

---

## **Layoff's Tips & Trends**

**by Lynne Eisaguirre**

---

If you've been laid off recently, you may be shocked and scared. If you're the boss who has to lay people off, you may be heartbroken that you have to dump some of your best people.

In this, as in many things, knowledge is power. While what follows is not legal advice, but offered for educational purposes only, it may help to understand some basic tips and trends about layoffs.

### **Layoff Trends**

At this writing, the January total for layoffs in this country is at least 150,000, according to the Chicago-based executive search firm Challenger, Gray and Christman. Jobless claims hit a 26-year high of 589,000. Caterpillar, Pfizer, Home Depot and General Motors were just a few of the giants with January surprises. If you've been laid off, or you're a boss doing layoffs, here are some basic tips.

### **Layoffs for Employees: Can They Do This?**

Lay-offs are, unfortunately, common in these days of the poor economy, downsizing, right-sizing, and mergers and acquisitions. If you're over forty and

have toiled for years in corporate America, you or someone you have worked with has most likely been laid off at least once.

If you're wondering about what your employer can or cannot do, what follows are the basics.

Under the WARN Act, the company must give sixty days advance notice of a mass layoff or plant closing. However, the law applies only to companies with 100 or more employees and only to certain types of layoffs. Government or union employees may have even more rights in this regard.

In general, most courts will not second guess layoffs or reductions in force (RIF), even if you think it's wrong, since they have a right to make bad business decisions, as long as they follow the law when doing it. There are three areas where courts might find a wrongful termination:

1. If the layoff was in fact not legitimate
2. If there was no valid criteria for the layoff; or
3. If some groups protected under discrimination laws were adversely and disproportionately impacted.

### **Layoffs as Excuses**

As to the first exception, if a laid off employee is replaced within six months, the RIF looks suspicious. Courts will sometimes find wrongful

terminations here, finding that the layoff was just an excuse to get rid of selective employees.

### **What is the Criteria?**

Some companies have written policies that establish criteria for selecting employees for layoffs such as seniority, job titles, or merit. All of these are legal as long as they're applied *consistently* and are backed by *documentations*. Criteria must be based on legitimate business decisions and should be in writing. If the criterion isn't applied consistently or could be viewed as discriminatory, a court might consider the termination wrongful.

### **Discriminatory Layoffs**

If you believe that you've been picked to be laid off because you were over the age of forty (age discrimination), or because of your sex, race, pregnancy or other protected characteristic, you may have additional rights to pursue.

Age discrimination, for example, is the fastest growing type of discrimination case in federal courts these days, partly because of layoffs. What happens is that companies decide to lay off workers to cut costs. They start looking at the salary numbers and notice that older workers are the most expensive. Someone comes up with the bright idea to lay off the most expensive workers; they do and then seem surprised when they're hit with a class-action age-discrimination

case. Workers frequently win these cases, especially if they're in a workplace—which is common—where there are lots of “jokes” about age.

### **Ask for what you Want**

Although it's extremely difficult, keep your cool and ask for details. Ask if they can keep you on the books for some period of time while you search for another job. Ask if you can continue to use your office. Ask what severance package they have in mind, if any. Ask if you can have the company pay for outplacement counseling. Ask for their cooperation in maintaining your health insurance, if you have it, through COBRA (Consolidated Omnibus Budget Reconciliation Act). Ask (although they may not be willing to tell you) for the details on the layoff in general—especially for information about others who are being laid off. Ask for a reference letter. While they may not be willing to give you any of these things, it never hurts to ask!

### **Layoffs for Bosses: What Can I do and Say?**

If you have the sad task of doing layoffs, what follows are the basics.

In some states and companies, a layoff means that you have to offer the employees who were laid off their jobs back if they become open again. A RIF (reduction in force) refers to a permanent reduction.

### **Follow all the Criteria and Policies**

Obviously, you should follow all your companies' procedures and policies in doing the layoff. Courts will generally not question whether there was a business reason for the layoff. Some traps, however, include situations in which the layoff isn't really a layoff but an attempt to get rid of older or more expensive workers. Even if you don't believe this is the intent, you need to look at the numbers to make sure that there's not what the courts call a "disproportionate impact" on the oldest workers or any other group with a particular protected characteristic. The courts will question things if you don't consistently apply the criteria for the layoff or if the layoff isn't legitimate. If the laid off employee is replaced within six months, the RIF looks suspicious. Even if you give the new employee a different job title, it looks phony.

If you have a layoff and then your budget is restored, you should call the people you laid off and give them an opportunity to come back to work. Even if you've restructured the job, you should interview the laid off employees as a matter of fairness; they may be able to do the new job.

If you're using a legitimate layoff to get rid of a non-performer, you should have documentation to back up the non-performance.

You should have legitimate criteria for the layoff. The criteria should be in writing, and it should be company-or department-wide. Allowing one manager to decide about his or her own criteria is dangerous.

## **What to Say during Layoffs**

When you talk with your employees about layoffs, it should be very simple. Tell them the truth, whatever the legitimate business reason might be. If you can offer severance packages and outplacement counseling, you will save money and heartache in the long run. Employees are less likely to sue if they've received these benefits.

Last but not least, express compassion. It's a big deal for most employees to lose their job. Tell them how sorry you are, and let them express whatever emotions they have. Studies consistently show that employees who are treated with dignity and respect tend to sue less often than other employees. Even when you're delivering the bad news you can act humanely.