



## *How to shed extra weight at your company*

By Jonathan Fraser Light

Companies are ramping up and bringing people back to work, but some businesses owners are asking whether they need the same number of employees as they did pre-COVID-19. The new reality is that many businesses are practicing social distancing, eliminating services or experiencing a reduction in cash flow. Layoffs may be appropriate, but there are pitfalls for the unwary.

**WARN Act notice.** If your company has at least 75 employees and lays off 50 employees or more or closes a particular division or location, you may be required to comply with the California version of the WARN Act, requiring a 60-day notice of the layoff to employees and various government officials. Even though the state has suspended the 60-day notice requirement, companies still must provide the notice as soon as practical.

If you must decide who stays and who goes, determine what your needs are and then identify those employees most qualified to meet those needs. Most valuable employees move to the top of the “stay” list based on qualifications, cross-training, attendance, lack of performance issues and any other objective or subjective criteria. Seniority should only be used as a tiebreaker.

**Avoiding age discrimination claims.** Age discrimination is the most common claim arising out of a group layoff, usually followed by disability. Employers who are trying to cut costs often select the most expensive workers to let go first. They tend to be older because they have been with the company longer. But in some cases, the company can legitimately show that an employee is not performing at prior levels in part because of age or physical limitations. Employers must proceed carefully in laying off older workers using clear documentation justifying the decision. Note: an employee on leave, or who feels uncomfortable returning because of coronavirus concerns, is not exempt from a group layoff if that employee, for legitimate business reasons, would have been placed into the layoff group. Just document especially well why those workers should be in the layoff group.

**Reducing the sting.** It is almost always useful to pay severance in return for a relatively short release of claims

that isn't overly detailed but gets the job done. Its content differs slightly for workers age 40 or older. If the company has at least 20 employees, then older workers must be given 21 days to sign (or 45 days, if it's a group of two or more) and 7 days to renege after signing. Younger workers need only be given a few days to sign, and can't rescind after signing.

The mechanics of handling a layoff can be difficult. Should it be done in person? Through Zoom? As a single, large group or one-on-one? Do any long-term employees deserve special contact?

**Are you going to offer severance pay?** If so, how much? Should you pay a lump sum severance or spread payments over time? How about paying medical insurance to laid off workers, and if so, for how long?

**Covering all your bases.** Think about the logistics of what the company needs returned: keys, passwords, credit cards, computer equipment, samples, company documentation and an information dump regarding pending projects.

**Resignation alternative.** In a one-off termination situation, it doesn't hurt to allow the employee to resign for purposes of representing to prospective employers that they were not fired. The employee will still qualify for unemployment insurance benefits because it is a “resignation in lieu of termination.”

**Vacation/PTO.** All vacation and paid time off (PTO) must be disbursed at separation. Unused sick time does not have to be paid. All wages (which includes PTO/vacation) must be paid on the day of termination; separate from any severance that may be owed after signing.

**Share the reasons.** Don't hesitate to provide the employee, especially in a one-off termination situation, the reasons why they are being terminated. Don't rely exclusively on an “at-will” employment or “it's not working out.” If an employee claims harassment, discrimination or retaliation, at-will is set aside and the employer must show the legitimate business reasons for the termination.

Lastly, document all decisions. Paper is the employer's best friend in these situations.

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### Perspective