

# **A Recall to Arms after Covid-19 – Some California Employers Must Offer Rehire to Laid-off Employees**

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California recently enacted an employee recall law that may substantially affect employers in the tourism and travel industries amid the emerging post-Covid-19 economy. On the heels of Governor Gavin Newsom's announcement to fully reopen its economy on June 15, 2021 – presuming the welcome and waning Covid-19 hospitalization rates – the state took another step to protect laid-off employees who had worked in hotels, clubs, event centers (e.g. concert halls, stadiums, sports arenas, racetracks, coliseums, and convention centers), airports and building services in retail and commercial buildings, before the Covid-19 emergency in March 2020.

SB 93, codified as Labor Code section 2810.8, requires owners and operators of covered businesses to provide a written offer of employment to laid-off employees, regardless of change in ownership or assets or relocation of the business since the employee's layoff, so long as the business conducts the same or similar operations as before the pandemic. This applies to employees laid off by the Covid-19 emergency including those who may have lost their jobs due to measures taken by federal, state and local governments in response to the pandemic such as public health directives and government shutdown orders. It also applies to employees laid off due to lack of business, reduction in force, or for other economic, non-disciplinary reasons. A laid-off employee is qualified and entitled to this offer of recall if the employee held the same or similar position at the business at the time of the employee's most recent layoff.

## **Employer's obligation under SB 93**

Within five days of establishing a job position – which could mean either when the business creates the position or makes it available – the employer must offer a laid-off employee this and any other job position, if they qualify. The offer must be in writing and given by hand or by mail and also transmitted by email and text message if the employer has the employee's email address and phone number. If multiple employees qualify for a job position, the employer must offer the job in order of seniority of hiring date. The employer must allow five days for the employee or employees offered a position to accept or decline the offer before hiring someone else.

Employers must also provide written notice within 30 days to a laid-off employee who is not rehired

due to lack of qualification, and this notice must include the length of service of the person hired instead of the laid-off employee and any other reason for the employer's decision. In addition, an employer must retain a copy of the notice of the layoff provided to employees and communications of the recall offers. This obligation lasts three years from the date of the written notice of layoff.

The state Labor Commissioner's Office, also known as the Division of Labor Standards Enforcement, will enforce the new law using the stick granted by state legislature. Laid off employees are protected against retaliation for trying to enforce their rights granted under SB 93, even if their allegation of noncompliance is incorrect. An employee who files a complaint with the Labor Commissioner and prevails can be awarded damages and their job, while the employer faces penalties of \$100 for each employee who proves a violation under the law. As written, SB 93 does not appear to permit a private right of action.

## **Looking ahead**

This new law will remain in effect through 2024. As the reader may intuitively note, there are a number of terms in the statute that are not specifically defined as to which nuance may matter. There are also likely to be real world scenarios that the legislature did not address. For example, if individual hotels are owned by separate Limited Liability Companies but each has the same sole member, are they separate employer or one joint employer. How does this work if employee X works at one facility in a unionized position in Oakland but also works for the same employer in a non-union facility in the East Bay? While Los Angeles area employers in these covered industries have been subject to a similar city ordinance since June 14, 2020, other businesses in the state may need to pause and assess their employee rosters from last year before hiring new employees. Employers may benefit from waiting for guidance on this new but ambiguous law from the Labor Commissioner. We hope to see the Labor Commissioner issue guidance on SB 93 soon.

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