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Nevada Hospitality and Travel Workers Right to Return Act: What Do Employers Need to Know?

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In 2021, the Nevada Legislature enacted legislation providing certain employees with rights to return to their former employment. Senate Bill 386 (SB386), the Nevada Hospitality and Travel Workers Right to Return Act, requires certain employers to provide written notification of layoffs to laid-off employees, offer reemployment to laid-off employees, and maintain records relating to the law for at least two years. The law became effective on July 1, 2021, and required immediate compliance from certain[1] employers within the hospitality and travel industry. Compliant employers responded to the law by identifying laid-off employees that may have rights under the law, sending correspondence to those laid-off employees, and making job offers to them as appropriate.

It is not clear when an employer's obligations under the law will end. The law expires on whichever date is later, either the governor terminates the March 12, 2020, Declaration of Emergency or August 31, 2022. Upcoming midterm elections might provide political motivation to terminate the emergency declaration; however, continued receipt of or future requests for federal aid dollars may be contingent on continuing such a declaration. Employers may see their obligations under the law continue well into the future, and it is important for these employers to understand how to comply.

Which Employers are Subject to the Law?

The law applies to the following employers: airport hospitality operations, airport service providers, casinos, event centers, and hotels located in a county with a population greater than 100,000, which currently are Clark and Washoe counties. Notably, this law also applies to any business that contracts, leases, or sublets premises connected to a casino, event center, or hotel. For example, a restaurant that is within the premises of a casino or hotel may be required to comply with this law. However, for this law to apply, the employer must currently employ or must have employed at least 30 employees on March 12, 2020.

Which Employees are Subject to the Law?

The law defines "laid-off" employees as those who were employed for no less than six months during the 12 months

preceding the governor's Declaration of Emergency on March 12, 2020, whose most recent separation from active service occurred after March 12, 2020, and where such separation was due to a governmental order, lack of business, reduction in force, or other economic and nondisciplinary reason.

The law does not cover laid-off employees who have a valid severance agreement, executive or management employees otherwise classified as exempt employees under the Fair Labor Standards Act (FLSA), or theatrical or stage performers. SB386 also provides that if an employee is subject to a collective bargaining agreement (CBA) with a right to return provision, any conflict between the language of the CBA and the law will be governed by the CBA. However, there is a real question as to whether any part of the law would apply to a unionized employer.[2]

General Requirements

Notice

Effected employers must, at the time of layoff, provide a written notice of layoff to qualifying laid-off employees, provided in English, Spanish, and any other language spoken by 10 percent of the employees. Such notice must include the following:

- Notice and effective date of the layoff;
- Summary of the right to reemployment or clear instructions on how to access information relating to the right to reemployment; and
- Contact information to use for filing complaints relating to alleged violations of the law.

It is important to note that if an employer had laid off employees due to COVID-19 prior to July 1, 2021, the employer was required to provide a notice of the layoff by July 21, 2021.

Offers of Recall

A qualifying employer is also required to offer a laid-off employee positions that became available after July 1, 2021, that the employee is qualified to perform, including the same position previously held by the employee or a similar position within the same job classification that the employee held at the time of the layoff. Positions must be offered in order of seniority, taking into consideration the last position the employee held with the company and giving priority to employees with the "greatest length of service."

An offer of re-employment must provide the employee with no less than 24 hours after receiving the offer to accept, and that the employee must be available to begin working within five days after accepting the offer. An employer may offer simultaneous conditional offers of employment based upon the priority given to employees with the greatest length of service. Notably, "greatest length of service" is defined as the total of all periods of when the employee has been in active service, including time when the employee was on leave or vacation.

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If an employee does not accept the offer within 24 hours or is unavailable to begin working within five days, the employer may recall the next available employee with the greatest length of service. Further, if the employer does not recall a specific employee because the employee lacks qualifications and hires another person, the employer must provide the laid-off employee with a written notice of the decision and the reasons for the decision within 30 days.

Limited Exemptions

An employer is not required to extend additional offers of reemployment if:

- The employee states in writing they do not wish to be considered for future open positions or for positions with different schedules than the employee had prior to separation; or
- The employer has extended three bona fide offers of employment within three weeks of each offer for the same or similar position with a comparable number of regularly scheduled hours of work that the employee worked prior to the layoff and each offer delivered by mail is returned as undeliverable, any offers sent by electronic mail are returned as undeliverable, and if the last-known phone number of the employee is no longer in service.

Recordkeeping Requirements

The notice and each offer of re-employment must be provided to the employee either in person or mailed to the employee's last-known address, and also sent via telephone, text message, or electronic mail. Employers are also required to retain records of the notices and offers of re-employment that are disseminated. In particular, the employer must retain the following records for at least two years after an applicable layoff:

- The employee's full legal name;
- The employee's job classification at the time of the layoff;
- The employee's date of hire;
- The employee's last-known address, email address, and telephone number;
- A copy of the written notice of layoff to the employee; and
- Records of each offer of employment made to the employee.

Retaliation and Enforcement Provisions

Aggrieved employees may file a complaint with the Nevada Labor Commissioner and a private cause of action exists for employees to file actions

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in court for alleged violations of SB386. Before pursuing any action, employees must first provide their employer with written notice of the alleged violations and provide 15 days to cure the violation.

Employers are prohibited from terminating, reducing compensation, refusing to employ, or taking any adverse action against an employee who, under the law, seeks to enforce their rights; participates in any proceeding; opposes "any practice" that does not conform with the requirements of the law; or an employee who mistakenly, but in good faith, alleges that an employer has not complied with the law. Proven violations may entitle employees to rehiring and reinstatement, future and back pay, civil penalties of $100 for each violation, compensatory and liquidated damages, and attorneys' fees and costs.

Notably, there is a rebuttable presumption that attaches if: (a) an employee provides the employer with written notice of the employer's violation of the law; (b) the employer terminates, demotes, or takes adverse employment action against the employee; and (c) the employer took such action within 60 days after the employee provided notice of the employer's violation of the law. The employer may rebut the presumption if the reason for the adverse employment action was for a "legitimate business reason."

Employers Should Implement Best Practices

In order to ensure compliance, employers should implement the following best practices.

Job Offer Process

- Identify the applicable laid-off employees and positions to be reopened.
- Create a checklist for each reopened position sorted by seniority with all the required contact information for the employees.
- Begin working down the list during the rehiring process by:
  - Sending conditional offer letters to qualified employees;
  - Confirming the contact information is correct, and documenting each time communication is sent or received from a laid-off employee;
  - Confirming whether a response was received from the laid-off worker; and
  - Keeping a record of responses.

Employee Complaints

- Designate, in the layoff notice, a person and dedicated email address to receive complaints from employees.

- Check the email address and regular mail at least daily to ensure all complaints are forwarded to the appropriate person immediately.
- Schedule weekly meetings with management to discuss complaints, cure deadlines, and responses.

Preserving Records

Employers should retain every communication with laid-off employees required under SB386, including the notice of layoff, each conditional offer of employment, each complaint filed by a laid-off employee, and all contact information and employment details for each laid-off employee. Records should be retained until at least August 31, 2026, depending on the expiration date of the law.

ENDNOTES:

1. Hospitality Employers whose employees are covered under collective bargaining agreements may have the ability to argue that Section 301 of LMRA preempts the Nevada Hospitality and Travel Workers Right to Return Act. No court has yet ruled on this issue.
2. See id.

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