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BUYING TROUBLE

WARN Requires Employers to Give Employees Advance Notice of Mass Layoffs and Plant Closings

Given the current economic climate, many employers are finding it necessary to cut costs, which often includes cutting jobs. If an employer is experiencing more dire financial circumstances, the employer may decide to eliminate a large number of employees in a short time period. Before laying off employees, however, employers should keep in mind that federal law, specifically the Worker Adjustment and Retraining Notification Act ("WARN"), requires that the employer provide the affected employees with at least 60 days advance notice for certain types of layoffs.

An employer is covered by WARN if it has 100 or more employees. In counting employees, an employer need not count those employees who have worked less than 6 of the last 12 months for the employer or who work an average of less than 20 hours per week. WARN applies to private for-profit and non-profit employers, as well as certain public and quasi-public employers.

WARN requires a covered employer to provide at least 60 days advance notice of a covered "plant closing" or "mass layoff." The notice is to be provided to affected employees, the labor union, if applicable, the State dislocated worker unit and an appropriate unit of local government. The Act defines a plant closing as the shutting down of an employment site or one or more operating units at an employment site in which 50 or more employees lose their jobs within a 30 day period. A mass layoff is an employment loss at an employment site, other than a plant closing, during any 30 day period affecting 500 or more employees or between 50 and 499 employees if the number of employees laid off constitutes at least 33% of the employer's active workforce at that employment site. Based on these definitions, an employer will be obligated to comply with WARN if it eliminates a specific department or if it reduces headcount across departments, provided the numerical thresholds are met.

WARN may also be triggered by aggregating all of the layoffs made or planned within a 90 day window. In other words, if an employer shuts down two separate departments at a single site of employment within a 90 day period, the two separate plant closings must be added together to determine if WARN applies. If the second department closure causes the total number of jobs lost to rise above the WARN threshold, then the employer will be expected to provide the required WARN notice to the employees terminated in the first round of layoffs as well as the second. Thus, an

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employer that plans to implement a rolling series of layoffs must project the total of future layoffs to determine if it should provide employees affected by the first layoff with WARN notice.

WARN does provide a few exemptions that excuse an employer from providing the full 60 days notice. Notice is not required when an employer closes a temporary facility or when a facility closes after completion of a project and the employees were hired with the understanding that their employment would end at the end of the project. An employer also may be excused from providing notice to union employees who are on strike when the strike causes the plant closing or mass layoff, although nonunion employees laid off in the same layoff would be entitled to receive notice.

Employers also may provide less than 60 days notice if they meet the requirements of the faltering company or unforeseeable business circumstances exceptions to WARN. Under the narrow faltering company exception, an employer can be excused from giving a full 60 days notice if providing such notice would jeopardize the employer's efforts to secure new capital or business to keep the company running. This particular exception applies only to plant closings. The unforeseeable business circumstances exception excuses an employer from providing the full 60 days notice for either a mass layoff or a plant closing when the layoffs result directly from a business occurrence that the employer could not have reasonably anticipated, such as the abrupt closure of a major supplier. WARN also excuses an employer from providing 60 days notice where a closing or layoff results directly from a natural disaster, such as a flood, earthquake, drought or storm. In each of these situations, the employer bears the burden of proving that the condition exists and must provide as much notice as is practicable. An employer who fails to properly comply with the WARN Act is liable for backpay and benefits for each aggrieved employee for up to 60 days.

Determining if WARN applies to a planned layoff or office closure can be a complicated process. In addition, certain states have similar but not identical provisions requiring an employer to provide advance notice of layoffs to affected employees.



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