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Blog Post

Notice Requirements When Furloughing or Laying Off Workers in the Pandemic

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Employers contemplating layoffs or furloughs of employees as a result of the COVID-19 outbreak need to be careful. Even if they are not subject to the federal Worker Adjustment and Retraining Notification Act (WARN Act), they may be obligated to provide various notices under state "mini-WARN" acts or other state laws.

Below is a quick overview of how these federal and state laws can impact employers.

1) What is the "WARN" Act?

The WARN Act requires employers with 100 or more employees to provide written notice 60 calendar days in advance of plant closings and mass layoffs. The purpose of this statute is to give employees and their families some transition time to adjust to the prospective loss of employment, to seek and obtain other jobs and, if necessary, to seek training or re-training to re-enter the job market. Many employers are aware of a notice obligation under the WARN Act, but what exactly triggers the obligation to issue the notices depends on the circumstances.

2) What are "mini-WARN" statutes?

This is the term commonly used to refer to state laws that closely mirror the WARN Act—with some notable differences. For instance, the WARN Act is

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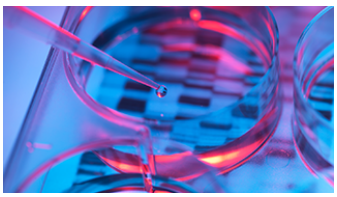

not implicated in temporary layoffs of less than six months. It also is not implicated unless, at a minimum, there are 50 job losses at a single site of employment in a 90-day period. However, mini-WARN statutes can be triggered by lower thresholds of job loss. Therefore, smaller businesses may need to pay closer attention to these state laws.

3) When is an employer required to provide 60-day advance written notice under the WARN Act?

Under the federal WARN Act, employers are required to provide written advance notice in the event of either a plant closing or a mass layoff. Both of these events are specifically defined under the Act. A *plant closing* refers to "the permanent or temporary shutdown of a single site of employment, (or more than one facilities/units within a single site of employment), if the shutdown results in an employment loss during any 30-day period for 50 or more employees." A *mass layoff* means a reduction in force that "results in an employment loss at the single site of employment during any 30-day period" for—either (i) 50 or more employees if they compose 33% of the workforce at that site, or (ii) 500 more employees.

Part-time employees do not count towards meeting this threshold. But employers should beware that the definition of "part-time employee" under the WARN Act differs from its common use meaning. Under the statute, a *part-time* employee refers to "an employee who is employed for an average of fewer than 20 hours per week or who has been employed for fewer than 6 of the 12 months preceding the date on which notice is required."

4) Given the COVID-19 outbreak, can employers provide advance notice less than 60 days from the layoff or closing and still be in compliance with WARN?

Under certain circumstances, yes. Obviously, given the sudden COVID-19 outbreak, providing employees

with nearly two months' advance notice is mostly likely impracticable. Fortunately, the WARN Act provides exceptions for both natural disasters and for "unforeseeable business circumstances." While President Trump declared a "major disaster" in invoking emergency powers under the Stafford Act, it's unclear whether the COVID-19 pandemic would qualify. However, the "unforeseeable business circumstances" exception clearly would apply. Under this exception, an employer may provide notice in less than 60 days if the plant closings or mass layoffs are caused by business circumstances that were not reasonably foreseeable at the time that 60–day notice would have been required. Federal regulations further clarify that "[a]n important indicator of a business circumstance that is not reasonably foreseeable is that the circumstance is caused by some sudden, dramatic, and unexpected action or condition outside the employer's control." It would then be the employers' burden to show how the COVID-19 outbreak suddenly and negatively impacted their business.

Notably, the regulations also state that "[a] government ordered closing of an employment site that occurs without prior notice also may be an unforeseeable business circumstance." A number of state and local governments have already issued orders to immediately shut down non-essential businesses and operations to avoid the spread of COVID-19.

Assuming this pandemic meets the unforeseeable business circumstances exception, employers are still required to provide written notice "as soon as practicable." Federal regulations further specify the type of information that must be contained in these written notices. When WARN Act notice is required, it must be given to each employee individually, their union (if any), and various state and local government agencies. If an employer is availing itself of the "unforeseeable business circumstances" exception, the written notice should also include a "brief statement" of the reason why advanced notice

was given in less than 60 days. (*See* 20 C.F.R. §639.9.) Therefore, employers considering mass layoffs as a result of the pandemic should provide notice as soon as practicable and should reference the COVID-19 outbreak as a reason for the shortened notice.

5) Must an employer still comply with WARN if it decides to take less permanent employment actions, such as furloughs or temporary layoffs?

Under the WARN Act, employers are not required to provide advance notice for "temporary" lay-offs or reductions in hours that are less than six-months in duration. However, the same is not necessarily true under "mini-WARN" statutes. For example, courts in California have interpreted the state's "mini-Warn" Act to require employers to provide advance 60-day notice for even temporary furloughs—as short as four to five weeks in duration. Therefore, if you are an employer considering only a temporary solution in response to this pandemic, you may still be required to provide advance notice, and you should consult with experienced counsel before taking any action.

Although a reduction in work hours is often seen as a "temporary solution," federal regulations state that employers are required to provide 60-day advance notice if they decide to reduce employee hours by 50% or more during each month of any six-month period. As a result, employers who are considering significantly reducing employee work hours as a temporary solution to the COVID-19 problem would still need to ensure compliance with WARN's notice requirements.

6) Would the COVID-19 outbreak also constitute an exception to the advance notice requirement under mini-WARN statutes?

Like other state laws, the mini-WARN statutes can differ greatly in terms of scope and substance. Although many of the mini-WARN statutes do

contain an "unforeseeable business circumstance" exception, there are some states, like California, that do not provide this exception to employers. (Other states without this exception include Hawaii, Tennessee, and New Jersey). Instead, California provides an exception for "physical calamities" such as a flood, earthquake, or drought, or "acts of war." Fortunately, the Governor of California issued an Executive Order on March 17, 2020 expressly suspending the state's mini-WARN Act so long as the employer still "gives notice as soon as practicable." The Executive Order also acknowledges that the mini-WARN statute is also suspended for employers who order a mass layoff, relocation, or termination that is "caused by COVID-19-related business circumstances that were not reasonably foreseeable as of the time that notice would have been required." Other states may follow suit.

Some states, like Illinois, have a significantly modified version of the unforeseeable business circumstance exception. In Illinois, an employer may give less than 60 days' notice only in the event of a plant closure and if the Illinois Department of Labor (not the employer) determines that the need for notice was "not reasonably foreseeable at the time that notice would have been required." Whether Illinois will waive any of its mini-WARN notice requirements remains to be seen.

In sum, employers should consider the location of the mass layoffs or plant closings to determine potential liability under these statutes.

7) Are there other differences between the federal WARN Act, mini-WARN statutes, and other notice requirements that might come into play?

- *The threshold for coverage under a mini-WARN statute can be lower in some states.*

The WARN Act only covers employers with 100 or more employees (not counting part-time employees). By contrast, several states cover much smaller

employers—some roughly half the size required under the WARN Act. Employers with 75 or more employees would be covered under California and Illinois's mini-WARN statutes, while employers with only 50 employees or more would be covered under the mini-WARN laws in Hawaii, New York, Tennessee, and Wisconsin. Employers with 25 or more employees would be covered in Iowa's mini-WARN.

- *Some states require more or less than 60-day advance notice.*

Generally, most states require a 60-day advance written notice, but a few states are outliers. Iowa only requires a 30-day advance notice, while New York's mini-WARN Act requires 90-day advance notice. Recently, New Jersey has passed a new law amending its existing mini-WARN Act to require (among other things) a 90-day advance notice period (rather than 60 days). However, New Jersey's amendment to its mini-WARN statute will not take effect until July 19, 2020.

- *An employer's notice obligation under mini-WARN statutes can be triggered by events different from the WARN Act.*

California, for example, requires employers to provide notice even in the event of "relocation," which is defined as the removal of all or substantially all of the operations of an employer to a different location 100 or more miles away. For these reasons, it is important to analyze mini-WARN statutes separately, and for employers to follow state and local directives that could waive or otherwise impact notice requirements.

- *Mini-WARN statutes may require employers to provide notice to specific state governing bodies.*

Each mini-WARN statute designates state or local agencies who should receive notice of layoffs or plant closures. For example, in California, notice

must be provided to: (1) the Employment Development Department; (2) the Local Workforce Development Board; and (3) the chief elected official of each city and county government within which the termination, relocation, or mass layoff occurs. Other states like Minnesota and Oregon include additional government entities or individuals (such as a commissioner) who must receive a copy of the notice.

Certain states also require additional notices when dealing with unionized employees. It is critical to review each state's requirements to ensure compliance with all applicable mini-WARN statutes.

- *Some states may require more than advance written notice in the event of a closing of location or mass layoff.*

Some states do not have mini-WARN statutes, but have other laws requiring other forms of notice. For example, Alabama and Ohio require employers to call the nearest unemployment office or agency if they will terminate or lay off a certain number of employees within a one-week period. Georgia and North Carolina, on the other hand, do not require employers to call any local agency, but require employers to fill out specific forms in the event of plant closures. Interestingly, Kansas has a law that requires employers to first obtain a permit before closing down any locations.

Although Connecticut has not enacted a mini-WARN statute, the Connecticut Plant Closing Law requires employers who are either relocating or closing a plant to pay the full cost of continuing the existing group health insurance for terminated employees and their dependents during the shorter of 120 days or until the employee becomes eligible for other group coverage.

The recent sweeping changes to New Jersey's mini-WARN statute also includes an amendment that would require employers who trigger notice under

the law to also automatically provide employees with severance pay. Specifically, all terminated employees would be entitled to one week of severance pay for each year they have worked with the company. New Jersey would become the first state in the nation to require severance pay under these circumstances. However, these changes to the New Jersey law do not take effect until July 2020.

Given these key differences between the WARN Act, mini-WARN statutes, and other state notice requirements, employers contemplating layoffs and closures should work closely with counsel to ensure compliance. For assistance addressing issues in your workplace, contact your Akerman attorney.
