MINNESOTA COUNCIL OF NONPROFITS

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Reduce Risk During Layoffs

by the Nonprofit Risk Management Center

Layoffs that are motivated by economic or administrative reasons — such as loss of funding or staff reorganization — are common in the nonprofit sector. The result is that employees, through no fault of their own, may find themselves unexpectedly without a job. When downsizing is necessary, the nonprofit can take steps to reduce its liability in the process of laying off one employee or several paid staff.

Consider All Options

When economics dictate that a staff position be cut, it's critical that the nonprofit have a well-supported business reason to select which employees are to be terminated. The risk is that you'll be vulnerable to claims that discrimination played a part in deciding who was to be let go. Whenever a nonprofit is considering layoffs, alternatives should be also considered. Can the objectives of the reduction-in-force (RIF) be accomplished through a hiring freeze, a salary freeze, reducing hours, or a status change from full-time to part-time? Document that you've considered alternatives to the RIF. Take the time to spell out in a written memorandum to the board, the business reasons for the necessary layoffs, as well as your justification for those employees selected for termination.

Evaluate Who Will Be Effected

Before implementing any layoffs, consider how the workforce will be impacted. Is the downsizing going to affect one particular group of employees more than others? Is the reorganization going to eliminate the only minority in the agency? If your answer to either question is yes, even if there are solid business reasons for the selection of that particular employee, there are clear liability risks involved in the RIF.

Selecting Employees or Positions to Eliminate

In selecting which employees or positions will be eliminated, it's imperative to use an objective method. Possibilities include basing retention on seniority, positions or job functions linked to essential parts of the mission or specific goals of the organization determined by a needs assessment, a lottery, or strong past performance ratings.

Whatever the method, consider convening an oversight committee to provide objectivity for the process of implementing the reductions. Also, consider conducting a needs analysis to determine which positions are critical and which could be eliminated, and reviewing the termination decisions for discriminatory bias.

Salary shouldn't be a consideration in deciding who goes and who stays within an organization, because older workers typically are those with longer tenure and are at the higher end of the salary scale.

Reducing the Risk of Facing a Lawsuit

Nonprofits can reduce the risks of facing a lawsuit in a number of ways. First, consider asking for voluntary resignations from employees. Also, take time to identify ways to support employees who will be let go. If the current policies prohibit use of the nonprofit's equipment for personal reasons, consider relaxing these rules and allowing employees who will be laid off the opportunity to use equipment to prepare resumes or search job notice websites. Review the reference giving policy. If the organization does not give references, consider changing the policy and using a reference form. A reference form is a document that serves as a written reference. It is a great service to departing employees to ensure that they will be able to provide a reference to prospective employers. It may even be worthwhile to negotiate a severance package in exchange for a signed release and waiver of claims against your organization. Although a release will cost something, it can be an important step to reduce the possibility of a suit.

Communicating with Staff

It's critical to communicate to the staff the reason for the downsizing. Management or the board should share the economic realities of the situation with the staff, and explain the business justification for the reorganization or downsizing. They might explain that the downsizing is being carried out reluctantly and only after efforts have been taken to avoid such as result. If possible, make an effort to network with other nonprofits in the community to identify alternative new positions for those being let go.

Federal and State Laws that Affect Downsizing

In severe downsizing situations, such as a nonprofit closing its doors, the federal Worker Adjustment and Retraining Notification Act (WARN Act) or a similar state law may apply. WARN only applies to those nonprofits with 100 or more full- or part-time employees, who, in aggregate, work at least 4,000 hours per week. WARN requires employers to give employees 60 days advance notice when 50 or more employees will be terminated, if that constitutes one third of the workforce (or when 500 or more employees will be laid off). By law in Minnesota, a nonprofit must immediately notify employees in writing when a petition for bankruptcy is filed.

Softening the Blow of Termination

Because layoffs are often unexpected and not the employee's fault, many nonprofit employers offer separation pay when termination is a result of economic necessity. There is a risk in having such a policy as a standard procedure because in cases where a severe shortfall necessitates layoffs, there may not be sufficient funding to cover all of the separation payments.
While softening the blow of a layoff can be a good idea, rather than codifying separation pay in personnel policies, it's better to offer separation pay as funding allows. An alternative is to clearly state in policy language that separation pay will be offered "at the discretion of the board, as funding permits."

Preparing an Organization for Layoffs

Begin by reading the nonprofit's handbook, noting any policies that might lessen the right to conduct a reduction-in-workforce or specify how RIFs are to occur. Also review all written policies given to employees.

Instruct management not to make promises that they can't keep, such as there won't be any layoffs or that everyone's job is safe. Employees who feel that they've been misled or lied to are more likely to sue.

Before considering hiring younger workers who have needed skills to replace older employees who don't posses these skills, offer to retrain the older workers in new skills and document that offer.

Never use a layoff process as a way around terminating poor performers. RIFs are not an alternative to terminating someone for poor performance or gross misconduct. A layoff process should never be used for this purpose.

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