



Legal Minute

Winter 2009

What to Do When You Have to Lay Off an Employee

The information in this Legal Minute is condensed and adapted for Texas from a Legal Alert written by Winston & Strawn and published by the DC BAR Pro Bono Program. Texas C-BAR thanks the DC BAR Pro Bono Program for permission to use this important information.

In an effort to contend with the extraordinary world wide economic downturn, organizations of all kinds, including nonprofit employers, are faced with the unpleasant though necessary prospect of reducing the size of their workforces through layoffs. This alert provides nonprofit employers with information to help ensure layoffs are conducted lawfully and implemented in a manner designed to minimize the risk of litigation.

Being Prepared

When planning and conducting reductions in force, employers should keep several general considerations in mind to help avoid liability in the event of litigation challenging the lawfulness of the layoff. **First**, prepare a written layoff plan and follow it. In particular, the nonprofit should:

- Establish the criteria to be used in selecting personnel for layoff,
- Develop a strategy for conducting the layoffs,
- Train and advise the managers to abide by the plan, and
- Communicate clearly to the employees not included in the layoff the purpose for the layoff and what the road ahead looks like.

By establishing and following a predetermined protocol, employers help to shield themselves from allegations that illegitimate criteria influenced their decisions. **Second**, carefully document layoff plans and decisions and the events and factors giving rise to the need for the reduction in force. A written record demonstrating that objective, legitimate considerations framed the organization's termination decisions will provide critical evidence if layoff decisions are challenged in litigation. **Third**, retain legal counsel to provide advice.

Plan for the Cost

When you lay off an employee, the employee is typically eligible for unemployment compensation. Under the Texas Unemployment Compensation Act, an employee is usually eligible to receive 26 weeks of compensation, although Congress just voted to extend compensation for a maximum of an additional 20 weeks. In Texas, the amount of benefits varies, based on the employee's wages, with the maximum benefit equal to \$417 per week. The benefits are reduced if an employee receives employer-paid severance. In order to fund the unemployment benefits, federal unemployment or FUTA taxes are deducted from the paychecks of the employees of every for-profit company, along with FICA taxes. The employer pays a matching amount. In addition, the employer must pay quarterly premiums to the Texas unemployment compensation trust fund.

Nonprofit employers that are exempt under Section 501(c)(3) and their employees are not subject to FUTA taxes. In addition, nonprofit employers can elect not to pay into the unemployment compensation trust fund. Instead, a nonprofit can elect the reimbursement method. Under this method, the nonprofit does not pay unemployment insurance premiums on an ongoing basis, but instead agrees to reimburse the Texas government, on a quarterly basis, for any unemployment benefits paid to its former employees during the quarter. Therefore, before a nonprofit lays off any employees, it should determine whether it elected the reimbursement method and determine what it will owe if its former employees are eligible for unemployment compensation.

Specific Issues to Consider

Employers are prohibited from making termination decisions on the basis of an employee's race, national origin, sex, age, or any other characteristic protected by law, with only a few, narrow exceptions. It is also unlawful for an employer to engage in any practice that adversely impacts one of these groups. Thus, even if the decision to layoff certain employees was made without

regard to race, age, sex, etc., the layoff may still be unlawful if it has a disparate impact on one of the aforementioned protected groups. To help ensure compliance with both requirements, employers should consider the following when making their layoff decisions:

Document the reason for the layoff. In the event of litigation, the employer's defense will largely hinge on its ability to establish that legitimate business reasons necessitated the layoff and the selection of certain employees for separation rather than others. This can be difficult to do years after the decision was made. Thus, employers should document the company's financial status, losses and expenses at the time of the layoff and demonstrate how a layoff will help to further its business goals.

Create clear selection criteria. Employers typically use both performance and non-performance based criteria when determining which employees will be laid off. Regardless of the methodology, the criteria should be clearly defined, as objective as possible and related to the company's business objectives. Whether the layoff will affect an entire department or only specific positions, employers should determine how the layoffs will promote its business and document the decision making process.

Select and train managers. The nonprofit's managers should be trained on the nonprofit's predetermined selection criteria and directed to follow the layoff plan. Managers should not discuss race, national origin, sex, age or any other protected characteristic during the process of determining which employees to select, and selections are best made by a team of managers in order to promote objectivity and consistency in the selection process.

Gather data. After the initial decisions have been made, employers should gather information pertaining to the race, national origin, sex, age, etc. of those affected by the layoff. The data should be analyzed to determine whether any of these groups have been disproportionately adversely impacted by the layoff decisions. In short, employers should determine whether any protected group will be affected in a statistically anomalous way.

Review the contractual and unemployment benefits obligations. Before any employee is laid off, employers should confirm that none of the employees in the target group have employment agreements obligating the employer to a certain term of service or severance payment. The nonprofit should also review its employee handbook or HR policies to determine if it has promised its employees severance benefits and whether it will have to reimburse the government for unemployment benefits.

Have separation agreements and waivers. Even if the nonprofit does not have a severance plan, it should consider providing selected employees with severance pay in order to ease their transition to new employment and obtain "insurance" against future claims of wrongful dismissal or other employment related claims. In consideration for the severance, the employer should have the employee sign a release and waiver of all claims against the nonprofit. The Older Worker's Benefit Protection Act requires that certain provisions be included in such agreements in order for the waiver of age discrimination claims to be valid, and, depending on where the employee works, there may be other state or local requirements that must be met in order to ensure an enforceable agreement. Therefore, the nonprofit should work with its attorney to develop a waiver agreement for the nonprofit to use.

Other key laws to pay close attention to include:

- The Federal Worker Notification and Retraining Act (WARN), which requires employers to provide 60 days' advance notice before implementing a layoff in certain circumstances for organizations that employ 100 or more "full-time" employees.
- The Consolidated Omnibus Budget Reconciliation Act (COBRA) which applies to employers with more than 20 "full-time" employees. COBRA requires employers to offer terminated employees the option of continued group health coverage for a period of time post employment. In Texas, the Small Employer Health Insurance Availability Act requires companies of 2-50 employees to provide continuing health benefits for employees for up to 6 months. If the employee is eligible for federal COBRA benefits, the Texas benefits follow the expiration of the federal benefits.
- Following these steps can help both to ensure implementation of a reduction based on sound business reasons, while providing protection from liability stemming from layoffs. Consideration may also be given to layoff alternatives, such as hiring freezes, wage freezes, voluntary early retirement or voluntary separations, if those steps can help the organization achieve its business goals.

Additional Resources

- US Dept. of Labor: <http://workforcesecurity.doleta.gov/unemploy/uifactsheet.asp>
- DC Dept. Of Employment Services: <http://does.dc.gov/does/cwp/view,a,1232,q,537855,doesNav,%7C32062%7C.asp>

This communication is provided by the D.C. Bar Pro Bono Program and Winston & Strawn LLP as a public service solely for informational purposes, without any representation that it is accurate or complete. It does not constitute legal advice and should not be construed as such. It does not create an attorney-client relationship between the recipient and any other person, or an offer to create such a relationship. This communication contains information that is based, in whole or in part, on the laws of Texas and is current as of the date it is written. The information may not be appropriate for anyone operating outside of Texas. Consult an attorney if you have questions regarding the contents of this communication.