Tucker Ellis LLP

CLIENT ALERT

WARN ACT REQUIREMENTS FOR COVID-19-RELATED SHUTDOWNS AND LAYOFFS

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As businesses consider shutting down operations or laying off employees due to the COVID-19 outbreak, they should also consider their obligations under the federal Workers Adjustment and Retraining Notification Act ("WARN Act") and any state WARN legislation. Depending on each employer's individual circumstances, it may qualify for one or more of the exceptions to the WARN Act's notice requirements. Whether the requirements of the WARN Act apply to an employer and whether the employer must provide advance notice of a shut down or layoff often requires a case-by-case analysis, and employers are encouraged to consult with counsel regarding their obligations.

FEDERAL WARN ACT REQUIREMENTS

WHAT IS THE FEDERAL WARN ACT?

Generally, the WARN Act is designed to protect workers and communities from the significant economic impacts of large-scale closures or reductions in workforce by giving those employees and certain governmental entities advance notice when a significant number of employees will find themselves out of work. The notice is intended to provide employees with time to seek alternative employment and for state and local agencies to provide assistance and job training to dislocated workers.

WHAT BUSINESSES ARE COVERED BY THE WARN ACT?

The WARN Act applies to employers with 100 or more employees, excluding part-time employees (*or* a combination of 100 full-time and part-time employees who work a total of 4,000 non-overtime hours per week). Part-time employees are defined as any employees who work fewer than 20 hours per week on average or who have worked for the employer fewer than 6 of the prior 12 months.

Any employer contemplating a shutdown or layoffs as a result of COVID-19 should first determine whether it meets the criteria for coverage under the WARN Act.

WHEN IS NOTICE REQUIRED UNDER THE WARN ACT?

Employers are required to provide at least 60 calendar days' notice to their employees and certain governmental entities before a "plant closing" or "mass layoff."

A "plant closing" occurs when a single site of employment, facility, or operating unit is temporarily or permanently shut down resulting in an "employment loss" of 50 or more employees (excluding part-time employees).

A "mass layoff" occurs when there is a reduction in workforce that is not the result of a plant closing but that results in an "employment loss" at a single site that affects: (1) at least 33% of the active employees (excluding part-time employees); and (2) at least 50 employees (excluding part-time employees). If 500 or more employees are affected, the 33% requirement does not apply.

A key component of both a plant closing and a mass layoff is the requirement that there be an "employment loss" for the affected employees. "Employment loss" is defined as: (1) a termination that is not for cause, voluntary departure, or retirement; (2) a layoff exceeding 6 months; or (3) a reduction in hours of work of more than 50% during each month of any 6-month period.

These definitions are critical for employers in determining whether or not a WARN Act notice is required for their specific circumstances. Employers should carefully evaluate whether their intended actions meet the criteria of a plant closing or mass layoff, and, importantly, whether the affected employees will experience an "employment loss." For example, if the affected employees are merely being laid off, rather than terminated, and the layoffs will be for a period of less than six months, no WARN notice would be required. With the uncertainty surrounding the length of time that will be needed to combat the COVID-19 outbreak, it may be difficult to predict whether employees will be recalled within six months; however, most federal and state travel and work restrictions are currently set to expire in far less time, and the President has recently indicated his intent to return businesses and employees to work as soon as possible, so employers could reasonably expect that any such layoffs would fall short of the 6-month benchmark for requiring a WARN notice in certain circumstances.

WHAT IS THE UNFORESEEABLE BUSINESS CIRCUMSTANCES EXCEPTION?

The WARN Act provides an exception to the minimum 60 days' notice requirement in the event of "unforeseeable business circumstances." This exception applies to plant closings and mass layoffs caused by business circumstances that were not reasonably foreseeable at the time that 60-day notice would have been required. Also, the implementing regulations for the WARN Act specifically recognize that "an unanticipated and dramatic major economic downturn" or "a government-ordered closing of an employment site without prior notice" may constitute unforeseeable business circumstances.

Businesses that are now forced to shut down operations or lay off some or all of their employees as a result of the COVID-19 pandemic or a state order directing them to cease operations would likely meet the unforeseeable business circumstances exception to providing a full 60 days' notice to their employees and the requisite government entities.

Importantly, if a business faces an unforeseeable business circumstance that prevents it from sending the required WARN Act notice at least 60 days prior to the plant closing or mass layoff, it is still required to provide as much notice as possible and a brief explanation as to why the required notice period was reduced. Therefore, employers facing a circumstance that would otherwise have required them to provide the required 60 days' notice should prepare and provide notices as soon as possible before implementing the planned shutdown or layoff.

WHAT IS THE NATURAL DISASTER EXCEPTION?

Another exception to the typical 60 days' notice requirement applies when a plant closing or mass layoff is the "direct result" of "any form of natural disaster, such as a flood, earthquake, or a drought." As with the unforeseeable business circumstances exception, the WARN regulations provide that an employer is still required to provide notice as soon possible, even if the employment loss has already occurred.

The definition of what constitutes a qualifying natural disaster under the WARN Act regulations includes floods, earthquakes, drought, tsunami, or "similar effects of nature." It is unclear whether a pandemic like COVID-19 meets this definition. Moreover, *in order to satisfy the exception, employers would need to show that the shut down or layoffs were the "direct result" of the pandemic itself, and not, instead, the result of the business slowdown resulting from the economic impact of the virus or from the mitigation measures ordered by state and local governments*.

Further, just as with the unforeseeable business circumstances exception, the natural disaster exception still requires employers to provide the required WARN Act notice as soon as possible. It does not exempt employers from providing a notice altogether. Therefore, employers who intend to rely on the natural disaster exception should still prepare and provide such notice to employees and the requisite government entities as soon as possible.

STATE WARN ACT REQUIREMENTS

While most states, including Ohio, follow the federal WARN Act's requirements, several states (e.g., CA, IL, MD, NJ, NY, TN, WI) have passed their own WARN legislation that expands on the protections under the federal legislation.

For example, California has its own version of WARN that operates similarly to the federal WARN Act, but with crucial differences. First, Cal-WARN applies to any employer who has employed 75 or more persons, including part-time employees, at a single industrial or commercial facility (called a "covered establishment") within the preceding 12 months. Those employers must provide 60 days' notice before: (1) terminating operations at the covered establishment; (2) relocating the covered establishment's operations more than 100 miles; or (3) laying off 50 or more employees at the covered establishment in a 30-day period. For an employee to count as part of the 50-employee threshold, that person must have worked for the employer for at least 6 of the preceding 12 months.

In addition, several features of Cal-WARN are less employer-friendly in the COVID-19 context than the federal WARN Act. While the federal WARN Act applies only to layoffs exceeding six months, Cal-WARN applies to layoffs of any duration. Therefore, businesses operating in California facing a shutdown or layoff will need to provide a WARN notice even for a short-term layoff.

Cal-WARN has an additional exception for "physical calamity or act of war," but it is uncertain whether a pandemic would qualify as a physical calamity.

Importantly, Cal-WARN contains no exception for unforeseeable business circumstances; however, on March 17, 2020, California Governor Gavin Newsom issued an executive order (N-31-20) in response to the COVID-19 outbreak suspending the 60-day notice requirement under Cal-WARN for employers who meet the following conditions:

1. The employer gives the required notices to the affected employees, the Employment Development Department, the local workforce investment board, and the chief elected official of each city and county government within which the termination, relocation, or mass layoff occurs;
2. The employer gives as much notice as practicable and includes a brief statement on the basis for reducing the notification period;
3. The termination, relocation, or layoff is caused by COVID-19-related business circumstances that were not reasonably foreseeable at the time notice would have been required (i.e., 60 days before); and
4. For notices given after March 17, in addition to the usual contents of the notice, the employer must include the following statement: "If you have lost your job or been laid off temporarily, you may be eligible for Unemployment Insurance (UI). More information on UI and other resources available for workers is available at labor.ca.gov/coronavirus2019."

While the California Governor's Executive Order does not completely suspend Cal-WARN's requirements, it provides a mechanism in line with the federal WARN Act to give some relief to employers facing unforeseen business circumstances.

ADDITIONAL INFORMATION

The Tucker Ellis Labor & Employment Group is closely monitoring updates and guidance on developing issues related to COVID-19. For additional information or assistance, please contact:

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