

Downsizing the Right Way

Christine M Renda, Esq

July 26, 2002

Whether you're terminating a few or laying off a number of employees, following these simple rules will help you reduce the risk that your former employees will sue

No single policy, practice or procedure can eliminate the possibility that you will be sued by an employee you have had to lay off or terminate. However, you can reduce the likelihood that you will be sued by one of these employees if you institute certain practices both before and during the termination process. Employee lawsuits are not only expensive, they decrease productivity and negatively impact morale. Even a frivolous claim will cost the company tens of thousands to defend; a legitimate claim can cost hundreds of thousands in legal fees alone. Employment claims will also make it more difficult and more expensive for you to obtain employment practices liability insurance.

Individual Terminations

There are ways to minimize the risk that a former employee will sue you for his/her termination if you follow these simple steps:

1. Be prepared. Know what you're going to say before you begin the process. You should familiarize yourself with the employee's personnel file, including any written warnings or other discipline given in the past, especially if it supports the reason for the termination. You should also be prepared to present the employee with his or her last paycheck and documentation concerning benefits so that you are not left with these outstanding issues after the employee leaves the office.
2. Don't do it alone. Never terminate an employee without an appropriate witness (the employee's supervisor or human resources personnel) who can later provide an account of the circumstances surrounding the termination, if necessary. A third party will also provide an added measure of security and safety if needed.
3. Tell the truth, succinctly but unequivocally. As difficult as it may be to tell someone he or she is just not performing, telling the employee the truth during the termination

process should decrease the chances the employee will speculate that you have lied to cover up a discriminatory motive and decrease the chances the employee will seek legal redress at some point. It will also eliminate the issue of “pretext” if a discrimination claim is ever filed.

4. Be brief and firm. Don’t apologize for the decision or engage in a debate with the employee to justify your decision.
5. Treat the employee with dignity. Being terminated will invariably be one of the most difficult experiences of one’s life. Never underestimate the value to be gained by showing some compassion during this painful process. Take care, however, to avoid being overly complimentary of the employee or making statements that seem to indicate that the company is uncertain about the propriety of its decision.
6. Give the employee a brief opportunity to explain his or her side of the story. In most cases, this will not cause you to change your mind about your decision to terminate, but may make the employee feel better to have gotten it off his chest and less likely to sue out of anger at being given short shrift during the termination.
7. Document the specifics of the conversation as soon as possible after its conclusion so that you will have a contemporaneous account if you need it at some later time.

Layoffs

The federal Worker Adjustment and Retraining Notification Act (WARN) requires employers with 100 or more full-time employees to provide 60 days’ written notice to affected employees when it is about to partially or fully close a plant location or lay off 50 or more employees at one site. The civil penalties for violation of the WARN Act can be severe and include fines of up to \$500 per day for each violation and the award of back pay, lost benefits and attorneys’ fees.

It is critical to have a written policy in place before implementing a major layoff or downsizing. To the extent possible, objective criteria should be used for determining which employees will be terminated, although the decision sometimes must be based, at least in part, on performance issues. Whatever criteria are ultimately used, it is critical that you apply those criteria in a consistent manner.

It is advisable to conduct an impact study to determine the demographic makeup of the company both before and after the layoff. If it appears that the approaching layoff will disproportionately affect a protected group, the company should reconsider its approach.

Take time to articulate, both in writing and for dissemination to your employees, the reasons for the downsizing and the methodology for choosing which employees to terminate. The news should be communicated directly to your employees before it is released to the press. You should also make every effort to attempt to communicate individually with all of those affected by the downsizing.

One way to mitigate or altogether eliminate employment claims related to the downsizing is to offer terminated workers a reasonable severance package and require those employees who accept them to sign releases that waive their right to bring employment claims against the company. Such agreements need to comply with the Older Worker Benefit Protection Act (OWBPA) for those employees over 40. Among other things, the OWBPA requires that laid off employees are advised in writing of their right to consider the agreement for 45 days prior to its effective date.