Fair WARNing: COVID-19 WARN Act Class Action Filed Against Hooters

Insights
5.06.20

It took less than a month for the plaintiffs' bar to seize upon what is likely to be the first of many COVID-19-related class action lawsuits alleging violations of the Worker Adjustment and Retraining Notification Act, also known as the WARN Act. The first such lawsuit, filed against a popular restaurant chain in Florida, highlights several important lessons for employers who are considering or have recently implemented layoffs due to government shut-down orders and a decline in business. You need to pay particular attention to this expected trend and prepare ahead of time to avoid facing a potentially costly claim.

Mass Layoffs Lead To WARN Class Action
Like so many employers faced with the economic impact of this unprecedent pandemic, including many in the hospitality industry, Hooters III, Inc. made the difficult decision in March to conduct layoffs at several restaurants in Florida. These locations were forced to either shut down completely or close their dining rooms and offer carry-out or delivery only.

According to a notice dated March 26, 2020, available on the WARN Act webpage for the Florida Department of Economic Opportunity, the company provided notice that one of its locations would close completely and another 10 locations (operated by separate legal entities) would be subject to significant reductions in force. This affected a total of 679 employees across all locations. This notice, which likely informed the factual allegations of the class action complaint, stated that all affected employees were provided a separation notice.

The complaint filed in a Florida federal court contains sparse facts, but alleges that the company conducted layoffs as early as March 20 and failed to provide advance notice of the layoffs as required by the WARN Act. The plaintiffs, who claim to be long-term employees of the company, allege that the company "could have but failed to evaluate the impact of COVID-19 . . . as evidenced by the fact that it gave no advance written notice whatsoever." The plaintiffs also claim that Hooters III could and should have relied on Paycheck Protection Program loans — which did not become available until April, about two weeks after the workers allege they were laid off — to raise funds that could have prevented many or all of the layoffs.

It should be noted that Hooters III has not yet responded to the complaint and is likely to raise several viable defenses to the allegations. As most employers experienced in defending workplace claims know, there are always two sides to every story. However, even examining just the bare-bones

complaint can help you plot a strategy that will minimize your chances of being on the receiving end of a lawsuit.

What Does The WARN Act Require?

On its face, the WARN Act appears fairly straightforward, but the nuances of this federal law are complex. It requires covered employers to provide 60 days' advance notice before a plant closing or mass layoff. But there are many issues to unpack in this simple sentence.

- **Covered employers** include those with 100 or more employees (excluding part-time employees), or those with 100 or more employees, including part-time employees, who in the aggregate work at least 4,000 hours per week, exclusive of overtime (under the WARN Act, part-time means employees who work on average less than 20 hours per week, or have been employed fewer than six of the 12 months preceding the date notice is due, including those who work full-time).
- A **plant closing** is the temporary or permanent closure of a "single site of employment," or one or more facilities or operating units within a single site of employment, that results in an employment loss during any 30-day period for 50 or more employees (excluding part-time employees).
- A **mass layoff** is a reduction in force, not the result of a plant closing, and that results in an "employment loss" at a single site of employment during any 30-day period for at least 50 employees (excluding part-time employees) that constitute at least 33% of the active employees (excluding part-time employees), or 500 or more employees (excluding part-time employees), regardless the percentage of active employees. In addition to the 30-day periods, the WARN Act provides for aggregation of separate, but related layoffs over a 90-day period.
- An **employment loss** is defined as (1) an employment termination, other than a discharge for cause, voluntary departure, or retirement, (2) a layoff exceeding six months, or (3) a reduction in hours of work of individual employees of more than 50% during each month of any six-month period.
- Generally, separate buildings are considered separate employment sites, but the WARN Act regulations provide that a **single site of employment** can include separate buildings which are not directly connected or in immediate proximity if they are in reasonable geographic proximity, used for the same purpose, and share the same staff and equipment (for example, an employer who manages a number of warehouses in an area but who regularly shifts or rotates the same employees from one building to another).

The WARN Act provides several exceptions to the 60-day advance notice requirement. One exception is referred to as the **unforeseeable business circumstances** exception, which allows for less than 60 days' notice when the plant closing or mass layoff is caused by business circumstances that were not reasonably foreseeable at the time that notice would have been required. There are also exceptions for **natural disasters** and **faltering companies** (those actively seeking capital). Common to all of the WARN Act exceptions is the requirement that the employer give "as much notice as is

practicable," although the regulations contemplate that in certain cases this may be notice "after the fact."

Additionally, the WARN Act regulations provide an additional requirement for employers who had previously announced and carried out a short-term layoff (six months or less) which is being extended beyond six months due to business circumstances (including unforeseeable changes in price or cost) not reasonably foreseeable at the time of the initial layoff. These employers are required to give notice when it becomes reasonably foreseeable that the extension is required.

Practical Considerations For Employers

In light of the lawsuit against Hooters III, if you are considering layoffs in light of COVID-19 or have recently conducted layoffs, you should consider whether WARN Act notices should be provided to your employees. When evaluating the potential need for WARN Act notices, you should consider the following questions:

- **Do we have to provide notice if the layoffs are caused by COVID-related business closures?** In light of the unprecedented impacts of COVID-19, many employers are currently faced with economic impacts on their business requiring sudden and dramatic reductions in force. If you are dealing with these issues, you may be able to rely on the unforeseeable business circumstances exception, but you should still provide as much notice as is practicable – even if circumstances dictate that notice is provided after the layoff occurs. The notice should explain the reason for the reduced notice period.
- **Do our planned actions constitute a plant closing or mass layoff?** Due to the 90-day aggregation period, you are required to plan ahead and consider the potential for future layoffs. If a subsequent round of layoffs related to the first round exceeds the threshold for a plant closing or mass layoff, those impacted by the first round should have been provided notice. There may be a violation if you failed to provide such notice.
- **Did our employees experience an employment loss if we bring them back within six months?** Under the WARN Act, employees do not experience an employment loss if they are subject to a temporary layoff and are recalled within six months. Because many employers do not know what the future holds, it may be safest to issue WARN notice at the outset.
- **Does our notice contain all of the required elements?** The WARN Act regulations are very specific as to the information required in the notice. You should be careful to ensure that all information required be included in notices to employees, bargaining unit representatives, and government officials.
- **Do we have to pay employees for 60 days after providing notice?** The WARN Act only requires notice – it does not require severance pay (though state law may). However, if you fail to provide the required advance notice where an exception does not apply, you could be liable to affected employees for 60 days of pay and benefits, plus their attorneys' fees.
- **Does our state have a mini-WARN law?** Several states have plant closing and mass layoff laws [illegible] "mini-WARN" laws. Many of these state laws impose [illegible]

commonly referred to as "mini-WARN" laws. Many of these state requirements have lower thresholds for employment losses, require a longer notice period, and require additional information be provided in the notices. If you have operations in these states, you should review these requirements and ensure that notices comply with both the federal and state laws.

Conclusion

Reductions in force raise a variety of potential legal issues and you should seek legal guidance before implementing layoffs. You should begin planning as soon as possible if layoffs are possible and provide as much notice as is practicable in the event unforeseeable business circumstances prevent a full 60-day notice period.

Fisher Phillips will continue to monitor the rapidly developing COVID-19 situation and provide updates as appropriate. Make sure you are subscribed to Fisher Phillips' Alert System to get the most up-to-date information. For further information, contact the authors, your Fisher Phillips attorney or any member of our Post-Pandemic Strategy Group Roster. You can also review our FP BEYOND THE CURVE: Post-Pandemic Back-To-Business FAQs For Employers and our FP Resource Center For Employers.

This Legal Alert provides an overview of a specific developing situation. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

Related People

Matthew R. Korn
Partner
803.740.7652
Email

Alden J. Parker
Regional Managing Partner
916.210.0404
Email

Service Focus

Litigation and Trials

Mergers and Acquisitions

Trending

COVID-19/Vaccine Resource Center