Layoff Lessons
Downsizing with Care and Compassion
A Risk Management Webinar

April 5, 2006
Jennifer Chandler Hauge, Esq.
and
Melanie L. Herman, Esq.

Overview

- What approach makes sense?
- What are the legal and practical risks associated with downsizing?
- How to prepare… so when the time comes, you can act
  - in your nonprofit’s best business interests
  - in a way that is sensitive to the human impact
- Your questions, experience and concerns…

Voluntary Separation

- When voluntary, a separation from employment poses fewer legal risks
- Temptation to mischaracterize a termination
- No safe harbor
- "Constructive termination"
What is Downsizing?

- Reducing number of employees and/or volunteers
- Process used can create/alter legal risks
- Emotional ramifications:
  - Person departing
  - Persons left behind
- Safe separations require care + compassion

Separation Types

- Termination
- Dismissal
- Lay-off
- Reduction in Force

Separation Types

- Reorganizing
- Elimination of a position
- Right-sizing
- Delayering
- Others?
Semantics

- Managing expectations
- Your language – what does it convey?
  - Reasons for separation?
  - Motivation of the nonprofit employer?
- Fairness
  - Honesty

Why give a reason for separation?

- Why giving a reason is better than giving no reason…
- When you don’t give a reason…
- State service letter laws
- Defending future claims

Important Lesson

- Your internal memo: the reason for the separation
- Using the right language
- If you don’t know…
- If there are two reasons and one is safer
Downsizing Risks

- Illegal motivation, such as:
  - Religious discrimination
  - Age discrimination
  - Violation of ADA

Shifting Burden

- When allegation of wrongful termination is made, nonprofit employer has burden of showing:
  - Legitimate business reason
  - "burden of proof" to defeat alleged violation of federal or state anti-discrimination laws

Legitimate Business Reason

- Objective criteria established
  - Through policy or precedent; or
  - Articulated in connection with termination at hand
Examples of Objective Criteria

- Seniority
- The Weakest Link
- Strategic Positioning
- Budget Reductions

After determining legitimate business reason

- Consider human impact
  - On departing employee(s)
  - On remaining staff

WARN Act

- Federal law
- Similar state laws; lower thresholds
  - MI – 25 or more workers
  - CA – 75 or more workers (including part time)
  - MA, MD, TN, WI, HI, CT and others
Hypotheticals

- What’s happening in each? What are the risks? What can each nonprofit do to manage its risks?

- #1 – The disappearing grant
  - ED decides to expand duties of a part-time employee, to include transporting seniors.

- #2 – The absent employee who wasn’t missed
  - ED decides to let her go

- #3 – Budget Crunch
  - Amy Attitude
  - Absent Anna
  - Caucasian Carl
Risk Management Principles
- Preparation
- Documentation
- Consistency

Risk Management Principles
- Compassionate Communication
- Remain Receptive to Complaints and Concerns
- Provide Help

Protecting Your Nonprofit
- Follow internal policies
- Articulate the objective, business related reason for selecting employees
- Consult legal counsel
- Consider using a Separation Agreement and Release
- Review your D&O insurance
About Us

- **Nonprofit Risk Management Center**
- Free technical assistance to nonprofit leaders, staff and advisors
- [www.nonprofitrisk.org](http://www.nonprofitrisk.org)
- Free tutorials and fact sheets on the Web site, plus affordable books, conferences, software and consulting help

Our Resources

- **FREE**
  - Workplace Safety Tool Kit
  - Business Continuity Planning Tutorial
  - Pillars of Accountability
  - ADVICE
- **AFFORDABLE**
  - [www.RiskManagementClassroom.org](http://www.RiskManagementClassroom.org)