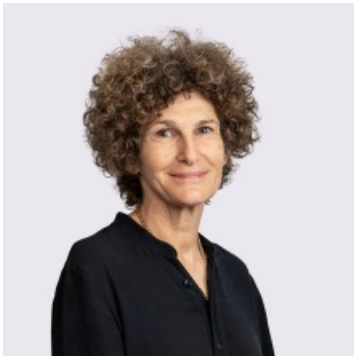


Hospitality Industry in 2021: Bringing Employees Back to Work During COVID-19 Pandemic

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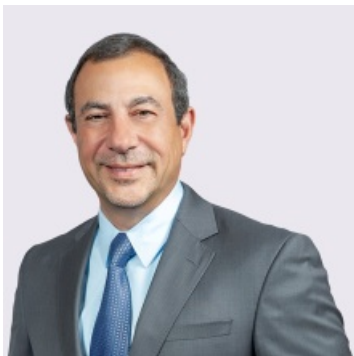
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With COVID-19 vaccinations rolling out across the country, loosening restrictions on operations, increased demand, and other signs of recovery in the industry, hospitality employers are poised to expand their workforces. This article explores potential legal risks that may arise as hospitality employers that laid off or terminated staff during the pandemic hire staff.

This is the third in a series of conversations that our Hospitality Industry Team plans to share as we venture through workplace legal issues in 2021 together.

Looking at the Future

Consumers are itching to travel, eat out, and reignite the social aspect of their lives. Increases in consumer activity necessarily mean increased work, which will pave the road for hiring or rehiring employees who were separated due to the pandemic.

As the hospitality industry looks forward to the possibility of growing operations, what legal hurdles could it face during this new phase of staffing?

Most lawsuits related to hiring claims center around what, if anything, was promised to former employees, the questions asked during the screening process, and the basis for hiring decisions. It is important for employers to keep these issues in mind as they bring employees back to work.

Must an employer rehire its former employees before considering new applicants?

No, so long as there is no contractual obligation that would require the former employee to be reinstated. A contractual obligation can arise pursuant to a collective bargaining agreement with a union or by virtue of an employment agreement with the former employee. It is also possible, depending on the circumstances, that an employer can create a legally enforceable promise to rehire staff based on the communications to staff when they were terminated or even after termination.

As the pandemic struck in 2020, hotels and restaurants laid off staff, and employers were free (assuming the employer was not subject to collective bargaining restrictions) to terminate staff due to the reduction in operations. Employers had no obligation to promise staff they would be given priority when businesses reopened.

Whether an employer has created a legally enforceable obligation to rehire former staff depends on what was communicated at the time of the layoff or termination. In order to evaluate whether former employees have rehire rights (that employees would be the first to be offered positions upon reopening, for example), the employer should seek legal counsel to ascertain whether the employer's communications created legal rights that would require certain employees be reinstated when positions become available.

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Can an employer legally hire an applicant and reject a former employee who was laid off?

Yes. If there is no other legal obligation to reinstate a former employee, employers are free to hire the most qualified applicant for the position.

However, employers' recruiting strategies should be carefully evaluated. This is especially true for hospitality employers reopening venues that were shuttered or operating at a limited capacity during the pandemic and need to hire significant numbers of staff. Consistent with regular hiring practices, employers should institute recruiting procedures that are unbiased and will enable the business to identify the most qualified candidates.

A former employee who is not rehired may challenge the hiring decision, arguing the company was discriminatory or retaliatory because the employer had more information about former employees than about prospective hires. For instance, an employer likely will know an employee's age, national origin, or history of absences or accommodations related to a serious health condition or disability. The former employee may be part of a protected class and argue that because they were qualified in the past to work at the hotel or restaurant they should not have been passed over for this opportunity, particularly where they had no documented performance or conduct issues.

To defend against a failure-to-hire claim, the employer must articulate a legitimate non-discriminatory reason for the decision. Because hotels and restaurants often are hiring multiple employees at the same time as business increases, they should use clearly defined, objective criteria that is associated with the needs of the business when making hiring decisions. If a new hire is favored over a former employee, the employer should be able to establish why the new hire was more qualified than the former employee.

What are some of best practices when evaluating applicants?

The most important step an employer can take to ensure its hiring decisions are fair and lawful is to train interviewers and decision makers. Training is a critical step toward unbiased hiring. Training can reinforce the importance of fairness in evaluating applicants and the techniques to best enable employers to assess applicants' skills and experience.

Training should reinforce:

- The purpose of the interview;
- How to ensure applicants are treated consistently;
- How to avoid bias in the hiring process;
- What questions not to ask;
- How to best record applicants' answers to questions;
- What are protected characteristics and how to avoid asking questions that will elicit information that should not be considered; and
- How to document the hiring decision.

It is an exciting time for the hospitality industry. Employees are ready to return to work and consumers are ready to enjoy dining out again. Building the most qualified team possible is high on the list of industry employers' goals. Good practices can ensure that restaurants avoid litigation related to their hiring decisions.

Please contact a team member or the Jackson Lewis attorney with whom you regularly work if you have questions or need assistance.

Related:

- [Restaurant Industry in 2021 Series: Tips](#)
- [Restaurant Workers Qualify for Vaccines in Some States; May Qualify in Others Soon](#)

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