Employers Facing COVID-19 Closures Should Remain Mindful of WARN Act Requirements

Posted on March 20, 2020

In the face of mandatory closures and temporary shutdowns across the country, employers making hard decisions about how to deal with the continuing spread of COVID-19 should remain mindful of potential notice requirements regarding layoffs and temporary reductions under the Worker Adjustment and Retraining Notification Act of 1988 ("WARN Act"). While each situation should be reviewed on its own, for many employers, the WARN Act's obligations should not be an obstacle to personnel reductions employers must make in response to COVID-19. Temporary layoffs or reductions in hours of less than six (6) months do not generally fall within the definition of an employment loss under WARN. Additionally, WARN was drafted with contingencies for natural disasters and unexpected business circumstances which do not allow for an advance notice of a closure or layoff.

What is the WARN Act?

Employer who employ 100 or more employees (not including part-time employees) fall under the WARN Act's requirements. Generally, the WARN Act **requires applicable employers to provide sixty (60) days' advance notice** to affected workers (or their representatives) of a **plant closing** or a **mass layoff**. Although the WARN Act uses the term "plant closing," its obligations are not limited to traditional plants or factories. A "plant closing" means a temporary or permanent shutdown of a single site of employment that impacts 50 or more full-time employees. A "mass layoff" occurs when there a site is not fully shutting down, but where significant number of full time employees (500 or more employees, or 50 to 499 employees if they make up at least thirty-three percent (33%) of the employer's active workforce) are being laid off or having their hours reduced by more than fifty percent.

The WARN Act is only implicated where those employees (1) are terminated (other than for a discharge for cause, a voluntary departure, or retirement); (2) subjected to a layoff exceeding six months; or (3) subjected to a reduction in their hours of work of more than 50% in each month of a six-month period. Under normal circumstances, failure to properly notify the impacted employees can subject an employer to steep damages, including back pay for impacted employees for each day of violation and penalties of up to $500 for each day of violation.

The Impact of COVID-19 on WARN Act Requirements

While the WARN Act's requirements continue to apply in the face of COVID-19 – meaning that covered employers are still generally obligated to provide notice of a mass layoff or plant closing – employers should remember that the WARN Act's notice requirements apply only if the layoffs and/or closures last longer than six months. In practice, this means that the Act's burdens may very well end up being less onerous for many employers than they may initially expect.

Additionally, the Act provides for certain exceptions to the notice requirement. One of those exceptions is for "unforeseeable business circumstances," which the U.S. Department of Labor says applies "to closings and layoffs that are caused by business circumstances that were not reasonably foreseeable at the time notice would otherwise have been required. Importantly, an employer relying on this exception must still give as much notice as practicable and ultimately bears the burden of proof in showing that the unforeseeable business

circumstances exist. Given the unprecedented nature of the COVID-19 outbreak and international response, many legal observers will be watching how the Courts handle this issue in the future.

Best Practices

Given the unprecedented mandatory shutdown of many business, such as restaurants, and the temporary closing of many other facilities, employers will need to be mindful of how they proceed with layoffs and closures. To the extent possible, employers should still strive to give their employees as much advance notice as possible – even though 60 days may not be possible in many situations. Additionally, to the extent that employers can limit layoffs, closures, and reductions to less than six months, they will likely avoid many of the WARN Act's requirements altogether.

If you are considering a temporary layoff, closure, or reduction in employee's hours – or if you have other questions about the WARN Act, or navigating the law during the COVID-19 outbreak – please contact Denis Jacobson at djacobson@tuggleduggins.com or (336) 271-5242, Ross Hamilton at rhamilton@tuggleduggins.com or (336) 271-5279, or Daniel Stratton at dstratton@tuggleduggins.com or (336) 271-5240. Please also follow our Twitter account – @TuggleDuggins – at https://twitter.com/TuggleDuggins for continuing, up-to-date information related to navigating the law during the COVID-19 outbreak.

100 North Greene St. Suite 600
Greensboro, NC 27401

P.O. Box 2888
Greensboro, NC 27402

Phone: 336.378.1431
Fax: 336.274.6590