



## **Staff Layoffs and Reductions in Force – Managing the Risks**

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Many institutions are reacting to these trying economic times for higher education by reorganizing administrative departments, redeploying personnel, and terminating appointments. This paper reviews legal risks associated with staff layoffs and describes practices institutions have used effectively to manage those risks. The paper also addresses preparation and planning steps designed to reduce legal exposure.

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## EXECUTIVE SUMMARY

Staff layoffs at colleges and universities, both campus-wide and department-specific, usually involve employees entitled to a broad array of substantive and procedural rights. Layoffs may generate organized resistance and adverse public relations. They will likely provoke agitation in the workforce. Layoffs can result in legal actions for breach of contract, discrimination, and wrongful discharge. They can be challenged on other grounds, too—for example as violations of labor laws, breaches of collective bargaining agreements, or infringements of rights guaranteed by statutes governing reductions in force. Institutions can manage legal risks through intelligent planning, well-designed procedures, and adherence to legally defensible operating standards.

This paper, an overview for managers, addresses some of the strategies higher education institutions use to contain legal risks incident to staff layoffs. Issues germane to layoffs of faculty members, such as how to ensure that faculty contract rights and tenure requirements are taken into account, are not treated here. The paper is intended mainly for academic administrators and institutional managers. It is not legal advice, is not aimed at lawyers, and contains little legal jargon and few case citations. Institutions should consult their legal counsel who have experience with the issues we address below.

Well-managed colleges and universities exhibit three key characteristics in planning and implementing staff layoffs:

- *Managers use a team approach to decision-making.* The team, which includes human resource professionals, lawyers, risk managers, and public affairs specialists, treats honesty and integrity as paramount values, and is sensitive to legal requirements and the institution's interest in stable, fair-minded employee relations.
- *Well-crafted personnel policies are in place before the layoff process begins.* Policies are reviewed in advance for compliance with legal requirements, and are applied with thoughtful regard for consequences and consistency.
- *Managers are attentive to current and potential problem cases where legal risks are foreseeably high.* Managers address problem cases early and energetically.

For a "Pre-Termination Checklist" related to staff layoffs, see page 21.

## **I. THE CONTEXT OF LAYOFFS TODAY**

Stagnant enrollments, cuts in funding from government and other external sources, hostility to increases in tuition and fees, plummeting endowments, and mounting fixed costs have forced many colleges and universities to cut expenses.

Because staff salaries and fringe benefits are the largest item in most institutions' budgets, cost-containment efforts usually entail pressure to reduce staff payroll and reorganize staffing for efficiency. Institutions today are planning for economic hard times by ordering personnel freezes, eliminating unencumbered positions, restructuring administrative units, and taking other cost-containment measures that jeopardize job security of staff.

Courts use the terms "layoffs" and "reductions in force" interchangeably to mean work force reductions caused by economic or financial considerations in which employees are terminated, typically due to no fault of their own, and not replaced by newly-hired employees who perform substantially the same work. In this paper we use the term "layoff" in that sense, to refer to no-fault termination of staff members due to economic or financial circumstances beyond their control.

Layoffs involve legal risks, many of which we address below. As noted above, however, this paper is not an alternative to consultation of the institution's legal counsel on management of those risks. We recommend such consultation as soon as layoffs are contemplated.

Few questions have so concerned college and university lawyers and risk assessment professionals as how best to manage layoffs. Employment-related administrative proceedings and lawsuits make up well over half of liability claims asserted against most colleges and universities. Claims related to layoffs and other terminations are proliferating. While there is no way to prevent all such claims, many institutions have learned that effective planning by their managers and counsel can keep exposure within anticipated and manageable limits.

Colleges' and universities' behavior in conducting staff layoffs is subject to more demanding expectations than those that apply to most employers. Often a college or university is the largest employer in its community. It is expected to treat its employees humanely and to offer reasonable and generally long-term job security. Like other tax-exempt organizations, not-for-profit colleges and universities are thought by many to be subject to a higher standard of probity, fairness, and accountability than are for-profit enterprises. Journalists, community leaders, politicians, and judges tend to demand more of colleges and universities than of other employers.

Whether or not that view is warranted, there is no doubt that layoffs generate strong emotion, are contentious, and likely will be seen by many as a breach of faith and abandonment of values long associated with colleges and universities. Administrators who make layoff decisions or participate in the layoff process should be mindful that their actions will be skeptically scrutinized when challenged in a grievance proceeding or courtroom. Their motives will be attacked, their reasoning criticized and mischaracterized, and their conduct judged against demanding expectations. Many institutions will use layoff procedures that were unintentionally designed to be highly protective of employee rights.

These, then, are common attributes of staff layoffs at colleges and universities: Layoffs affect employees entitled to an unusually broad array of substantive and procedural rights; may be contested in the glare of public scrutiny; and will provoke anxiety, suspicion, and other strong emotions in the workforce, because employees accustomed to job security will feel betrayed.

Well-managed institutions, sensitive to these factors, are guided by three principles in designing layoff processes and implementing staff layoffs.

First, the well-managed institution relies on a *team approach to decision-making*. Managers who make the decision know whom to consult, and consult early enough in the process to make consultation useful. Human resource professionals, risk managers, lawyers and public affairs specialists are members of the planning team. There is no good substitute for managers of integrity who are guided not only by what the law compels, but also by their commitment to honesty and the institution's long-term interest in stable, fair-minded employee relations. Recommendations from the team are reviewed where appropriate by senior officials of the institution, including the president, who guides the appropriate process of presentation to designated trustees, board committees, or even the full board. Circumstances in which board-level review and approval of layoffs are indicated are identified by the president in consultation with trustees.

Second, the institution has in place *well-crafted personnel policies* that are rigorously reviewed in advance and administered thoughtfully and consistently. Managers know what processes to follow, what standards to apply, and what grievance rights are available to those who lose their jobs. Decisions are made fairly and with the expectation that the reasons will make sense if publicly aired.

Third, institutional policies encourage managers to *address existing and potential high-*

*risk cases early and with high energy.* By “high-risk cases,” we mean employees who, perhaps because they have had performance-related problems in the past or may believe that demographic or age-related characteristics influenced their termination, pose special risk. Claims data show that a disproportionate percentage of legal claims come from high-risk cases. Defense of these claims tends to be more difficult the longer the problem has festered. Positions harden and the parties become fixed on vindication rather than on reaching sensible resolutions. Experienced administrators identify high-risk cases early in the process and, assisted by the institution's lawyers, take steps to prevent these situations from ripening into major trouble.

A layoff plan is unlikely to be an effective strategy if its purpose is to remedy a pattern of deficient or untimely management of weak performance by employees. Generally, layoffs are more defensible as a legal matter if based on programmatic or functional change or economic retrenchment.

## **II. LEGAL RISKS ASSOCIATED WITH STAFF LAYOFFS**

To what legal risks does an institution expose itself when it lays off staff? How can the risks be anticipated and minimized?

A generation ago, under the traditional “employment at will” doctrine, most states' law gave employers broad latitude to terminate staff members for any reason or even no reason. With rare exceptions, neither federal nor state law impeded the day-to-day termination of employees or blocked mass layoffs. More recently, however, Congress, state legislatures, and federal and state courts have increasingly restricted employment at will and extended to employees expanded legal rights. Today, employees can challenge layoffs by asserting claims for breach of contract, unlawful discrimination, tortious conduct, violation of employment statutes, and, for employees who belong to labor unions, violation of labor laws and collective bargaining agreements.

### ***Breach of Contract***

Asserted employment rights of college and university staff members are set forth in many documents, including appointment letters, employee handbooks, personnel manuals, and written policies. All of these can be claimed, with merit or not, to be part of the employment “contract.” Courts and other adjudicators, such as arbitrators, hold institutions liable for denying rights to which employees are entitled as a matter of employment contract law. For example, with respect

to unionized employees, collective bargaining agreements are a basic source of contractually enforceable employment rights.

Thoughtful human resource management involves ongoing attention to the documentary and other underpinnings of employees' potential breach of contract claims. Many institutions present human resource policies in an indexed personnel manual or easy-to-access Web site. Human resource professionals and university counsel should review the entire manual every year or two to ensure that policies are clear, carefully worded, consistent with changes in law and institutional practice, and contain appropriate disclaimers as to their contractual effect. Ordinarily, it is wise to include in the manual a policy on layoffs. Under the policy, the institution should reserve the right to terminate staff positions for financial or programmatic reasons, and should prescribe standards and procedures for effecting large-scale and department-specific layoffs that become appropriate, while retaining flexibility to address particular circumstances.

In addition to breach-of-contract claims that rely on the institution's written policies, employees who face layoff sometimes assert that their supervisors made oral promises of job security. Many personnel manuals disclaim oral employment guarantees, as illustrated by this provision from a public university's employee handbook:

No one at the University now has or in the past has had the authority to make any binding oral promises, assurances, or representations regarding employment status or security. Any such representations made prior to the effective date of this policy are hereby rescinded and superseded by this policy.

Several steps can help minimize exposure to claims for breach of employment contract. Personnel policies should be disseminated to all staff members to whom the policies apply. This can be done by including instructions on these policies in the new-employee orientation process and sending periodic reminders to all staff that human resource policies are available on an institutional Web site or through the human resources department. Managers should be trained on how to apply pertinent personnel policies, and where to turn for interpretive help. At institutions that require managers to evaluate subordinates in writing, managers should take the obligation seriously and see to it that evaluations adequately document performance deficiencies that may bear on termination decisions down the road.

### *Discrimination Claims*

It is unlawful to take an employment action against an employee if the action is motivated by consideration of the employee's race, national origin, religion, gender, age, disability or membership in another legally protected category. Although many states and some cities have extensive antidiscrimination laws, discrimination claims are most often grounded in federal law or state law similar to it. For example:

- Claims of race, gender, pregnancy, national-origin or religion-related employment discrimination can be brought under Title VII of the 1964 Civil Rights Act or 42 U.S.C. § 1983.
- Discrimination on the basis of a disability is actionable under the Americans with Disabilities Act or the Rehabilitation Act of 1973.
- The Age Discrimination in Employment Act ("ADEA") protects workers age 40 and over from discrimination on the basis of age.

Discrimination claims asserted under state or local law often involve equal protection provisions in the state constitution or claims under a state human rights statute or local ordinance. Most federal, state, and local antidiscrimination statutes also forbid retaliation for making a claim of discrimination. Caution is needed if a candidate for layoff has previously asserted a discrimination claim; evidence is needed to establish that the decision is not retaliatory. Institutions ordinarily want as well to observe their own non-discrimination statements, which in some cases confer protections beyond those required by government.

Discrimination is alleged in many contexts. For instance, layoff plans that incorporate early-retirement or specially negotiated severance arrangements can entail age discrimination issues under the ADEA and the Older Workers Benefit Protection Act ("OWBPA"). The ADEA forbids "involuntary retirement" of persons age 40 and over on the basis of their age. Considerable litigation has involved whether early retirement plans offered as an alternative to layoffs are "voluntary." OWBPA sets standards for determining whether fringe-benefit-related early retirement inducements are provided equitably to older workers. It also imposes conditions on the institution's ability to require the employee to release ADEA claims in exchange for early retirement benefits. Because age-based discrimination claims are prevalent and complex, we comment on requirements of these two federal laws in Section III of this paper. Especially with respect to layoff plans that affect significant numbers of employees age 40 or older, the

institution's legal counsel should be consulted early in the planning stage. Counsel in some jurisdictions will identify age discrimination protections available under state law to persons younger than 40.

If the institution is found to have effected a discriminatory layoff, liability can include back pay, compensatory damages, punitive damages, attorney fees, and equitable relief such as reinstatement. Many university counsel believe that discrimination claims are the most threatening hazard associated with large-scale layoffs, due to the exposure the claims entail to large judgments and attorney fees. Under many civil rights laws — including the ADEA and a number of other laws this paper cites — a prevailing plaintiff is entitled to reimbursement of attorney fees. If a laid-off employee persuades a court that the institution acted based on the employee's age, race, religion or other protected characteristic, the institution would be exposed not only to fees for the services of its own lawyers, but also fees of the employee's lawyers. The amounts an institution may owe in employees' attorney fees can exceed other liabilities associated with employment litigation, and in some observers' view represent the real deterrent to civil rights violations. Even where cases are merely threatened or litigation stops short of a court judgment, the institution in employment claims often must absorb some element of the employee's attorney fees when the claim is settled.

The risk of legal challenge on discrimination grounds and the high cost of discrimination litigation can be so substantial that special steps along the lines described in this paper should be taken before large-scale layoffs are announced, to increase the likelihood that the layoff plan will withstand attack on these grounds.

### *Tort Claims*

A tort, in general, is commission of a willful or negligent wrong, other than a breach of contract, that causes its victim measurable injury. In recent years, employment-related tort theories have expanded. In addition to venerable claims such as wrongful discharge and fraudulent discharge, employees in many states now regularly sue for tortious interference with contractual relations, intentional infliction of emotional distress, defamation, breach of the implied covenant of fair dealing, and other claims grounded in tort law. Employers can be liable for compensatory and punitive damages, but usually are not exposed to plaintiff attorney fee liability in such cases.

### ***Claims Resting on Federal or State Employment Laws or a Collective Bargaining Agreement***

The Worker Adjustment and Retraining Notification Act (“WARN”), a federal law, requires covered employers to give at least 60 days’ written notice of “mass layoffs” and “plant closures” to affected employees or their collective bargaining representative, and to state and local monitoring agencies. For purposes of the statute, virtually all colleges and universities are large enough to come within the definition of a covered employer (any employer with 100 or more full-time employees).

A growing number of states have enacted their own versions of WARN, often with broader coverage and more restrictive notice provisions than the federal statute. California, Connecticut, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, South Carolina and Tennessee all have worker notification laws that could be triggered by large-scale institutional layoffs.

Federal law also bars employers from terminating employees because courts have garnished their wages to pay debts or because they have taken leave under the federal Family and Medical Leave Act. A number of federal and state laws contain additional protections, including laws that forbid taking adverse action against an employee who qualifies as a “whistle-blower.”

Collective bargaining agreements and state public-sector labor laws often limit employers’ rights to determine layoff sequences. In recent years, with job security foremost in union negotiators’ minds, extensive restrictions to prevent employers from contracting out services performed by bargaining unit members have been added to many collective bargaining agreements. Such provisions often reduce savings that can be achieved by layoffs, notably in maintenance and technical areas.

### ***Other Claims***

Layoffs at colleges and universities often have involved blue-collar maintenance and public safety workers. When these employees are laid off, the institution’s exposures may increase. For example, layoff of public safety officers can increase risk of negligence liability for a consequent spike in dangerous activity on campus.

Institutions may also experience a kind of survivors’ syndrome after layoffs. Not only do grievances, administrative complaints, and lawsuits from laid-off personnel increase, but

employees not laid off tend to assert their rights more aggressively. Perhaps they do so because their morale is affected by added duties assigned when the workforce shrinks or because, fearful of the next wave of layoffs, they want their personnel records to be pristine and resist even a small blemish on their records.

Layoffs can precipitate other kinds of claims as well. For example, in designing and implementing severance and separation agreements, care should be taken to comply with “employment benefit plan” requirements of ERISA, if applicable.

### III. CONSIDERING ALTERNATIVES TO LAYOFFS

Institutions almost invariably should take two steps before the first public mention of possible staff layoffs:

- *Develop the case for the layoff.* The institution should determine with confidence the reasons for and magnitude of the downsizing or restructuring. Once the case for the change is made, it should be revised or revisited only for compelling reasons.
- *Anticipate the case against the layoff.* The institution should prepare for the argument that downsizing or restructuring can be avoided by increasing revenues, cutting expenditures elsewhere or pursuing other alternatives. The institution should be prepared to show that each alternative was carefully considered and either implemented without achieving the necessary savings or shown impractical or unachievable, taking into account the institution’s mission and ability to operate successfully after action is taken. Once the institution makes the case forcefully for a specific layoff strategy, ordinarily that strategy should be revised only for compelling reasons.

Skepticism by employees, students, faculty, and the public may be allayed to some extent if the institution can show that layoffs were undertaken only after alternatives were implemented or considered and rejected. We identify below some alternatives that many colleges and universities have pursued when financial shortfalls put pressure on the payroll.

***Hiring freezes and elimination of positions through attrition.*** Critics can be expected to contend that the institution should not lay off employees if the salary line can be sufficiently reduced by not replacing employees who leave voluntarily.

***Furloughs.*** Cash savings associated with temporary furloughs can sometimes make elimination of permanent positions unnecessary. Many institutions include furlough authorization provisions in their personnel policies and collective bargaining agreements. By way of illustration, the collective bargaining agreement between one public university and its unionized staff employees contains this provision: “[T]emporary adjustments in the workforce can be made without application of the Layoff ... Procedures. Such temporary layoffs will not exceed a total of seven (7) days per contract year or two (2) days per pay period, and the Union will be notified before such layoffs are implemented.” Absent such authorization, furloughs may cause legal problems.

***Negotiated retirements.*** Voluntary severance and early retirement plans, increasingly common throughout the country, have been implemented at many colleges and universities. Under a typical incentive plan, the institution offers a package of benefits to all or selected employees for a specified period. Employees who elect to retire are not replaced. Negotiated retirement plans and voluntary separation plans reduce the number of positions that must be eliminated by layoff, and may even reduce the payroll sufficiently through attrition to make layoffs unnecessary.

Negotiated retirement arrangements often can be closely tailored to the institution’s needs. The package of retirement-inducing benefits can be offered across the board. Alternatively, if doing so does not raise such other legal hazards as undue risk of discrimination claims or ERISA violation, benefits can be made available only to employees in particular departments or those who have reached a specified seniority level. Potential problems arise under the Age Discrimination in Employment Act, however, when eligibility criteria are related to age or such arguable age-surrogates as years of institutional service.

The Older Workers Benefit Protection Act, enacted to protect older employees against coercive early-retirement plans, generally bars employers from offering older workers severance terms materially less generous than terms offered the workforce as a whole under an early retirement incentive program. OWBPA also limits the employer’s ability to obtain from older workers releases of age discrimination claims in exchange for sweetened early retirement benefits. Releases must adhere to exacting statutory requirements: The release must be in writing and its terms must be expressed clearly; the employee must be advised in writing to consult an attorney before executing the release; the employee must be given at least 21 days (or

45 days in the case of a group termination program) to consider it; and the employee must be given at least seven days after signing it to revoke it unilaterally. Releases in group termination programs also require disclosures concerning job titles and ages of persons in the layoff unit. Employees generally cannot be asked to waive the right to file a discrimination charge with the Equal Employment Opportunity Commission, although a waiver of the right to file a lawsuit and recover monetary or other personal relief can be effective.

#### **IV. PREPARING FOR LAYOFFS**

##### ***External and Internal Communications***

Advance communication with affected employees and other pertinent institutional constituencies is usually desirable if the layoff is to be conducted in the least disruptive way. The rationale for staff layoffs should be developed, justified, and explained honestly, and the institution should be able to show that it will emerge from the process stronger and better positioned to perform its mission.

Layoff decisions can stem from a financial trauma, such as flood or sudden meltdown of the stock markets and economy, or from progressive deterioration of the institution's finances — for example, a shortfall in tuition revenue, unanticipated increase in employee fringe benefit costs, sudden downturn in federal grant and contract support, or surge in utility expense. Weeks or months may elapse from the moment of initial revelation to the final decision to implement a layoff plan that covers large units of the institution. The process often begins in the financial vice president's office, proceeds to the president, and quickly widens through the institution's management and constituencies. The earlier and more coherently the institution is prepared to inform its staff of impending bad news, the less likely are staff members to be bewildered.

As soon as large-scale layoffs are seriously contemplated, a small team of decision makers should be assembled. The institution's risk manager, human resource and benefits specialists, lawyer, public affairs specialist, and a representative of the financial office should be key members of this team. This small group should develop a coordinated and consistent communications strategy. Documents that explain the rationale for layoffs — for example, reports to trustees, minutes of presidential cabinet meetings, charts designed to demonstrate the justification for layoffs, and public statements — should be reviewed carefully by the team

before they are finalized and issued. Such documents may loom large in litigation contesting the legal basis for layoffs. Consideration should be given to which communications and documents will be within the attorney-client privilege and maintained as confidential. Senior management, including the president, should review proposed layoff decisions, and where and to the extent appropriate consult designated trustees, board committees, or the full board. Large-scale layoffs in particular should entail fiduciary judgment.

A careful attention to the personnel files of staff members is highly desirable where a proposed layoff of the staff member is to any extent performance-related. “Facts”, as the saying goes, “are stubborn things”, and as the facts will figure in ensuing legal claims, the facts should be examined before, not after, a termination decision.

Once the official message regarding the layoff is finalized, it should be communicated to the institution’s various constituencies. Usually, the message should focus on why layoffs are necessary. Most people react more sympathetically if they learn of the institution’s financial difficulties directly from its spokesperson rather than through the rumor mill.

Briefing sessions should be conducted for trustees (at least some of whom are likely to have been consulted previously on the matter) and, at least at public institutions, key legislators and government officials. Meetings and discussion forums with faculty, staff, and other constituents on campus often are useful settings in which to help explain to employees the financial conditions that have created the need for a layoff. Special communications with alumni, faculty, students and parents can take various forms, such as a president’s letter and articles in the alumni magazine and student newspaper.

Newspapers (including campus newspapers), television and radio stations, and other community media merit close attention in the context of large-scale layoffs. In even the largest cities, mass layoffs of college or university staff members are likely to attract media interest. In small towns, where institutions often have a dominant role in local politics and culture, layoff of even a few employees can have communitywide reverberations and be front-page news. Sometimes, press releases should be prepared and distributed — after careful review by the response team — to local media. In some communities, it may be advisable to schedule a press conference to address the layoffs.

To what extent, if any, should the institution’s president figure in public communications about a large-scale layoff? Whether the president should be a visible spokesperson may depend

on the layoff locus. If the layoff is confined to one or a few operating areas (for example, buildings and grounds, the teaching hospital, or central administration offices under the supervision of one vice president), wise strategy may call for delegation of communications responsibility to an appropriate division or unit head. It may be prudent to reserve the president for possible major public controversy. Naturally, the president's aptitude for effectively handling such situations should be taken into account. Many well-managed institutions designate one spokesperson, other than the president, to be the principal voice in major internal and external communications on layoffs.

*Whether the contemplated layoffs involve personnel from many offices and departments or only a few (or even one), sensitivity to each affected work unit's culture, specific personnel-management issues, and needs is imperative.* Often, the planning of layoffs is substantially decentralized, with some central administration oversight and, hopefully, prior review. Consultation with the institution's counsel and human resource professionals is no less important where one or a few work units are involved than where institution-wide layoffs are.

### ***Sequencing Layoffs: The Challenge of Identifying Positions To Be Eliminated***

***The role of the staff layoff policy.*** At many institutions, a layoff policy is included in the institutional policies manual (by which we mean a manual in book or binder form, an integrated Web site, or both). Some colleges and universities presciently designed their policies years before layoffs were imminent. Even at those institutions, however, policies are often abbreviated and archaic, reflecting a bygone area when layoffs were rare. An urgent task for the planning group is to determine as soon as the possibility of layoffs surfaces whether the institution's existing policy contains three key elements:

- Workable, neutral, demonstrably fair criteria for developing a layoff plan, including determining layoff criteria and selecting individual employees for layoff;
- Timely opportunity for counsel and other responsible offices, including the risk management, personnel, and equal opportunity offices, to review layoff plans before implementation; and
- An equitable but efficient process for extending to affected staff members the right to administrative appeal.

If the institution's layoff policy does not address these elements, or includes antiquated and unworkable procedures in these areas, the institution is likely to face a Hobson's choice between, on the one hand, amending its policy shortly before a round of layoffs, thereby increasing breach-of-contract exposure, and, on the other hand, utilizing an inadequate policy that increases exposure to discrimination and deprivation-of-due-process claims.

***Quantitative or qualitative layoff criteria?*** A layoff plan can reduce the number of staff in existing positions or involve a restructuring in which new jobs are created and staff in existing positions are let go. Whatever approach is taken, should the policy rely on quantitative (and perform objective) criteria, such as seniority or years in rank? Or should it use qualitative (that is, subjective) criteria, such as job performance and skills or whether the position is essential to the institution's mission? The question can be difficult. From a legal perspective, use of objective, measurable criteria such as seniority is sometimes safest. Title VII and the Age Discrimination in Employment Act provide that an employer acts legally if it follows a "bona fide seniority system," and courts have interpreted the law to allow layoffs in reverse order of seniority, provided that seniority is fairly determined.

Most colleges and universities, however, want to keep their best employees and prefer layoff sequences based at least in part on relative performance or job skills. While such sequences may be desirable operationally, reliance on subjective criteria can be more hazardous legally. Application of subjective criteria increases the risk that layoff decisions will be difficult to explain persuasively and that discriminatory animus will appear to infect the layoff process. Layoff decisions based on performance, skills or qualifications should be supported by substantial, reliable evidence.

Experienced human resource professionals familiar with the institution can be valuable guides in the application of layoff criteria and clarification of various related risks. Care should be taken to ensure that, where appropriate, confidentiality of communications between such persons and the institution's legal counsel is protected by attorney-client privilege and related legal doctrines.

***Pre-implementation review.*** Layoff policies at many institutions include a requirement for internal review prior to the formal implementation of staff layoffs. This policy is illustrative:

The layoff plan must be submitted to Human Resources and the Office of Affirmative Action Programs in sufficient time to allow those offices to conduct

an internal review. In the case of a planned layoff of 10 employees or more within any 90-day period from a single Vice Presidential area, the layoff plan must also be submitted to the University Counsel. Human Resources will be responsible for coordinating the review process. The pertinent reviewing offices will review the layoff plan to ensure that the plan (a) is consistent with Equal Employment Opportunity policies, (b) provides adequate and appropriately documented programmatic justification for the identification of layoff units, and (c) provides appropriate documented justification for the selection of particular employees for layoff within a classification and grade level. A layoff plan cannot be implemented until it has received the approval of the appropriate reviewing offices.

Provisions like that require layoff plans to be implemented in two stages. First, statistics are analyzed to determine whether the layoffs will disproportionately affect employees in statutorily protected categories (members of protected minority groups, people age 40 and older, women, disabled workers, and so forth). At this initial stage, the operating unit in which layoffs will be implemented provides lists showing, for each employee to be laid off, the employee's gender, race, and age. Attorneys and human resource professionals review the lists to determine whether the percentage of "protected" employees on the layoff list is larger to a statistically significant degree than the representation of such employees in the unit as a whole. If it is, the layoff criteria should be reexamined to ensure that discrimination is not a factor and that evidence of the legitimate business reasons for the criteria is strong. The layoff plan can be revised on the recommendation of the office charged under the policy with conducting the pre-implementation review — often, the affirmative action office.

At the second or case-by-case stage, the reviewing office examines the personnel file of each person to be laid off and, for comparison purposes when appropriate, files of similarly situated personnel, to ensure that staff are selected for layoff in accordance with layoff criteria and not for irrelevant, factually unsustainable or illegal reasons. This labor-intensive review also involves supervisors, who are asked to justify their selection of employees to be laid off. When the process is carefully conducted in accordance with this two-stage review, risk is reduced that resulting layoff decisions will be successfully challenged as arbitrary or discriminatory.

***An acceptable appeals process.*** To practice fairness and due process, institutions should give affected personnel reasons for the layoff decision and an opportunity to contest it through an internal review process. Opportunity to contest does not mean that the laid-off employee should be entitled to elaborate or protracted proceedings. It may be desirable both to limit the grounds

for appeal and to apply a specially developed appeal process more streamlined than is the generally applicable process for staff grievances outside the layoff context. The published grievance policy applicable to staff should specify both the procedure that applies to situations other than layoffs and the streamlined procedure for laid-off employees. Specification of the review process requires careful judgment by the institution's counsel.

## V. IMPLEMENTING LAYOFFS

### *Notifying Affected Employees*

A sensible perspective on notification of employees is contained in *Risk Management of Reductions in Force*, a publication United Educators prepared for the National Association of College and University Business Officers:

While experiences vary, many institutions have the line manager or department administrator communicate a layoff individually to each affected employee. Supervisors should be given extensive orientation on the notification process. They should be encouraged to be sympathetic and supportive, but to avoid giving false hopes. The human resource staff may work closely with these “notification managers” to rehearse remarks and determine if it is necessary to substitute another individual to convey the message. Central coordination of the notification schedule and the use of written materials outlining policies, procedures, and benefits [are] important.

This report—formally *NACUBO Advisory Report 92-1: Risk Management of Reductions in Force*—contains advice on the mechanics of implementing layoffs. The text is available online at [www.nacubo.org/documents/library/ElectronicDocs/AdvisoryReports1992-1.pdf](http://www.nacubo.org/documents/library/ElectronicDocs/AdvisoryReports1992-1.pdf). A number of consulting companies train managers on what to say in these notification sessions. Many claims arise out of managers, because they are and want to appear sympathetic, saying the wrong thing at the notification stage.

No one way to terminate employees is universally correct. Institutions have different cultures, adopt varying policies, and are governed by idiosyncratic state and local laws. However, experience teaches that legal risks can usually be reduced by observing several commonsense rules:

First, institutions and the officials who represent them in the layoff process should unfailingly treat employees with dignity and respect. This is sound not only as a risk-minimization principle, but also as a matter of plain decency and compassion.

Second, documentation is key. Officials responsible for carrying out layoffs should carefully document the reasons for each decision. If the layoff sequence depends on subjective evaluation of job performance and qualifications, the employee's personnel file and other records used or created in the layoff process should persuasively document distinctions made.

Third, terminations should be conducted with decorum and dignity. Diplomacy and humanity cannot make a firing easy, but at least the process can avoid gratuitous embarrassment and needless, anxiety-provoking uncertainty. Officials should determine initially whether layoff notices will be communicated orally or in writing. Under either approach, it is best to provide notice individually, rather than in a group setting, and to have present at least one responsible person -- most often, a member of the human resources department who participated in the layoff planning -- in addition to the staff member's supervisor. Employees' questions should be answered truthfully. Usually, most questions can be anticipated as part of the pre-implementation planning phase. Employees should have prompt access to information on severance benefits, outplacement assistance, and unemployment-compensation applications. Do not expect affected employees to return to work immediately; give them time to absorb the news.

Fourth, sound decisions need to be made about whether and how to disclose internally the identities of laid off employees and the reasons for the layoff. A strict need-to-know rule is generally best. Typically disclosure outside the organization is unwarranted. Supervisors and others involved in the process should be instructed not to make negative statements about persons laid off. Employees' privacy should be respected.

Fifth, unless the institution knows for certain that no additional layoffs will follow, its spokespersons and managers should avoid statements that may lead remaining employees to believe that their jobs are safe. At many institutions layoffs come in waves. More harm can be done by lulling staff members into a false sense of security than by being truthful about continuing uncertainty.

### ***Ongoing Consideration of the Employee***

Managers experienced with layoffs know that supportive outreach steps to assist the employee are nearly always in the institution's interest. Investment in assisting employees to move forward positively is usually a prudent risk-management strategy, among its other virtues. Colleges and universities often take such steps as these:

*Severance Benefits.* Severance packages conventionally include four elements: a notice period before the effective date of the layoff, severance pay, continued eligibility for selected fringe benefits, and preference in applying for other internal positions.

A perennial problem is whether laid-off employees should be entitled to work through the notice period or whether the institution should substitute paid leave and require employees not to come to work. The institution's layoff policy should be flexible enough to allow the result that most effectively serves the work units involved. In some circumstances, institutional work depends on a smooth transfer of duties from laid-off staff to those who will succeed them, and those laid off should be encouraged to remain on the job during the notice period. In other circumstances, demoralization of staff members who lose their jobs makes advisable their departure from the workplace as soon as possible.

Severance pay is usually keyed to length of service, and typically a formula is used to determine how much severance each laid-off staff member is entitled to receive — for example, two weeks plus one additional week for every five years of completed service, up to a maximum of six weeks' pay. The subject of severance-pay policy is complex and warrants careful consideration.

Some institutions conventionally require employees to execute a release in return for severance pay. Others do not. Counsel should be consulted on the issue, among other reasons because releases are regulated under various laws, such as the Older Workers Benefit Protection Act. The decision whether to seek a release is judgment-laden and involves legal strategy, risk-management considerations, and the educated application of common sense.

*Counseling and outplacement.* To provide counseling services to laid-off personnel is often cost-efficient to the institution, valuable to the employee, and likely to reduce claims. Outplacement services, including if appropriate retention of a qualified outside firm, can be valuable benefits, as can preretirement counseling for personnel who take early retirement. Particularly at larger institutions, finding employment in another part of the organization may be

a realistic possibility. Experience shows that when laid-off employees feel they have a meaningful prospect of future employment or a secure retirement, they are less likely to assert unwarranted claims.

*Health and fringe benefits.* The federal COBRA law requires that employer-provided health benefits be made available for up to 18 months following termination. “COBRA” stands for the Consolidated Omnibus Budget Reconciliation Act, a federal statute enacted in 1986 to preserve the group health insurance benefits of terminated employees. Under COBRA, former employees are entitled to retain their benefit eligibility for a maximum of 18 months, subject to extension in limited circumstances. But COBRA coverage is expensive. Employees must pay 102 percent of the combined employer-employee premium (although employers have the discretion to subsidize some or all of that premium). At some institutions, laid-off employees qualify for additional post-separation benefits, such as tuition benefits for dependents who currently receive them. Benefits specialists should be consulted, as should counsel with respect to health-records privacy notices and other such issues.

*Hiring preference.* Laid-off employees sometimes receive various reemployment preferences, such as recall rights for a certain period, notice of job vacancies, preferences over external candidates, restoration of seniority benefits upon rehire, and the presumption of no break in service if the employee is recalled within a specified period.

*References.* Thorny issues can be posed when laid-off employees request letters of reference. Requests for reference can put the employer in a bind. On the one hand, employers are unlikely to want to prevent a discharged employee from obtaining other employment. On the other hand, employers are expected to state truthfully the reason for an employee’s termination, and can incur liability if they misrepresent the reason. To reduce exposure to defamation claims, some institutions adopt the general policy of providing in response to reference requests only basic factual information, such as dates of employment and last position held. Administering and monitoring compliance with institutional policy on references is a challenge at colleges and universities, where many individuals may be contacted by prospective employers.

Care should be taken to comply with pertinent requirements under ERISA, including preparing any necessary formal benefits-plan documents and summary plan descriptions.

### ***Attention to the Problems of Remaining Employees***

Residual effects on employees not laid off should be considered. Layoffs often are preceded by weeks or months of intra-office tension, with resulting loss of efficiency and harmony. Layoffs can leave surviving employees overburdened. Their loyalty to the institution may be shaken by feelings of resentment. Surviving employees may be called upon to perform added duties without added compensation. A well-conceived layoff plan recognizes the need to restore employee morale, alleviate anxiety, and restructure the working environment to address burdens on employees who remain.

## **VI. IN SUMMARY: A PRE-TERMINATION CHECKLIST**

### **A. Develop an overall management plan for the layoffs.**

The plan should analyze such questions as:

- Are layoffs necessary? Has the case been made, and articulated, convincingly?
- Have alternatives been considered?
- Who are the members of the planning group?
- Who will be the institutional spokesperson?
- Who has been involved in the decision and who has been consulted?
- Is the institution comfortable that its layoff planning and implementation will pass the “front-page test”?

### **B. Plan carefully for identifying persons to be laid off.**

- Does the institution have a workable layoff policy? Has the policy been reviewed recently to ensure that it is up to date and legally defensible?
- Do managers understand the criteria that will be used for identifying positions to be eliminated?
- Are the layoff criteria quantitative (objective and measurable) or qualitative (subjective)? If qualitative, how are the criteria to be applied? Is the assessment in each case adequately documented?
- Are the reasons why employees are selected for layoff internally consistent? If work performance is a criterion, does the personnel file of the laid-off employee

support the determination that the employee should be laid off while others are not?

- Will there be disproportionate impact on legally protected classes of employees? If so, can there be assurance that the institution can prove that no unlawful discrimination figured in termination decisions?

**C. Prepare carefully to notify affected employees.**

- Ensure that managers confer with trained human resource professionals to identify and address questions likely to arise.
- Tell employees the truth and treat them with dignity and respect.
- Make sure employees understand the criteria used to determine layoff sequence.
- How much notice will be given?
- Who will be responsible for notifying each individual?
- Respect employees' privacy.
- Prepare written materials on severance arrangements, outplacement assistance, reemployment rights, and appeal rights, and have the materials available at individual employee meetings.

**D. Anticipate reactions and needs of remaining employees.**

- Explain any reorganization or job restructuring necessitated by layoffs.
- Use briefing sessions and group counseling to alleviate anxieties.

**E. Debrief afterward.**

- Identify a small group of key administrators who will be responsible for monitoring and evaluating the process.
- Consider whether institutional policies and practices should be modified based on the experience gleaned during the initial round of layoffs.

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