

CAN YOU LAY OFF REMOTE WORKERS FIRST? 4 KEY CONSIDERATIONS FOR EMPLOYERS FACING RIFS

Insights
Mar 8, 2024

Here's the scenario: You were just told that your company needs to reduce its workforce by 10%, and it's your job to put together an action plan for this grim assignment. But there's a catch. The leadership team wants you to lay off all the remote workers first to hit this target. They say it shouldn't be a problem since you're an "at-will" employer, but you're not so sure. You want to know the legal considerations you should make before creating your action plan — and that's a good idea because there isn't a one-size-fits-all solution. Here are four key questions to consider as you create your strategic plan for these difficult decisions.

1. How Has Your Company Responded to the Remote Work Boom?

- Remote work is now an accepted option in many industries — and approximately 22% of the workforce will be fully remote by 2025, [according to reports published by Forbes Advisor](#).
- While some employers are calling workers back to the office, it remains a desired option for a significant percentage of the workforce. Notably, an astounding 98% of workers want to continue working from home, at least part of the time, according to Forbes Advisor.
- Business leaders, however, are eager to bring employees back to the office. In fact, 64% of CEOs said they expect a full return to the office before the end of 2026, [according to research by consulting firm KPMG](#). Moreover, 87% said

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they plan to reward employees who return to the office with favorable assignments, raises, or promotions.

- Teambuilding, collaboration, productivity, innovation, and pricey rent for unused office space are often cited as reasons to bring employees back together at the worksite.
- As the labor market shifts and hiring frenzies are replaced with layoff plans, executives might see this as an opportunity to shift back to an “office first” philosophy.
- Before requiring employees to come back onsite or selecting workers for a layoff based on their remote status, however, you’ll want to think about the impact on your company culture, which has surely evolved since pre-pandemic times.
- You’ll also want to consider the impact on morale and your recruitment and retention efforts. Is this a sustainable plan for your particular business, industry, and location? [You can read more here about the potential pros and cons of mandatory return-to-work policies.](#)

2. What Does At-Will Employment Really Mean?

- Your leadership team said they feel comfortable laying off remote workers first because you operate only in states that follow the employment at-will doctrine — which means you or the employee can end the employment relationship at any time and for any lawful reason. In fact, every state except Montana follows this general rule, though the details vary from state to state.
- Applicable at-will employment rules will still apply to remote workers, but terminations are typically not so simple or straightforward. First, there are some exceptions to at-will employment to consider, including situations where:
 - An employment contract or collective bargaining agreement sets other terms;
 - A promise of job security is made in such a way to imply a contract of employment;
 - A decision to terminate employment violates public policy or is otherwise unlawful under employment and labor laws; or

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- A specific state or local rule requires a reason for termination (such as NYC's "just cause" rule for fast-food workers).
- You'll also need to consider state-specific rules that impact the termination process, which may include notice periods, final pay obligations, unemployment insurance, and other requirements that vary by location.
- Additionally, you should determine whether notice is required under the federal or applicable state WARN Act.
- So, what does all this mean for your layoff plan?
 - You may likely be able to lay off remote workers under an at-will employment arrangement — or if the reasons for the termination satisfy "good cause," "good faith," "just cause," contractual, or other applicable standards.
 - But you'll want to carefully review each affected employee's conditions of employment, as well as the federal, state, and local laws that apply to your remote workforce. This illustrates the importance of knowing where your employees are actually located.
 - You'll also want to consider potential discrimination claims and the best practices discussed in more detail below.

3. Do Remote Workers Have Any Specific Job Protections?

- Although remote workers do not have separate job protections simply because they work from home, they may work from home for a reason that is protected by the law. Indeed, research shows that workers with disabilities, people of color, and women are more likely to work from home.
- The Americans with Disabilities Act (ADA) protects workers with disabilities, and Title VII of the Civil Rights Act prohibits covered employers from discriminating based on race, color, national origin, religion, and sex. These and other federal, state, and local employment laws could come into play.
- Perhaps you hired a customer service representative who works from home as a reasonable accommodation under the ADA. Will laying off this employee solely because they work remotely result in a discrimination claim?

- What if many of your project managers work from home to balance work and caregiving responsibilities? Are they predominantly female employees? Using remote worker status as the layoff criteria could be unlawful if it has a disparate impact on women (or another protected category of workers).
- A disparate impact claim may arise when an employer does not intend to discriminate against someone, but a facially neutral process – such as laying off remote workers – ends up having a statistically significant negative impact on a certain protected class of workers (such as the female employees in the example above).
- Once the employees establish the disparate impact, it's up to you to demonstrate that the policy is genuinely job-related and necessary. So, you'll want to be prepared with documentation. If you meet this burden, the employees have the opportunity to establish that there was a less discriminatory alternative that would meet the business necessity.
- You should also consider applicable retaliation laws and whether the layoff impacts employees who engaged in protected activity, such as filing a discrimination claim or complaining to Human Resources. Be ready to show your legitimate business reasons for eliminating jobs.
- Because of these potential legal pitfalls, it's a good idea to use clear, objective criteria to make employment decisions, including layoff plans.

4. Are There Any Additional Best Practices to Consider?

While you may be able to layoff remote workers first, there are a host of legal considerations to make when conducting any reduction in force. You can prepare by taking the following steps:

- **Determine the Goals.** This may impact the selection criteria and other aspects of the layoff.
- **Consider Alternatives.** Before selecting employees for a reduction in force, consider alternatives, such as whether employees can be relocated or offered alternative positions.
- **Create a Process.** Develop a defensible process for making selections and train managers on how to use it. It

is often a mistake to leave this to the discretion of managers, as this can lead to decisions that appear subjective, unfair, or discriminatory.

- **Review for Potential Adverse Impacts.** Evaluate the list of affected employees to determine whether there are any potential adverse impacts based on a protected category (such as race, sex, or age).
- **Determine Whether WARN Notice is Required.** Once the selections are finalized, calculate how many employees will be impacted and the facilities in which they work to determine whether WARN notice may be required under federal or state law. Federal WARN requires 60 days' advance notice of a mass layoff or plant closing, whereas some states, like New York, require up to 90 days' advance notice and/or have additional notice requirements. This analysis may get complicated for remote workers in various locations, so it's a good idea to reach out to your attorney for guidance.
- **Prepare Separation Agreements.** Decide whether separation pay will be offered (or is required by company policy or state or local law) and if so, work with legal counsel to prepare separation agreements.
- **Develop Key Communications.** Prepare communications to affected employees, potential communications to non-impacted employees, and talking points for managers. You may want to collaborate with the leadership team, the HR department, and legal counsel in the planning process, along with the company's communications or public relations teams.
- **Miscellaneous Considerations.** You should prepare for the various additional steps necessary to carry out an effective RIF. This could include developing outplacement and other support resources for your workforce. These final steps will largely be tailored by your company's own individual circumstances. For more information, our [RIF/WARN Toolkit](#) outlines the many considerations regarding layoffs.

Conclusion

If you're contemplating a RIF or other layoff impacting your remote workers, your Fisher Phillips attorney is ready to help. You may also reach out to authors of this Insight or any

attorney on our [Reductions in Force \(RIFs\) Team](#). We will continue to monitor the latest developments related to this area and provide updates as warranted, so you should ensure you are subscribed to [Fisher Phillips' Insight System](#) to gather the most up-to-date information directly to your inbox.