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Labor & Employment ADVISORY ■

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Developing a Plan to Bring Your Employees Back to Work

As statistical reports begin to point to a deceleration of COVID-19, corporate America has begun planning to bring back employees who were furloughed or laid off due to the pandemic. The nearly nationwide shutdown presented employers with unprecedented challenges, both legal and practical. Likewise, returning employees to work will require employers to grapple with a host of unfamiliar challenges, including possible changes in how and where employees work, reflecting our "new normal."

Return-to-work plans will necessarily vary based on local and state directives and on factors like the nature of the workforce, geography, and industry, but now is the time for employers to lay the groundwork for implementing specific return-to-work plans.

Furloughed Employees versus Laid-Off Personnel

Different protocols may be required to bring back employees who were laid off compared with employees who were furloughed for a brief period. If an employer rehires a worker who was laid off, a new employment relationship is being formed.

- In such circumstances, you must decide if hiring protocols will be relaxed or if rehired personnel will be required to pass all standard requirements for new employees.
- For example, consider whether you will require rehired personnel to submit to background checks and drug screens.
- If so, will you relax standards for someone who had a good record as your employee but who does not now clear the drug screen or background check?

Even if your company is willing to relax certain company requirements, government-mandated steps in the new-hire process must also be considered.

- Remember, when an employee is rehired, it triggers a new employment verification process. If a former employee is rehired within three years from the date their original Form I-9 was completed, you may be able to rely on the previously executed Form I-9; but otherwise, a new Form I-9 will be required and the E-Verify process may also need to be completed.
- Similarly, it is imperative that employers ensure that they comply with state and local laws that may impose obligations on employers as part of the onboarding process.

Be aware, too, that in some jurisdictions an unpaid furlough that lasts several months may be considered a legal separation. In those jurisdictions, an employer should satisfy all the same steps it would complete for a new hire when bringing the furloughed employee back to work.

Have Employees' Positions or Terms of Employment Changed?

When employees return to work, the new normal may mean that work assignments have changed either because of a reduced total headcount or other organizational changes. Compensation terms and benefit plans may also be modified.

- Consider whether changes to an employee's position convert the position to a non-exempt role. It will be important for employers to monitor changing job duties to ensure that workers are properly classified.
- If bonus, commission, or other compensation plans or benefit plans are modified, be certain that you consult with counsel and make any necessary amendments to the plans.
- Clearly communicate the changes to impacted employees, preferably in writing.

Consider Requiring New Written Acknowledgments and Contracts

As noted, when rehiring a laid-off worker, a new employment relationship is formed. This means that acknowledgments or contracts previously signed by the worker are unlikely to remain in force, and new signatures should be obtained. Bringing people back to work may be an ideal opportunity to refresh standard new-hire documents.

- Determine if a new offer letter should be presented, or other written evidence of the agreed-upon terms and conditions of employment, including acknowledgement of "at will" employment status where appropriate.
- If your company requires employees to execute nondisclosure agreements or other forms of contracts containing restrictive covenants, new documents signed by the rehired employee should be obtained.
- Review your contracts for choice-of-law and forum selection provisions that may not be permissible (e.g., California prohibits out-of-state venue and choice-of-law provisions in most employment agreements).
- Consider requiring arbitration agreements with class action waivers and requiring that all returning workers, including those who were furloughed, execute updated contracts.

- Use this opportunity to redistribute your most recent employee handbook and obtain new acknowledgments of receipt; require employees to review and acknowledge any anti-harassment policies anew.
- Determine whether any regulations that apply to sexual harassment training will run from the new hire date or relate back to training provided earlier in 2020 or within the last year.
- Consider implementing an electronic onboarding process for the completion of any new written documents or agreements; if you already use electronic signature systems, review your protocols to ensure compliance with the Uniform Electronic Transactions Act (UETA).

Reinstatement of Tenure and Paid Sick Leave Laws

Not only do many employers' policies provide for grandfathering rehired employees' prior tenure for vacation policies, many state and local paid sick leave statutes and ordinances require employers to do so.

- Review your employee handbook for any grandfathering provisions that apply to rehired employees and ensure that your HR information management system properly identifies the rehired employee's date of hire and tenure for benefits.
- Consider granting rehired employees their same tenure even if your policies do not provide for it.
- Review any state and local paid sick leave statutes and ordinances for reinstatement requirements upon rehire and ensure that the timing of employees' ability to use any reinstated paid sick leave complies with those statutes and ordinances.
- Ensure your HR information management and payroll systems track the reinstated amounts as required on wage statements.
- Ensure that any time off taken pursuant to the Emergency Paid Sick Leave Act under the Families First Coronavirus Response Act (FFCRA) does not count against regular paid sick leave under state or local regulations.

Vacation and PTO Issues

Many employees who were on unpaid furloughs are likely to have applied and exhausted their accrued vacation or PTO.

- Consider whether your company will reinstate employees' original annual allotment for 2020 and offset prior usage or implement more restrictive time-off policies for the remainder of 2020.
- Consider how to treat any vacation or PTO advances you may have made to furloughed employees who terminate before earning back the advance; will you forgive any advances or require the employee to "repay" the advance from their final paycheck (if permitted by state law)?
- For unionized workforces, be certain to comply with any terms of your collective bargaining agreements that may relate to vacation or PTO rights.

- California employers with an "unlimited vacation policy" should review the terms of their policy to ensure compliance with a case decided during the quarantine period, *McPherson v. EF Intercultural Foundation Inc.*

Health Insurance Premium Payment Issues

- Consider issues related to any payments your company made or advanced to employees for their portion of health insurance premium payments during furloughs.
- Determine whether state law permits agreements for repayment of such advances through payroll deductions and enter into appropriate agreements.

Which Employees Will Be Invited Back?

Decisions about who will be returned to work and on what timetable must be made carefully and be based on proper business considerations.

- Determine whether to implement a phased return and the means and timing of the notice of recall that will be given to employees.
- Recognize that selection decisions about which employees will be invited back may be subject to scrutiny and could be the basis of allegations of discrimination claims. Ensure selection decisions are based on legitimate, nondiscriminatory business factors.
- Determine whether any local ordinances require rehire or return to work by seniority.
- Consider whether conducting disparate impact analysis may be prudent.
- If your work force is organized, make certain you comply with any right to recall based on seniority or other contract obligations.
- Be mindful of the Age Discrimination in Employment Act (ADEA) and Americans with Disabilities Act (ADA) and state equivalents that prohibit discrimination against people who are "regarded" as disabled when determining whether to recall employees who may be members of a more vulnerable part of the population because of age or who were diagnosed with COVID-19 or who cared for others who were diagnosed with COVID-19.
- Also be mindful of new federal and state prohibitions against retaliation against employees who took leave for reasons associated with COVID-19.
- Establish a process for determining if individual employees are safe to return (e.g., self-certifications, temperature or other screenings, testing if available) and a protocol for returning employees who have tested positive.

- Consider privacy issues related to any employee's COVID-19 condition before or during any furlough or layoff period. Ensure HR personnel maintain confidentiality in any discussions with managers and supervisors about the timing of such employees' return to work or their physical location or restrictions upon return.

What About Employees Who Are Reluctant to Return?

Some employees may be reluctant to return to work because of fear of infection, or may have logistical difficulties in returning that are COVID-19 related, like childcare responsibilities due to school closures.

- Aside from morale issues, consider whether the Occupational Safety and Health Act or the National Labor Relations Act (NLRA) are implicated.
- Employees are only entitled to refuse to work under the Occupational Safety and Health Act if they believe they are in imminent danger. Section 13(a) defines "imminent danger" to include "any conditions or practices in any place of employment which are such that a danger exists which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this Act." The threat must be immediate or imminent, which means that an employee must believe that death or serious physical harm could occur within a short time, for example, before the Occupational Safety and Health Administration (OSHA) could investigate the problem.
- Section 7 of the NLRA extends broad-based statutory protection to those employees (in union and non-union settings alike) to engage in "concerted activities for the purpose of … mutual aid or protection."
- Be proactive in anticipating employee concerns about safety and develop a communication plan to provide reassurance about new social distancing policies and implementation of additional workplace health and safety protocols in accordance with Centers for Disease Control and Prevention (CDC) and OSHA guidance.
- Plan to provide employee training on return-to-work health and safety protocols as part of your company's orientation for recalled or rehired workers, in addition to any new hires.
- Consider whether to develop special protocols to address employees' logistical challenges, such as lack of childcare, limited public transportation, or safety issues associated with mass transportation.
- Ensure you have a plan to address a probable increase in requests to work from home, especially accommodation requests under the ADA. The increase in teleworking during the pandemic may lead to an erosion of employers' ability to require work at the jobsite as an essential job duty.

Should You Reconfigure Your Work Areas?

In accordance with social distancing and other guidance provided by the CDC, OSHA, and health experts, prudent planning for a return to work will include a review of the configuration of your company's work spaces.

- Consider how social distancing can be maximized and whether it is even possible for all aspects of your operations.
- In open-concept workplaces and other potentially appropriate workspaces, consider whether plexiglass shields or other materials should be erected to create barriers between workers.
- If your company utilizes hoteling workplaces, consider whether to temporarily suspend the practice in favor of allocating dedicated spaces to employees.

Alston & Bird has formed a multidisciplinary task force to advise clients on the business and legal implications of the coronavirus (COVID-19). You can view all our work on the coronavirus across industries and subscribe to our future webinars and advisories.

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