

JACKSON LEWIS RIF CHECKLIST

1. Consider cost-saving alternatives to conducting group termination programs. Management's options for reducing expenses without reducing headcount include: (a) hiring freezes; (b) wage and bonus freezes; (c) bonus reductions; (d) postponement of wage increases; (e) fringe benefit reductions; (f) job sharing; (g) employee transfers; (h) work furloughs of limited duration; (i) reducing work hours with proportionate pay cuts; and (j) discontinuing the use of temporary and part-time employees and redistributing their work.
2. Articulate management's legitimate business reasons. The need for cost savings or a reduction in the number of full time positions are among the most common reasons for a reduction in force ("RIF"). All levels of management should understand the benefit of the downsizing because in defense of a discrimination charge, the employer may have to produce witnesses who can articulate a legitimate business reason for the reduction. Before implementing a workforce reduction program, the employer should ensure there is a demonstrable economic or other business need to lay off employees. Whenever possible, the employer should prepare an internal memorandum explaining the economic and other business considerations necessitating the reduction in force.
3. Review any prior written policies for conducting reductions in force. If there have been prior layoffs, the employer should be aware of any existing policies and procedures that define the criteria for making layoff selections or identify the severance benefits to be provided. Disciplinary and termination policies in employee handbooks should also be reviewed. While the employer may want to change its prior policies or procedures, it should not assume that existing policies and procedures can be ignored. Employees may raise issues in reliance on existing policies and procedures which previously have been distributed to them. Utilizing reduction procedures and benefits that are consistent with past practice can minimize employee resentment and claims of unfair treatment based on comparisons to the manner in which prior workforce reductions were implemented.
4. Consider implementing voluntary attrition programs before terminating employees involuntarily. Employers often offer early retirement incentive programs and voluntary resignation incentive programs to avoid or minimize the need to discharge employees. If enhanced pension and health care benefits (including retiree health benefits) are offered in connection with such programs, the employer must review and if need be

amend its pension and group health insurance plans to ensure those benefits can be made available to eligible employees. Employers sponsoring voluntary attrition programs must also create a timetable for the sequencing and implementation of one or more group termination programs.

5. Determine whether to obtain waivers and releases. Whenever possible, employers should obtain general releases from employees who participate in voluntary and involuntary termination programs. Attainment of such waivers dramatically reduces employer exposure to individual and class-wide claims of discriminatory discharge. If employees selected for layoff are 40 years of age or older, any releases of federal age discrimination claims under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* (“ADEA”), must comply with the Older Workers Benefit Protection Act, 29 U.S.C. § 626(f) (“OWBPA”). This will affect the timing of the reduction program, because employees who participate in group termination programs must be given 45 days to consider the release of ADEA claims. To be enforceable, releases must be supported by consideration over and above any benefits to which employees are entitled as a matter of policy or past practice. From a practical perspective, the consideration must be sufficient to provide affected employees with a meaningful incentive for releasing their right to pursue legal claims against the employer. Conversely, the employer should confirm it can afford the aggregate cost of the anticipated consideration for any group termination program before offering the program to its employees.
6. Ascertain any notice requirements for plant closings and/or mass layoffs. Determine whether the number of employees to be reduced will trigger the notice requirements of the Worker Adjustment Retraining and Notification Act, 29 U.S.C. §§ 2101-2109 (“WARN”), or any state plant closing statutes. If WARN is implicated, the timetables for notifying employees of their terminations will be affected.
7. Determine the benefits to be offered to employees being laid off. Any existing employment contracts, benefit plans, employee handbooks and other policy statements addressing the amount and formula for calculating severance pay and benefits must be reviewed. For example, severance plans should be reviewed and ambiguities regarding benefit calculations should be eliminated. If receipt of severance pay is not conditioned upon the execution of a general release, consider amending the severance plan or policy to apply this condition to all employees who become eligible for severance benefits. Incentive compensation plans should be reviewed and ambiguities regarding pro rata payments, employer discretion and eligibility conditions should be eliminated. Employee loan agreements

should be reviewed to ensure payment can be accelerated and offset from severance pay. After applicable benefit plans and policies have been reviewed, management must decide which benefits will be offered to affected employees, such as severance pay, outplacement services and/or continuation of medical benefits. Management should also contact outplacement companies to determine the services they offer and the costs of those services.

8. Determine where the layoffs will occur. Generally, layoffs will occur in the departments or units of the company most significantly affected by the underlying reason for the reduction. However, it may be necessary or desirable to implement company-wide reductions. Obviously, this decision should be made in the initial planning stage.
9. Review collective bargaining agreements for procedural requirements and consider bargaining obligations. If unionized employees are selected for layoff, review applicable collective bargaining agreements for clauses governing selection procedures and recall rights. If the employer wishes to offer union employees the right to participate in a voluntary attrition program, or wishes to lay off unionized employees who are not covered by a collective bargaining agreement, the employer has a duty to bargain with the union. If the decision to conduct voluntary or involuntary layoffs can be influenced by labor costs, the employer must bargain with the union over the decision to implement the program. If the decision cannot be influenced by labor costs (e.g., the employer is going out of a line of business), the employer must bargain with the union over the effects of the decision to implement the program (e.g., the benefits being offered). If the employer bargains in good faith to impasse, it can unilaterally implement its final offer to the union.
10. Consider establishing a layoff committee. There are multiple tasks involved in implementing a successful workforce reduction. It is helpful to have a layoff committee or task force to assume responsibility and take the necessary steps to accomplish the reduction. It is desirable to select individuals who are members of classifications protected by law (e.g., race, gender, age) to serve on the committee. This can help ensure fairness and negate an inference of bias in the decision-making process.
11. Determine criteria for layoff selection. It is imperative to have a written plan or guidelines outlining how individuals will be selected for layoff. Adherence to objective selection criteria will infuse the process with consistency, especially when employees are being selected from units or departments throughout the company. Permissible criteria commonly used to evaluate and select employees for reductions in force include: (a)

length of service or seniority; (b) category (e.g., first eliminate all temporary, part-time or contract employees); (c) strict use of pre-existing job performance data; and (d) ability to perform work functions remaining after a layoff (and any consequent reorganization) is completed. When job performance is used as criterion, whenever possible employers should assess performance based on written performance evaluations and counseling notices. When ability to perform remaining work is used as a criterion, employers should identify the essential functions of each available job and the skills best suited to that position.

12. Determine whether to offer protections against layoff. Sometimes employers offer employees protection against layoff, such as: (a) allowing affected employees to transfer to other vacant positions within the organization; (b) allowing affected employees to bump other employees; (c) permitting managers to transfer to non-managerial positions; and (d) providing high-level management review for certain employees (e.g., high salary or long-service employees). The decision to offer such protection should be made prior to implementing the layoff.
13. Review proposed layoff selections prior to implementation. It is critical the process include a review of each layoff decision to assess the justification for each selection and the risk of any adverse impact against members of classifications protected by law. It is also important to determine if an employee slated for termination can allege a claim for retaliatory discharge based on his or her expression of opposition to employer practices, participation in administrative agency proceedings or utilization of legally protected leave of absence. Legal counsel should be involved in this phase of the process.
14. Ensure selection decisions are supported by adequate documentation. In addition to utilizing written selection guidelines, documented evidence of relative job performance and documented confirmation of essential job functions and skills, document the rationale for each selection decision whenever possible. If a terminated employee refuses to sign a release and attempts to challenge the employer's termination decisions, proper documentation enhances the objectivity of the selection process and provides an evidentiary basis for proving the employer had legitimate, nondiscriminatory reasons for its actions.
15. Prepare a script for communicating layoffs. The layoff committee should prepare a script or outline of points that management should make when meeting with employees selected for layoff. Whenever possible, teams of two management officials should meet with selected employees individually to convey the layoff decision. Notes of each interview should

be written and retained to help the participants subsequently remember what took place, if necessary. In conducting the interviews, keep to the point and: (a) be brief, consistent, direct and firm as to the layoff decision and explanation; (b) specify whether the layoff is permanent or temporary — explain any available recall or rehire rights; (c) explain any available severance benefits, health insurance conversion rights and other termination benefits; (d) discuss any outplacement services and other transitional services that will be offered; (e) give employees written information about their termination benefits and be prepared to respond to questions regarding unemployment insurance benefits; (f) anticipate employees' shock, surprise, and difficulty absorbing the information; (g) describe final paychecks, including pay for accrued vacation and sick time; and (h) make realistic arrangements for the return of company property.

16. Comply with legal requirements for terminating the employment relationship. Before communicating termination decisions, employers should review state law requirements for tendering final paychecks, paying accrued but unused vacation and sick time, paying earned bonuses and other earned incentive compensation, and deducting monies owed to the employer from the employees' final paychecks.
17. Have a procedure for following up during the layoff process. Employees who have been laid off should be afforded respect and concern in the time following the layoff announcement, particularly when communicating the details of benefits, job references, etc. Affected employees should be directed to contact a designated employee relations official with follow-up questions. Other supervisors should be advised to refer questions from laid off employees to the designated contact person.
18. Decide whether references will be given. A determination should be made whether, and if so, how, references will be provided. Requests for references should be answered in a consistent manner.
19. Assess any potential risk of harm to co-workers and company property. Employees with sensitive positions or who pose a risk of harm or sabotage to other employees or company property may require special treatment. Determine whether there are any employees who pose potential problems and plan their interviews to afford the least opportunity for disruption or subsequent misconduct. Alert security personnel and revoke the employees' access to company property, such as computer systems, as soon as possible. Employees who are determined to pose a risk of sabotage can be accompanied by an escort out of the facility after their interviews. The need or desire to escort a terminated employee from the

premises should be balanced against the employee's sense of dignity and self-respect. An employee who believes he or she was treated disrespectfully may be more likely to bring a legal claim against the employer. Therefore, implement all extra security measures as discreetly and respectfully as possible.

20. Heighten management awareness to the sensitivity of all employees. Reductions in force have a significant impact on all employees, those laid off and those remaining. Employers should be sensitive to the importance of treating employees fairly and with respect. Those involved in the decision-making process must prevent any premature disclosure or leaks of information.
21. Consider potential immigration issues pertaining to laid off employees. Employers should review employee records and Forms I-9 to determine whether any employees affected by a reduction in force are on temporary employment visas (e.g. H-1B, L-1, E-1/E-2 or other temporary visas). Note that employees who have a Permanent Resident Card (also known as an Alien Registration Receipt Card), or an Employment Authorization Card, have unrestricted employment authorization and are not in the same situation as employees on temporary visas.
22. Consider structuring severance payments to address potential immigration issues. If severance pay is given, decide whether aliens on temporary visas will receive severance in lieu of salary. If appropriate, consider whether to structure the extension of payroll time with aliens on temporary visas.
23. When appropriate, notify USCIS. At the appropriate time, notify the U.S. Citizenship and Immigration Service ("USCIS") of the termination of a temporary alien's visa petition.
24. If necessary, reimburse travel expenses for temporary aliens with H-1B visas who must return to their permanent residence after their employment ceases. If a temporary alien on H-1B visa status who is laid off prior to the expiration of the visa term is unable to locate another employer in the United States that will sponsor his or her visa, the employer must reimburse the employee's one-way travel to his or her permanent residence. If the temporary alien obtains alternate employment, the original employer should: (a) offer the temporary alien an airplane ticket; and (b) confirm the ticket offer, and the employee's rejection of the ticket offer, in writing.

25. Review the visa status of alien employees selected for layoff. The employer should determine whether any of alien employees selected for layoff are in the process of obtaining an employment-based immigrant visa. If the employee is scheduled for termination prior to the 181st day of his or her Adjustment of Status, he or she will be at risk of losing the benefits of the immigrant visa. In this situation, the employer should determine whether it wishes to accommodate the employee by preserving his or her employment until after the 181 day period expires. In deciding whether to make such an accommodation, the employer must be careful to avoid creating a basis for a claim of nationality or citizenship discrimination.