



Layoffs, Terminations & Workers Compensation

Overview

Layoffs have become an unfortunate reality of everyday life in America. The drumbeat has been nearly constant since the early 1980s, but has recently intensified and affects all sectors. With the exception of the last eighteen months, during which almost all layoffs have been due to the severe economic downturn, layoffs have typically resulted from legitimate competitive practices (i.e. involving merger and acquisition activity, economic restructuring, or market factors) and in some cases corporate heartlessness. The reason for the workforce reduction does not change the consequences in terms of human costs (depression and angst amongst terminated and surviving employees that produces a near fatal blow to the psyche) and the enormous challenges employers face getting through the process including:

- Discrimination (i.e. protected categories), harassment and retaliation claims – avoiding litigation
- Duties of the Employer – complying with State and Federal laws (WARN Act)
- Likely increase in workers compensation claims
- Human costs - affected employees becoming anxious, scared, or angry and remaining employees suffering from survivor's anxiety....depressed, stressed and fatigued.
- Workplace violence concerns

Layoff or Firing – What's the difference?

Layoff is the temporary suspension or permanent termination of employment of an employee or (more commonly) a group of employees for business reasons, such as the decision that certain positions are no longer necessary or the result of a business slow-down or interruption in work. Originally the term referred exclusively to a temporary interruption in work, as when factory work cyclically falls off. However, the term has also applied to the permanent elimination of positions as a cost-cutting measure (or for other reasons).



Further euphemisms are often used to "soften the blow" in the process of firing and being fired, including downsize, right size, smart size, workforce reduction or workforce optimization, simplification and reduction in force (also called a "RIF", especially in the government employment sector). Mass layoff implies laying off a large number of workers. Attrition implies that positions will be eliminated as workers quit or retire. Early retirement means workers may quit now yet still remain eligible for their retirement benefits later. Firings imply misconduct or failure while layoffs imply economic forces beyond one's control.

Getting Started – Deciding Who Goes and Who Stays

Sometimes the selection is clear. An entire division, office or facility is being closed. All the employees are being terminated. In other instances, the decision is not so obvious. Some employees will be laid off and others in the same plant, office or facility setting will not be. How do you choose who goes and who stays? The easiest criterion is seniority. In fact, unions often insist that seniority, not qualifications or competency, be the determining factor in layoffs in their collective bargaining contracts. However, layoffs can be a good time to weed out poor performers, many of whom may be longer-term employees. Other criteria may include cross-training, prior discipline, attendance, performance review comparisons, ability to get along with others and quality of work. The more objective the criteria, the better.

If a more selective criterion is to be used, the managers should make the preliminary cut. Each manager should develop a list of the people in their department, identifying who is initially selected for layoff. The manager should be prepared to justify why the employees on the list were at the low end in performance. The human resource department will need to verify that the performance reviews are in line with what the manager has presented about the employee. Any inconsistency can create problems later.



A matrix should be created of all employees in the relevant work groups along with a list of all potential discrimination categories. A simple check-the-box system on the grid (see chart below) should reveal graphically whether a pattern exists. A separate age bias test should be calculated. Simply calculate the average age of the workforce before and after the proposed layoff. If there is a dramatically lower age average, then the employer may need to make some adjustments even if it means keeping a lower performer. This avoids the perception of discrimination and provides a defensible position in the event of an age discrimination claim.

Employee	Race			Male	Female	On WC Claim or Light Duty	Pregnant	On Leave of Absence	Age		
	Cauc	Black	Other						18-39	39-49	50+
J. Smith	X				X	X					X
B. Jones		X			X		X	X		X	
C. Charles	X				X	X					X
H. Nash			X		X	X			X		
M. Holly	X				X				X		
K. Light		X		X						X	
W. Harry	X				X	X			X		

The graph clearly indicates woman appear to be the majority of the layoffs and most have a pending workers compensation claim and/or are on light duty which could prove problematic as one “class” of individuals may feel targeted.



Duties of Employer

Employers may be required to give advance notice to affected employees and certain government entities. There are federal and state laws which discuss the issue of notice owed to employees before large layoffs. The federal law is known as the Worker Adjustment and Retraining Notification or the WARN Act. The Worker Adjustment and Retraining Notification Act (WARN) was enacted on August 4, 1988 and became effective on February 4, 1989.

WARN offers protection to workers, their families and communities by requiring employers to provide notice 60 days advance notice of covered plant closings and covered mass layoffs. The notice must be provided to either affected workers or their representatives (e.g., a labor union); to the state dislocated worker unit; and to the appropriate unit of local government.

Employers Subject to the Act

In general, employers are covered by WARN if they have 100 or more employees, not counting employees who have worked less than six months in the last 12 months or employees who work an average of less than 20 hours per week. Private, for-profit employers and private, nonprofit employers are covered, as are public and quasi-public entities which operate in a commercial context and are separately organized from the regular government. Regular federal, state, and local government entities which provide public services are not covered.

Employees Subject to the Act

Employees entitled to notice under WARN include hourly and salaried workers, as well as managerial and supervisory employees. Business partners are not entitled to notice.

What Triggers Notice

WARN notices are triggered by the decision to implement plant closings, a sale of a business or mass layoffs.



Notification Period

With three exceptions, (narrowly-construed faltering company, unforeseeable business circumstances and natural disaster) notice must be timed to reach the required parties at least 60 days before a closing or layoff.

State Specific

Many states have passed laws that expand the federal WARN act. For example, California's "baby" WARN Act (AB 2957) contains additional provisions that employers should be aware of. The baby WARN Act applies to "mass layoffs", "terminations" and "relocations" at "covered" establishments. Under California's baby WARN Act, an employer is "covered" if it has employed 75 or more persons within the preceding 12-month period. It is unclear whether this means 75 total people over the course of a year or 75 at any one point during the year. Second employer is "covered" if there have been any "mass layoffs," "terminations," or "relocations" at a covered establishment. The terms are defined below: Covered Employers must provide at least 60 days notice to affected employees. Employers also have to provide notice to the California Employment Development Department, the local workforce investment board and the chief elected official of each city and county government within which the termination, relocation or mass layoff occurs.

On August 5, 2008, New York State Governor David Paterson signed into law the New York State Worker Adjustment and Retraining Notification Act ("NY WARN Act"), which become effective on February 1, 2009. The NY WARN Act is more expansive than its federal counterpart, because it increases the number of employers and events that fall within the statute's mandates and requires covered employers to provide 90 days' written notice in advance of a plant closing, mass layoff or relocation, as those terms are defined in the statute.

Employers should check with their respective states to make sure they are in compliance with the federal laws and often expanded state laws.



Workers Compensation Claim Issues

It is a documented fact that an impending or even threatened layoff increases workers compensation claims...especially in a tight job market. Individuals faced with a reduction in their income, temporary unemployment benefits and the likelihood of unaffordable health insurance may look to workers compensation as a way to ensure their income is sustained when they no longer have a job due to a layoff, termination or other situations they can't control. Even if layoffs are not in the plans, rumors of job restructuring are enough to scare some employees into believing layoffs are imminent. Simple because an employee files a claim after his or her employment ends does not necessarily mean that the claim is fraudulent. Some employees who were reluctant to file a claim because of fear of being on the layoff list decide to file once their employment ends. Whether the injuries are real or imagined, the fact is, workers compensation claims increase during and after a layoff.

There is probably no way to prevent illegitimate claims from being filed, but careful and accurate recordkeeping can help in the defense of such claims and minimize costs. The following techniques can avoid or minimize claims cost following downsizing, terminations or layoffs.

Inform your Insurance Carrier - Let your insurance carrier know about downsizing plans beforehand. Together you can develop strategies for warding off any abusive claims. Report any suspicions you have about a claim, along with all the reasons for your suspicions, to your workers compensation carrier. The earlier you voice concerns, the better the opportunity to investigate, gather medical evidence and discuss strategy on defensible positions.

Focus on the Things You Can Control - The workers compensation system was designed to protect the employee and the laws favor the employee. However, measures can be taken to minimize cost and limit the life of the claim. Often *this is the goal* – reducing cost and the life of the claim – which can be frustrating to employers. The reality of workers compensation claims is that they are not won by hitting a home run. Rarely is there one isolated piece of information that “knocks it out of the park” and provides an ironclad denial. Claims are won through a series of singles. Documentation



of anecdotal evidence (the employee was fine on the last day of employment; no one saw the individual get hurt; the employee was observed using the body part he or she is alleging is not functional etc.) and objective evidence (the independent medical exam's x-ray or MRI shows no injury) builds your defensible positions and get you to home base (which is usually a negotiated settlement). The value of the claim will be substantially less with well documented information. The claims take patience and persistence to resolve as bringing the employee back to work (the most common resolution to workers compensation claims) is not an option in a layoff situation. The lack of this option complicates the claims handling. The efforts and costs expended to defend suspect claims is difficult but worth the aggravation as it far outweighs suffering the enormous cost of a permanent long term workers compensation claim.

Revisit Your Accident Reporting Policies – Require all employees to report accidents immediately, no matter how minor.

Obtain Signed Verification Forms - Immediately before the end of employment, have employees sign a form verifying whether they have experienced any accidents on the job that have not been reported. Such documents are valuable in defending claims filed once employment ends.

Conduct Wellness Exams and Videotaping - Many employers contract with their workers compensation medical provider to conduct physical examinations to determine an employee's overall health and fitness status preceding a layoff. Others videotape the work areas with employees performing their usual duties. These tools can help demonstrate an employee's health and activities at the time employment ends. A cautionary note - information obtained concerning an employee's health must not be used as a *reason to terminate or lay off* the individual. This would violate the Americans with Disabilities Act.

Keep Accurate and Detailed Records - Be sure industrial hygiene recordkeeping is accurate and well-documented, including baseline levels of noise, airborne particles, indoor air quality, chemicals and dust exposures, as well as equipment condition or housekeeping inspection logs.



Many of the workers compensation claims filed after employment ends are occupational disease in nature. Claims for hearing loss are common after layoffs. Make sure records are not destroyed as employees' payroll, work schedule and accident reports may become evidence in a claim after the worker's employment has ended.

Implement Employee Assistance Programs - Employees may be less likely to file suspicious workers compensation claims if they believe you are genuinely concerned about their welfare. Providing job fairs, resume counseling, placement services and on-site therapy are some ways employers can help.

Examine Security Measures - Incidents of workplace violence are more likely following layoffs or terminations. Examine the level of security you can provide for remaining employees. Take all threats seriously. Use exit interviews to determine an employee's attitude and tendency towards violence. Consider denying employees unescorted access to work areas following a layoff or termination. Any employee hurt on the job through violence of another current or prior employee will result in a workers compensation claim.

Conduct Thorough Accident Investigation - Be sure every accident is thoroughly investigated immediately following its report. Separate witnesses from the injured employee to get signed statements from them. If equipment or other physical evidence is involved, remove it from use until it can be examined. Address any other hazards which may have caused the accident.

Learn Potential Fraud Indicators - Claims adjusters look for red flags that a claim might warrant additional investigation. Warning signs can include:

- the employee is disgruntled after being fired or laid off
- the employee has been told his or her employment is about to end
- the employee is having financial difficulties
- the accident is not witnessed
- the injury involves subjective complaints of pain with no ability to obtain objective medical evidence



Although none of these tips may actually prevent an employee from making a workers compensation claim after leaving an employer, they can assist in defending against such claims. The more evidence to present to the judge that there was no mention of any accident until after employment ended or was announced to end, the stronger the defense will be.

Frequently Asked WC Questions

Can employers require an employee to sign something affirming they are not injured when laid off?

Sure, but it will not prevent a workers compensation claim. No employer can require an employee to waive their workers compensation rights. It may assist in creating a defensible position later if a claim is filed (in that perhaps the pain alleged later is not related to work since the individual signed that they were fine on the last day of work) but it will not necessarily preclude recovery under workers compensation. Some employers have offered money at the time of the layoff (\$1,500 is the average) to the employee to sign an agreement that he or she will not file for a workers compensation claim later but again it probably will not hold up legally should the employee file a claim later. The signing of such a form can have a psychological impact on the employee in that he or she *thinks* they have signed away their rights.

Can employers have the employee waive rights to workers compensation in the severance agreement along with other claim waivers?

No state allows for this.

Are stress claims due to *fears* of being laid off compensable?

Most states will not allow an employee to collect workers compensation because of layoff fears. Courts have ruled that a worker could not be reimbursed for stress caused by the company's bankruptcy and falling stock price. The courts ruled this tension is not related to "events of employment."



Are stress claims resulting from termination covered?

This is new territory due to the enormous number of terminations and layoffs recently. California has ruled that stresses from termination are considered a compensable injury. However, California has allowed compensability of other types of medical conditions (i.e. heart attacks) where no other state has followed.

What if an employee is on restricted duty at the time of layoff?

Another major area of concern is how to handle employees who were previously injured on the job and who have returned to work in a modified duty capacity or those who have not returned to work in any capacity.

If you are ending employment for any employees who fit into this category, the answer is quite simple. Your workers compensation carrier must continue or reinstate disability benefits and perform vocational rehabilitation efforts in order to find job opportunities within those employees' physical restrictions and vocational capabilities. It is therefore very important that an employer notify their carrier of their intent to end employment for an employee currently on workers compensation or modified duty before doing so.

Case law has upheld that if an individual working restricted duty due to a work injury is laid-off, the employer is obligated to reinstate wage-loss benefits. In many cases, employers will not do so voluntarily and a petition to reinstate benefits must be filed by the employee.

Where the employee demonstrates that his or her workers compensation benefits were improperly suspended (either the employee had not completely healed from the work injury and/or was incurring a wage loss as a result of the injury) and was subsequently laid off, the employer must then demonstrate that either the employee was completely healed from the work injury at the time of the layoff or must reinstate workers compensation benefits. If the layoff was for purely economic factors and the employee's layoff is not related to the work injury or employee's inability to work, it is much more unlikely that benefits will be reinstated.



State-specific nuances may play a role here as well. For instance, Michigan has a unique issue involving employees on light (favored or restricted) duty. In most circumstances if the employee lost a job through his or her own fault (i.e. fired for cause or quit) benefits would not continue. However, if the employee fits into a special category, that is, an employee that has been back to work for less than 100 weeks and loses his or her job through no fault of the employee (laid off due to economic down turn or suffered from other disability that was not work-related) benefits resume. Many employers feel this is unfair, and it is not clear why the legislature treated this group of workers in this way, but it is clear that this is what the act says and it has been upheld in court.

It is important for an employer to understand the laws in the states where they operate. An insurance agent and/or carrier can assist with this information.

[Can we deny a claim based on our suspicion that it is fraudulent due to the timing \(before, during or after the layoff\) of the filing?](#)

This may be easier in some states than others. Some states have introduced legislation to disallow the filing of workers compensation claims within a state timeframe of a scheduled shutdown. For instance, West Virginia considers “shutdown” as one of four factors in determining compensability of a claim. The West Virginia law allows for consideration of whether there had been a scheduled shutdown beginning within one week of the date of filing; or whether the employee pursuing a claim received shutdown notice within 60 days of the filing.

Many states have bad faith laws which will require a high standard to deny a claim; suspicions may not be considered enough cause. A carrier could be fined for not accepting the claim. Even in those states where you can deny the claim, this does not mean the employer’s insurance company will prevail. The best defense is a well investigated and documented claim.

[Can an employer lay off an employee on workers compensation?](#)

Yes. If the employer would have laid off this employee even if they were still on the job, the fact that they are on workers compensation leave does not prevent the employer from laying the employee off. No law requires employers to give special treatment to employees just because they are on workers compensation leave. An employer can fire an employee for poor performance even if the employee has filed a workers



compensation claim. In addition, an employer can include an employee in a reduction in workforce (layoff) if the employer picked the employee for some reason other than the fact that the employee was on workers compensation at the time. In this instance worker compensation benefits for the employee continue.

However, if an employer lays off an employee *because* they were off work receiving workers compensation benefits, that might lead to a case of illegal retaliation. All states have laws that prohibit employers from retaliating against employees who ask for and/or receive workers compensation benefits. An employer cannot fire, demote, harass, lay-off, or otherwise harm such employees because they are exercising their rights under the workers compensation system. An employee who has been the victim of unlawful retaliation can sue over this and win.

Impact of Staff Reductions on the Survivors

There may be a high anxiety level among the remaining employees, who may believe that another round of layoffs is imminent. To the extent the employer can soothe those feelings; a group meeting immediately after the layoff should take place. If key performers need to be retained, perhaps a special meeting with them is warranted. The employer should also have a plan for dealing with customers who will be working with a new company contact and may consider moving their business because of the employer's apparent instability.

Human Resource Considerations

Our sense of self-worth and often our feelings of success or failure are closely linked with our work. Treat employees with dignity and respect. Be professional as well as empathetic and sympathetic. The process should be sensitive and kind. Some tips:

- Avoid the “walk of shame.” Give the employee the courtesy of not marching out with a security person.
- Schedule layoffs for the lunch hour, or when other employees are not around. Assign a sympathetic manager to accompany them back to the desk to remove their personal belongings while another manager is posted by the door to divert anyone from coming in.
- Have an employee assistance program available to help deal with the emotions.



- If possible, hold exit interviews. This documentation may be useful later, especially if a workers compensation or discrimination claim is made.
- Offer dislocated employees the use of outside placement agencies.
- Give the employee a letter outlining issues such as severance, COBRA and unemployment recognizing people often do not really hear what is being said when they are upset.

Workplace Violence Consideration

There is no ironclad guarantee someone will not become violent after being laid off or fired. But there are steps companies can take to significantly mitigate the risk, thus ensuring the safety of their employees and protecting their firms from potential liability. Any employee injured in a workplace violence incident is covered by workers compensation.

The critical thing is to have a plan, an established method for releasing people. When the numbers do not look good, a business must have a planning meeting to put a strategy in place to handle layoffs. Employers should give as much warning as possible of an impending layoff, even when not required by law. The tendency of many managers is to keep everything as secret as possible. The prevailing wisdom is an anticipated layoff can be extremely detrimental to production and/or the company may be susceptible to possible sabotage.

Many employers do the opposite and assure the employees everything is fine. Rumors persist (as every work environment is a hot-bed for gossip) and the entire work force is on edge, preoccupied, scared and unproductive while they wait for the ax to fall. What happens is the news finally does break and people feel taken aback and unprepared. Even though rumors persisted, they did not want to believe them. Some employees more than others will feel angry and/or betrayed and believe the employer had not acted in good faith. No matter the difficulty, try to share with the employees whatever the fortunes of the company are along with layoff or other restructuring realities. The trust you establish with the workforce *before* the layoffs will serve an employer well *during* the layoff and may go a long way in preventing any violent episodes.



Be sure to give employees the reasons for the layoffs, making it clear individuals are not being singled out. Frame the decision in the context of business.

The following may be helpful in mitigating incidents:

- Be alert to what line supervisors and managers say about particular employees to identify those who may become violent, then take appropriate security measures. Everyone has a tipping point.
- In an employer feels it is necessary, they should not hesitate to put additional security measures in place during the week after a firing. If necessary hire security guards.
- Educate managers and supervisors to warning signs.
- Have a procedure for reporting potentially violent or suspicious behavior or situations.
- Form a crisis management team. They can inform individuals how to protect themselves, when the local police should be involved, and how to secure emergency help.
- Access to the premises by former employees should be limited. Non-authorized or terminated employees access cards and passwords to computers must be deactivated.

[Avoiding Layoff Litigation](#)

Not surprisingly, layoffs often lead to lawsuits for wrongful termination. And while some may say that lawsuits are an inevitable part of doing business, there are ways to minimize the risk of litigation that so often accompanies layoffs.

Document the business purpose for the layoff. Layoffs driven by a well-defined, documented business purpose are less likely to violate discrimination and other laws than layoffs broadly aimed at lowering payroll.



There is no one-size-fits-all approach to formulating a layoff strategy. Therefore, companies should consult with legal counsel before implementing a reduction in force. Counsel can assist in compliance with WARN Act notices, a discrimination analysis, employee contract issues, collective bargaining agreement obligations, severance and separation benefits, employee releases and protection of company property, trade secrets and confidential information.

Conclusion

Employee reductions can pose a significant challenge for employers and often a devastating turn of events for employees. It is important for employers to have a layoff strategy broken down into goals and an action plan for the company. The layoff can be so overwhelming an employer may forget the overall company's vision and strategy. Each employer should ask the question; "How do we not just survive but thrive after a layoff? How do we inspire our remaining employees to achieve amazing things... to continue their focus and innovation and not be paralyzed by these troubled and uncertain times?" First, every employer must *over communicate* in these situations. The employer should reiterate the vision and strategy of the company and the action taken (layoffs), although painful for everyone, accomplishes the mission.

Next, keep in mind; these are human beings whose lives have just been turned upside down. The surviving employees will give the employer the benefit of the doubt and their commitment to the employer if the employer tells them the truth and treats the employees leaving with fairness and compassion.

Ernst Fehr, an Austrian economist and professor of economics' at the University of Zurich, has done many studies in human cooperation and social norms. His studies reveal that people inherently reject unfairness. This rejection transcends language and cultures.



As previously mentioned, the work environment is a hot bed for gossip. Everybody knows everything. I suspect many individuals know more about their co-workers than they ever wanted to know. Most employees know what is fair and unfair. They understand what a legitimate claim is (whether the claim is workers compensation or discrimination) and a claim where the current or prior employee is attempting to “work the system.” Most employees want the legitimately injured employee cared for physically, emotionally and financially and they want the employer to take a hard line on the questionable claims, particularly the claims easily recognized as suspect by everyone.

There is substantial evidence of the power and cost-saving effects of a caring and compassionate culture. The evidence also suggests that a systematic, objective approach to claims and treating employees in a consistent, professional manner with both respect and dignity is extremely effective in reducing workers compensation and discrimination claims. This effective attitude should not be abandoned because of the layoff. The employer should certainly be more vigilant in investigating claims from employees no longer employed but care should be taken to not assume all claims are suspect.