

# Furlough, Layoff, Reduction in Force Resource Guide



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*Whatever the question...*

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## Introduction

Reducing staff is a difficult process that some businesses may have to face from time to time. There are several steps that apply regardless of the type of staff reduction that is needed. Below are basic compliance components to review prior to finalizing the organization's decisions. The steps below are outlined in the order that will provide the least amount of re-work. If possible, and timing may not allow for this, include employees in a discussion about options for reduction to reduce. At times, employees are willing to work reduced schedules or have other excellent ideas that can help the organization meet the needed change.

### Step 1: Determine if the need will be met through Furlough, Layoff, or Reduction in Force?

All three of these terms describe actions that are intended to achieve cost savings by reducing a company's payroll costs. Even though the words have been used interchangeably, their true meanings are very different.

#### Furlough

A furlough is an alternative to layoff. When an employer furloughs its employees, it requires them to work fewer hours or to take a certain amount 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 method of furlough is to require all employees to take a week or two of unpaid leave. 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). If an exempt employee is furlough for one day during a workweek, they become non-exempt for that work week and overtime should be managed to maintain the cost saving intended. However, 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. In these times, with remote work access, many ways to communication and conduct business very specific instructions should be given the alleviate all work for the furlough week.

An employer may require all employees to go on furlough, or it may exclude some employees who provide essential services. Generally, the theory is to have employees share some hardship as opposed to a few employees losing their jobs completely. Employee benefits remain intact during a furlough.

#### Layoff

A layoff is a temporary separation from payroll. An employee is laid off because there is not enough work for employees to perform. The employer, however, believes that this condition will

change and intends to recall the person when work again becomes available. Employees are typically able to collect unemployment benefits while on an unpaid layoff, and frequently an employer will allow employees to maintain benefit coverage for a defined period as an incentive to remain available for recall. However, you need to check your insurance plan documents to ensure the parameters of continued benefits.

### Reduction in Force

A reduction in force (RIF) occurs when a position is eliminated without the intention of replacing it and involves a permanent cut in headcount. A layoff may turn into a RIF or the employer may choose to immediately reduce their workforce. A RIF can be accomplished by terminating employees or by means of attrition.

When an employee is terminated pursuant to a reduction in force, it is sometimes referred to as being "riffed." However, some employers use layoff as a synonym for what is a permanent separation. This may be confusing to the affected employee because it implies that recall is a possibility which may prevent the employee from actively seeking a new job.

Regardless of the which process is most appropriate for the organization please be very specific in your use of terminology and education those who are have related conversations to do the same.

## Step 2: Selecting Employees

After the organization has defined its need, a system for determining who will stay and who will go must be created. The selection criteria should be designed based on one of the following; seniority, performance, job classification/status, job skills or a combination of these. Below is an explanation of each criteria.

### Seniority-Based Selection

With seniority-based selection, the "last employed/first unemployed" concept is used. Because seniority-based systems reward employees for their tenure, there is a lower risk that older workers will sue employers for age discrimination under the ADEA. However, using seniority does not protect the employer from further risks for potential discrimination against other protected groups. In addition, using seniority-based selection may require the employer to retain employees with outdated skills or less technologically savvy employees.

### Performance-Based Selection

Although this method of selection is often a preferred choice among managers because of its added flexibility for weeding out marginal or poorly performing employees, it should be approached with caution. We cannot emphasize enough the importance of documented performance as the basis for this method. We find the that many performance-based selection

processes fall apart because the information available is not objective, contains rater biases, or is not well documented. If this is the case for your organization, please consider an alternative selection criterion. Employers choosing to use this method should carefully document the decisions for retaining or reducing all employees in the selection pool.

### Job Classification/Status -Based Selection

Employers who have multiple classifications, part-time or contingent workers on their payrolls may want to impact certain groupings of workers first to ensure greater job security for other job classifications/status groups. Depending on the size and organizational complexity of the operation this method may not be enough to meet reduction needs, and it may need to be used in conjunction with other selection criteria.

### Skills-Based Selection

With this type of system, it is sometimes possible for employers to retain those workers who have the most sought-after skills. However, be aware that this method may cause an organization to retain younger workers with needed and versatile skill sets, and to lay off older workers who may not have the necessary skills. The older workers are protected from discrimination by the Age Discrimination in Employment Act. Again, clear documentation should be maintained.

### Combination Criteria Ranking – Based Selection

Although all the above methods can be equally effective when planned carefully, perhaps the most effective method of selection is using a combination of all the criteria previously discussed. Below is a sample of the ranking criteria used by some organizations that have implemented selection policies that are based on multiple criteria such as seniority, skill, and performance considerations.

- Employee's skills, abilities, knowledge, and versatility
- Employee's quantity and quality (performance) of work
- Employee's seniority within the organization

Regardless of the selection method used, the organization must have clear documentation that identifies the information needed to determine which employees will be impacted. An organization should not consider criteria such as leave status or protected conduct (i.e., whistleblower).

## Step 3: Avoid Adverse Action/Disparate Impact

An organization should review the identified employees for layoff to determine if an adverse (disparate) impact exists for a protected class. As a reminder, protected classes include

individuals who are members of a certain race, color, ethnicity, national origin, religion, gender, genetic information, specific age, 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. Again, documentation that shows the process for employee identification of employees based on the selection criteria above will go a long way toward this effort.

### Step 4: Review Federal and State Worker Adjustment and Retraining Notification (WARN) Act Regulations to Stay Compliant

Employers must determine if the WARN Act will apply. The WARN Act requires employers conducting a large-scale layoff to provide 60 days' notice to affected employees. A few exceptions apply. They are Faltering Company, Unforeseeable Business Circumstances, and Natural Disaster. Each are outlined below.

#### Faltering Company

This exception, to be narrowly construed, covers situations where an organization has sought new capital or business to stay open and where giving notice would ruin the opportunity to get the new capital or business, and applies only to plant closings.

#### Unforeseeable Business Circumstances

This exception applies to closings and layoffs that are caused by business circumstances that were not reasonably foreseeable at the time notice would otherwise have been required.

#### Natural Disaster

This applies where a closing or layoff is the direct result of a natural disaster, such as a flood, earthquake, drought or storm.

When the notices are given under these exceptions, they must include a brief statement of the reason for reducing the notice period in addition to the items required in notices.

Employers must inform affected employees of the specific action, and if layoff, what the expected duration. Employees must be notified of their expected separation date, and if there are any bumping rights. Also, in the case of layoff, employers should clearly outline the process for recall rights and applying for future positions with the organization if applicable.

It is *important to note* that temporary reductions of less than six months are not considered to be employment losses under Federal WARN. The size of the layoff also matters. Federal WARN is not triggered unless, at a minimum, there are 50 employment losses at a single site of employment in a 90-day period.

Just as important to note are state specific or “mini-WARN” legislation that extend notice requirements or reduce trigger points. Organization must comply with both federal and state specific laws and, when in conflict, the most beneficial [to the employee] language will apply.

### Step 5: Determine if Severance Packages and Additional Services will be provided

Many employers offer severance packages to their displaced employees. A written severance package policy allows employees to realize the steps involved in the layoff or reduction in force. Employers are not obligated to provide severance, 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 (review your plan documents); employer-paid COBRA premiums; outplacement services; counseling and resume workshops; and more.

### Step 6: Review Older Workers Benefit Protection Act (OWBPA) Regulations for Compliance

If releases from age discrimination are used in exchange for severance pay, they must comply with the OWBPA to effectively release claims under the Age Discrimination in Employment Act. The OWBPA addresses four different release scenarios, and each scenario contains five steps that must be followed to be compliant. Under the OWBPA, employers also need to provide workers age 40 and over a consideration period of at least 21 days when one older worker is being separated, and 45 days when two or more older workers are being separated. Additionally, employees must receive a revocation period of at least seven days.

During a reduction in force or as part of a voluntary exit incentive program, two additional requirements are needed to validate the releases. The employer must publicly identify the targeted employees, and secondly, the affected employees must be informed in writing of the job titles and ages of all individuals selected for the group program, along with employees in the same job classification or unit that were not selected for the program.

### Step 7: Conduct Communication Session(s)

These are difficult communications and should be handled professionally. This may reduce potential anger and resentment from employees. However, this will be emotional, and employees will express emotion in any number of ways and at various times. Organizations must ensure they are prepared for these communications and that all information has been collected

and is available to employees. Organizations 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.

Notifying the remaining workforce of the events and reasoning will help reduce potential rumors or misinformation. The organization may also want to communicate their financial position and its continued commitment to the remaining workforce and any shifts in organization goals and objectives. Many of the employees the employer is addressing had built strong friendships with co-workers that will or have left. Organizations 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.

Organizations 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 the departure date. Also consider offering ongoing question and answer assistance to those who have departed. If an organization has an employee assistance program, then this information should be provided as well to aid those employees and family members affected.

In closing, there are multiple considerations and determinations to be made in these types of situations. Do not act in haste. Rather, be thoughtful and ready to provide information.