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California Imposes Employee Recall Obligations Upon Employers Who Laid Off Workers Due to The Pandemic

As California businesses resume their usual operations and see their staffing needs slowly expand to pre-pandemic levels, employers must now contend with the state's newly enacted employee recall requirements. On April 16, 2021, Governor Newsom enacted Senate Bill 93 requiring employers in certain industries to prioritize the rehiring of workers laid off due to the COVID-19 pandemic based on a statutory preference system.

Covered Employers

Employers operating hotels with 50 or more guest rooms, private clubs, event centers¹, airports, airport hospitality services, or building services (including janitorial, building maintenance, of security services) to office, retail, or other commercial buildings must comply with the statewide right of recall.

Covered Employees

The law protects employees who were laid off due to the pandemic, including a public health directive, government shutdown order, lack of business, a reduction in force, or other economic, non-disciplinary reason. Employees must have been employed by the employer for 6 months or more in the 12 months preceding January 1, 2020.

Employer Obligations

Employers must offer a covered employee all available positions for which the employee is qualified. This applies to all positions that become available on or after April 16, 2021. Employees are deemed "qualified" when they held the same or similar position at the time of their most recent lay-off.

Recall offers must be extended in writing within 5 days of establishing a position and must be delivered to the employee by hand or to the employee's last known physical address, and by email and text if the employer maintains such information. Once a recall offer is extended, the employee must be given 5 business days to accept or decline the offer. Where multiple laid-off candidates vie for the same position, the employer must extend the offer to the worker with the greatest length of service based upon the date of hire.

Where an employee is not extended a recall offer due to a lack of qualifications, the employer must provide that individual with written notice within 30 days of the denial. The notice must identify both the length of service with the employer of those hired in lieu of that recall, along with all reasons for the decision.

¹ "Event Center" is defined as a publicly or privately owned structure of more than 50,000 square feet or 1,000 seats that is used for the purposes of public performances, sporting events, business meetings, or similar events, and includes concert halls, stadiums, sports arenas, racetracks, coliseums, and convention centers. The term "event" also includes any contracted, leased, or sublet premises connected to or operated in conjunction with the event center's purpose, including food preparation facilities, concessions, retail stores, restaurants, bars, and structured parking facilities. Cal. Lab. Code §2810.8(a)(8)

Employers must also maintain detailed records for at least 3 years from the date of layoff, containing the following data:

- Employee's full name;
- Job classification at time of separation;
- Date of hire;
- Employee's last known residence address;
- Employee's last known email & telephone number;
- A copy of the notice of layoff; and
- All records of communications between the employer and the employee concerning offers of employment made to the employee under the new law

Violation of Recall Law

Employers are prohibited from refusing to employ, terminating, reducing compensation, or taking any other adverse employment action against laid-off employees for attempting to enforce their rights under this new law.

In the event of a violation, the California Division of Labor Standards Enforcement (DLSE) has exclusive jurisdiction to enforce the law. In other words, affected employees cannot pursue private actions. However, employees can submit complaints directly to the DLSE to secure hiring and reinstatement rights, front pay or back pay, and the value of the benefits the laid-off employee would have received under the employer's benefit plan, along with interest. Employers found to be in violation of the law can also face civil penalties amounting to \$100 per employee whose rights were violated plus an additional \$500 per employee for each day of the violation.

Conclusion

The new law took effect April 15, 2021 and is set to expire December 31, 2024. Covered employers should determine which employees were laid off due to the pandemic and prioritize these individuals in considering the expansion of their workforce. It is also important to maintain clear and accurate records, consistent with the requirements of the new law.