Article

Mass Layoffs And Plant Closings, Oh My!

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In many circumstances, there is little time between management's realization of the need for a layoff and the actual separation of employees. Employer actions resulting in such loss of work for significant numbers of employees risk running afoul of the legally required 60-days notice of separation under the Worker Adjustment and Retraining Notification (WARN) Act. The failure to provide such notice may result in litigation and significant monetary liability. The WARN Act generally applies to employers who have 100 or more employees and who experience a "Mass Layoff" or "Plant Closing." A plant closing is better understood as a facility or office closing as it is not limited to the industrial setting. Since passage of the law in 1988, all types of businesses have been faced with the WARN Act's notice of job loss mandates.

FIRST THINGS FIRST

An employer faced with circumstances where numerous employees are going to be separated (e.g. liquidation, reorganization, or as a result of an acquisition) must consider WARN. It must also be aware of state laws, referred to "Baby WARN Acts," that might be applicable to their circumstances. Many states have such laws that set forth differing coverage, triggering standards and notice requirements. The first step when faced with separating a significant number of employees is to determine what laws are applicable to the location being impacted.

WARN ACT BASICS

The WARN Act is applicable to business enterprises with 100 or more employees. A business enterprise is defined in such way that related businesses may be required to aggregate employees to meet the initial threshold. If a business enterprise meets the definition for coverage, it must give 60 days advance notice of a "plant closing" or a "mass layoff" to its affected employees.

A "plant closing" is 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 for 50 or more employees (excluding part-time employees) during any 30-day period.

A "mass layoff" is defined as a reduction in force 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 for either: (1) at least 33 percent of the employees and (2) at least 50 employees (excluding part-time); OR at least 500 employees, without consideration of the percentage of the site's workforce that is affected.

Both the plant closing and mass layoff standards are confined to a "single site" of employment. For example, if a company with two separate physical operations or office locations where to close, each location would be individually analyzed to determine if WARN notice requirements have been triggered. Stated differently, employees at physically distinct locations are not aggregated to determine WARN Act coverage.

WHAT IS AN EMPLOYMENT LOSS?

An employment loss associated with a layoff or plant closing, in addition to a permanent separation from employment, includes a layoff exceeding six months or a reduction in hours of greater than 50 percent during a six month period. It does not include a discharge for cause, a voluntary quit or a retirement. Further, certain

employees who are offered a reassignment or transfer in lieu of termination are also not counted as experiencing an employment loss. Such transfer or reassignment must be to a location within a reasonable commuting distance or it may qualify regardless of distance if the employee accepts the offered transfer or reassignment.

THE AGGREGATION REQUIREMENTS

When calculating the number of employees who experience an employment loss there are two aggregation periods. First the employer must determine if WARN is triggered on a 30 day rolling period. In the mass layoff setting, this is a look ahead and look back period for each job loss (or group of laid off employees) to determine if the notice triggers have been met -- 50 or more employees have experienced an employment loss and the total number laid off exceeds 33 percent of the workforce. If WARN is not triggered, then the employer must apply a 90-day aggregation test in the same manner as the 30-day test. This additional test is intended to prohibit employers from implementing repeated small layoffs to avoid the WARN Act notice requirements.

WHAT'S IN THE NOTICE?

If the WARN Act is triggered the employer must provide 60 days written notice to each of the following: 1) any labor union representing affected employees; 2) each affected employee who is not represented by a union; 3) the state "dislocated workers unit;" and, 4) the highest elected local government official where the facility is located (e.g. mayor, city commissioner, etc.). While the contents of each notice vary slightly depending on the recipient, they generally set forth the following information:

- Name and address of the facility impacted
- Name and address of the employer representative to contact with questions
- Whether the job losses are temporary or permanent
- Whether individual employees have bumping rights
- The date(s) of the expected job loss
- The positions to be affected and names of individuals to be impacted

The written notice must be provided before the 60-day notice period begins to run and may be delivered in person or by mail. If the closing or layoffs are extended beyond the dates in the written notice, the employer may reissue amended notices so long as the new date is less than 60 days out. If it is more than 60 days out, a new notice must be given to all of the WARN notice recipients.

EXCEPTIONS

There are a number of exceptions to the WARN Act's 60 day notice requirement where such notice may be reduced or not given at all. These exceptions are closely scrutinized by the courts and, even when applicable, as much notice as is practicable must be given to employees by the employer. The general circumstances allowing for shortened notice include a faltering company which is trying to obtain operating capital, a sudden and unforeseeable business circumstance, or a natural disaster.

MERGERS AND ACQUISITIONS

In the sale of a business context, the WARN Act's statutory default is that the buyer will be considered the employer of all employees impacted by an acquisition or other business transaction as of the closing of the business deal. Under such default provision, the Seller is responsible for providing notice if the WARN Act is triggered before the sale closes and the Buyer is responsible for WARN Act notice if it is triggered after the closing.

The statute specifically allows the parties to a sales transaction to contractually assign any or all obligations and liability associated with WARN to either the Seller or the Buyer. Addressing those issues can be accomplished in a myriad of ways, from requiring the hiring of employees by the buyer, to a full assumption of potential liability by either party.

THE COST OF VIOLATING THE WARN ACT

The cost for failing to comply with the WARN Act is backpay and benefits for each working day the employer failed to give affected employees notice, for up to the full 60 day notice period. The backpay is calculated based on the each employee's most recent regular rate or the average regular rate for the last three years of employment, whichever is higher.

PAY AND BENEFITS IN LIEU OF WARN ACT NOTICE

The WARN Act statute does not specifically address whether an employer may provide pay and benefits in lieu of WARN ACT notice. It does, however, specify that previously existing contractual severance obligations may not be used to offset WARN Act liability. Where there is no contractual severance obligation or if paid in addition to such severance, courts generally allow an employer to provide employees pay in lieu of WARN notice and the payment will serve as an offset of potential liability under WARN.

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