

The Employment Law Counselor

hosted by Jeff Stewart Episode 1

PLUS Staff: [00:00:00] Welcome to this PLUS Podcast. Before we get started, we'd like to remind everyone that the information and opinions expressed by our speakers today are their own and do not necessarily represent the views of their employers or of, PLUS. The contents of these materials may not be relied upon as legal advice.

Jeff Stewart: Hello and welcome to the Employment Law Counselor Podcast. I'm your host, Jeff Stewart, and today we're talking layoffs. It seems like you can't go more than a day or two without seeing news of a major layoff from a major US company these days. Twitter, IBM, Goldman Sachs, DirecTV, Spotify, Microsoft, even Yankee Candle have announced major reductions in their workforce.

Today, I've got my partner, Jim Anelli, here to talk about how we can avoid liability in layoffs situations.

Jim, thank you for joining me today.

James Anelli: Yeah, thanks, Jeff. This is a timely topic. It's, it's, it's really critical and [00:01:00] it's important to employers and as you can see, you've mentioned a number of companies, and particularly Twitter stands out for me is sort of a case study about layoffs.

What they accomplish, how they should be done, and, and really the pitfalls associated with Twitter. I mean, you could see the unexpected consequences to layoffs that are not planned, where you just lose a tremendous amount of talent if it's not done properly. And, and we can talk about that later in the program.

But, you know, people have to think about layoffs, I think, in a different way from an employment setting. They need to focus not only. On the jobs that are being lost, which are, are critical and, and sad really. And they also need to focus on the employees that are left and, and how to handle those employees in a, in a difficult situation.

Jeff Stewart: I think, I, I absolutely agree, and I think it's important to really discuss what we [00:02:00] mean when we say layoff, because many times, while the word layoff implies a possibility of recall. When we're talking about

these mass layoffs the companies are doing, they're really terminations. Wouldn't you agree?

James Anelli: Oh, absolutely. Uh, the, the term is probably antiquated and, and really does involve termination and it, it can happen for a variety of reasons. And, and Twitter is probably a, a great example of that. It can happen because of a change in economic conditions. It can happen in a merger and acquisition where; companies choose to downsize the size of their organization.

And it can also happen in a voluntary, uh, way where employees are given the option to leave the company in exchange for a severance payment. So, when we use the term layoff, we're really talking about a blanket term that covers a variety of different situations. [00:03:00]

Jeff Stewart: Absolutely. So let, let's take a typical scenario where a company forecasts difficult times and decides to reduce their size of its workforce by a certain number.

Now, ideally, the company is going to identify how many people it needs to lay off or to terminate, determine whether that's going to be an involuntary or voluntary situation. Come up with some standard to decide how people are going to be selected for layoff, and then they really have to look at a lot of potential pitfalls.

Some of the pitfalls that I look at are, you know, are there potential discrimination issues? You know, is there severance that we want to give? What are some of the issues that you look at, Jim, as potential pitfalls?

James Anelli: Sure. I think you, you, you started out talking about the planning process and, and most companies, uh, do plan for layoffs and recognize there's a need to, uh, [00:04:00] look at what the company is trying to accomplish.

Sometimes it's as simple as cutting, uh, the overall size of an organization in order to maintain, uh, the viability of a company in difficult economic, uh, climates. Other times it's a strategic situation because the level of business has dropped, or there's been a change in the industry, maybe a change in technology that makes a particular segment of a company no longer viable in terms of competition.

And so, often it's a, a, a planning process, but they're also within that planning process, various decisions that need to be made such as, you know, do you pay employees, uh, severance? Do you want, how do you go about selecting the

employees that will be subject to a layoff? Is it a departmental type review or is it broader type [00:05:00] review?

And on top of that, um, I think most importantly is the planning process needs to consider what employees will be needed to guide a company through difficult times post, uh, layoff, and what employees will be needed to successfully bring the company back to economic viability. And, and those are typically decisions that are made in conjunction with.

A board of directors and, and, uh, the C-suite of an organization and, uh, revolve around, you know, what the organization is their timeframe is and the severity of the issues facing them.

Jeff Stewart: Yeah. And you mentioned the timeframe there, and there's another area that we're going to get into in a little more, in a few moments, which is, are there any statutory notice requirements? You know, for example, the the WARN Act, which provides a [00:06:00] requirement of 60 days' notice in a plant closure or a mass layoff situation. Um, and those are defined by statute, but it's not as though you can say, Hey, I want to lay off 150 people at this location and do it tomorrow. You know, there might be notice requirements. Now you may be able to do that and pay them in lieu of the notice, but it is something you need to be aware of. So, I think it's best. Why don't we talk about some of these potential pitfalls that you and I have both recognized in a little bit of detail here. First is that selection procedure of who's going to be laid off.

I always tell my clients, Jim, and I'm sure you do the same. It's best to have some objective criteria, you know? Most common is seniority. Um, you know, the, the people with the least [00:07:00] seniority are the first ones to be let go. Now that could be company-wide or it could be department-wide depending on how you're doing things. Um, but that's a nice objective standard to avoid potential discrimination claims.

James Anelli: Uh absolutely. Oftentimes it's somewhat easy in deciding the scope or parameter of a layoff. Um, many times companies decide that they'll eliminate an entire department or a product or a service. And so all employees associated with, uh, a product, service or department would be laid off. And so the contour is pretty clear and, and, and objective. Uh, other times it is more of a selection process where the layoff is applicable to all employees in the organization.

And, uh, management, uh, has been asked to come up with a cost savings of a particular number, and in doing so, looks at [00:08:00] potential candidates across the entire company. Inherent in that process is a selection process where, Management is selecting particular employees. Um, seniority is one way to do it. Performance is, is another way to do it. There are oth, you know, certainly, uh, other methods of, of reaching a, a determination of who will be subject to the layoff. The, the critical thing is to examine though whether your layoff process is having a disproportionate impact on protected classes. So, if you're laying off, say a hundred workers, for example, company-wide, and 80% of them are women, even though they only make up 40% of the organization then clearly, um, it's having a disproportion, uh, disproportionate impact on women.

And it's important to look at that and modify that selection process so that it matches up with [00:09:00] the census of, of an organization in general. And that's one of the things that, uh, lawyers will do. Overseeing, uh, the layoff process itself.

Jeff Stewart: And another area to look for is specifically age discrimination. Uh, especially if, as you said, Jim, you're targeting, you know, we need to get our budget down by a certain number and we look at, you know, the higher earners.

Many times, people who have been with the company longer and our paid more are also older. And if you're over the age of 40, you are in a protected class. And if your layoff is 70% people over the age of 40, um, we could have a potential age discrimination problem.

James Anelli: Yeah, this is actually, uh, becoming more of an issue. Um, and, and here's why. Uh, with the advent of different types of communication platforms, you know, like Slack and o other instant [00:10:00] messaging platforms, you have numerous conversations occurring among, uh, management. Uh, officials and what you can run into sometimes is you have someone who will make a stray comment about, well, we need to get rid of the deadwood, or we need to get rid of, you know, certain individuals because they're not, you know, active enough, they've slowed down too much and you, you get these comments that really are indicative of age discrimination and that's how plaintiffs prove their case. They, they, they introduce these comments to show the motivation behind the selection process. And it may well be that the company isn't intending at all to engage in age discrimination, but these stray comments made on these platforms can be really damaging to that, that process.

And so that's one area that I really do see management really needing [00:11:00] to buckle down because, when we get into these cases and we see some of these comments, the jury, as you might imagine, takes these comments really seriously. Even though it may have been a comment that nobody really blessed, it was just kind of set out of the blue and it wasn't something.

That's why a management review of the, um, ultimate impact of these types of layoffs is critical to disprove any type of straight comment that may have been made. And given the by management technology.

Jeff Stewart: Given the technology today, those comments are now provable because they live forever in, you know, a messaging app or something to that effect. Whereas as stray verbal comment, you know, people can forget that, that they made. And they're difficult to prove.

Absolutely. So, let's move to the second area, and that is the issue of severance. You know, a lot of companies think, oh, well, you know, if we just offer [00:12:00] severance in exchange for a release, we're good.

We don't have to worry about any potential lawsuits, et cetera. We should be fine. Do you find that to be the case, Jim?

James Anelli: Well, I, I, I think companies often review severance for a variety of different reasons. So, in some instances, they're looking at severance because they're obligated to provide severance under, say, war, A Warn Act or other state mini warn acts.

Um, alternatively though, uh, many of my clients, for example, will look at, you know, concepts of fairness, and they kind of recognize that many of these employees aren't at fault, you know, for the, uh, the layoff itself. And in terms of equity, they want to provide, uh, a certain amount of, of severance to these workers.

But, you know, typically it's an exchange for a, a release. It's fairly common these days to provide severance [00:13:00] in layoffs and to request a release. I would say, um, the vast majority of employers do request a, a release and exchange for severance. The types of severance that are paid can often vary depending upon, uh, both seniority. Um, the employee's position within the company. And, uh, also, uh, for those companies that are unionized, there may be a specific, uh, provision to pay severance of a specific amount, you know, under a collective bargaining agreement. But I, I do think that in, in answer to

your question, having a severance agreement certainly would prevent, you know, most claims from being filed with respect to the individual employee.

And so that's why I think employers, you know, try to obtain those, uh, agreements. Um, there is always going to be employees for whatever reason, refuse to [00:14:00] sign a severance agreement, or alternatively get an attorney to negotiate, uh, severance. My, my experience in this area has been that very few employers in a, in a group layoff situation will get into negotiations with an individual employee that would be different than what has been proposed for the group.

Jeff Stewart: Right, and I, I agree with you. I think the one thing that you need to be sure of as a company is you used an example that you may have severance due to The Warn Act. So in lieu of 60 days' notice, we're required to give 60 days of pay if we want a general release. We have to give more than the minimum that the statute requires.

So maybe we give, you know, 90 days of pay, uh, but there has to be more than what someone is required to be paid in order for the release to have [00:15:00] consideration.

James Anelli: That's right. In fact, that is a common mistake that I see all the time where, uh, a company has, say a severance, uh, policy or, or a severance program and the release, a agreement or severance agreement that's provided to the employee recites that it's paying the amount of severance of the company would otherwise have to pay as consideration for the agreement.

In those situations, there is no consideration for the agreement and therefore that even if the agreement is executed, it's probably not enforceable unless there's some other additional consideration and the bar is not particularly high. You can offer almost anything else, and it generally will be deemed additional consideration.

But despite that fact I, I see these types of agreements. From time to time where there really isn't sufficient consideration 'cause the company hasn't done anything else other than agreeing to pay what they're already legally required to pay.

Jeff Stewart: Yeah. Now [00:16:00] let's go to the next pitfall, and it's one that people may not think of as a pitfall as much, and that is, do you have employees work after they've been notified that they're going to be laid off or let go? And my position is many more problems can occur if you allow an employee to

continue working after they know they're going to be let go. Do you see the same thing, Jim?

James Anelli: You know, I, I, I do. I think in general, you're right. I think that most employers will basically ask the employees, you know, not to work, uh, upon providing notice of termination in a layoff.

However, you know, I have to say that. You know, attorneys think about liability, and they think about the law, whereas many times our clients are business people and they have [00:17:00] to confront the practicalities of doing business. And, and this is actually one example where there, there can be a pretty significant divergence.

So, there may well be times when a company is simply not in a position to say, to say three or 400 employees, you know, we'll provide a notice of termination and pay you severance for the next 60 days. And, and, and you don't have to come into work because there, there is a need to complete projects. There is a need to complete different types of contract work.

There's a need to maintain some stability in the organization. And so, what I've seen employers do, and it's, it's kind of interesting is they combine the notice of the, the layoff with a bonus program if the employees stay through the entire program. [00:18:00] And you know, that's an example of companies that don't have the ability to simply say, don't come into work.

There were other times, particularly in, I would say, in smaller layoffs where employees, uh, can be given notice and they're immediately asked to leave the office. I think quite frankly, that has to be done in a way that gives the employees the opportunity to say goodbye to each other. It's, as you might imagine, these are always difficult circumstances.

And I think if it's done in the right manner, you'll actually cut down on the number of claims later on. But I, I do think there's a divergence here and in some industries and some businesses. But Jeff, I agree with you. I think in general, It's, it's probably a good idea. I think it's really up to management to make that determination for, you know, itself and its, its organization.

Jeff Stewart: Um, yeah, and, and some of the areas of potential [00:19:00] liability or problems that I have seen when someone is notified that they're going to be let go, but they continue to work are areas like, you know what? All of a sudden, they have a worker's comp issue. You know, they get hurt at work and now we're dealing with that worker's comp issue for five years or longer.

James Anelli: Yeah. Another, another issue is the employees are out looking for jobs. Absolutely. So they, they know they're going to be laid off and say, six to eight weeks, just by way of an example. And they basically look at it as, I've got to get a job in the next six to eight weeks. I got to go out and interview. I got to brush up my resume, I got to talk to people and talk to friends.

And they're sort of there in the sense that they're still employed during some particular timeframe. They're still coming into work, but they're, they're ac, you know, their interest in their focus has moved on to the next job.

Jeff Stewart: And [00:20:00] yeah. And that actually goes to a couple other areas that I see as potential problems there.

If someone continues to work, is what kind of communications are they having with the company's customers? Where, if they are communicating with vendors, customers, et cetera, are they speaking well of the company or are they, say, letting them know, you know, hey, I'm getting let go and I'm upset A, B, C, or D.

Another area is, frankly, theft. Seen people come and take files, take various things from the office because they know they're gone. It may not be the first thing you think of, but these are people who feel many times wronged by this layoff decision.

James Anelli: Right. And I think you see that particularly in the professional services area, uh, you know, of the economy where you've got, um, individuals that have [00:21:00] clients.

and the first question is, okay, I'm going to be laid off from this particular company, can I take my clients with me? Can I move on? And, you know, wherever I go, you know, take, take those clients, take that business with me to another company. And so it, it, it definitely, um, depending upon the industry and the types of employees we're talking about, can be a significant factor in deciding, well, maybe I don't want these employees to be in a situation where they're, you know, basically working with clients that they may seek to take in in the future to a new employer.

And so I may decide it's, it's too much of a risk to allow that individual, it, it could even be the case, and I've seen this before where, um, for some groups of employees, uh, management has decided that they don't need to come into work and that they'll, uh, initiate the termination immediately. And [00:22:00] then

for others, they've decided, you know, not, not to do it, particularly in a fairly large type of group layoff situation.

Jeff Stewart: Agreed. All right, so let's talk about the, the last, I'll say pitfall area, um, that we identified earlier, and that is the WARN Act and some statutory, uh, rules that may impact a layoff, generally a large layoff. Now I'll say right now, we could do an entire podcast on the WARN Act. That's not what this is intended to be, but just as an overview, the WARN Act that is implicated when an employer closes a facility that affects 50 or more employees when there is a layoff of 500 or more employees at a single site, or if you lay off 50 or more, that is, that constitutes at least 33% of your [00:23:00] workforce, and the WARN Act requires 60 days advance notice.

Or pay in lieu of that notice. Now, in addition to the Federal WARN Act, many states have enacted what I'll call mini WARN acts that usually lower those thresholds to smaller layoffs that are implicated under federal rules. And some require even more notice. And I think the the most important thing is, to know what state you're in and to look, what are the rules? Would you agree with that, Jim?

James Anelli: Oh, very much so. I mean, the, the Federal WARN Act, uh, is I think, coming up on its 30th anniversary. And I will say that it, it definitely, is probably one of the most misapplied, uh, statutes by employers. Uh, it, it's a complicated statute and, what's happened over the last dec [00:24:00] few decades is, is that the courts have added onto the statute a a lot of triggers that employers can miss in, in doing, uh, a mass layoff.

And as a result, they unintentionally trigger WARN. And, you know, it can be a massive amount of, of exposure if, if the layoff is, is large enough. In addition to that, as a background, you've mentioned the state, uh, they call them mini WARN acts, but I, I will tell you that this is an area that really has been ramping up and I, I think this could well be the year where we start to see many more states start adopting state WARN acts.

And it's, it's complicated because, uh, a lot of large employers do work in many states, and these, uh, these statutes can be quite different. So, for example, in New York and Tennessee, uh, there's a 50-employee requirement to [00:25:00] be covered by the state, uh, mini WARN Act. It's not a hundred employees like the Federal Act and so many small employers are governed by New York and Tennessee's, you know, mini WARN Act and they probably don't realize it. On top of that, New Jersey has just enacted an amendment to its WARN Act effective this April, 2023, which provides for severance. Even if notice is given

to employees covered, uh, by the, the layoff, if it's 50 or more employees and the employer has a hundred employees nationally within the US.

And you know, I was working with one client earlier this week and the amount of severance that we calculated was 1.5 million for a relatively small employer, uh, just over a hundred employees. And so, as you can see, these state acts [00:26:00] are, are going to be critical in deciding where you have layoffs in that jurisdiction, how to structure them. Uh, another aspect of this, of course, is where you have employees working remotely.

And the issue becomes where, where do these employees reside in connection with these types of, uh, WARN acts. In the federal Act it, it may not be all that important, but in some of these state acts, it, it may well be an interesting question. Um, we're currently dealing with this on several levels where if you have a whole workforce that's reporting to say headquarters in New Jersey, are they New Jersey employees for the purpose of the New Jersey WARN Act, or are they employees of the state where they're working at home, you know, in in their house?

And you're going to see more cases on, on this particular topic, but that's just, uh, symptomatic. I think [00:27:00] of WARN in general is that you always have cases that come down from the courts to sort of explain and expand, uh, some of these, these WARN Act considerations. And so for sure anybody doing a a mass layoff is going to have to pay really careful attention to the states that are involved and, and really walk through it.

One of the issues in this area, for example, is that the states are now saying that independent contractors can be deemed employees if they don't meet the state test for an independent contractor. And so, you could have situation, as you know, where companies may have 30 to 40 independent contractors on staff and may have 70 employees and think that they're not covered by a WARN Act.

And yet if you include the independent contractors, if they can't meet the uh, state's, uh, standards, then they clearly are [00:28:00] covered. And, and, and that's another issue that's, that's out there that is, is currently being addressed. This is all stuff that's on the cutting edge, but it's, it's out there right now.

Jeff Stewart: And I think in the current environment you're going to see more state legislatures pass, mini WARN acts or expand theirs because they're seeing large layoffs and they want to make sure that employees, frankly, are protected in some way. And jobs.

James Anelli: You're actually going to start seeing not only states, but cities, Philadelphia has a WARN Act. Uh, District of Columbia has a WARN Act. Um, I won't be surprised to see a number of other states. Uh, adopt, uh, uh, sorry, and other, other cities adopt WARN acts as well as, you know, states. So, you agreed you could have a situation where you not only need to look at the state, but you need to look at the city that the layoff is occurring.

Jeff Stewart: All right, so with that, Jim, as you know, I like to give our listeners [00:29:00] a few takeaways from our discussion here today.

Do you have a takeaway to give to our listeners?

James Anelli: Yeah. I have two takeaways. I think the first is, uh, layoffs are complex. They should be done with planning, and they should be done in consultation with, with management. And I, I think the first thing that really should be discussed is what is the overall goal for the organization and what is in its best interest as an organization?

And what is, how will the layoffs, uh, be perceived by the employees who are remaining? How will the employees who are remaining be treated? What types of communications will there be with the employees who remain? And what is the overall goal of, of the organization post termination and post layoff? Uh, sometimes these types of discussions don't happen and, and things can go kind of off the tracks and [00:30:00] you can wind up losing a tremendous amount of talent in an environment where it's very difficult to obtain talent. And so, I think it's, you know, most companies that do this well are very pragmatic in how they view this and, and that would be my takeaway.

Jeff Stewart: Mine would be that layoffs done poorly can lead to a tremendous amount of potential liability, but it's really the companies themselves that have control over this. As Jim said, planning, taking your time and figuring out what is my goal. How do I get there? And let's do it carefully and make sure we are communicating internally with our management team externally with legal counsel and make sure we know what laws may be implicated in order to do it well.

And then communicating with your people so that they understand how they were [00:31:00] selected or what the re, business reason is behind it. The more people understand the why, the less likely the claims will come back to you. So, with that, I'd like to thank you for listening to the Employment Law Counselor Podcast.

On behalf of Jim Anelli, I'm Jeff Stewart. Thank you, and we'll talk to you again soon.

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