COVID-19 and Workforce Reductions: Federal and California WARN Act Considerations for Employers

March 23, 2020

Key Points

- Due to severe restrictions aimed at curbing the spread of coronavirus (COVID-19), some businesses are being forced to significantly reduce staff, and many will likely close altogether for at least some period of time.
- The federal WARN Act requires covered employers to provide 60 days' advanced notice before terminating or laying off employees in connection with a plant closing or mass layoff. However, there are three exceptions to the 60 days' notice requirement and two of these exceptions—for unforeseeable business circumstances and for faltering businesses—are likely to apply during the crisis that is unfolding from COVID-19.
- California has also relaxed its notice requirement in light of the COVID-19 crisis.

With federal, state and local officials taking increasingly drastic measures to slow the spread of COVID-19, many businesses are facing difficult decisions about what to do with their workforces. The challenges facing employers during this crisis are unprecedented. Guidance published by federal agencies is evolving rapidly as the crisis worsens, and state and local governments are imposing severe restrictions on business and personal activity in an effort to slow the spread of the virus (including complete lockdowns). Authorities are unable to predict with certainty when such restrictions will end. Many employers will be compelled to reduce the size of their workforces in the face of these challenges. Such reductions may trigger laws requiring advance notice to employees before they are terminated, laid off or have their hours reduced. Employers who ignore these laws risk legal challenges that could persist long after the pandemic ends.

The Federal WARN Act

The federal law governing notice to employees ahead of a reduction in force (RIF)—including both terminations and temporary layoffs—is the Worker Adjustment and Retraining Notification Act (WARN). WARN requires a covered employer[1] to provide written notice of at least 60 calendar days in advance of (1) a temporary or permanent "plant closing," or discontinuance of an operating unit, that affects 50 or more full-time

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employees[2]; (2) a "mass layoff" of more than 500 full-time workers at a single site of employment during a 30-day period that is expected to exceed 6 months; (3) a RIF of between 50 and 499 full-time workers at a single site of employment during a 30-day period, if the RIF affects at least 33 percent of the employer's active full-time work force at the site and is expected to exceed 6 months; or (4) extension of a temporary layoff affecting the number of employees in (2) or (3) at a single site of employment that was originally expected to last 6 months or less.[3]

However, an employer need not provide the full 60 days' notice if the RIF is caused by unforeseeable business circumstances, a natural disaster or if a site of employment closes after a faltering company fails to obtain capital or business necessary to maintain operations.[4] As explained below, the exceptions for unforeseeable business circumstances and faltering companies are most likely to apply during the current crisis.[5]

The Exception for Unforeseeable Business Circumstances

Under the unforeseeable business circumstances exception, employers are relieved from the obligation to provide a full 60 days' notice if the RIF is caused by a "sudden, dramatic, and unexpected action or condition outside of the employer's control" such as a "dramatic major economic downturn" or "[a] government ordered closing of an employment site that occurs without prior notice."[6] This exception likely applies to many RIFs necessitated by the COVID-19 crisis. However, employers relying on this exception should proceed with caution.

- *First*, the COVID-19 crisis is unprecedented, making certain prior interpretive authority (e.g., case law and U.S. Department of Labor guidance) potentially less applicable.
- *Second*, the unforeseeable business circumstances exception is an affirmative defense (i.e., the employer bears the burden of proving that it applies). A RIF that currently seems to have been unforeseeable may be judged differently with the benefit of hindsight. Indeed, the strength of this defense may weaken as a company is able to defer a RIF despite pressure on its operations. Furthermore, a legal challenge under WARN can take years to litigate, and a final determination of whether the exception applies may be made when the pandemic is no longer front of mind.
- *Third*, even if the exception applies, advanced notice is still required. The employer must provide as much notice as is practicable and explain why affected employees are receiving less than 60 days' notice.
- *Fourth*, multiple workforce reductions otherwise not covered by WARN that occur within 90 days of each other must be aggregated unless they are the result of separate and distinct causes.[7] If the number of affected employees triggers WARN when aggregated, notice is then owed to *all* of them. Because the unforeseeable business circumstances exception still requires as much notice as is practicable, an employer taking a one-step-at-a-time approach to terminations or layoffs will still need to determine when the need for potential additional RIFs is reasonably foreseeable and who may be impacted. In other words, employers anticipating multiple RIFs otherwise not covered by WARN must look ahead and assess whether WARN will apply when all such RIFs are aggregated.

- *Fifth*, while WARN generally does not apply to a temporary layoff of 6 months or less, it does apply to a layoff that is later extended.[8] Notice is required for the initial layoff if such an extension beyond six months is reasonably foreseeable from the start; otherwise, notice is only required once changed circumstances necessitate an extension.[9] At the moment, it is difficult to predict how long companies will experience financial pressure and shuttered locations caused by the impact of COVID-19. Thus, an employer should carefully consider whether a furlough or layoff can realistically be expected not to exceed 6 months.
- *Sixth*, state or local laws may impose more stringent advanced notice obligations on an employer than those imposed by WARN or may cover RIFs not subject to WARN. Many states, and even some localities, have their own "mini-WARN" laws, which do not always track WARN. However, some states already have relaxed their WARN laws or clarified their standards in response to the pandemic. For example, as discussed in detail below, California will recognize a new exception for RIFs caused by the COVID-19 crisis that tracks the federal WARN Act. Likewise, New York's Labor Department published a statement on its website to clarify that a similar exception to its notice law is likely to apply under the circumstances caused by COVID-19.[10]

The Exception for a Faltering Company

A company actively seeking capital or new business which would allow it to avoid the closing of a facility or the discontinuation of an operating unit for a reasonable period is excused from providing 60 days' notice *if* the company also reasonably believes that such notice would preclude its ability to obtain necessary capital or business.[11] This exception is intended to remove a legal obstacle to finding lifelines that will save certain operations, but it does *not* apply to other types of layoffs.[12] Nor may the employer focus solely on the financial condition of the facility or division; its actions must be based on a company-wide need for additional capital or business.[13]

Of course, what is reasonable will be fact-dependent and in the eye of the beholder, complicating a prospective determination of whether a failure to provide notice would be "reasonable" under WARN. Furthermore, the employer must be able to demonstrate that there was a realistic opportunity to obtain necessary financing or business and that the financing or business would have been sufficient to defer the RIF.[14]

A number of the considerations discussed with respect to the exception for unforeseeable business circumstances apply with equal force to the faltering company exception. For example, like the exception for exceptional circumstances, the faltering company exception is an affirmative defense, and it does not excuse lack of notice altogether. Moreover, this exception is to be "narrowly construed."[15] However, WARN risk should be weighed against the potential harm that notice may pose to efforts to stave off a RIF.

The Exception for a Natural Disaster

WARN provides for a third exception from the 60-day notice requirement: a RIF that is the direct result of "any form of a natural disaster."[16] WARN regulations provide a non-exhaustive list of such disasters that includes floods, earthquakes, droughts, storms, tidal waves, tsunamis and "similar effects of nature."[17] A public health emergency caused by the spread of an infectious disease is not listed and does not fit neatly

within this exception. Yet the spread of COVID-19 is an effect of nature, which, over a short period of time, is causing substantial harm to the global economy. It remains to be seen if, and under what circumstances, COVID-19 will be accepted as a natural disaster for purposes of WARN.

California Relaxes Notice Requirement for State WARN Act

In California, businesses with more than 75 employees must give workers 60 days' notice before a mass layoff, relocation or termination. However, on March 17, 2020, California Gov. Gavin Newsom issued Executive Order N-31-20 (the "Order") suspending the normal notice requirements mandated in California's WARN Act for mass layoffs.

Because the COVID-19 pandemic has forced employers to "close rapidly without providing their employees the advance notice required under California law," the Order temporarily suspends the notice requirements and related statutory and civil penalties contained in Labor Code sections 1401(a), 1402, and 1403 for employers who impose a mass layoff, relocation or termination "caused by COVID-19-related 'business circumstances that were not reasonably foreseeable as of the time that notice would have been required.'"[18] This language mirrors federal WARN. Prior to the Order, California exempted only layoffs caused by a "physical calamity" or "act of war."[19]

Although the Order temporarily provides relief from the 60-day requirement, it still requires employers to issue prior notice of a mass layoff, relocation, or termination and it imposes other requirements consistent with federal WARN.

First, employers are required to give employees "as much notice as is practicable" and provide employees with a brief statement explaining the "reason for reducing the notice period."[20]

Second, the employer must provide notices to "the California Employment Development Department, the local workforce investment board, and the chief elected official of each city and county government within which the termination, relocation, or layoff occurs" pursuant to Labor Code Section 1401(a)-(b).[21]

Lastly, notices given after March 17, 2020, must contain the following statement: "If you have lost your job or been laid off temporarily, you may be eligible for Unemployment Insurance (UI). More information on UI and other resources available for workers is available at labor.ca.gov/coronavirus2019."[22]

The relief provided by the Order is retroactive to March 4 and will be effective "through the end of this emergency."[23] The Order also directs California's Labor and Workforce Development Agency to issue public guidance on how the Order will be implemented.[24]

[1] WARN applies to employers with (a) 100 or more employees, excluding part-time employees, or (b) 100 or more employees, including part-time employees, who in the aggregate work at least 4,000 hours per week, exclusive of overtime hours. *See* 20 C.F.R. § 639.3(a).

[2] By "full-time employees," we mean employees who are not "part-time" as defined by WARN. Employees who work an average of fewer than 20 hours per week, or who have been employed for fewer than 6 of the 12 months preceding notice (even if full-time), are "part-time" employees under WARN. *See id*. at § 693.3(h).

[3] *See id*. at §§ 639.3(b), (c), (f); 639.4(b). Note that, under WARN, full-time employees whose hours are reduced by more than 50 percent for each month in a 6-month period are "affected employees" entitled to notice. *Id*. at § 639.3(e), (f)(1).

[4] *Id*. at § 639.9.

[5] We do not comprehensively address all of WARN's requirements in this alert. Employers should consult with counsel concerning all obligations under WARN, including what information must be included in a WARN notice.

[6] *Id* at § 639.9(b).

[7] *Id*. at § 639.5(a)(1)(ii).

[8] *Id*. at § 639.3(f).

[9] *Id*. at § 639.4(b).

[10] *See* https://www.labor.ny.gov/workforcenypartners/warn/warnportal.shtm.

[11] *See* 20 C.F.R. § 639.9(a).

[12] *Id*.

[13] *Id*. at § 639.9(a)(4).

[14] *Id*. at § 639.9(a)(2)–(3).

[15] *Id*. at § 639.9(a).

[16] *Id*. at § 639.9(c).

[17] *See id*. at § 639.9(c)(1).

[18] *See* Order at § 2(iii) (quoting 29 U.S.C. § 2102(b)(2)(A)).

[19] *See* Cal. Lab. Code § 1401(c).

[20] *See* Order at § 2(ii).

[21] *Id*. at § 2(i).

[22] *Id*. at § 2(iv).

[23] *Id*. at § 2.

[24] *Id*. at page 2.