



Cost Cutting: Options to Consider Before Layoffs

Protecting your organization and softening the blow for employees

by Kathryn M. Vanden Berk

It has become painfully obvious that the year 2009 will require careful management of agency resources. It will be a rare organization that does not find it necessary to reduce staff. Let's review the rules for layoffs and reductions in force so that you will feel confident that these difficult decisions will be implemented correctly.

Cost-Cutting Options

Remember that layoffs are not the only way to reduce costs. Here are some other cost-cutting options:

- job elimination or consolidations;
- hiring freezes;
- work sharing and job sharing;
- reduced workweeks;
- reduced salaries or reduced hourly pay, benefits, and/or incentive programs;
- elimination of overtime work;
- seasonal or short-term shutdowns;
- voluntary or involuntary unpaid leaves of absence/vacations; and
- early retirement.

Employers applying these strategies to deal with bona fide financial distress will often find that courts are sympathetic to the employer even if decisions inevitably result in some amount of discrimination.¹

However, be aware that a decision to eliminate employees on the *pretext* of financial difficulties can open you to a charge of discrimination if the pretext can be proven.² A too-easy reliance on financial issues could place you in legal jeopardy if it is clear that you are using this as an excuse to get rid of a class of

employees who are protected due to age, race, or their recent whistle blowing³ or unionizing activities.⁴

Also, you are always on firmer ground if you have identified your agency as an "at will" employer, a policy available in some states that allows you to terminate employees for any reason or no reason. Again, a caution: an "at will" policy will not protect you if your decisions are clearly discriminatory or retaliatory, and financial difficulties are not provable.

Cost-Cutting Criteria

It is best to begin with a critical evaluation of agency programs and services. Which are essential to your mission? Which have reliable funding streams? Which are you most successful at? You cannot successfully retool your workforce unless you first know what your remaining employees will be needed to do.

When you have finished evaluating your programs, develop guidelines that will drive your decision making for staff elimination. Typical guidelines are:

Length of service. Seniority is a favorite criteria. If you cut costs by eliminating your most junior employees, it is easy to make decisions that are demonstrably fair. However, this often results in elimination of those with the greatest potential for future success. Seniority is best used as a tie breaker where two employees are equally qualified.

Be cautious about using value-laden words when you make job elimination decisions that will impact older

employees. Employees who hear that you are "getting rid of the dinosaurs" may well have a claim against you for age discrimination.⁵

Performance. Performance is a great criteria, but only if your performance evaluation system can withstand scrutiny. If documentation in your personnel files cannot justify a decision based on performance, then either don't use that as a criteria, or make your decisions afresh, very carefully, and base them on long- and short-term performance rankings that are objective and not subjective.⁶

Job Skills. Evaluate the position descriptions that will remain after the reduction. Do they adequately state the skill or experience level needed? Your reduced workforce must be capable of performing those jobs that remain in the agency, and the jobs must be geared to agency needs. If an older worker does not have the necessary skills for the available positions, then his or her elimination can be justified. This is "business necessity" at its most basic level.

Larger organizations should have a written layoff policy that can be implemented as the need arises. Those agencies with more than 100 employees will need to abide by the requirements of the Worker Adjustment and Retraining Notification Act⁷ when certain conditions exist.

Your state may have enacted special laws that deal with reductions in force. Check with legal counsel to be sure that you abide by any applicable state laws as well.

Softening the Blow

If you have the resources to do so, you may find that morale is greatly helped within your remaining staff if they know you have tried to soften the blow of temporary or permanent layoffs for their former coworkers.

The greatest fear for most employees is loss of their health insurance benefit. Consider funding health care benefits for those who are temporarily laid off, or providing some extra months of coverage for those who are permanently laid off. Additional considerations are: providing transition programs such as resume assistance, search services or career counseling, and covering job loss within your employee assistance program.

This is very important: If you provide severance funds or any other benefit that is not actually earned or vested, be sure to get a severance agreement that releases your agency from any liability in exchange. This is a quid pro quo situation, where you give something and get something back.

You can and should require a release in exchange for the unearned compensation. It is foolish to give up anything of value (especially money) without getting peace of mind and closure in exchange. If any employee is over the age of 40, be aware that the Age Discrimination in Employment Act imposes specific periods for employees to review and revoke release agreements.⁸

Rolling It Out

If you plan on terminating a number of employees at the same time, it is wise to plan talking points for the discharge day so that all employees get the same message but in private meetings.

I suggest that each employee meet with at least two agency managers, preferably one being their supervisor and the other a human resources professional. A good agenda would include an explanation for the decision, alternatives that have been considered, criteria used to make layoff

decisions, and severance or other benefits offered. If there is severance, *be sure that no severance is provided until a release is signed and effective.*

Most professionals consider Friday afternoon to be the most logical time for implementing a reduction in force. In my experience, this has held true, but this is a matter for your discretion.

Return to Work

You may decide to have a recall policy so that employees who were laid off or are on unpaid leave may be recalled if finances ease and their skills are needed. Typically, these policies will not offer automatic recall unless the job classification, performance records, and skill levels are tightly matched.

Be aware that you may be challenged if you recall only some of your workers but replace others who may be in a protected class (age, race, etc.). This may raise questions about whether the layoffs for financial reasons were pretextual in the first place. ■

ENDNOTES

1. In *Baker v. Am. Airlines Inc.*, 430 F.3d 750 (5th Cir. 2005), an airline employee lost her age discrimination claim because her employer's explanation for her termination, i.e., that she was laid off in a company-wide 10 percent reduction in force necessitated by an industry slowdown after Sept. 11, 2001, was a legitimate, nondiscriminatory reason.
2. Pretext arises when finances are not the real reason for termination but merely a convenient excuse to eliminate problem employees. In *Juarez v. ACS Government Solutions Group Inc.*, 314 F.3d 1243 (10th Cir. 2003), the court awarded compensatory and punitive damages to a Hispanic computer operator who had received consistently high scores in past performance evaluations. In contrast, the employer retained non-Hispanic computer operators, some of whom had less experience or tenure, had poorer performance histories, were frequently tardy or absent, and slept or drank on the job.
3. Under the Sarbanes-Oxley Act, nonprofit employers may not use layoffs to terminate employees in retaliation for actions protected by public policy, such as filing workers' compensation claims or whistle blowing.
4. For example, manipulating layoff policies to discourage or encourage union membership is an unfair labor practice prohibited by the National Labor Relations Act (NLRA). In *National Labor Relations Board (NLRB) v. Kentucky May Coal Co.*, 89 F.3d 1235 (6th Cir. 1996),

the court affirmed the NLRB decision that an employer violated the NLRA when, during a union organization campaign, it laid off virtually all of its employees after subcontracting the work out.

5. In *Equal Employment Opportunity Commission v. Board of Regents of the University of Wisconsin System*, 288 F.3d 296 (7th Cir. 2002), evidence indicated that the employees were chosen based on their ages since written reasons for the selection of older workers was not prepared until after decisions were made, and managers used language implying that the older employees were inadequate based solely on their ages.
6. In *Sartor v. Spherion Corp.*, 388 F.3d 275 (7th Cir. 2004), it was determined that within the context of a substantial business reorganization, the fact that the sole black employee at a particular management level was not retained does not itself signal that the company was motivated to fire her because of her race.
7. The Worker Adjustment and Retraining Notification (WARN) Act requires employers to provide advance notice of certain large-scale layoffs and agency closings. The purpose of the notice is to give affected employees extra time to obtain alternative work or job training and to alert local assistance agencies. The WARN Act is found at 29 U.S.C. §§2101, et seq., and is activated when there are very specific facts and circumstances.
8. The Older Workers Benefit Protection Act (OWBPA), a part of the Age Discrimination in Employment Act (ADEA), requires employers to provide 21 days for the employee to consider a severance offer and seven days following execution to revoke his or her consent.



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