

## CORONAVIRUS RESPONSE ALTERNATIVES TO A REDUCTION IN FORCE

The current global pandemic is causing short-term stress and financial hardship for small businesses. These issues have potential long-term effects and are causing small business owners to look carefully at ways to reduce expenses.

A reduction in force (RIF) or layoff is the involuntary termination of employees as a way to reduce labor and benefits-related expenses when a business is going through financial hardship. Before you decide to pursue a reduction in force, it's advisable to first explore alternatives. In fact, you should treat a RIF as a last-ditch effort when all other alternatives fail. Consider using one or more of these alternatives.

### VOLUNTARY TIME OFF

#### *Voluntary sabbatical*

Sabbaticals are common in academic fields and less common in the business world. In academia, sabbaticals are usually paid time off to do research, further one's expertise, or complete a specific study or degree. A sabbatical is an opportunity for an employee to take time off and can be offered as unpaid. In business, this time could allow an employee a similar time to study, work on a big idea, pursue another interest, or simply reduce stress. This can be highly valuable in high-tech or high-stress fields.

#### *Voluntary unpaid time off*

Offer employees the opportunity to take unpaid time off. If an employee is willing to take off some unpaid time, it can save the company cash output. This allows the employee to still save their paid time off for future vacations when normal business operations resume. Employees who live paycheck to paycheck may not want to participate in this option, but some workers may be willing to take even a few days or a full week unpaid.

#### *Voluntary paid time off*

Offer employees the opportunity to take paid time off. This allows them to use up paid time off while normal workload is light or the business has reduced hours. Then, when business resumes, they will return to normal workload and hours.

## INVOLUNTARY CHANGES

### *Hiring freeze, cross-training and merging roles*

A hiring freeze means that an employer stops hiring new employees for all positions or non-essential positions. The decision empowers employers to prioritize energy, time and financial resources on mission-critical issues by eliminating the costs associated with hiring, such as job advertising, interviewing, onboarding, training and wages and benefits for new hires. Essentially, a hiring freeze is a stop-gap policy to cut costs while keeping your current employees. Alternatives to a complete hiring freeze include hiring only for certain essential positions or consultants who are only using short term contracts and are not paid benefits.

A hiring freeze will result in leaving positions unfilled and important tasks incomplete. As a result, it's important to consider simultaneously cross-training current employees to complete essential tasks that would otherwise be left undone. Employers might also consider merging roles so that current employees take on different or additional responsibilities. While any of these decisions will require flexibility from your current staff, most employees will be willing to adapt, they know the measures are in place to help secure their own jobs and the organization at large.

### *Overtime limits*

Employers in Colorado are required to pay overtime to any nonexempt employee who works more than 40 hours in a workweek - that hasn't changed, even in the current COVID-crisis. However, employers may want to consider asking their employees to limit overtime as a way of reducing overall costs. Employers can direct employees to notify their manager of the possibility of needing overtime in advance. Managers can then determine if that overtime is necessary or if the work can wait until the following workweek. For example, if a physician's assistant has a set of daily tasks that cannot be completed without exceeding a 40-hour workweek, she should notify her manager. Her manager can then decide if she should work overtime to finish the tasks or if the tasks can wait until the following workweek or should be reassigned to an employee on another shift.

In order for overtime limits to have a meaningful impact on the business' bottom line, managers need to be especially intentional about asking employees to check in with them prior to working more than 40 hours. Managers also should be sure to check in with staff when they forget to do so. Employers should clearly explain the rationale for overtime limits - to reduce costs and keep jobs - to increase employee buy-in and willingness to follow through.

### *Reduction in pay or hours*

From an employee perspective, working some is better than no work at all and earning less is better than earning nothing. Employers can reduce employee hours to pay as a way of decreasing business expenses or responding to changing demand when there is simply not enough work for all staff.



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For hourly employees (non-exempt), employers can reduce the total number of hours scheduled for each employee. Keep in mind that a reduction to less than 20 hours per week may impact access to health care coverage for some employees.

Employers can also consider reducing employee pay. This is a valid option as long as the pay still meets state (and federal) minimum wage requirements for hourly employees. Employers can also consider a reduction in pay for salaried (exempt) employees but need to be aware that a reduction may result in loss of exemption and change to hourly non-exempt status.

## *Furlough*

Want to save jobs but are facing impending layoffs? Consider furloughing employees. A furlough is forced unpaid leave. Furloughs help employers immediately reduce costs while simultaneously providing business continuity and competitiveness for when the market recovers. While they mean no pay for employees - especially problematic for those living paycheck to paycheck - they also provide assurance of a return to work. A later job is better than no job. Also, benefits are typically continued for furloughed employees.

Furloughs can be implemented in a variety of ways. Employers might furlough all employees or only non-essential staff or make different determinations for each department. Depending on business needs, the length of the furlough might last one month or one week or one day every week. Employers can specify an expected timeframe for furlough, although it is okay for this to change depending on business needs. Given all the unknowns in the COVID-19 situation, an employer may decide not to specify the end date until a later point in time.

Employers need to be extra careful to enforce a “no work” policy for all furloughed employees, including those who are salaried. Furloughed employees should do zero work, including no email and no calls, actions that would require employers to pay employees even while furloughed.

## INVOLUNTARY CHANGES



### PROS

- ✓ Voluntary departures are often less damaging to organizational morale because employees feel more in control of the choice
- ✓ Voluntary departures can minimize risk of lawsuits because employees are less likely to take legal action when the decision was their choice
- ✓ Employers may require employees to sign a release of claims in exchange for their participation in the voluntary departure program



### CONS

- ✗ The employer may not be able to control which employees opt into the voluntary departures program; it presents high risk if the good employees choose to leave
- ✗ If not enough employees participate, the employer may still be forced to utilize involuntary methods of reduction in force

## TYPES OF VOLUNTARY DEPARTURES

### *Voluntary retirement*

This form of retirement is typically offered by a company in order to reduce their workforce without conducting a layoff or holding another downsizing event. By doing so, it allows workers to make the switch into retirement at an earlier age while also helping the company right-size their company, aligning their talent with business goals.

### *Voluntary separation*

The purpose of the voluntary separation program is to allow employees to voluntarily separate employment when business needs demand a reduction in force. This allows employees to choose to depart from the organization on their own. Employees who are looking for an opportunity to leave, those who may have been wanting to relocate, or who were otherwise dissatisfied or wanting to change jobs/career might be willing to choose voluntary separation.

## REDUCTIONS IN FORCE

### Considerations for reductions in force

- Ensure you plan carefully to minimize the exposure to liability by ensuring you are compliant with employment laws and document all decision-making
- Consider the impact on employee morale when making RIF decisions
- Consider severance-related expenses
- Be cognizant of the potential loss and business impact due to the departure of highly valued and experienced employees

## STEPS FOR A REDUCTION IN FORCE

After exploring alternatives, if you decided to implement a reduction in force, here are the steps to follow:

1. Create objective criteria
2. Complete analysis for compliance
3. Prepare to provide advance notice
4. Prepare severance plans and other benefits
5. Document the plan
6. Conduct the Layoff Conversation
7. Inform the Workforce of the Layoff

## Step 1: Create objective criteria

Create objective criteria for determining which roles will be affected. Creating objective criteria is important. Consider these potential selection criteria for layoffs.

### *Seniority-Based Selection*

With seniority-based selection, the “last hired/first fired” concept is used. Because seniority-based systems reward employees for their tenure, there is a lower risk that older workers will sue employers for age discrimination under ADEA (Age Discrimination Employment Act). However, using seniority does not protect the employer from further risks for potential discrimination against other protected groups. In addition, using seniority-based selection may require the employer to retain employees with outdated skills or less technologically savvy employees.

### *Employee Status-Based Selection*

Employers who have part-time or contingent workers on their payrolls may want to layoff those workers first to ensure greater job security for remaining core workers. Unless an employer’s workforce is made up largely of contingent workers, this method alone may not be sufficient to meet downsizing needs, and it may need to be used in conjunction with other selection criteria.

### *Merit-Based Selection*

Although this method of selection is often a preferred choice among managers because of its added flexibility for weeding out marginal or poorly performing employees, it should be scrutinized carefully. Because merit selection criteria are based either in part or in whole on performance information (which is not always objective, may contain rater biases and may not be well documented), this method has not been proven to provide an accurate qualitative means for ranking the differences among individual employees’ performance in selecting employees for layoff. Employers choosing to use this method should carefully document their decisions for retaining or reducing all employees in the selection pools.

### *Skills-Based Selection*

With this type of system, it is sometimes possible for employers to retain those workers who have the most sought-after skills. However, be aware that this method may cause a company to retain younger workers with needed and versatile skill sets, and to layoff older workers who may not have the necessary skills. The older workers are protected from discrimination by the Age Discrimination in Employment Act. Once again, clear documentation should be maintained.

## Step 2: Complete analysis for compliance

After determining the selection criteria that you will use, it's critical to conduct analysis on the workforce impact to ensure you are compliant.

First, conduct analysis for any potential disparate impact. Disparate impact is negative impact on a disproportionate group of protected individuals, which can result in a claim of discrimination. Even the use of the objective criteria can result in unintentional disparate impact. For example, the decision to terminate using skills-based analysis would have a disparate impact on a racial minority group if the majority of possible terminations were employees of Filipino descent. Once you have compiled the list of positions (or employees) to eliminate, it is imperative that you carefully assess whether the layoff has a disproportionate effect on any group of protected employees, such as racial minorities, women, older workers (age 40 or over), or the disabled.

Second, review the Older Workers Benefit Protection Act (OWBPA) Regulations for compliance. If releases from age discrimination are used in exchange for severance pay, they must comply with the OWBPA to effectively release claims under the Age Discrimination in Employment Act. The OWBPA addresses four different release scenarios, and each scenario contains five steps that must be followed by to be compliant. Under the OWBPA, employers also need to provide workers age 40 and over a consideration period of at least 21 days when one older worker is being separated, and 45 days when two or more older workers are being separated. Additionally, employees must receive a revocation period of at least seven days. This means that employees have seven days to withdraw their signature from an agreement and that the agreement is not actionable until the seven day period ends.

## Step 3: Prepare to provide advance notice

Federal laws require employers to provide a period of notice in some cases. The Workers Adjustment Retraining and Notification Act (WARN) requires employers with 100 or more employees to provide employees, bargaining representatives and local government officials with 60 days advance written notice of a mass layoff or a plant closing. A mass layoff is defined as at least 33% of full-time employees and a minimum of 50 employees at a single site. A plant closing is defined as a shutdown of a single site, if the shutdown results in an employment loss of at least 50 full-time employees. In addition to the federal WARN law, several states have different and/or more expansive plant closing laws.

## Step 4: Prepare Severance Plans and other benefits

Severance is a general term for money paid to a terminated employee. Severance is commonly used in reductions in force as a way to compensate affected employees with assistance to help them financially while they search for a new job. Severance is usually accompanied by an agreement the employee signs. This can help release or reduce the risk that the employee will file a claim or suit against the employer. Severance is not required by law in Colorado. A severance package may include pay to cover wages as well as insurances or other benefits such as outplacement services.



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## *Pay*

Severance Pay is usually calculated based on current salary and tenure with the company. Severance pay can be provided as a lump sum or spread out and employees pay taxes on severance pay received.

A common calculation is 1-2 weeks of current pay for each year of tenure. For example, if an employee makes \$21 per hour at 40 hours per week for an average of \$840 per week and has worked for the company for four years. The company chooses to pay two weeks of pay for every year worked, which is eight weeks of pay or \$6,720.

## *Continuation of benefits*

The Consolidated Omnibus Budget Reconciliation Act (COBRA) gives workers and their families, who lose their health benefits, the right to choose to continue group health benefits. This will have limited periods of time and applies under certain circumstances such as voluntary or involuntary job loss and reduction in the hours worked. Qualified individuals may be required to pay the entire premium for coverage up to 102% of the cost to plan. Not all organizations are eligible for COBRA. Please check with your provider to confirm if this option is available to you and your employees.

Other benefits such as 401k contributions, life insurance, flex spending, worker's compensation, and tuition assistance are generally terminated at the end of the employment period. Be sure to check with your HR partner and include these details in the layoff documentation for the affected employees.

## *Outplacement*

Outplacement is a support service that some companies provide to laid off employees to help them transition to new jobs. A third-party organization usually provides the outplacement services which may include resume writing and advice, career guidance, training, interview skills practice, and other career related workshops. The former employer usually pays for the outplacement services for a set period of time.

## *Severance Agreements*

It is advisable to utilize a severance agreement to protect your organization from claims and lawsuits. It's not a guarantee but can certainly mitigate risk. Severance agreements are legal documents, so they should be carefully worded. Consult with your HR partner or legal counsel before drafting severance agreements.



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## Step 5: Document the plan

The reduction in force (RIF) plan should be documented in writing. This helps to ensure it is consistently followed and applied fairly. The plan also acts as documentation should the execution of fairness of the process ever come into question. Include in the documentation the business decision and reason for the RIF, which departments and positions are impacted, criteria used, and how the decisions were made. Also include the severance plan and benefits offered to affected employees and copies of all documents provided to the employees.

## Step 6: Conduct the Layoff Conversation

Sitting down with an employee who is about to be laid off will be difficult, but if handled professionally, it may reduce potential anger and resentment from the employee. It's a good idea to prepare for conversations by scripting them and making notes in advance. It may seem inauthentic, but it can help you to ensure you convey the critical messages and avoid landing yourself or your company in legal trouble. Handling the conversation with respect and empathy may also help reduce the likelihood of an employee to file a complaint. (Poorly done terminations are a common reason disgruntled employees filed complaints later.)

Start by having all information that has been collected and available to the employee. Be empathetic and explain the reasons for the layoff, review health benefits and COBRA election procedures, 401(k) options, outplacement services, and the rehire process, if available. Provide information on the unemployment process, along with any other job placement information available for displaced workers. It is also recommended to review the severance agreement with the employee and answer any questions the employee may have before leaving the company. You may also want to offer to answer any questions that employees may have over the next several weeks. If your organization has an employee assistance program and mental health care benefits, provide this as a reminder to aid those employees and family members affected by the layoff.

Your layoff conversation should contain the following components:

- Main message - impact to the employee and timing (layoff)
- Business impact - how many others will be affected
- Departure process - how will they leave and what can they tell others
- Time to review severance and benefits information - time to read and ask questions
- Thank you message - thanking them for their service

## Sample script for layoff conversation

*"Kalani, we have been working to find ways to reduce costs. With the downturn that has hit our local economy, we are eliminating some positions. Unfortunately, your position is one of those, so I am afraid that means we are forced to let you go.*

*Today will be your last day of work with us, and we have information to share with you regarding your severance package, health insurance, and unemployment insurance. I know this is a lot of information. Before I go any further, I just want to give you a minute to process and let me know your thoughts."* [allow time for response]

*"OK, let me tell you a few more things and then I want to give you a chance to ask questions too. We are laying off several other people as well. I cannot tell you who at this point in time. I do ask for your discretion because we would like to tell people ourselves and not have rumors spreading around the office.*

*In addition, I know that you have some close friends here and may want to say goodbye. I can respect that, but again will just ask that you please do so quietly and ask them to keep your departure private until we announce it to the whole company later today. Do you think you can manage that or would you prefer to just leave immediately with no one knowing for now?" [allow time for response]*

*"Now I do want to give you a minute to read through these materials and ask questions before we close out." [allow time for response]*

*"Thank you for your professionalism. This is a very difficult time. I want to thank you for all your hard work and dedication for the past two years. You contributed a lot here and we are going to miss working with you. Thank you."*

## Step 7: Inform Workforce of Layoff

Notifying the remaining workforce of the layoffs that were conducted will help squelch potential rumors. You may also want to communicate the company's financial position and its commitment to meeting company goals and objectives going forward with the current workforce. Many employees have built strong friendships with the laid-off co-workers and they will be anxious to know their future with the company as well. Be prepared to honestly communicate and answer questions to keep morale and productivity high going forward. You will need everyone on board and aware of the future challenges to be successful.

### Sample script for layoff conversation

*"As you all know, these are difficult times for many businesses and we are not immune. Unfortunately, members of our own company have been laid off today. I know this can be scary and may leave some of you worried - not only about your friends who were laid off, but also about your own job. As far as we know right now, we do not have any additional layoffs planned. Of course, there are no guarantees, but the leaders are doing their best to protect the business and as many jobs as possible. I am not going to share details about severance, but I do want you all to know that our company has done its best to provide some financial support and continuation of healthcare to the laid off employees. We wish the best to those people who have separated for us. I know it will be hard to focus and these are challenging times. We are still in this together and I appreciate your patience and willingness to continue working through this very difficult time."*

At Obsidian HR, our team of experts are here to help. If you would like to learn more about what you can do to keep your employees safe and your business running during this health crisis, don't hesitate to contact us. You can email us at [inquiry@obsidianhr.com](mailto:inquiry@obsidianhr.com) or call us at (720) 456-3590.