

Five Issues to Consider When Returning Furloughed and Laid Off Employees to Work

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As the nation slowly reopens for business, employers and employees are understandably filled with uncertainty. For many employees, there is uncertainty about the risks involved with returning to work. For many employers, there is uncertainty about the scope of their legal obligations to employees and others during a continuing pandemic. These are uncharted waters in many respects, but there is guidance upon which employers can rely in making decisions about how to resume operations, including in making decisions about returning furloughed and laid off employees to work. While there are many issues employers must consider in resuming operations, this article focuses on five specific issues to consider when returning employees to work.



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One point to keep in mind is that the terms “furlough” and “layoff” do not have definitive meanings across jurisdictions. Any practical difference between the terms would depend on how employees have been affected, not the particular term used by the employer. In what follows, we will use “furlough” to refer to a period of unpaid leave with or without benefits and “layoff” to refer to a termination of employment, with the potential for recall.

1. Deciding Whom to Return to Work

As the economic effects of a prolonged shutdown continue, employers may find themselves unable to return all furloughed or laid off employees to work. The decision to return some—but not all—of the workforce can have legal implications that employers must carefully consider. Specifically, an employee who feels that his or her employer’s decision not to return the employee to work was based on his or her

membership in a protected class can bring a disparate treatment claim. Additionally, if an employer's decisionmaking process has a disproportionate negative impact on a protected class of employees, the employer could be faced with a disparate impact claim.

For this reason, employers may want to develop a business case for their reopening plans by putting in writing an explanation of their business conditions and the number of employees (or the particular skillsets) they need in order to resume operations. Once the employer has determined the number of employees needed and the skills needed, it can decide upon the selection criteria to be used when deciding who will be offered the opportunity to return and train qualified decisionmakers on how to apply those selection criteria. Then, after the employer has made tentative initial selection decisions, employers may wish to run a statistical analysis to ensure that the decision-making process does not have a disproportionate impact on members of a protected class.

2. Preparing a Return-to-Work Notice

Employers may wish to consider preparing a return-to-work notice to send to any laid-off or furloughed employees, in order to establish a written record that the employer offered the employee the opportunity to return to work. Among the information employers may consider including in the return-to-work notice include the date the employee is expected to return to work, any special return-to-work instructions (such as revised policies that employees will need to acknowledge), notification of any changes to wages, hours, or deductions from pay, and the steps taken to ensure the workplace is safe for employee reentry.

3. Determining Whether Additional Policies are Needed

Resuming operations offers employers the opportunity to update key policies and determine whether new policies are necessary. For example, employers may wish to add flexibility to their existing leave and attendance policies, in light of employees' continuing childcare and family care obligations. Employers that adopted temporary work-from-home policies during the pandemic may wish to adopt standing work-from-home policies for employees who will be permitted to continue working from home. Additionally, employers may wish to consider COVID-19-specific policies and protocols regarding social distancing in the workplace, work meetings, business travel, and employee and visitor screening.

4. Implementing Safety Protocols

Many employers have adopted additional safety protocols upon employees' return to work in order to reduce the possibility of transmission among employees. Among the potential steps to consider are implementing social distancing policies; training employees on ways to reduce transmission; adding signage in the workplace to remind employees of safety protocols; applying enhanced cleaning and disinfection protocols; making additional supplies and personal protective equipment (PPE) available;

adopting a screening method for employees and visitors; and employing a procedure for handling sick, symptomatic, and exposed employees.

5. Reporting to State Unemployment Agencies

All states require employers to report new hires *and re-hires* so the data can be stored in a state directory. Note that multistate employers may be able to register as such and report to a single state. The time period that an employee must have been out of work in order to subject the employer to reporting obligations varies by jurisdiction. Therefore, employers may want to check the requirements of the states where they operate to ensure they are meeting their reporting obligations.

This article only scratches the surface of the many issues employers may need to consider in resuming operations. Additional analysis of these issues and many more is available in [Ogletree Deakins' Return to Work Guide](#), which contains 45 pages of written analysis and recommendations on common return-to-work issues, in addition to more than 20 templates, flowcharts, surveys, and checklists.

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