



## Practical Insights, Volume V, Issue 2

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### Top Ten Concerns When Reducing Payroll Costs

#### 1. What Are the Risks In Reducing Employee Benefits?

You risk violating rules for qualified pension plans if you "discriminate" in eligibility, participation, accrual or vesting, or you cutback on accrued benefits. On the other hand, you are permitted to discriminate in providing health benefits to different employee classifications under an insured health plan (but not under a self-insured plan). You are also permitted to provide different severance payouts for different employees, and, if employees are given adequate advance notice, require that unused annual leave be forfeited on a termination for any reason.

#### 2. What Are the Risks in Reducing Hours of Work?

You risk unlawfully rendering employees ineligible for pension plan participation or contributions or unwittingly excluding them from coverage under a group health plan. On the other hand, you may reduce hours or eliminate entire days or workweeks, if you give adequate advance notice to employees. However, tying a reduction in hours directly to a reduction in salary can create the risk of declassifying your exempt employees.

#### 3. What Are the Risks In Reducing Salaries?

You risk declassifying your exempt employees (those who meet the tests for an executive, administrative, or professional employee) if you change work schedules to increase or decrease salaries more than two or three times in any twelve month period. On the other hand, you may reduce salaries as long as exempt employees receive the same amount of compensation each week (not below \$536.10 in New York), regardless of how many hours worked. Give notice in advance of the affected payroll period.

#### 4. How Do I Choose Whom to Layoff?

It is best to use an objective criterion, like seniority, but it may result in some of your best workers being laid off. Alternatively, you may "force rank" your employees for the sole purpose of the layoff. This ranking compares the relative capabilities of your employees in relation to the capabilities needed in your restructured jobs.

#### 5. How Long Should the Period Be Between Notice and Actual Termination?

You should keep the period between notice and actual termination as short as

possible. This can help minimize the spike in workers' compensation and disability claims that is often experienced by employers in connection with a layoff.

#### **6. Is There a "Best Practice" Way To Terminate An Employee?**

How many times have we heard: "it's not what he did; it's the way he did it." Choose your words, demeanor and tone carefully. Avoid careless language. Be sensitive to the individual's situation. When you are conducting a reduction in force, do not bring up old grievances, problems or criticisms that were not factors in your decision to layoff. Angry employees are more apt to sue.

#### **7. When Can I Get a General Release Against Any Claims By An Employee?**

When you give something of additional value to an employee; something more than s/he was otherwise entitled to receive on termination. Examples are: enhanced separation pay, continuation of a paid benefit, a good recommendation over and above standard policy, and waiver of a non-compete agreement.

#### **8. Can I Use the New COBRA Subsidy In Exchange for a General Release?**

Employees involuntarily terminated during the period 9/1/2008 through 12/31/2009 are eligible to receive a federal subsidy of 65% of their COBRA premium for nine months. If you pay part or all of the employee's share, the subsidy will be reduced or eliminated, and the entire cost will have to be paid by you, the employee, or both of you, in which case the continued benefits can be used in exchange for a general release.

#### **9. How Does the New New York WARN Act Affect My Company?**

Subject to limited exceptions, New York's newly-enacted Worker Adjustment and Retraining Notification ("WARN") Act require employers with 50 or more full time employees to give 90 days written notice to employees who, among other things, suffer an "employment loss" (*i.e.*, a reduction of hours of more than 50% during each month of a six month period or a layoff of more than 6 months) in connection with a covered mass layoff, plant closing or relocation. This law covers circumstances involving as few as 25 of your employees, if they compose at least 33% of your workforce at a single site of employment. If covered, you must give 90 days advance notice to affected employees or you will be liable for 60 days of back pay and benefits.

#### **10. After A Layoff, Will I Be Able To Keep My Company Union-Free?**

You are vulnerable to union organizing if your employees believe you are not looking out for them, you do not have their interests at heart, or you do not appreciate their efforts. After any reduction in staff, salary or benefits, you should meet with your employees. Identify their concerns and issues. Determine their priorities. And, going forward, develop the most effective ways to obtain input from your employees.

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