AFL-CIO

AMERICA'S UNIONS

WHAT WORKING PEOPLE NEED TO KNOW ABOUT RETURN TO WORK, RECALL RIGHTS AND EMPLOYMENT REVERIFICATION

The AFL-CIO is committed to protecting all workers, regardless of immigration status, and minimizing the human and economic toll of the COVID-19 crisis. As businesses slowly begin to reopen, workers who have been laid off and furloughed deserve and expect a fair opportunity to return to work and restore their livelihoods. This document outlines potential problems, and strategic responses to those problems, for workers and their unions to consider as we strive to return to work safely and promote a just recovery.

WHAT TYPES OF RECALL ISSUES SHOULD WE BE LOOKING FOR?

There is always a risk of discrimination and retaliation in the recall of workers from layoff, including the risk that an employer will hire an entirely new group of employees when reopening. Employees of subcontractors can be particularly vulnerable because properties where they work may decide to replace their contracts (e.g., hire a new cleaning contractor) as the work reopens, thus causing the contractor's employees to lose their jobs.

ARE EMPLOYERS OBLIGATED TO REVERIFY THE WORK AUTHORIZATION OF RETURNING WORKERS?

No. Longstanding regulations from the Department of Homeland Security (DHS) make clear that employers are not required to reverify the I-9 forms of employees returning from layoff, since they are considered to be "continuing in employment." However, the law does not prohibit an employer from doing so. If the employer chooses to reverify its employees, it must not do so in a selective or discriminatory manner.

WHAT IF MY EMPLOYER STARTS USING E-VERIFY?

A similar analysis applies to E-Verify. An employer who was not signed up to use E-Verify before shutting down generally cannot now sign up and use E-Verify to screen current employees who are returning from layoff. Workers who think their employer has misused E-Verify can push back by having a work-authorized colleague file a complaint with the Immigrant and Employee Rights Section at the Department of Justice.

WHAT STEPS CAN UNIONS TAKE TO PROMOTE FAIR REHIRING PRACTICES?

In a unionized workplace, the employer typically will be required to comply with specific requirements set forth in the collective bargaining agreement concerning the recall of bargaining unit members from layoff. The union should demand bargaining over any reverification of bargaining unit members, since that would amount to a change in working conditions. Similarly, the union should demand bargaining over an employer's decision to sign up for E-Verify and/or use E-Verify to screen returning bargaining unit members. (Samples of relevant contract language are provided below.)

WHAT STEPS CAN NONUNION WORKERS TAKE?

In a workplace without a formal bargaining unit, workers should inform employers that reverification is not required by law, and in fact presents real legal risks. Workers can remind their employer that it is unlawful to reverify on a discriminatory or retaliatory basis, and that the employer cannot demand specific

documents to complete the I-9 process, as this would constitute document abuse.

SHOULDN'T THERE BE A LAW ABOUT THAT?

Yes! With a strong push from unions, a growing number of jurisdictions, including Los Angeles, have enacted "Right of Recall" ordinances that require employers to call back their prior workforce and give them a first chance at positions as they reopen. In addition, other jurisdictions, including New York City, have enacted worker retention laws that require a new contractor (a "successor" in legal language) to retain the prior contractor's employees for a period of time. Because these laws frequently are challenged in court by employers, it is important to get legal advice if you are considering advocating for such a law.

SAMPLE CONTRACT LANGUAGE

Verification and Reverification of Work Authorization: The employer will not require or demand proof of immigration status, except as may be required by 8 U.S.C. 1324a(b) and listed on the back of the I-9 form. Further, the employer will not require that an employee reverify his or her authorization to work unless the employer obtains actual or constructive knowledge that the employee is not authorized to work in the United States. "Actual or constructive knowledge" means such knowledge that would subject the employer to liability under the "employer sanctions" provisions of the immigration laws, 8 U.S.C. 1324a. Further, the employer will not require employees engaged in "continuing employment" to provide proof of work authorization, including Social Security numbers.

"Reverification" means requesting that an employee show documents that purport to prove their authorization to work in the United States, and includes a request to provide proof of a valid Social Security number. In the event that the employer determines it has the requisite "actual or constructive knowledge" that requires it to reverify an employee's authorization to work, the employer will:

1. Prior to notifying the employee, notify the union and provide the union with the factual basis for that determination.
2. Afford the employee a reasonable period of time of not less than 120 days to establish work authorization.
3. Not take any adverse employment action against the employee unless the employer has complied with 1. and 2. above, and is required to do so by law.

Transfer of I-9 Forms: No employee shall be required to reverify status in circumstances constituting "continuing employment." In the event of a sale of the business or its assets, or other business reorganization that transfers the employees to a different entity, the employer shall transfer the I-9 forms of its employees to the new employer, and shall condition such sale on the successor employer's written agreement to use transferred I-9 forms to satisfy obligations with respect to I-9 forms. [This obligation also should be incorporated specifically into the owner and operators' successorship obligations.]

Inquiries into Immigration Status: The employer will not ask any employee, either orally or in writing, to respond to questions or provide documentation of immigration status, except as required by law. If the employer determines that such a request is required by law, the employer will provide the employee(s) and the union a detailed explanation for the request, in writing, citing the factual and legal basis for the request. The union will have two weeks to reply to the request. The employee will not be required to respond to questions or provide the requested documentation while the union and the employer attempt to resolve a dispute under this section.

Employer Participation in Electronic Verification: The employer will not participate in E-Verify or any computer or online verification of immigration or work authorization status, except as required by law.