

# Belt Tightening

**W**hether one can contend the recession is waning, a perfect storm affecting non-union, private employers stubbornly lingers. As of June 2010, seasonally adjusted unemployment rates were 12.3 percent in California and 9.5 percent nationally. Compared to a year earlier, the numbers are up 1.3 percent in California and about the same nation-wide. The U.S. Bureau of Labor Statistics (BLS) reports that more than 45 percent have been unemployed for more than 27 weeks. The BLS further reveals nearly 10,300 Extended Mass Layoffs Events (i.e., layoffs of 50 or more employees from single employers for over 31 days) from January through June 2010 that resulted in the separation of more than 987,000 workers.

With replacement employment still difficult to find for so many, we are seeing a marked increase in the number of employment litigation claims filed. Published EEOC statistics, for example, show that there have been more than 90,000 charges filed by employees against employers in each of the last two years. While employers may still need to layoff employees in this economy, how layoffs are conducted and considering alternatives can provide some shelter from this perfect storm.

## Reduction in Workforce Overview

A team of decision makers should be selected who are able to credibly and objectively:

- Define and document the good faith business reason for layoffs.
- Determine and document the criteria for those to be selected for layoffs.
- Consider alternatives to layoffs.
- Make decisions that remaining personnel can view as fair.
- Avoid or reduce the potential for discrimination, retaliation and other claims.

## Planning the RIF

Most courts will be reluctant to interfere with an employer's decisions that are based on good faith business reasons for reduction in



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workforce (RIF), particularly if the reasons are credible, well defined and documented. Good faith business reasons include: economic necessity (e.g., employer's survival, loss of business or contract, cost-cutting measures needed), reorganization or consolidation of job functions, elimination of functions or positions that are redundant and job functions being replaced with or reduced by technology. An example, assuming it's based on actual verifiable business data, could be: "due to a XX percent downturn in our revenue, we need to reduce our payroll costs by YY percent."

Think through and document the criteria

## Workforce Reduction and Alternatives During a 'Perfect Storm'

to be used for selection of employees for layoff. One way to develop the criteria is by asking: What work needs to be done? What skills are necessary to do the work? Who has those skills? Who are the top performers? Note that the first two questions are completely blind to specific people. This can provide a solid and objective foundation. Then, internally test the criteria by evaluating whether the criteria support the stated business reason for the workforce reduction.

Other factors can be used such as seniority (by service years or specific job function/position), elimination of job functions and independent evaluation process (the more objective, the better). Avoid subjective factors such as "flexibility" or "commitment" as they can leave room for a challenge that they are "code" for unlawful factors such as age discrimination. If employee cost is a criterion, also consider positive value of employees due to skills and experience. If using performance evaluations as a selection tool, review multiple years' evaluations and consider whether they are fair and objective. If an employee's last evaluation was high, why is the company planning to let this high performer go? If the last evaluation was low when prior evaluations were high, consider whether there is some defect in the review or the reviewers' perspectives.

Certainly do not consider legally protected class status in selection process, such as: race, color, creed, sex, pregnancy, gender identity, age (40 or over), national origin, ancestry, physical or mental disability, veteran status, current military status, marital or registered domestic partner status, medical condition (e.g., cancer), sexual orientation, genetic factors and approved leave of absence.

Once the business reason, selection criteria and preliminary selection decisions have been made and documented, the employer should prepare a communication plan to convey its decision making with clarity. It's helpful to prepare communications templates in advance for delivering the news to affected employees

and moving the conversation from decisions that have already been made to “where do we go from here?” Likewise, communications need to be made to remaining managers and employees to create a consistent message about how/why the decisions were made. It’s unwise to commit to the remaining workforce that there will be no further layoffs. Instead say, in effect, “We took the steps we believe we needed to take to put the company on the right track for the future. We hope we are done with layoffs. We will continue to evaluate the company’s progress from time to time. The best thing we can all do is do our best work together.”

Before implementing the layoff plan, it’s helpful to have counsel review the plan and objectively evaluate the criteria and data supporting the stated business reason and the potential that the stated business reason or selection criteria might be viewed as a pretext for selection using unlawful factors. Pretext often means that the company’s stated reason for decision is “unworthy of belief” and is an attempted smoke screen to hide the unlawful reasons. In addition to protected class factors noted above, the preliminary layoff list should

be evaluated to see if any protected class group is being disproportionately—even if unintentionally—affected. If so, the criteria may need adjustment.

Finally, the potential for drawing and defending claims such as breach of employment contract, retaliation for refusing sexual harassment, whistleblower activity, Workers Comp claims, asserting a legal right and asserting or supporting another employee’s legal rights should be considered before the layoff plan is implemented.

**This is a WARNING**

The California Worker Adjustment, Retraining and Notification (WARN) Act generally requires employers of 75 or more employees that will close a work site or conduct a layoff of 50 or more employees to provide 60-days advance written notice of job-loss to affected workers and to certain government agencies. The federal WARN act applies to employers of 100 or more employees. These acts are riddled with traps for the unwary and penalties. Employers should rely on their counsel to guide them here.

**Severance Agreements**

Law does not require severance pay, unless the employer has a mandatory severance plan or an employment contract that provides severance rights. Often an employer volunteering to help an employee transition to other employment in exchange for a general release and waiver of claims against the employer and all affiliations can both reduce litigation risks and maintain morale of remaining employees. There are special requirements that must be included in the release document under the federal Age Discrimination in Employment Act (ADEA) for the document to operate as a waiver of age discrimination claims under federal law. The document should, among other things:

- Refer to the rights under the ADEA.
- Provide some consideration for the waiver of ADEA rights.
- Advise the employee to consult with an attorney before signing.
- Give 21 days to consider the agreement prior to signing (or 45 days if a “group” of employees are let go within 30 days), and seven days to revoke after signing.

If a group (two or more) is let go, the documents must have a chart identifying

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all employees in the decisional unit by job position and age (not by name) and whether that individual was selected or retained. The EEOC provides further guidance at [www.eeoc.gov/policy/docs/qanda\\_severance-agreements.html](http://www.eeoc.gov/policy/docs/qanda_severance-agreements.html).

#### Are Layoffs Really Needed?

There are several good alternatives to layoffs, including reduction of pay, hours and/or benefits, part-time status and temporary work-site closure. Many workers are relieved to keep a job, and a company can boost employee morale by permitting everyone to pull together to sustain the company, and retain talented and trained employees.

A reduction in pay (or hours) is the most legally supportable when the greatest number of employees are affected equally. If certain divisions of the company, job categories or individuals are selected for reduction, make those selections as carefully as with RIFs to avoid discrimination, retaliation and other claims. Like RIFs, the employer should determine and document the selection criteria and screen the preliminary list for claims risk. Giving as much advance notice as possible


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helps employees prepare for the change and helps the employer communicate its intention of fairness.

Employers generally have discretion to make pay cuts; however, limitations include employment agreements (which might include offer letters) and equal pay laws. Five or 10 percent pay cuts are occurring with more frequency among employers. Pay cuts must

be prospective since wages (including bonuses and commissions) already earned cannot be taken away and minimum wage requirements still apply.

Employers have, in general, broad latitude to reduce benefits such as health insurance and premium payment, 401(k) matching, and paid vacation and sick days. Of course, all changes must be made prospectively, advance notice should be given and applicable benefit plan documents, employer policies, employment agreements and local ordinances need to be considered before making the change.

It's difficult enough for an employer to feel compelled to institute a RIF or alternative cuts. But, with the steps outlined above, the affected employees can hopefully move on to other opportunities and the employer can shore up its business, sustain jobs for remaining employees and look to a brighter future with reduced risks of litigation. 

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