

After September 11 Employment Law Issues

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We at Fair Measures grieve with those who have lost family, friends and coworkers, and join in the praise for the countless acts of heroism. We are also aware that these events have brought up many questions for employers and employees. We offer answers to some of these questions below.

What are the Rights of Reservists Called for Duty?

How Should Layoffs be Implemented?

Are There Special Rules for Laying Off H-1B Visa Workers?

What are the Rights of Muslim and Arab Employees?

Do Employees Have the Right to Express Unpopular Political Views?

What Are the Rights of Reservists Called for Duty?

The Pentagon has said it expects to call up as many as 47,500 members of the Reserves and National Guard to active duty. Managers should review company policies and be aware of their responsibilities towards these employees.

The Uniformed Services Employment and Re-Employment Rights Act (USERRA) protects reservists from discrimination of any kind that relates, even in part, to the employee's military service. If called to duty, reservists must provide their employers advance notice of their orders, either orally or in writing, unless precluded by military necessity. While employers can ask commanders to temporarily defer employees for later duty on a case-by-case basis, the final decision rests with military authorities.

Employers must promptly reinstate reservists once their tour of duty is complete. Time limits for reservists to return to work depend on the duration of the orders and range from 8 hours to 90 days after completion of military duty.

The National Committee for Employer Support of the Guard and Reserve (ESGR) was created to serve as a liaison between reserve members and their civilian employers. Employers can find answers to their specific questions by contacting the ESGR Ombudsmen Services at (800) 336-4590, or at the National Committee for Employer Support of the Guard and Reserve.

How Should Layoffs be Implemented?

Amidst all the turmoil, it is important to remember that layoffs should be done in a principled way, not only to avoid lawsuits, but also because it is important at this time to treat everyone with deep respect.

We have compiled a Layoff Guide for Employers that is available [here](#). It includes legal background information, a step-by-step guide, FAQs, and forms required under the WARN Act. Half of the money paid for this Guide will be donated by Fair Measures to the American Red Cross.

At a minimum, when conducting a layoff, an employer should

- Follow all company policies,
- Have a legitimate business reason for picking individuals for layoff (such as seniority, performance, skill set, flexibility, or other economic justification),
- Document your decision-making process with objective, verifiable facts,
- Analyze your initial lay off list to see if your decisions are having an uneven impact on the basis of age, race, gender, etc. If so, contact your Human Resources or Legal advisor,
- Have the final paycheck ready, including accrued vacation, bonuses, overtime, or commissions due,
- Give notice of continuation of health benefits under COBRA, and
- Give written notice under the WARN Act.

The WARN Act does not require 60 days notice in cases of layoffs due to “unforeseeable business circumstances,” but it does require that written notices be given to employees, any Union affected, the State unemployment office and local governmental officials. (Sample notices are provided in the [Layoff Guide](#))

Note for employees: if you think you have been unfairly laid off, find out your rights with our [Wrongful Termination Guide](#).

Are There Special Rules for Laying Off H-1B Visa Workers?

The American Competitiveness in the Twenty-First Century Act of 2000 prohibits companies from laying off U.S. workers within 90 days of hiring an H-1B visa worker in the same job classification. After that, the law is silent on what an employer should do in the case of a general layoff.

Employers should not use visa status as a reason to pick someone for layoff. However, the H-1B regulations make clear that these employees are temporary workers. An employer usually should lay off temporary workers before laying off regular employees.

The employer also can use other objective criteria and apply it to H-1B and U.S. workers alike.

If H-1B visa workers are laid off, employers have three important duties

1. Offer to pay the air fare of the workers back to their home countries, and
2. Give immediate notice to the U.S. Immigration and Naturalization Service of the termination of employment, and
3. Don't discriminate in severance or other termination benefits.

The legal requirement to offer to pay air fare to the home country is very specific, and applies whether the company originally recruited the employees from abroad, or hired them within the U.S.

The requirement is also very narrow. A company is only required to pay one-way airfares for the workers, not their dependents, nor any additional shipping costs.

Since many non-immigrants in this situation elect not to return to their home countries, companies can inform them of their right to obtain transportation through the company's travel agency, within 30 days of termination. The employer is then relieved of the obligation, and in most cases will not be out the money.

What are the Rights of Muslim and Arab Employees?

There have been many reports that Muslims, persons of Arab descent and those who "look" Middle Eastern are being harassed and intimidated. The U.S. Equal Employment Opportunity Commission (EEOC), which enforces federal anti-discrimination law, is paying special attention to these claims. Cari M. Dominguez, Chair of the EEOC, called on all employers and employees across the country to promote tolerance and guard against unlawful workplace discrimination.

A manager has a unique role in preventing harassment and discrimination in the workplace. Whether it is a discriminatory comment, shunning, or worse, a manager should stop the behavior. In addition, managers can do the following

- Remind employees of policies against harassment based on religion, ethnicity, and national origin,
- Communicate procedures for addressing workplace discrimination and harassment,
- Urge employees to report any improper conduct,
- Provide training and counseling, as appropriate, and
- Be a model of good will towards all employees.

For more information, the EEOC has developed an information sheet, which is available by contacting EEOC's Publications Distribution Center at (800) 669-3362 voice and (800) 800-3302 TTY and on the [EEOC's Web site](#).

For further in-depth information on harassment and discrimination law, [click here](#).

Do Employees Have the Right to Express Unpopular Political Views?

As this crisis continues, people are going to express their opinions about what happened and what is the appropriate response. Employees do not have the right to discuss non-work related issues at work. Most employers allow it, but it's important to realize that it is a privilege that the employer can revoke at any time. After all, the purpose of the workers is to work.

If management allows discussion in the workplace, employees must be respectful and tolerant of different opinions. If these discussions disrupt the office, undermine a manager's authority, or impair working relationships, the employer should stop the discussion.

In most states, employees are protected against discrimination, harassment or termination as a result of expressing their political views. They are protected by general privacy laws, specific political speech statutes, or the laws prohibiting discrimination against employees who engage in lawful activity.

Public sector employees have more freedom of speech than employees in private industry. For example, when Ronald Reagan was shot, an employee of a Texas sheriff's department said, "If they go for him again, I hope they get him." She was fired, but the U.S. Supreme Court held that was unconstitutional because she was speaking on a matter of public concern. *Rankin v. McPherson*, 107 S.Ct. 2891 (1987).

Do not take any adverse employment action against employees because of their political opinions. If employees have been told to get back to work, and instead continue the discussion, they can be reprimanded, disciplined or ultimately terminated for insubordination.

In Closing

At this time in our nation's history, it is most important to remember the principles upon which our country is founded. The U.S. stands for the rule of law, justice, fairness, tolerance, and respect. As managers, we have the ability to bring those values to life in our daily world of work.