



## Making Adjustments in Troubled Economic Times

By Liz Tascio  
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Downsizing. No one welcomes it. But when layoffs and firings become necessary in order to sustain a business – a position many employers find themselves in now – human resources professionals can help make sure it all happens as smoothly and fairly as possible. Their actions can protect employers from ill will and legal claims, and make it possible to bring back laid-off employees later on.

At the Human Resources Roundtable in October, attorney Joel J. Greenwald, of Greenwald Doherty LLP, suggested some best practices HR professionals can use to manage the process of downsizing.

### **Preparing for a layoff**

One of the first steps in assessing a company's downsizing needs is determining which employees can be let go, and under what circumstances. A well-thought-out round of layoffs can leave the door open for employees to return to the company, lessening the chance they'll want to take legal action against their former employer.

Greenwald suggests three ways to determine who is to be laid off:

- Go by seniority: Greenwald calls this the safest route.
- Go by skill set: Maybe the company no longer needs a mechanic, for example.
- Go by performance: This is valid, but can result in discrimination charges.

Whatever the cause for dismissal, make sure it's business-related and backed by solid evidence. And stick with one cause – don't tell someone you're firing them because they're least senior, but also because they weren't performing well on the job. "Two reasons can weaken each other," Greenwald says.

No matter how fairly decided, a round of layoffs can seriously erode morale, leaving it up to HR reassure remaining employees, says Greenwald. "People need to know they still need to perform. You've got to spin the positive message ... and keep people happy."

### **Preparing for a firing**

If you must dismiss someone for cause, the company's best protection is good documentation. Thorough documentation that began when an employee was hired can show justifiable grounds for the termination.

"If you think somebody's a problem, don't wait until right before you terminate them to get your witness statements and get your documentation in a row," Greenwald says. And be specific: For example, jotting down that an older employee is not as energetic or computer-savvy as younger employees is potentially discriminatory.

Over-documentation isn't better than too little documentation, he adds. If a company doesn't regularly do appraisals, for example, and then evaluates a particular employee each week before firing him, that's not going to look fair to a jury.

Some characteristics of well-kept employee documentation within a company include:

- Appraisals that are consistent from department to department, showing that managers agree on a standard level of satisfactory performance
- Memos from throughout the year that provide a record of whether performance goes up or down between reviews
- A combination of email and formal communication
- Solid attendance records and a clearly stated policy for excused absences
- Written warnings that mention previous infractions; notes from any investigations, including basic facts like date, time, and place, and which handbook-specific policies were violated; and signatures from both the employer and employee

If employees resist performance evaluations, a company can offer an option to sign the evaluation but not agree to it. If an employee refuses to sign even with this option, the employer can note that in the file.

### **Assessing and avoiding legal risk**

As more and more businesses adjust to current economic conditions, Greenwald predicts a rising number of litigation in '09. Therefore, he stresses the importance of consulting the business's lawyers: "My better clients use me more effectively before [terminations and lawsuits] happen."

In the case of mass layoffs, in which one-third of the workforce or at least 50 workers will be affected, an employer's legal department must give prior notice to them and to the government, 60 days in advance. Before mass layoffs are announced, Greenwald recommends scanning the list and looking for patterns – are women or minorities disproportionately represented, for example? – that could result in class-action suits.

Before a layoff, HR professionals should get familiar with federal and state laws on firings. Review company policies, too, since court cases tend to cite "implied contracts" found in employee handbooks. Greenwald will review any company's handbook for free.

Greenwald pointed out a few termination traps, which are near-guaranteed litigations:

- Discrimination. If an HR professional senses the employee may claim discrimination, it's best to contact legal immediately.
- Overtime violations. "I'm more scared of overtime cases than anything else," says Greenwald. "Everybody violates the overtime laws." Even salaried and temporary employees may qualify for overtime. When Wal-Mart outsourced janitorial services, workers sued both the janitorial company and Wal-Mart for \$20 million based on overtime grievances. The janitorial company went bankrupt and Wal-Mart is left as the sole defendant.
- Timelines. If you must fire or lay off employees who have taken disability or maternity leave, be aware of how the dismissal looks in that context, says Greenwald. Often, a patient employer may find that a new mother may decline to come back; if she asks for fewer hours, the employer can decline and offer her severance instead. That happens more than half the time with workers who are at risk of being fired anyway, Greenwald says.

## **In the event of a lawsuit**

Despite the best work of HR professionals, some employees will take legal action after being let go. Greenwald suggests a few money- and time-saving strategies:

- Don't show all your cards. It's easier to catch someone in a lie if you hold onto documentation until you're required to show it.
- If you have pre-emptive policies in place, use them. Some employers require mandatory arbitration as part of internal grievance processes, for example; some protect themselves with noncompete and nonsolicitation agreements.
- Make the claimant "feel the battle." Greenwald suggests making the claimant's lawyer work hard, especially since he or she is probably not getting paid by the hour. If the case seems like it will be hard to win, the lawyer may advise the client to give up.
- Choose your battles wisely. Though settling through arbitration can seem the easiest option, sometimes a case that goes to court can set an example.

## **After dismissal**

With any layoff or termination, it's important that HR believes the occurrence is fair. It's worthwhile to consider how a jury would perceive a particular firing or layoff. "I think if you do the right thing," says Greenwald, "[the lawsuits] are going to be pretty defensible, but even a defensible lawsuit is costly, ugly, and evil."

If a dismissal is the only option, use these strategies in the exit interview:

- Choose a neutral setting if possible
- Use a written form
- Have a witness take notes
- Be clear about why the employee is being let go
- Show compassion and empathy
- Offer outplacement options
- Make severance conditional upon a separation agreement
- Be as generous as possible, especially if you think the person could become a problem later
- Do your best to make sure the employee doesn't leave angry

If layoffs and firings are done in good faith and with good documentation, the chance of a legal claim or a lawsuit goes down. And later, when the company's fortunes improve, it's often possible to bring back laid-off employees – a move that shows loyalty to employees, raises morale, and can often be attributed to the good work of HR professionals.

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