What Employers Need to Consider When Recalling Furloughed Workers

August 19, 2020

By: David Schloss

Porzio Employment Law Monthly

The fits and starts of the COVID-19 pandemic have unleashed a number of challenges on businesses and our economy. One such challenge facing the multitude of companies who were forced to furlough some or all of their staff when the pandemic hit is how to recall those furloughed workers as activity picks up in a manner that is fair, sound, makes business sense and mitigates risk. This article will briefly identify and address some of the most critical questions those employers face.

First, however, let's try to define "furlough," which is not an easy task since there is no clear and consistent definition under federal or state law, particularly, for private, non-union employers.

That said, a furlough is generally considered to be a temporary reduction in pay and hours (often down to zero) during a time of economic downturn, either generally across industries or specific to a particular business. A furlough can be thought of as an unpaid leave of absence (with or without benefits) with the expectation which, at some point, when conditions improve, workers will be brought back; as compared with a layoff, which is a termination of employment with no concomitant expectation of recall. A furlough presents a "bad news/good news" scenario for the worker -- the bad being, you're no longer going to be paid -- the good being, you're not terminated, you're still part of the company, and we expect to have you back in the fold sometime soon.

Pandemics, like the one currently engulfing the nation, result in a sudden and dramatic downturn as opposed to the gradual business decline that often results from shifting markets or technologies or through normal competition. As such, they don't provide employers with much lead time for careful preparation. Companies were hit hard and out of nowhere by this pandemic. Businesses, in some cases went from thriving to shuttered overnight, particularly in travel, leisure and entertainment. In order to stop the bleeding, many companies were left with no choice other than to quickly cut costs. Furloughing staff provided a means to do so without technically having to terminate employees, and making it more seamless to bring folks back as conditions permit.

Now let's focus on how companies may best recall their furloughed workers.

Employers must initially determine who will be invited to return. The decision is easy if the answer is everyone, but not so simple if your company is going to return some, but not all. The determination can present practical and legal challenges that must be considered as those not selected can quickly transform from furloughed workers to frustrated plaintiffs. Begin the process by creating a coherent and comprehensive business case directly addressing the criteria driving the decision on who returns and who does not. A number of legitimate and lawful criteria can be used to justify the decision: divisional; functional; by position; skill set; seniority; and, even performance. The key is that the employer prepare a clear statement

and rationale for the selection criteria and process that makes sense and is consistently applied. Otherwise, your decision could be seen as unlawful should the outcome have an adverse impact on a protected class of employees.

Your business case should contain all relevant considerations including: the number of workers returning; the timing of their return; the terms and conditions under which they'll be returning; and, the selection criteria supporting your decision. The business case is especially critical if the criteria used is skills or performance driven. Those decisions should be supported by documentation existing prior to the selection, i.e., performance reviews, rather than created to support the selection. The latter could be construed as mere justification for a decision that has an adverse impact rather than a genuine and earnest attempt to evaluate the skills and performance most essential to your company's restart.

Also, it is good practice to prepare formal recall letters and deliver them to furloughed workers at least one week before their return date in order to create a clear record of the offer to return and the terms under which that offer is made. From a practical standpoint, it is respectful to the employee who may need to adjust child care in order to return or who has picked up temporary work while on furlough. From a legal standpoint, formal letters provide protection in the event the employee does not return to work and, instead remains on unemployment or later claims that a return was never offered.

The recall letter should include all key terms and conditions of the return (as if it were an original offer letter) including return date, location, title, reporting structure, vacation and sick leave balances, status as hourly or salaried, and hours and pay rates for non-exempt employees and salary for exempt. It should also describe any significant changes to the business or job to avoid surprises.

Since the worker was furloughed with an expectation of returning, in most cases, it is not necessary to re-do employment verifications, drug screens or background checks, but those are sometimes required by industry or agreement, so please check with counsel.

Finally, a return from furlough is a great time to review and revise various workplace programs and policies as much has changed over the past several months. Be prepared for a brave new world where the law requires you to provide emergency paid sick leave and, in some cases, family leave, for those suffering from or quarantined as a result of the disease or caring for children whose school or day care is closed as a result of COVID-19.

Additionally, SOP's should be in place providing protocols for the health and safety of those returning to the work site including:

- Daily employee health screenings;
- Response to the onset of symptoms at work;
- Return to work following suspected or confirmed COVID-19;
- Cleaning and sanitizing workspaces; provision of PPE and plans for social distancing; and,
- Contact tracing and notification of those potentially exposed to the disease while at work.

Also, employers need to be prepared to respond to those employees who choose not to return or seek an accommodation because they or someone they live with has an underlying health condition or is simply anxious about returning.

Finally, for New Jersey employers, note that amendments to the NJ "Mini" WARN Act involving employer obligations in the event of a mass layoffs, which were passed in January and due to go into effect in July, were postponed by the Governor's designation of the COVID-19 pandemic as a national emergency. We are awaiting further word on this, so be cautious about future notification requirements if workers are not recalled, and consult with counsel upon reinstatement of those who were furloughed.

These are difficult times and, in many ways, uncharted territory for employers, but all in all, if your company is fortunate enough to be in a position to recall furloughed workers -- that's a good thing, which, if done correctly, will benefit all.