Legal Update Article

WARN Act Issues to Navigate for the Restaurant Industry

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Restaurants' plans for temporary or permanent closures or layoffs could trigger the notice requirements of the federal Worker Adjustment and Retraining Notification Act (WARN Act) or the many state mini-WARN Acts enacted across the country. Therefore, restaurants should be mindful of the various ways that the WARN Act can be triggered and plan accordingly.

The federal WARN Act (29 U.S.C. § 2101 *et seq.*) requires covered employers to provide written notice at least 60 days before implementing a "plant closing" or a "mass layoff."

Although it is more generally understood that large-scale layoffs or the closure of large facilities that result in the termination of hundreds of employees might implicate the WARN Act, restaurants can unknowingly trigger the WARN Act's notice requirements under less obvious circumstances that could require choosing between suddenly changing plans or risking the potential of facing a class action lawsuit or Department of Labor investigation. This article discusses various WARN Act issues that restaurants should consider.

Single-Site Aggregation

The federal WARN Act, as well as most state mini-WARN Acts, is triggered based on employment losses at a single location (typically referred to as a "single site of employment"). However, under certain circumstances, multiple facilities can be aggregated together to form one larger single site of employment for purposes of the WARN Act. Therefore, if a company owns multiple franchises of small restaurants, there is the potential that two or more of these restaurants can be aggregated together to form one larger single site of employment.

Factors that a court may review in assessing single-site aggregation include the distance between the facilities, the frequency of sharing of employees, the frequency of sharing of equipment, common management, common payroll, and common purpose.

If multiple smaller restaurants are aggregated together, an owner could unwittingly trigger the WARN Act by terminating employees at multiple restaurants within the same timeframe.

Operating Unit Closures

A "plant closure" under the WARN Act occurs when a threshold number of employees are terminated due to the closure of a facility or one or more operating units within a single site of employment. An operating unit is defined as an organizationally distinct product or work function at a single site of employment.

A common way that this can apply to restaurants would be the closure of a restaurant that operates within a larger facility such as a hotel or sporting venue. Even if the hotel and the restaurant share common ownership and the hotel remains open, the restaurant closure could result in a WARN Act trigger event under certain circumstances.

California WARN Act

The California WARN Act is unique in that it could apply to smaller restaurants. The California WARN Act applies to "covered establishments," which is any restaurant that has had at least 75 full-time, part-time, or temporary employees in the past 12 months.

One way to trigger the California WARN Act is through a "termination," which is a cessation or substantial cessation of operations, regardless of how many employees are actually laid off. Thus, if a restaurant has a significant amount of turnover or temporary workers, that restaurant could meet the definition of a "covered establishment" and any shutdown (or partial shutdown) could trigger the California WARN Act, even if only a small number of employees are actually laid off.

Temporary Closures

Restaurants that temporarily close such as to undergo renovations could also wind up triggering the WARN Act by placing employees on a temporary furlough. Employees can suffer an "employment loss" for WARN Act purposes through a temporary layoff that exceeds six months. In fact, some state mini-WARN Acts count layoffs of even less than six months for purposes of determining whether their mini-WARN Act is triggered. Very short furloughs have been determined to potentially trigger the California WARN Act. Therefore, employers should be confident in the length of a temporary closing before implementing a closing plan. Moreover, even if an owner of multiple restaurants seeks to transfer employees to its other restaurants to preserve the employees' employment during the renovation period, those employees can still be deemed to have suffered an employment loss if they refuse the transfer and the new restaurant is not within a reasonable commuting distance for that employee.

Seasonal Restaurants

Terminations at seasonal restaurants also can trigger the WARN Act in certain circumstances if employees are not hired with a clear understanding that their employment will end at the conclusion of the season and the facts allow the employees to reasonably expect to be recalled when the restaurant reopens. However, for triggering purposes, the federal WARN Act and many state mini-WARN Acts do not count employees that have been employed for less than six of the previous 12 months. Therefore, depending on the length of the restaurant's season and whether employees have worked the previous year, sometimes the number of affected employees can be reduced on that basis for purposes of calculating a potential WARN Act trigger.

Before implementing any sort of layoff, restructuring, or group termination, restaurants should consider reviewing their plans with legal counsel to ensure all legal requirements are met. Given the complexities involved, please contact a Jackson Lewis attorney if you have questions about whether and when notice is required under the WARN Act or state-law WARN Act-type statutes, or when defending threatened or pending WARN Act actions.