



April 2020

Back to Business After COVID-19: Legal Considerations When Rehiring Employees

By Alexander W. Bogdan, Carolyn D. Richmond, and Glenn S. Grindlinger

With President Trump announcing plans for “Opening up America” in stages and Gov. Andrew Cuomo discussing how to “Un-PAUSE New York,” New York employers should begin considering the necessary steps for reopening business once they are allowed to do so. Businesses that have closed or limited operations due to COVID-19 can start planning for the best approach to be up and running as soon as possible while mitigating risks involved in reopening. One primary consideration for resuming operations is determining which employees to invite back to work once a business is allowed to reopen.

Mitigating Employment Discrimination Risks

Ideally, businesses will be able to reopen with the full complement of employees they had prior to having to close or reduce operations. In that case, hiring decisions would be straightforward—employers could invite back all of the employees they let go or furloughed. Realistically, though, companies will not be at full operations upon reopening, either because of government mandates or because anticipated lower demand for services. In these circumstances, employers will not be able to rehire or bring back from a furlough all of their former employees. Employers must be cautious in determining who to bring back to the workplace to mitigate risk of potential discrimination claims based on the decision not to bring back certain employees.

Employers will need to have a legitimate, non-discriminatory reason for choosing which employees to rehire or return to work. These reasons could include factors such as seniority, operational needs or documented past performance issues. Employers should document their decision-making process now, before deciding who will be invited to return to work. By working now to document the factors used to determine who will be rehired, an employer will protect itself from potential claims asserting that they “made up” reasons after the fact to cover up a discriminatory basis for failing to rehire an employee.

Basing a rehiring decision on seniority will typically offer an employer the most protection from discrimination claims, but it is not itself without risks. Consider, for example, if you are a restaurant reopening with half capacity because of government limitations on capacity. If your most senior former employee was your sommelier, do you need to rehire that person over a line cook, even though you may decide operationally you will not need a dedicated sommelier if you are operating at half capacity? Decisions like these need to be well-documented at the time they are made so that if you do decide to bring back a junior line cook instead of a more senior sommelier, you can show that the decision was not based on, for example, the sommelier’s age, but rather on legitimate operational limitations.

Employers also need to be cautious when basing any rehiring decisions on past performance issues. It is one thing if employee performance issues were well-documented prior to the mass terminations or furlough, but another altogether if the business had not been diligent in disciplining and documenting employees for poor performance. If an employer chooses not to bring back an employee because of purported performance problems, but those problems were not documented in the employee's personnel file, the employer may be exposed to an argument that the performance problems were just pretext for discrimination.

Ideally, if a business did not terminate or furlough its entire workforce, the same factors that were used to make the initial termination or furlough decisions should be used in rehiring. If a business chose employees to be furloughed based on seniority, then seniority should be the main factor considered when deciding who to bring back to the active workforce. Using the same factors for both the termination decision and the rehiring decision will help show both that the rehiring decision was based on legitimate, non-discriminatory factors, and that the original termination decision was as well.

Employers need to take extra care to ensure that decisions about who to bring back into the workplace are *not* based on apparent higher risk of COVID-19 complications. Businesses may have concerns about inviting back older or pregnant employees into the workforce because they may be at higher risk from COVID-19. The EEOC, however, has said in recent guidance that employers cannot unilaterally decide not to hire individuals who are over 65 or pregnant because of COVID-19 risks without running afoul of federal discrimination laws.

Businesses can discuss concerns with those individuals and see if they wish to delay a return to work or if telecommuting would be an

option, but the decision not to rehire because of age or pregnancy cannot be made by the employer. Employers in New York State and New York City need to be extra cautious not to make decisions based on COVID-19 factors, even if done out of concern for an employee, as there are additional protected categories under the New York State and City Human Rights Laws, such as caregiver or familial status, that may be implicated.

For more information about this alert, please contact Alexander W. Bogdan at abogdan@foxrothschild.com or 212.878.7941, Carolyn D. Richmond at crichmond@foxrothschild.com or 212.878.7983, Glenn S. Grindlinger at ggrindlinger@foxrothschild.com or 212.905.2305, or any member of the firm's national Labor & Employment Department.

Attorney Advertisement

© 2020 Fox Rothschild LLP. All rights reserved. All content of this publication is the property and copyright of Fox Rothschild LLP and may not be reproduced in any format without prior express permission. Contact marketing@foxrothschild.com for more information or to seek permission to reproduce content. This publication is intended for general information purposes only. It does not constitute legal advice. The reader should consult with knowledgeable legal counsel to determine how applicable laws apply to specific facts and situations. This publication is based on the most current information at the time it was written. Since it is possible that the laws or other circumstances may have changed since publication, please call us to discuss any action you may be considering as a result of reading this publication. www.foxrothschild.com