A WARN Act Refresher Course

Insights
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As the steady drumbeat of grim economic news continues, more and more employers are forced to face the unpleasant prospect of laying off valued employees to survive. When times are tough, the last thing a struggling business needs is a class-action lawsuit claiming that the former employees are entitled to 60 days' additional pay under federal or state law.

When groups of employees are laid off or facilities are closed altogether, larger employers must provide advance notice and/or pay under the federal Worker Adjustment and Retraining Notification (WARN) Act except in certain defined circumstances. Many states have so-called "mini-WARN Acts" that cover smaller employers and smaller layoff groups than the federal WARN.

In general, WARN requires employers to give affected employees (or their union representatives) and local government officials 60 days' advance notice of a "plant closing" or "mass layoff" that results in an "employment loss" to a specified number of employees. If the required notice is not provided, or not properly provided, employers can be liable for up to 60 days of pay and benefits, plus civil penalties and attorney's fees.

This article will cover the key components of the federal WARN Act to consider when planning a layoff, and describe the mini-WARN Acts at the state level. If you foresee dramatically reduced staffing needs 60 days in the future you should analyze your potential WARN Act liability.

Which Employers Are Covered?
WARN generally applies to private employers with 100 or more employees, not counting employees who have worked less than 6 months in the last 12 months nor employees who work an average of fewer than 20 hours per week. WARN can also apply to public and quasi-public entities if they are engaged in business and are organized separately from the regular government. In some cases, independent contractors and subsidiary companies may be treated as part of the employer when counting the number of employees for coverage purposes.

The 100-employee threshold can be met with at least 100 full-time employees, or with 100 or more full- and part-time employees who work at least 4,000 hours per week in the aggregate (exclusive of overtime hours). Temporary employees are counted for purposes of WARN Act applicability, but are not entitled to WARN notice. Conversely, part-time employees are not counted for purposes of

WARN Act applicability (except by aggregating their hours as noted above), but are entitled to receive WARN notice. Seasonal employees may or may not be counted, depending on their status.

The number of employees is typically determined as of the date notice of the layoff or plant closing would be due, unless that number is not representative of the normal level of employees.

What Is An Employment Loss?
WARN applies when an "employment loss" affects the requisite number of employees. The statute defines an employment loss to include:

- the termination of an individual's employment for any reason *other than* discharge for cause, voluntary departure, or retirement;
- a layoff of more than six months; or
- a reduction in hours of work of an individual employee of more than 50 percent during each month of a six-month period.

Employees who volunteer for layoff or early retirement are not considered to have been involuntarily terminated, and so do not count against the "employment loss" numbers. Accepting a reassignment or transfer likewise is not considered an involuntary termination, nor is declining a reassignment or transfer within reasonable commuting distance from home, in most circumstances.

A temporary layoff of six months or less is not an "employment loss" under WARN. But a plant closing or mass layoff that is intended to be temporary will trigger WARN obligations if it later turns out to exceed six months.

Events Triggering Notice Obligations
1) Plant Closings

A plant closing is defined as the permanent or temporary shutdown of a site of employment that results in an employment loss for 50 or more employees during any 30-day period. This can include the shutdown of one or more facilities or operating units at a single site of employment if the shutdown affects 50 or more employees.

2) Mass Layoffs

A "mass layoff" is defined as a reduction in force that is not a plant closing, but which results in an employment loss at a single site of employment for:

- 500 or more employees; or
- at least 50 or more employees and at least 33% of active full-time employees.

Counting Employees
To determine whether a plant closing or mass layoff triggers WARN notice obligations, you must count the number of employees who experienced an employment loss. Different rules apply when counting employees for this purpose than when counting employees to establish whether your business is covered by the Act.

Temporary employees are typically included, while part-time employees (those employed for fewer than six months or working on average fewer than 20 hours per week in the last 90 days) are typically excluded.

Rolling Layoff Windows
Generally, you must provide at least 60 days' notice prior to any covered plant closing or mass layoff affecting the requisite number of employees. Typically WARN looks to the number of employment losses occurring in any rolling 30-day period.

For example, if an employer with 100 employees laid off 40 workers and then laid off more 20 workers 25 days later, WARN would apply and notice would be required for both sets of employees.

Under some circumstances the 30-day window increases to 90 days. If two or more groups suffer employment losses at a single site of employment within 90 days, and neither group alone is large enough to trigger WARN obligations, the groups will be aggregated together. WARN notice will be required unless the employer can show that the individual events occurred as a result of separate and distinct actions and causes, and were not an attempt to evade its WARN obligations.

Thus, when an employer makes a reduction in force, it must look forward and backward 90 days from each employment loss to determine whether WARN obligations arise and notice must be given. Each individual layoff triggers another rolling 90-day window.

What Do You Send, And To Whom?
WARN notices must be provided in writing and must contain specific information as set forth in the WARN regulations, which varies by recipient. Notices must be given to the affected employees, their bargaining representatives, if applicable; to the designated State worker displacement agency, and to the chief elected official of the unit of local government where the mass layoff or plant closing will occur.

Exceptions To The Notice Requirement
WARN provides a few exceptions in which 60-day advance notice is not required: 1) faltering company exception (for plant closings only), when the employer was actively seeking new business or capital and providing notice of the impending shutdown would make it impossible to obtain the business or capital; 2) the unforeseeable business circumstances exception, for mass layoffs and plant closings caused by business circumstances that were not reasonably foreseeable at the time notice would otherwise have been required; and 3) when a plant closing or mass layoff is the direct result of a natural disaster, such as a flood, earthquake, drought or storm.

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Notice is also not required when a temporary facility is closed, or a particular project has been completed, provided that the affected employees were hired with the understanding that the employment was for a limited period only. Plant closings or layoffs that result from strikes or lockouts also do not trigger WARN notice requirements as to the striking bargaining unit employees.

WARN also contains a special sale-of-business exception that is beyond the scope of this article.

The Cost Of Getting It Wrong

Employers who fail to comply with WARN's notice provisions, or issue notices with major errors, are liable to employees for back pay and benefits for each day of the violation up to a maximum of 60 days, plus civil penalties of up to $500 per day and reasonable attorney's fees. Back pay liability may be offset by any wages or benefits paid to employees during the period of violation, and by any "voluntary and unconditional payment" by the employer to the employee that is not required by any legal obligation.

The civil penalty can be avoided by paying the required back pay to each affected employee within three weeks after separation. The courts also have discretion to reduce the amount of an employer's liability if the employer can establish that it acted in good faith and reasonably believed that its conduct did not violate WARN.

States With Mini-WARN Acts

In addition to federal WARN, a significant number of states have enacted "mini-WARN" legislation that extend notice requirements to layoffs involving smaller businesses or fewer employees at a time. These mini-WARN Acts often impose requirements on employers that can vary significantly from federal law, and it is important to check your compliance with all laws that may apply in a layoff situation.

A comprehensive review of all the various state laws isn't possible within the scope of this article, but a list of those states which have such laws includes these: California, Connecticut, Hawaii, Illinois, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New York, Ohio, Pennsylvania, South Carolina, Tennessee and Wisconsin.

Final Thoughts

WARN and mini-WARN requirements are not the only things to be addressed when employees must be laid off. For example, when providing group severance packages, you must also comply with the Older Worker Benefits Protection Act. In addition, the recently-enacted stimulus bill requires employers to subsidize 65% of employees' COBRA-continuation-coverage premiums for a period of nine months for employees who were involuntarily terminated between September 1, 2008 and December 31, 2009.

Service Focus

Reductions in Force (RIFs)