

Reduction-In-Force Checklist

The following is a checklist of legal and practical issues to be reviewed in connection with a reduction-in-force. Not all of these items will necessarily apply to your situation, but we suggest them as a starting point.

- 1 Establish reduction-in-force objectives
- 2 Security and workplace violence
- 3 Layoff selection
- 4 Employment taxes
- 5 Final pay
- 6 Worker Adjustment and Retraining Notification Act (WARN Act) compliance
- 7 Who will implement the reduction-in-force
- 8 Severance payments
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- 10 Employment records
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- 12 Relocation
- 13 Bargaining with the union
- 14 Pending or possible legal claims
- 15 Non-union contracts
- 16 Fringe benefits

1 Establish reduction-in-force objectives

- ❑ Assign team responsible for decision-making. Team should consist of representatives from upper management, human resources, financial, and legal, business managers, and heads of affected departments.
- ❑ What is the business reason for the reduction-in-force? (e.g., cost savings). The team above should be included, excluding legal.
- ❑ Consider other possible alternatives to achieve the same objective with less disruption to the workforce.
- ❑ How many/which positions affected? Percentage of total workforce and facility workforce?
- ❑ How many/which locations affected?
- ❑ When will layoffs occur? (e.g., establish schedule if layoffs will occur over a period of time)
- ❑ When will employees be informed?
- ❑ If there is to be a facility closing, will a reduced team be retained to shut down the facility/operation? How many? Which positions? Who? For how long?
- ❑ Need for a freeze on hiring, promotions and pay increases? If so, are checks/balances in place so that high level approval is required for exceptions?
- ❑ Identify essential departments or positions that are needed until the site closes, e.g., HR, plant manager.
- ❑ Will temporary workers be needed if employees, after being informed of layoff or closure, begin quitting in numbers so that the site cannot operate or close down efficiently?

2 Security and workplace violence

- ❑ Ensure company property and network is secure during and following a layoff.
- ❑ Consider the need for additional security personnel both during and following a layoff.
- ❑ Evaluate the need for on-site employee assistance program (EAP) help for laid off and retained employees.

3 Layoff selection

- ❑ Establish criteria to be used in determining which positions are affected. For example, Performance/Job Functions/Location.
- ❑ Establish criteria for selection of employees.
- ❑ Give selection criteria to selection team.
- ❑ Consider disparate impact upon employees in protected categories to avoid claims of age, race, etc., discrimination and to comply with U.S. Equal Employment Opportunity Commission (EEOC) regulations. Leave time for statistical analysis, and to obtain justifications for decisions.
- ❑ Consider whether any bumping or other seniority rights exist under any collective bargaining agreements.

4 Employment taxes

- ❑ What are the state law requirements on payment of employment taxes (unemployment, workers' compensation, state income, local wage, etc.) upon facility closure?
- ❑ Do any federal or state withholding or other employment taxes have to be paid out of the ordinary course when a facility closes?

5 Final pay

- ❑ Are there any state law requirements for when employees must receive their final paychecks?
- ❑ Will any of the affected employees be due commissions or bonuses at time of layoff? If so, when must payment be received per contract, Company policy/practice, or state law?
- ❑ Are the affected employees entitled to accrued, but unused, holiday/sick/vacation pay under federal or state law, by Company policy/practice, or by virtue of a labor contract or individual agreements?
- ❑ Are there any child support/garnishments in effect, and if so, how will final check be treated?

6 Worker Adjustment and Retraining Notification Act (WARN Act) compliance

- The U.S. WARN Act requires 60 days' advance notice of plant closing or mass layoff to employees, union representatives and local government. There are numerous state versions of WARN, some burdensome, others less so.
- Does the company meet any WARN exceptions (such as unforeseeable business circumstances, temporary project, sale of business, etc.)?
- If no exceptions apply, WARN requires notice for: (1) Plant closing – permanent or temporary shutdown of site, resulting in 50 or more affected employees being laid off in any 30-day period (part-time employees not counted) (and as few as 25 in some states); and (2) Mass layoff – 33% or more (and at least 50) of single site's affected employees being laid off or 500 or more employees being laid off (part-time employees not counted) during any 30-day period. ("Part-time" employees are those who are either: (1) employed less than six months in the prior 12 month period; or (2) employed for fewer than 20 hours per week, in both cases measured as of 60 days prior to the first of the layoffs.)
- There are no WARN Act obligations if the layoffs are staged such that fewer than 50 employees (excluding part-time) are terminated at a single site in any 90-day period. Should this option be considered? Spreadsheets can be prepared to assist in this scheduling.
- Is there a state WARN Act? If so, what are its requirements?
- Consider paid leave in lieu of the legally-required notice if notice is impracticable.

7 Who will implement the reduction-in-force

- Assign team responsible for implementation. Team should consist of representatives from upper management, human resources, financial, and legal, and business managers.
- Prepare implementation schedule.

8 Severance payments

- Does the Company have any severance pay plan/policies/practices, individual contracts, or labor agreements obligating it to provide severance pay or benefits?
- Does the severance pay plan comply with the Employee Retirement Income Security Act of 1974 (ERISA)?
- What benefits are required by the severance plan and does the company want to amend it?
- Has the plan been distributed to participants?
- Does any state or federal law obligate the Company to provide severance pay or benefits?
- Consider severance packages to employees – severance pay, continuation of health benefits, etc.
- Submit information regarding any past practices regarding severance for review, along with the proposed severance structure/formal for privileged review to legal team.
- Consider retention bonuses to key employees for continuing to work through and following closure.
- Consider providing incentives for high performing employees to stay.

9 Communication

- Plan for communication to employees.
- Plan for communication to public officials, the media, vendors, suppliers and other interested third parties.
- Who will serve as the Company's spokesperson? Should the Company engage a public relations consultant?
- Do any applicable state laws require a particular form of termination notice, or otherwise require documentation?

10 Employment records

- ❑ Provision must be made for the physical transfer of hard copies of employment records (personnel files, medical files, comp. files, time and pay records, etc.) to the Home Office.

11 Releases

- ❑ Send your release to legal counsel for review before the reduction-in-force.
- ❑ Require releases in exchange for severance pay and benefits not required by law, contract, or Company policy/practice.
- ❑ Compliance with the Age Discrimination in Employment Act of 1967 (ADEA Act) requirements for valid release of age discrimination claims for workers 40 and over: 45 days to consider agreement and 7 days to revoke (over 40 employees must also be provided with certain information relative to layoff and retention of employees) under federal law. State law requirements may vary.
- ❑ Determine whether any state-specific language is required to release certain state claims.

12 Relocation

- ❑ Should any key employees be offered relocation packages, such that the Company would pay for part or all of their relocation to another facility?
- ❑ Should any non-key employees be offered the opportunity to transfer to open positions at another facility, whether or not the Company pays for any portion of the relocation expenses?



13 Bargaining with the union

- ❑ Are there National Labor Relations Act of 1935 (NLRA) or contractual obligations to bargain with the union over the “decision” to close or layoff?
- ❑ Are there NLRA or contractual obligations to bargain with the union over the “effects” of the layoff?
- ❑ Are there any contractual restrictions in the labor contract to plant closure or layoff?

14 Pending or possible legal claims

- ❑ Do any of the affected employees have employment agreements with the Company that restrict its ability to terminate them or require the payment of severance pay or benefits?
- ❑ Do any of the affected employees have any pending claims, or had their claims recently resolved, such as, lawsuits, discrimination charges, workers’ comp. claims, contract grievances, etc.
- ❑ Does the Company anticipate that any of the affected employees are litigious, such that a claim (lawsuit, discrimination charge, etc.) is highly likely?
- ❑ Are there any pending investigations by the Occupational Safety and Health Administration (OSHA), Wage-Hour, or other federal or state agencies affecting the facility involved?

15 Non-union contracts

- ❑ Are there insurance agreements and/or administrative services agreements (such as with third-party vendors for comp. claims) that must be terminated due to the plant closure? Are there any continuing obligations under those agreements?
- ❑ Are there any independent contractor relationships that must be terminated due to the plant closure? Are there any continuing obligations under those contracts?

16 Fringe benefits

Pension, profit-sharing, 401(k), retirement and similar plans (legal obligations)

- What are the Company's obligations relative to terminating contributions and notice of termination (e.g. 204(h) notice)?
- What are the Company's obligations, if any, concerning continuing funding of the plans?
- Is there any withdrawal liability under the Multi-Employer Pension Plan Amendments Act?
- Do any benefits documents promise "facility shutdown benefits," which permit employees to take early retirement benefits and/or participate in the welfare plans after the shutdown?
- Will the shutdown cause any plan to suffer a "partial termination?" A partial termination occurs when a sizeable number of employees are removed from plan participation, which causes the terminating participants to become fully vested in the plan. There is no hard and fast rule for when an employer triggers a partial termination, but a rule of thumb is a 20% reduction in the number of active plan participants within a plan year. (It has an effect on participants whose employment terminates during the plan year.)
- Do you need to amend the plans?

Determine benefits to be offered (voluntary, as part of severance packages and in addition to severance pay)

- Should there be a Voluntary Early Retirement Plan? If so, does the Company have time to implement it? (45 days to consider decision to participate, 45 days to consider release, 7 days to revoke the release).
- If there is a voluntary plan, notify employees and provide talking points to supervisors that:

- » package is voluntary;
 - » the consequences of accepting/rejecting the package;
 - » employees should not be told to volunteer and employees' choice should be free of fraud and undue influence
 - » employees have an opportunity to reject the package or revoke the package after accepting
 - » employees have a reasonable amount of time to consult his/her family, financial advisor, and/or attorney;
 - » if applicable, employees should be forewarned particular that they will be laid off if they did not accept the plan or told that there could be some layoffs or shifting of positions within the company if a certain number of people do not participate.
- Should there be continuation of certain benefits paid for by the Company, such as health coverage?
 - Outplacement services?
 - Retention of Company vehicle, laptop, cell phone, etc.?

Group health insurance continuation (legal obligations)

- Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) benefits.
- Have COBRA election forms been sent for all COBRA-eligible benefits (medical, dental, flexible spending account (FSA), EAP, health saving account (HSA), vision)?
- Are there any state law health insurance continuation requirements?
- Notify employees that they may be eligible for subsidies on the exchanges, making health benefits more affordable than COBRA.
- Does the Company have an obligation to communicate conversion rights under insured policies such as long-term disability and life?

About the Author

Rod Fliegel has been a shareholder (partner) at Littler since 2001 and has been practicing exclusively in the area of labor and employment law since he graduated from law school over 20 years ago. Rod has broad subject matter experience and significant expertise in class action defense, the intersection of the federal and state background check laws (e.g., Title VII and the FCRA and their state law equivalents), and the intersection of the federal and state disability discrimination and family medical leave laws. Rod also has extensive experience defending employers in state, federal and administrative litigation, including matters with the EEOC, the FTC, and the NY AG. As the national coordinating counsel for several clients, Rod handles and oversees matters throughout the country.