LEGAL UPDATES

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Department of Labor Issues Guidance on WARN Act Notices for Plant Closings and Mass Layoffs During COVID-19

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The Department of Labor (DOL) recently issued guidelines on the federal Worker Adjustment and Retraining Notification (WARN) Act as a result of pandemic-related employee furloughs and layoffs. As employers develop return-to-work strategies, they may be unable to recall or re-hire all workers who have been furloughed or laid off. The inability to recall workers may require employers to provide notice under the WARN Act, especially if employers opted to forego WARN notice when initially implementing furloughs based on a reasonable belief that the furlough would last six months or less. The key provisions of the WARN Act that employers should consider as they assess return-to-work strategies are discussed below.

What is the WARN Act?

The WARN Act requires employers to provide employees with at least 60 days' written notice of "plant closings" and "mass layoffs." The purpose of the advance notice is to provide the employees with transition time and enable them to find alternative employment or to enter a skills training program.

Under the WARN Act, a **mass layoff** is a reduction in force within a single site of employment that results in an "employment loss" during any 30-day period for either (1) 50-499 employees that represent 1/3 of the total active workforce at the single site, or (2) 500 employees or more.

A **plant closing** is the permanent or temporary shutdown of a single employment site (or even one or more facilities or operating units within a

single site of employment) if the shutdown results in an employment loss during any 30-day period for 50 or more employees.

Part-time employees who work fewer than 20 hours/week and employees who have been on the job for less than six months are not counted when determining whether the obligation to provide WARN notice has been triggered.

Importantly, an **employment loss** is (1) an employment termination, other than for cause or due to voluntary departure or retirement; (2) a layoff exceeding six months; or (3) a reduction in hours of work of individual employees of more than 50% in each month of any six-month period.

How are employees that are affected by an employment loss counted?

To determine whether WARN notice obligations are triggered, employers must track the number of employees experiencing an employment loss within a 30-day rolling period. Employers must also track employment losses that occur during a 90-day rolling period. This is because an employer must also give notice if the number of employment losses which occur during a 30-day period fails to meet the threshold requirements of a plant closing or mass layoff, but the number of employment losses for two or more groups of workers, each of which is less than the minimum number needed to trigger notice, reaches the threshold level during any 90-day period. Employment losses within any 90-day period will count together toward WARN threshold levels, unless the employer demonstrates that the employment losses during the 90-day period are the result of separate and distinct actions and causes.

Who is a covered employer?

Covered employers are business entities that employ 100 or more full-time workers or 100 or more full-time and part-time workers who work at least a combined 4000 hours per week excluding overtime.

When must notice be given under the WARN Act?

The WARN Act notice requirements are triggered when an employer orders a mass layoff or plant closing. Unless an exception applies, employees must receive notice with the information specified in the WARN Act and its regulations at least 60 days before experiencing an employment loss.

When should an employer give WARN Act notice to employees currently on layoff or furlough?

During the COVID-19 pandemic, many employers have laid off or furloughed employees with the

intention of bringing them back to work in six months or less. Because a layoff lasting six months or less is not an "employment loss" under the WARN Act, the DOL's recent guidance confirms that these employers were not required to provide WARN Act notice at the time of the initial layoff or furlough. However, as employers continue to evaluate their ability to recall previously laid off or furloughed workers, they should consider whether the layoffs will be extended beyond six months and/or whether they will be forced to separate some or all of the employees who they previously anticipated recalling.

If a layoff is extended beyond six months due to business circumstances not reasonably foreseeable at the time of the initial layoff, the WARN Act requires notice when it becomes reasonably foreseeable that the extension is required. Accordingly, as soon as employers realize that they will be extending a furlough or layoff beyond six months, they should conduct a WARN Act analysis to determine whether the number of employees laid off for six months or more triggers notice requirements. Similarly, if an employer realizes that it will have to terminate the employment of individuals currently on furlough, it should conduct a WARN analysis before doing so.

Does an exception to the WARN Act notice requirements apply?

There are a few, very limited, exceptions to the 60-day notice requirement of the WARN Act. In its recent guidance, the DOL focuses on the unforeseeable business circumstances exception for layoffs and furloughs related to COVID-19.

The **unforeseeable business circumstances exception** permits employers to provide less than 60 days' notice when a plant closing or mass layoff is caused by business circumstances that are not reasonably foreseeable at the time the 60-day notice would have been required.

According to the DOL, the "foreseeability" component of the exception requires a sudden, dramatic and unexpected action or condition outside the employer's control, including an "unanticipated and dramatic major economic downturn…or a government ordered closing of an employment site that occurs without notice." The burden of proof rests with the employer and focuses on the employer's business judgment. "The employer is required to exercise such commercially reasonable business judgment as would a similarly situated employer in predicting the demands of a particular market."

Employers making the difficult decision to reduce their workforces due to the unanticipated economic impact of COVID-19 may be able to rely on this exception to provide less than 60 days' notice to impacted employees. If an employer provides less than 60 days' advance notice of a closing or layoff and relies on this exception, the employer still is required to give as much notice as possible to employees. In addition to the other required information, the employer also must include a brief statement of the reason for providing less than the 60 days' required notice.

As lockdowns for some regions or some businesses persist, it is conceivable that the **faltering company exception** also may apply to some employers. Under this exception, a faltering company is not required to give notice of an anticipated plant closing when it is actively seeking capital or business, which, if obtained, would avoid or postpone the plant closing, and the company reasonably believes the advance notice would impair its ability to obtain the capital or business. This exception is narrowly construed and may be cumbersome for employers to prove. Thus, it is recommended that any company seeking to rely on this exception consult with legal counsel before doing so.

Can WARN notices be emailed?

The DOL's recent guidance confirmed that email is an acceptable form of delivery of the WARN Act notice to employees if the email address is specific to the individual employee and the notice otherwise complies with all written notice requirements of the WARN Act and its regulations. Different notice must be given to the state dislocated worker unit and to the chief elected official of the unit of local government where the mass layoff or plant closing will occur. If applicable, separate notices also must be given to bargaining representatives.

Contact us

If you have questions about your obligations under the WARN Act or under state mini-WARN Acts, contact Barbara Grandjean, Brittany Falkowski or your Husch Blackwell attorney.

Tracey Oakes O'Brien, Knowledge Manager, is a co-author of this article.

COVID-19 Return-to-Work Resource

For the many businesses that partially or completely shuttered their on-site operations due to government-mandated COVID-19 orders, transitioning employees back to the workplace is an unprecedented and complex endeavor. Husch Blackwell's Return-to-Work Resource Center provides best practices, answers to common questions and potential issues to consider.