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PERSPECTIVE

Legal issues when bringing employees back from furlough

By Todd R. Wulffson

Over 95% of the U.S. population is currently under stay-at-home or shelter-in-place orders. Millions of workers have been laid off or furloughed, the latter being at least impliedly told that they will be returning to their jobs. With California counties starting to announce their readiness to return to normalcy (e.g. Orange County's Board of Supervisors voted unanimously on April 28 to re-open the county), it is time all California businesses started planning to re-open. It is going to take some thoughtful planning, however, because businesses that restart operations will face a slew of legal pitfalls and logistical challenges as they recall employees who have been working remotely or sitting idle during the COVID-19 pandemic.

Do Your Employees Want to Return?

Assuming your employees are not earning more from unemployment than they will when they come back to work, some may also be hesitant to return before a vaccine is widely available. Such employees may be able to make out a claim under the Fair Employment and Housing Act for a real or perceived disability associated with the media-fueled fear of the virus. It is also important to realize that employees fearful of infection who return from furlough may become immediately eligible for paid leaves under the federal Families First Coronavirus Response Act and other similar state statutes.

As a result of the foregoing, it is advisable to extend any return to work offer to furloughed employees initially on a voluntary basis. If employees want to remain on an unpaid leave of absence, they can – but they will not be able to activate paid leave unless they are required to return to work. You can then decide how and when to require all employees to return.

Employment Law Issues Involved in Returning Employees to the Workplace

A preliminary issue will be to determine how many employees you wish

to recall. Unless you are recalling all employees at once, you will have to determine an objective selection process to bring them back, keeping in mind demand, social distancing imperatives, and the timeline for production. The entire process, however, will be subject to legal scrutiny.

It is important to keep in mind that the law and COVID-19 may not mesh well. For example, if an employer only allows younger workers without certain health conditions to come back right away, and it tells other workers considered more susceptible to infection to stay home, the employer will likely be handing out age, disability, pregnancy and medical condition discrimination lawsuits.

If an employee has been gone for more than six months, or was terminated (i.e. laid off) it is generally best to put them through the normal application and hiring process, with all new paperwork (although you can likely forego interviews). This should include an application, I-9 form, and the normal hiring paperwork. This process may also include appropriate background checks, drug and alcohol tests, and potentially, a post-offer/pre-employment physical exam. The re-hired employee should execute all new hire paperwork, including an employee handbook acknowledgment, binding arbitration agreement (even if you did not have one before), and confidentiality agreements, etc.

If the furlough lasted less than six months, the employee may not have to go through the entire hiring process, but it is still best to provide a recall letter (perhaps with a voluntary offer, as noted above) at least a week or more in advance of their return to work, with a date by which the employee must respond. Returning employees will have many questions and will need reassurance. The letter should be an offer letter, with the usual components, including salary (be careful not to reduce exempt employees' salaries below the double minimum wage minimum), benefits, position, duties, etc. It is also a good opportunity to reassure the employee (and to document for anyone who may inquire later) as to how you will be ensuring workplace safety.

Health Issues in Returning Employees to the Workplace

All California employers should be using the current down time (if they have any) to prepare a "COVID-19 Response Plan" to supplement their Injury and Illness Prevention Program ("IIPP") which is required by California law. The Response Plan allows an employer to evaluate and map out the return of employees to the workplace, including developing sound plans, policies and procedures aimed at minimizing the risks of exposure to COVID-19 in the workplace, and responding to its presence in the workplace. (For more information about COVID-19 Response Plans, click here.)

Employers need to be regularly monitoring directives from the Centers for Disease Control, the Occupational Safety and Health Administration, and any local health officers. Communicating to employees that you are aware of the directives and complying with them has the dual benefit of reassuring your returned employees, as well as mitigating risk that someone may later claim you were negligent in returning workers too soon or improperly.

Keep in mind that while you are monitoring the flood of COVID-19 information, your business is in California, which means things may need to be done differently here. For example, do not automatically adopt a company-wide temperature-taking regimen. The Equal Employment Opportunity Commission has said it is okay, but California views it as a medical exam, which collects medical information, and may put your business in legal jeopardy if you decide someone's temperature justifies an unpaid leave of absence. If you decide to use forehead temperature scans, try to contract with a healthcare professional to take the temperature, and collect as little information as possible.

Be careful about requiring employees to wear masks. If you are required by law to have employees wear them, or if you require them, you have to provide them free of charge. You also need to provide training on how to use them properly. Doctors and nurses take classes on how to properly use masks and gloves – so

you cannot just leave it to your employees' imagination to figure it out.

Overall, the return to work should be a positive experience, worthy of celebration by the employer and all employees. With some thoughtful planning, businesses can avoid unnecessary legal risks associated with returning employees from furlough (because after all, we have all suffered enough already). ■

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