



EMPLOYMENT LAW

Fairer Layoffs: Have a Plan for Saying Goodbye

Feedback

By Allen Smith, J.D. | November 12, 2019

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When a reduction in force (RIF) is announced, the environment in the workplace often becomes chaotic. The employer must strike the right tone—empathetic but professional.

"Plan and practice" for the delivery of the message, recommended Stephen Woods, an attorney with Ogletree Deakins in Greenville, S.C. "Roll with the unexpected when—not if—it happens. Delivering a lawful RIF message as compassionately as possible in a safe environment is more important than RIF-day perfection."

Woods said employers should avoid fielding excessive questions or challenges over why an individual was selected to be laid off. To prevent initial shock from turning into anger or an emotional breakdown, he said, keep employees selected to be laid off moving—not sitting in a chair, stunned that they are being laid off.

Woods recommended using a series of rooms to deliver the news with a setup like the following:

- The employee who is to be laid off enters the first room, where the company representative delivers the news, often with the employee's manager present.
- Once the laid-off worker has heard the news and the company rep has answered a few questions, if any, the company rep tells the person that she or he will be moving to another room, where others will review severance and benefits. The manager and rep then stand up, shake the individual's hand, wish him or her well, and move him or her to the second room. "Standing up signals that the conversation is over and almost always works to cut off RIF-ee complaints," Woods said.
- In the second room, the company reps review with the laid-off worker the various sections of the severance agreement, if there is one—including the deadline to sign and return the release to be eligible for severance. They should also communicate the date benefits will end and explain that COBRA materials will be mailed. The company representatives then confirm the employee's home address for the COBRA notice and finally collect his or her company-issued property. Sometimes, the employee will need to go back to his or her work area or station to retrieve personal items. When that is necessary, company escorts should go with the employee in as unobtrusive a manner as possible.

Delivering the layoff message to a group of employees sometimes is the most effective approach, especially for larger layoffs, said Kelly Scott, an attorney at Ervin Cohen & Jessup in Los Angeles. "That shared message sometimes is easier to digest," he said. But for smaller layoffs, it's best to deliver the news individually to those affected, he stated.

However, Lynne Anne Anderson, an attorney with Drinker Biddle in Florham Park, N.J., said that during layoffs, the news should always be delivered individually, even if group layoffs may be logistically easier. Otherwise, in a group setting, some employees may be sent to one room and told they'll stay when some of them will actually be laid off, while others could be sent to another room and told they will be laid off when some of them will stay. "It's important to give dignity" to the people who are being laid off, she said.

Ideally, the layoffs will start first thing in the morning and finish by the afternoon. The remaining employees should meet in a town hall or be sent an e-mail about the RIF after the process has concluded. They need to be told how everyone will operate in the new organization, to keep everyone calm and focused, she said.

PART 1

How Do You Decide Who Stays and Who Goes?
(www.shrm.org/ResourcesAndTools/legal-and-compliance/employment-law/Pages/layoffs-selection-criteria.aspx)

PART 2

When RIF Selections Go Wrong
(www.shrm.org/ResourcesAndTools/legal-and-compliance/employment-law/Pages/layoffs-adverse-impact.aspx)

PART 3

Should Employers Notify in Writing or Not?
(www.shrm.org/ResourcesAndTools/legal-and-compliance/employment-law/Pages/layoffs-written-notice.aspx)

PART 4

Have a Plan for Saying Goodbye

"If [employers] are well-organized and well-prepared, very few people have a reaction that puts anyone in danger," Anderson said, adding that she is not a fan of having police or security onsite, though they should be considered if there are concerns of a risk of workplace violence.

Severance

Don't insist that employees accept severance agreements on the spot, which would violate the Older Workers Benefit Protection Act (OWBPA), said Robin Shea, an attorney with Constangy, Brooks, Smith & Prophete in Winston-Salem, N.C. Anderson said that if an employee volunteers to sign a release immediately, the employer should tell him or her, "No, take it home and think about it."

The OWBPA requires specific information be provided to employees age 40 or older during layoffs if they are offered severance in return for signing a release. For group layoffs including two or more employees 40 or older, the laid-off workers get 45 days to consider the separation agreement and must also be provided notice of the others selected for termination, including title and age, the ages of all individuals in the same job classification or organizational unit who were not selected, and how the determinations were made, among other requirements.

Anderson said she sees a lot of employers mistakenly provide only 21 days for individuals to consider the separation agreement in a group layoff, even though 21 days is appropriate only when just one older worker is being discharged.

Employers that are laying off workers may not be able to afford severance pay. If they do provide severance, some experts recommend they require a release to reduce the risk of lawsuits. (Scott said emphatically, "Don't pay a severance without a release.") Others say no release should be required because a release looks like the employer has something to hide, stated Christine Walters, J.D., SHRM-SCP, an independent consultant with FiveL Co. in Westminster, Md.

If employers provide a severance, should they include a clause in the release stating that laid-off workers are required to notify the employer if they get another job so the severance payments can end? "Some say yes—no double dipping. You are paying to tide them over until they get a new job," Walters stated. "Some say no because they are giving the person money to say thanks for their prior years of service and not conditioned upon what happens moving forward."

Don't assume that you can elect to pay accrued, unused vacation as part of the severance deal, Shea cautioned. "Under many state laws, that will be wages, which means the employee has a right to the payment at the same time that he or she receives a final paycheck, regardless of whether he or she accepts a severance agreement."

Remaining Employees

HR should reach out to employees retained after a layoff to boost morale and productivity and calm fears.

"Don't forget your 'survivors,' " Walters said. Co-workers often are upset when they see their fellow workers laid off. "If you have an employee assistance program, notify them of the RIF so they can be prepared for an uptick in visits, and remind your employees that remain that the EAP [employee assistance program] is there for them."

"Most people will be thinking, 'Am I next?'"

David Epstein, SHRM-SCP

Director of Domestic Human Resources for Doctors Without Borders

[SHRM members-only HR Q&A: What is an employee assistance program (EAP)? (www.shrm.org/resourcesandtools/tools-and-samples/hr-qa/pages/whatisaneap.aspx)]

"Most people will be thinking, 'Am I next?' " said David Epstein, SHRM-SCP, director of domestic human resources for Doctors Without Borders in New York City. "Be as generous as possible with severance [and] health benefits as you can. If possible, allow staff to say goodbye as long as there are no security issues. Closure is important for both the laid-off workers and those remaining in the organization. Always treat people with respect and dignity."

[SHRM members-only toolkit: Managing Downsizing by Means of Layoffs (www.shrm.org/resourcesandtools/tools-and-samples/toolkits/pages/managingdownsizing.aspx)]

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