

SEPTEMBER 9, 2020 | TRADITIONAL LABOR RELATIONS

# WARN Act Notices Deadline Approaching for Layoffs and Furloughs

Any employer that temporarily laid off or furloughed employees in the Spring of 2020 as a result of the COVID-19 pandemic and has not yet recalled those employees should be aware of an impending important deadline under the federal Worker Adjustment and Retraining Notification Act ("WARN Act").



The WARN Act requires employers with 100 or more full time employees to provide at least sixty (60) calendar days written advance notice to their employees of an upcoming company-wide closing (referred to as a "plant closing") or mass layoff. While a "plant closing" is fairly self-explanatory, a mass layoff is defined as either (1) a layoff of 500 or more workers at a single site of employment during a 30-day period; or (2) a layoff of 50-499 workers, when these layoffs constitute 33% of the employer's total active workforce at the single site of employment.

A WARN Act notice must be given to employees affected by a plant closing or mass layoff when those employees have suffered an "employment loss." While a temporary layoff or furlough lasting less than 6 months does not meet the definition of an "employment loss," one that lasts longer than 6 months is indeed considered an "employment loss."

At the outset of the COVID-19 pandemic in March 2020, many of our clients were considering a temporary layoff or furlough and as a result, they asked us whether they needed to provide their workers with a notice under the WARN Act. At that point, since it was anticipated that any job losses as a result of the pandemic would last for less than 6 months, notice under the WARN Act would NOT have been necessary. Now, however, it is rapidly approaching the 6-month mark for those employees that have been temporarily laid off or furloughed since March or April. Thus, covered employers once again want to know whether a WARN Act notice is now required.

The short answer to that question is yes, a WARN Act notice likely will be required based on the Act's definition of "employment loss." Specifically, under the Act, a temporary layoff or furlough without notice that is initially expected to last six months or less but later is extended beyond 6 months (which is likely the case for many U.S. employers) may violate the Act unless: (1) The extension is due to business circumstances not reasonably foreseeable at the time of the initial layoff; AND (2) Notice is given when it becomes reasonably foreseeable that the extension is required. This means that an employer who previously announced and carried out a short-term layoff of 6 months or less and later extends the layoff or furlough beyond 6 months due to business

circumstances not reasonably foreseeable at the time of the initial layoff (e.g., COVID-19) is required to give notice at the time it becomes reasonably foreseeable that the extension is required. Given that it is now foreseeable that the layoff or furlough extension is necessary that would result in an employment loss exceeding six months, an employer's failure to provide WARN notice to its affected employees (and other required recipients) could expose the employer to liability under the WARN Act.

It is important to note that there are several exceptions to the WARN Act's 60-day notice requirement that may apply to COVID-19 related scenarios, including:

(1) the faltering company exception, which is when a company is actively seeking capital or business and reasonably in good faith believes that advance notice would preclude its ability to obtain such capital or business, and this new capital or business would allow the employer to avoid or postpone a shutdown for a reasonable period; and

(2) the unforeseeable business circumstances exception, which is when the closing or mass layoff is caused by business circumstances that were not reasonably foreseeable at the time that 60-day notice would have been required.

An employer must keep in mind, however, that even if one of these exceptions applies, a plant closing or mass layoff STILL requires notices to affected employees. That notice should include a statement as to why the employee did not receive the full 60-day notice, which in all likelihood would be due to COVID-19 related circumstances.

The WARN Act is enforced by private legal action in the U.S. District Court for any district in which the violation is alleged to have occurred or in which the employer transacts business. An employer's violation of the WARN Act could result in substantial liability, including back pay and benefits for each day of violation to each aggrieved employee up to 60 days, and \$500 in civil penalties for each day an employer fails to provide notice to a unit of local government.

In addition to the federal WARN Act, employers should keep in mind that approximately 23 states have their own state "mini-Warn Acts" that may impose more stringent requirements than Federal WARN. These states include Alabama, California, Connecticut, Delaware, Georgia, Hawaii, Illinois, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, Tennessee, Washington, and Wisconsin. Thus, if you have operations in any of those states, you must take into account your obligations under both the Federal WARN Act and your applicable state mini-WARN Act.

We are available to assist with questions about whether the WARN Act applies to your particular circumstances and/or to assist with providing WARN Act compliant notices when necessary.