CLIENT ALERTS & INSIGHTS

Benesch COVID-19 Resource Center: Tips for Employer Compliance with WARN Act during the Coronavirus Pandemic

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Due to the vast impact of the COVID-19 pandemic on every facet of life, many employers have considered reducing hours or closing worksites in order to withstand the devastating economic slowdown. The pandemic has especially interfered with employers that must utilize physical worksites in order to operate, including manufacturers, retail businesses, and construction businesses. It has become apparent that the duration and impact of the pandemic will be unpredictable. Employers should take precautionary steps now in order to comply with the federal Worker Adjustment and Retraining Notification (WARN) Act and applicable state "mini-WARN" Acts.

Notification Obligations and Employer Coverage Requirements

The WARN Act requires covered employers to provide at least 60 days' advance notice of a mass layoff or plant closing. A mass layoff occurs when, at a single site of employment, 50-499 full time employees are laid off and the layoffs constitute 33% of the employer's total active workforce at the site of employment. A mass layoff also occurs if 500 or more employees are laid off at a single site of employment. A plant closing occurs when an employer permanently or temporarily shuts down a single site of employment, or one or more facilities or operating units within a single site of employment, and 50 or more full-time employees experience an employment loss. If there are multiple employment losses occurring during a 90-day period that separately are insufficient to trigger coverage, those multiple employment losses will be combined to determine whether the aggregate employment loss meets the minimum thresholds triggering the WARN Act. If the multiple employment losses have truly separate and distinct causes, they will not be combined.

An employment loss occurs if there is:

- An employment termination, other than a discharge for cause, voluntary departure, or retirement;
- A layoff exceeding six consecutive months; or
- A reduction in hours of more than 50% during each month of any six month period.

Notably, a layoff that lasts less than six months is not an "employment loss" under the WARN Act and would not trigger notification obligations even if it otherwise exceeds the thresholds described above. Thus, an employer seeking for relief from the effects of COVID-19 would not trigger the WARN Act by implementing a short-term layoff and recalling enough employees to get under the thresholds prior to the passage of six months.

Employers are covered under the WARN Act if they employ at least 100 full-time employees or 100 or more employees, including part-time employees who, in the aggregate, work at least 4,000 hours per week. An employee is considered a full-time employee under the WARN Act if that employee works more than 20 hours per week and has been employed for at least 6 out of the last 12 months.

When the above circumstances are present for a covered employer, the WARN Act requires an employer to provide at least 60 days' advance notice to all employees that will experience the employment loss (including any part-time employees). Employers that fail to provide the required notice may be liable for damages including back pay, benefits, and civil penalties for each affected employee for each day of deficient notice. Litigation may also involve an award of attorneys' fees to the plaintiffs.

Exceptions from Notification Requirements

An employer may order a plant closing or mass layoff with less than 60 days' advance notice if the plant closing or mass layoff is caused by (a) business circumstances that were not reasonably foreseeable as of the point in time at which notice would have been required or (b) a natural disaster. An employer relying on one of these exceptions must provide notice as soon as practicable and must provide a brief description of the reasons for reducing the statutory notice period. An unforeseeable business circumstance is caused by some sudden, dramatic and unexpected action or condition outside the employer's control. There is no legal precedent establishing whether a virus or pandemic constitutes an unforeseeable business circumstance, natural disaster or physical calamity. An employer may reasonably take the position that the COVID-19 pandemic constitutes an unforeseeable business circumstance based upon the definition and plain meaning of the term.

In certain situations, mass layoffs and plant closings may occur in order to comply with state or local executive orders prohibiting or limiting the operations of certain businesses. Employers may consider asserting that the government, rather than the employer, ordered any plant closing or mass layoff that may occur. The employer accordingly will not be subject to the WARN Act's requirements because the layoffs or closure was not employer-initiated.

Decisions Regarding Workforce Management

The decision to lay off a large portion of an employer's workforce is a difficult one. In lieu of layoffs, some employers may consider asking their workforce to voluntarily take vacations, accept reductions in pay, work fewer hours, voluntarily furlough, or accept voluntary termination packages. Depending on the circumstances, employers may be able to use these methods of workforce management in order to avoid employment losses covered by the WARN Act.

Whether or not these measures result in an employment loss covered under the WARN Act, employers will still need to consider compliance with other laws. Under the Fair Labor Standards Act, employers must pay non-exempt employees only for actual hours worked. If a non-exempt employee is working remotely, it is extremely important for the employer to require that employee to track all hours worked and report them accurately to the employer to ensure wages and overtime, if applicable, are properly recorded and paid. If an exempt employee performs any work during a particular workweek, the employer is obligated to pay the exempt employee for that workweek. Work can include remote work performed away from the employer's premises or outside normal

working hours. Also, certain employer actions regarding reductions in pay or reductions in hours could cause employees to lose their exemption from FLSA coverage.

State "mini-WARN" Acts

Several states have their own "mini-WARN" Acts. These states include Alabama, California, Connecticut, Georgia, Hawaii, Illinois, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New York, Oregon, Pennsylvania, Tennessee, Washington, and Wisconsin. The requirements under each state mini-WARN Act can differ from the federal law's requirements. Employers operating in these states should seek counsel in order to ensure compliance with state law.

Note on Determining Coverage under Families First Coronavirus Response Act

The recently enacted Families First Coronavirus Response Act ("FFA") will affect how businesses manage their workforce. The FFA covers businesses with fewer than 500 employees, and it imposes obligations to provide certain paid leave to covered employees. Those employers unsure about whether their business is covered under the FFA, especially those with commonly-owned or other affiliated businesses, should remain consistent with the manner in which they have characterized their business for the purposes of the Family and Medical Leave Act ("FMLA"). In counting employees for the purposes of determining whether an employer's total workforce is below the 500 employee maximum, employers that have commonly-owned or other affiliated businesses should use the FMLA's integrated enterprise test. Factors considered in determining whether two or more employers are an integrated enterprise are (1) common management, (2) interrelation of operations, (3) centralized control of labor relations, and (4) degree of common ownership or financial control. No single factor is determinative; the totality of the circumstances are considered. If two or more employers are an integrated enterprise, their workforces will be combined to determine the employee headcount and any corresponding coverage under the law. In order to be consistent, an employer that ordinarily resists integrated enterprise classification should not now avail itself of such a classification in order to avoid FFA obligations.

Employers should consult legal counsel before conducting any layoffs or workforce reductions. If you have any questions related to the WARN Act or other employer obligations, please contact a member of the Benesch Labor & Employment Practice Group.

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Please note that this information is current as of the date of this Client Alert, based on the available data. However, because COVID-19's status and updates related to the same are ongoing, we recommend real-time review of guidance distributed by the CDC and local officials.