

The Legal Strategist

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FIRST QUARTER 2021

TEXAS ESOTERIC FACTS

- A couple from Texas has claimed the Guinness World Record title of the oldest married couple in the world with their combined age of 211.
- Frozen Margarita machine was invented in Texas by Mariano Martinez in 1971.

Businesses that have closed or limited operations due to COVID-19 can start planning for the best approach to be up and running as soon as possible while mitigating risks involved in reopening. One primary consideration for resuming operations is determining which employees to invite back to work once a business is allowed to reopen

The Feature Topic is a cursory review. If you would like more information on this, or any other topic previously covered in my newsletter, which can be viewed on [The Legal Strategist](#) tab of my web site, please contact my office at 713.526.1883.

Scott Barrett

FEATURE TOPIC:

Mitigating Employment Discrimination Risks & COVID

Ideally, businesses will be able to reopen with the full complement of employees they had prior to having to close or reduce operations. In that case, hiring decisions would be straightforward—employers could invite back all of the employees they let go or furloughed. Realistically, though, companies will not be at full operations upon reopening, either because of government mandates or because anticipated lower demand for services. In these circumstances, employers will not be able to rehire or bring back from a furlough all of their former employees. Employers must be cautious in determining who to bring back to the workplace to mitigate risk of potential discrimination claims based on the decision not to bring back certain employees.

Employers will need to have a legitimate, non-discriminatory reason for choosing which employees to rehire or return to work. These reasons could include factors such as seniority, operational needs or documented past performance issues. Employers should document their decision-making process now, before deciding who will be invited to return to work. By working now to document the factors used to determine who will be rehired, an employer will protect itself from potential claims asserting that they “made up” reasons after the fact to cover up a discriminatory basis for failing to rehire an employee.

Basing a rehiring decision on seniority will typically offer an employer the most protection from discrimination claims, but it is not itself without risks. Consider, for example, if you are a restaurant reopening with half capacity because of government limitations on capacity. If your most senior former employee was your sommelier, do you need to rehire that person over a line cook, even though you may decide operationally you will not need a dedicated sommelier if you are operating at half capacity? Decisions like these need to be well-documented at the time they are made so that if you do decide to bring back a junior line cook instead of a more senior sommelier, you can show that the decision was not based on, for example, the sommelier’s age, but rather on legitimate operational limitations.

Employers also need to be cautious when basing any rehiring decisions on past performance issues. It is one thing if employee performance issues were well-documented prior to the mass terminations or furlough, but another altogether if the business had not been diligent in disciplining and documenting employees for poor performance. If an employer chooses not to bring back an employee because of purported performance problems, but those problems were not documented in the employee’s personnel file, the employer may be exposed to an argument that the performance problems were just pretext for discrimination.

Employers need to take extra care to ensure that decisions about who to bring back into the workplace are *not* based on apparent higher risk of COVID-19 complications. Businesses may have concerns about inviting back older or pregnant employees into the workforce because they may be at higher risk from COVID-19. The EEOC, however, has said in recent guidance that employers cannot unilaterally decide not to hire individuals who are over 65 or pregnant because of COVID-19 risks without running afoul of federal discrimination laws.

If you would like more information on this or any other topic relating to re-hiring or bringing back employees after the COVID shutdown, please contact [Scott Barrett](#) to set up a consultation.