

Looking at Alternatives to Layoffs

Layoffs are rattling corporate America. In a survey of U.S. business executives by professional services firm PwC, 50 percent of respondents indicated that they were reducing their companies' headcounts.

Last month, 7-Eleven laid off nearly 900 corporate employees. Companies like Wayfair, Peloton and Ford announced plans to eliminate thousands of positions in August.

As of mid-August, the U.S. tech sector alone had shed more than 38,000 employees, a tally by Crunchbase News shows. And in a sign that it is slowing hiring efforts, Apple is laying off recruiters. So, if employers are looking to trim costs, are layoffs the best way to go? Not necessarily, experts say. Alternatives to wielding the layoff axe are available — here are 5 of them.

1. Furloughs

Furloughs can be a short-term way to avoid at least some layoffs, according to Jill Chapman, senior performance consultant at Inspireity, a professional employer organization (PEO). This can save money without losing employees altogether, she said.

A furlough is a mandatory but temporary leave of absence. A furloughed employee works a reduced schedule or takes unpaid leave.

By contrast, a layoff involves a separation from employment when there's a lack of available work. The employer may anticipate more work will be available soon and may recall the employee. The word "layoff" often is incorrectly used as a substitute for a "reduction in force," when an employer lets an employee go and doesn't plan to bring him or her back.

[SHRM members-only HR Q&A: What is the difference between a furlough, layoff and reduction in force?]

2. Job Sharing

Job sharing lets two employees share duties in a job that normally would be filled by one full-time employee.

"The hope of job sharing is to reduce hours, save costs and, ultimately, provide employees the ability to resume their normal work schedule once business improves," Chapman said.

[SHRM members-only Express Request: States' Shared Work/Work-Share Programs]

3. Pay Cuts

Pay cuts can help prevent a business from bleeding jobs. However, Chapman noted that this strategy can be costly for employees, particularly those living paycheck to paycheck amid high inflation.

"For this to be effective, there must be an agreed-upon, uniform cut percentage across the board. Though this will hurt in the short term, it is definitely a more stable alternative for both the employee and employer," Chapman said.

4. Cuts in benefits or perks

Aside from pay cuts, an employer might temporarily reduce benefits or perks to "buy the company some time" to turn around its finances, said Nicole Barra Conde, co-founder and chief operating officer of international online hiring platform Strider. Because Twitter hasn't met finance performance goals, the company announced Aug. 19 that employees might receive half the amount of their typical annual bonuses this year.

Mariko Paul, assistant GC and HR consultant at Engage PEO, said options for trimming benefits & perks include:

- Eliminating corporate swag. While purchases of employer-branded pens, caps and T-shirts dropped off dramatically at the peak of the pandemic, sales activity is rebounding.
- Charging for employee meals that had been free. But keep in mind that 58 percent of employees surveyed this year by corporate catering company ezCater cited free meals as a highly desirable workplace benefit.
- Reining in high-cost travel expenses by, for instance, requiring executives to fly in the economy-class cabin instead of the first-class cabin. There's a cautionary note here: 40 percent of business travelers surveyed by BCD Travel cited sitting in economy-class seats on long-haul flights as a source of travel stress.
- Relying on videoconferencing in place of business trips. It's worth noting that business travel is on the rise following a significant lull at the height of the COVID-19 pandemic. Still, 75 percent of business executives surveyed by Tourism Economics said virtual meetings are likely to continue in order to contain travel expenses.
- Lowering or getting rid of the company's 401(k) match. SHRM research shows that 83 percent of employers contribute to traditional 401(k) plans and 76 percent contribute to Roth 401(k) plans.

5. Contract labor

Tim Rowley, chief operating officer and chief technology officer of PeopleCaddie, a digital talent marketplace for contractors, said a "proactive" alternative to layoffs is making sure your workforce features a balanced mix of contractors and full-time employees.

"As market conditions change, so does a company's need for labor. The modern corporation needs to be able to quickly adjust to rapidly changing market conditions," Rowley said. "Therefore, companies need to determine what the optimal composition of their workforce is between permanent employees and contingent labor so they have the flexibility to remain nimble and competitive."

What is the difference between a furlough, a layoff and a reduction in force?

These are all types of cost-saving employment actions that are commonly misunderstood because the words are often used interchangeably when their meanings are actually different. Below are general descriptions of these terms; however, it is important to point out that not everyone will use these terms to mean the same thing. Understanding the context of the specific circumstances is more important than the term being used. This applies not only when communicating employment actions to employees but also when complying with legal requirements such as those under the WARN Act or state termination pay, or for purposes of responding to unemployment claims.

Furloughs

A furlough is a mandatory temporary leave of absence from which the employee is expected to return to work or to be restored from a reduced work schedule. Furloughs are often used when the employer does not have enough cash for payroll (for example, government shutdowns due to lack of budget approval) or when there is not enough work for all employees during a slow period and, by reducing employee schedules, the employer can avoid terminating employees.

Furloughed employees may be required to take a certain number of unpaid hours off over a number of weeks, take a specified number of unpaid days or hours throughout the year, or take a single block of unpaid time off. For example, an employer may furlough its nonexempt employees one day a week for the remainder of the year and pay them for only 32 hours instead of their normal 40 hours each week. Another example of furlough is to require all employees to take several weeks of unpaid leave sometime during the year.

Employers must be careful when furloughing exempt employees so that they continue to pay them on a salary basis and do not jeopardize their exempt status under the Fair Labor Standards Act (FLSA). A furlough that encompasses a full workweek is one way to accomplish this, since the FLSA states that exempt employees do not have to be paid for any week in which they perform no work.

Depending on the specific circumstances, furloughed employees may be able to continue benefits coverage and also collect unemployment insurance for the reduction in the time worked.

Layoffs

A layoff is generally considered a separation from employment due to a lack of work available. The term "layoff" is mostly a description of a type of termination in which the employee holds no blame. An employer may have reason to believe or hope it will be able to recall workers back to work from a layoff (such as a restaurant during the pandemic), and, for that reason, may call the layoff "temporary," although it may end up being a permanent situation.

To encourage laid-off employees to remain available for recall, some employers may offer continued benefits coverage for a specified period of time if the benefit plan allows. Most laid-off workers will typically be eligible to collect unemployment benefits.

The term layoff is often mistakenly used when an employer terminates employment with no intention of rehire, which is actually a reduction in force, as described below.

Reduction in Force

A reduction in force (RIF) occurs when a position is eliminated with no intention of replacing it and results in a permanent cut in headcount. An employer may decide to reduce its workforce by terminating employees or by means of attrition. In some circumstances, a layoff may turn into a RIF when a permanent decision is made to not recall employees.

Avoid Costly Mistakes in Layoffs

Without careful planning, layoffs can result in costly errors. Here is an overview of common errors some employers make when conducting layoffs and how to avoid them. This piece is the first of a three-part series on layoffs. A subsequent article will outline steps to limit potential liability for layoffs, and a third will examine the Worker Adjustment and Retraining Notification (WARN) Act and state "mini-WARN" requirements.

"The losses incurred in discrimination litigation following a badly executed layoff can easily exceed the amount that was sought to be saved by implementing the layoff," said Gerald Hathaway, an attorney with Faegre Drinker in New York City.

"Whenever a company or employer has to contemplate a reduction of employees, it can be very emotional and stressful for those responsible for making the selections and the communications—and of course for those impacted," said Trina Ricketts, an attorney with Ogletree Deakins in Kansas City, Mo. No employer wants to conduct a reduction in force (RIF), because organizations understand the personal impact on their employees, she added.

"As such, the way to minimize the stress associated with such a difficult task is to have as much time as possible to analyze and plan," Ricketts said. This is especially true if a company is new to RIFs on a large scale, she added.

Common Errors

The most common error with layoffs is being oblivious to [the WARN Act](#) and the mini-WARN laws of many states, which often have stricter obligations for employers than the federal WARN Act, Hathaway said.

"Sometimes, on the eve of a layoff, someone within the company will ask, 'What about WARN?' " noted Hathaway, who was involved in the layoffs of more than 300,000 workers during the Great Recession. Only three lawsuits resulted from those layoffs—two discrimination claims and one WARN Act claim—and the employer won all on summary judgment, he said.

"Worse, sometimes WARN is a literal afterthought—the layoffs were implemented with no thought at all given to WARN obligations," Hathaway added.

The next most common error is disorganization when preparing the job title and age data that must be provided to laid-off employees ages 40 and older in order to get valid releases under the Older Workers Benefit Protection Act, he said.

"That data has only one chance to be right," Hathaway explained. "If it is wrong and employees sign releases before the data is corrected, the employer has an obligation to make a payment pursuant to the signed separation agreement but does not have the benefit of an enforceable release."

Plus, there is the error when supervisors succumb to the temptation to use a layoff to get rid of all their "troublemakers," who may have whistleblower or retaliation claims, Hathaway noted.

Another mistake is not giving sufficient focus to justifying the choices made. "Why Jane and not Joe?" he asked. "All layoffs create the risk of disparate treatment discrimination claims. Layoffs can also create disparate impact claims—run the numbers before finalizing layoff choices" to see if the layoff will result in a disparate impact.

Pay attention to immigration issues as well, as Hathaway recommended. "Some layoffs may require the company to pay for transportation for the return of foreign nationals to their home countries," he said.

Avoid acting inconsistently with the stated reasons for the layoff, cautioned Robin Samuel, an attorney with Baker McKenzie in Los Angeles.

Such inconsistent action might include handing out bonuses or going on hiring sprees despite justifying the layoffs as a necessary belt tightening for economic reasons, he said.

In particular, employers that have conducted layoffs should not fill positions that were recently eliminated in a RIF, said Ted Hollis, an attorney with Quarles & Brady in Indianapolis.

Preparation Is Key

Not preparing sufficiently is a common mistake, Samuel said.

"Some layoffs may require employers to give impacted employees and government agencies 60 or 90 days' advance notice of the layoff," he noted. The WARN Act requires 60 days' notice from covered employers, but some states, such as New York, require more, he explained.

"Employers also need to prepare their RIF selection criteria and adverse impact analysis well in advance so that changes can be made as needed to mitigate the risk of claims," Samuel said. It takes time, as well, to prepare the termination paperwork, internal and external messaging, severance packages, and [final pay requirements](#) in compliance with applicable law, he added.

Some company officials think U.S. layoffs can be completed within days because most U.S. employees are [employed at will](#), said Amanda Cohen, an attorney with Baker McKenzie in Palo Alto, Calif.

Nonetheless, "there is a lot of informational diligence, document preparation, process and planning that goes into a layoff," she said. "Where possible, we recommend budgeting at least a few weeks for a smaller layoff and several months for a larger layoff that may trigger the federal WARN Act or state mini-WARN statutes."

Alternatives to Layoffs

Employers should consider alternatives to layoffs, such as furloughs, reduced work schedules, pay reductions, and state work-share programs, Samuel said.

Pay reductions should be across the board, and pay can't go below the minimum wage, said Dan Kaplan, an attorney with Foley & Lardner in Madison, Wis. For the most part, employers are free to set and modify terms of employment, but if an organization is unionized, it will need to consult with the union, he added.

Hour reductions should be across the board as well, such as a 20 percent or 25 percent reduction in hours or a reduction to a four-day workweek, Kaplan said.

Other options include rolling short-term layoffs or an extra week off during a month. "It is better not to have layoffs than to have layoffs," Hathaway said. "Look at other ways to save."

How to Conduct a Layoff or Reduction in Force

Conducting a layoff is a difficult process that some businesses may have to face. The basic compliance components to review during the layoff/RIF process are outlined below

STEP 1: SELECT EMPLOYEES FOR LAYOFF

After an employer has designed its future organizational structure, a system for determining who will stay and who will go must be created. The selection criteria should be designed to identify the employee traits that will be instrumental in meeting the company's goals. Several factors can be used in deciding the selection process, including seniority, performance, job classification or job knowledge and skills. However, an organization should not consider criteria such as leave status or protected conduct (i.e., whistle-blower). By aligning the future goals of the organization with the best selection process, the company will be able to determine its success going forward.

STEP 2: AVOID ADVERSE ACTION/DISPARATE IMPACT

An organization should review the selected employees for layoff to determine if an adverse (disparate) impact exists for a protected class. Protected classes include individuals who are members of a certain race, color, ethnicity, national origin, religion, gender, genetic information, age (40 or over), those with a disability or those who have veteran status. States may have additional protected classes, such as sexual orientation, marital status or smokers. Any protected class that may have a disproportionately larger percentage affected by the layoff (e.g., employees reaching retirement age) will need to be evaluated and substantiated.

STEP 3: COMPLY WITH WARN ACT REGULATIONS

The federal Worker Adjustment and Retraining Notification (WARN) Act requires employers conducting a large-scale layoff to provide 60 days' notice to affected employees (few exceptions apply). Employers must inform affected employees if the layoff is permanent or temporary, and if the latter, what the expected duration is. Employees must be notified of their expected separation date, and if there are any bumping rights. Employers should clearly outline the process for recall rights and applying for future positions with the company if applicable. In addition, a number of states have enacted "mini-WARN" legislation that extends notice requirements to smaller businesses conducting layoffs. Reviewing state laws will be important given that mini-WARN Acts often impose additional requirements that differ from federal law.

STEP 4: DETERMINE SEVERANCE PACKAGES AND ADDITIONAL SERVICES

Many employers offer severance packages to their displaced employees. Employers are not obligated to provide severance to laid-off employees under federal law, but severance packages may lessen the chance of legal action filed on behalf of former employees. Some states, however, have specific criteria for required severance. Severance packages may include salary continuation; vacation pay; continued, employer-paid period of benefits coverage; employer-paid COBRA premiums; outplacement services; counseling and resume workshops; and more.

STEP 5: REVIEW OLDER WORKERS BENEFIT PROTECTION ACT (OWBPA) REGULATIONS FOR COMPLIANCE

Employers must comply with the OWBPA to effectively release claims under the Age Discrimination in Employment Act (ADEA) when employees are asked to waive age discrimination claims in exchange for severance pay. The OWBPA establishes specific requirements for a "knowing and voluntary" release of ADEA claims to guarantee that an employee has every opportunity to make an informed choice whether or not to sign the waiver. There are additional disclosure requirements under the statute when waivers are requested from a group or class of employees. See Waivers of ADEA Claims.

STEP 6: CONDUCT THE LAYOFF SESSION

Employer communication during a layoff or RIF will be scrutinized. Notifying employees individually, being respectful and understanding the significance of such business decisions on the individual is necessary. 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. Employers must ensure that they are prepared for this meeting and that all information has been collected and available to the employee. Employers will want to be sympathetic 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. Employers may also want to 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. Employers may also want to offer to answer any questions that employees may have over the next several weeks. If an organization has an employee assistance program, then this information should be provided as well to aid those employees and family members affected by the layoff.

STEP 7: INFORM WORKFORCE OF LAYOFF

Notifying the remaining workforce of the layoffs that were conducted will help squelch potential rumors. The employer 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 of the employees the employer is addressing had built strong friendships with the laid-off co-workers, and they will be anxious to know their future with the company as well. Employers should be prepared to honestly communicate and answer questions to keep morale and productivity high going forward. Employers will need everyone on board and aware of the future challenges to be successful.

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