

What are the legal risks of layoffs?

Q. In recent months, a sharp decline in revenue has forced us to consider downsizing. What are the legal risks associated with a layoff, and how can we minimize them?

A. The primary risk in conducting a layoff arises from how you select the employees to be terminated. Employees who are terminated could bring discrimination claims, arguing that they were chosen instead of their peers because of their age, race, gender, etc.

To minimize the risk of discrimination claims, develop a careful process for how termination selection decisions should be made. If possible, use objective criteria, such as seniority or the elimination of certain jobs.

If you use more subjective criteria (such as who has the best skill sets for the slimmer organization), have the decision-maker articulate in writing the basis for the selections and have the decisions reviewed by others, such as higher-level management, HR and legal counsel.

Before finalizing layoff decisions, analyze whether there is a disparate impact on any protected groups.

Also, consider offering severance in exchange for a release of claims.

Remember to comply with the requirements of the Older Workers Benefit Protection Act for those affected employees who are age 40 or older and with the requirements of the Worker Adjustment and Retraining Notification Act, depending on how many employees will be laid off.

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