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CLIENT ALERT: United States Department of Labor Issues Guidance on WARN Act in Light of COVID-19 Pandemic

The huge layoff and job loss impact of the COVID-19 pandemic has brought renewed attention to the requirements of the Worker Adjustment and Retraining (WARN) Act, often called the federal "plant closing" statute. The United States Department of Labor (DOL) recently published a series of FAQs serving as a refresher on WARN Act issues, with particular emphasis on issues that have arisen, or are expected to arise, in light of the COVID-19 pandemic.

Brief Summary of the Act

The WARN Act requires certain businesses to provide 60-days' notice before a significant loss of employment, casually referred to as a "plant closing" or "mass layoff." Failure to provide the notice can result in costly lawsuits, where the exposure includes a back pay obligation for all affected employees for the 60-day period when notice should have been provided.

Smaller businesses are not covered by WARN. Covered businesses must have:

- 100 or more full-time employees; *or*
- 100 or more employees (including part-time) working 4,000 total hours (excluding overtime) per week. Note that, in this context, part-time employees are those working an average of under 20 hours per week *or* fewer than 6 of the previous 12 months.

More than just "plant closings" are covered. The 60-day notice requirement is triggered by:

- An employment loss of 50 or more employees during a 30-day period; *or*
- A layoff resulting in employment loss of 500 or more employees, or at least 50 employees *and* 1/3 of the worksite's total workforce during a 30-day period.

A series of small layoffs over a 90-day period, none of which would individually trigger WARN, but which in total add up to numbers requiring that WARN notice be given, also triggers the notice requirement. When the employer can show that the smaller layoffs resulted from individual and distinct actions, and not an attempt to evade WARN, the notice requirement will not kick in. Therefore, in evaluating WARN's applicability, employers must remain vigilant with regard to both affected employee numbers and timing.

Where notice is required, it must be given to (1) affected employees or their representatives, (2) the dislocated worker unit for the state in which the worksite is located, and (3) the chief elected official in the municipality in which the worksite is located.

The WARN Act and COVID-19

In the age of COVID-19, where businesses are dealing with a great deal of uncertainty, the DOL reminded that "employment loss" is a term of art that does not necessarily mean *permanent* job loss. Even a *temporary* layoff or furlough can trigger a WARN notice requirement if the layoff or furlough (1) extends beyond 6 months, or (2) results in a 50% or more reduction in hours of work for 50 or more individual employees each month during a 6-month period. As will be discussed below, some states – including California – have their own WARN laws requiring notice even for temporary layoffs and furloughs shorter than 6 months.

The DOL prescribes no specific method of notice, but simply requires "any reasonable method" that will ensure receipt. Given the prevalence of business shutdowns, layoffs, and furloughs that have already occurred, e-mail is a reasonable method of providing notice as long as the notice is specific to each individual employee.

There are exceptions to the 60-day notice rule which may apply in the midst of COVID-19. The "unforeseeable business circumstances" exception applies to unexpected and dramatic conditions beyond an employer's control. Examples include a principal client's sudden termination of a contract, an unanticipated and dramatic economic downturn, and a government closing of a worksite without notice. Exceptions are also made for faltering businesses (in plant closing situations) and those impacted by natural disasters.

Employers must take note that these exceptions do not excuse the employer from providing notice altogether; rather, they are exceptions to providing *60-days'* notice. Employers meeting an exception must still provide "as much notice as is practicable," along with a statement as to the reason or reasons for the short notice.

Reasonable Foreseeability

A major issue in the COVID-19 era is determining when an employer should have reasonably foreseen that employment loss will extend for more than 6 months. The test for "reasonable foreseeability" is primarily one of business judgment. WARN, however, is enforced by private litigation, not by the DOL or any other central authority. Different courts can reach different conclusions as to whether—and when—employment losses of an extended nature might be "reasonably foreseeable."

An uptick in WARN litigation can be expected in the wake of COVID-19. Amidst everything else brought on by the pandemic, employers must try to stay alert about whether a furlough or layoff is triggering the WARN notice requirement.

State-Specific Considerations

A number of states have enacted "mini-WARN" acts modifying the federal WARN Act, often by imposing additional requirements. For example, in Maine and New York, employers must give 90-days' notice before a layoff or other covered event, and in California, *any* layoff of 50 or more employees triggers the state mini-WARN act.

Some states have also issued COVID-19-related guidance on their mini-WARN acts. For example, as of

this writing, California, New Jersey, and New York have relaxed their mini-WARN acts in light of the current crisis:

- On March 17, 2020, California's governor issued an Executive Order altering the California WARN Act in a variety of ways. Notably, the Governor modified the notice requirement so that employers must only give "as much notice as is practicable" until the end of the current state of emergency.
- On April 14, 2020, New Jersey enacted COVID-19-related amendments to the New Jersey WARN Act, excluding COVID-19-related mass layoffs from the Act and temporarily delaying pending amendments that were to be effective on July 19, 2020. The delayed amendments, including an increased notice period of 60 to 90 days, will not go into effect until 90 days *after* the Governor's State of Emergency Order related to COVID-19 is lifted.
- On April 17, 2020, New York's governor issued an Executive Order modifying the New York mini-WARN Act. Similar to California, the New York Order temporarily modified New York's 90-days' advance notice requirement by requiring notice "as soon as is practicable" from employers facing "unforeseeable business circumstances."

This is a constantly developing area of the law, and guidance from other states regarding their mini-WARN Acts could be forthcoming in the near future.

Employers with questions regarding the WARN Act's applicability or looking for assistance in providing the required notice are encouraged to consult with their MBJ attorney.

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