

**Construction Employment in 11 Largest Metropolitan Areas
August 2008-August 2009**

Area	Aug. 08	Aug. 09	12-mon. % change	12-mon. Gain/loss
Dallas-Fort Worth-Arlington, TX	197,400	187,400	-5%	-10,000
New York-Northern New Jersey-Long Island, NY-NJ-PA	376,400	346,300	-8%	-30,100
Washington-Arlington-Alexandria, DC-VA-MD-WV	175,100	158,500	-9%	-16,600
Los Angeles-Long Beach-Santa Ana, CA	36,800	206,700	-13%	-30,100
Philadelphia-Camden-Wilmington, PA-NJ-DE-MD	128,200	110,700	-14%	-17,500
Seattle-Tacoma-Bellevue, WA	124,100	106,600	-14%	-17,500
Chicago-Naperville-Joliet, IL	215,900	184,600	-14%	-31,300
Miami-Fort Lauderdale-Pompano Beach, FL	131,000	110,100	-16%	-20,900
San Francisco-Oakland-Fremont, CA	110,900	93,000	-16%	-17,900
Boston-Cambridge-Quincy, MA-NH NECTA	98,100	81,000	-17%	-17,000
Detroit-Livonia-Livonia, MI	68,800	53,700	-22%	-15,100

Laboring Through Layoffs

Finding Balance When The Economy Forces You To Cut Your Workforce

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The current economic cycle has triggered employers to rein in costs, trim failing business units and, in some cases, prepare for closure or bankruptcy. Many businesses are taking action in response to the financial circumstances, such as significant drops in revenue or loss of credit. Other businesses recognize that current market conditions may worsen, and that preventative action now may prevent greater fiscal harm to the business later. In these circumstances, a reduction in force—the termination of a number of employees—is often a necessary business tool to improve a faltering business model.

IDENTIFYING AND DOCUMENTING THE DECISION

Just like any individual termination decision, a business should carefully construct and define the basis for any reduction in force. Regardless of size—company-wide, department, etc.—the larger goals of the reduction in force should be well delineated and documented. Consistent internal documentation should define the legitimate reasons for the reduction in force. This documentation will be necessary for the business if it must defend its business decision as illegal or discriminatory.

The basis for the decision must also be lawful and comply with federal, state and local anti-discrimination laws. Thus, a decision to terminate a large number of employees to revitalize the company with a younger workforce would be unlawful. However, cutting 10 percent of its work force because the company lost a significant credit facility would be lawful.

A business should be very cautious to not permit decision makers to disguise unlawful discriminatory motive with a legitimate business reason, or to otherwise color the termination program with some unlawful discriminatory motive. Also, a business should consider whether alternative employee-related measures may result in similar cost savings. Although employment termination can result in an immediate reduction in labor costs, re-filling those spots at a later time when the economic cycle changes also comes with significant direct and indirect costs. Examples of alternatives include: reducing or freezing compensation, hiring freezes, changes or reductions in benefit structures, periodic shutdowns, reduced hours or workweeks or bringing sub-contract work back in-house.

TYPES OF TERMINATION PROGRAMS

Involuntary Termination Program

The involuntary termination program should be designed with three questions:

- What is the ultimate goal of the reduction in force
- Which job classifications to target for reduction to meet that goal
- Which employees within those job classifications to eliminate. Only when specific job classifications are identified should the business then focus on which employees within those classifications to eliminate.

In many circumstances, a business may consider other alternatives, such as combining job classifications, or moving employees otherwise subject to termination into vacant positions or positions that will allow the termination of a less-qualified or lower performing employee.

The business should establish quantifiable criteria for selection of employees from the designated job classifications, such as productivity, skills, attendance and disciplinary records, avoiding subjective assessments.

Voluntary Separation Program

A voluntary separation program (VSP) offers an incentive to employees to voluntarily terminate employment. Typically, a VSP is offered to a group of employees based on some particular, non-individual criteria, such as by job function, years of service, or compensation levels. The VSP is designed so that an employee must release any claims against the business before accepting an incentive. To be non-discriminatory, the pool of employees selected for a VSP is typically broad, and may sometimes include employees that a business would not have selected for an involuntary termination program.

Waivers

As part of a voluntary or involuntary termination program, a waiver—a release of claims—can be instrumental in reducing a business’s exposure to risk resulting from claims associated with the reduction in force or claims associated with an employee’s tenure with the business. A release of claims must be knowing and voluntary. A business must also provide consideration for the waiver.

Typically, a business could provide extra severance pay or some other incentive that an employee did not already have a right to receive in exchange for an employee’s release of claims. If, however, the business simply provides an employee severance it already promised the employee, then the release will not be supported by new consideration and will be invalid.

For the release to cover Age Discrimination in Employment Act (ADEA) claims, the actual release of claims and the agreement it is contained within must strictly comply with very specific Older Workers Benefit Protection Act (OWBPA) requirements. Consult with counsel to determine whether your release is broad enough to release ADEA claims.

In a layoff situation, the OWBPA requires precise compliance with its regulations, including specific reference to the ADEA, consideration beyond what the employee is entitled, 45 days to consider the release before signing, seven days to revoke the release after signing and written notice of (a) the group to which the offer has been made, eligibility requirements, and any applicable time limits, and (b) the position and age of each employee selected for the group, as well as ages of all employees in the same job classification who are not eligible.

WARN NOTICE

The Workers Adjustment and Retraining Notification Act (WARN) provides that a business is required under certain circumstances to provide 60 days notice of a mass layoff or plant closing.

Generally, private employers are covered by WARN if they have 100 or more employees, not counting employees who have worked less than six months in the last 12 months and not counting employees who work an average of less than 20 hours a week. An employer must give notice if an employment site (or one or more facilities or operating units within an employment site) will be shut down (a plant closing), and the shutdown will result in an employment loss which will last at least six months for 50 or more employees during any 30-day period. Moreover, a covered

employer must give notice if there is to be a mass layoff which does not result from a planned closing, but which will result in an “employment loss” at the employment site during any 30-day period for 500 or more employees, or for 50-499 employees if they make up at least 33 percent of the employer’s active workforce.

As mandated by WARN, the employer must give written notice to the chief elected officer of the exclusive representative(s) or bargaining agency(s) of affected employees and to unrepresented individual workers who may reasonably be expected to experience an employment loss.

This includes employees who may lose their employment due to bumping, or displacement by other workers, to the extent that the employer can identify those employees when notice is given. The employer must also provide notice to the state dislocated worker unit and to the chief elected official of the unit of local government in which the employment site is located.

In certain circumstances, less than 60 days notice may be appropriate. For example, less than 60 days is permitted where a company has sought new capital or business in order to stay open and where giving notice would ruin the opportunity to get the new capital or business.


Moreover, less than 60 days is permitted for unforeseeable business circumstances, or as a direct result of a natural disaster. In these circumstances, notice must be given as soon as practicable, along with an explanation as to why the notice period was abbreviated.

OTHER CONSIDERATIONS

If your workforce is organized and covered by a collective bargaining agreement, you must look to the collective bargaining agreement for guidance on how to handle the layoff of employees who are part of the collective-bargaining unit. Generally, the collective-bargaining agreement will address the process by which organized employees can be discharged (and later rehired) as part of a layoff.

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