

Beware legal pitfalls of rehiring ex-workers, laid-off staff

If your organization pared back during the economic slide, you may be joining other employers that are rebuilding their staffing levels.

More employers expect to pick up the hiring pace in the second half of this year, according to the latest Manpower employment survey. That means you could be planning to bring back former employees who were let go or laid off.

While rehiring ex-employees is common, it comes with important legal and practical implications. Here's a rundown:

Rehirings: Bias laws apply

For starters, know the law. Federal and state laws regulate your policies and practices relating to reductions-in-force and recalling employees. That means it's illegal to discriminate on the basis of race, color, religion, sex, national origin, age and disability in layoffs and rehiring.

For instance, if you're hiring new employees and, at the same time, rehiring some (but not all) laid-off employees, you could be vulnerable to a lawsuit.

Example 1: Say a black employee with good performance reviews was laid off along with five others in the same position. Six months later, three of those white employees were rehired, along with a new white employee. The black former employee might decide to sue on the basis that he or she was equally qualified to be rehired, yet wasn't.

Example 2: Say you laid off three employees, telling them it was strictly for economic reasons. Your words made it clear that a decline in business stood as the only reason for their termination. So you can expect tough questions when business rebounds, you start hiring again and decide not to recall any of the three laid-off workers.

Was it because they weren't good workers? If so, why didn't you fire them for job-performance reasons? Was the replacement of a different gender or ethnic background? All of these questions could spur a lawsuit by a former employee who claims unfair treatment.

Craft rehire policy with care

You can minimize the potential for rehire legal claims by following these strategies:

1. Study your state laws, union pacts and existing policies. You may have contractual obligations to recall laid-off workers if they're covered by a collective-bargaining agreement or bound by an individual employment contract. Also, state or local laws could bind you to rehire certain laid-off workers as well.

2. If you have no policy on recalling employees, set one. To avoid potential liability, any organization policy regarding rehires must be reasonable and nondiscriminatory, and applied consistently.

According to Larry Rosenfeld, co-chairman of the labor and employment practice in the Phoenix office of law firm Greenberg Traurig LLP, employers should include these strategies in their policies:

- Place the responsibility on the worker to contact you to express interest in job vacancies. This takes the burden off you to make the call and identify positions for which former workers would be qualified.
- Put a time limit on any preferential consideration for rehire. Doing so will silence an employee's claim that your organization was required to hire him or her on a preferential basis indefinitely.
- Specify that you retain the right to consider workers' skills and your business needs ahead of seniority in deciding whom to recall. It's common for organizations to structure their rehiring with the last worker laid off becoming the first worker rehired. But your business needs may not always make that rule practical. Give yourself the discretion to decide your recall order.

3. Describe the terms and conditions of rehire. Barring any agreement with an employee, and assuming you have legitimate, nondiscriminatory reasons for your rehire decisions, you're free to dictate the terms you offer a former worker you rehire.

Clearly spell out whether or not the job is a temporary call-back, and its compensation and benefits.

Pay special attention to reservists' rehire rights

You usually have lots of leeway in developing your rehire policy. But that's not the case with workers returning from military service.

You're required to "promptly" rehire returning reservists who make "timely application" for their previous jobs, according to the federal Uniformed Services Employment and Reemployment Rights Act (USERRA). And you must reinstate them without any loss of seniority or benefits.

USERRA does offer employers one "out." You don't have to hire the returning reservist if you can prove your organization underwent a significant change that would make rehiring a burden on the firm. Here are the three instances where this argument would apply:

1. Changed circumstances. Rehiring the person would be impossible or unreasonable, such as when a layoff would have included the employee regardless of his or her military duty.
2. Undue hardship. You're excused from rehiring returning military when the difficulty or expense would cause

"undue hardship" on your business.

3. The job was brief and nonrecurring. You don't need to rehire if the employee's vacated position was one created for a brief and nonrecurrent period.

For more details on USERRA, visit www.dol.gov/vets or www.esgr.org.