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PROVIDING WARN ACT NOTIFICATION TO EMPLOYEES AS SEQUESTRATION APPROACHES

BY ANTHONY E. COOCH, ESQUIRE

The Worker Adjustment and Retraining Notification Act ("WARN" or the "Act") requires that employers provide advance notice to employees when effectuating mass layoffs or plant closings. Over the past few months, the Act has become news as the January 2, 2013 date for sequestration approaches.

Earlier this summer, in preparation for severe budget cuts and potential loss of significant business, several large Federal contractors indicated their need to issue WARN notices in order to comply with Federal law. On July 30, to quell anxiety that would be caused by such notices, the Department of Labor ("DOL") issued a guidance letter stating WARN Act notification is unnecessary because sequestration is an "unforeseen business circumstance."

DOL's position on this issue is incorrect. The precedent cited by DOL is not analogous to sequestration and is contrary to the purpose and scope of the Act as stated in the regulations. In this article, we will review the WARN Act, discussing its requirements, the unforeseen business circumstance exception, as well as what employers should do as the date for sequestration approaches.

Background

The Balanced Budget and Emergency Deficit Control Act of 1985 as amended by the Budget Control Act of 2011 ("BCA") requires a reduction in defense and non-exempt non-defense spending across the board. The Congressional Budget Office estimates that cuts will result in a decrease in non-discretionary defense spending of approximately 10 percent and a decrease in non-defense discretionary spending of 8 percent.

The upcoming cuts are expected to have a significant impact on Federal government contractors. Because Federal agencies will likely receive reduced apportionments, they will be forced to refocus agency priorities. This, in turn, will result in fewer new contracts and a potential reduction in the amount purchased from existing contracts. Accordingly, Federal contractors will likely experience reduced sales resulting in potential plant closings and mass layoffs of employees.

Those Federal contractors considering layoffs or plant closings cannot simply shut down. Under the Worker Adjustment and Retraining Notification Act, employers expecting to effectuate a mass layoff or plant closing are required to provide 60-day advance written

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notice to employees or their representative and to certain state authorities. Employers failing to provide adequate notice may be subject to civil liability and attorneys' fees.

With sequestration becoming more of a reality, several large government contractors who would be subject to WARN Act provisions indicated their plans to issue WARN notices to large numbers of employees. In response, on July 30, 2012, the Department of Labor issued Training and Employment Guidance Letter No. 3-12. The guidance letter states that WARN Act notifications are not necessary due to the fact that the details of sequestration are unknown, and prematurely issuing WARN notices would waste state resources and cause unnecessary uncertainty and anxiety in workers.

WARN Act Requirements

The WARN Act provides protection to workers and their families by requiring employers to provide notification in advance of plant closings and mass layoffs. According to the regulations, notice is necessary in order for employees to (1) adjust to the prospective loss of employment, (2) seek and obtain alternative work, and (3) begin obtaining new skills to assist in future employment.

WARN applies to employers with employment levels that fall into one of two categories:

- 100 or more employees, excluding part-time employees
- 100 or more employees, including part-time employees, who in the aggregate work at least 4,000 hours per week, exclusive of hours of overtime

WARN notices are required when a covered employer plans to enact mass layoffs or plant closings. Under the Act, a mass layoff occurs when employment loss is experienced during any 30-day period by (1) 33 percent of all employees with the 33 percent equaling at least 50 employees, or (2) 500 or more employees. Part-time employees are not included in the calculation.

Employment loss is further defined as:

- Employment termination, other than a discharge for cause, voluntary departure or retirement;
- A layoff exceeding 6 months; or
- A reduction in hours of work of individual employees of more than 50 percent during each month of any 6-month period.

When WARN is triggered, employers must notify the representative of the employees, the employees if there is no representative, and the state dislocated worker unit or other state designee. The notice should contain specific information listed in the Act's regulations.

The "Unforeseeable Business Circumstances" Exception

When layoffs or plant closings are the result of an "unforeseeable business circumstance," employers can shut down without providing the full 60-day advance notice. Employers seeking to utilize this exception must show that the plant closing or mass layoffs were caused by business circumstances not reasonably foreseeable at the time 60-day notice would have been required.

For an unforeseeable business circumstance to exist, the plant closing or layoff must have been caused by some sudden, dramatic and unexpected action or condition outside the employer's control. Examples include:

- Principal client sudden and unexpected termination of a major contract with the employer
- A strike at a major supplier of the employer
- Unanticipated and dramatic major economic turndown

The Department of Labor relies upon this exception in support of their argument that WARN notification is not necessary, even with sequestration set to take effect on January 2, 2013. According to the agency, (1) efforts are being made to avoid sequestration, (2) agencies have some discretion with regards to implementation of sequestration meaning that some contracts may not be affected, and (3) the actual contracts affected are unknown. As a result, whether funding cuts will occur and the specific areas to be cut are unknown.

DOL further argues that WARN notification is not possible because companies do not know the specific information required to be included in WARN Act notices. If notifications were made they would be premature, speculative and would cause unnecessary anxiety and waste of resources.

Analysis of the Department of Labor's Position Against Notice

DOL's position does not reconcile with precedent nor with the WARN Act regulations. In its guidance letter, DOL cites two cases in support of its position that WARN notification is not necessary at the present time.

Both cases involve the development of the A-12 "Avenger" aircraft for the United States Navy. The contractors involved in these cases were working under contracts to develop

the aircraft. The costs incurred for development exceeded the contract amount. Because of the cost overruns, the Department of Defense held a series of meetings including ordering the contractors to "show cause" as to why the contract should not be cancelled. After meeting with the contractors, the Secretary of Defense and the Department of the Navy both indicated their support for the program. However, soon after expressing support, the contracts were cancelled resulting in job losses for many of the contractors' employees.

Several employees who were terminated brought suit against the contractor, claiming WARN Act violations. In each case, the Court found for the contractors, essentially holding that because positive meetings regarding the contract and expressions of support by the Navy and Department of Defense continued up until the contract cancellation, the cancellation was unforeseen and improbable. Thus, not providing the full 60-day notice was not a WARN Act violation.

In its analysis, the Court examined the probability of a contract being cancelled versus the possibility of its cancellation. The Court found that every contract has a "possibility" of being cancelled. This does not require WARN Act notification as this would result in a notification in nearly every contract. It is not until there is a "probability" that a contract will be cancelled that makes the business circumstance reasonably foreseeable.

Here, sequestration is not a possibility. There is no speculation as to when it will occur and as we near January 2, 2013, the probability of sequestration increases. The sequestration amount is also not an unknown. The Congressional Budget Office has estimated cuts between 8 and 10 percent. This means contractors who generate most of their revenues from Federal government contracting can expect to see a revenue decrease somewhere in the neighborhood of 8 to 10 percent.

A position that providing WARN Act notification would be premature due to the lack of specifics is contrary to the statute's regulations. The regulations state that the purpose of the statute is to provide advance notice so workers and their families have time to adjust to the prospective loss of employment. Furthermore, in the regulations, the Department of Labor "encourages employers to give notice in all circumstances".

Application

WARN enforcement is through civil suits brought by employees, their representatives and local government. DOL has no standing, and according to the WARN Act regulations, will provide no advisory opinions. Thus, in deciding whether to provide notice, employers must weigh the cost of notice versus the cost of lawsuits in the event notice is not given. Based on the statute, regulations and precedent, providing WARN Act notice at this time would not be improper. In fact, the regulations encourage notice versus silence.

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YOUR CONTRACT'S ARBITRATION CLAUSE MAY NOT BE OPTIONAL

BY ARIANNA S. GLECKEL, ESQUIRE

Does your standard contract contain an arbitration clause stating that either party to the contract "may" choose arbitration instead of litigation? If so, it may not matter that you include the word "may" to try and make arbitrational optional instead of mandatory.

A case from the United States District Court for the Southern District of New York from September of this year held exactly that. This case arose from a dispute over breach of a Distribution Agreement between Bellview Airlines Limited and Travelport Global Distribution Systems, pursuant to which Bellview was to distribute a computerized travel reservation system in Nigeria owned by Travelport. Travelport Global Distrib. Sys. B.V. v. Bellview Airlines Ltd., 2012 U.S. Dist. LEXIS 128604 (S.D.N.Y. Sept. 10, 2012).

The arbitration provision in the agreement stated that all disputes "shall be governed by the laws of the State of New York" and that any "dispute or controversy . . . arising out of or related to this agreement . . . may be submitted to arbitration in the United States in accordance with the UNCITRAL Arbitration rules . . . [and the] Appointing Authority shall be the United States Council of Arbitration . . . ."

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Travelport sent a letter to Bellview terminating the agreement based on Bellview's material breaches of the agreement. Bellview filed suit and Travelport sought an order compelling arbitration and seeking an injunction as to the pending lawsuit.

The Court held that the language in the agreement stating the dispute "may be submitted to arbitration" triggers mandatory arbitration. The Court noted many other courts have held that absent some separate suggestion that an arbitration provision is intended to trigger permissive arbitration, provisions with the word "may" trigger mandatory arbitration.

Travelport is a good example of how important careful drafting of arbitration clauses can be. In certain circumstances, arbitration can be a good alternative to litigation. However, it also has additional costs associated with it and some procedural differences from the traditional court system that you and your company should be aware of and consider before including an arbitration provision in your contracts.

For a review of your company's arbitration clause or to discuss the benefits and drawbacks of arbitration compared to litigation, contact Arianna S. Gleckel at agleckel@beankinney.com. Ms. Gleckel is an associate at Bean, Kinney & Korman, P.C., practicing the areas of commercial litigation and employment law.

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