**Legalities of Rehiring Employees After COVID-19 Layoffs**

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**Since the Coronavirus (COVID-19) pandemic has taken hold, many employers have been in the unfortunate position of having to either reduce their employees’ hours or lay off their employees.**

**Although the $349 billion Paycheck Protection Program (PPP) — which offers loans designed to help small businesses with fewer than 500 employees stay afloat and keep workers employed during these trying times — ran out of money 13 days after its launch, the Senate on April 21 passed another bill that allocates $310 billion more into the program and an additional $60 billion to a separate small business emergency grant and loan program. The House expects to tackle the measure on April 23.**

**A PPP loan be forgiven up to 100 percent and is meant for employers to spend on retaining workers, maintaining payroll, and paying for rent and utilities. It includes incentives for businesses to hire back workers before the end of June and/or bring back workers who were furloughed, and forgiveness is based on the employer maintaining or quickly rehiring employees and maintaining salary levels.**

**Whether you’re rehiring employees thanks to having received funds under the PPP, or simply because your business has re-stabilized and is in a position to do so, some logistical questions exist as to how to handle the rehiring process under current circumstances.**

**Layoff vs. Furlough**

**Before we talk about some considerations surrounding rehiring employees, it’s important to first understand the difference between a “furlough” and a layoff or termination.**

**A furloughed employee may have reduced or even zero work hours, but they remain an employee; a layoff, on the other hand, is generally a complete employment severance that terminates the employer-employee relationship.**

**As for final pay requirements under Labor Code section 201, there isn’t much of a difference between a furlough and layoff because the Labor Commissioner has stated that if an employer reduces an employee’s scheduled work hours to zero — and doesn’t reschedule that employee within that same pay period — the employer has effectively laid off the employee, thereby triggering final pay requirements. In the context of bringing employees back to work, however, the distinction is relevant. And this article focuses on instances where an employee was terminated or laid off for COVID-19-related financial reasons and is now being rehired.**

**Form I-9 Requirements**

**When re-hiring an employee who was just working for them a few weeks ago, will employers need to jump through all the new hire administrative hoops?**

**The short answer is no when it comes to the Form I-9 that is. If you rehire an employee within three years from the date their Form I-9 was previously completed, you may either rely on the employee’s previously executed Form I-9 or complete a new one. As a reminder, beginning May 1, employers can only use the** [**10/21/19 version of the Form I-9**](https://mcusercontent.com/59c285d90cd9002079d9e814a/files/1e4c49cd-884d-46f7-8d15-8e385ed76bc0/i_9_paper_version.pdf)**, which expires 10/31/2022.**

**According to the USCIS Handbook for Employers, you must follow certain guidelines if you rely on a previously completed Form I-9:**

* Employees whose employment authorization status haven’t changed from their previous Form I-9 don’t need to provide additional documentation. Just provide the rehire date and any name changes in Section 3, and sign and date the form.
* For employees whose previous Form I-9 indicates that employment authorization has expired, you must reverify employment authorization in Section 3 and provide the rehire date. If the previous Form I-9 isn’t the current version, you must complete Section 3 on the current version.
* For employees whose Section 3 of the previously completed is already used but you’re rehiring them within three years of that Form I-9’s original execution, you may complete Section 3 on a new Form I-9 and attach it to the previously completed form.

**Employees rehired after three years of original Form I-9 completion must complete a new Form I-9.**

**For employers required to physically examine documents upon hire or rehire, the Department of Homeland Security (DHS) is deferring the physical presence requirements for employers that have employees “taking physical proximity precautions due to COVID-19,” allowing such employers to inspect Section 2 identity and employment eligibility documentation remotely — via video link, fax or email, for example — within three business days of hire, and the employer must retain copies of these documents. Once normal business operations resume, employees whose documents underwent remote verification must report to their employer within three business days for official in-person document verification. Once an employer has physically inspected the document, they should enter “COVID-19” in the Section 2 “Additional Information” field as the reason for the physical inspection delay. They should also state “documents physically examined” followed by the date of inspection in either Section 2 or Section 3, as appropriate.**

**It should be noted that these exceptions are only made for employers and workplaces that are operating remotely. No exceptions are made if employees are physically present at a work location. So for “essential businesses” allowed to remain open despite local and state stay-at-home orders, the traditional physical inspection requirements apply when hiring new employees or reverifying documents for a rehire.**

**Reinstated employees aren’t subject to the same employment eligibility requirements as rehired employees, according to Gilberto Santillan v. USA Waste of California Inc. (2017). For a worker who’s continuing employment and has a reasonable expectation of employment at all times — such as their hours being temporarily reduced to zero; they were “furloughed;” or they otherwise had an approved leave of absence, reinstatement after suspension or temporary layoff for lack of work — a hire hasn’t taken place. For more information,** [**visit I-9 Central.**](https://www.uscis.gov/i-9-central)

**Paid Sick Leave**

**Unlike unused, accrued vacation — which is treated like wages — mandatory paid sick leave (PSL) doesn’t need to be paid out at the end of employment. In other words, you aren’t required to provide a PSL “cash out” at termination, resignation, retirement or other separation of employment. If an employee leaves employment and is rehired within one year, however, previously accrued and unused paid sick days must be reinstated, and the employee must be allowed to use them and begin accruing additional paid sick days. Certain California jurisdictions also have paid sick leave ordinances with similar employee reinstatement requirements; employers should refer to those ordinances to ensure compliance.**

**Employers whose PSL was part of a broader paid time off (PTO) policy that was paid out upon separation from the employee (whether due to layoff, furlough or another reason) aren’t required to reinstate that accrued PTO.**

**Background Checks and Drug Tests**

**Under normal circumstances, many employers choose to conduct background checks and pre-employment drug testing prior to hiring new employees; in fact, some employers are required to do so depending on their industry. And there’s a very narrow window in which these pre-employment screenings can take place: It must be after a contingent offer of employment is made and before the employee begins working.**

**If there’s anything we’ve all learned as the COVID-19 pandemic has unfolded, it’s that these circumstances are anything but normal. For many of us, this may be one of the most life-altering events we’ll ever experience.**

**So given these unprecedented circumstances, what’s an employer to do when rehiring a previously laid-off employee? Are they permitted to subject that employee to another background and/or drug test prior to rehire? And if so, should they, given that the employee already has been through that process?**

**We know that once an individual is an employee, the circumstances for drug testing are much more limited and require a showing of “reasonable suspicion” due to privacy concerns. So should an employer forego a drug screening that would otherwise be required under “normal” circumstances? And perhaps more important, if they do, will that jeopardize the employer’s argument that the screening is justified by “business necessity” and “job-relatedness”?**

**There may be pros and cons to maintaining the status quo versus deviating from your standard practices during these extraordinary times. Given the unprecedented nature of this pandemic, and because there is no agency guidance at this time, consult with legal counsel about how best to proceed.**

**New Hire Paperwork and Employee Handbook**

**Employers are required by law to provide employees with many forms and pamphlets upon hire — which should be no different, even when you’re rehiring a recently laid off employee.**

**In addition to the Form I-9, this includes things like the federal W-4 and the state DE-4, as well as the Workers’ Compensation, Disability Insurance, Paid Family Leave and Sexual Harassment pamphlets, to name a few.**

**In addition to the required forms and pamphlets, employers with an employee handbook should redistribute the handbook to your employees and include a confirmation of receipt. As a reminder, beginning January 1, 2020, all new hires must be provided a copy of a lactation accommodation policy.**