Labor and Employment Corner

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Employers Be Forewarned — Follow The WARN Act

As business plummets, layoffs rise. This is nothing new. The difference now is the exponential increase in workforce reductions. Since early 2015, the labor market has been experiencing a significant spike in announced layoffs. Many recent actual or planned cuts emanate from falling oil prices, with various energy companies responding to declining prices and other negative market forces. There has been a ripple effect on other industries; no industry is immune. Even a major technology giant thought to be insulated from layoffs and an e-commerce titan joined the ranks of companies downsizing for economic reasons in 2015.

When deciding how to respond to the declining economy, many employers agonize over the decision to reduce their workforces. Even after employers make the decision to shrink their workforces, a number of obstacles remain, and the applicable law is not the least of them. The federal Worker Adjustment and Retraining Notification Act (WARN), 29 U.S.C. § 2101 *et seq.*, protects workers by requiring advance notice of any covered mass layoff or plant closing. State and local laws often impose additional restrictions on making workforce reductions. Prudent employers are, therefore, forewarned, appreciating the importance of following applicable downsizing reduction laws and the significant consequences of the failure to do so. This article will highlight WARN's general provisions and provide a word of caution to employers seeking to utilize mass layoffs or plant closings as cost-cutting measures, since noncompliance with WARN can itself be very costly. Complying with applicable laws while making sound workforce reduction decisions can be tricky. Smart business leaders will obtain competent legal advice before implementing a reduction in force or closing a work location.

The WARN Act

The WARN Act requires that covered employers give 60 days' notice before plant closings and mass layoffs. 29 U.S.C. § 2102. WARN specifically provides that "[a]n employer shall not order a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice of such an order." 29 U.S.C. § 2102(a). A prudent employer will first examine the statutory definitions of these terms to determine whether WARN applies to a planned plant closing or layoff.

Applicability of the WARN Act

At lunch, a client mentions that the company is poised to lay off a few dozen employees at one of its work locations. You ask, "Did you look at your WARN Act obligations?" "Oh yes," says your client. "A few months ago, we did a layoff at a different location, and we looked at it then. No WARN notices were needed, and that was a bigger layoff. And besides, I think a quarter of the workers are temporary and part-time. I'm sure we're fine." How do you reply?

A prudent employer will first examine WARN's key statutory definitions to determine whether WARN applies to a planned plant closing or layoff, including when there are a series of small layoffs. For example, what the law defines as part-time may differ from what an employer considers part-time. Therefore, it is wise to examine the law and its applicability to each circumstance. Some of the key terms to consider are WARN's definitions of employers, employees, plant closings, and mass layoffs.

Covered employers have "100 or more employees, excluding part-time employees," with part-time employees defined as those "employed for an average of fewer than 20 hours per week" or "for fewer than 6 of the 12 months preceding" the required notice date; and employers with "100 or more employees who in the aggregate work at least 4,000 hours per week," exclusive of overtime. 29 U.S.C. § 2101(a)(1) and (a)(8). Although government employers are generally not covered, public and quasi-public employers may be covered if they operate in a business context separated from government. 20 C.F.R. § 639.3(a)(1)(ii).

A "plant closing" is a "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" at that single site of employment for 50 or more nonpart-time employees "during any 30-day period." 29 U.S.C. § 2101(a)(2).

A "mass layoff" is a workforce reduction, not from a plant closing, that results in an "employment loss at a single site of employment during any 30-day period" involving (1) 50 to 499 employees if they make up at least at least 33 percent of nonpart-time active

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workforce or (2) at least 500 nonpart-time employees. 29 U.S.C. § 2101(a)(3).

Employers sighing in relief that their plant closing or layoff does not meet the above definitions are wise to realize that smaller, individual reductions in force happening around the same time may still be considered a "plant closing" or a "mass layoff" if they meet these definitions in the aggregate. Indeed, "employment losses for 2 or more groups at a single site of employment, each of which is less than" the above-referenced minimum numbers "but which in the aggregate exceed that minimum number" and "occur within any 90-day period" are considered a plant closing or mass layoff as defined by WARN, "unless the employer demonstrates that the employment losses are the result of separate and distinct actions and causes and are not an attempt" to evade WARN's requirements. 29 U.S.C. § 2102(d). This WARN provision requires employers to consider the "rolling" impact of downsizing decisions.

Employers not covered by WARN should remember that Congress intended that even where no WARN requirements exist, an employer "should, to the extent possible, provide notice to its employees" regarding a proposed plant closure or permanent workforce reduction. 29 U.S.C. § 2106.

Remember:

- Don't immediately disregard part-time, seasonal, or temporary employees.
- Consider the anticipated layoff or closing in the broader context of the company's past layoffs and the company's plans for the coming months.
- Ask about layoffs at other company locations, and handle appropriately.

Meaning of Employment Loss

"OK," your client says, "I'll get you the numbers and have you take a look at the situation. But isn't there some way around this? What if we offer to rehire some of the full-time workers at our corporate headquarters? We could reduce the hours of some positions there and make it all work out if that would avoid some sort of class action."

Generally, an "employment loss" is (1) "an employment termination" that is not for cause, voluntary, or because of a retirement, (2) "a layoff exceeding 6 months," or (3) an hours reduction of "more than 50 percent during each month of any 6-month period." 29 U.S.C. § 2101(a)(6). But be careful, because WARN both modifies and expands this definition, just as it does other definitions in the statute. For example, WARN provides that where the planned mass layoff is initially anticipated to be less than six months but extends past six months, the mass layoff is considered an "employment loss" unless the cause of the extension involves business circumstances "not reasonably foreseeable at the time of the initial layoff" and the employer gives notice when the extension beyond six months becomes reasonably foreseeable. 29 U.S.C. § 2102(c). As another example, there is no "employment loss" where the plant closing or mass layoff results from a relocation or business consolidation and, prior to the event, the employer "offers to transfer the employee" (1) to a different work site "within a reasonable commuting distance with no more than a 6-month break in employment," or (2) to any work site "regardless of distance with no more than a 6-month break in employment, and the employee accepts within 30 days of the offer or of the closing or layoff, whichever is later." 29 U.S.C. § 2101(b)(2). Whether there is an "employment loss" is also affected by whether there is "a sale of part or all of an employer's business." *See* 29 U.S.C. § 2101(b)(1) (defining certain exclusions from the employment loss definition in the event of certain business sales). A WARN analysis in the event of a planned sale can be complex.

Remember:

- Certain temporary layoffs and hours reductions can trigger WARN requirements.
- Ask about employees who are offered relocation, and find out the details in order to analyze whether WARN obligations exist.
- Be ready to reevaluate if layoff plans change.

Exceptions to the Rules

"I remember hearing that there are exceptions built into the WARN Act," your client tells you. "Couldn't we fit into one?"

The required 60-day notice period may be reduced if certain circumstances are present, but the employer must still "give as much notice as is practicable," provided that at the time of giving notice the employer gives "a brief statement of the basis for reducing the notification period." 29 U.S.C. § 2102(b). For example, a plant closing or mass layoff caused by a "natural disaster, such as a flood, earthquake, or the drought" negates the requirement of the full 60-day notice. 29 U.S.C. § 2102(b)(2)(B). As another example, a plant closing or mass layoff may occur "before the conclusion of the 60-day notice period" if "caused by business circumstances that were not reasonably foreseeable at of the time that notice would have been required." 29 U.S.C. § 2102(b)(2)(A). Additionally, the employer may "order the shutdown of a single site of employment before the conclusion of the 60-day period" if the employer was "actively seeking capital or business which, if obtained, would have enabled the employer to avoid or postpone the shutdown and the employer reasonably and in good faith believed that" it would not obtain the needed capital or business if it gave the required notice. 29 U.S.C. § 2102(b)(1). WARN does not apply where the plant closing or mass layoff results from "completion of a particular project or undertaking, and the affected employees were hired" knowing their employment was limited to the duration of the project or undertaking. 29 U.S.C. § 2103(1). WARN also does not apply where the plant closing or mass layoff "constitutes a strike or constitutes a lockout not intended to evade" WARN's requirements. 29 U.S.C. § 2103(2). Any employer planning to rely on a statutory exception to the notice period should proceed cautiously and with the advice of counsel, as the facts and circumstances matter, and the decisions interpreting WARN do not provide clear-cut answers.

Remember:

- Don't neglect consideration of the statutory exceptions. It is worth investigating whether they apply.
- Attempting to manipulate a layoff so that it fits into a statutory exception might create more headaches in the future. When in doubt, compliance with WARN's notice provisions may well be the least expensive and best course.

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The Cost of Noncompliance

"Well," your client says, "what's the worst that could happen here? I need to be able to talk with my business people about the risks if they have to consider delaying the layoff. It might even make more sense to risk paying the penalty, since we've been planning for months. What do you think?"

The consequences of noncompliance with WARN can be significant. Aggrieved employees, employee representatives, or even local government units may sue the employer. 29 U.S.C. § 2104(a)(5). Suits are often brought not just on behalf of one affected employee but on behalf of all who arguably could claim to have been harmed by noncompliance with WARN.

Employers may face claims for: (1) back pay for each day of violation, (2) benefits under a covered employee benefit plan as defined by 29 U.S.C. § 1002, (3) civil penalties up to $500 for each day of violation, and (4) attorneys' fees. 29 U.S.C. § 2104(a). A "court may, in its discretion, reduce the [employer's] amount of the liability or penalty" provided that the employer "proves to the satisfaction of the court that" its "act or omission" was "in good faith and that the employer had reasonable grounds for believing" its conduct did not violate WARN. 29 U.S.C. § 2104(a)(4). The court's ability to reduce the employer's exposure is important. Therefore, a prudent employer will have acted with competent legal advice and have solid facts to show good faith and reasonable grounds for the manner in which it proceeded.

Other Potential Legal Obligations

In addition to WARN claims, employers may face liability under related state and local laws. Several states and local governments have laws that are similar in concept to the WARN Act. *See,* e.g., Cal. Lab. Code §§ 1400-1408 (more expansive WARN-like obligations under California law, including application to companies with at least 75 full-time and/or part-time employees); Minn. Stat. § 116L.976 (employers required to advise the Minnesota Workforce Development Commissioner of the names, addresses, and occupations of the affected employees); N.Y. Lab. Law §§ 860 *et seq.* (employers with 50 or more full-time workers in New York must give 90-day notice prior to layoff or closing affecting at least 25 employees); Philadelphia Code 9-1500 (imposing notice obligations at the local level). To make matters more complicated, these laws may apply even if WARN does not. Therefore, careful analysis of the law in each jurisdiction should precede any layoff.

Finally, don't forget that WARN rights are "in addition to" all other rights an employee may have. 29 U.S.C. § 2105. In other words, WARN will add to, not replace, any contractual or statutory rights an employee enjoys under other laws.

Remember:

Noncompliance can be serious and very costly to the employer. Get it right before the layoffs.

Don't think that WARN is all that matters. Contracts, state and local statutes, and ordinances may provide additional remedies for employees.

Conclusion

These are tough economic times for many employers across the country. As companies wrestle with difficult economic decisions and determine how to respond to negative market effects, prudent employers will be ever-mindful that WARN and other laws may impact when and how they implement plant-closing and downsizing decisions. Careful planning and execution are the keys to success.