

## Layoff Lessons *Downsizing with Care and Compassion*



A Risk Management Webinar

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Jennifer Chandler Hauge, Esq.  
and  
Melanie L. Herman, Esq.

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## 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...

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## Voluntary Separation

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



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## 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



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## Separation Types

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

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## Separation Types

- Reorganizing
- Elimination of a position
- Right-sizing
- Delaying
- Others?

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## Semantics

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

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## 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

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## 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

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## Downsizing Risks

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



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## 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

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## Legitimate Business Reason

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

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## Examples of Objective Criteria

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



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## After determining legitimate business reason

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



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## 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

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## 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.

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## Hypotheticals



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

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## Hypotheticals

- **#3 – Budget Crunch**
  - Amy Attitude
  - Absent Anna
  - Caucasian Carl



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## Risk Management Principles

- Preparation
- Documentation
- Consistency

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## Risk Management Principles

- Compassionate Communication
- Remain Receptive to Complaints and Concerns
- Provide Help



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## 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

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## 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

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## Our Resources

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

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