



Webinar 20 - October 23, 2024

Reductions in Force/Layoffs/Reduced Hours: What Employers Need to Know

WEBINAR OUTLINE

INTRO/SETTING THE STAGE

- The Importance of Understanding Laws Pertaining to RIFs/Layoffs/Reduced Hours for Employers

THE BASICS OF RIFS, LAYOFFS AND REDUCED HOURS

- The Difference Between RIFs/Furlough/Layoffs/Reduced Hours
- Key Points to Consider Before Deciding on RIFS/Layoffs/Reduced Hours

COMPLIANCE COMPONENTS FOR CONDUCTING A LAYOFF/RIF

REQUIREMENTS UNDER THE FEDERAL AND NEW YORK STATE WARN ACT

HRtelligence TIPS

INTRO/SETTING THE STAGE

The Importance of Understanding Laws Pertaining to RIFs/Layoffs/Reduced Hours for Employers

- **Legal Compliance**

Note:

Failure to comply with these laws can result in significant legal penalties and lawsuits from impacted employees.

- **Employee Morale**

Note:

Improperly handled RIFs or reduced hours can severely damage employee morale which can lead to decreased productivity and higher turnover.

- **Transparency and Communication**

Note:

Understanding the laws allows employers to communicate clearly and transparently with employees regarding the reasons behind workforce reductions.

- **Discrimination Concerns**

Note:

When implementing RIFs, employers must be careful not to discriminate against protected groups.

- **Notification Requirements**

Note:

Many jurisdictions have "WARN" (Worker Adjustment and Retraining Notification) laws requiring employers to provide advance notice before significant layoffs.

- **Unemployment Insurance Implications**

Note:

Improperly handled layoffs can lead to increased unemployment insurance costs for the company.

THE BASICS OF RIFS, LAYOFFS AND REDUCED HOURS

The Difference Between RIF/Furlough/Layoffs/Reduced Hours

Reduction in Force (RIF)

- A RIF occurs when a position is eliminated with no intention of replacing it and results in a permanent cut in headcount.
- An employer may decide to reduce its workforce by terminating employees or by means of attrition.
- In some circumstances, a layoff may turn into a RIF when a permanent decision is made to not recall employees.

Layoffs

- A layoff is generally considered a separation from employment due to a lack of work available.
- The term "layoff" is mostly a description of a type of termination in which the employee holds no blame.
- An employer may have reason to believe or hope it will be able to recall workers back to work from a layoff (such as a restaurant during the pandemic), and, for that reason, may call the layoff "temporary," although it may end up being a permanent situation.

Furlough

- A furlough is a mandatory temporary leave of absence from which the employee is expected to return to work or to be restored from a reduced work schedule. Furloughs are often used when the employer does not have enough cash for payroll (for example, government shutdowns due to lack of budget approval) or when there is not enough work for all employees during a slow period and, by reducing employee schedules, the employer can avoid terminating employees.
- Furloughed employees may be required to take a certain number of unpaid hours off over a number of weeks, take a specified number of unpaid days or hours throughout the year, or take a single block of unpaid time off.
- Depending on the specific circumstances, furloughed employees may be able to continue benefits coverage and also collect unemployment insurance for the reduction in the time worked.

Reduced Hours

- Employers may consider reducing employees' regular work hours and pay to lower costs and avoid layoffs during difficult times.
- Another situation in which employers may wonder whether they can make reductions in hours and pay is when employees violate workplace rules or fail to meet productivity standards.

Key Points to Consider Before Deciding on RIF/Layoffs/Reduced Hours

Are there alternatives to the reduction in force?

- Are there less drastic measures that could work such as temporary pay cuts, reducing hours, freezing some benefits, implementing a company shut-down for an extended period around the holidays, forcing the use of vacation time, or consolidating offices, etc.

What is the reduction in force selection criteria and is it consistently applied?

- Once it is determined that a RIF is necessary, the next step is to identify the criteria for employee selection. The stated business goals should be used to clarify the criteria for selecting people.
- Developing a consistent approach will reduce the risk of discrimination claims as well as the perception of arbitrary, unfair actions.

Determine size of layoff and duty to WARN

- Another key issue is determining the size of the layoff.
- Depending on the size of your layoff, there may be a state and/or federal duty to notify the workforce before you can execute the layoff.

Conduct a layoff analysis for disparate impact

- Once you've established layoff criteria, decided upon the size of your layoff, and generated a potential list of affected employees, an analysis must be conducted to determine if it will disproportionately impact a group of legally protected employees.

Severance and Release Issues

- Typically, employers will provide some amount of severance — often based on a formula such as years of service and position/title.
- If offering a severance, it's common to request the employee to sign off and release any and all claims against the employer in exchange for severance. As always, check your state and country laws when deciding what is appropriate for your reduction in force (RIF).

COMPLIANCE COMPONENTS FOR CONDUCTING A LAYOFF/RIF

Assemble a RIF Team and Choose the Decisionmaker(s)

- Many stakeholders need to be involved in RIF decisions. Early in the RIF process, an employer's leadership team should form a RIF planning team comprised of managers from these departments.
 - Corporate finance will determine what cost savings must be realized by the RIF to keep the business competitive.
 - The Legal Department and Human Resources will play lead roles in managing the RIF and communicating with employees.

Assure Confidentiality

- When planning a RIF, premature disclosures of information to employees should be avoided.
- Circumstances may unexpectedly change and a planned RIF ultimately may not occur or may involve fewer employees than originally planned.
- The RIF team should establish and ensure strict confidentiality among participants.

Consider and Decide Upon Selection Criteria

- Ensure that the criteria used to select employees for separation are business-related and non-discriminatory.
- Employers must use objective, business related criteria that can be easily explained to the organization such as:
 - length of service or seniority;
 - a specific department or office location
 - elimination of specific job functions or levels
 - pre-existing job appraisal data and documentation related to successful performance of critical post-reduction functions
- Employers should have a documented, objective comparison of employees where skills and job performance are the criteria in making layoff determinations.
- Create and maintain documentation to support the decisions made in the layoff process. These records will be critical in the event of litigation challenging some aspect of the layoff.

Review Decisions for Disparate Impact/Union Issues

- Prior to implementing the RIF, the RIF team should evaluate data concerning those employees selected for job elimination.
- Common legal claims brought by affected employees after a RIF is that the employer disproportionately chose the individual for job elimination based on a protected class, so employers should consider whether a RIF is likely to prompt such claims.

- If the workforce, or part of it, are members of a union, then RIF terms may have to be bargained for under a collective bargaining agreement.

Review Older Workers Benefit Protection Act (OWBPA) Regulations for Compliance

- Employers must comply with the OWBPA to effectively release claims under the Age Discrimination in Employment Act (ADEA) when employees are asked to waive age discrimination claims in exchange for severance pay (the ADEA applies to employers that employ 20 or more employees).
- The OWBPA establishes specific requirements for a "knowing and voluntary" release of ADEA claims to guarantee that an employee has every opportunity to make an informed choice whether or not to sign the waiver.

Evaluate WARN Act Coverage

- The federal WARN Act applies to plant/facility closures and mass layoffs and requires sixty (60) days' written notice to affected employees and government officials/agencies.
- The New York State WARN Act requires private sector employers in New York State that employ 50 or more full time employees to issue a WARN Notice ninety (90) days before closing.
- Employers planning a RIF must know if their actions are covered by these laws.

Plan for Termination & Final Pay Requirements

- As part of RIF planning, employers must take care to comply with normal state law final pay rules for terminated employees. Typically, final earned wages and salary and accrued but unused vacation time must be paid to discharged employees on the date of termination.
- Employers should carefully plan to pay commissioned employees any earned commissions in accordance with the terms of any existing commission plan.

Choose Special Severance Benefits

- Because the legal risks from RIFs are significant and simply to assist departing employees, many employers will offer special severance benefits to employees in connection with a RIF as part of a separation agreement. These benefits may include salary continuation or a lump sum severance payment, health insurance continuation payments or COBRA reimbursement, and transition assistance.
- An important duty of the RIF team will be to consider what special severance benefits to offer affected employees and their costs.

Use Special Separation Agreements

- If special severance benefits are offered, an employer usually will require employees to sign separation agreements that include a release of legal claims.
- Under ADEA and the OWBPA, separation agreement for RIFs that contain releases of age discrimination claims must contain specific provisions, such as a 45-day consideration period and a 7-day revocation period. Employees over age 40 also must be provided with information disclosures about the special severance plan, such as the time limits applicable to the plan, the eligibility factors (as described above), and a listing by job titles and ages of those employees selected for participation in the plan.
- Many states now restrict the scope of confidentiality/nondisclosure provisions in separation agreements and/or require specific language in the release of claims.

Plan for Employee Communications

- Carefully plan on how to announce the RIF to affected employees.
- The RIF team should develop a procedure for collecting company property from affected employees.

Address Concerns of Remaining Employees

- Implement a RIF communications strategy to address the concerns of remaining employees that the RIF may be one of several.
- The RIF team should let remaining employees know that the RIF was necessary to right-size the business but that no further reductions currently are planned.

REQUIREMENTS UNDER THE FEDERAL AND NEW YORK STATE WARN ACTS Federal WARN Act

The federal Worker Adjustment and Retraining Notification Act (WARN) requires employers with 100 or more employees (generally not counting those who have worked less than six months in the last 12 months and those who work an average of less than 20 hours a week) to provide at least 60 calendar days advance written notice of a plant closing and mass layoff.

Plant Closing

- Covered employers must provide notice if an employment site (or one or more facilities or operating units within an employment site) will be shut down and the shutdown will result in an employment loss for 50 or more employees during any 30 day period.

Mass Layoff

- Covered employers must provide notice if there will be a mass layoff which does not result from a plant closing, but will result in an employment loss at an employment site for 500 or

more employees, or for 50-499 employees if they make up at least 33% of the employer's total active workforce, during any 30 day period.

Covered employers must also give notice if the number of employment losses for 2 or more groups of workers, each of which is less than the minimum number needed to trigger the notice requirement under the Act, reaches the threshold level during any 90 day period of either a plant closing or mass layoff. Such job losses within a 90 day period will count together toward the Act threshold requirements unless the employer demonstrates that the losses during the 90 day period were the result of separate and distinct actions and causes.

Sale of Business

- If the sale of a business by a covered employer results in a covered plant closing or mass layoff, notice is required. The notice must be provided by the seller if the closing or layoff occurs up to and including the date/time of the sale. The buyer is required to provide the notice if the closing or layoff occurs after the date/time of the sale. Covered employees of the seller become employees of the buyer, for purposes of the Act, immediately following the sale.

Notice Requirements

- Covered employers must give written notice to the chief elected officer of the exclusive representative(s) or bargaining agency of the affected employees and to any unrepresented workers who may reasonably be expected to experience an employment loss.
- Notice must be given to employees who have worked less than 6 months in the preceding 12 months and employees that have worked an average of less than 20 hours per week even though such employees are not counted when determining if a triggering event has occurred.
- Covered employers must also provide notice to the State dislocated worker unit and to the chief elected official of the unit of government in which the employment site is located.
- Notice must be provided at least 60 days before a covered closing or layoff. When the individual employment separations related to a closing or layoff occur on more than one day, the notices are due at least 60 days before each separation.

New York State WARN Act

The New York State WARN Act which provides stricter requirements than the federal WARN Act, requires businesses with 50 or more full-time employees to provide 90 days notice of employment losses to affected employees and certain government entities or officials. The term employment loss means:

- An employment termination, other than a discharge for cause, voluntary departure, or retirement.

- A mass layoff that exceeds six months in duration; or
- A reduction in hours of work of more than fifty percent (50%) during each month of any consecutive six-month period for either:
 - At least twenty-five (25) employees constituting at least 33% of the employees at the site (excluding part-time employees); or
 - At least two hundred (250) employees (excluding part-time employees) regardless of whether they comprise thirty-three percent (33%) of the employees at the site (excluding part-time employees).
 - A plant closing affecting twenty-five (25) or more employees, excluding part-time employees.

How are “furloughed” employees classified for WARN purposes?

- An employee on a furlough that lasts a duration of less than a consecutive six-month period, is considered a “temporary layoff”.
- An employee on a furlough that lasts beyond a consecutive six-month period, is considered a “permanent layoff”.

A temporary layoff or furlough without notice that is initially expected to last six months or less but later is extended beyond 6 months may violate the Act unless:

- The extension is due to business circumstances not reasonably foreseeable at the time of the initial layoff; and
- Notice is given when it becomes reasonably foreseeable that the extension is required.

This means that an employer who previously announced and carried out a short-term layoff (6 months or less) and later extends the layoff or furlough beyond 6 months due to business circumstances not reasonably foreseeable at the time of the initial layoff, is required to give notice at the time it becomes reasonably foreseeable that the extension is required. A layoff extending beyond 6 months for any other reason is treated as an employment loss from the date the layoff or furlough starts.



TRENDS



INSIGHTS



PRACTICAL
GUIDANCE



STRATEGIES

- Ensure that layoffs or reductions in force (RIFs) are based on nondiscriminatory reasons, such as quality or quantity of work, rather than on race, color, religion, sex (including pregnancy, sexual orientation, or gender identity), national origin, disability, age (40 or older) or genetic information.
- Ensure that employees are not selected for layoff or RIF because they reported discrimination, participated in a discrimination investigation or lawsuit, or opposed discrimination (for example, threatened to file a discrimination charge or complaint).
- Before implementing the layoff or RIF, review the selection criteria to determine if they will result in the disproportionate dismissal of older employees, employees with disabilities or any other group protected by federal employment discrimination laws.
 - Revise the layoff/RIF criteria, if needed and if possible, to limit the impact on these groups while still achieving your business's goals.
- Ensure that managers involved in applying layoff/RIF selection criteria understand the criteria and apply it accurately and consistently.