

## Reducing Headcount Without Increasing Risk

By Ed Harold (New Orleans)

In a slumping economy, the cost side of doing business comes under significant scrutiny in all industries. This is certainly no different for retailers, which are often the hardest hit in a recession economy. Given that labor is generally the largest or second largest expense for retailers, labor is one of the first areas targeted for cuts. But unlike reducing inventory, delaying expansion plans, or monitoring fuel use, when labor is cut, real people take the hit and sometimes they come back swinging.

It is perhaps hard to understand how individuals let go in a company-wide downsizing can claim that, even though they were one of two thousand affected, they were victims of discrimination. But it can and does happen. So, as with any employee termination, there are steps that need to be taken to reduce the risks of post-layoff lawsuits, which can diminish the expected savings, or even wipe them out entirely.

### Documenting the Decision

Reductions in force are certainly not the only method of reducing labor costs. Companies can explore reductions through better scheduling, prohibiting overtime, across-the-board reductions in pay or hours worked, furloughs, elimination of contract labor, and hiring freezes. Certainly many of these possibilities will be explored by small box retailers who staff locations with flexible employees working irregular hours depending upon the store's needs. Since it is often hard to keep all the positions in a small store filled, laying off store employees might not be an option.

In the case of larger retailers, having dozens or hundreds of employees per store, store staff layoffs are more likely to achieve the desired results. Whatever the size of the store, when employees are going to be let go in a reduction in force, creating a plan for the layoff and executing it are critical.

The first aspect of planning a layoff is properly documenting the reason for the RIF and the goals the RIF is designed to accomplish. Many businesses incorrectly conclude that the reason for most layoffs, to cut costs, will be obvious and needs no further study. But employers' actions are judged with the benefit of 20/20 hindsight. Should the cost savings not be realized, or should unanticipated events lead to a flurry of hiring only a few months later, the stated purpose of the RIF will be challenged as a pretext to cover up the employer's intent to eliminate or reduce the representation of a protected class in a workforce. Studies and information gathered during the RIF planning stage will more effectively rebut such arguments than information created after a claim is made.

### Designing and Implementing the RIF

Once the company's goals are firmly in place, the RIF can be designed to accomplish them. Reaching the goals will normally begin with a hard look at the organizational structure itself, and the tasks performed by the various positions within that structure. Examination can identify tasks currently performed that can be eliminated. It will also pave the way for identifying positions that can be reconfigured to handle the more important tasks. This will lead to the development of a new more efficient organizational structure designed to handle the most important tasks with fewer

employees. Through this point, there has been no consideration of any individual employee. Rather, the examination is based on the company's mission and identifying the positions needed to carry out that mission.

After designing the future organizational structure, you must create a system for determining who will be retained and who will be let go. While some discrimination lawsuits attack the factual basis for the RIF as a whole, more challenge the reasons for selecting a particular individual for layoff. When employees are spread throughout many different stores in diverse locales with diverse managers involved in the decision making process, applying a consistent system of selection is difficult at best.

Individual managers will try to deviate from the system if it results in decisions about employees that are inconsistent with the manager's own perception of who should stay. Ad hoc

decisions are anathema to defending the decision-making process. As such, your selection system should produce a set of information supporting each decision about each individual let go.

Of course employee length of service is a system that is often used. The benefits are that using seniority is easy to execute and almost impossible to challenge as discriminatory. Defending this method is simple because so many people believe that seniority should be the standard used in all layoffs. The downside is that the best employees are often not the most senior. Any exceptions to the system will wreck the objectivity and heighten the disgruntlement of employees who lose their jobs because of an exception. It is not always the best choice.

The other common system is to base selection of employees on a performance measure. The benefits of this system are flexibility in choosing criteria to meet the stated goals and retaining the best employees. For example, in a sales force layoff, it would be fairly simple to rank employees completely objectively on sales volume and ignore all other potential criteria. But in many cases, there is no such fully objective criteria resulting in the need to use more subjective impressions.



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*Continued from previous page*

Selection criteria should be designed to identify the employee traits most important to meeting the company's goals. Prior employee evaluations can be very useful in this process. Never ignore these as they will be used as evidence as to the employee's performance prior to a layoff. Unfortunately the subjects of an annual evaluation are not always the criteria you consider important in a layoff. Managers are also likely to be more honest with themselves about employees' performance when jobs are on the line. So every employee who could be affected should have an evaluation performed solely for purposes of the RIF. That evaluation should be reviewed against other information in the employees' files so that discrepancies can be identified and investigated.

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### Office Locations

#### Atlanta

1500 Resurgens Plaza  
945 East Paces Ferry Road  
Atlanta, GA 30326  
phone (404) 231-1400

#### Charlotte

Suite 2020  
227 West Trade Street  
Charlotte, NC 28202  
phone (704) 334-4565

#### Chicago

1000 Marquette Building  
140 South Dearborn Street  
Chicago, IL 60603  
phone (312) 346-8061

#### Columbia

Suite 1400  
1901 Main Street  
Columbia, SC 29201  
phone (803) 255-0000

#### Dallas

Thanksgiving Tower  
Suite 4343  
1601 Elm Street  
Dallas, TX 75201  
phone (214) 220-9100

#### Denver

Suite 3300  
1999 Broadway  
Denver, CO 80202  
phone (303) 218-3650

#### Fort Lauderdale

Suite 800  
450 East Las Olas Boulevard  
Fort Lauderdale, FL 33301  
phone (954) 525-4800

#### Houston

Two Allen Center  
Suite 620  
1200 Smith Street  
Houston, TX 77002  
phone (713) 292-0150

#### Irvine

Suite 400  
18400 Von Karman Avenue  
Irvine, CA 92612  
phone (949) 851-2424

#### Kansas City

Suite 400  
104 West 9th Street  
Kansas City, MO 64105  
phone (816) 842-8770

#### Las Vegas

Suite 650  
3993 Howard Hughes Parkway  
Las Vegas, NV 89169  
phone (702) 252-3131

#### New Jersey

430 Mountain Avenue  
Murray Hill, NJ 07974  
phone (908) 516-1050

#### New Orleans

Suite 3710  
201 St. Charles Avenue  
New Orleans, LA 70170  
phone (504) 522-3303

#### Orlando

1250 Lincoln Plaza  
300 South Orange Avenue  
Orlando, FL 32801  
phone (407) 541-0888

#### Philadelphia

Radnor Financial Center  
Suite 650  
201 King of Prussia Road  
Radnor, PA 19087  
phone (610) 230-2150

#### Portland

Suite 1250  
111 SW Fifth Avenue  
Portland, OR 97204  
phone (503) 242-4262

#### San Diego

Suite 950  
4225 Executive Square  
La Jolla, CA 92037  
phone (858) 597-9600

#### San Francisco

One Embarcadero Center  
Suite 2340  
San Francisco, CA 94111  
phone (415) 490-9000

#### Tampa

SunTrust Financial Centre  
Suite 2525  
401 E. Jackson Street  
Tampa, FL 33602  
phone (813) 769-7500

RIFs are the most common event subject to a claim of disparate impact discrimination. The disparate impact theory of discrimination does not focus on the subjective issue of employer intent. Rather, it evaluates job actions using objective statistics to determine if the impact of the decision on a particular group of employees, e.g., employees over 40, is disproportionately larger than their percentage in the work force.

For example, if 50% of employees in the work force were over 40, but 80% of the employees being let go were over 40, a court might conclude that the selection process resulted in age-based discrimination.

In order to avoid this quagmire, carefully assess how your decisions are impacting various protected categories. It's important to involve legal counsel in this process so that you do not unwittingly create discoverable information that can be used in litigation.

### Announcing the Decision

The communication and treatment of employees being let go is usually the most important factor in whether an employee will file suit. Plan carefully how affected employees will be told of the decision and what benefits they will receive at the time of the layoff or termination.

Proper communication is a difficult step when many different individuals are responsible for communicating to many different employees. Store managers who will communicate to the affected employees should be provided a script of what to say and cover. While these conversations should be held in private, it can be important that in addition to the manager presenting the news, another observe as a witness to what was said. This will help avoid claims based on wholly fabricated stories of what was said.

When cuts are made for economic reasons, offering costly benefits may seem counter productive. But the cost of these packages pales in comparison not only to the monetary cost of litigation, but the productivity cost of employees involved in it who must spend time away from their jobs. Because of this, the most commonly offered benefit is severance pay in return for a release of all claims. Although not perfect protection against litigation being filed, releases often can be used to end litigation swiftly and inexpensively.

Other forms of benefits include job placement assistance, some period of employer paid COBRA benefits, job training or educational assistance, continuation of employee discounts for a period of time, and pension enhancements.

### Other Factors to Consider

Keep a few other items in mind when planning a RIF. First, determine if the WARN act will apply. Under WARN, employers conducting large scale layoffs may be required to provide 60 days notice to affected employees. You also need to decide whether affected employees will have recall rights; structure your announcement accordingly. There is a big difference, for example, between the term "layoff," which implies a right of recall after a short duration, and "termination for lack of work," which does not. Do not leave employees with the erroneous perception that the company has an obligation to bring them back to work if a vacancy occurs.

If releases are used in exchange for severance pay, they must comply with the Older Worker's Benefits Protection Act in order to effectively release claims under the Age Discrimination in Employment Act.

Conducting a reduction in force while minimizing the risks of being sued by employees is an arduous task. Planning the process and executing it will go a long way toward preventing lawsuits at a time when companies are ill equipped to handle them.

*For more information, email the author at [eharold@laborlawyers.com](mailto:eharold@laborlawyers.com) or call 504.522.3303.*

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