

EMPLOYERS: PROCEED WITH CAUTION - MANAGING LAYOFFS

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Recent mergers and acquisitions and a volatile economy have prompted reductions in workforce. Although employers are familiar with the exposure associated with an individual termination, layoffs affecting two or more employees can present additional legal pitfalls.

- When thinking of downsizing, employers should define and articulate the pertinent business needs.
- Before downsizing, the employer must consider representations or promises made to employees regarding workforce reductions, including those concerning the criteria used or procedures followed.
- Despite applicable at-will employment laws, employers may be exposed to discrimination liability if employees can show they were selected for layoff because of their membership in a protected class such as gender, race, national origin, religion, age, disability and, under Nevada law, sexual orientation.
- Before selecting which employees to layoff, employers should establish layoff criteria, including objective or subjective factors, or a combination.

In addition to these potential pitfalls, other laws set forth affirmative obligations for employers considering reductions in workforce. For example, the National Labor Relations Act requires employers with unionized employees to bargain over the effects of the layoffs. Under the Worker Adjustment and Retraining Notification Act (WARN Act), certain employers must give 60 days advance notice to employees, certain local officials and any applicable bargaining

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representative prior to mass layoffs or other substantial reductions in force. In addition, most layoffs constitute a qualifying event under the Consolidated Omnibus Budget Reconciliation Act (COBRA) so that covered employers must provide affected employees with written notification of their right to elect continuation of healthcare benefits.

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