



News & Types: Client Advisories

Opening Up Your Workplace Again - Part 6

5/19/2020

Practices: Employment, Labor & Benefits

EXECUTIVE SUMMARY

On Thursday April 16, 2020, President Trump unveiled his "Guidelines for Opening Up America Again" (the "Guidelines"). The Guidelines are designed to help state and local officials reopen their economies, get people back to work, and provide some initial topics for employers to consider prior to reopening. Masuda Funai is publishing a series of articles addressing the business, human and safety aspects that employers will need to consider as part of each company's individualized reopening plan.

Today's article will discuss the "Returning to Work" considerations when recalling and onboarding employees who have been on furlough, as companies begin to re-open operations. Please reach out to your relationship attorney with any questions.

As companies begin to re-open and recall employees, they need to consider a number of issues to ensure a smooth transition for the employees, to comply with a myriad of laws, regulations and guidances issued by government agencies, and to lessen legal liabilities.

1. RECALLING FURLOUGHED EMPLOYEES:

Employees who are not recalled have a potential case against the company for discrimination, retaliation or a violation of federal, state or local law. Therefore,

- Conduct a risk analysis regarding employees who may contend that the company did not recall them because of a protected characteristic (race, national origin, age, etc.) or in retaliation for engaging in protected activities (applying for and receiving Emergency Paid Sick Leave or Emergency FMLA under the Families First Coronavirus Response Act or having complained about safety and health issues at the company).
- Draft and implement a written plan for deciding how and whom to recall that is based upon non-discriminatory, legitimate business reasons.
- To help prove that the company used legitimate business reasons, a company may use a matrix, listing the names of the furloughed employees on the vertical axis and the factors considered on the horizontal axis, which may include the employees' length of service with the company (i.e., seniority), the employees' ratings on their most recent performance evaluations, the number of times the employees have been tardy or absent, and/or their skills in operating different machinery and performing different tasks. Companies

then recall employees in the order in which they meet the most factors and document the decision-making process.

2. ONBOARDING:

The onboarding process may include many of the same actions companies implement when onboarding newly hired employees and many actions companies implemented in response to COVID-19.

- Welcome employees back to work, re-introducing them to the most important policies in the Employee Handbook and signing them up to receive all applicable benefits.
- Because many companies expanded the number of PTO, vacation and/or sick days, or allowed employees to borrow from unearned leave, draft and distribute the new policies and track, record and inform employees of the leaves they have earned, not earned, and may or may not use pursuant to the company's policies, to comply with state laws that treat earned and unused leave the same as they treat wages and, therefore, require companies to pay out earned but unused leave upon an employee's ending of employment for any reason.
- Respond to employees who request to continue to telework from home, either because they are afraid to travel and work in the same area as co-workers or because they are in a vulnerable group due to their age or underlying health conditions.
- Establish and implement a consistent policy to either allow employees who are afraid to work to continue to telework, or to inform these employees that their continued refusal and failure to work in the company's facility subjects them to disciplinary action, up to and including termination.
- Establish and implement a consistent policy regarding accommodations to those employees who are in vulnerable groups, including those aged 65 and over who are more vulnerable to COVID-19 than younger employees, but may not have an underlying health condition such as diabetes or cancer, but be aware that the federal Age Discrimination in Employment Act does not require accommodations because of age.
- Draft, distribute and implement telework policies and agreements for employees to sign, which include important responsibilities of managers who will continue to supervise the work of the teleworking employees and important responsibilities of the teleworking employees to perform measurable and meaningful job assignments.
- Comply with the wage and hour laws of the federal Fair Labor Standards Act and state laws so as not to convert salaried, exempt employees into a non-exempt status by having exempt employees perform too much non-exempt work or having outside salespersons perform work in the office, converting them to inside salespersons entitled to overtime pay.

By planning the recall and onboarding process, companies will ensure a smooth process and avoid legal entanglements and liability.