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INFORMATION MEMO
LABOR AND EMPLOYMENT LAW

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Do You Need to WARN Your Employees?

Since 1989, the federal Worker Adjustment and Retraining Notification ("WARN") Act has required covered employers to give written notice in advance of certain workforce reductions affecting at least 50 employees. Twenty years later, a New York law expanded the coverage to reductions potentially affecting as few as 25 employees.

If your business is planning or considering downsizing at these levels, then a review of the WARN Act needs to be undertaken early in the process.

When Are WARN Notices Required?

The federal WARN Act requires employers with 100 or more employees to provide 60 days' advance written notice in the event of a "mass layoff" or "plant closing," as defined in the law. New York State's WARN Act covers employers with as few as 50 total employees, and requires 90 days' notice. Some other states also have mini-WARN laws, not addressed here, that may differ and should be reviewed with respect to reductions in force in those states.

The "employer" for WARN purposes can extend across a "business enterprise" to encompass more than one legal entity. So, you need to consider total employees across affiliated companies before concluding that you are not a covered employer based on the size of your workforce.

Covered employers may need to give WARN notices (to employees, their unions where applicable, and certain government officials) in the following circumstances:

- "Plant Closing": where an employment site (or one or more facilities or operating units within an employment site) will be shut down, and the shutdown will result in an "employment loss" for 50 (25 in New York) or more employees during any 30-day period.
- "Mass Layoff": where there is to be a mass layoff which does not result from a plant closing, but which will result in an employment loss at the employment site during any 30-day period for: (a) 500 (250 in New York) or more employees, or (b) for 50-499 (25-249 in New York) employees if they make up at least 33% of the employer's active workforce.
- "Relocation" (New York WARN): where all or substantially all of the industrial or commercial operations of an employer will be removed to a different location fifty miles or more away from the original site of operation and 25 or more employees suffer an employment loss.

Despite the reference to a 30-day period in the definitions of plant closing and mass layoff above, there are additional provisions that allow for the aggregating of employment losses for up to a 90-day period in some cases in determining whether WARN notices must be provided.

The New York WARN Act also specifically requires notice for certain "covered reductions in hours," but any such covered reduction would seemingly also qualify as a "mass layoff" based on the definition of "employment loss."

Generally speaking, "employment loss" for WARN purposes includes: (a) employment terminations other than a discharge for cause, voluntary departure, or retirement; (b) layoffs exceeding 6 months; and (c) a reduction in an employee's hours of work of more than 50% in each month of any 6-month period.

When May Notice Not Be Required Under the WARN Acts?

Before you send out WARN notices, here are some potential exceptions to consider:

- "Part-time employees" don't count. For WARN purposes, this specifically means employees who have worked less than 6 months in the last 12 months and employees who work an average of less than 20 hours a week. (But part-time employees are entitled to receive notice where otherwise required to be issued.)
- Independent contractors don't count. But make sure that the individuals who are classified as independent contractors truly are independent contractors rather than employees.

- New York's Shared Work Program may provide an exception to New York WARN obligations based on reductions in hours. Where applicable, the Shared Work Program permits an employer to reduce the hours of work of its employees, up to a maximum of 60%, with employees supplementing lost income with partial unemployment insurance benefits.
- No notice is required if the employer offers to transfer employees to a different site of employment within a reasonable commuting distance.
- No notice is required if the plant closing is of a temporary facility or if the plant closing or mass layoff results from the completion of a particular project or undertaking and the affected employees were hired with the understanding that their employment was limited to the duration of the facility or project or undertaking. In some cases, seasonal employment may also qualify for an exception from the notice requirement.
- Notice might not be required where employees retain employment with another company in the context of the sale of a business.
- "Faltering companies" may get some relief from the full notice period. This applies only to plant closings and is limited to situations where a company has sought new capital or business in order to stay open and giving notice would ruin the opportunity to get the new capital or business.
- An "unforeseeable business circumstances" exception applies to closings and layoffs that are caused by business circumstances that were not reasonably foreseeable at the time notice would otherwise have been required. The employer still must give as much notice as possible.
- Full notice is not required where a closing or layoff is the direct result of a natural disaster, such as a flood, earthquake, drought, or storm.
- Employers do not have to give notice when permanently replacing an economic striker as defined under the National Labor Relations Act.

All of the above should be considered narrow exceptions. Employers should only rely on them upon consultation with counsel experienced in applying the WARN Acts.

What Happens If WARN Notices Aren't Issued?

If an employer should have given notice under WARN and does not, then it may be held liable for damages to each employee who should have received notice for up to 60 days' pay and benefits, plus civil penalties and attorneys' fees.

Is It Too Late To Comply With WARN?

If your company is contemplating downsizing in numbers that could trigger WARN issues, you should immediately consider whether or not notices should be issued. Depending on timing and business considerations, it may be better to issue late notices rather than no notices. In other cases, it might be advisable to delay implementing the reduction in force to permit full notice to be provided. And sometimes you might even determine that notices aren't required under the WARN Acts in the first place.

If you have any questions about this Information Memo, please contact Scott P. Horton, any of the attorneys in our Labor and Employment Law Practice, or the attorney in the firm with whom you are regularly in contact.

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