

# THE DAILY RECORDER

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## Minimizing the Risks Associated with Layoffs

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Call it a recession or a depression; the consequences of this economy are the same for an increasing number of employers in the country—employee layoffs. Not coincidentally, employment lawyers experienced a surge of business at the end of 2008 from employers seeking advice on how to reduce the potential liability associated with reductions in force.

For example, larger employers must comply with the federal Worker Adjustment and Retraining Notification Act (WARN) and California's Baby—WARN. Both of these laws require employers to give employees and local public officials at least 60 days' notice of plant closings, "mass layoffs," and similar actions. The particular provisions of WARN and Baby-WARN are complicated and beyond the scope of this article. (We addressed the requirements of WARN and Baby-WARN in previous articles.) Suffice it to say that employers who have employed at least 75 people in the last 12 months must be aware of their responsibilities under these laws.

Of course, employers of all sizes face potential liability for their layoff decisions. Employers must ensure the process used to select affected employees is fair and consistent. Even if the selection criteria are valid, employers can get into trouble for failing to properly calculate final pay and provide proper notices to employees. While some employers offer their employees separation pay

conditioned on receipt of a general release agreement (to avoid liability for any future potential claims), such agreements are not always drafted properly and do not necessarily protect employers from every type of claim.

Ultimately, there is no substitute for knowing the law and implementing the necessary policies and procedures to avoid, or at least minimize, layoff risks.

### Discrimination and Wrongful Termination Claims

Numerous federal, state, and local laws protect employees from discrimination and wrongful termination. The two primary legal frameworks governing unlawful discrimination are the federal Title VII of the Civil Rights Act of 1964 and California's Fair Employment and Housing Act (FEHA).

Employers can minimize the risk of wrongful termination claims by ensuring employees are treated fairly in the separation process.

Employers should carefully analyze the positions at issue when identifying that employees will be affected by a layoff. When analyzing affected positions, employers should consider whether the layoff is disproportionately affecting any protected class of employees and, if so, whether there is a legitimate business explanation for the disparity. High-level managers in the organization, such as Human Resources, should

participate in the process to provide an additional level of review.

In addition, employers should tell the truth about why the employee was selected for layoff. If the decision was based on subjective criteria, such as work performance, rather than objective criteria, such as years of service, the employer must be prepared to defend its decision. Appropriate documentation of the decision-making process is key.

### Leaves of Absence

When making layoff decisions, employers often struggle with how to handle employees who are either on a protected leave of absence at the time of the decision, or who have a history of taking such leaves. Despite the numerous federal, state, and local laws that provide protected leaves to employees, employers are not required to eliminate an employee from the layoff list because she is currently on leave, or only returned from leave a month ago, for example.

Both the federal Family and Medical Leave Act (FMLA) and the California Family Rights Act (CFRA) provide that an employee who is on a leave of absence has no greater right to a job than the employee would have had if she were actively working. In other words, if the employee's position is eliminated for a legitimate business reason while she is on leave, she would not have a valid claim under the FMLA/CFRA because of a layoff.

The law compels the same result for employees who have active workers' compensation claims, or who recently participated in an internal sexual harassment investigation, for instance. Participation in these activities does not insulate employees from being laid off due to a decline in business. That said, unfortunately, some employers make the mistake of targeting employees who are on leave because, after all, "they are already off work anyway." Obviously, taking this approach is problematic and likely to result in a legal claim.

In short, when making layoff decisions, employers should not put any weight on an employee's leave history. If the layoff is a response to the poor economy, then the employee's leave history is irrelevant.

### Final Pay

California has very strict time requirements for the payment of final wages on separation of employment. When an employer terminates an employee, all wages earned and unpaid are due immediately at the time and place of termination. "Wages" include bonuses, commissions, and accrued vacation. Under Labor Code section 203, failure to pay all wages due at time of termination may result in the payment of "waiting time penalties" to the employee in the amount of one day's wages for each day the final pay is late, up to a maximum of 30 days.

Employers who are caught up in administering layoffs sometimes forget about these requirements. Layoff checklists can help avoid problems in this area.

### Separation Notices

There are various notices that must be provided to employees upon termination of employment. The federal Consolidated Omnibus

Budget Reconciliation Act of 1985 (COBRA) and the companion state law, Cal-COBRA, require employers to notify an employee of COBRA rights at the time of a qualifying event, including termination of employment.

Similarly, pursuant to the California Labor Code, employers must provide every employee with a notice regarding the availability of continued medical, surgical, or hospital benefits through the Department of Health Care Services' Health Insurance Premium Program (HIPP). A copy of the HIPP notice may be obtained from the agency at <http://www.dhcs.ca.gov/formsandpubs/forms/Documents/CobraEnglish.pdf>.

Employers must also provide to employees a pamphlet published by the California Employment Development Department (DE 2320). The pamphlet summarizes the employee's rights to unemployment benefits. A copy of the pamphlet may be obtained from the EDD's website at [http://www.edd.ca.gov/pdf\\_pub\\_ctr/de2320.pdf](http://www.edd.ca.gov/pdf_pub_ctr/de2320.pdf).

Finally, the California Unemployment Insurance Code requires employers to provide to employees written notice regarding changes in their employment status. The notice must include, at a minimum, the name of the employer, the name of the employee, the social security number of the employee, whether the action is a termination or a layoff, and the date of the action. The California Chamber of Commerce has a sample form available at [www.hrcalifornia.com](http://www.hrcalifornia.com).

### Separation Agreements

Employers are not legally required to provide separation pay to terminated employees. However, some employers choose to do so in exchange for a release of any claims

the employee may have against the employer. This is particularly useful if the employer has reason to believe the termination may result in litigation.

With respect to group layoffs, waiver and release agreements pertaining to age discrimination claims under the Age Discrimination in Employment Act ("ADEA") must carefully comply with the Older Workers Benefit Protection Act ("OWBPA"). The OWBPA contains specific requirements applicable to termination programs offered to a group or class of employees as part of a layoff. Employers must disclose to employees, in writing: (a) the class, unit or group of employees covered by the termination program; (b) the factors affecting eligibility for the program; (c) any time limits that apply to the program; (d) the job titles and ages of all employees who are eligible for the program; and (e) the ages and titles of employees in the same class, unit or group who are not eligible or selected for the program. Employers who fail to comply with these specific requirements risk an age discrimination lawsuit even if an employee signs a separation agreement that contains an appropriate ADEA waiver.

Releases cannot include waivers of unpaid wages. However, The Division of Labor Standards Enforcement ("DLSE"), the agency in charge of enforcing California's wage and hour laws, recognizes an employer's and employee's right to settle disputed wage claims. Therefore, separation agreements should include an acknowledgment by the employee that she has received all wages due. Other acknowledgements may be appropriate depending on the situation (e.g., a non-exempt employee could acknowledge she reported all hours worked, etc.).

Until recently, the courts disagreed about whether an employee could waive FMLA claims in a general release. The recent final FMLA regulations clarified that Department of Labor approval is not required to release FMLA claims. So, employers should now include the FMLA in the list of laws covered by the release. In addition, separation agreements should include an acknowledgement that

the employee has taken and/or was not denied any legally required leave.

### Conclusion

Unfortunately, layoffs that occur during economic downturns often lead to litigation. The pool of potential litigants grows every day as layoffs are reported across the country, across industries, and across employers of every size. The

saying, “an ounce of prevention is worth a pound of cure” has never been more applicable to today’s economic and legal climate. At a time when cost cutting is a matter of survival, employers that take preventative measures during layoffs to reduce their legal exposure will see a significant return on their investment.

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