

The Five Biggest Mistakes Employers Make When Laying Off Employees

Article By:

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The economic downturn is hitting companies hard and management is making tough decision in an effort to maintain the company's bottom line. In these times, employers tend to make mistakes which, if avoided, would not only save money for the company's bottom line but also insulate the company from expensive litigation. Here are the biggest mistakes being made by employers when implementing layoffs:

Mistake #1: Calling a Performance-Related Termination a “Layoff.”

Companies often avoid “terminating” an employee with a poor performance record because management has not created a paper trail documenting the problems and/or because calling it a “lay off” just seems nicer. A termination for poor performance, breach of policy, or misconduct is not a layoff. A layoff occurs when there is a legitimate business reason to eliminate a position or positions from the corporate structure.

Companies who may need to reduce personnel in the near future should begin now with the corrective process, such as interacting with the employee and putting him on notice of the issues, developing a written action plan and giving him a reasonable opportunity to cure the problem. Then, if the company needs to reduce personnel in the future, the poor performers can be let go with much less risk to the company.

Mistake #2: Conducting Layoffs Without a Written Layoff Plan and Process.

The layoff process should be in writing, methodical, consistent and fair. Management decides which positions, groups, offices or departments need to be reduced. There should be a written justification of the need for a layoff, a layoff policy, and a written procedure for selecting employees for layoff. This last documentation should include the selection criteria, management's role, Human Resource's role, and, if applicable, a severance and release agreement. The company's attorney should be involved in each step and certain documents should be maintained as confidential under the attorney-client privilege.

Mistake #3: Neglecting to Assess the “Adverse Impact” of Layoff Decisions.

When layoff decisions are made, HR should be tasked with conducting an adverse impact analysis. This is often done in conjunction with the company attorney in order to maintain the confidentiality of the information under the attorney-client privilege. This process includes analyzing the protected categories of each potentially affected employee in comparison to each other and to the workforce at large. For example, if every employee laid off is over the protected age of 40, then the older population within the company may be disproportionately affected by the layoff and an age discrimination lawsuit may ensue. The goal is to ensure that a protected group of employees is not being targeted, purposefully or not.

Mistake #4: Failing to Follow the Requirements for 40+ Year Olds Affected by Layoff.

Older workers (those over 40) are members of a protected class and this is one of the categories that must be assessed during the adverse impact analysis addressed above. Employers who offer older workers a release agreement must also ensure that it is a “knowing and voluntary” release under the Older Workers Benefit Protection Act. To meet this criteria, then, the release must specifically reference claims under the Age Discrimination in Employment Act, offer an extended period to consider the release agreement (45 days for “group terminations” and 21 days for individual terminations), allow older workers 7 days to revoke the release agreement after signing, and inform the older worker the right to consult with an attorney prior to signing the release.

In addition, older workers who are subject to being laid off due to a “group termination” are entitled to receive data under the older workers’ laws. The employer must provide information about the ages (not the names) and job titles of those employees selected and those not selected from the “decisional unit.” Broadly speaking, a decisional unit consists of the group of employees that were considered for layoff, such as a specific department. The rules on this issue are complex and can be located at 29 C.F.R. sec. 1625.22(f).

Mistake #5: Failing to Give Advance Notice Under WARN.

Larger companies (75 or more employees under California law and 100 or more employees under federal law) have notice obligations under the California and federal WARN Acts. These Acts require large employers to give 60 days advance notice of a “plant closing” or “mass layoff,” as those terms are defined in the statutes (generally, an employment loss of 50 or more employees during any 30-day period). Most employers look at employment losses that occurred or are planned within 90 days forward and backward to see if they reach the 50-employee threshold within any one 90 day period. The California WARN law also applies to “relocations.” There are certain extremely limited exceptions to the 60-day notice requirement.

The notice to employees must contain specific data which varies by circumstance. Generally, it includes the name and address of the employment site, whether or not the action is expected to be permanent, the expected date of the action, whether there are bumping rights, names and job titles of affected employees and the contact data of a company official who can offer further information. In

addition, various governmental entities must be informed of the layoff, including the Employment Development Department, the local workforce investment board, and/or the chief elected official of each city and county government within which the termination, relocation or mass layoff occurs.

THE FIVE MOST POPULAR OPTIONS IN LIEU OF LAYOFFS

If companies can avoid reducing personnel through a layoff, they look to less draconian options to save on costs. The following are the most popular options companies consider in an effort to reduce costs and overhead:

Number 1: Implementing an Alternative Workweek Schedule

In this author's experience, some of the companies with highest morale and lowest turnover are those which implement a 4-day/10 hour per day workweek without the payment of overtime. Employees working under this arrangement must be paid overtime of no less than one and one half times their regular rate of pay for any work in excess of their regular daily hours (up to 12 hours) and for any hours in excess of 40 in a workweek. They are also entitled to double their regular rate of pay for any work in excess of 12 hours per day and for any work in excess of 8 hours for those days worked beyond their regular work schedule.

California employers have the ability to propose a "menu" of work schedules for the affected employees to choose from; alternatively, the employer can propose only a single work schedule for all employees. In addition, an employer has options to propose more than one alternative schedule to different "work units" within the company; indeed, it can divide the workforce into separate "work units" and propose different schedules for each.

There are strict requirements which must be followed to properly implement an alternative workweek schedule and therefore avoid overtime liability for certain hours which would traditionally require overtime pay. These requirements include providing a detailed notice and proposal to the affected employees, a special meeting at least 14 days before the election, a secret ballot election, and notice to the California Division of Labor Statistics. See Labor Code § 511; applicable Wage Order.

Number 2: Permitting Offsite Work - Telecommuting

Telecommuting is also becoming more popular. While many employers are reluctant to implement such a policy due to the loss of control over the employees' work, others have found it to be beneficial and cost-effective. If your company is considering this option, a sound policy should be put in place that describes the procedure, the expectations and the responsibilities of the employee who telecommutes. The employees should sign off on the policy or enter a separate agreement with the company regarding their obligations while telecommuting.

Some provisions to consider are: eligibility requirements for employees to participate (such as 12 months of employment; full-time employees; performance criteria); use of (and company obligation to pay for use of) a home computer and home telephone; reporting requirements; timekeeping procedure; termination of the arrangement; workers compensation and OSHA obligations for work from home.

Number 3: Using State Programs

Most states offer programs to assist employers in dire need. One such program in California is the Employment Development Department's "Work Sharing Program." Under this program, eligible employers may reduce employees' working hours and the affected employees receive partial unemployment benefits (the employer's EDD reserve account is used for these funds, which means higher payroll taxes as the employer must make higher employer contribution rates to make up for the loss). For example, if a company has 100 full-time employees and wants to reduce the work week for all employees by one full day, there would be a 20% reduction in pay and hours. The employees would be eligible to receive 20% of their weekly unemployment insurance benefits.

At least two employees must be affected and there must be a minimum 10% reduction of the regular permanent (not temps) workforce and a minimum of 10% reduction of wages and hours. Employers must fill out a Work Sharing Plan Application, which can be obtained from the EDD's Special Claims Office. The EDD offers a "Guide for Work Sharing Employers."

www.edd.ca.gov/pdf/pub_ctr/de8684.pdf.

Number 4: Temporary Shutdowns/Forced Vacation

The general rule of thumb is that a company can shutdown for a short period of time if it is done correctly. Temporary shutdowns or furloughs for non-exempt employees raise minimal issues as there is no need to pay them for regularly scheduled hours if they are not actually worked (of course, collective bargaining agreements and relevant policies must be reviewed). It is not clear as to whether non-exempt employees can be forced to use accrued vacation during the shutdown with only little or no notice, but many employment lawyers concur that this is possible, especially if the vacation policy indicates that the employer can schedule vacation.

Exempt employees, however, can lose exempt status if they are not paid for the full week in which they work. If an exempt employee works any part of a workweek, then they are entitled to their salary for that workweek (with some exceptions). As a result, exempt employees subject to a week-long shutdown must be instructed to perform no work during the workweek, and this includes calling in, checking emails, corresponding or telephoning others, etc.

Note, too, that exempt employees cannot be forced to use vacation without "reasonable notice" before requiring the use of accrued vacation. This has been deemed to be at least 90 days or one full fiscal quarter, whichever is greater, of advance notice. The safest practice is to not force or require the use of vacation for any employee without 90 days advance written notice.

Number 5: Hiring Freezes, Wage Freezes & Wage Reductions

Many companies have implemented hiring freezes. Employment laws permit this; however, if the company needs to make “exceptions” to the freeze, then such “exceptions” should be well justified and documented (some companies create an “exception” form or the like which must be submitted to HR and/or upper management). Separately, salary freezes are becoming more common as well. The employer basically informs employees there will be no raises until further notice given the financial constraints. Again, companies are well advised to review policies, offer letters, contracts, collective bargaining agreements and any other documentation that might limit its ability to freeze salaries. Wage reductions are also taking place on occasion across the state. However, they must be implemented consistently and fairly so that certain employees are not disproportionately impacted. Certain industries also have legally set minimum wages. Moreover, salaries for exempt employees must still meet the minimum salary requirements in order to maintain exempt status. Finally, as mentioned, policies and contracts, including collective bargaining agreements, should be reviewed prior to reducing salaries.

A final note: In addition to canceling holiday and similar company gatherings, many companies are revisiting their benefits, reimbursement, travel and training policies. For example, vacation is not required to be given by California employers. While the employer may not take away vested vacation, it can change the policy going forward, with adequate notice in advance of the change. The same is true of sick days.

Employers are also tightening up their policies, checking documentation more thoroughly and eliminating travel and training when possible. Some employers are going “paperless” where possible in order to eliminate hard copy costs.

Finally, employers are reviewing their benefit plans to determine if there are benefits that can be changed or if there are new benefits that can be offered to employees at little or no cost to the employer. Many such benefits are available to companies and they can offer a morale boost in a time when employees across the state greatly need one.

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