Thinking Of Shifting Your Retail Business Model? Consider This Your WARN-ing

Insights
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Though the internet has been in our lives for decades and online retailers are hardly a new concept, many brick-and-mortar retailers continue to evaluate the risks and benefits of moving away from the shop on the corner and toward the shop dot com. One factor you will need to keep in mind if you consider closing up or shrinking your physical presence is how to handle employee layoffs.

The key law in play when making those types of calls is the Worker Adjustment and Retraining Notification Act, also known as the WARN Act. This article presents a primer on the issues you need to keep in mind when reducing your workforce, whether you are moving your business to a digital platform or restructuring for other reasons.

Background: What Is The WARN Act?
The WARN Act, enacted in 1988, requires employers to give notice to employees and others in advance of "plant closings" and "mass layoffs." Because businesses do not need to consider this law on a regular basis, it sometimes gets forgotten at critical junctures.

What Does It Require?
The WARN Act is, as the name implies, all about giving notice – a warning, if you will – to those who will be impacted by a mass layoff. Specifically, the law requires the employer to give 60 days' notice to each affected employee or employee union representative, the state unemployment office, and the chief elected official (i.e., the mayor) of the locality in which the layoffs are to occur.

Triggering Event: Plant Closings And Mass Layoffs
While the statute was clearly written with manufacturing in mind, a "plant closing" refers to any permanent or temporary shutdown of a single site of employment in any industry that results in the loss of employment for 50 or more employees (excluding part-time employees) within a 30-day period, *or* the elimination of a department within a single site of employment that results in the loss of employment for 50 or more employees (excluding part-time employees).

A "mass layoff" for purposes of WARN is any other reduction-in-force that results in an employment loss for at least 33% of the active employees and at least 50 employees in a 30-day period (excluding part-time employees). A mass layoff can also include the loss of employment for 500 or more employees (again, excluding part-time employees) at a single site in a 30-day period.

While a "single site" may encompass multiple locations situated close together, such as several contiguous buildings in an industrial park, it typically refers to a single business location, particularly if the location employs distinct workers. For example, in a 1997 federal appeals court case from the 5th Circuit, three grocery stores under the same ownership in the same town were determined not to be a single site for purposes of WARN. The court found that each store prepared its own weekly sales report, had its own profit and loss statements, determined its own product needs, placed its own resupply orders, had its own management staff and payroll, and hired, fired, and disciplined its own workers. Despite the ruling in this case, if you have stores located close enough together that they share management and employees, it is worth taking a closer look to see if they could be considered a "single site" for purposes of WARN.

Additionally, if there are multiple layoffs at a single site within a 90-day period, none of which would trigger WARN alone but meet the requirements in aggregate, it is important to understand that those, too, may require WARN notice. To avoid WARN obligations in this scenario, you would have to show that each layoff was the result of separate and distinct actions and causes, as opposed to an attempt to skirt your WARN obligations.

Who Is Included In The Employee Count?
Many retail employers will avoid WARN obligations if they are primarily laying off part-time or seasonal employees. A part-time employee is one who worked less than 20 hours per week on average during the previous 90 days (or over the course of employment if less than 90 days), or an employee who worked less than six of the 12 months preceding the required notice date. As noted above, part-time employees are not counted in determining whether the event is a plant closing or mass layoff.

Who Must Receive Notice?
If the employees losing their employment are represented by a union, notice must go to the chief elected officer of the exclusive representatives or the bargaining agent of the affected employees, as well as the officer of the employees' local union – which may be the same person.

Employees who are not represented by a union must be notified directly. Although part-time employees are not considered in the count giving rise to the layoff, they still must be notified if they will experience employment loss.

What Must The Notice Contain?
The notice must include four specific pieces of information in order to pass WARN muster:

- A statement as to whether the action is expected to be permanent or temporary;
- If the entire "plant" is to be closed, a statement to that effect;
- The expected date of the plant closing or mass layoff; and
- The name and telephone number of a company official to contact for further information.

If the notice is provided to non-union employees, it must also contain information about whether "bumping rights" – the right of a senior employee to replace a less senior employee – exist under company policy or practice.

A notice to a union representative must contain the four main pieces of information listed above, along with:

- The name and address of the employment site where the plant closing or mass layoff will occur;
- The anticipated schedule for making separations; and
- The titles of positions to be affected and the names of the workers holding affected jobs at the time of the notice.

The required notice to the state and the appropriate local elected official must contain all of the information described above for *both* unrepresented and represented employees, along with the name of each union representing affected employees, and the name and address of each union's chief elected officer.

Additional Requirements May Apply

This article presents a brief overview of the key scenarios that may trigger your requirement to provide notice under federal law. Be aware that the statute includes additional provisions as to when and by whom the notice must be sent. Further, specific circumstances may exempt you from some of the requirements above.

Additionally, many states have their own layoff laws, sometimes called "mini-WARN Acts," which may require additional forms of notice under certain circumstances. States that have such laws include Alabama, California, Connecticut, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New York, Ohio, Oklahoma, Oregon, Puerto Rico, South Carolina, South Dakota, Tennessee, Vermont, and Wisconsin.

Before embarking on a reduction-in-force or layoff, you should partner with your labor and employment attorney to make sure you understand the varied requirements that might come into play to ensure you can proceed with the appropriate WARN-ing.

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