

Considering Employee Layoffs? Here are Some Best Practices



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Announcer:

Welcome to Paychex THRIVE, a Business Podcast, where you'll hear timely insights to help you navigate marketplace dynamics and propel your business forward. Here's your host, Gene Marks.

Gene Marks:

Hey everybody, and thanks for joining us again. My name is Gene Marks and you're here with the Paychex THRIVE Podcast. I am talking today to Lenny Feigel. Lenny is an attorney at Foley & Lardner LLP. Lenny, first of all, I know you're in Jacksonville. Is the firm also in Jacksonville as well, like we're all in Jacksonville?

Lenny Feigel:

We're a national firm. We have an office in Jacksonville, but we have offices in almost every major city. I mean, it's Chicago; Washington, D.C.; Milwaukee.

Gene Marks:

Got it, got it, got it. And tell me a little about yourself. How long have you been practicing law? Where'd you do you go to school?

Lenny Feigel:

I went to University of Florida for law school. I've been practicing law for 16 years now, and I've been the whole time with Foley & Lardner, so it's been it's been a good mix.

Gene Marks:

Wow, that's amazing. And you're still practicing, you haven't gotten it right yet. It's like at some point don't you get it right.

Lenny Feigel:

I try to every day.

Gene Marks:

That's always like a doctor, it's like, yeah, I've been practicing medicine for 20... Why would I let you operate on me if you're still practicing? But all right, that's good. So, you're down in Florida. Do you specialize in labor law in particular or any other type of specialties?

Lenny Feigel:

I specialize in what we call labor and employment. So, labor laws tends to be traditional labor which is collective bargaining, union work. So, I do a little bit of that, but in Florida there's not as many unions as there is in the northeast. So, my practice is primarily employment based, terminations, wage and hour, anything that does with the employers, and my practice is only with employers. So, we only represent employers most of the times.

Gene Marks:

So, you represent the good guys in other words. Is that right?

Lenny Feigel:

That's on our side. Exactly.

Gene Marks:

That's fun. I have a real good friend who's also an employment, a labor attorney, also represents employers who he calls the good guys. It's good to hear that it's a huge field, very well needed. I'm a CPA so I tell a lot of our clients you really need to have a good relationship with a labor attorney because there's a lot of issues that businesses of all size are dealing with.

Lenny Feigel:

Especially now with the new, I mean, there's changes in the law constantly and especially in the last eight years there's been a ton of changes, COVID-related and otherwise. So, yeah, I echo that. I think helps companies, be best to have a good relationship to be able to pick up the phone and just have a 10 minute to an hour call. It usually is beneficial to the client.

Gene Marks:

Yep, I agree. And it's not just national. It's also, it's very much local as well, depending on where you are in the country. So, that makes a lot of sense. Okay, so we're talking now because you had written a piece that caught my attention in JD Supra, it's jdsupra.com. It's called "What Should Employers Consider If Conducting Layoffs." You and I are having this conversation now at a time where the economy is really slowing down. A lot of big companies, well, the tech industry is already starting laying off tens of thousands of employees, real estate and construction, not too far behind, financial services. A lot of small businesses and midsize companies may also be in a similar situation. So, Lenny, what should employers consider when you're conducting layoffs? Give us some advice here.

Lenny Feigel:

Yeah, I think the first thing is how big of the layoff is it going to be. I mean, that's the first thing. You have to plan and you got to prepare. I mean, if it's going to be two people, it's not nearly as a big deal as if it's going to be a hundred and what's going to be impacted. So, I mean, I always tell our clients, plan, plan, plan, and I know that's difficult because like you said, employers are the good guys. No one wants to lay people off. Not one company wants to lay people off. So, usually, what ends up happening is it's an option that's going out there and it's a topic of discussion, but no one really puts pen to paper, and they wait and they wait because everybody wants to be optimistic or they don't want to be...

Gene Marks:

Of course.

Lenny Feigel:

And then when that happens, then there's urgency because they probably waited too long. So, if you're planning on this, if it's even an idea or a topic, involve your HR, human resources department. If you have in-house legal, involve them, or external legal, at least so you can get a checklist along the lines of, hey, what should we be looking at if we're going to do this.

Gene Marks:

Okay. So, let's talk about that checklist. Give me some of your thoughts what should be on that checklist.

Lenny Feigel:

Yeah, I think the first thing is where are the layoffs going. So, are they coming from a department? Are they coming from across the board? That's the first thing. Are you going to offer some type of early retirement or attrition? How are you going to do the layoffs? How are you selecting who is going to be laid off? I mean, usually, what you want to do is you want to say use objective criteria, and by that I mean something that you can point to and say this is what it is. For instance, are you going to just use performance evaluations for the last year or the two years? If you're going to do that, I caution employers, make sure you actually do good performance evaluations. You got to check them. Oftentimes our beliefs of what happened recently doesn't correlate with a history usually because people forget.

Lenny Feigel:

Are we going to use seniority? Is there a collective bargaining agreement, meaning is one area, one department, or one plant or facility represented by a union? If it is, there may be rights. They may have layoff rights such as bumping rights. So, you got to figure out where are the rights that...you got to first figure out where any rights exist. Do some employees have contracts, employment contracts which title them to certain rights? So, you got to figure out, I think the first thing is where is the layoffs going to occur or where they may occur, who may be impacted.

Gene Marks:

Got it. Got it. Along those lines, I don't know, the last time there were big layoffs that occurred was back in 2008, 2009 at the Great Recession. It's been a while. I mean it's been like 12, 13 years, if you can believe it, since that's occurred, and a lot's changed in the workplace. Employees are so much more vocal, and stuff gets going on social media, and people are real prone to claim harassment or discrimination. So, what are your thoughts about, do you think this is a tougher environment to lay people off than it's been before? What do you think employers should be considering?

Lenny Feigel:

Sure. Do I think it's tougher, I think it's tougher from the media. I mean, the media attention, publications. There's images that employers want to maintain. They want to be positive. So, I mean, I think the first in my opinion is treat people, your employees and ones you may even be letting off, treat them with respect the best you can. Keep them informed whenever you're making those decisions. And beforehand, you got to keep it in a tight circle because you don't want rumors getting out.

Gene Marks:

Sure.

Lenny Feigel:

But there are certain things we can do to mitigate risk, I mean, from liability. First thing is, like I said, use objective criteria. I mean, that's the first thing. And follow that, make sure you're right. I mean, if you're saying, "I'm going to use it for the performance evaluation scores," check them. Make sure you're accurate. Or if you're going to say who has better skill sets, okay, well you got to define what that means. Are you saying somebody who can work in two different jobs, or are you saying it's just somebody who's better at

the skillset? Well, how do you choose that? You can use performance evaluations to kind of support that, but you want it... The objective criteria to me to mitigate the risk is something that is quantifiable. That's the best time because if it's just some amorphous, who's the better employer, I mean, employee, you can be challenged on that. I mean, that's what we're looking to do is to mitigate the risk with the least amount of potential liability.

Gene Marks:

Which basically means that to make it quantifiable, you had mentioned before and you mentioned this now about making things based on performance reviews. I mean, I guess that is the clearest way to do it, but the big assumption is, is that you've been doing your performance reviews. I mean, do you find that to be an issue? Because I certainly do among clients that they're way behind.

Lenny Feigel:

Yeah. No, it's a constant challenge I think for employers, and some of it where it's a bigger layoff for a larger company, where the challenge comes in is you may have good performance evaluations for one department or division and may not have them as strong in the others. I mean, one other factor to consider is when you're laying employees off, I mean, if you're using technicians for example, and oftentimes, I mean, they're doing the job or there not. A lot of companies like that, they're not doing annual performance evaluations for something as a technician.

Gene Marks:

Right. And you need to.

Lenny Feigel:

They're just not. And they should be, absolutely. They should justify any raises, things like that. And here, one of the things you should be looking at, I mean, to help mitigate risk is are you going to offer some type of separation pay. If you are-

Gene Marks:

Tell us a little bit about that, about what you see companies offering as far as separation or severance.

Lenny Feigel:

Yeah, usually, they will come up with some type of formula. It can be one week per every two years served with a minimum payment of two weeks, but a lot of that depends on who's being impacted. If it's C level employees or up in management, some of those employees may have rights to separation per policy. So, it kind of again goes back to what's the core decision and who's being impacted. But there'll almost always be a formula. Most of the time I've seen, it's like I said, one week every two years or one week every year up to five, and then another variation of the formula, one every two after that. If you're an employee of over 10 years, they may have some sort of payment for benefits, continuation of benefits, how they're going to handle that.

Gene Marks:

I mean, when people do have layoffs at companies, pretty much across the board though, there is severance involved. Right? I mean, whenever I read about big companies doing layoffs, you always take a reserve because you're always paying out some type of severance or paying out benefits to whatever. Is that what you see as well? I mean, what about smaller size companies or midsize companies? Do you see many of your clients that they would have a layoff and it would just be like your last day is on Friday and that's what it is without any severance, or is that really uncommon?

Lenny Feigel:

It happens, but it's uncommon. I mean, again, employers try and do the right thing most of the time.

Gene Marks:

They do.

Lenny Feigel:

My experience, when I've seen where they are just saying, "Okay, there's a layoff," again, depends on how big the layoff, but if it's a substantial layoff, I mean, they may not have the financial resources to offer a separation package. So, it's not only about choice, but it's availability, an option. So, that's why I say go plan if you're thinking about this, and again, employers, if they're trying to survive and they don't want to have their image tarnished, they want to have a good image so they want to offer separation. It also mitigate risk because as part of a separation package, and I always tell all our clients, make sure people sign a release. They don't get their separation package unless they sign the release which then, I mean waives any rights to sue you.

Gene Marks:

When you advise your clients when they have a layoff, do you advise them to do it immediately and show the employees the door or to give them time? In other words, your last day will be a week from Friday or two weeks from Monday. What has been your best strategy for doing that?

Lenny Feigel:

Sure. I'm going to give you the typical lawyer response, and that depends.

Gene Marks:

Yeah, of course.

Lenny Feigel:

First, there's a federal law, it's called the WARN Act. It's really the Worker Adjustment and Retraining Notification Act. If those layoffs, which usually have to have at least 50 employees laid off or more to qualify, and it's very specific, very technical, but that's the minimum. If those layoffs qualify for notices under the WARN Act, you have to give those employees 60 days advance notice.

Gene Marks:

So, they can keep working at your company for 60 days? Or is there ever scenarios where you see clients... See, my concern with laying people off is that you're going to have disgruntled employees potentially sabotage or steal data or whatever. So, do you find clients saying, "Okay, well, yeah, we'll give them 60 days notice, but they're not coming into work after today"? That's an option.

Lenny Feigel:

Yeah, but you're going to have the 60 days notice. You have to pay them for the 60 days. That's the liability.

Gene Marks:

Yes, right, right.

Lenny Feigel:

So, if you want to pay in lieu of notice, yeah, I mean, you can do that. But a lot of employers, what they don't want to do though is they don't want... I mean, they've got certain challenges too. They've got disgruntled employees, but they need to continue the business. You can't just lay everybody off unless you're really ready for it, and especially if you're paying them for the notice, you can't include that notice period as consideration for any separation agreement. You got to have something additional because they're entitled to that. So, that's one problem. I was going to say the other issue is if people are working, you have intellectual property concerns you want to protect.

Lenny Feigel:

So, yeah, I always tell employers, you want to give the least amount of notice you have to or is practical because you have concerns of what may happen. You need to take some precautionary with your IT consultants or your IT people. Do they have protections in there? Is anybody going to be downloading... I mean, do they have access to download lists, customer lists, or some other protected confidential information that can harm you.

Gene Marks:

You had mentioned a separation agreement. Is that any different than a release, or are they pretty much the same thing?

Lenny Feigel:

Yeah, so that's our internal vernacular.

Gene Marks:

That's fine. That's fine.

Lenny Feigel:

So, a release means you have released viable claims against somebody. So, a separation agreement usually contains a release. You'll have other issues in there saying exactly when the date of termination is, you've informed the employee. There's certain other requirements that need to be in to release certain claims, like an age claim. There's certain requirements that have to be in the agreements. You have to advise them they can seek counsel, that they have what we call a seven day to revoke any acceptance of the claim. So, they can sign it and then within seven days say, "No, I want to revoke my acceptance." So, there's legal requirements that are set out usually in the separation agreement. Maybe you have affirmations of, hey, I've returned any and all confidential information. You may have a non-disparagement claim, I mean, provision in it.

Gene Marks:

Right. Are these agreements themselves, is this a federal thing or is this mostly driven by states law?

Lenny Feigel:

Yeah, it depends. So, to have a contract law releases is both federal and state. So, some states have specific language you have to put in to have any valid release. California's a specific state. Other states, like Florida, where my office is, there isn't any specific language. If you can put in, I release these claims, any and all claims, you can list out the statutes and that's it. That's sufficient.

Gene Marks:

What happens if an employee does not sign the release or they refuse to do that? You had mentioned they have seven days that they can opt out. What should employer do in that situation?

Lenny Feigel:

It's got to be voluntary.

Gene Marks:

It depends. But go ahead.

Lenny Feigel:

I mean, if they're not going to separate, if they're not going to sign it, then I mean, you can't force them to sign it. It has to be voluntary. And under the law, the age discrimination claim, I mean, it's called the Older Workers Benefit Protection Act, just for those that are concerned, there are specific times that it has to be left open. So, if it's a group termination, they have 45 days of this to remain open for them to consider.

Gene Marks:

But I mean, what's in it for the employee to sign it then if they're not required to? I mean, can't the employer hold up on their final paycheck or any final payouts to them unless they do sign that release?

Lenny Feigel:

Yeah, so the benefit to the employee is they get that separation pay, whatever that formula is, if it's a month salary.

Gene Marks:

Right, right.

Lenny Feigel:

I mean, that's the carrot that they get. But no, you can't withhold payment. I mean, that is in some states-

Gene Marks:

Well-

Lenny Feigel:

Go ahead, sorry.

Gene Marks:

No, no, no, no. The question is just like can you make that separation pay contingent on signing the release so that-

Lenny Feigel:

Yes, absolutely.

Gene Marks:

Okay. Right. That's what I was getting at.

Lenny Feigel:

Yeah. So, for instance, you're conducting layoffs and you say, "Anybody who signs it gets \$5,000, but you have to sign the release. It's contingent upon you signing. If you don't sign it, you don't get the \$5,000."

Gene Marks:

Got it. That's exactly what I'm saying.

Lenny Feigel:

But you have to make sure you pay them for every hour they worked up to that time.

Gene Marks:

Got it. Okay. That's great. So, just as a recap though, so the big takeaway first of all is that if you're planning on doing layoffs, you got to plan to do your layoffs, and this should be in advance. Too many of your clients wait until too late probably where they're scrambling to do what they got to do. That's definitely number one. If you're going to do that and you've got more than 50 employees, you're going to have to allow those people getting laid off, they get time allowed. I think you said 60 days you have to continue them as an employee before they're actually terminated from their jobs. You said that you should have some type of a separation agreement which would include a release as part of it, and that separation agreement would lay out certain rules for returning materials, what your pay would be, what both the employer and the employee's obligations are to formally terminate. Is there anything else that I'm not thinking of or that we haven't discussed in advance of planning a layoff that you'd like to add?

Lenny Feigel:

Yeah. So, I mean, one of them is when you're doing the layoff, you need to train the managers or whoever's going to be communicating that message, spend time informing them and teaching them, training them what can and what can't be said. I mean, provide it in bullet point or something to them. You also have to remember, unless you're closing, you have employees that are staying, and they're being retained. You need to make sure, they're going to know, you got to communicate and have a communication meeting with them or a something. What's the plan? I mean, I would advise you most of the time have a frequently asked questions kind of meeting or webinar or something because people, I mean if they just had a big layoff, employees that are being retained are going to have lots of questions.

Gene Marks:

Sure, sure, of course.

Lenny Feigel:

Am I next? What's the outlook look? I mean, is it good? The other thing to consider for layoffs is if somebody's rehired within a certain period of time, are you going to want part of the separation pay back? So, if they apply, I mean, you're making layoffs in North Carolina at a plant and then somebody applies for your facility in Oklahoma and they get hired. I mean, are you going to want something back? It's one of those things, I mean, again, it's all about the planning. So, the other issue is with the discrimination is there's two different types of discrimination to keep in mind. So, if there's what we call disparate impact which is if it's a neutral policy, something that seems neutral but it has an impact, an adverse impact on a protected group, usually those are class actions because they impact the big people. That's all statistic driven because it's a neutral policy.

Lenny Feigel:

But when you're doing what we call a disparate impact analysis, you can look behind the scenes and see, hey, I don't see a disparate impact, but there's some evidence here that can show a disparate treatment which is intentional discrimination, and it highlights some of those issues, like, hey, why are we selecting this group or this person, or look, you only have two female employees in this whole division and they're the two that are being terminated. You better have a description, I mean, a valid documentation demonstrating how you came to that decision because it's going to look a little fishy.

Gene Marks:

Got it, got it. Which brings us back to the importance of the performance reviews being done as well and trying to base on this as much quantifiable as possible. Lenny, it's great advice. It's advice that I think is going to be really important to a lot of businesses as we head into the end of 2022 and 2023.

Gene Marks:

I'm assuming you saw "Up in the Air" with George Clooney. You had to have seen that movie, right?

Lenny Feigel:

Yeah, I did.

Gene Marks:

Oh my god, he travels around the country firing people. That's like his job. He is a consultant. That's all he does. You see and you get a kick-

Lenny Feigel:

That sounds terrible.

Gene Marks:

Oh, that was the whole point. It was miserable, and the people that he interviewed in the movie were actual real life people, the people that he terminated were real life people that had gotten terminated from their jobs and they had a chance to react back to him the way that they wanted to react if they could go back and do it again. It was really, it was some movie. So, you can watch this. You've given me good advice. I've just given you good advice. How does that sound?

Lenny Feigel:

I like that. I'll have to watch that.

Gene Marks:

You'll like that.

Lenny Feigel:

It sounds funny.

Gene Marks:

Lenny Feigel's an attorney at Foley & Lardner LLP. Lenny wrote this great article called What Should Employers Consider If Conducting Layoffs, you can find it at jdsupra.com, J-D-S-U-P-R-A.com. Lenny, thank you so much for joining me. Great information. Would love to have you back sometime soon.

Lenny Feigel:

My pleasure, Gene. Thanks.

Gene Marks:

Appreciate it. You take care.

Gene Marks:

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Announcer:

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