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May 13, 2020 CLE Presentation: Rehiring from Layoffs and Furloughs, Who to Bring Back and How? Critical Return-to-Work Issues Including Health Screenings and Waivers of Liability

Part 1: Introduction and Overview of Incentives to Rehire After Layoffs and Furloughs, Including the Paycheck Protection Program

1. Overview of Terminology

    a. Furlough – A temporary period of mandatory, unpaid leave, during which the employee remains employed but does not perform services and earns no compensation.
    b. Layoff – Permanent separation of one or more employees from employment.
    c. Reduction in Force ("RIF") – Multiple layoffs occurring simultaneously or otherwise as part of the same action.

2. Employers may have numerous incentives to begin rehiring and reinstating employees now.

    a. States are reopening, enabling businesses to open and return employees to work.
    b. Funding sources – state, county, and other grant programs
    c. Paycheck Protection Program

3. Paycheck Protection Program ("PPP") – The PPP is a massive federal program funded by a $659 billion Congressional appropriation. It provides low-interest loans to businesses with fewer than 500 employees to help keep businesses afloat and workers employed during the pandemic. The loans are at a one-percent interest rate, have a six-month deferment period, and are payable in two years. The most attractive feature of the PPP is loan forgiveness, which turns the loan into a grant if the business follows certain guidelines.

4. PPP Loan Forgiveness

    a. Proceeds may only be used for:

        i. Payroll costs
        ii. Mortgage interest payments
        iii. Rent (incurred prior to February 15, 2020)
        iv. Utility payments (incurred prior to February 15, 2020)
        v. Interest payments (incurred prior to February 15, 2020)

vi. Refinancing a Small Business Association Economic Injury Disaster Loan entered into between January 31, 2020 and April 3, 2020

b. At least 75% of the loan must be used for eligible payroll expenses, which include:

i. Salary, wages, commissions, or tips (capped at $100,000 on an annualized basis for each employee);
ii. Employee benefits including costs for vacation, parental, family, medical, or sick leave (but not Families First Coronavirus Response Act leave, which is already reimbursable through a tax credit for the employer);
iii. Allowance for separation or dismissal;
iv. Payments required for the provision of group health care benefits including insurance premiums;
v. Payment of any retirement benefit; and
vi. State and local taxes assessed on compensation (but not federal taxes)

c. Loan forgiveness may be reduced if:

i. The recipient reduces the number of full-time equivalent employees ("FTEE") during the eight-week period of the loan, based on a formula that compares the average number of FTEEs during the 8-week loan period to the average number of FTEEs during a comparison period (either 2/15/19-6/30/19 or 1/1/20-2/29/20, in accordance with the recipient's election).
ii. During the eight-week loan period, the recipient reduces the salary or wages of any employee earning less than $100,000 on an annualized basis in 2019 by more than twenty-five percent, as compared with that employee's wages during the last completed quarter prior to receipt of the loan.

d. Employers may reverse the loss of loan forgiveness by bringing back an equivalent number of FTEEs as those who were laid off or furloughed between February 15 and April 26, 2020, by June 30, 2020.

i. The FTEEs need not be the same employees as those who were laid off or furloughed.
ii. Employers who reduced headcount and wages must restore both by June 30, 2020.
iii. This creates a significant incentive to rehire by June 30, 2020.

e. There are many unanswered questions about the June 30 deadline.

i. What about layoffs or furloughs that occurred after April 26, 2020? (Awaiting guidance.)
ii. May an employer restore FTEE staffing levels at the end of June, only to lay them off again in July? (Probably not.)

f. As a practical matter, it would be very hard for an employer to meet the requirement of using 75% of the loan proceeds for payroll purposes if the employer does not have close to full staffing levels during the bulk of the eight-week loan period.

g. Hopefully, the government will issue further guidance on loan forgiveness to help instruct borrowers' decisions. Borrowers are encouraged to check the Department of Treasury website regularly for new updates to its growing list of Paycheck Protection Program Frequently Asked Questions.

Part 2: Rehiring Considerations Posed by Furloughs and Layoffs; Avoiding Pitfalls

1. Despite employers' desire to restore staffing levels to pre-pandemic numbers, employees may not want to return.

    a. Employees may have found new work.

    b. Employees may not wish to return because they are earning more money in unemployment benefits than they would earn at work. However, employers and employees should consider:

        i. Employees who reject offers of reemployment may forfeit their rights to continue to receive unemployment benefits.
        ii. The Federal Pandemic Unemployment Compensation program, which has increased regular unemployment compensation benefits by $600 per week, sunsets on July 31, 2020.
        iii. According to the PPP FAQs (Question 40), if an employer makes a good-faith effort to rehire a previously laid-off employee for the same salary or wages and the same number of hours, and the employee declines, the employer's loan forgiveness amount will not be reduced with respect to that laid-off employee.

    c. Employees may be worried about COVID-19 exposure.

2. Some employers may not yet be in a position to begin restoring staffing levels. Such employers may need to consider permanently separating employees who were previously furloughed, which may entail some practical and legal risks.

    a. PPP: Failure to rehire furloughed employees may negatively affect the employer's access to loan forgiveness.

    b. Promise of Future Employment: In some cases, the employer may be legally obligated to return the employee to work. The employer may have inadvertently promised a return to employment in the employee's furlough letter or other correspondence with the employee. To preserve the presumption that the employee is employed "at-will" (meaning that either the employer or the employee may terminate the relationship at any time), furlough letters should avoid any statements promising a

return to work on a particular date or at any point in time. Such statements may be cured by an express statement that the letter is not a contract or guarantee of employment and a reaffirmation of the employee's at-will status. Otherwise, the employee may need to be returned to work, at least temporarily, in order to reinstate the employee's at-will status to permit the separation to occur.

c. Severance: Employers considering new layoffs or terminating furloughed employees should determine whether the employees are entitled to severance benefits.

    i. In the United States, employees generally do not have a legal right to severance benefits, unless the employer has established a right by contract or policy. Employers should review employment agreements and severance plans to determine whether the employee is entitled to severance.
    ii. Severance is considered to be a welfare benefit, similar to health care and retirement benefits. If the employer has a written severance plan or has established a *de facto* entitlement to severance through a pattern or practice of providing severance in similar circumstances, that benefit would be governed by the Employee Retirement Income Security Act of 1974 (ERISA).
    iii. Employers also should consider whether other similarly situated employees who were laid off previously as a result of the COVID-19 pandemic received severance benefits. If so, the employer might want to consider extending similar benefits to the new layoff group. The employer should pay particular attention to the perception of discrimination if the employer were to treat employees who are members of a protected class (*e.g.*, age, race, gender, etc.) less favorably than other similarly situated employees.

3. Employers who are prepared to restore their staffing levels have the option of returning furloughed employees to work, rehiring employees who were laid off, or hiring new workers.

    a. Reinstating Furloughed Workers:

        i. When rehiring furloughed workers, employers should consider having exempt employees resume employment at the start of a workweek.
        ii. Employers should reactivate employees' health benefits if the employer's benefit plan required employees to obtain COBRA continuation coverage during the furlough.
        iii. If a furloughed employee obtained other employment during the furlough, the employer should ask the employee to certify in writing that the employee has not taken any confidential information from the other employer, will not disclose any of the other employer's confidential information to the rehiring employer, and that returning to work will not violate any obligations to the other employer.

    b. Rehiring Laid-Off Workers: There are many advantages to rehiring laid-off workers.

i. Decreased risk of liability.
ii. Increased employee morale.
iii. Productivity benefits.
iv. Employers also might be able to recoup severance benefits that were paid to the rehired workers at the time of the layoff, depending on the terms of the separation agreement. Note that any clawback of severance benefits would likely void the releases contained in the separation agreement.

c. Hiring New Employees:

i. Employers may choose to hire new employees instead of reinstating employees who were previously laid off.
    a. Employers may have selected those employees for layoff due to poor performance.
    b. Economic conditions may necessitate changes to the employer's business model, which could require the employer to hire employees with different skillsets.
    c. Employers may fear cultural rifts between employees who were laid off and those who continued during the crisis, or resentment by those who were previously laid off.

ii. Employers are generally entitled to pick the employees they wish to hire (or rehire), but employers hiring new employees following a layoff should consider the following risks:
    a. Perception of wrongful termination – An employee who was laid off and not offered reemployment may assume that the stated reason for the termination was a pretext for discrimination or harassment. Employers should pay special attention to the demographic makeup of both the employees who were laid off and of the employees who are hired following the shutdown.
    b. Failure to follow internal policies – When backfilling positions, employers should review any policies addressing rehiring after layoffs and employee separation letters to assess whether the employer must give preference to its previously laid-off employees.
    c. Promises made during the termination process – Employers should review written communications and speak with the managers who conducted termination discussions during earlier furloughs and layoffs to determine whether employees were promised that they would be returned to employment after the crisis or once economic conditions improve. If so, such promises could entitle those employees to reemployment.

4. Avoiding Pitfalls – Tips for Hiring and Rehiring After Furloughs and Layoffs

a. Before rehiring, review layoff and recall policies, severance plans, separation agreements, furlough letters, and other correspondence relating to earlier

furloughs and layoffs. Speak with the managers who conducted furlough and layoff discussions. Assess whether employees may have been promised reemployment or hiring priority, or whether these prior communications otherwise may limit the employer's flexibility in making rehiring decisions.

b. Review recruiting and hiring policies. If no policy is in place, consider creating one. Policies should emphasize objective, job-connected criteria and a process for ensuring compliance.
c. When deciding which previously laid-off employees should be selected for rehire, employers should focus on objective criteria such as documented performance reviews, skills-related needs, seniority, and other justifiable factors. Reliance on employees' past performance should focus on documented, objective considerations (e.g., numerical rankings, performance metrics, and specific examples of strong or weak performance). Employers should avoid relying on subjective feedback or impressions of employees' past performance or overall "fit."

d. In addition to taking steps to prevent overt or implicit bias from influencing rehiring and hiring decisions, employers should assess whether selections may disproportionately impact certain cohorts of employees. For example, if rehiring decisions are based solely on past salary and those with the lowest salaries are selected for rehire, older workers may be adversely affected because they may have greater experience, and thus may command a higher salary. A better approach would be to offer rehire to the strongest candidates and allow those selected to decide whether to accept the lower compensation amount.

Part 3: The Role of Waivers in Return-to-Work Plans

1. Many employers will open while COVID-19 is still a risk to both employees and customers. Recognizing this, businesses are crafting return-to-work plans with various risk mitigation strategies. The plans differ, but their underlying goal is nearly identical across industries: protect employees and customers from infection and protect businesses from liability.

2. Risk mitigation begins with a safe environment for employees and customers. This means following industry best practices, having highly-trained employees, and ensuring that customers know and follow all relevant policies. Of course, employers should also comply with guidance from government agencies, including the CDC, OSHA, and EEOC.

3. Employees and customers will return to somewhat different business settings than the ones which closed a number of weeks ago. Employees should expect: temperature checks before work; physical safety barriers (like the plastic shields many of us have already seen in supermarkets); limits on the number of people at meetings; bans on handshakes; mandatory hand-washing and mask-wearing; and various other safety measures.

4. As the government considers legislation to limit COVID liability, businesses consider whether to implement waivers for their employees and customers.

5. **What are waivers?**

6. The term waiver could refer to one particular provision of a larger agreement. However, when a business has a well-written agreement defining its relationship with customers, that entire agreement *is* the waiver. In other words, a waiver is really a series of contractual provisions that each have their own legal impact. This agreement includes the actual "waiver clause," and it also includes a number of additional protective provisions which limit liability through other legal mechanisms.

7. *Waivers and Releases of Liability* by Doyice and Mary Cotton, an excellent treatise on the law of waivers, argues that the more appropriate name for a properly-drafted waiver agreement is an "Assumption of Risk, Waiver of Liability, and Indemnification Agreement." As this proposed name suggests, the *primary* provisions of a complete waiver agreement are the assumption of risk clause, waiver of liability clause, and indemnification clause. Another important provision is the agreement to comply with essential policies. The *secondary* provisions include the covenant not to sue, severability, choice of law, and integration clauses.

    a. The strongest waiver provision is the **assumption of risk clause**, which explains the inherent risks which cannot be mitigated by a business' care. The assumption of risk clause is intended to disclose those risks and prevent a business from being sued for events that were not caused by its negligence.

    b. A slightly weaker provision is the actual **waiver clause**, which is intended to prevent liability from injuries stemming from a business' ordinary negligence. Even if the business did act negligently, the waiver clause is intended to limit liability. While courts sometimes accept specific, well-drafted waivers of ordinary negligence, they generally do not allow waivers for gross negligence, recklessness, or intentional conduct.

    c. Next we have the **indemnification clause**, by which the indemnifying party agrees to reimburse the indemnified party for: (1) any loss to others caused by the indemnifying party; and (2) any loss incurred by the indemnifying party. Courts typically uphold these between sophisticated businesses but are reluctant to enforce them when an individual indemnifies a business.

    d. The final primary provision is the **agreement to comply with essential policies**, which helps establish a contributory negligence defense if a party is injured because of that party's own failure to comply with an essential rule.

    e. States have different approaches to waiver enforceability. The **choice of law clause** allows the business to pick a relevant state with favorable waiver law.

    f. The **severability provision** ensures that, if one clause of the contract is unenforceable, it will not make the whole contract unenforceable.

g. The related **integration clause** prevents the parties from claiming reliance on any communications or promises that were made before the contract was signed.

h. Finally, the **covenant not to sue** has a slightly different effect than the waiver itself. While the waiver eliminates the cause of action, the covenant not to sue recognizes that a cause of action might exist but commits the party to not suing regardless of that fact.

8. **Is there a new role for waivers in the employment context?**[1]

9. The answer begins with an important ethical consideration: Based on recent data, we have reached roughly 15% unemployment with about 20 million jobs lost in April. Now more than ever, many employees will sign just about anything to have a job. Even in normal times, courts have traditionally disfavored waiver agreements between employers and employees due to the unequal bargaining power of the parties. For this reason, waiver agreements in the employment context are generally thought to violate public policy.

10. Waivers also have a limited role in the employment context because of state workers' compensation statutes, which generally provide medical expenses, lost wages, and rehabilitation costs to employees who are injured in the course and scope of their employment. These statutes prohibit lawsuits against the employer for all but intentional actions, with some few states allowing a slightly lower standard.

11. In certain circumstances, courts have upheld waivers when employees are engaged in inherently dangerous activities, such as skydiving, horseback riding, wall climbing, and physical fitness exams. These are cases in which the workers compensation bar either did not apply or was not analyzed by the court.

12. Most workplaces are certainly more dangerous today than they were three months ago. Despite taking all relevant safety precautions, an employee still might contract COVID at work. Workers compensation coverage will likely bar the vast majority of COVID-related claims. Is there room for an assumption of risk in all this? Time will tell us the answer.

13. **Is there a new role for waivers in a company's relationship with its customers?**

14. When thinking through this question, it may be instructive to consider the businesses that have relied on waivers for decades. Examples include fitness centers, golf courses, community pools, summer camps, YMCAs, ski resorts, and other similar industries.

15. Every gym member has had the experience of signing a waiver agreement before being allowed past the front desk. As customer-facing businesses look to stay afloat while limiting COVID-related lawsuits, the experience from these industries may expand into other settings. For example, membership-based big-box retailers already use a card-for-entry model, much like a

[1] Thank you to Potomac Law Group partner, Mark Papadopoulos, whose research, analysis, and insight is relied on throughout the discussion of waivers and particularly in the applicability of waivers in the employment context.

typical gym. Might we be entering a future in which other retailers follow suit? Could various service providers modify existing client contracts to add communicable disease waivers? Once again, time will tell us the answer.

16. Businesses thinking of adding waivers should consider two important points: First, waiver agreements are by no means flawless instruments. Courts tend to interpret them narrowly and construe them against the party seeking to rely on the waiver. Second, even when drafted properly, a lengthy liability waiver might not be the best way to begin a relationship with customers, who made decide to take their dollars elsewhere.

17. Regardless of implementing waivers, the foundation of risk mitigation is a safe environment for employees and customers, compliance with relevant regulations, adoption of industry best practices, highly trained employees, and customers who know and follow relevant policies. Once this foundation is in place, a carefully-considered, thoughtfully-drafted waiver agreement might be a piece of the larger risk mitigation puzzle.

Part 4: EEOC Guidance on Pandemic Preparedness in the Workplace

1. Temperature checks are becoming part of the new normal for many employees. Whenever employers conduct health screenings or otherwise make decisions based on their employees' health, the Americans with Disabilities Act (ADA) becomes a key consideration.

2. The ADA regulates medical examinations conducted by employers and the medical questions employers are allowed to ask employees. It also requires reasonable accommodations to disabled individuals in the workplace. The Equal Employment Opportunity Commission (EEOC) has issued guidance to help employers navigate ADA considerations while taking steps to keep COVID out of the workplace. The key takeaways include the following:

    a. Employers should not ask questions related to disabilities, such as whether an employee has a compromised immune system or a medical condition which makes the employee more susceptible to COVID-19.

    b. Employers may ask questions about symptoms of COVID-19 to ensure that sick employees stay home. Likewise, when employees call in sick without giving details, employers may ask about symptoms of COVID-19 in order to protect the rest of the workforce. However, employers should not ask these questions of employees who are already working remotely and have not been interacting with customers or coworkers.

    c. Employers can check temperatures, administer COVID tests, and conduct COVID screenings of current employees, and of new employees but only after making a conditional job offer. If an employee refuses to answer COVID screening questions or allow a temperature check, the employer may bar the employee from the workplace. However, the EEOC encourages employers to first assure employees that their medical information will remain confidential, which may make employees more likely to comply with employer requests.

d. Any records resulting from medical screenings should be maintained in a separate medical file (not as part of an employee's personnel file) and treated as a confidential medical record.

e. In general, confidentiality is very important. Employers who send an employee home should keep the decision confidential. Employers can tell other employees that they were exposed to a coworker with COVID, and then send home all employees who worked in close proximity to that person; but employers should not identify the coworker in question. Along these same lines, if an employee is working from home due to having COVID symptoms, the employer can share that the employee is working from home but should not share the reason.

f. Employers can delay the start date of an employee who has symptoms of COVID. If an employer needs an employee to start working immediately, then the employer can withdraw a job offer to an employee with COVID.

g. Employers can request that employees who were exposed to a person with symptoms of COVID stay out of work until a certain number of days passes without symptoms. Employers can also request that employees who traveled to affected areas stay out of work.

h. If an employer does send an employee home for COVID-related reasons, the employer can require a doctor's clearance prior to allowing the employee to return to work. Note that the CDC tells employers *not* to require a doctor's certification to validate symptoms, because that discourages employees from staying home.

i. Employers can also require employees to adopt infection-control practices, such as prohibiting handshakes, requiring frequent hand-washing, wearing masks, maintaining six feet of distance from other employees, and related measures.

3. In the coming weeks and months, COVID may remain a significant risk for employees with compromised immune systems and other medical conditions. Since employers cannot ask questions related to disabilities, how can they determine which employees may be unavailable when they reopen? The EEOC explains that an inquiry is not disability-related if it identifies nonmedical reasons for absence on the same footing with medical reasons. So, for example, an employer is permitted to ask a survey question along the following lines: *In the event our business reopens in the near future, would you be unable to come to work for a reason such as your child's day care center being closed, public transportation being sporadic, or having a compromised immune system or health condition?* By answering *yes* to this question, an employee is not telling the employer the exact reason the employee cannot come in.

4. Depending on how early a particular business reopens, certain vulnerable employees might need to continue working from home for some period of time. Employers still have obligations to provide reasonable accommodations during a pandemic using the usual interactive process to identify those accommodations.

Relevant Links

1. Wendy Fischman and Isaac Mamaysky, *Rehiring Furloughed and Laid-Off Workers Post-Pandemic*, Law360 Expert Analysis, April 20, 2020, law360.com/articles/1263677/rehiring-furloughed-and-laid-off-workers-post-pandemic.

2. Paycheck Protection Program Frequently Asked Questions, U.S. Department of the Treasury, home.treasury.gov/system/files/136/Paycheck-Protection-Program-Frequently-Asked-Questions.pdf.

3. Mark Papadopoulos and Isaac Mamaysky, *The Role of Waivers in Return-to-Work Plans*, Law360 Expert Analysis, forthcoming on May 19, 2020.

4. Isaac Mamaysky, *Employer Takeaways from EEOC Virus Screening Guidance*, Law360 Expert Analysis, March 31, 2020, https://www.law360.com/articles/1258157/employer-takeaways-from-eeoc-virus-screening-guidance.

5. EEOC Website, *Coronavirus and COVID-19* (2020), eeoc.gov/coronavirus.

6. Doyice and Mary Cotton, *Waivers and Releases of Liability* (Sport Risk Consulting 2016), available at sportwaiver.com/book-waivers-releases-of-liability.