

Managing Risk



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Layoffs Without Lawsuits

Layoffs are unpleasant and disruptive at best. But handled badly, a layoff can harm morale, reduce productivity and even lead to employment discrimination lawsuits.

Before deciding to let employees go, determine whether a layoff is truly necessary. Other personnel changes may trim costs enough to let you avoid layoffs. These changes also minimize the risk of employment discrimination claims, minimize workforce disruptions and help you keep

valuable employees available for when the economy turns around. Steps you can take to reduce employment costs without resorting to layoffs include:

- * Imposing a hiring freeze
- * Terminating employees with performance problems
- * Freezing wages
- * Reducing benefit costs through benefit reductions, cost-sharing with employees or both
- * Reducing work hours and pay proportionately
- * Job-sharing
- * Offering incentives to early retirement.

If these steps won't cut staffing or costs to desired levels, proceed carefully before making any layoffs. The following pointers will help you ensure layoffs are handled fairly, minimizing loss of morale and helping you defuse any charges of employment discrimination:

- 1 Document the reasons why the company needs to make a reduction in force (RIF).
- 2 Determine the goal for the RIF. How much money does the

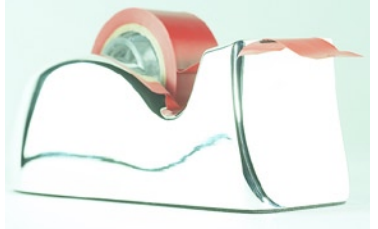
company need to save? How many positions will it eliminate?

- 3 Determine the essential functions of the company and the skills needed to perform them.
- 4 Determine the criteria you will use for making layoffs. Legitimate criteria include: length of service (last in/first out), importance of the job function (eliminating inessential positions or departments) and employment class (i.e., eliminating an entire class of employee, such as part-time, temporary/seasonal or contract workers).
- 5 Consider the impact of layoffs on protected classes of workers. Terminating only workers with low seniority might affect women and minorities disproportionately, which could lead to class action discrimination lawsuits. Likewise, focusing layoffs on older workers may run afoul of federal age discrimination law. The Age Discrimination in Employment Act (ADEA) prohibits forcing employees out at an arbitrary "retirement age" — they can continue to work until they can no longer do their jobs. You can offer incentives to en-

This Just In

H.R. 1880, the National Insurance Consumer Protection and Regulatory Modernization Act, would create a national insurance regulation system. A new national insurance commissioner, appointed by the president, would oversee the incorporation, regulation and supervision of national insurers and national insurance agencies, issue charters and licenses and regulate and supervise national insurance producers.

Currently, individual states have the responsibility of licensing and regulating the insurance companies and salespeople doing business within their borders. As proposed, H.R. 1880 would make federal chartering optional, creating a dual state/federal regulatory system, similar to the system for banks. Proponents say federal chartering would eliminate the need for insurers and brokers to deal with 51 different sets of regulations. Others say the state system provides important consumer protections.





Terrorism Risk Update

Before September 11, 2001, most business policies included coverage for terrorism-related losses. Today, however, some types of policies exclude coverage for certain terrorism-related losses. Here's what you need to know about covering your terrorism risks.

Although the risk of any one company or location experiencing terrorism-related losses is fairly low, if a terrorism event occurs, total losses could be devastating. What reasonable, practical steps can an organization take to protect itself from terrorism-related losses?

- 1 Assess your risk.** Conventional wisdom says that businesses in certain locations (high-rise buildings, major metropolitan areas, in or near landmark properties) or in certain industries (utilities, high technology, chemicals) face a higher risk of terrorist attack than others. Also at risk are businesses located on or near major transportation corridors.
- 2 Protect employees and visitors.** Workers' compensation payments for deaths and injuries accounted for much of the loss related to the 9/11/01 terrorist attacks on the World Trade Center. Having emergency evacuation plans, disaster preparedness supplies, survival supplies and first aid supplies readily available can minimize loss of life and injury. Remember to review and update your plans as necessary, and to rotate emergency supplies on a regular basis to keep them fresh. A good rule of thumb is to have three days' worth of water and food available per person, in case a widespread disaster makes leaving the premises difficult.
- 3 Assess building security.** Companies that

manufacture, sell or store potentially hazardous substances should pay particular attention to sensitive areas. Is access to your premises controlled, or can anyone enter during business hours? Identification-based entry systems or posting security guards by entrances can help limit access to authorized persons.

- 4 Protect information systems.** Reliable backup systems and a disaster continuity plan can minimize data losses and help your business recover processing capabilities quickly in the event of a disaster.
- 5 Assess building design.** Companies renovating or building facilities will want to consider incorporating "defensive architecture" features into their buildings. Defensive architecture uses design features to minimize losses from terrorist attacks, as well as from other disasters, such as fire, smoke or chemical spill.
- 6 Evaluate your insurance coverage needs.** Mortgage lenders typically require commercial property owners to carry terrorism coverage. Before 9/11, commercial property policies generally covered terrorism-related losses. After the 9/11 attacks, insurers afraid of widespread and "uninsurable" losses excluded terrorism losses from commercial property policies.

The lack of available coverage prompted Congress to write the Terrorism Risk Insurance Act of 2002 (TRIA), which required insurers to offer terrorism coverage to commercial property owners and made the federal government liable for a large share of related losses. The Act specifically included excess insurance, workers' compensation insurance and surety insurance in its definition of "property and casualty insurance."

But there's a catch. While TRIA and its successor acts covered attacks involving conventional weapons, insurers can exclude property

coverage for attacks with nuclear, biological, chemical or radiological (NBCR) weapons. According to a study released in December 2008 by the U.S. Government Accountability Office, most commercial policies exclude coverage for NBCR weapons. Analysts expect to see terrorist groups' use of this type of weapon increase in the future, causing concerns about the financial impact of this type of attack. Although your property policy likely excludes coverage for NBCR weapons, most states require workers' compensation insurers and group life and health insurance to include coverage for terrorism, including NBCR events.

For information on assessing your terrorism risks and obtaining appropriate coverage, please contact us. ■

LAYOFFS—continued from Page 1

- courage workers to take early retirement; just be sure to offer the same benefits to all employees. Offering higher benefits to workers over age 60, for example, could be seen as discriminatory.
- 6** Determine if plant-closure laws, such as the federal Worker Adjustment and Retraining Notification Act (WARN) or state laws requiring notice to laid-off workers apply. Generally, WARN requires most employers with 100 or more employees to provide notification 60 calendar days in advance of plant closings and mass layoffs. Employees entitled to notice under WARN include managers and supervisors, as well as hourly and salaried workers. WARN requires that notice also be given to employees' representatives, the local chief elected official, and the state dislocated worker unit.
- 7** Determine how layoffs will affect benefit plans, including pension and health benefits. Determine what notices laid-off employees will require. Layoffs may also cause partial terminations of your benefit plans,



Use Your EAP to Reduce Workers' Compensation Costs

Today, nearly two-thirds (65 percent) of employers have an employee assistance program, or EAP. Generally considered part of an employee benefits program, your EAP might also be a hidden resource to help you control workers' compensation costs. Consider the following facts:

✱ **Workers under stress are more likely to become ill or injured.** Counseling can help employees deal with stress.

✱ **Drug and alcohol abuse contribute to many work-related accidents.** By providing confidential access to drug and alcohol treatment programs, your EAP makes access to treatment programs easier.

✱ **An EAP can provide referrals to licensed psychologists or psychiatrists** who can examine workers' comp claimants suspected of fraud or malingering.

✱ **EAPs can offer behavioral health treatments to those undergoing treatment for workplace illness or injury,** possibly helping speed the return-to-work process by alleviating depression and stress related to the physical condition.

An EAP offers employees confidential short-term counseling with a counselor specially trained to identify the underlying problem. When appropriate, the EAP counselor will make referrals to specialists or other providers. Some EAPs have their own network of specialists — such as addiction specialists, mental health specialists, family counseling specialists, legal advisors and more. Others work on a refer-

ral basis, referring employees to outside providers and programs when necessary. The employee has the responsibility of following through with any referral appointments and making financial arrangements for any services that fall outside the scope of the benefit program.

EAPs can also help employers deal with personnel problems in a sensitive manner, without violating an employee's right to privacy. For example, a supervisor who sees an employee's work suffering due to a personal problem or possible drug or alcohol abuse can refer that employee to the EAP without having to inquire on the nature of the problem.

An EAP can help you get the most out of your benefit plan. A good EAP will promote its services with communications to your employees. When an employee turns to the EAP for assistance, the EAP counselor can help your employee identify resources covered by your benefit program. For example, an employee facing addiction might be referred to a program covered by your health benefits. An employee with mental health problems might be referred to a provider in your group health insurance plan's network. EAPs may also inform employees of their rights under government-mandated benefit programs, such as workers' compensa-



tion, the Family and Medical Leave Act, the Americans with Disabilities Act and federal and state mental health parity mandates.

The Northeast Georgia Employee Assistance Program, an EAP provider, says, "The median annual EAP cost per employee, which varied by region of the country, was \$21.83 for internal programs and \$18.09 for external programs in a select sample study." An EAP may be structured with a flat per-employee fee, or on a pay-as-you-go basis.

As employees in downsized workforces deal with increased workloads and increased demands at home, you may find an EAP is a worthwhile investment. For more information on EAPs, please call us. ■

LAYOFFS—continued from Page 2

which may require reporting under ERISA.

- 8 Consult an employment attorney to review your RIF strategy and communications before making layoffs.
- 9 Review your employment practices liability insurance (EPLI) coverage. EPLI policies cover employment-related lawsuits; howev-

er, some insurers exclude downsizing-related claims from coverage. Other insurers have begun to require more due diligence from insureds before they will cover claims resulting from downsizing.

- 10 Check your EPLI limits. A 2008 survey of private company liability risks found that the total cost, including judgments, settlements, fines and legal fees, of an employ-

ment practices liability-related event averaged \$63,114.

Handling layoffs in accordance with the law and with sensitivity can prevent many of the mistakes and misunderstandings that lead to discrimination lawsuits. Please call us for an analysis of your employment practices liability exposures. ■

