



Layoffs and Rightsizing for Unionized or Unionizing Workforces

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Chris Foster
Partner, Employment
San Francisco



Marjorie Soto Garcia
Partner, Employment
Los Angeles



Tony Torain
Partner, Employment
Washington DC

Legal frameworks

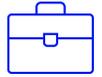
General Principles



For unionized operations

- Layoffs pose the “least” NLRB and union-related “risk” when there is **specific and express** language in a current collective bargaining agreement giving the company the right to lay off, setting the specific limits if any, and there is at least 2 weeks’ prior notice (or greater if WARN applies)
 - Often there is not clear layoff or management rights terms, and not much time for advance notice but a layoff will still need to proceed
 - this creates a navigable cost benefit analysis and strategic issue
 - Layoffs are scrutinized by NLRB during contract negotiations
 - technically, layoffs are precluded unless the union agrees to the terms or there is overall impasse
- **Labor law exposure (via NLRB or labor arbitration):** backpay and other “make whole” relief (e.g., medical costs from lost insurance) less interim earnings, reinstatement and forced communications about union and NLRA rights and violation of the same
- **Strategic exposure:** strikes, picketing and other labor actions; unionization interest by non-impacted employees

General Principles



For non-unionized employers/operations

- Layoffs pose the “least” NLRB and union-related “risk” when there is a strong and compelling reason for the layoff; it is swift (with no prior leaks); severance is seen as reasonable; and there is effective and consistent communication
- Layoff rumors are often a spark for employees to quickly reach out to a union for support, to create longer-term strategic delay and create severance negotiating leverage
- **Labor law exposure (NLRB or labor arbitration):** backpay and other “make whole” relief (e.g., medical costs from lost insurance) less interim earnings, reinstatement and forced communications about union and NLRA rights and violation of the same + ***potential recognition and bargaining obligation with union***
- **Strategic exposure:** strikes, picketing and other labor actions; expansion of union interest or organizing activity (including employment, WARN-based lawsuits)

Issue checklist for unionized employers

- Will layoff occur during CBA term or extension?
- Layoff, seniority, and management rights terms, including most recent negotiation notes
- History of layoffs and bargaining with union re layoffs
- History of grievances, arbitrations on layoffs
- Reason for layoffs
 - Result of entrepreneurial change in direction of the company?
 - Major customer loss?
 - The more substantial and fundamental the reason, the greater the potential defenses
- Will non-union and supervisory employees be impacted, and will severance packages be the same
- Value of severance package for impacted employees
- Is there time for at least 2 or more weeks of “effects bargaining” with union regarding terms?



Issue checklist for non-unionized employers

- Extent of any known NLRA “protected concerted activity” or union organizing
- Impact scope, speed
- Risk of leak
- Specific documentation of plan and timing
- Selection optics and impact
- Rationale and optics, relation in timing to any market/internal developments or communications
- History of layoffs
- Consideration of voluntary separation programs
- Will supervisory employees be impacted, and will severance packages be the same?
- Value of severance package for impacted employees
- Does the WARN Act apply?



NLRB status and enforcement trajectory

NLRB Status and Developments

- The Trump Administration has appointed an Acting NLRB General Counsel (William Cowen – LA, Republican)
- Five seats – only one active member
 - **Current:** David Prouty (Democrat)
 - **Appointed:** Scott Mayer (Republican) – awaiting Senate confirmation Oct. 1
 - **Appointed:** James Murphy (Republican) – awaiting Senate confirmation Oct. 1
 - **Vacant:** Marvin Kaplan (Chair - Republican) – term expired August 2025
 - **Vacant:** Gwynne Wilcox (Democrat) – ongoing litigation regarding removal in D.C. Cir.
- Three-member quorum is required (no quorum since January 2025)
 - Only 6 rulings have been issued post-inauguration, vs. 94 during a comparable period following President Biden’s inauguration

NLRB Status and Developments (cont.)

- New and different enforcement priorities and trajectory – especially on the critical issue of settlements
- Unreviewable discretion to not prosecute unfair labor practice charges
- **However** – Biden appointed NLRB Regional Directors are still in place and largely handle and direct day to day NLRB election petitions and unfair labor practice investigations
- Consider pursuing immediate communication to NLRB GC office (Division of Advice) and asserting emerging defenses to investigations and charges

Major development in the Fifth Circuit

- In August 2025, the Fifth Circuit Court of Appeals (covering TX, MS, LA) enjoined the NLRB from prosecuting unfair labor practice charges against three companies.
- The courts reasoned that the removal protections for NLRB “Board” members and ALJs were likely unconstitutional.
- The order in this case only applies to the three companies at issue, but other employers are expected to continue fighting the NLRB’s jurisdiction by asserting the same arguments and seeking appeals of NLRB decisions in the Fifth Circuit.
- Beyond this decision, employers are more broadly now able to challenge the NLRB by leveraging the Supreme Court’s *Loper Bright* decision which ended so-called *Chevron Deference* to administrative agencies.

Risk mitigation strategies

Risk mitigation

Framing the business rationale

- **Rule:** parties must generally bargain over changes to terms and conditions of employment (i.e., layoff)
- **Evaluation of potential bargaining exceptions:** inherent entrepreneurial decision making (score and direction of the business), exigent circumstances (disaster), union waiver; extreme financial exigency
 - Entrepreneurial discretion / effects bargaining (excuses decisional bargaining) – no obligation to bargain regarding legitimate decisions to change business strategy, scope, or direction
- Ensure proper documentation and support of the rationale
- Communication consistency and management
 - NLRB subpoenas for internal communications on layoffs can be broad
 - “Bad motive” evidence can undermine otherwise lawful business decisions

Risk mitigation

Diving into economic exigencies

- **Exceptions:** (a) union is refusing to bargain in “good faith”; or (b) financial or other emergencies (high burden)
 - Nature of change
 - Whether change is reasonably necessary
 - Impact of change
 - Bargaining history (if any)
 - Additional factors
- **Examples where economic exigency excusing unilateral action found**
 - Layoffs: Impending hurricane and citywide evacuation; machinery breakdown rendering entire plant inoperable
 - Closures/partial closures: Bankruptcy; timber shortage in area
 - Subcontracting: lone IT worker resigned and server outage
 - COVID-19 staffing shortages
- **Examples where economic exigency *not* found:**
 - Sale of business (known for months)
 - Layoffs: Permanent COVID-19 furlough; loss of key account; losses in business/sale volume; reduction in raw materials
 - Wage reductions due to declining profits / reduced demands from key customer
 - Projected operating losses (elective surgeries during COVID-19 pandemic)

Risk mitigation

Next steps

- Evaluation of all CBA terms providing management rights for the layoff or decision resulting in the layoff
- Severance agreements
 - Confidentiality / non-disparagement
- In general, plan on:
 - at least 2 weeks' effects bargaining meetings every couple of days
 - Initial fights over whether there is “decisional” or “effects” bargaining
 - Voluminous info requests and fights over scope, privilege and relevance
 - Economic exigency – expect deep dive into company financials
 - Being transparent to employees about status of negotiations if there is misinformation/rumors
 - Brinkmanship to the very end and potentially needing to reach “impasse”

Effects bargaining

Effects bargaining strategies

- **Legal standard:** After decision has been made but prior to implementation, good faith “bargaining” regarding layoff decisions (e.g., timing, severance, transfer rights etc.): meetings and info requests – concessions and agreement not strictly required but are best to avoid protracted disputes.
- **In practice:** Meetings in person or by zoom, every couple of days, starting with company’s proposal and considering union’s counter. Must document effort to “bargain in good faith”. Some movement and concessions will help expedite process and develop ideal “record” but are not strictly required.
 - Ultimately, if employees want an attractive severance offer, they will often push the union to backdown on technical legal arguments.
- **Preparation:** Evaluate and decide on sequence and timing of communications (internal and external); ensure consistency and right tone; documentation related to the decision, timing, and impact (including copies of proposed severance agreement) to be able to quickly respond to information requests and manage “the record”/ consider communicating with employees including providing “draft” severance agreements with specific terms subject to agreement with the union
- **Timing:** Generally aim for 2-5 weeks runway from point of notice to union and employees
- **Exposure:** at least 2 weeks’ backpay less interim earnings – but can be more weeks to the point of reaching agreement, impasse, or waiver by union – in a 2018 case the DC Circuit vacated an award of 26 weeks’ backpay

Government contracting considerations

Government contracting

- **Terminations for Convenience or Loss of Grant Funding:** A termination for convenience allows the Government to unilaterally terminate a contract without liability. The Government may terminate a contract because the purpose of the contract no longer serves the agency or the Administration's priorities or budget. In addition, many federal grants that conflict with the Government's priorities have recently been suspended or terminated.
 - Government contractors should understand the parameters of the termination notice, the rights granted under the contract with the government agency and any rights granted to the union under the collective bargaining agreement to lawfully conduct layoffs with minimal risk of challenge from the union.
 - The circumstances of the government contract termination or grant termination are beyond management's control, and layoffs may be necessary for the Company to remain fiscally viable. The employer should clearly communicate the Government's decision to terminate all or part of the contract or grant to the union as soon as it receives the termination notice to set the stage for effects bargaining and to set expectations regarding realistic concessions.
- **Termination Costs:** Determine what expenses are included in contract termination or close-out costs. Severance pay and other benefits may be recoverable. Understanding what costs are recoverable from the government will help employers budget for benefits to offer the union employees who are laid off due to the loss of funding.



Thank you

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