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Blog Post

Longer Than Expected Layoffs May Trigger Notice Requirements

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Back in the spring, when COVID-19 first forced the shutdown of many businesses, did your company temporarily furlough or lay off workers? If so, pay attention to that calendar, as six months may be rapidly approaching. As we noted in our prior blog, certain layoffs and reductions in hours that last longer than six months trigger federal notice requirements under the federal Worker Adjustment and Retraining Notification Act (WARN Act), so if those short-term layoffs or reductions are looking longer term or even permanent, now is the time to act.

The WARN Act applies to employers who have 100 or more employees and requires advance notice of plant closures and mass layoffs, unless the circumstances fall within one of the exceptions under the WARN Act. A plant closure is a permanent or temporary shutdown that results in an "employment loss" during any 30-day period for 50 or more employees (not counting part-time employees) at a single site of employment. A mass layoff is one that results in an "employment loss" during any 30-day period for 50-499 employees (not counting part-time employees) if they compose 33 percent of the workforce at a single site of employment.

Under the WARN Act, an "employment loss" is any employment termination, other than a discharge for

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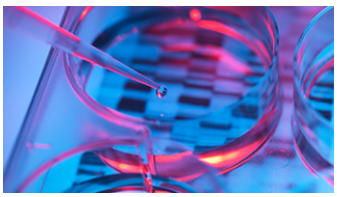

cause, voluntary departure, or retirement, a layoff that exceeds six months, or a reduction in hours of work of more than 50% during each month of any six-month period.

Employers that conducted what they expected to be short-term furloughs/hours reduction in the spring but now expect these measures to extend beyond six months should ensure they provide the required 60 days' WARN Act notice to their employees. Employers should provide as much notice as possible and provide detail to employees explaining the business circumstances and the reason for extending the layoffs and/ or the reduction of work hours.

To minimize liability for failing to provide the required notice under the WARN Act, employers should maintain open communication with their workforce and provide regular updates regarding changes to business conditions. Not only will this show a good faith effort on the part of the employer to provide as much notice as possible, but it will allow employees to be proactive in making the appropriate career and financial decisions for their families.

Additionally, employers should be mindful of the application of the "unforeseeable business circumstances" exception as it applies to extended layoffs. Pursuant to that exception, an employer may order a plant closing or mass layoff before the conclusion of the 60-day period if the closing or mass layoff is caused by business circumstances that were not reasonably foreseeable as of the time that notice would have been required. The WARN Act regulations provide that one important indicator of the lack of foreseeability would be a circumstances caused by "by some sudden, dramatic, and unexpected action or condition outside the employer's control" such as the sudden termination of a major client contract, a supplier's strike, or a government ordered closing of a site without prior notice or even a dramatic major economic

downturn. While the pandemic may have presented such a circumstance when stay-at-home orders were first issued in March 2020, it will become increasingly difficult for employers to rely on this exception as closure orders continue or are reinstituted. The more time passes, the less likely employers can take the position that the impact of the pandemic on their workforce was "unforeseeable" within the meaning of the WARN Act.

Employers should also be conscious that while they may not be subject to the notice requirements under the federal WARN Act, they may be obligated to provide notice to their employees under state "mini-WARN" acts or other state laws. Most state mini-WARN acts closely resemble the federal WARN Act, however, some states have key distinctions that employers in these states should be mindful of. For example, California's mini-WARN Act requires employers to provide 60 days' notice to their workforce even in circumstances where employees are temporarily laid off, and New York's mini-WARN Act requires employers to provide 90 days' notice (rather than 60) of a mass layoff. Employers should carefully assess federal, state and local requirements prior to temporarily or permanently laying off employees.

Employers who fail to provide the required WARN Act notice must pay each affected employee for an amount equal to back pay and benefits for the time in which the covered employer should have provided notice to its workforce, for up to 60 days. The employer's liability for a violation may be reduced by any wages paid to the employee for the notice period, any voluntary and unconditional payment by the employer to the employee that is not required by any legal obligation; and any payment by the employer to a third party or trustee (such as premiums for health benefits or payments to a defined contribution pension plan) on behalf of and attributable to the employee for the period of the violation. Employees who bring claims under the

WARN Act can also recover their attorneys' fees and civil penalties up to $500 per day for each day of violation.

Employers who need guidance with continued or renewed layoffs, reductions in hours, or other COVID-19 issues should consult with their Akerman lawyer.
