Employer Update

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WARN Act During COVID-19: When Predicting Business Health is Uniquely Murky

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In This Issue

The COVID-19 pandemic and resulting government-mandated shutdowns of non-essential businesses have required many employers to confront difficult questions about the length of layoffs amidst an environment of unique uncertainty regarding both the duration and depth of the crisis. Although events that lead to layoffs are always fraught with some future uncertainty, the COVID-19 pandemic is unprecedented in myriad ways, including the opaqueness of a business's ability to anticipate its near and intermediate term operations, finances, and personnel. This article highlights some of the different considerations for employers under WARN where there exists greater than normal uncertainty about the future work environment.

The federal Worker Adjustment and Retraining Notification Act (the "WARN Act") requires covered employers to provide 60 days' advanced notice to affected employees, unions, and certain governmental entities before engaging in a "mass layoff" or "plant closing." 29 U.S.C. § 2102(a); 20 C.F.R. § 639.2. In order to constitute a "mass layoff," at least 50 full-time employees equaling at least one-third of the workers at a single site of employment must experience an "employment loss." 29 U.S.C. § 2101(a)(3); 20 C.F.R. § 639.3(c). Similarly, a "plant closing" requires at least 50 full-time employees at a single site of employment to experience an "employment loss" in connection with the closing of the location or a "facility or operating unit" within the location. 29 U.S.C. § 2101(a)(2); 20 C.F.R. § 639.3(b). The WARN Act defines an "employment loss" to include "a layoff exceeding 6 months." 29 U.S.C. § 2101(a)(6)(B); 20 C.F.R. § 639.3(f)(1)(ii). *See also* Worker Adjustment and Retraining Notification, 54 F.R. 16042, 16047 (April 20, 1989) ("The Department notes that it interprets the statutory terms 'termination' and 'layoff' in section 3(a)(6) to be distinguishable and have their common sense meanings. Thus, for the purposes of defining 'employment loss,' the term 'termination' means the permanent cessation of the employment relationship and the term 'layoff' means the temporary cessation of that relationship."). In attempting to determine the circumstances under which layoffs caused by the COVID-19 pandemic require WARN Act notice, many employers face the difficult task of projecting whether a temporary layoff will last for more than six months. Multiple governmental authorities simultaneously offering different and shifting timelines for the end of mandated shutdowns because of new health data and other factors further compounds employers' difficulties in making such projections.

The Conservative Approach: Providing Standard WARN Act Notice

Employers certainly will reduce their risk of WARN Act liability amidst the COVID-19 pandemic by providing notice as early as possible *before* effectuating a temporary layoff that *may* extend for longer than six months. *See* Worker Adjustment and Retraining Notification, 54 F.R. 16042, 16049 (April 20, 1989) ("[A] prudent employer wishing to avoid potential liability would provide notice to the workers at least 60 days prior to their layoff *unless it is certain* that the layoff will not exceed 6 months.") (emphasis added). However, in the face of government-mandated shutdowns of non-essential businesses, many employers may not be in a position to wait 60 days before implementing such layoffs. In such circumstances, some employers may be able to rely upon the existence of "unforeseeable business circumstances," such as the government-mandated shutdowns or the COVID-19 pandemic more broadly, as a basis to provide less than 60 days' notice in advance of a "mass layoff" or "plant closing." Under the WARN Act, employers may point to an "unforeseeable business circumstance" as a defense to a claim of inadequate notice where business circumstances that were not "reasonably foreseeable" at the time notice would have been required caused the inability to provide timely notice. 29 U.S.C. § 2102(b)(2)(A); 20 C.F.R. § 639.9(b).

However, issuing a WARN Act notice at the commencement of a layoff may have adverse consequences for the employer. For example, customers and investors may not want to continue transacting business with employers about to undertake a significant layoff. Similarly, a layoff may negatively impact employee morale. For those employers who have reason to believe that the temporary layoff *may* last for less than six months, and thus no WARN Act notices would be required, issuance of a premature notice can lead to unnecessary and avoidable harm to the business. *See Smith v. Consolidation Coal Company/Island Creek Coal Co.*, 948 F.Supp. 583 (W.D. Va. 1996) (dismissing WARN Act claim as premature when employees who experienced a temporary layoff brought suit before six months had passed).

The Middle Approach: Providing Conditional WARN Act Notice

To mitigate the negative consequences of WARN Act notice and minimize possible liability under the WARN Act, employers should consider providing *conditional* WARN Act notice. *See in re AE Liquidation, Inc.*, 866 F.3d 515, 533 n.18 (3d Cir. 2017) (observing that "conditional notice may be a useful tool to help employers ensure that they have complied with the WARN Act in close cases . . ."); *Loehrer v. McDonnell Douglas Corp.*, 98 F.3d 1056, 1063 n.9 (8th Cir. 1996) ("To be sure, if the regulatory prerequisites to the issuance of conditional notice are satisfied, it seems that an employer would in most situations be well-advised to undertake notification in order to fend off the prospect of liability."). Under this approach, the notice states that the occurrence or non-occurrence of the "mass layoff" or "plant closing" is conditioned upon the occurrence or non-occurrence of an event that "will necessarily, in the normal course of business, lead to a covered plant closing or mass layoff less than 60 days after the event." 20 C.F.R. § 639.7(a)(3). Providing conditional WARN Act notice acknowledging only that a "mass layoff" or "plant closing" *may* potentially occur, rather than definitely will occur, may serve to blunt the adverse impact of such a notice on the business. However, an employer is permitted to give conditional notice *only* when there is a "definite" future event that will dictate whether the "mass layoff" or "plant closing" will occur.

As an example of when a conditional notice would be appropriate, the regulations explain that "if the non-renewal of a major contract will lead to the closing of the plant that produces the articles supplied under the contract 30 days after the contract expires, the employer may give notice at least 60 days in advance of the projected closing date which states that if the contract is not renewed, the plant closing will occur on the projected date." Similarly, the Department of Labor commentary on the regulations provide as another example that "conditional notice may be advisable" when a "referendum is scheduled to take

place to decide whether [a] utility should continue to operate [a nuclear power] plant." Worker Adjustment and Retraining Notification 54 F.R. 16042, 16059 (April 20, 1989). By contrast to the definite future events described in regulatory pronouncements, in *Pearce v. Faurecia Exhaust Systems, Inc.*, the court rejected the plaintiff's argument that his employer should have given conditional notice of a potential future bankruptcy filing by a major customer, holding that "the bankruptcy at issue here was not a 'definite' event, as required by 20 C.F.R. § 639.7" because the employer "was unaware of when . . . *or even if [bankruptcy] would happen*." 2012 WL 2884748, at *7-8 (S.D. Ohio July 13, 2012) (emphasis in original).

Amidst the COVID-19 pandemic, employers should consider whether the end of government-mandated shutdowns or the receipt of government stimulus loans, by a date certain, will dictate whether a "mass layoff" or "plant closing" will occur. Such "definite" events may serve as a basis for providing conditional WARN Act notice. However, if more open-ended or ill-defined considerations relating to the employer's finances will complicate this analysis, then the employer may not be able to provide conditional WARN Act notice.

That is not to say that an employer that is unable to provide conditional WARN Act notice is left without options to avoid liability. As stated above, an employer may still be able to invoke the "unforeseeable business circumstances" exception if its precarious financial condition is caused by business circumstances that were not "reasonably foreseeable" at the time notice would have been required. 29 U.S.C. § 2102(b)(2)(A); 20 C.F.R. § 639.9(b). In addition, an employer may also be able to invoke the "faltering company" exception, whereby it must show that "as of the time that notice would have been required[,] the employer was actively seeking capital or business which, if obtained, would have enabled the employer to avoid or postpone the shutdown and the employer reasonably and in good faith believed that giving the notice required would have precluded the employer from obtaining the needed capital or business." 29 U.S.C. § 2102(b)(1); 20 C.F.R. § 639.9(a). Variant facts and circumstances will dictate whether an employer can support such defenses, and thus whether an employer can rely upon such defenses will require careful investigation and documentation of the facts in each case.

The Aggressive Approach: Delaying WARN Act Notice

Employers unwilling to provide any WARN Act notice at the outset of a temporary layoff because the employer has reason to believe that the temporary layoff *may* last for less than six months run the risk of the layoff extending beyond this duration. In that situation, a future plaintiff with 20-20 hindsight may accuse the employer of failing to provide required notice in advance of a "mass layoff" or "plant closing." 29 U.S.C. § 2102(c); 20 C.F.R. § 639.4(b).

However, the WARN Act provides employers with a defense under these circumstances. An employer will face liability only for a temporary layoff that extends beyond six months if the extension beyond six months was "reasonably foreseeable" at the time notice would have been required. 29 U.S.C. § 2102(c); 20 C.F.R. § 639.4(b). If the extension beyond six months was not "reasonably foreseeable" at that time, the employer may avoid liability *if* it initially announces the estimated length of the temporary layoff as less than six months, *see e.g.*, *United Mine Workers of American Intern. Union v. Lehigh Coal and Navigation Co.*, 2006 WL 449214, at *3 (M.D. Pa. Feb 23, 2006), *and* thereafter provides WARN Act notice as soon as it becomes "reasonably foreseeable" that the temporary layoff previously expected to last less than six months will be extended beyond six months. 29 U.S.C. § 2102(c); 20 C.F.R. § 639.4(b). *See Michigan Regional Council of Carpenters v. Holcroft L.L.C.*, 195 F.Supp.2d 908, 913 (E.D. Mich., 2002) ("In most situations the employer would benefit under § 639.4(b) because it would be excused for having failed to give notice 60 days prior to the commencement of the layoff if the circumstances necessitating the extension of the layoff were reasonably unforeseeable."). While courts have not had occasion to define what "reasonably foreseeable" means in the context of a layoff extension, in the "unforeseeable business circumstances" context, courts have explained that

something is "reasonably foreseeable" when its occurrence was "probable," meaning that "the objective facts reflect that the layoff was more likely than not." *See e.g.*, *In re AE Liquidation, Inc.*, 866 F.3d 515, 530 (3d Cir. 2017).

For example, an employer may operate in a jurisdiction in which local officials have mandated the closure of non-essential businesses for three months but have guaranteed that the closure will be lifted after that period. The employer, which is planning on implementing a temporary layoff, does not provide any WARN Act notice and instead announces to its workforce that it expects the temporary layoff to last for three months. If the local officials later change course and extend the closure, the employer may reasonably argue that it was not "reasonably foreseeable" at the outset of the layoff that it would extend beyond six months. The employer must then provide WARN Act notice of the extension quickly after learning of the need for an extension in order to take advantage of the defense.

To illustrate the circumstances of when a layoff of longer than six months may be "reasonably foreseeable" at its outset, the Department of Labor commentary on the regulations provides an example in which the defense may not be available. The commentary explains that "if an employer shuts down for 5 months to retool his plant for a new product line and the retooling process takes longer than originally anticipated, and the employer has experienced similar delays in previous retooling, the employer may be liable under WARN for having failed to give notice 60 days before the shutdown was begun since the cause of the extension arguably was foreseeable." Worker Adjustment and Retraining Notification, 54 F.R. 16042, 16052 (April 20, 1989).

Oricella However, if an employer does not extend a temporary layoff that it initially expected to last less than six months, but rather, converts the layoff to a permanent employment termination, the employer may be unable to rely on the Section 2102(c) "reasonably foreseeable" defense concerning the extension of layoffs. *See Leeper v. Hamilton County Coal, LLC*, 939 F.3d 866, 870 (7th Cir. 2019) (implying that the § 2102(c) defense does not apply to a permanent "employment termination" because "the statute doesn't impose a duration requirement on 'employment termination,' which evokes an *event* rather than a *period*."); *see also Graphic Comms. Intern. Union, Local 31-N v. Quebecor Printing (USA) Corp.*, 252 F.3d 296, 299 (4th Cir. 2001) (holding that conversion of a temporary layoff into a permanent employment termination constitutes a distinct "employment loss" separate from the beginning of the layoff). Instead, the employer may need to rely on the "unforeseeable business circumstance" defense, which may be more difficult for the employer to prove. *See* Worker Adjustment and Retraining Notification, 54 F.R. 16042, 16052 (April 20, 1989) (suggesting that "the standard for foreseeability under [29 U.S.C. § 2102(c) and 20 C.F.R. § 639.4(b)] may be seen as *less exacting* than it is under the "unforeseeable business circumstances" exception of section 3(b)(2)(A) of WARN . . .) (emphasis added).

Employers who choose not to send WARN Act notice at the outset of a layoff because the employer has reason to believe that the temporary layoff *may* last for less than six months may be drawn into a factual dispute as to when the duration of the layoff became "reasonably foreseeable." In that case, a future plaintiff may seek to prove that the employer had reason to know at the outset of the layoff that it would extend for longer than six months.

Employer Advice

Employers considering engaging in temporary layoffs of an indefinite duration as a result of the COVID-19 pandemic should assess the likelihood of the layoffs extending beyond six months and the possible consequences of being second-guessed by future plaintiffs with 20-20 hindsight. Employers also should consider the possibility of adverse publicity, harm to employee morale, and of course, the scope of potential liability in the event of WARN Act non-compliance.

Providing notice 60 days before a temporary layoffs certainly provides employers with the best defense to a claim for violation of the WARN Act. Employers concerned about how providing WARN Act notice may affect their businesses should consider providing

conditional notice. However, conditional notice requires an employer to identify a "definite" future event that will trigger the "mass layoff" or "plant closing," thereby substantially narrowing the situations in which conditional notice would be permissible. For those employers unwilling to provide any notice because the employer has reason to believe that the layoff may last for less than six months, the employer should maintain contemporaneous records of the facts as it learns them and the bases for its decision-making. Such documentation will maximize the employer's ability to prove that the extension of the layoff for longer than six months was not "reasonably foreseeable" at the outset of the layoff.

Finally, employers also need to comply with state statutes similar to the WARN Act, as such statutes may require longer notice periods and/or are triggered by lower numbers of "employment losses" than the WARN Act. Employers should contact counsel to address state specific requirements that may exist.

Federal Trade Commission and Justice Department Issue Joint Statement on COVID-19 and Competition in U.S. Labor Markets

By Steven Bernstein and Lauren Morris

As individuals across the country are working on the front lines of the COVID-19 pandemic as essential service providers, the federal antitrust regulators announced that they are closely monitoring the activities of employers, staffing companies, recruiters, and others in order to protect against anticompetitive conduct that would disadvantage their workers. On April 13, 2020, the Antitrust Division of the Department of Justice (the "DOJ") and the Bureau of Competition of the Federal Trade Commission (the "FTC," and collectively the "Agencies") recognized in their Joint Statement on COVID-19 and Competition in U.S. Labor Markets that the spread of COVID-19 may require unprecedented cooperation among private businesses, individuals, and government entities. The Agencies, however, issued a strong warning that the pandemic is no excuse for anticompetitive conduct that harms workers, and the Agencies "are on alert" for such antitrust violations.

In the Joint Statement, the Agencies make clear that they are closely monitoring labor markets for potential anticompetitive activities involving employers, staffing companies, and recruiters, "such as agreements to lower wages or to reduce salaries or hours worked." The Agencies highlight in the Statement their track record of enforcement against anticompetitive conduct in labor markets, including: "unlawful wage-fixing and no-poach agreements, anticompetitive non compete agreements, and the unlawful exchange of competitively sensitive employee information, including salary, wages, benefits, and compensation data."

The Agencies also emphasize the civil and criminal sanctions available to address antitrust violations, such as the DOJ's authority to prosecute collusive agreements criminally, the FTC's authority to pursue civil actions even absent an agreement in cases such

as invitations to collude, and the civil sanctions available to both Agencies to challenge unilateral conduct that harms competition in a labor market. The Agencies make clear that they "will not hesitate to hold accountable" anticompetitive actors who prey on workers, and the Joint Statement provides contact information at the FTC and DOJ for those interested in lodging a complaint.

Key Takeaways

- This Joint Statement is consistent with the Agencies' commitment to "vigorously enforce the antitrust laws in labor markets" in recent years. (*See, e.g.*, prosecution of "naked," horizontal no-poach and wage-fixing agreements between competitors subjected to the *per se* framework, as opposed to the rule of reason, which can be found here.)
- Companies should ensure that their employees, particularly those individuals involved in hiring, recruiting, retention, or placement of workers, have received antitrust counseling and understand the consequences of illegal anticompetitive activities impacting workers.
- As the Joint Statement specifically expresses concern regarding the potential for competitive harm to doctors, nurses, first responders, and those who work in grocery stores, pharmacies, and warehouses, employers in these business areas should recognize that their activities during the pandemic may attract particularly close scrutiny from the antitrust agencies.

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