



Virginia Workplace Law

Deju Vu All Over Again – Layoffs and Furloughs Return

By: Karen Elliott. *Friday, June 24th, 2011*

If you've been reading the news lately, you will see that companies are going through another round of layoffs and furloughs. Just today, it is reported that the [Richmond Times Dispatch is requiring employees to take 15 furlough days](#). This is their second furlough in two years.

Don't discount this news simply because it's happening to print media, which for sure, has been struggling with the advent of web based news. Alongside the Times Dispatch news was news that [Foot Levelers in Roanoke is laying off twenty for a restructuring](#). In speaking with my fellow employment lawyers, I know that we are all beginning to dust off the layoff/furlough policies that we had hopefully put away for awhile.

If your company is facing the prospect of a layoff or furlough, be sure to keep the following checklist in mind:

For Layoffs:

1. [Does the WARN Act apply?](#) This should be your initial question. If you have 100 or more employees, you may need to comply with the Worker Adjustment and Retraining Notification Act.
2. How are employees selected? When selecting employees for layoff, the employer cannot discriminate against a protected class of employee. Obviously, employers may not use selection criteria that discriminate on the basis of age, race, ethnicity, gender, national origin, disability, or other protected classification. However, even if the criteria are non-discriminatory, you must analyze whether or not the result has a disparate impact on one or more protected class of employees. If it does, you must re-think your process.

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3. Popular selection criteria include:

Seniority – i.e. last hired. But, if you've recently instituted aggressive affirmative action efforts, it may disproportionately affect minority employees and therefore be deemed discriminatory. If you are a government contractor, this will be an issue for your affirmative action plan compliance.

Job classification or pay grade, such as part-time, temporary and highly compensated. Selecting the highest paid employees for layoff may have a disproportionate impact on older employees. Be prepared to demonstrate that cost not age, motivated the use of salary.

Merit/performance. This can be dangerous because most employers do not consistently keep their files well-documented and it may be easier for an employee to claim retaliation, discrimination or even defamation. If you use this basis, make sure the evaluations are validated, unbiased, and well-documented and based upon provable facts or well-based opinions.

Knowledge, skills and abilities. For example, who will you need for the newly organized company to function? Again, you must be able to adequately document individual employee knowledge, skills and abilities.

Perform a "dry-run" analysis of how a layoff policy will affect different protected employee groups. If the dry run shows that an adverse impact occurs in a protected class (i.e. a disproportionate number are of a particular race, age, sex), then the employer should change the selection criteria or be able to justify the decision with concrete facts to show business necessity.

Other factors to consider:

- Who is in charge of making the layoff determinations? The person making the decisions should be different than the person selecting the layoff criteria.
- How will you notify employees?
- Consider other policies. (What does your Handbook say? Do you have enforceable non-competes?)
- Severance payments. Will you offer and if so how much? You will need a release of all claims.

If Initiating a Furlough Consider:

1. Make sure the exempt status is not affected.
2. Check the impact on applicable contracts (including non-competes) and collective bargaining agreements.

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3. Consider the impact on benefits such as 401(k) contributions, H1-B visa prevailing wage requirements.
4. Determine whether vacation or PTO must or may be used pursuant to state law and whether employees may borrow from future vacation.
5. Provide advance notice in compliance with state law and in consideration of employees' financial obligations.
6. Inform employees that no work is permitted during the furlough; this includes checking voicemail and email.
7. Centralize reporting of any emergency.
8. Make sure reductions do not have an adverse impact against a single group within a protected status.

What are you seeing or experiencing? Is the economy impacting your business?

If you need any assistance with restructuring of your business, the [Virginia Workplace Lawyers](#) at Sands Anderson would be pleased to assist you.

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