JacksonLewis

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COVID-19 and Reimagining the Workplace: Daily Briefing Recap

The Federal WARN Act and Related COVID-19 Issues

Please note that the following is a recap of our Daily Briefing from May 11, 2020. Due to the rapidly evolving nature of the pandemic, we recommend that you consult the most up to date materials possible. Visit Jackson Lewis P.C.'s COVID-19 resource page for updates on workplace impacts and sign up here to receive invitations to future daily COVID-19 webinar briefings and email updates on ongoing legal and workplace health challenges.

What is the WARN Act?

- Federal law that requires employers to provide written notice to various state and local government officials, affected employees, and any union representatives at least 60 days before certain group separations occur.
- Which employers are covered by the WARN Act?
  - Those that employ either:
    - 100 or more full-time employees anywhere in the U.S.; OR
    - 100 or more full-time or part-time employees whose weekly work hours (excluding overtime hours) equal or exceed 4,000 hours per week in the aggregate.
  - NOTE: WARN defines "part-time employee" as someone who is employed for an average of fewer than 20 hours per week OR who has been employed for fewer than 6 of the 12 months preceding the date on which notice is required.
  - Independent contractors and subsidiaries which are wholly or partially owned by a parent company are treated as separate employers or as a part of the parent or contracting company depending upon the degree of their independence from the parent.

When does the WARN Act require 60-days' advance written notice?

- Plant closing: the permanent or temporary shutdown of a "single site of employment," or one or more facilities or operating units within a single site of employment, if the shutdown results in

an employment loss at a single site of employment for at least 50 full-time employees during any 30-day period.

- Mass layoff: a reduction in the workforce which is not the result of a "plant closing" and results in an employment loss at a single site of employment during any 30-day period: (1) for at least 50 full-time employees, if those employees comprise at least 33% of the active full-time workforce at the site; or (2) for at least 500 full-time employees regardless of the percentage of the workforce they comprise.
  - Note that layoffs at a facility generally will be aggregated during a 90-day period, unless the employer can show the layoffs were implemented for separate and distinct reasons.

What are the contents of WARN notices?

- The contents of WARN notices vary by recipient but generally must include, among other things:
  - The name and address of the employment site where the triggering event will occur;
  - The name and telephone number of a company official to contact for further information;
  - The expected date of the first separation;
  - Information regarding unions; and
  - A statement as to whether bumping rights exist, which must be included even where there are no unions.
- Note: the federal WARN Act and state mini-WARN Acts have very specific information requirements for notices. If you trigger both federal and state, you must comply with both. A general notification (oral or written) without the statutorily-prescribed contents will be insufficient.

State mini-WARN concerns

- Many state mini-WARN Acts follow the federal WARN Act.
- Some states and territories have lower numbers to constitute a triggering event, e.g., NY, U.S. Virgin Islands, IL for mass layoffs.
- Some states and municipalities have completely different triggering mechanisms, e.g., CA, WI, NJ, HI, NH, Philadelphia, VT.
- CA and WI do not have a 6-month furlough option before an employment loss occurs.

COVID-19 related issues

Are there really "exceptions" to federal WARN notice requirements?

- There are "quasi-exceptions," which permit employers to provide fewer than 60-days' notice in certain circumstances:
  - Unforeseeable Business Circumstances Exception (applies to plant closings and to mass layoffs).
  - Faltering Company Exception (applies to plant closings only).
  - Natural Disaster (applies to plant closings and to mass layoffs):
- All exceptions require as much notice as is practicable, with an explanation included in each notice.
- Mini-WARN laws may not have the same exceptions as federal WARN.

The Unforeseeable Business Circumstances Exception

- The triggering event was caused by business circumstances that ***were not reasonably foreseeable*** at the time the 60-day notices would have been required;
- The circumstances must have been caused by a sudden, dramatic, unexpected action or condition beyond the employer's control; and
- Employers must use "commercially reasonable business judgment" in determining whether a business circumstance is reasonably foreseeable.
- WARN notice issues relating to COVID-19 likely will fall within the unforeseeable business circumstances exception.
- However, the unforeseeable business circumstances exception is fact specific; an employer ***must evaluate the specific situation and whether it could have provided notice at an earlier time***.

COVID-19 WARN dilemma: the extending furlough

- A temporary layoff or furlough which lasts less than 6 months will not constitute an "employment loss" for the purposes of the federal WARN Act:
  - Employers must use their judgment as to whether or not they truly believe they will be able to return employees to work within 6 months.
  - If employers act quickly in sending WARN notices, there is a greater likelihood they will be able to defend their use of the unforeseeable business circumstances exception.
  - If they do not provide WARN notices because they believe the layoff will not exceed 6 months, but later have to extend the layoff beyond 6 months, current case law indicates the initial layoff date will be deemed the beginning of the employment loss.
    - This situation will result in a WARN violation UNLESS the employer can point to a separate discrete unforeseeable business circumstance that occurred during the temporary layoff period AND the employer sent WARN notices within a reasonable period after this separate discrete circumstance arose; for example:
      - A new shelter order or extension of a closure order that had an end date might be acceptable.
      - The employer's belief that business will improve and the pandemic will end in less than 6 months may NOT be sufficient to satisfy a reduced notice period.

What if I have more questions?

As issues and concerns around COVID-19 unfold daily, employers must prepare to address the threat as it relates to the health and safety of their workforce. Keep up to date with Jackson Lewis' latest available information and resources.

If you have any questions, please contact the Jackson Lewis attorneys with whom you regularly work.