

7 STEPS EMPLOYERS CAN TAKE WHILE REHIRING TO AVOID COVID-19 DISCRIMINATION WORKPLACE LAWSUITS

Insights
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A former employee of a prominent midtown Manhattan boutique hotel filed a class-action age discrimination lawsuit against her former employer, alleging the hotel failed to rehire her or other older employees after reopening following COVID-19-related shutdowns. Plaintiff Darci Fernandez Penal and the 30 to 40 other purported similarly situated employees claim they were laid off and subsequently terminated from the The Kimberly Hotel due to business disruptions to the hospitality industry caused by the pandemic, which substantially reduced occupancy in New York City hotels. Employers in New York and across the country will (if they have not already) be faced with the delicate decision – should you rehire laid off or terminated staff? Here are seven steps you can take, as gleaned from this case filed on August 3, to minimize your chances of being sued when making that decision.

Case Summary

Penal, age 64, worked for The Kimberly Hotel as a housekeeper for almost 25 years. She alleges that on March 20, 2020, she “received a letter from The Kimberly Hotel’s Vice President and General Manager informing her that she was being laid off from her position.” A few weeks later, Penal received a second letter stating that her layoff was due to “unforeseen business circumstances prompted by the COVID-19 pandemic.” The letter also stated that The Kimberly expected the layoff to be “temporary” but that the “duration was impossible to predict” and that The Kimberly

Related People



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would “close temporarily.” In September 2020, The Kimberly reopened for business, but did not recall Penal back to work.

On November 10, 2020, Penal received a final letter from The Kimberly stating she would not be recalled and, effective February 9, 2021, her employment would be terminated. Penal alleges that since October 2020, 30 to 40 other employees (including housekeepers, porters, and doormen) were similarly terminated from their employment for reasons related to the COVID-19 pandemic and resultant travel restrictions and lower hotel occupancy levels. The terminated employees, like Penal, allegedly had long tenures at The Kimberly and a majority were over the age of 40.

Following the November 10 letter, The Kimberly closed again due to the COVID-19 pandemic, but once again reopened in March 2021. The Kimberly did not recall Penal or any of the previously terminated employees and instead, as Penal alleges, hired younger and presumably lower paid employees to fill the vacant positions. She accordingly alleges that The Kimberly’s COVID-19 related reasons for the terminations was merely pretext for age discrimination. In support of her claims, Penal asserts that the hotel’s General Manager allegedly stated that he was “cleaning house.” On August 3, Penal filed a complaint in the Southern District of New York against The Kimberly for its alleged violation of the Age Discrimination in Employment Act and New York State and New York City Human Rights Laws.

Takeaways for Employers

While this case is in its infancy and the employer has not yet even had a chance to respond to the allegations, you can still learn valuable lessons from this lawsuit. It’s an important reminder that employers must be on high alert when making the decision to replace an older worker with a younger worker – especially within a short period of time – as that is often sufficient to plead a *prima facie* case of age discrimination.

This does not mean you cannot make *lawful* hiring decisions suitable to your business needs. You must, however, take preemptive steps to protect your organization in case those decisions are later challenged. In instances involving the potential rehiring of laid off or terminated workers, here are seven key considerations you should take into account as you navigate the reopening (and possibly reclosing) of your business.

Service Focus

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1. **Review Employer Policies and Applicable Collective Bargaining Agreements.** You should review and follow internal policies, if any, concerning the rehiring of laid off or terminated employees. For example, if the employee handbook calls for the rehiring of laid off staff, that condition should be followed. Differentiation from employer policies may lead to allegations of disparate treatment. Employees responsible for hiring, firings, and layoffs should also be familiar with these policies. Workforces governed by collective bargaining agreements may have rights to recall as specified by the contract.
2. **Be Aware of Applicable Law.** Some jurisdictions, like [California](#) and [Los Angeles County](#), have passed legislation providing certain workers laid off during the COVID-19 pandemic with the right to be recalled to the position. Make sure you are aware of any applicable laws that could provide your workforce with the right to recall. Consult legal counsel if necessary.
3. **Convey Permanency.** When laying off or terminating an employee, convey to them that the action is permanent. In this case, The Kimberly allegedly told Penal that her layoff was “temporary.” Statements that the layoff is temporary or guarantees of reemployment upon reopening could potentially create liability, and, at the very least, is likely to disgruntle employees who relied on such representations.
4. **Offer Re-employment.** When rehiring for vacant positions, consider offering employment to laid off or terminated employees first. Former employees are aware of the innerworkings of your business and will be able to more easily and quickly perform the job. You will also avoid allegations of unfairness as you will have offered all formerly employed staff the opportunity to return.
5. **Publicize Hiring.** If you do not want to automatically rehire former employees, consider notifying them of their option to reapply for their former positions or other vacant positions within the company. You might consider sending your former employees an application with a letter encouraging them to apply.
6. **Specify Rehiring Terms.** If you decide to rehire laid off or terminated employees but do not or cannot pay them their prior salaries, make that clear in any communication. During your conversations with former employees or in

any disseminated written materials you should clearly state the salary and benefits, as well as any other terms and conditions of employment that may have changed.

7. Know Your Reasoning and Have Documentation. Know and have documentation to support your decision to layoff or terminate certain employees. If you have chosen to layoff or terminate certain employees based on performance, business need, or other metrics, you will want to have a record of, for example, said poor performance or lower sales. In the event that you offer re-employment to some, but not all of the laid off employees, you must be able to articulate valid business reasons for the decisions and should have documentation that supports the decisions.

Conclusion

In most jurisdictions, you are under no obligation to rehire *lawfully* laid off or terminated staff. But to avoid burdensome and expensive legal action, make sure you have legitimate and verifiable reasons supportive of your decision. If you have questions about how to ensure that your employment decisions are in compliance with local, state, and federal laws, contact any attorney in your local [Fisher Phillips Office](#).

For additional information regarding COVID-19 related litigation being filed across the country, and to perform your own analysis of our litigation data, you can visit [Fisher Phillips' COVID-19 Employment Litigation Tracker](#). Fisher Phillips will continue to monitor the rapidly developing COVID-19 situation and provide updates as appropriate. Make sure you are subscribed to [Fisher Phillips' Insight System](#) to get the most up-to-date information. For further information about COVID-19, contact your Fisher Phillips attorney, the authors of this Insight, or visit our [COVID-19 Resource Center for Employers](#).