



OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.

Attorneys at Law

One Ninety One Peachtree Tower
191 Peachtree Street, N.E., Suite 4800
Atlanta, GA 30303
Telephone: 404.881.1300
Facsimile: 404.870.1732
www.ogletreedeakins.com

CHECKLIST FOR IMPLEMENTING EFFECTIVE LAYOFF POLICIES AND PROCEDURES¹

A. Develop a Layoff Policy

Have a written layoff policy in place *before* implementing a reduction in force or short-term plant shutdown. A clear policy should provide decision-makers and other participants in the selection process with consistent and meaningful guidance. When implementing a policy, employers should consider (1) layoff selection criteria, (2) what recall or preferential hiring rights (if any) should be granted to laid off employees, (3) whether to permit “bumping,” and (4) what severance benefits/packages (if any) will be provided to employees.

B. Consider a Freeze on Hiring, Promotions, and Transfers

Consider imposing a hiring freeze on affected units or departments before the layoff begins in order to validate the layoff. Also consider a pre-layoff promotion and transfer freeze. It would be difficult for a judge or jury to understand why a recently promoted employee was terminated in a performance-based layoff or a recently transferred employee was either removed from consideration or selected for layoff based on the transfer. Finally, implement a post-layoff hiring freeze for the affected unit, absent changed business circumstances.

C. Undertake Initial Planning

Document a clear business justification for a layoff while the layoff decision is being considered. All reasons for the layoff should be prepared under the supervision of counsel in anticipation of litigation. If the employer chooses to notify employees of the anticipated layoff, be truthful about the underlying reasons for the layoff and develop a sound communication plan before such notification. If possible, consideration should be given to including a reorganization of the affected business units as part of the justification for the layoff decision. In addition, appropriate selection criteria should be developed in order to protect the organization from discrimination and wrongful termination claims.

¹ This RIF Checklist has been created by the lawyers of Ogletree Deakins to inform our clients and friends of the firm of important information in this area of law. It is not, of course, intended as specific legal advice, but rather is offered to alert our clients and friends of the firm to important developments that may affect their business operations and/or considerations involved in this area. When faced with actual or potential business problems relating to these areas, readers are encouraged to seek specific legal counsel.

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D. Select and Train Decision-makers

Where layoff selections are subjectively based, this process inevitably creates opportunities for laid off workers to claim that the decision-makers used unlawful criteria to make their selections. Whenever possible, the decision-makers should be composed of individuals of diverse races, sexes, and ages, and include some people who are not in the affected employees' chain of command. Also, avoid using a single decision-maker; multiple decision-makers tend to dilute the effect of individuals who may harbor animosity toward the layoff candidates. Similarly, involving people from different parts of the organization (human resources, finance, operations, etc.) typically improves decision-making. Take time to educate the decision-makers on antidiscrimination laws, particularly the Age Discrimination in Employment Act (ADEA). Consider holding briefing sessions to allow decision-makers to ask questions and talk through criteria they may be asked to employ in making their selections.

E. Select Individuals for Layoff

Courts are growing increasingly skeptical of "subjective criteria" or evaluation methods when selecting individuals for layoff. The use of objective factors, such as inverse seniority, clearly remains the most defensible.

However, if subjective criteria are used to distinguish between employees, it is important to build a sound case for individual layoff decisions. Selection of persons for layoff should be pushed down to the group or departmental level to (i) ensure management personnel with personal knowledge of the employee to be affected are making these selections and (ii) avoid claims that decisions to lay-off employees were centralized and therefore are susceptible to class treatment. Follow these guidelines in developing your case for layoff decisions:

- 1. Do not merely rely on past performance evaluations and performance ratings**

These are likely to be written in highly complimentary terms and are not designed for comparing employees with respect to their skills or include consideration of requirements of the business going forward. Some raters are tough graders, while others do not give any performance evaluation at all.

- 2. Develop special performance ratings**

Develop special performance ratings for the purposes of the layoff to assess such things as relative skills, knowledge, ability to perform remaining work, and other relevant qualifications of employees. Do not simply use an existing performance valuation or ratings tool.

3. Give explicit written guidelines to supervisors completing the evaluation form.

Write the guidelines with the assumption that you later will be showing them to a judge and jury. If possible, use multiple raters who have knowledge of the affected employees to evaluate them independently, without knowledge of the ratings given by other evaluators.

F. Analyze and Adjust the Proposed Layoff

Once a proposed layoff list has been prepared, the employer, together with legal counsel, should conduct a disparate impact analysis under protection of the attorney-client privilege. If necessary, the employer should consider making appropriate adjustments to its layoff selection procedures so as to preclude disparate impact discrimination against protected groups.

G. Conduct a Final Review

Consider using an independent review committee that includes minorities, women, and older workers to assess the tentative layoff decisions to ensure compliance with established guidelines. The review committee should be especially concerned with consistent application of the selection criteria so as to eliminate bias and act as a reviewer, rather than decision-making committee.

H. Train all Supervisors

All supervisors likely to participate in the plant closing, especially those who interact with the employees, should receive training to make certain that everyone who is involved understands the employer's position and the programs and procedures to implement the layoff. In addition, supervisors need to be trained in communicating the layoffs to employees, understanding their reactions, and effecting actual termination. Finally, supervisors may require substantive training on the liability facing the employer if employees are treated unfairly or discriminatorily.

I. Notify Employees of the Layoff

Announce layoff decisions in a meeting with the individual employee unless an entire facility or department is being closed. In the meetings with affected employees, you should follow these guidelines:²

² Poor communication of a reduction plan, and failure to follow an established communication plan, can lead to privacy or defamation suits by employees who are angry or embarrassed at how they were treated.

1. Stress the finality of the decision

Avoid providing the employee with false hopes that the business might turn around in the future. A clear and unmistakable decision also begins the tolling of the statute of limitations period on future claims.

2. Advise affected employees of their benefits rights

Explain severance pay (if any), coverage under COBRA, and procedures for applying for unemployment compensation, outplacement assistance, and employee assistance programs.

3. Provide a list of open positions

To avoid claims based on failure to transfer, employees affected by a layoff should be informed of all open positions and be allowed to apply for them, and management then should consider each application carefully. Provide the affected employees with a list of open positions for which they might be qualified. Offer to place “surplus” employees in open positions that exist at the time of the layoff, unless such open positions are eliminated.

4. Explain what procedures were used in the layoff decision

If the employee questions the selection for the layoff, he or she should simply be advised of the procedure that was used in making the layoff selection decision. There should be no discussion regarding the employee’s relative scoring or why he or she was selected for the layoff.

J. Plan for the “Second Phase” of the Layoff

1. Outplacement assistance

Offering outplacement assistance to laid-off employees evidences the employer’s good intentions, reduces the chances of a lawsuit being filed, and helps potential plaintiffs to mitigate their losses.

2. References

The employer is best served by adopting a policy of limited employee references, covering only the dates of employment and the positions held by the employee. So as to reduce the potential for claims of defamation or blacklisting by a former employee, such inquiries should be referred to one person, preferably the human resources director. Supervisors should be instructed not to discuss a former employee with any outside person, or even within the employer. In many states, an employer that in “good faith” provides to a requesting prospective employer information about the reason for termination of a former employee or about the job performance of a

current or former employee is immune from civil liability for the disclosure or the consequences of providing the information.

3. Security

A real possibility exists that a disgruntled employee may seek retribution for what he or she deems unfair treatment. Major risks include workplace violence, employee sabotage (including computer sabotage), and release of confidential information. Take the necessary precautions.

4. Employee Assistance

Several agencies and organizations are designed to aid dislocated employees in their transition. Information and assistance in contacting these organizations may greatly benefit a number of employees. Consider providing affected employees with contact information for the state unemployment agency, and EAP programs.

A plant closing can be traumatic news for long-term employees. A staff counselor can help workers adjust to the notification and help minimize some adverse reactions among the workforce.

Questions invariably will arise that are not answered in the initial notification. A variety of methods exist to address follow-up questions, such as a toll-free phone number, organized on-site worker information meetings, and the free distribution of written materials (*e.g.*, with job retraining information). Employees will benefit from access to information on the following: (1) unemployment insurance benefits; (2) pension or benefits and health insurance coverage (including COBRA coverage); (3) job search assistance; (4) job training and referrals; (5) resume assistance; and (6) education (including GED classes).

5. Establish an Appeals Process

Consider having an appeals committee, comprised of a demographically balanced group of executives, to consider wrongful layoff claims.

6. Undertake Post-Layoff Planning

Meet with retained employees after a layoff to rebuild trust. Communications about the improved health of the employer and the critical role of the retained employees in rebuilding the organization will help reestablish loyalty and improve employee morale.