

A top-down view of a desk with a laptop, glasses, and a pen. The laptop is on the left, with its keyboard and trackpad visible. A pair of black-rimmed glasses is in the upper right, and a black pen is in the lower right. The background is a plain white surface.

Work**Smarts** Half-Day Seminar

The Exit: Managing Employee Separations

Presented by Elizabeth Wentz and Liz Felker

 Spencer**Fane**[®]

Layoffs, layoffs everywhere!

FORBES > MONEY

Disney Layoff 7,000 As Embattled House Of Mouse Announces Restructure

Nearly 20,000 jobs lost in another week of brutal mass layoffs for tech and media

Yahoo, Dell, Zoom, Disney, and News Corp. joined the growing list of high-profile companies announcing cuts

BUSINESS

Zoom is the latest tech firm to announce layoffs, and its CEO will take a 98% pay cut

FORBES > MONEY

Github To Layoff 10% Of Global Workforce In Latest Tech Cuts

February 8, 2023 · 11:05 AM ET

Yahoo announces layoffs of 20 percent of staff by end of 2023

The Exit: Managing Employee Separations

- Severance Benefits
- Individual Terminations
- Reductions in Force
- Employment Agreements



Severance Benefits

Severance Benefits: General

- Severance benefits may be offered:
 - to provide a specific group of employees with income continuation if they are terminated due to an event out of their control (such as a reduction in force);
 - to provide some protection to both current and prospective employees for a job loss;
 - in exchange for a release of claims by a terminated employee;
 - to maintain a competitive advantage with other companies for employee recruitment purposes;
 - pursuant to company custom; or
 - out of a sense of loyalty to employees.

Severance Benefits: Types

- Formal Severance Plan
 - Sets expectations for employees
 - Provides consistency
 - Provides protection for the company by using formal separation agreements
 - Treats similarly situated employees equitably
 - Simplifies monitoring whether all legal requirements are met
- Informal “One-off” Severance Offer
 - Provides flexibility for different severance benefits on an employee-by-employee basis because no expectations have been set
 - Allows for negotiation on an individual basis depending on risk
 - Permits flexibility to account for changes in the economy and for a range of other circumstances

Severance Benefits: Plan

- ERISA Considerations
 - ERISA is applicable to severance “plans,” which are severance arrangements that:
 - provide for a series of payments (rather than a one-time, lump-sum payment to a group of employees on occurrence of a certain event that is not anticipated to reoccur); and
 - require an ongoing administrative scheme.
 - A severance “plan” must comply with ERISA by satisfying:
 - reporting and disclosure requirements, including annual filing of a Form 5500 with the DOL and distribution of a summary plan description to participating employees;
 - claims and appeals requirements; and
 - the requirement that the plan be in writing.

Severance Benefits: Plan

- ERISA Welfare Benefit Plan
 - Plan that provides severance benefits but NOT retirement benefits
 - Not required to comply with ERISA's minimum participation, vesting, and funding standards, requirement that plan assets be held in trust, and certain fiduciary obligations.
- ERISA Pension Benefit Plan
 - Plan that provides retirement benefits
 - Must comply with ERISA's minimum participation and vesting requirements
 - May be required to meet federal tax qualification requirements and comply with ERISA's trust and fiduciary standards.

Severance Benefits: Plan

A severance plan subject to ERISA will be considered a Welfare Plan and NOT a Pension Plan if:

- Payment of plan benefits is not contingent on an employee's retirement;
- The total payment to an employee does not exceed two times his prior year's annual compensation; and
- All payments to an employee are made within the 24-month period following his termination.

Severance Benefits: Administration

- Challenges in Administering Severance Arrangements
 - Informal or Unintended Establishment of a Severance Plan
 - Failure to Meet ERISA's Administrative Requirements (if applicable)
 - Discrimination Issues
 - Conditioning Benefits on Waivers and Releases

Severance Benefits: 409A

- Internal Revenue Code Section 409A governs payment of deferred compensation (any compensation payable in a year after the year in which the right to compensation arose)
- Payments of deferred compensation that fail to comply with Section 409A result in adverse tax consequences for the employee receiving the payment:
 - Full taxation of all compensation deferred under the non-compliant arrangement (and any similar arrangements that must be aggregated with it);
 - An additional 20% penalty income tax; and
 - Payment of additional make-up interest if the deferred compensation was vested in a year before the year of the violation.

Severance Benefits: 409A

- Exceptions to Section 409A:
 - Short-Term Deferral Exception
 - Payments made no later than 2½ months after the end of the fiscal year of the employer during which the employee terminated
 - Severance Pay Exception
 - Involuntary termination or termination based on good reason
 - Payments are made by the end of the second calendar year following the year of termination
 - Payments do not exceed the lesser of two times:
 - The employee's base salary at the end of the year prior to the year of termination; or
 - The limit on compensation under a qualified retirement plan for the year of termination (\$305,000 for 2022).



Individual Terminations

Individual Termination

- Type of employee
 - At-Will
 - Employment Agreement

Individual Termination: At-Will

- At-Will Employee: terminable “for any reason that is not unlawful”
 - What is the reason for termination?
 - Is there documentation to support the termination?
 - Who is recommending the termination?
 - Has the employee been given a realistic opportunity to improve?
 - Is there a risk that the termination is “unlawful?”
 - Protected characteristics?
 - Leave recently requested or taken?
 - Recently filed workers’ compensation claim?
 - Request for or offer of an accommodation due to a disability?
 - Recently filed complaints? What kind?
 - Recently participated in any investigations?

Individual Termination: At-Will

- Post-termination Decision Considerations
 - Separation Agreement
 - For employees 40+ years old:
 - 21-day consideration period
 - 7-day revocation period
 - Timing for termination meeting
 - Return of company property
 - Removal from social media
 - Messaging to other employees

Individual Termination: Employment Agreement

- Options for Termination
 - For Cause
 - Without Cause
 - Mutual Agreement
- Considerations
 - Employee position
 - Impact on remaining employees
 - Public relations concerns
 - 409A issues



Reductions in Force

Reductions in Force: Preparation

- Preparation for the RIF
 - Define the reason for the RIF
 - Define the business unit for consideration
 - Define the criteria for selection for the RIF
 - Consider whether the company will offer severance to those selected
 - Outline the timeline of the RIF
 - Notice
 - Separation Date
 - Consider any interim actions needed for business operations

Reductions in Force: WARN

- WARN Notices (Federal)
 - Who:
 - Employers with 100 or more full-time workers where at least 50 people at a single site of employment experience an employment loss
 - Employment loss:
 - Closing a facility permanently or temporarily (affecting at least 50 employees)
 - Discontinuing an operational unit permanently or temporarily (affecting at least 50 employees)
 - Layoff of 500 or more workers at a single site of employment during a 30-day period
 - Layoff of 50-499 employees and the layoff constitutes 33% of the full-time employees at the single sit of employment
 - Temporary layoff of less than six months that meets the above and is extended
 - Reduction of hours of work for 50 or more workers by 50% or more for each month in any six-month period
 - Calculating Employment Loss:
 - 30-day period
 - 90-day aggregate period

Reductions in Force: WARN

- WARN Notices (Federal)
 - What must be provided:
 - 60 days' notice to employees
 - For unrepresented employees, the notice must include:
 - Whether temporary or permanent
 - If an entire plant is closed, a statement indicating the same
 - Expected date when the plant closing or mass layoff will start
 - Expected date the actual employee will be separated
 - A statement regarding bumping rights
 - The name and telephone number of a company official to contact for more information
 - Advance notice to the State Rapid Response Dislocated Worker Unit
 - Advance notice to the chief elected official of the local government where the closing or mass layoff will occur
 - Advance notice to any affected Union
 - Exceptions to 60-day Notice Requirement:
 - Faltering company
 - Unforeseeable business circumstances
 - Natural disaster

Reductions in Force: Disparate Impact Analysis

- Disparate Impact Analysis
 - What:
 - Review to determine if the RIF criteria impacted those with protected characteristics in a negative way
 - Covered under attorney-client privilege
 - When:
 - Once the employer has “finalized” the list
 - Enough in advance of the RIF to allow for strategy discussions and potential movement

Reductions in Force: OWBPA

- Older Workers Benefit Protection Act (OWBPA) Group Termination
 - Separation Agreements: Employees 40+ Years Old
 - 45-day consideration period
 - 7-day revocation period
 - Exhibit A:
 - Business unit
 - Criteria for selection
 - Chart of selected and not selected individuals

Reductions in Force: Messaging

- Preparing the RIF Messaging
 - Who and What:
 - For the impacted employees
 - Talking points
 - FAQs
 - For the remaining employees
 - For the leaders
 - For the community/press
 - When:
 - Impacted employees should be told in quick succession
 - Remaining employees should be told as soon as possible after impacted employees



Employment Agreements

Employment Agreements: General

- At-Will Agreement
 - For states where ancillary agreements are required for restrictive covenants
 - To set expectations for employees
- Employment Agreement with Term
 - To structure a relationship for a set amount of time
 - To set expectations for employees

Employment Agreements: With Term

- Who:
 - Leaders
 - Executives
 - Employees the employer needs time to replace
- What:
 - Defines the term of the relationship
 - Defines the reasons for termination
 - Clarifies what the employee receives at the time of termination
 - Sets expectations for payment at the time of termination
 - Outlines requirements for any separation pay

Employment Agreements: With Term

- Considerations for an Employment Agreement with Term:
 - Term (hard expiration date versus automatic renewal)
 - Definition of termination for Cause
 - Definition of termination for Good Reason
 - Notice requirements for termination without Cause/without Good Reason (and working obligations during notice period)
 - Severance pay in exchange for signing a Severance Agreement
 - Timing of severance pay and 409A applicability/impact



WorkSmarts

Top Tips

The Exit: Managing Employee Separations

- Periodically review severance arrangements and practices to ensure severance benefits are being communicated and provided to employees according to the employer's intent
- Ensure at-will terminations are conducted in a way that establishes the employer's reason for termination and the lawfulness of the termination
- Implement procedures that require the employer to consider its legal obligations under the WARN Act and OWBPA and conduct a Disparate Impact Analysis any time a RIF is being considered
- Keep accurate records for each employee with an individual Employment Agreement, including complete, up-to-date copies of all Employment Agreement documents

Thank You



Elizabeth Wente

Partner | Springfield, MO

417.888.1038 | ewente@spencerfane.com



Liz Felker

Partner | St Louis, MO

314.333.3907 | efelker@spencerfane.com