

Recall Furloughed Workers Lawfully

By Allen Smith, J.D.

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Employers recalling furloughed workers should plan carefully to avoid legal hazards as they determine who will return to work and what to include in recall letters. They should also have a coherent return-to-work plan for returning employees.

The recall process can be an opportunity to reset work expectations. "The pandemic has given many employers an opportunity to re-evaluate their staffing levels and business models," said Andrew Sherrod, an attorney with Hirschler in Richmond, Va. "If payroll cost reductions are implemented, be careful when using salary level as a basis for decision-making. Doing so could lead to age-discrimination claims if older workers are disproportionately affected."

Selecting Who to Return to Work

Employers should follow any existing policies on recalls, such as a seniority system, when determining who to recall first, said Isaac Mamaysky, an attorney with Potomac Law Group in New York City.

If an employer doesn't have recall policies, the main goal should be to avoid the perception of wrongful termination in rehiring decisions, he added.

"While performance-based rehiring is common, those types of decisions can be subjective and thus open to legal challenges," he said. "Employers should decide based on documented performance reviews," and on numerical components of those reviews, if available, because they are "the most objective."

Reviews shouldn't be conducted for purposes of recalling furloughed workers but should have taken place in the regular course of business in prior review periods, he said.

"While there is typically nothing wrong with favoring a high performer over a low performer, companies basing decisions on such criteria should have ample documentation to justify performance evaluations to avoid and defend against discrimination claims," Sherrod said.

Román Hernández, an attorney with Troutman Sanders in Portland, Ore., also cautioned that while it may be technically acceptable to recall high performers and not poor or mediocre ones, "it may be more prudent for employers to adopt a uniform practice with regard to recalling employees using business judgment regarding the essential needs of the company." For example, one business unit may have more pressing needs to recall workers than another.

Recall Letters

There is no specific requirement regarding when advance notice of recall must be provided, said Arlene Switzer Steinfield, an attorney with Dykema in Dallas. Similarly, there are no legal requirements for the contents of a recall letter.

But employers should tell the workers as soon as possible, even if the date is not in the immediate future, Mamaysky said.

"The more notice employers give, the more likely they are to retain those workers," he said. "Also, to the extent furloughed employees have found new jobs, frequent communication will mean that the employer is more likely to know who will not come back."

As a rule of thumb, the recall letter should provide at least a week's notice and have a date by which the employee must respond to the employer regarding his or her intention to return to work, Hernández said.

Notice helps furloughed workers make any needed arrangements for child care, elder care and transportation, Steinfield said.

The recall letter should provide an update on changes made to operations to protect against COVID-19 and inform employees of the terms of their return to prevent a deluge of questions and manage expectations, said Kathryn Siegel, an attorney with Littler in Chicago.

She said that the employer should consider including in these letters:

- The return-to-work date and the time and location where the employee should report.
- The employee's title after recall.
- The employee's exemption status.
- For nonexempt employees, the expected work hours and a reminder on recording all hours worked.
- The employee's pay rate or salary.
- The timing of payment.
- Eligibility for vacation and vacation accrual policy.
- Any remaining bank of accrued time off.

SHRM RESOURCE SPOTLIGHT

Coronavirus and COVID-19 (www.shrm.org/ResourcesAndTools/Pages/communicable-diseases.aspx)

Return-to-Work Plan

The recall process should be part of a cohesive return-to-work plan, recommended John MacDonald, an attorney with Constangy, Brooks, Smith & Prophete in Princeton, N.J., and New York City.

He said the plan should address how to:

- Provide detailed workplace safety procedures, including written guidance on best practices for hygiene and social distancing.
- Address any safety-related concerns that employees may have, including identifying the appropriate company officials with whom to raise such concerns.
- Handle coronavirus-related leave issues.
- Manage coronavirus-related accommodation requests.

In addition, MacDonald said employers should take the following steps as they develop their plans:

- Review any existing policies that were changed formally or in practice as a result of COVID-19, such as remote work policies, and revise as needed.
- Adopt policies on reporting COVID-19 exposures or symptoms.
- Create frequently asked questions for managers and front-line supervisors on how to respond to coronavirus-related issues they may encounter.
- Adapt benefits to changes in employment status of returning workers.

Upon return from furlough, timely re-enroll employees in any benefits that were terminated, said Christine Keller, an attorney with Groom Law Group in Washington, D.C. Consider adding a rollover feature to health flexible spending accounts into the next plan year and raising the amount of the rollover to \$550 consistent with recent IRS guidance (www.shrm.org/resourcesandtools/hr-topics/benefits/pages/irs-allows-mid-year-enrollment-and-election-changes-for-health-plans-and-fsas-coronavirus.aspx), she said.

Background Checks

When workers are recalled from furloughs, background checks won't be needed for most positions, according to Jonathan Wetchler, an attorney with Duane Morris in Philadelphia.

But if they are required due to customer or legal obligations, the employer must ensure it has a valid authorization for the background check, Siegel said.

In California, she said employers should always obtain a new authorization, even if the furlough was briefer than six months and the authorization contains so-called evergreen language. In recent years, drafters have included evergreen language in background-check authorizations, providing consent for a background check to be run at any point during an employment relationship, she explained.

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