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Avoiding Employee Recall Issues After Coronavirus Recedes: Labor Law

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Richard D. Alaniz, JD • Apr. 29, 2020

The desire to get back to normal is growing by the day across the country. It is a feeling that is shared by virtually every person in the country. As the effects of the Coronavirus pandemic begin to dissipate, shelter-in-place orders expire, and the preventative steps taken have their intended impact, employers will begin the process of recalling furloughed employees. Careful planning will be critical if potential issues, both legal and practical, are to be avoided.

As long as anti-discrimination laws are not violated, neither the state nor federal government dictates how a recall of laid off employees must be conducted. To the extent that there are any rules or guidelines to be followed, they are primarily the result of obligations under a collective bargaining agreement or an employer's policies such as those contained in an employee handbook. Even if there are no written guidelines, there may be an established past practice, course of conduct or other written or verbal commitments that employees might reasonably expect would be followed when recalls begin.

Whatever recall procedure an employer follows, it is imperative that employees be thoroughly informed about the process. This is a time for complete transparency. With employees understandably desperate to once again be earning a paycheck, those not promptly recalled when operations resume are sure to raise questions. Early and clear communications to all employees regarding the recall process and schedule will help to ease the anxiety while waiting for a call back. Since it is very probable that the prolonged business stoppage has resulted in the permanent loss of some jobs, the issues of which jobs and whether those whose jobs were eliminated have an opportunity to fill other available positions will be equally critical to address.

Recall Obligations

If an employer is subject to a collective bargaining agreement, it is virtually certain that it contains layoff and recall provisions. Seniority generally dictates the order of recall and employers are obligated to follow it or else be subject to grievances and/or unfair labor practice charges. In most non-union situations the employer must look to its written policies, usually contained in the employee handbook. Many include language relating to layoffs and recalls. If so, those procedures should be followed absent unusual circumstances. Since an employee handbook is generally not considered a binding contract, failure to follow its provisions may not result in a lawsuit, but employee morale and the employer's reputation will suffer, perhaps permanently.

In circumstances where there is neither a contract nor written policies, employers must next look to any representations made to employees, either verbal or written. Were any promises or commitments made in the layoff notice, memos, letters or e-mails about the employees' jobs when economic circumstances change? Did supervisors or managers make promises of recall to employees? Such representations may have created rights or obligations where none may have existed previously.

The Recall Process

If there is no contractual or established policy or commitments that mandate a process, an employer is free to implement a policy on recalling employees. A policy is imperative if the recall is to proceed in an orderly and legal fashion. In order to help avoid any legal claims, the policy must be reasonable and non-discriminatory. It must be applied in such a manner as well. The policy must be specific about the terms and conditions of recall. It should address at a minimum, the following issues: (1) How the recall decisions will be made. It should specify that the company retains discretion to consider employee's skills and the needs of the business; (2) Notice requirements, including responsibility on the employee to maintain contact to affirm availability and time frame for responding to recall notice; (3) Impact of the furlough on vacation accrual and other benefits; (4) The time limit on how long an employee will be considered to have recall rights; (5) Pay out of any accrued vacation or similar benefits for employees not recalled and/or whose jobs have been eliminated. There are no legal requirements for how long the period of recall rights may be. While other matters may be addressed in a recall policy, these listed are among the most fundamental decisions that will be made in any employee recall.

Potential Discrimination Claims

In most if not all operations, quickly resuming production will be the priority. The potential for discrimination arises in the selection of who to recall. All of the protective provisions of Title VII and similar state human rights laws continue to apply. Since the majority of today's workforce falls within a protected category, there will be some situations where an employee within one or more of the various protected categories will be passed over for recall or not recalled due to job elimination. While potential claims of discrimination based upon race, gender, national origin, or disability are always possible in such circumstances, perhaps the most potential lies in claims of age discrimination under the Age Discrimination in Employment Act (ADEA). The large number of employees well past the protected age of 40 in today's workforce should be a cause for concern for both the recall process,

as well as in the case of job eliminations. Whether accurate or not, older workers are often viewed as less productive and more expensive than younger employees. They are sometimes the first casualties in a workforce reduction.

The impact of the extended job and income loss, as well as the devastation of 401k accounts as a result of the pandemic, will force many near-retirement employees to want to keep working. Many were already considering this as a result of the significant losses to retirement plans incurred in the 2008-2009 recession. Knowing the difficulty of finding suitable employment when a person is 50 or 60, or perhaps even older, they will desperately want to hang on to their pre-pandemic jobs. Therefore, if theirs are the jobs eliminated, or it even appears to be the case, the potential for claims of ageism could be significant.

In a recent study on "Ageism in the Workforce" by global specialist insurer Hiscox, it was noted that of the 400 full-time U.S. workers, equally divided between men and women over the age of 40 that they surveyed, 67% responded that they planned to continue working after they turn 66. The study also noted that workers age 55 and older will soon comprise at least 25% of the nation's workforce, with the fastest growth among persons aged 65 and older. Given the very real concerns of this segment of the workforce with continuing to work that were already present prior to the impact of the Coronavirus pandemic, they can be expected to challenge even the appearance of discriminatory treatment.

State Orders Protecting Vulnerable Workers

Some states may enact additional protections that prohibit companies from laying off certain workers that meet certain requirements. For example, on April 13, Governor Inslee of Washington State issued Proclamation 20-46, "High-Risk Employees- Workers' Rights," which prohibits any employer from failing to accommodate high risk workers from COVID-19. The proclamation requires companies to accommodate workers that are over 65 and those that have severe obesity, heart disease and several other conditions. Employers are required to allow these employees to telework if possible, reassign them, or allow the employee to take leave or file for unemployment. Employers must also fully maintain all provided health insurance benefits for these high-risk workers. Employers are also prohibited from permanently replacing any high-risk employee who takes leave or exercises their right to an alternative work assignment. Companies should expect other states to take similar action.

Practical Considerations

Actual or Perceived Unfairness

Whether potential legal obligations to follow a certain recall procedure might or might not apply in any given workplace, it could be less important than the long-term impact on employee morale created by a recall process that is actually or perceived as unfair. In these most stressful and unique circumstances created by the workplace effects of the Coronavirus, employees will understandably be particularly focused on how they are treated by their employers. While most employers took every reasonable step to avoid furloughing their employees, the decision ultimately had to be made. Most employees accepted it as an unavoidable circumstance of the current crisis. As the economy begins its return to normalcy, there will be major employee concerns about being recalled.

A well-planned and well-publicized recall process as discussed above will not only facilitate an orderly resumption of operations, it will also go a long way in minimizing potential claims of biased treatment as well as the damage to employee morale that may result. Any resentment built up by seeing others, perhaps younger, with lesser seniority and/or less skilled, will be difficult to overcome in the future. If there is a basis for some legal claim, it may well be filed. Equally damaging could be the employee perception that their employer does not care that they are not valued. A negative attitude on the part of some who feel unfairly treated can easily spread to others. No employer should knowingly risk the goodwill that is so critical to maintaining a satisfied and productive workforce.

Other Recall Issues

There are a couple of other important issues for all companies to consider in implementing a recall.

First, employers must consider whether they will need to progressively ramp up their operations before they bring back all of their staff. Certain employees may need to be brought back first to ensure that the rest of the employees are able to work. For example, a maintenance staff may need to be brought back first to ensure that all equipment is operational. Some employers may wish to bring employees back in waves to ensure that they have sufficient work. Companies may also need to confirm the supply chains of critical materials before they can resume operations or wait for clients to resume operations first before they reopen.

Second, any employee that is recalled will be immediately eligible for the sick leave under the Families First Coronavirus Response Act. They will not be eligible for the

expanded family leave until they have been employees on the company payroll for at least 30 days. The potential for leave requests could even increase once employees are back in the workplace.

Third, as a reminder, salaried employees can be paid a prorated salary if they start in the middle of the week or if their employment ends in the middle of the week. If salaried employees are recalled in the middle of the week, this pay issue should be taken this into consideration.

Conclusion

Long before any employee recalls begin, employers need to carefully access what skills and experiences are most needed to resume production. A detailed schedule of who will be recalled, and to the extent known, when, should be a priority. Open and frequent communication with the furloughed employee will help to ease the understandable concern about how soon they may start to resume their normal lives.

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