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WARN-ing Ahead: Key Considerations and Reminders for Employee Separations in 2023

Labor & Employment Workforce Watch

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Given the current economic climate, employers may find themselves in the unfortunate position of needing to conduct a reduction in force or layoff in 2023. Before doing so, employers must consider and evaluate the impact of state and federal law relating to such separations.

Most notably, on the federal level, employers must account for the Worker Adjustment and Retraining Notification Act ("WARN"). The WARN Act requires employers with 100 or more employees to provide affected employees with at least 60 days' notice if the employer is planning on conducting a "plant closing" or "mass layoff," with some limited exceptions. Generally, a plant closing occurs when an employer shuts down an operating unit within a single site of employment, resulting in employment loss (which includes both loss of employment and sustained reduction of hours by more than 50%) for at least 50 full-time employees. A mass layoff occurs when there is no plant closing, but there is employment loss for 500 or more full-time employees at a single site of employment or 50-499 full-time employees which constitutes 33% of the employer's active workforce at that single site of employment.

WARN creates some exceptions to its 60-day notice rule, but those exceptions only apply to certain circumstances, specifically:

- Unforeseeable business circumstances exception, which applies when the closing or mass layoff is caused by unforeseen circumstances, such as the cancellation of a major order.
- Faltering company exception (for plant closings), which applies when a company is trying to secure capital or business in an effort to postpone or avoid a shutdown and providing notice of a plant closing could jeopardize the company's ability to secure capital or business.
- Natural disaster exception, which applies when a plant closing or mass layoff is the direct result of a natural disaster such as a storm, earthquake, or other act of nature.

Though case law is fairly limited on the application of these exceptions, some recent court opinions have offered additional insight. For example, in August 2022, a West Virginia federal court analyzed the faltering company exception and provided two key takeaways for employers.

First, the Court stressed that prior attempts to secure additional capital alone is not sufficient to qualify for the "faltering company" exception. Instead, an employer must demonstrate that, at the time the 60-day notice would have been required under WARN, it was actively seeking capital that was realistically obtainable and (if obtained)

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would have been sufficient to avoid or postpone the shutdown. The employer must also have reasonably and in good faith believed that sending the 60-day notice would have precluded it from obtaining the financing. **Second**, the Court found the employer failed to provide a brief statement of the reason for reducing the notice period, a requirement to claim any of the exceptions to WARN. For this additional reason, the employer could not take advantage of the "faltering company" exception.

With respect to the natural disaster exception, the Fifth Circuit recently ruled that this exception does not cover infectious diseases, such as COVID-19, which was a frequently discussed issue especially at the height of the COVID-19 pandemic. ? Notably, the Supreme Court subsequently denied certiorari and refused to review this decision, leaving intact the Fifth Circuit's decision adopting a narrow view of the natural disaster exception.

Importantly, even if one of these exceptions does apply, all of them require the employer to provide as much notice as is practicable.

If WARN is triggered, employers must comply with the specific notice requirements under WARN, including:

- providing notice to affected employees, representatives of affected unionized employees, the state or entity ?designated by the state to carry out rapid response activities, and the chief elected ?official of the unit of local government where the closing or layoff will occur;? ? and
- providing the specific information required for each category of affected individuals (*e.g.*, whether the planned action is expected to be ?permanent or temporary, the expected date when the plant closing or mass layoff will ?commence, and the expected separation date, among other things).

Employers should also be aware that many states, including California, New York, and Illinois, have their own notice requirements (commonly referred to as "mini-WARN Acts") in addition to the requirements of WARN. Such requirements may include longer notice periods, mandate group health insurance coverage, and impose their own set of obligations in addition to, or different from, WARN.

Because of the different exceptions to, and applicable notice requirements under, WARN, employers should be mindful of their obligations with respect to mass layoffs and plant closures and consult with counsel for guidance.

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