Ballard Spahr LLP

Checklist: Issues to Consider When Bringing Back Laid Off Employees

In the midst of the COVID-19 pandemic, many employers laid off employees with the hope of rehiring them once business resumed. As employers begin preparations for reopening in-person workplace operations, a number of previously terminated employees may be brought back to the same or similar positions. There are various factors that employers should consider when rehiring employees. The following checklist provides a guide to these issues. Please note that the same issues may not be applicable for furloughed workers who remained employed during the furlough period.

For additional guidance on reopening the workplace, refer to Ballard Spahr's Employer Guidelines: Reopening the Workplace (here) and Checklist: Reopening the Workplace in Light of the COVID-19 Pandemic (here). In addition, you can view our two-part webinar series on reopening available in the Ballard Spahr COVID-19 Resource Center (here).

☐ **Rehiring Plan** – Employers may not be able or willing to rehire every employee laid off as a result of the pandemic. Decisions about who to recall and who not to recall should be made carefully, as an employee who is not recalled could attempt to challenge the decision as discriminatory. Employers should approach the recall process in much the same way they would approach a reduction-in-force selection process, based on legitimate business factors and a sound, documented process that is designed to avoid both disparate treatment and disparate impact based on protected characteristics. Of course, recalls of bargaining unit employees may be governed by the collective bargaining agreement.

☐ **Return to Work Letter** – Employers should treat the rehiring process just as they would any other formal offer of employment and memorialize the key terms of employment in written documentation to prevent potential misunderstandings down the road. Return to work letters should include any changes to schedules or compensation, as well as information about revised employee leave policies or new policies or procedures employers will implement to address COVID-19 concerns. In jurisdictions with laws mandating written notice of compensation terms, the letters should comply with the content and timing requirements of those laws. As discussed in more detail below, the return to work letters should include a notice about the employee's obligations under relevant covenants, such as non-competes and confidentiality.

☐ **Employees Refusing to Return** – For various reasons, employees may opt not to accept the employer's offer to return to work. In response, employers should remind employees that unemployment benefits are contingent upon no work being available—therefore, failure to return to work may result in termination of unemployment benefits. State unemployment laws vary, and many states may be willing to excuse a refusal to return to work for reasons related to COVID-19, such as lack of child care, and allow continued receipt of benefits.

☐ **Document Any Refusals to Return and the Reasons Provided** – Employees may decline an offer to return to work for any number of reasons or for no reason at all. Some may simply not respond. Employers should make sure to accurately document all refusals and the reasons employees provide. This documentation may be needed to confirm submissions to state unemployment compensation bureaus. In addition, for Paycheck Protection Program (PPP)

recipients, regulations issued by the Small Business Administration (SBA) provide that a borrower's forgiveness amount will not be reduced if a laid off employee refuses a written rehire offer (at the same pay and number of hours) and that refusal is reported to state unemployment authorities. Alternatively, employees may be willing to return to work but are unable to do so due to illness, lack of child care, or other reasons that render them eligible for leave under the FMLA, FFCRA, or state or local leave laws.

☐ **Background Checks, Substance Abuse Testing, or Other Pre-Employment Screening** – Many employers condition offers of employment on the candidate's ability to pass a substance abuse screen or complete a background check. Some of these screenings may be required by law for certain positions. Other employers may require such screening for all employees who have been away from the workplace for longer than an established period. Employers should consider their existing policies and decide whether to waive customary pre-employment processes for rehired employees, where permitted by law to do so. Decisions not to conduct background checks, substance abuse tests, or other screening are typically within an employer's discretion; however, if an employer decides to waive these conditions, it should do so consistently for all returning employees. Employers that are subject to Department of Transportation or other similar governmental regulations requiring substance abuse screening should ensure that they are complying with all applicable requirements. Similarly, employers should be mindful of state and local ordinances that prohibit questions about criminal, credit, or salary histories and other state and local hiring limits—all of which likely still apply in the rehiring scenario.

☐ **Reaffirm Applicable Agreements** – Often, important agreements with employees such as agreements not to compete, non-solicitation agreements, and confidentiality agreements terminate when the employee is laid off. Employers should review these agreements and, if necessary, ensure that employees re-enter or reaffirm these contracts when they are rehired. Employers should be mindful that in certain jurisdictions, an offer of at-will employment may not be sufficient consideration to make such agreements enforceable against existing (or, potentially, re-hired) employees. In such cases, the employee should be offered additional consideration.

☐ **Break-In-Service Issues** – Employers should review employee benefit plans, fringe benefit policies, and compensation plans that contain service-based eligibility, vesting, or benefit terms. These will give rise to the question how the layoff period will be treated and whether it constitutes a break-in-service. For example, time on layoff will not count as service toward the 1250-hour eligibility requirement for FMLA, although laid off employees will not have to re-satisfy the one-year service requirement. Employers also should consider how they plan to recoup health care premiums for employees who received continued coverage during the time that they were unemployed. State wage laws may require employee consent before the employer may deduct outstanding premiums from an employee's pay.

☐ **Bonuses, Leave Accrual, and Other Time-Based Programs** – Related to the break-in-service issue is how time on layoff will count or not count for purposes of bonus and incentive plans, leave accruals, and other employment programs that are measured with time or service. These may be governed by the terms of the programs or policies, which often can be amended by the employer within its discretion. Will paid time off (PTO) be counted as accruing during the layoff period? If PTO was not paid out upon layoff, will the lost time be restored upon recall? Will employees have adjusted hire dates for anniversary-based benefits, such as vacation entitlement? Will customary leave waiting periods be enforced for recalled employees? Will new hire probationary periods be used? What impact will the layoff period have on performance review cycles and merit-pay programs? Employers should give consideration to these issues before the recall, amend any programs or policies as needed, and communicate to employees the impact of the layoff period.

- [ ] **Form I-9 Considerations** – Form I-9 regulations permit employers to use the I-9 on file at rehire if the original date of hire is less than three years from the date of rehire. If so, employers will complete Section 3 (Rehire and Reverification) of the Form I-9 and enter in the rehire date. However, if an employee's employment authorization expired on the previously completed Form I-9, a new form will have to be completed.

- [ ] **Form W-4 Considerations** – Where an employee is laid off and then rehired, employers are permitted to rely upon the employee's most-recently completed Form W-4 (Employee's Withholding Certificate) if one is in their files. In light of the 2020 revisions to the Form, employers may want to consider offering employees the option to complete a new Form W-4 so that employees can obtain more precise withholdings.

- [ ] **Requests for Accommodation** – Employers should anticipate that some employees may be fearful of reentering the worksite and that anxiety, as well as underlying health conditions, may lead to requests for accommodation. This could include continued remote work and/or a leave of absence. Where employees have a disability, including one that places them at higher risk of severe illness if they contract COVID-19, employers should engage in the interactive process to determine what accommodations, if any, may be effective. However, employers generally are not required to grant accommodations to employees who are not disabled under the ADA. Pregnant employees cannot be treated less favorably than employees who are similarly situated in their inability to work (such as other high risk employees) and some states may require specific accommodations for pregnant employees.

Ballard Spahr's Labor and Employment Group is working closely with our employer-clients to prepare workplace reopening and rehiring plans, including anticipation and planning for the issues that will arise given the unique and unforeseen circumstances caused by the COVID-19 pandemic. If we can assist you, please contact any of the attorneys in the Labor and Employment Group.

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