

April 1, 2020

MAKING STAFF CHANGES IN RESPONSE TO COVID-19

In response to the unprecedented health and economic crisis, many nonprofits may be forced to reduce staff, despite public and private aid in relief of COVID-19 (for more information, see [https://lawyersalliance.org/userFiles/uploads/legal_alerts/Government and Private Aid Available to Nonprofits for COVID-19 Relief April 2020.pdf](https://lawyersalliance.org/userFiles/uploads/legal_alerts/Government_and_Private_Aid_Available_to_Nonprofits_for_COVID-19_Relief_April_2020.pdf)).

Lawyers Alliance is pleased to share legal and other considerations when planning alternatives to reductions in force; avoiding legal risk in conducting a reduction in force; and practical guidance on managing the workforce that remains.

I. Alternatives to Reduction in Force (RIF)

A. Reasons to Avoid Layoffs

- Preserve program services
- Retain talent
- Maintain morale
- Reduce legal risk
- Save certain costs (accrued vacation; severance)
- Maintain unemployment experience rating
- Be better positioned for recovery
- *But understand that sometimes layoffs can't be avoided*

B. Avoiding layoffs. Alternatives should be considered before contemplating layoffs, as long as the employer's policies, employee contracts and offer letters, and any applicable collective bargaining agreement permit such action. Employers should document that any or all of the following were considered:

1. *Reassigning Employees between Program Areas.* Consider whether other program areas have the funding and need for staff being considered for the RIF. Unless an employee has a contract or is covered by a collective bargaining agreement, or the organization's handbook states otherwise, employment-at-will doctrine means no guarantee of continued employment, no guarantee that the job description stays the same. Caution: Disability law may require a reasonable accommodation to enable a disabled individual to perform essential functions of the new position to which he or she is transferred.
2. *Reducing Salaries and/or Bonuses:* Unless prevented by a collective bargaining agreement or an individual's employment contract, an employer may legally reduce an employee's compensation (as long as the reduced compensation is above minimum wage and, for exempt employees, as least \$1,125 per week in New York City). Salary reductions should be across the board to prevent discrimination charges as well as morale problems. Any written bonus plan should be checked to make sure that it gives the employer discretion to reduce or eliminate bonus, and amended if necessary. To soften the blow of asking employees to do the same amount of work for

less money, an employer might want to offer additional paid vacation, holidays or personal days off.

3. *Moving Employees from Full to Part-Time or Reducing Hours.* An organization may be able to save in salary and benefits if person's hours drop below threshold required for provision of health benefits. Caution: Possible liability because person could sue over loss of salary, arguing that he/she was chosen for reduction of hours for discriminatory reason. Be able to defend the decision to move someone to part-time, including programmatic reason (e.g., this position can be done by part-time person). Avoid the temptation to use an employee as an unpaid volunteer for all or part of the workweek. Also note that a reduction in hours of at least 50 percent for each month in any six month period may require advance notice to affected employees pursuant to the New York and Federal WARN Acts (see below).
4. *Furlough.* A furlough may be used when an employer places an employee into temporary non-duty, non-pay status because of budget issues, lack of work, or for other non-disciplinary reasons. Furloughs may be voluntary or mandatory and are different from normal layoffs because employees continue to work on a reasonably regular basis. During a furlough, employees are *scheduled* to have certain days off without pay. For example, an employer may ask or require employees to take off every other Monday without pay. Although employees may be required or allowed to use PTO during furlough, normally furlough is unpaid and compensation is reduced proportionately.

CAUTION: A full-time furlough of over 6 months, or a reduction in hours of at least 50 percent for each month in any six month period, may constitute an "employment loss" triggering notice requirements under both the federal and state WARN Acts (see below).

CAUTION: In addition to performing certain types of duties, an exempt employee must be paid on a salary basis: the employee receives the same weekly salary regardless of how much work he or she performs during the workweek. However, some courts have allowed employers to furlough exempt employees for partial weeks and reduce their salary proportionately (as long as the minimum exempt salary threshold, which in New York City is \$1,125 per week, is met). The U.S. Department of Labor has stated in recent opinion letters that a permanent, *prospective* reduction in hours with a reduction in weekly salary does not destroy the salary basis for exempt employees. Consider, however, furloughing exempt employees in full-week increments to avoid any possible claim that the employees are no longer exempt. Employees performing any work, even checking voicemail or email, while on furlough, are entitled to be paid. Therefore, take effective measures to ensure that no work is performed during furlough.

CAUTION: A reduction in hours may affect an employee's eligibility to participate in benefits plans, vacation, and other terms and conditions of employment. Loss of group health coverage may trigger continuation rights under COBRA or state law. Review and, if necessary, amend benefits plans and employment policies to avoid unintended consequences.

CAUTION: Advise employees of effect of wage loss on garnishment, child support orders, etc.

CAUTION: Consult immigration counsel before attempting to furlough foreign nationals working under a non-immigrant Visa.

5. *Shared Work.* Consider the New York State Department of Labor Shared Work Program that is designed to supplement wages of employees whose hours are cut and to encourage employers to reduce hours rather than to conduct across-the-board layoffs. Any eligible New York employer must submit a plan for approval at least two, but no more than four, weeks prior to implementing the reduced hours program.

Eligible Employers: any New York employer that has two or more full-time employees working in New York State and that, with any predecessor, has been liable for unemployment insurance purposes for at least four consecutive calendar quarters may apply to participate in the Shared Work Program.

Plan Requirements:

(1) The employees' weekly hours and wages must be reduced at least 20 percent but not more than 60 percent. Note: the New York State Department of Labor regulations state that reduction in hours under a Shared Work program does not constitute an employment loss under the New York State WARN Act.

(2) Employees who normally work no more than 40 hours per week are eligible to participate.

(3) The employees' fringe benefits cannot be reduced or eliminated, unless they are reduced or eliminated for the entire workforce.

(4) The plan cannot exceed 53 weeks.

(5) The employer cannot hire additional full-time or part-time employees for the work group covered by the plan.

(6) If the employees are covered by a collective bargaining agreement, the collective bargaining agent must approve the Shared Work plan.

(7) The plan must be in lieu of a layoff of an equivalent percentage of employees.

6. *Health Care Costs.* Until several years ago, nonprofits could consider HMOs, increasing employee co-payments for medical services, raising level of deductibles, instituting or increasing amount of payroll deductions for individuals, spouses and children, and "consumer directed plans," which give employees a fixed amount of money to spend on health care. Now, these options will need to be discussed fully with a benefits expert in order to understand the effects of the Affordable Care Act.
7. *Pension Costs.* To the extent that the organization contributes to employees' retirement plans, review the organization's ability to reduce these contributions with its pension provider. Check with provider, as the nonprofit may not be able to do so under terms of plan.
8. *Efficient Administration:* Review vendor costs; ask for competitive bids. Consider an audit to make sure that only eligible persons are participating.

II. Limiting Liability When Layoffs Cannot be Avoided.

A. Best Practices for Selecting Employees for the RIF.

1. *Document Reasons for the RIF.* When considering layoffs, the organization should document that it has considered alternatives (see above). The business reasons for the layoffs and justification for terminating certain employees should be provided to the organization's board of directors. Consider creating an oversight committee to provide objectivity for the process of implementing the reductions. Ideally, the organization should determine its objectives and decide which positions it can eliminate before selecting individual employees for termination.

CAUTION: If there is any possibility that the RIF might be subject to the notice requirements of the New York State and/or Federal Worker Adjustment and Retraining Notification Act (see below), seek legal advice immediately to determine which law applies and if so, how to comply.

2. *Follow Established Procedures, or Create Them.* Any applicable collective bargaining agreement, employee handbook or policies, and individual employment contracts should be consulted to ensure that procedures for selecting employees for a layoff, as well as any procedures for "bumping" or efforts to place affected employees in other positions within the organization, are followed. If there is no applicable procedure, develop one so that all decision makers follow a consistent, objective process.
3. *Proceed with Caution: Employees on Leave.* An employee on leave under the Family Medical Leave Act or on military leave is legally entitled to job reinstatement unless the job would have been eliminated even if the employee had not been on leave. However, unless all or most jobs in the same category as that of the employee on one of these types of leave have been eliminated, it may be difficult for an employer to prove that eliminating the employee's job did not violate the law. For employees on all types of leave, consider honestly whether the person would still lose his or her job if he or she were in the office today and performing according to ability. Even if the answer is "yes," there is a risk that terminating the person on leave will look like disability or caregiver discrimination. Consider waiting until the person comes back and re-evaluate performance after certain length of time.
4. *Review Demographics of Group Layoff.* If a nonprofit is laying off a group of employees, review demographics of group to be laid-off to see if RIF has a "disparate impact" on members of protected classes (e.g. women, over age of 40, etc.). Even if there are justifiable business reasons for a lay-off that disproportionately impacts a particular group of employees, there are clear liability risks. Note whether any employee is about to vest any important benefits. It is important to obtain legal counsel in connection with a group layoff.
5. *Make Skills/Performance-Related Termination Decisions.* Employers need to show that the decision to terminate an individual was unrelated to person's protected class, if any, based on (1) whether the individual has the skill sets needed to perform in the post-layoff workplace, and (2) job performance: measurable factors such as quality of performance, attitude on the job, productivity, attendance, punctuality, seniority, etc.

Written employee evaluations, including documented performance problems, are critically important to support the decision.

B. Best Practices/Legal Obligations After Employees Are Selected

1. *Communicate Information about the RIF Clearly and Effectively.* As soon as possible, senior management must provide a unified response with a clear plan of action, including a timeline and communication strategy. Inform all employees in the organization at the same time with a communication directly from the executive director explaining what is happening, the reasons for the downsizing, the plan and, if possible, whether additional layoffs should be expected in the near future. Each employee who is being terminated should be informed in person in a private meeting, preferably with two representatives of management.
2. *Avoid Telling Employee Selected for Performance Reasons that “Economic Reasons” or “Loss of Funding” Was Only Reason for Layoff.* Blaming the economy when there are performance issues to be relied on can backfire. If an individual files a lawsuit, and the organization wants to argue that the individual was eliminated due to poor performance, it will look like that reason was made up after the fact. The employer ends up looking dishonest. If the employer lets the individual know that the layoff decision was at least partially performance-related, and that the problems have been documented, the individual may be less likely to sue because he or she knows that the employer can defend the decision. At the very least, the organization will be in a better position to defend a lawsuit if one is filed.
3. *Termination Letters/References.* The organization must give the employee written notice of the employee’s last day of work and when benefits will end. Employee may ask for a letter/reference stating that he or she was laid off solely for economic reasons. Don’t do this; it will put your organization in a bad position if it is sued and has to defend with performance reasons.
4. *Obtain Releases From Employees, If Possible.* Consider entering into an agreement offering an employee who has been selected for layoff some type of benefit (e.g., severance, extra salary, pay for continued health insurance, outplacement) in addition to regular salary in exchange for a release from liability for all employment-related claims.
 - *Releases pursuant to the ADEA.* The ADEA applies to employers with 20 or more employees and protects individuals who are 40 years of age or older from employment discrimination based on age. The Older Worker Benefit Protection Act (OWBPA) amends the ADEA to prohibit age discrimination in employee benefits and to prevent older workers from being coerced or manipulated into waiving their ADEA rights. The OWBPA establishes minimum standards for determining the validity of waivers of claims under the ADEA. In order to be valid and enforceable, waivers must be “knowing and voluntary”. Waivers must comply with the following standards to be considered “knowing and voluntary” in connection with an exit incentive or other termination program involving two or more employees:
 - i. The waiver must be part of an agreement between the employer and employee and must be written in plain language, which can be understood by

the average employee eligible to participate. An agreement that is technically correct may not be valid if it takes a lawyer to understand it.

- ii. The waiver must refer specifically to rights or claims arising under the ADEA.
 - iii. The waiver cannot cover rights or claims that may arise after the date the waiver is executed.
 - iv. The waiver must be given in exchange for consideration and that consideration (e.g. severance, extra salary) must be in addition to anything of value the employee is already entitled to receive (e.g., regular salary, unused accrued vacation).
 - v. The employee must be advised in writing to consult with an attorney before signing the agreement.
 - vi. The employee must be given at least 45 days to consider the agreement, and 7 days to revoke the agreement after signing it.
 - vii. The employee must be informed in writing as to any class, unit or group of employees covered by the program and any applicable time limitations.
 - viii. The employee must be given the job titles and ages of all individuals eligible or selected for the program and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program. This information is limited to employees in the same “decisional unit” as the discharged employees, meaning the portion of the employer’s organizational structure from which the employer chose the persons who would be offered consideration for the signing of a waiver and those who would not be offered consideration for the signing of a waiver.
 - ix. If the agreement does not comply with these requirements it is not enforceable as to claims under the ADEA. The Supreme Court has held that if a release does not comply with the OWBPA, employees who have signed the releases may keep the money given to them as consideration for the release and still sue their former employer for age discrimination. The EEOC has prohibited provisions in agreements that limit the individual’s right to challenge a waiver of ADEA rights, and any provisions requiring the individual to tender back the consideration received in exchange for waiving ADEA rights are invalid.
5. *Accrued Unused Vacation Pay.* New York law generally requires that any accrued, unused vacation pay must be paid within 30 days of termination (except for exempt employees earning more than \$900 a week). Consider requiring employees to take all or part of any unused accrued vacation to avoid large cash payouts upon termination. Keep in mind that there may be no way to recoup accrued unused vacation payments made to employees who are laid off following termination/non-renewal of a funding contract.
6. *New York State and Federal WARN Acts.* The New York State and Federal Worker Adjustment and Retraining Notification (WARN) Acts require that certain organizations give advance written notice of a mass layoff, plant closing, or certain plant relocations. The New York State WARN Act (NYS WARN Act) is more expansive than the Federal WARN Act and places more stringent obligations on smaller organizations. Employers

who were already covered by the Federal WARN Act will now be covered by the NYS WARN Act and will also need to comply with the New York requirements, including the significantly longer period for providing written notice.

- a. Who is covered?
 - i. The NYS WARN Act applies to private employers with **50 or more full-time employees, or 50 employees that work in the aggregate at least 2,000 hours per week, at a single site of employment** (with certain exceptions).
 - ii. The Federal WARN Act applies to private employers with **100 or more full-time employees, or 100 employees that work in the aggregate at least 4000 hours per week** (with certain exceptions)
- b. What is required?
 - i. The NYS WARN Act requires **90 days written notice** before a covered plant closing or mass layoff including those caused by relocation; at a single site of employment.
 - ii. The Federal WARN Act requires **60 days written notice** before a covered plant closing or mass layoff, (including those caused by relocation) at a single site of employment.
- c. *What triggers the notice requirement?*
 - i. Triggers under the NYS WARN Act are (i) a “*plant closing*” if facility or site of employment is shut down and **25** or more full-time employees suffer an employment loss; (ii) a “*mass layoff*” if the RIF results in employment loss for either (1) 33 percent of the workforce, which amounts to at least **25** full-time employees, or (2) a total of **250** full-time employees; or (iii) a “*relocation*” of all or substantially all of the covered employer’s industrial or commercial operations to a different location 50 miles or more away. Note that any of the above situations caused by bankruptcy are included.
 - ii. Triggers under the Federal WARN Act are (i) a “*plant closing*” if facility or site of employment is shut down and **50** or full-time more employees suffer an employment loss; (ii) a “*mass layoff*” triggering the written notice requirement occurs if the RIF results in employment loss for either (1) 33 percent of the workforce, which amounts to at least **50** full-time employees, or (2) a total of **500** full-time employees; (iii) written notice of a “*relocation*” not required unless relocation also constitutes a plant closing or mass layoff.
 - iii. Under both statutes, "employment loss" means layoffs lasting longer than six months or reduction in work hours by more than 50 percent during each month of any six-month period affecting the same number of employees as for a layoff.
 - iv. Caution: Job losses within any 90-day period will count together toward each WARN threshold level, unless the employer demonstrates that the employment losses during the 90-day period are the result of separate and distinct actions and causes.

d. *Exceptions to the written notice requirements.*

a. Under the NYS WARN Act:

- i. in the case of a plant closing (but not a mass layoff or relocation), if (1) at the time the written notice would have been required, the employer was actively seeking capital or business; (2) the capital or business sought would have enabled the employer to avoid or postpone the relocation or termination; and (3) the employer reasonably and in good faith believed that giving the written notice would have precluded the employer from obtaining the needed capital or business;
 - ii. in the case of a plant closing (but not a mass layoff or relocation), if the need for notice was not reasonably foreseeable at the time the written notice would have been required;
 - iii. the plant closing or mass layoff is because of natural disaster;
 - iv. the mass layoff, relocation or employment loss is because of a physical calamity or an act of terrorism or war;
 - v. if the plant closing is of a temporary facility or the plant closing or mass layoff is the result of the completion of a particular project or undertaking, *and* the affected employees were hired with the understanding that their employment was limited to the duration of the facility, project or undertaking; or
 - vi. the plant closing or mass layoff constitutes a strike or a lockout.
- a. Employers who are unable to provide the required written notice must provide as much written notice as is practicable and a brief statement explaining the reduction of the notification period.
- b. The exemptions to written notice under the Federal WARN Act are the same as the NYS WARN Act, except that the Federal WARN Act does not include the exception for “physical calamity or an act of terrorism or war.”

e. *Who must receive notice?*

- i. Under the NYS WARN Act, (i) All employees (including part-time employees) who may reasonably be expected to experience an employment loss as a consequence of the proposed plant closing or mass layoff; (ii) union representatives (if any) of the affected employees; (iii) the New York State Department of Labor; and (iv) the local workforce investment board for the locality in which the employment loss will occur.
- ii. Under the Federal WARN Act, (i) Each union representing the affected workers or each affected worker, if not represented by a union, including part-time and/or inactive employees plus employees who will likely suffer an employment loss due to bumping rights, to the extent known by the employer; (ii) the State dislocated worker (Rapid

Response) unit, designated under the Workforce Investment Act; and
(iii) the chief elected official of the unit of local government in which
the employment site is located.

- i. *Content of Notice.* The content requirements are similar under each of the NYS and Federal WARN Acts; NYS regulations set out requirements in great detail. Notice must be specific. All required information must be provided in writing at least 60 days in advance (90 days under the NYS WARN Act).
 - (a) Notice may be conditional on the occurrence of an event, but the event must be definite and the consequence of its occurrence will necessarily lead to a covered plant closing or mass layoff less than 60 days after the event. For example, if the non-renewal of a major contract will lead to terminating a program 30 days after the contract expires, the employer may give notice as least 60 days in advance (90 days under the NYS WARN Act) of the projected termination date which states that if the contract is not renewed, the termination will occur on the projected date.
 - (b) Information in the notice must be based on the best information available to the employer at the time the notice is served.
 - (c) If the covered event is to be postponed for less than 90 days after notice has been given, notice of the postponement must be given. After 90 days, completely new notices must be given.
- ii. There are two alternatives under the Federal WARN for the provision of notice to the State dislocated worker (Rapid Response) unit and the chief elected official of the unit of local government. One option is to provide notice containing:
 - (a) name and address of employment site where the plant closing or mass layoff will occur, and the name and telephone number of a company official to contact for further information;
 - (b) a statement as to whether the planned action is expected to be permanent or temporary and, if the entire plant is expected to be closed;
 - (c) the expected date of the first separation and the anticipated schedule for making separations;
 - (d) job titles of positions to be affected and the number of affected employees in each job classification;
 - (e) an indication as to whether or not bumping rights exist; and
 - (f) the name of each union representing affected employees, and the name and address of the chief elected officer of each union.

Alternatively, notice may contain:

- (a) the name and address of the employment site where the plant closing or mass layoff will occur;

- (b) name and telephone number of a company official to contact for further information; and
 - (c) the expected date of the first separation and the number of affected employees.
 - (d) The other information included in the first alternative must be listed on site and readily accessible to the State dislocated worker (Rapid Response) unit and to the unit of general local government. If this information is not available when requested, it will be deemed a failure to give notice.
- f. *Who may sue to enforce the Act?* Affected employees have the right to sue employers for violations of the NYS WARN Act, and the New York State Department of Labor also has enforcement authority. Affected employees have the right to sue employers for violations of the Federal WARN Act.
- g. *Potential Liability.* Under both the NYS and Federal WARN Act, an employer who fails to give the required written notice may be held liable for back pay and the value of the cost of any lost benefits (including the cost of any medical expenses incurred by the employee that would have been covered by an employee benefit plan) for the duration of the violation, up to a maximum of sixty days or one half of the days the employee was employed by the employer, whichever is smaller. The court may also award attorney's fees to a prevailing plaintiff. Under the NYS WARN Act, employers may be liable for a civil penalty of \$500 per day of each day of the employer's violation, if an employer fails to pay all applicable employees the amounts for which it is liable.

Good Faith Defense. Both the NYS WARN Act and Federal WARN Act contain a good faith defense. The good faith defense permits a court to reduce the amount of liability or penalty if it determines that the violation was in good faith, and that the employer had reasonable grounds for believing that it was not in violation.

7. *Employee Benefits.* Check with your benefits advisor to ascertain whether the RIF has resulted in a partial plan termination or, if you have union employees participating in a multi-employer benefits plan, withdrawal liability.
- a. Make sure that departing employees receive notice about how the termination of their employment affects their pension, health and welfare benefits, other than group health insurance covered by COBRA.
 - b. **COBRA.** Most New York State employers are legally required to allow terminated employees and their beneficiaries to continue their group health coverage for a period after employment ends by paying monthly premiums that are up to 102 percent of the actual cost to the employer. Group health plans for employers with 20 or more employees are subject to the Federal Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA). New York State law requires small employers (less than 20 employees) to provide the equivalent of COBRA benefits.
 - i. *Electing COBRA Coverage.* Employers must notify plan administrators of a qualifying event (lay-offs, etc.) within 30 days after termination. Plan participants generally must be sent an election notice no later than 14

days after the plan administrator receives notice that a qualifying event has occurred. The individual then has 60 days to decide whether to elect COBRA continuation coverage, and 45 days after electing coverage to pay the initial premium. Terminated employees and their beneficiaries generally are eligible for group coverage for a maximum of 36 months, but group plans may provide longer periods of coverage beyond those required by COBRA.

8. *Provide Respect and Assistance to Employees Who Are Leaving.* If possible, make an effort to network with other nonprofits in the area to identify alternative positions for those being laid off. Remember, when people feel like they have been treated with respect, they are far less likely to pursue litigation.

III. Employment Issues After the RIF

- A. *Job Openings.* Monitor how jobs are filled after positions have been eliminated: a laid-off employee may successfully challenge the organization's failure to transfer or rehire him or her, even if the initial layoff decision remains unchallenged.
- B. *Independent Contractors.* While employers often opt to continue to utilize a laid-off employee's services as an independent contractor, such arrangements present a real risk that the employer will be found to have misclassified the individual and be liable for failure to withhold income taxes, arrange workers compensation coverage, etc. Any post-employment independent contractor arrangement should be closely scrutinized to ensure that the former employee is truly acting as an independent contractor, not merely performing his or her old job on a part-time or temporary basis.
- C. *Volunteers.* Immediately after the layoff, discourage laid-off employees from volunteering for your organization, and avoid the temptation to "encourage" them to do so. Establishing the intent necessary to prove that the relationship is truly voluntary will be extremely difficult, especially if a former employee who was initially eager to volunteer changes his or her mind after several months of unemployment.
- D. *Don't Forget the Remaining Employees.* The remaining employees are likely to be worried about whether they will be next, resentful of increased workloads without increased compensation, and skeptical about performing new tasks out of their comfort zone. Try to keep staff focused on your organization's mission.

This outline provides general information about the matters discussed, and is not intended to be legal advice. If you need legal assistance, please contact Judith Moldover at Lawyers Alliance for New York at 212-219-1800 ext. 250 or visit our website at www.lawyersalliance.org.

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