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COVID-19 Pandemic Layoffs: Federal and State WARN Act Requirements and Their Unforeseeable Business Circumstances Exceptions

Employers across the country are increasingly contemplating temporary or permanent workforce reductions to help them withstand the economic impact of the coronavirus/COVID-19 pandemic. In implementing workforce reductions, employers must ensure that they comply with requirements to provide employees with advance notice of such reductions under the federal Worker Adjustment and Retraining Notification ("WARN") Act and state "mini-WARN" statutes. While the WARN Act's "unforeseeable business circumstances" exception, which waives stringent notice periods, will likely apply to workforce actions that are a consequence of the COVID-19 pandemic, employers must still give affected employees notice "as soon as practicable."

This alert summarizes key provisions of the WARN Act and key state "mini-WARN" Acts with a focus on the "unforeseeable business circumstances" exception.

OVERVIEW OF THE WARN ACT

The WARN Act, enacted in 1988, requires employers that employ more than 100 employees to provide 60 days' advance written notice of a "mass layoff"[1] or "plant closing"[2] that impacts 50 or more employees at a "single site of employment"[3] over a 90-day lookback period. An employer's decision to place an employee on furlough will not be implicated under the WARN Act if the furlough involves (i) a temporary layoff of shorter than six months, or (ii) involves a reduction of an employee's work hours of less than 50% during each month of a 6-month period.

If WARN applies, an employer must provide 60 days' written notice to the affected workers or their representative (*e.g.,* a labor union), and to the applicable state regulatory bodies (*e.g.,* the New York State Department of Labor) and the chief elected official of the local government where the layoff or closing is to occur.

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[1] A "mass layoff" is defined as an employment loss at a single site of employment for (i) at least 33% of the workforce, excluding part-time employees, and (ii) at least 50 employees, excluding part-time employees. The 33% requirement does not apply if 500 or more employees, excluding part-time employees, are affected. *See* 29 U.S.C.A. § 2101(a)(3).

[2] A "plant closing" is defined as the permanent or temporary shutdown, affecting 50 or more full-time employees, of a "single site of employment" or one or more facilities or operating units within a single site of employment. *See* 29 U.S.C.A. § 2101(a)(2).

[3] Whether a layoff occurs at a "single site of employment" for the purposes of the WARN Act is a fact specific analysis as a single site of employment may include a single location, a group of contiguous locations, such as a campus or industrial park, or non-contiguous sites in geographic proximity to one another. *See* 20 C.F.R. § 639.3(i).

The notice to each affected employee who does not have a representative must contain the following:

- The name and phone number of a company official to contact for further information;
- A statement as to whether the planned action is expected to be permanent or temporary and if the entire plant is to be closed;
- The expected date of the first separation, and the expected date when the individual employee will be separated; and
- An indication of whether or not "bumping"[4] rights exist.

In addition, the notice to an affected employee's representative (if applicable), the state dislocated workers unit, and the chief elected official of the local government where the closing or layoff is to occur must also contain the following:

- The name and address of the employment site where the plant closing or mass layoff will occur;
- The job titles of positions to be affected and the number of employees to be laid off in each job classification;
- For multiple layoff locations, a breakdown of the number of affected employees and their job titles by each location;
- The name of each union representing affected employees, if applicable; and
- The name and address of the chief elected officer of each union, if applicable.

COVID-19 AND EXCEPTIONS TO THE WARN ACT

An employer may conduct a covered layoff or plant closing on fewer than 60 days' notice if the layoff or closing is caused by:

1. *Unforeseeable business circumstances*: The "unforeseeable business circumstances" exception applies to plant closings and mass layoffs that are "caused by some sudden, dramatic, and unexpected action or condition outside the employer's control." 20 C.F.R. § 639.9(b); *see also* 29 U.S.C.A. § 2102. Courts look to whether an employer exercised "commercially reasonable business judgment" in predicting the demands of its particular market prior to the layoff or closure. *See* 20 C.F.R. § 639.9(b).
2. *Natural disaster*: The "natural disaster" exception applies where a closing or layoff is the direct result of a natural disaster, such as a flood, earthquake, drought, storm, tidal wave, or tsunami. 20 C.F.R. § 639.9(c); *see also* 29 U.S.C.A. § 2102. To qualify for this exception, an employer must demonstrate that the closing or layoff is a "direct result of a natural disaster." *See* 20 C.F.R. § 639.9(c).
3. *Faltering company*: The "faltering company" exception applies only to plant closings where an employer has sought new capital or business and where having given timely notice would have vitiated the employer's opportunity to obtain such new capital or business.

An employer bears the burden of proof that the conditions for the exceptions have been met. Even where the exceptions apply, an employer must give written notice "as soon as practicable" and include a statement as to the basis for the shorter notice period.

[4] Bumping rights permit an employee to displace another employee due to a layoff or other employment action pursuant to a collective bargaining agreement, employer policy, or other binding agreement.

The COVID-19 pandemic and its disruption to business operations will likely constitute "unforeseeable business circumstances." According to U.S. Department of Labor ("DOL") regulations, an "unanticipated and dramatic major economic downtown" or the "government ordered closure of an employment site that occurs without prior notice" may qualify as an unforeseeable business circumstance. *See* 20 C.F.R. § 639.9. The "natural disaster" exception has a "direct result" requirement which may present an additional hurdle to applicability in these circumstances, but employers may wish to explore such an argument should they find themselves without one of the other exceptions to rely upon.

Although the COVID-19 crisis is unprecedented, a 2012 decision from the U.S. Court of Appeals for the Eighth Circuit is instructive. In *United Steel Workers of Am. Local 2660 v. U.S. Steel Corp*., 683 F.3d 882 (8th Cir. 2012), a union sued an employer alleging the employer had violated the WARN Act by providing only 4 days' notice prior to the employer's commencement of a mass layoff in late 2008. The Eighth Circuit affirmed summary judgment in favor of the employer, holding that the 2008 economic crisis constituted an unforeseeable business circumstance under the WARN Act. *Id.* at 887-888. Although the Court found that the employer knew about the economic downturn several months before the layoff, the Court determined that the employer reasonably believed it could survive the downturn and sent the notice to affected employees one week after the employer determined that layoffs were necessary due to the substantial decrease in the demand for steel. *Id.* at 888-889. This decision suggests not only that the severe economic consequences of the COVID-19 pandemic may qualify as an unforeseeable business circumstance, but that businesses may receive some latitude in the courts, consistent with sound business judgment, with respect to the timing of their notices. Employers should be mindful that the passage of time will eventually impact the analysis of whether the pandemic's business disruptions qualify as "unforeseen."

Because an employer's ability to invoke the unforeseen business exception in response to COVID-19 is fact specific, employers must carefully evaluate their actions to reduce their workforce to ensure that they comply with the statute.

PENALTIES UNDER THE WARN ACT

Employers that fail to provide the required notice may be liable for damages including back pay, benefits and civil penalties for each affected employee for each day of deficient notice, along with the employees' attorneys' fees incurred in obtaining a recovery.

STATE "MINI-WARN" ACTS

In addition to the federal WARN Act requirements, employers may be obligated to comply with similar state laws, known as "mini-WARN" acts. States that have "mini-WARN" acts include Alabama, California, Connecticut, Georgia, Hawaii, Illinois, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, Tennessee, Washington, and Wisconsin.

Mini-WARN acts vary in scope and requirements from the federal requirements. For example, the New York WARN Act applies to employers with as few as 50 employees and requires 90 days' advance notice (rather than 60 days under the federal law) of (i) a plant closing affecting 25 employees (rather than 50), or (ii) a mass layoff affecting 250 employees or 25 or more employees if those employees constitute at least one-third of the workforce. Similar to the

federal law, New York allows for a shorter notice period if the need for the notice was not reasonably foreseeable.

The California and New Jersey mini-WARN acts do not contain an "unforeseeable business circumstance" exception. However, on March 17, 2020, California Governor Gavin Newsom issued Executive Order N-31-20[5] which suspended the California WARN Act's 60-day notice requirement where a California employer:

- Orders a mass layoff because of COVID-19 pandemic-related business circumstances not reasonably foreseeable as of the time the 60-day notice would have been required;
- Gives as much notice as practicable, providing a brief statement of the basis for reducing the notification period along with the information required by the federal WARN Act for notices; and
- Includes the following statement in its notice: "If you have lost your job or been laid off temporarily, you may be eligible for Unemployment Insurance (UI). More information on UI and other resources available for workers is available at labor.ca.gov/coronavirus2019."

This exception under California law is effective from March 4, 2020 through the end of the COVID-19 State of Emergency in California.

To date, New Jersey has not waived its 60-day notice requirement in response to the COVID-19 pandemic. Moreover, New Jersey significantly expanded its mini-WARN act in January 2020. Effective July 19, 2020, the New Jersey law will (i) apply to all employers with 100 or more employees regardless of how long those employees have been with the company or how many hours those employees work per week; (ii) require advance notice of a layoff of 50 or more employees across the state (instead of at a single site of employment) and without regard to the percentage of the workforce affected, or the hours or length of tenure of the affected employees; (iii) increase the notice requirement from 60 days to 90 days; and (iv) require employers to pay affected employees one week of severance pay for each year they have worked with the company. The severance requirement is not waivable, and is increased to four weeks of severance pay for each calendar year the employee worked if the employer fails to provide timely notice. Moreover, if an employer wants a release of claims, the employer must increase the severance pay for employees beyond this statutory minimum.

REQUIRED AND BEST PRACTICES

Given the various federal, state, and local laws that may be triggered by an employer's workforce reduction, employers should consult employment counsel for legal advice regarding the particular facts and circumstances of the contemplated reductions or terminations before taking any action.

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[5] *See* https://www.gov.ca.gov/wp-content/uploads/2020/03/3.17.20-EO-motor.pdf

closings, reductions in force, and the litigation of all types of statutory and contractual employment-related claims. Please contact Mark W. Lerner (212-506-1728) or Jessica T. Rosenberg (212-506-1789) if you have any questions.