The WARN Act and COVID-19

Amid “shelter in place” and “work from home” orders, employers have had to scramble to adjust to the coronavirus reality. In many cases, they have had to make hard decisions to layoff large numbers of employees. Depending on the scope of the layoffs, the Worker Adjustment and Retraining Act (WARN) requires covered employers to give affected workers 60 days advanced notice. Obviously, current circumstances are moving faster than that timetable.

In the old, non-coronavirus world, employers would have to issue a WARN Act notice for a “plant closing” or “mass layoff.” The WARN Act covers any employer that has 100 or more full-time employees or has 100 or more employees, including part-time workers, whose total work amounts to at least 4,000 hours per week, not counting overtime.

The ACT defines a “plant closing” as a temporary or permanent shutdown that results in 50 or more full-time employees losing their jobs. A “mass layoff” is a workforce reduction that is not the result of a plant closing but causes employment loss at a site for any 30-day period for one-third—but not less than 50—of the full-time workers, even if the plant remains open. If 500 or more full-time employees are affected in the layoff, the one-third requirement does not apply. Employers are only required to send notices if the event is expected to last six months or longer.

Of course, employers have no real way of knowing how long workers are going to be off. Further, the WARN Act offers a few exceptions that can allow employers to breathe easier. Employers are exempted from WARN Act requirements if faced with “unforeseeable business circumstances.” The current situation certainly applies. Additionally, there is a “government action” exception to the Act as well. So employers in areas under mandatory orders to close are covered by this exception.

Several states have their own WARN Acts. For example, California’s WARN Act (Cal-WARN) applies to companies with 75 or more employees. Employers should confer with counsel to determine whether they must also obey a state law.

California Governor Newsom recently announced a suspension of Cal-WARN notice requirements. Unlike the federal WARN, Cal-WARN does not contain the “unforeseeable business circumstances” exception.

Employers are not necessarily completely off the hook. Employers large enough to be covered by either the federal or state WARN Acts that believe the layoffs or closing will be longer than six months should send notices to:

Each employee affected by the closing or mass layoff (or, if union workers are affected, to the designated representative).

- The state’s dislocated worker unit, which provides training and assistance to employees who have lost their jobs.
- The appropriate local government official (usually the mayor or city manager).

In this case, employers should include a statement explaining that the 60-day notice requirement was not met

by either “unforeseeable business circumstances” or “government action,” depending on which applies. If both apply, state that also. The notices should include:

- Name and address of the employment site where the action will occur.
- Name and phone number of a company official to contact for further information.
- A statement as to whether the planned action is expected to be permanent or temporary and if the entire facility is to be closed.
- Job titles of positions to be affected and names of workers currently holding those jobs.

Employers should also be working closely with counsel right now. The WARN Act can be tricky, especially in these times. Your counsel can tell you whether you are subject to a Mini-WARN and if your governor has suspended or modified it as California has done.