Considerations for bringing back furloughed or laid-off employees

COMPLIANCE CORNER

Sean Ray

COMMENTARY

The governor recently allowed the final county in Oregon to move into phase one of the reopening process following the COVID-19 lockdown. As various counties progress through subsequent phases, and more businesses are allowed to reopen (or business picks up), employers will look to bring back workers who were laid off or furloughed when doors had to be closed. Due to social distancing guidelines and capacity restrictions, many employers will not bring back all employees at the same time. If employers recall some employees, but not all, what considerations do they need to take into account to limit liability?

Determining whom to bring back first

Ordinarily, employers would follow the written policies and procedures they have in place, or a collective bargaining agreement, for recalling employees. However, only those employers that regularly lay off and recall employees likely have such written procedures. Because the COVID-19 stay-at-home orders and business closures happened swiftly, most employers probably laid off or furloughed employees for the first time and without a plan for recalling them. So, what are the factors that an employer should consider when faced with recalling a portion of its staff?

The main concern in recalling certain employees is discrimination based on some protected characteristic, such as age, race, gender or protected leave, to name a few. In order to lessen the likelihood of litigation, employers should stick to factors far removed from protected characteristics. One such factor is length of time with the company. Tenure is easily measured and provides no room for argument – one employee either has a longer tenure than another or he or she doesn't.

Another consideration is that specific roles may be needed. As businesses slowly reopen following COVID-19, it's plausible that all roles will not be needed at first. If one employee's role is vital to the reopening process, then that person can be recalled before others in less vital roles.

Another factor is job performance, though it is more subjective than the other factors and fraught with "unfairness" arguments. Hopefully, employers have documented employees' performances, both good and bad, so that those evaluations or disciplinary documents can provide some objective evidence for the performance-based decisions. Ultimately, employers will likely consider a combination of factors to determine whom to recall first.

What if an employee declines to return?

A problem some employers may face is that some employees may not want to return to work for one reason or another. Many lower-wage earners could be making more money through unemployment benefits – thanks in part to the extra $600 per week provided by the Coronavirus Aid, Relief and Economic Security (CARES) Act – than they would if they were to return to work. As such, some employees may be reluctant to return until those benefits sunset at the end of July. Still others may not want to return out of fear of catching the virus, or because of a lack of child care.

How an employer handles a refusal to return will depend on the reason the employee does not want to return. Fear of catching the virus alone, or the desire to use up the remaining CARES Act benefits, will generally not confer any special protections on employees, and their refusal to return can be treated as a resignation by the employee. However, employers would do well to engage empathetically with such employees to determine their concerns, and whether they can be mitigated through protective measures, such as face mask requirements, social distancing, and extra cleaning measures.

If, however, an employee expresses a fear of returning due to a pre-existing medical condition that makes him or her more prone to serious complications if he or she contracts COVID-19, then the person likely has protections under the Americans with Disabilities Act (ADA). In these instances, the employer should engage in an interactive process with the employee to determine whether a reasonable accommodation can be provided, such as working remotely (if the position allows tasks to be completed in such a manner) or a temporary leave of absence.

Furthermore, if an employee must stay home to care for a child who cannot be in day care, sports camps or summer school because of COVID-19 restrictions, then that leave may also be protected; any decisions should be approached cautiously. Keep in mind the protected leave afforded to employees under the Families First Coronavirus Response Act (FFCRA), as that leave may still be available for some employees.

The decision to recall some employees, but not all, can create potential liability. Employers unfamiliar with such practices would be wise to have their plans reviewed by knowledgeable legal counsel.

Sean Ray is a partner with Barran Liebman LLP. He advises and represents employers in various labor and employment matters. Contact him at 503-276-2135 or sray@barran.com.