

NONPROFIT RISK MANAGEMENT CENTER
www.nonprofitrisk.org

Downsizing with Care and Compassion

A Risk Management Webinar

April 5, 2006
2:00-3:00 pm, EST

Presented by:

Melanie L. Herman, Executive Director
and
Jennifer Chandler Hauge, Esq., Volunteer

Nonprofit Risk Management Center
1130 17th Street, NW - Suite 210
Washington, DC 20036
(202) 785-3891 - FAX: (202) 833-5747
Web site: www.nonprofitrisk.org

Handout developed by:

Jennifer Chandler Hauge, Esq.
jchandlerhaug@gmail.com

*Generous funding to support this Web Seminar was provided by the Public Entity Risk Institute.
For more information, visit www.riskinstitute.org.*

Downsizing with Care and Compassion

During this Webinar we will explore how to approach downsizing; how to recognize the legal and practical risks involved; and how to prepare, so that when the time comes, your nonprofit will have flexibility to conduct terminations that are in the organization's best *business* interests, but are also sensitive to the *human* impact of separating employees from their jobs.

In the hypothetical scenarios considered for this Webinar we will be focusing on “involuntary” separations—where the initiative for the separation from employment is taken by the organization, not the staff member.¹ In contrast, when a staff member decides of his/her own initiative to leave employment, this is termed a “voluntary separation.”

A word about “voluntary separation”:

When voluntary, terminations pose fewer legal risks. Consequently, some managers are tempted to characterize a termination as “voluntary” when it truly was not initiated by the employee. It is important to note that calling a termination a “resignation” when in fact the employer is forcing the employee out of the workplace, *will not create a safe harbor for the employer*. In such cases the employee can claim that while the termination may appear to be the result of his own volition, it was instead caused by his employer or the conditions at the workplace that made it unbearable for the worker to remain employed. When employees raise this claim it is called “constructive” termination. Employers consequently should not believe that simply characterizing a separation as a “resignation” will provide insulation against a lawsuit.

What is “Downsizing?”

Technically “downsizing” simply means that an organization is going through a process of reducing the number of staff or volunteers. In other words, the organization is terminating someone's employment. No matter *what* the organization calls it, *how* the organization conducts this process can result in various legal risks. Additionally, whenever someone is separated from employment there are emotional ramifications for both the individual who is separated, and those who remain employed. Consequently, it is prudent risk management to conduct any termination with great care and true compassion.

In addition to “downsizing,” there are various names given to the event that results in a separation from employment. Each of these names or terms carries baggage because of semantic implications, which in turn can sabotage the termination from a legal perspective. It is important to know, and to properly label, what's really going on. For example, what are the differences between:

¹ Volunteers as well as employees can also be involuntarily terminated from service with a nonprofit. The same principles that are discussed above pertaining to paid staff are applicable to volunteers. However, a volunteer who is separated from service to a nonprofit organization is unlikely to have legal standing to bring a lawsuit under state or federal employment laws. Instead, the volunteer might bring a state court claim against the organization for “intentional infliction of emotional distress” or a similar tort claim. While the volunteer bringing such a lawsuit would not be entitled to money damages for “lost wages,” he or she might be able to recover a significant monetary award from the organization; certainly the organization would suffer from the experience of being named as a defendant in a lawsuit, regardless of any eventual damage award. An involuntarily separated volunteer might attempt to cause other difficulty for the nonprofit, such as harming the morale of remaining volunteers or generating negative publicity.

Termination (also referred to as being “fired” or “let go,” with no particular implication as to the reason for the termination.)

Dismissal (implies that the employee’s performance or conduct was unsatisfactory.)

Retirement (implies that the employee has voluntarily decided to cease being gainfully employed.)

Lay-off (implies that employees are being put on unpaid leave status, but as soon as work is available they may be re-hired: *Random House* dictionary definition: “...an interval of enforced unemployment.”)

Reduction in Force (implies that more than one staff member is being terminated, but no particular implication as to the reason for the terminations; generally however NOT appropriate to use when an employee’s performance was unsatisfactory.)

Reorganizing (implies that positions are being eliminated and that reporting relationships are being restructured.)

Elimination of a position (describes a situation where a particular position is being eliminated; no implication as to the reason, although generally not appropriate when the reason is poor performance.)

Right-sizing (implies that the organization was overstaffed to begin with, although this is really just a buzzword invented to put a positive ‘spin’ on the concept of ‘downsizing.’)

Delayering (implies that managers are being fired)

Others? – has your nonprofit used other terms to describe separation from employment?

Do semantics matter? Yes, because it’s all about managing expectations and certain phrases imply certain REASONS for the termination.

Consistency is important: Don’t tell the employee one reason and tell the state unemployment insurance office a different reason. Inconsistent “stories” play into a plaintiff’s plan to show that the employer was a ‘lying, cheating, evil character.’

- Your employees expect you to be ‘fair’ and being fair means, among other things, *telling the truth.*

If the correct phrase is so critical in order to avoid mistakes, perhaps we shouldn’t why say anything at all about the reason. Do we have to give a reason? Yes. Giving an employee a reason for her termination is far better than giving no reason at all. If no reason is given, certain employees will *assume* there was an illegal reason that the employer is trying to cover up.

In some states employers are *required* to provide written documentation to former employees about their termination which may or may not include the reason for the termination. Know your state law. Example: California requires employers to provide written notice of the reason for a termination.

If the organization has expressed a legitimate business reason for the termination in written documentation, as well as verbally to the employee, the organization will be in a better position to defend any allegation of wrongful termination.

You could be doing your organization *and* your employees a big favor at the same time.

Example: explaining the underlying economics of the situation, such as that funds were eliminated for the grant that supported a particular position, expresses a legitimate business

reason for eliminating a position, which also makes the termination less personal, and may diffuse the emotional distress associated with losing a job.

Important Lesson: Explain the reason in writing in your own internal memo that sets forth your reasoning for the termination, and also verbally explain the reason to the employee, *and use the right name.*

Don't label a separation something that it is not. Why? *Because nonprofit organizations are not supposed to lie.* (Characterizing a termination as one thing when it is really something else will be seen as deceitful.)

If you are not sure what category of termination you are dealing with, just stick to the generic phrases: "termination" or "separation" of employment.

Also, the exercise of writing down the reason for the termination in an internal memo will cause the decision maker to think carefully about articulating the *legitimate business reason* for the termination, which ultimately will protect the organization from claims of wrongful termination.

Caveat: Sometimes there are two reasons for a termination, and one of those reasons is safer for the nonprofit to rely on than the other.

Example: A new executive director notices that a long term employee's work product is sub-standard, however, the employee has never received anything other than a stellar performance appraisal in all the years she has worked at the agency. The executive director is in the process of re-thinking the staffing needs of the organization and realizes that all the job duties of the long term employee could be accomplished if two other workers divided the tasks and each took half. The additional duties would compliment the work that they are already responsible for and would not add much time to their workday. In fact, by eliminating that one position, with salary and benefits, the executive director realizes that she can close her budget gap for the year.

- * Should the executive director terminate the long tenured worker and give her job duties to the two remaining workers?

What are the risks involved in any "downsizing"?

The ultimate risk is that the person(s) impacted by the downsizing will claim that their termination was motivated by an illegal reason. Examples:

"All the employees who remained after the downsizing were less competent than I am, but they don't have to take time out to pray at various times during the work day, so I was selected for the downsizing. Obviously, this is religious discrimination!"

"The only reason I was fired is that I am 55 years old. Look at the rest of the staff: all younger than I am! To add insult to injury, the nonprofit is a faith-based organization that claims it cares about people!"

"I was on medical leave when they eliminated my position—my doctor told me I was disabled. How can they discriminate against me like that? I'm disabled!"

"The real reason I was fired is that I complained about the executive director having lunch behind closed doors every day with his female administrative assistant."

When a former employee claims that his or her termination was wrongful, the nonprofit employer will have the burden of showing that there was a **legitimate business reason** for the termination. This is the required “burden of proof” required of an employer in order to defeat a claimed violation of Federal Civil Rights laws, such as Title VII, or state anti-discrimination statutes.

Before you terminate a worker ask: “What is the *business reason* for separating this employee from employment?” A legitimate business reason could be that management or the board has lost confidence in the professional judgement of the employee being terminated; or more typically, that the funding for a certain position was not renewed so the position is being eliminated; or that the employee simply failed to meet performance goals.

A **legitimate business reason** is an objective criteria that the organization either has established through policy or precedent, or that the organization articulates in connection with the termination at hand. Examples of objective criteria used by employers to successfully justify terminations include:

1. **Seniority:** ‘last hired, first fired’
2. **The Weakest Link:** employees whose performance evaluations demonstrate that they fail to meet the expectations for their performance criteria will be discharged.
3. **Strategic Positioning:** employees whose job duties are linked to programmatic goals that are no longer a priority for the nonprofit will be terminated.
4. **Budget Reductions:** employees whose salaries are paid through a grant, contract or other funding that is not renewed will be terminated

A legitimate business reason for a termination is that the nonprofit has fewer dollars for its operating budget, and therefore must decrease costs by eliminating a staff position. The decision of which staff position to eliminate must also be based on legitimate, objective business reasons.

Once you are satisfied that there is a legitimate business reason for the termination, also ask: “What will the human impact of this termination be on the remaining workforce?” (For example, is the person being terminated the only person over 40 years old in the workplace, which could result in the appearance that the termination was motivated by age discrimination?)

- ☛ Sometimes, even though there is an obvious objective business related criteria for the termination, the end result is that the workplace is less well-balanced in terms of minority representation. This can give rise to allegations that the process used to select who would remain, and who would be terminated, was discriminatory.

Be alert to the impact of the terminations and prepare accordingly.

Wrongful discharge claims in downsizing situations typically allege:
discrimination
retaliation

violation of public policy, violation of whistleblower protection laws
violation of family and medical leave laws
violation of a state or federal WARN Act

What is the WARN Act?² When does it apply to my organization?

The WARN Act is a federal law that requires employers with over 100 employees to provide 60 days advance notice of plant closings and mass layoffs if they will impact a workplace where at least 50 employees will be terminated. (For purposes of the federal law, workers who have not worked for the employer more than 6 months out of the last 12 and workers who average less than 20 hours per week are not counted.) A "plant closing" is defined under the WARN Act as the permanent or temporary shutdown of a "single site of employment" that creates an "employment loss" during any 30 day period of 50 or more employees, excluding part time employees. Similarly, notice of termination must be provided when there will be a "mass layoff," which is defined as a reduction in force that is not a "plant closing" but will cause the termination of at least 50 employees at a single site of employment during any 30 day period, as long as the 50 employees comprise at least 33% of the workforce.

Note that a layoff or plant closing involving *fewer* than 50 employees will *not* trigger federal WARN Act notification requirements under federal law, **but that state laws should be consulted** whenever a facility is going to close.

Many state laws are more comprehensive than the federal law, and apply to smaller workplaces:

Example: The Michigan Act covers workplaces of 25 or more workers, while the California WARN Act covers workplaces of 75 or more workers, part time included. Other states with their own version of a plant closing law include: Massachusetts, Maryland, Tennessee, Wisconsin, Hawaii, and Connecticut, to name a few.

Hypothetical Scenarios:

What's the 'right' description for what's happening in each of these situations? What are the risks associated with these situations, and how can the nonprofit reduce those risks?

- **#1 - The disappearing grant** — A grant that paid the salaries of two employees providing transportation for seniors will not be renewed. The organization plans to eliminate the position of driver for this program, but the seniors still need to get where they need to go, so the executive director has decided to expand the job duties of a part time worker to include transporting seniors. The part time worker is younger than the two drivers and has different qualifications. Should the part timer's job duties be expanded to include transporting the seniors?
- **#2 – The absent employee who wasn't missed** — An employee who has been out on disability for two months just phoned to say that she intends to return next week. In the period that she has not been at work, senior staff has re-evaluated the staffing needs and program budget and

² Worker Adjustment and Retraining Notification Act ("WARN Act"), 29 U.S.C. 2101 § 2(a)(2).

concluded that it would be optimal if the position the employee occupied were eliminated. The executive director is about to call the employee on leave to tell her not to come back. Advise her.

- **#3 – Budget Crunch** — One of three administrative employees will need to be terminated in order for the nonprofit to meet its budgetary goals. One of the employees, who has worked for only six months, has been counseled for her difficulty working as part of a team. According to her supervisor, she has ‘an attitude’ that grates on the rest of the program staff. The employee has written numerous memos to her supervisor about the air quality in the office among other complaints. Another of the administrative employees is a minority who has worked for the organization for five years and has received satisfactory performance reviews during that time period but recently has been late to work repeatedly and has already used all her sick days for the year. The third employee has also worked for five years, and received satisfactory reviews and is white. Which administrative employee should be let go?

🔮 **What can each organization do to manage their risks in these situations?**

Summing Up

The suggestions offered here remind you about basic risk management principles to guide your implementation of downsizing at the workplace. The section below suggests critical items for inclusion in the rules you develop. The details of policy implementation are up to you.

Basic Risk Management Principles to Reduce Liability for Wrongful Termination in Downsizing Situations include:

1. **Preparation:** Know in advance what criteria you would use in the event that the organization is faced with the necessity of downsizing. Make sure the criteria used to determine who is terminated and who remains employed are objective, legitimate business reasons. Know whether your organization is covered by the federal or state laws governing plant closings.
2. **Documentation:** It’s important to articulate the objective business related reason(s) for why certain individual(s) were selected for termination but not others. The reasons should be documented in a management memo at the time the decisions are made. Consider formalizing a practice or internal procedure for managers requiring documentation of their decision making.
3. **Consistency:** Be consistent in your message to employees affected as well as to any third parties and make sure that individuals in similar circumstances are treated similarly (Example: If all employees with ten years or more of tenure are given seniority preference in a downsizing, someone with 7.5 years of tenure is NOT in the same category as someone with 10 years’ tenure.)
4. **Compassionate Communication:** Verbally inform the employee(s) as soon as possible about a planned termination and explain the business related reason. If the termination is based on performance failures, explain that. Giving employees advance awareness of significant changes

in their workplace will ease anxiety (and anger) caused by last-minute announcements, and give affected employees an opportunity to transition into alternate employment.

5. **Remain Receptive to Complaints and Concerns.** When an employee loses his or her job, expect multiple, legitimate concerns ranging from the impact on health insurance to a request for a job reference. Make sure that those affected know that the organization is open to their questions and concerns, and that they have ready access to someone who can answer their questions. Internal grievance procedures can channel complaints about terminations to the organization first, before the aggrieved former employee engages a lawyer.
6. **Provide Help.** Many nonprofits are too small to offer ongoing employee assistance programs, and most organizations have adopted strict rules prohibiting use of the organization's assets (e.g., computers, telephones) for personal reasons. Consider relaxing some of the rules for affected employees (for a limited time), in order to provide the assistance an employee may need during the difficult transition period. Before informing affected employees about their separation, conduct research on the availability of job placement services or other forms of support. If reasonably priced, consider paying for these services for affected employees. At a minimum, provide employees with information on any available free resources.

How Can I Protect My Nonprofit from Liability? In addition to the principles listed above, use this checklist:

- Follow closely any internal Policies and Procedures in the organization's handbook.** Before taking any significant step that will negatively impact an employee's situation, always consult your organization's personnel policies or employee handbook to determine whether the situation is covered. If so, *follow your established procedures*. If the procedures really don't make sense in the situation at hand, consult with legal counsel.
- Articulate the objective, business related reason for deciding which employee(s) will be terminated.** Challenge yourself. Write down the business reason. If you can't, that is a signal to you that an aggrieved employee could successfully challenge the termination decision.
- Consult with legal counsel, experienced in employment matters.** Terminations create too great a risk to fly solo. In advance of needing to consult with an employment lawyer, identify legal resources in your community where you can receive advice from an employment lawyer; ideally one who has worked with other clients in the nonprofit sector.
- Consider using a Separation Agreement and Release.** If your organization wants to take the most conservative path, and has assets available to write a check to departing employees, then consider utilizing a Separation Agreement and Release. A Separation Agreement and Release is a legally enforceable contract that commits the organization to compensate the departing employee in exchange for a promise by the employee not to bring a legal action against the employer. Such an agreement, if carefully drafted, can document and clarify the terms of the separation, such as the impact to the separating employees on their insurance coverage and the dollar amount of their separation package. The agreement can also describe other obligations that may be important to your organization, such as the requirement that the departing

employees keep certain information confidential, or return the organization's property etc. The Release aspect of the agreement (if drafted correctly) can prevent a former employee from bringing a lawsuit against the organization.

The **benefit** of these agreements is that they provide certainty to an otherwise often uncertain situation;

The **downside** is that they are costly, both in terms of the additional compensation to the departing employees and because it is unwise to use these agreements without professional legal assistance in drafting the language and in negotiating the agreement, often with the departing employee's lawyer.

Finally: Review your organization's Directors and Officers Liability Insurance or consult with your insurance broker/agent to confirm that your organization has coverage for Employment Practices Liability ("EPL") claims. Typical coverage will cover the costs of defending an organization when terminations are challenged. If you do not understand the coverage for employment practices claims after reading your policy, contact your agent/broker and request their help. Describe your circumstances and ask their opinion about whether there would be coverage in the event that one of the affected employees brought a future legal claim against the organization. Ask your agent/broker to respond in writing. Armed with that information you can make a business decision about the potential financial costs/risks of the planned action. Note that insurance will NOT cover payments to employees for separation pay.

Conclusion

Ending the employment relationship is never an easy task. But with appropriate policies in place and a plan for managing downsizing or terminations for cause, your nonprofit can emerge from this difficult task with your mission intact. Furthermore, if managed with care and compassion, you can minimize the decline in staff morale that too often results from a downsizing process. Although it sounds overly simplistic, remember the Golden Rule when you are contemplating and managing layoffs or terminations in your nonprofit: treat your employees in the same way you would want to be treated (or you would want a loved one to be treated) under similar circumstances. Always keep in mind that your organization is a nonprofit—and that employees expect that the values you uphold in serving your clients will be reflected in your relationship with paid workers and unpaid volunteers. Finally, remember that in order to protect your nonprofit's mission and future you must be deliberate and thoughtful in all of your employment practices. What you do, don't do, say or don't say could come back to haunt you for years to come and unnecessarily impair your ability to serve clients and your community.

The presenters for this Web Seminar welcome your comments and questions about the topics covered in this program or other employment-related concerns affecting your nonprofit. The presenters can be reached by email as follows:

Jennifer Chandler Hauge: jchandlerhaug@gmail.com,

Melanie Herman: Melanie@nonprofitrisk.org

Resources:

Society for Human Resource Management
1800 Duke Street
Alexandria, VA 22314
Phone: (800) 283-SHRM
TTY/TDD: (703) 548-6999
Fax: (703) 535-6490
Web site www.shrm.org

U.S. Equal Employment Opportunity Commission
P.O. Box 7033
Lawrence, Kansas 66044
Phone: (800) 669-4000
Web site www.eeoc.gov

Resources on the WARN Act: The US Department of Labor (US DOL) publication entitled [A Guide to Advance Notice of Closings and Layoffs](#) provides additional information about the WARN Act. Specific requirements of the WARN Act may be found in the Act itself, [Public Law 100-379 29 U.S.C. 2101, et seq.](#) The US DOL published final regulations on April 20, 1989, in the [Federal Register](#) (Vol. 54, No. 75). The regulations are available at [Title 20 Code of Federal Regulations Part 639](#).

Workforce Management
Crain Communications, Inc.
4 Executive Circle, Suite 185
Irvine, CA 92614
Phone: (949) 255-5340
Fax: (949) 221-8964
Web site www.workforce.com

Employment Law Information Network
The Innovation Center @ Wilkes-Barre
2nd Floor, Suite 219
7 South Main Street
Wilkes-Barre, PA 18701
Web site www.elinfonet.com

Personnel Policy Service, Inc. Publishers
159 St. Matthews Avenue
Louisville, KY 40207
Phone: (800) 437-3735
Fax: (800) 755-7011
Web site www.ppspublishers.com