PART 1 – CALLING BACK LAID-OFF AND FURLOUGHED WORKERS

On May 11, 2020, Governor Baker announced a four-phase reopening plan for Massachusetts businesses starting on May 18. During the shutdown, businesses deemed non-essential by the Governor’s previous order may have laid-off or furloughed all or a portion of their workforce. Similarly, businesses that were deemed essential may have had to reduce their workforce. With reopening in sight, businesses are contemplating bringing back laid-off workers. How many employees to recall, when to have them return, and which employees should be asked to return are all questions that need to be answered.

It is unlikely a switch will be flipped for most employers with a callback of 100% of the workforce. Some employers are anticipating that their reopening may be a gradual process. Employers may opt for a “soft reopening” in order to test safety procedures such as social distancing and other workplace safety measures. As a result, employers may not need the same number of employees or positions that they had back in early March. However, recalling only a portion of a workforce does have its own risks and employers need to exercise care in selecting which employees to call back to avoid discrimination claims.

When you're not in a position to restore the entire staff, how do you decide to not recall employees to bring back?

First, identify the types of positions and the number of employees needed for each position to be recalled. There may be certain skill sets or knowledge bases needed in order to ramp up business after a shutdown.

Second, if the business has a policy regarding recalling employees or a past practice of determining the order of recall, that policy or practice will need to be considered. There may be a legitimate business reason for not following past practices or for changing the policy. Employers should evaluate the business rationale of the selection process and ensure that the process is compliant with discrimination laws. Employers should also document the criteria used for selection of one employee over another.

While selection criteria may appear neutral on the surface, the application of the criteria to a group of employees may inadvertently affect a particular protected group. For example, rehiring based on seniority may eliminate all or a majority of the business's employees in a protected group. Selection criteria may need to be reconsidered in order to avoid discrimination claims based on the employee’s race, age, sex, disability or any of the other protected characteristics protected under state or federal law.

Can you decide to not recall employees because of a concern regarding their health?

Employers may have a genuine concern that a group of employees may be susceptible to greater harm if infected with COVID-19. For example, an employer may be concerned about the consequences of returning to work and possible exposure to COVID-19 of an older employee, an employee with a known medical condition or a pregnant employee. Any selection decision based on a person’s age, perceived disability or pregnancy will expose the employer to discrimination claims.
What if you laid off some employees and furloughed other employees?

Employers should consider calling back furloughed employees before rehiring laid-off employees. Employers may have given furloughed employees letters containing statements assuring them that they would be called back. Furloughed employees may have been retained on the employer’s health insurance and the employer may not have paid out accrued vacation at the time of the furlough—all indicators that the employer intended to have the furloughed employee return to work.

How do you communicate the callback?

For both laid-off and furloughed employees, the offer to return to work should be communicated in writing. The communication should detail the start date, full-time or part-time status, position, hours, wages, location and conditions of the job.

Employers should plan carefully for the return of their workforce. Selection of employees who have been laid off or furloughed is just one of many concerns. The next alert will address responding to employees’ concerns and requests when being recalled.