

Venture Layoffs – 10 Steps to Take ASAP

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1. Review All Agreements

- Review the terms of all employment-related agreements and identify provisions triggered by the departure. Typically, this will include an offer letter, confidentiality/IP/non-solicitation/non-compete agreement and possibly documentation related to an equity grant.
- Determine whether you are required to give any advanced notice.
- Determine if there are any severance obligations.
- Determine the existence and extent of any restrictive covenants agreed to by the employee (non-compete/non-solicit) and highlight ongoing enforceability. Prepare a letter reminding the departing employee of all post-employment obligations.

2. Review All Applicable Legal Requirements

- If it is a large layoff, does the WARN Act apply and has the termination criteria been reviewed to avoid unlawful discrimination?
- If the terminated employee is on an H-1B Visa, there are specific Department of Labor and Customs and Immigration Service requirements. Also, explore potential for visa transfer.

3. Notify and Coordinate with Your PEO

- If your employee is employed through a Professional Employment Organization (PEO), notify the PEO and coordinate with their process for employee resignations. PEO's usually set up a co-employment situation and, as a result, the PEO is likely to have legal concerns and its own well developed process.

4. Protect Proprietary Information and Company Assets; Restrict Physical Access

- Secure access to confidential information, limit/remove employee's access to information and the corporate network, and review network activity for unusual downloads or email traffic. Provide the employee with information about how company assets should be returned (laptops, monitors, phones, etc.).
- For in-person employees, revoke access badges or otherwise prevent unescorted access to your facility.

5. Evaluate Equity Repurchase Rights

- If the employee was granted company stock or options, review the terms of the grant. Focus on any notice or exercise requirements and their time frames – and exercise any repurchase rights in a timely fashion and in accordance with the process detailed in the equity agreement. Notify the employee of any applicable timetable with respect to their exercise of options.

6. Identify Transition Issues

- Plan for the transfer of tasks, projects, and third-party relationships to remaining employees.

7. Determine Final Pay Requirements

- Ensure compliance with applicable law regarding timing and content of final paycheck to employee. This will include unpaid wages and, in some cases, accrued but unused vacation time, unpaid bonuses and unpaid commissions.

8. Plan for Communication to Third Parties

- To control the narrative, develop a plan to proactively notify other employees and, if needed, customers, suppliers, investors or others.

9. Consider a Separation Agreement

- Evaluate the benefit of offering the employee “severance” (in excess of any amount of contractually required severance) in exchange for a release of claims and non-disparagement obligations, and even more so, confidentiality obligations if no NDA was previously in place.

10. Conduct Exit Interview

- If feasible, depending on the scope of the layoffs, the Exit Interview is a good opportunity to reiterate the employee’s post-employment obligations and to provide details with respect to COBRA and any other post-termination benefits.

FAQ's

1. Is the employee entitled to payout of unused vacation time?
 - This depends on the law of the state where the employees resides and, in some states, on the policy of the employer as set forth in the employee handbook, or other written agreement with the employee.
2. Is the employee entitled to payment of a pro-rata bonus?
 - This depends on the language of the bonus plan, and whether it specifically states that the employee must be employed on the date the bonus is paid to be eligible.
3. Should you offer a severance package?
 - A severance package may be a good idea if there are concerns regarding the exiting employee and the company would like to secure a release of all possible claims. Consideration, above that which the employee is already entitled, is required to make a release agreement enforceable. Severance can be money, accelerated equity vesting, payments to cover COBRA, or anything of value which the employee is not otherwise entitled to.
4. Do you take a different approach with respect to the termination of an independent contractor?
 - Not necessarily, however the approach would focus more on the terms of the contract with the contractor instead of employment laws. Given the significant problems of misclassification of independent contractors, however, it might be prudent to consider a release agreement.
5. Do any employee benefits continue after termination of the employment relationship?
 - Other than continuing group health plan benefits under COBRA (paid for by the employee), generally benefits end with the termination of employment unless they have a written employment agreement providing otherwise.
6. What do you do if the employee refuses to participate in an exit interview or agree to a separation and release agreement?
 - There is no requirement that the employee participate in an exit interview or agree to anything on the way out the door. However, such a refusal should be a red flag that the employee might file a lawsuit. The company should consult with counsel regarding next steps.