

# Should you rehire a former employee?

It's incredibly common for former employees to apply for new positions, especially those who were let go due to a lay-off or had left the company on good terms. Can you consider former employees for rehire? Absolutely. But keep these real-life court cases in mind when it comes to rehiring.

## **You can consider past discipline when rehiring staff you previously laid off**

Here's another reason to keep careful track of past discipline, especially if you are anticipating a reduction-in-force that may disproportionately affect older workers. When those workers apply for other, open positions that they're at least marginally qualified for, that past disciplinary history may be a good reason to not rehire them.

Recent case: Cassandra worked for a community center that provides services for people with mental illnesses, intellectual and developmental disabilities and substance abuse problems.

She began as an aide, but over the years was promoted to staff services officer. In that position, she was responsible for the food-service department, facility management, state and federal inspections and safety. She also oversaw maintenance, housekeeping and the center's fleet of vehicles. She often dealt with outside vendors.

The trouble began for Cassandra when a new supervisor didn't grant her exactly the leave she wanted when her son was hospitalized, although he did let her work remotely via laptop and cellphone. She complained to HR, and was immediately given the leave she had requested. However, her relationship with her supervisor deteriorated.

The supervisor began receiving numerous complaints from staff members and outside vendors about Cassandra's behavior at work. These included allegations of being rude, condescending, demeaning and belittling. She was also accused of violating the employer's anti-nepotism policies by favoring her brother-in-law, who worked in housekeeping. As a result of the complaints, the supervisor removed several duties from Cassandra's job description, including dealing with outside vendors, since several had complained about her.

Then the center had to lay off staff, and Cassandra's now-diminished position was among those eliminated. She applied for other open positions but was not selected.

Then she sued, alleging that she had been replaced by a younger man who had also lost his job in the RIF.

The center countered that the new hire wasn't doing the same job Cassandra had held, so he had not actually replaced her.

It also argued that even if he had, it had a valid reason for choosing him over Cassandra: He had absolutely no disciplinary history, while Cassandra had been on the receiving end of numerous complaints about her management style, including from impartial outside vendors.

The court agreed that the center didn't discriminate based on age or sex when it choose a RIF candidate without Cassandra's disciplinary baggage. It tossed out her lawsuit. (*Human Services of Southeast Texas v. Goffney*,

Final note: It is always a good idea to consult your attorney before instituting a RIF, especially one that may end up disproportionately affecting a protected class of workers.

Although this case was brought under Texas state law rather than federal law, you may have to comply with strict federal rules on how to handle older workers you want to terminate, offering a severance agreement in exchange for a promise not to sue. Your attorney can walk you through that process.

Plus, any time you conduct a large-scale RIF, you may have to comply with the federal WARN Act, which dictates when and how you announce and manage the layoff.

## **Make returning worker sign arbitration agreement again**

If you use an arbitration agreement, and a worker quits only to be rehired later, make sure she signs and dates a fresh copy of the agreement. Otherwise, the earlier resignation will have ended the agreement.

**Recent case:** Kathy signed an agreement to arbitrate all employment-related claims, as did her husband who worked for the same car dealership. Then Kathy quit and went to work elsewhere. Eventually, she was rehired. But no one presented her with a new arbitration agreement to sign.

After complaining about sex discrimination and harassment, Kathy was terminated. So was her spouse. Both sued, alleging discrimination.

The husband's case went to arbitration. However, Kathy got to sue in state court because she had quit, ending the first agreement, and had never been asked to sign a new one. (*Hartley v. Yucca Valley Auto*, Court of Appeal of California, 2019)

## **Document why you decided not to rehire**

You can use information from the disciplinary file when rejecting the candidate.

**Recent case:** Christina was a supervisor with the U.S. Department of Homeland Security. Years ago, she filed a whistleblower complaint.

When a subordinate who was a friend of hers was being investigated for misconduct, Christina improperly issued him a written reprimand, which precluded further punishment.

After that incident, she was allowed to retire instead of being terminated. Soon afterward, Christina applied for another DHS job and was rejected.

She sued, alleging retaliation. The court tossed out her lawsuit after DHS explained the reprimand incident disqualified her. (*Poulos v. Nielsen*, CD CA, 2019)

## **No absolute requirement to notify laid-off workers that their jobs are open again**

Sometimes, workers who are laid off are told they're eligible for rehire.

But absent a specific promise to call if there's a job opening, employees can't wait months or years to complain about discrimination when they discover the job was open and someone else filled it.

**Recent case:** Calvin, who is black and older than 40, was laid off from his job as a driver.

At the time, his boss said he would be eligible for rehire later. However, the company never called him back. Eventually, he discovered that younger, white drivers had been hired.

That's when Calvin sued, long after they actually had been hired. He argued that the date he discovered they had been hired was what counted, even though he had long missed deadlines for filing EEOC complaints after the others were hired.

The court tossed out Calvin's lawsuit. It reasoned that the employer's silence on job openings didn't extend the time Calvin had to apply or sue. Merely stating he was eligible for rehire also didn't make it mandatory to notify Calvin of openings. (*Kirklin v. Joshen Paper*, 8th Cir., 2018)

**Advice:** If employees who are being terminated are eligible for rehire, let them know how they should apply for openings. Tell them where you post jobs. Don't promise to contact them—put the ball in their court.

**Final note:** The employer won this case, but it still had to spend time and money defending itself.