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CRISIS PRACTICE

Coronavirus

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Federal and State Plant Closing and Mass Layoff Laws

This alert provides an overview of key laws to be considered prior to implementing large-scale employee layoffs and furloughs.

The Worker Adjustment and Retraining Notification Act, 29 U.S.C. § 2101, et seq. (the "WARN Act") is a federal law that requires covered employers to provide notice (in a specified form) prior to implementation of mass layoffs and plant closures. Several states (including California, Illinois, New Jersey, New York, and Wisconsin) have similar laws.

The WARN Act requires an employer with 100 or more employees to provide 60 days' notice to various recipients prior to implementing a mass layoff or plant closure. The law allows an employer to reduce the notice period where, among other things, the layoff or closure results from business circumstances that were not reasonably foreseeable at the time notice would otherwise have been required or from a natural disaster. Even where these exceptions apply, as much notice as is reasonably practicable is required. Presently, we anticipate that the rapid spread of the novel coronavirus around the world and both market and governmental responses to it are creating such unforeseeable circumstances, including precipitous drops in employee availability, forced closure of non-essential businesses and supply chain disruption. The coronavirus itself arguably qualifies as a natural disaster.

Federal Law

- ***Who is a Covered Employer?***

  - An "employer" for purposes of the WARN Act is any business enterprise with (i) 100 or more employees (excluding part-time employees) or (ii) 100 or more employees who in the aggregate work at least 4,000 hours per week (exclusive of hours of overtime).

- ***Do employees who are not actively at work factor into these calculations?*** Workers on temporary layoff or on leave who have a reasonable expectation of recall are counted as employees.

- ***How do I know if an employee is considered "part time" for WARN Act purposes?*** "Part time" employees are those who either (i) are

employed for an average of fewer than 20 hours per week (calculated by looking at the shorter of the period the employee has been employed or the last 90 days) or (ii) have been employed for fewer than 6 of the 12 months preceding the date on which notice is required.

- ***Do I need to include employees from related entities but who are on a different payroll?*** Whether subsidiaries and affiliates of a company are treated as separate "employers" for WARN Act purposes depends upon the degree of their independence from one another. Some of the factors courts consider in making this determination are (i) common ownership, (ii) common directors and/or officers, (iii) de facto exercise of control, (iv) unity of personnel policies emanating from a common source, and (v) interrelation of operations.

- ***What Does the WARN Act Require?***
  - The WARN Act requires covered employers to provide 60 days' written notice prior to implementing a "mass layoff" or "plant closure." Notice must be given to (i)(A) each affected employee, if not unionized or (B) each bargaining representative, if unionized, and (ii) specified state and local government recipients.
  - ***What are the triggering events and how do I determine that one will occur?***
    - A "mass layoff" is a reduction in force that results in an "employment loss" for (i) (A) at least 33% of the employees and (B) at least 50 employees, or (ii) at least 500 employees.
    - A "plant closure" means 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.
    - Part-time employees (as defined above) are excluded from all relevant calculations.
    - An "employment loss" is (A) an employment termination, other than a discharge for cause, voluntary departure, or retirement, (B) a layoff exceeding 6 months, or (C) a reduction in hours of work of more than 50 percent during each month of any 6-month period.
    - ***What happens if employees are let go in waves?*** When all employees are not terminated on the same date, the date of the first individual termination triggers the 60-day notice requirement. Generally, all employment losses occurring within a 30-day period are aggregated together when determining if the applicable thresholds have been met; however, all employment losses occurring within a 90-day period will be aggregated together unless the employer is able to demonstrate that the separate employment losses are the result of separate and distinct actions and causes.
    - ***Do I calculate these numbers on a Company-wide basis?*** Critically, the two triggering events – mass layoff and plant closure – are determined on a "single site of employment" basis, meaning that companies are generally running these calculations on an office-by-office or facility-by-facility basis.
      - A single site of employment can refer to either a single location or a group of contiguous locations. Groups of structures which form a campus or industrial park, or separate facilities across the street from one another, may be considered a single site of employment.

- Separate buildings or areas which are not directly connected or in immediate proximity may be considered a single site of employment if they are in reasonable geographic proximity, used for the same purpose, and share the same staff and equipment. An example is an employer who manages multiple warehouses in an area but who regularly shifts or rotates the same employees from one building to another. Non-contiguous sites in the same geographic area that do not share the same staff or operational purpose should not be considered a single site.
- ***What about my remote employees?*** For workers whose primary duties require travel from point to point, who work remotely, or whose primary duties involve work outside any of the employer's regular employment sites (e.g., railroad workers, bus drivers, salespersons), the single site of employment to which they are assigned as their home base, from which their work is assigned, or to which they report will be the single site in which they are covered for WARN Act purposes.

▪ ***What if a temporary layoff of fewer than 6 months gets extended?*** To avoid having the "employment loss" made retroactive to the first day of the temporary layoff, (i) the extension beyond 6 months must be caused by business circumstances not reasonably foreseeable at the time of the initial layoff; and (ii) notice must be given at the time it becomes reasonably foreseeable that the extension beyond 6 months will be required.

- ***What must the WARN Act notice contain?***
  - The content of the notices depends upon the recipient:
    - For affected employees, notice must contain: (i) a statement as to whether the planned action is expected to be permanent or temporary and, if the entire plant is to be closed, a statement to that effect; (ii) the expected date when the plant closing or mass layoff will commence and the expected date when the individual employee will be separated; (iii) an indication whether or not bumping rights exist (these usually do not exist outside of unionized operations); and (iv) the name and telephone number of a company official to contact for further information.
    - For employee bargaining representatives, notice must contain: (i) the name and address of the employment site where the plant closing or mass layoff will occur, and the name and telephone number of a company official to contact for further information; (ii) a statement as to whether the planned action is expected to be permanent or temporary and, if the entire plant is to be closed, a statement to that effect; (iii) the expected date of the first separation and the anticipated schedule for making separations; and (iv) the job titles of positions to be affected and the names of the workers currently holding affected jobs.
    - For governmental recipients, notice must contain: (i) the name and address of the employment site where the plant closing or mass layoff will occur, and the name and telephone number of a company official to contact for further information; (ii) a statement as to whether the planned action is expected to be permanent or temporary and, if the entire plant is to be closed, a statement to that effect; (iii) the expected date of the first separation, and the anticipated schedule for making separations; (iv) the job titles of positions to be affected, and the number of affected employees in each job classification; (v) an indication as to whether or not bumping

rights exist; and (vi) the name of each union representing affected employees, and the name and address of the chief elected officer of each union.

- All notices may include additional information useful to the recipient, such as information on available dislocated worker assistance, and, if the planned action is expected to be temporary, the estimated duration, if known.
- Critically, if the employer intends to avail itself of any of the exceptions to the WARN Act's notice requirements (discussed immediately below), then it **must** include a brief narrative explaining the applicability of the exception to the notice-triggering event.

- ***Are there any exceptions to the WARN Act's notice requirements?***
  - The WARN Act recognizes several exceptions to its general notice requirements, many of which may be relevant to layoffs and closures resulting from the coronavirus pandemic.
  - **Unforeseeable Business Circumstances**
    - An employer may order a plant closing or mass layoff before the conclusion of the 60-day period if the closing or mass layoff is caused by business circumstances that were not reasonably foreseeable as of the time that notice would have been required.
    - In all cases, an employer is charged with exercising reasonable business judgment in considering the demands of its particular market. An important indicator of a business circumstance that is not reasonably foreseeable is that the circumstance is caused by some ***sudden, dramatic, and unexpected action or condition outside the employer's control***. A principal client's sudden and unexpected termination of a major contract, a strike or shutdown at a major supplier, and an unanticipated and dramatic major economic downturn might each be considered a business circumstance that is not reasonably foreseeable.
  - **Natural Disaster**
    - No advance notice is required if the plant closing or mass layoff is the direct result of any form of natural disaster, such as a flood, earthquake, drought, or similar "effects of nature".
  - **Faltering Company**
    - An employer can provide reduced notice if: (i) it was actively seeking capital or business at the time that 60-day notice would have been required; (ii) there was a realistic opportunity to obtain the financing or business sought; (iii) the financing or business sought would have been sufficient, if obtained, to have enabled the employer to avoid or postpone the shutdown; and (iv) the employer reasonably and in good faith believed that giving the required notice would have precluded the employer from obtaining the needed capital or business. The actions of an employer relying on the "faltering company" exception will be viewed in a company-wide context. Thus, a company with access to capital markets or with cash reserves may not avail itself of this exception by looking solely at the financial condition of the facility, operating unit, or site to be closed.
    - The faltering company exception only applies to plant closures; an employer cannot use this as an excuse for shortened notice in the event of a mass layoff.
  - **Other Exceptions**

- ***Temporary Facility/Project Closure.*** If a plant closure is of a temporary facility or the closing or layoff is the result of the completion of a particular project or undertaking, and the affected employees were hired with the understanding that their employment was limited to the duration of the facility or the project or undertaking, then no notice is required.
- ***Strike or Lockout***. No notice is required if the closure or layoff results from a strike or a lockout.

- **Exceptions and COVID-19**. It will be some time before there is case law addressing the applicability of these exceptions to COVID-19 related layoffs. Presently, we anticipate that layoffs precipitated by COVID-19 and the societal impacts it has had, including the simultaneous economic downturn, will qualify as unforeseeable business circumstances and, potentially, as a natural disaster. However, application of these exceptions should be analyzed on a case-by-case basis, particularly as time passes, as changed circumstances over the coming weeks could alter courts' views on what is foreseeable.

- ***What happens if I don't provide notice***?
  - An employer who fails to provide notice in accordance with the WARN Act is liable to employees for (i) back pay for each day of violation and (ii) benefits under health and welfare and retirement plans that would have been received during the notice period, including the cost of medical expenses incurred during the notice period which would have been covered under an employee benefit plan if the employment loss had not occurred prematurely. There is also a $500 per day of violation civil penalty.
  - *This liability may be offset by any voluntary and unconditional payment by the employer to the employee that is not required by any legal obligation, including severance contingent upon execution of a release of claims.*

State Mini-WARN Acts

While there are several States that have laws that are triggered upon a group layoff or facility closure, this summary only addresses those that require notice to employees in advance of such events. The states with such laws include California, Hawaii, Illinois, Iowa, New Jersey, New York and Wisconsin. Key differences from the WARN Act are noted below.

- ***California***
  - Applies to employers who operate "covered establishments," which are facilities with 75 or more employees working at them.
  - There is no percentage requirement applicable to a mass layoff.
  - Generally, the unforeseeable business circumstance exception is not applicable; however, effective as of March 18, 2020, California effectively will allow employers to use this exception if they give as much notice as reasonably practicable under the circumstances.
- ***Hawaii***
  - Applies to employers with 50 or more employees
  - Does not recognize many exceptions available under the WARN Act

- ***Illinois***
  - Applies to employers with 75 or more employees
  - Mass layoff triggered by 25 employees (with 33% requirement) or 250 (regardless of percentage)
- ***Iowa***
  - Applies to employers with 25 or more employees
  - Notice triggered at 25 employees for layoffs and plant closures
  - Only requires 30 days' notice
- ***New Jersey***
  - Severance rights for employees terminated in a mass layoff or plant closure
  - Does not recognize many exceptions available under the WARN Act
- ***New York***
  - Applies to employers with 50 or more employees
  - Mass layoff triggered by 25 employees (with 33% requirement) or 250 (regardless of percentage)
  - Plant closing triggered by 25 employees
  - Requires 90 days' notice
  - All exceptions recognized, but only available for plant closures
- ***Wisconsin***
  - Applies to employers with 50 or more employees
  - Mass layoff triggered by 25 employees (with 33% requirement) or 250 (regardless of percentage)
  - Plant closing triggered by 25 employees
  - Aggregates all employment losses occurring in the same municipality (so not just single sites of employment; particularly relevant to retail operations)