Patterson Belknap Webb & Tyler LLP

Employment Law Alert March 27, 2020

Federal WARN and NYS Mini-WARN: Obligations for Employers in Light of COVID-19

As employers navigate the challenges of the COVID-19 public health crisis, many have been forced to consider difficult decisions about laying off and furloughing employees, or otherwise reducing employee work hours. In addition to complying with the new federal and state mandates concerning the provision of leave—see our alerts at the Patterson Belknap Resource Center—employers will need to comply carefully with the provisions of the Worker Adjustment and Retraining Notification Act, commonly known as the "WARN Act", and its state analogs, also known as "mini-WARN" laws. This alert addresses some of the key questions that employers may have as they navigate this new territory.

Both the WARN Act and New York State's mini-WARN Law provide that certain employers must provide notice to employees prior to undertaking mass layoffs, furloughs, or certain hour reductions. The federal notice period is ordinarily 60 days, and the New York notice period is generally 90 days, but exceptions for "unforeseeable business circumstances," including the occurrence of some "dramatic and unexpected condition outside the employer's control"—applicable under both federal and state law—will likely apply in the case of coronavirus-related closures or furloughs. Nonetheless, covered employers must still issue notice as soon as practicable and provide detailed explanations of the circumstances that required the closure or furlough.

Federal WARN Act

A. What triggers federal WARN Act obligations?

Plant closings and mass layoffs trigger federal WARN Act obligations. To qualify as a covered event under the federal WARN Act, the following conditions must be satisfied:

- A plant closing must result in an "employment loss" (as defined in subsection C. below) for 50 or more employees during any 30-day period.
- A mass layoff does not result from a plant closing, but must result in an employment loss at a single employment site during any 30-day period for 500 or more employees, or for 50-499 employees if they compose at least 33% of the employer's active workforce.

Employers may also be obligated to provide WARN notice if there are multiple employment losses occurring during a 90-day period that separately are insufficient to trigger the notice requirements. In such an instance, the multiple employment losses will be combined to determine whether the aggregate employment loss meets the minimum thresholds triggering the WARN Act notice requirements.

B. Which employers are required to comply?

Federal law requires the following employers to comply with WARN:

- Employers with 100 or more full-time workers (not counting workers who have less than 6 months on the job and workers who work less than 20 hours per week); or

- Any business that employs 100 or more workers, including part-time workers, who work at least a combined 4,000 hours a week.

Private for-profit businesses, private non-profit organizations, and quasi-public entities separately organized from the regular government all qualify.

The federal WARN Act defines a "full-time employee" as an employee who works 20 or more hours per week and worked for at least six of the twelve months preceding the date on which the notice is required. A "part-time" employee is 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, including workers who work full-time. Part-time employees include workers who would traditionally be understood as "seasonal" employees.

The period to be used for calculating whether a worker has worked "an average of fewer than 20 hours per week" is the shorter of the actual time the worker has been employed or the most recent 90 days.

C. Which employees are entitled to WARN notice?

Employees are entitled to WARN notice if they experience an "employment loss," such that:

- They are terminated from employment, but not if they voluntarily quit, retire, or are discharged for cause;
- They are laid off for more than 6 months; or
- They have their regular hours of work reduced by more than half during each month of a 6-month period.

Certain voluntary arrangements—for example, vacations, mutually agreed-upon reductions in pay, voluntary furloughs, and voluntary resignations—may not require notice under WARN. These arrangements should be carefully considered on a case-by-case basis.

D. Federal notice requirements

Under federal law, employees must receive a written notice 60 calendar days before the layoff. Among other things, the notice must contain:

- An explanation of whether the layoff or closing is permanent or temporary (of 6 months or less);
- The date of layoff or closing and the date of the separation; and
- Name and contact information for a person in the company who can provide additional information.

Federal law permits an employer to use any reasonable method of delivery (*e.g.*, first class mail, personal delivery with optional signed receipt) designed to ensure receipt of the written notice at least 60 days before separation. In the case of notification directly to affected employees (as opposed to a union representative), insertion of notice into pay envelopes is another viable option. However, employers who regularly include pre-printed notices in employees' paychecks or pay envelopes cannot rely on this delivery method because employees might not notice the WARN provisions. Verbal notices also do not satisfy the WARN Act requirements.

Advanced notice, which must also contain certain required items, must be provided to the State Rapid Response Dislocated Worker Unit as well as to the chief elected official of the local government where the mass layoff is to occur. In certain instances, other governmental entities may need to be notified. There are specific requirements as to the contents of such notice to governmental authorities.

New York State's Mini-WARN Act

A. What triggers Mini-WARN Act obligations?

Covered plant closings, mass layoffs, reduction in work hours, and relocation of substantially all facility operations will trigger Mini-WARN Act obligations. These events are defined as follows:

- A "mass layoff" refers to a workforce reduction (other than a plant closing) that results in an employment loss, lasting longer than six months at a single site of employment during any 30-day period for at least 250 employees or at least 25 employees, if they comprise at least 33% of the workforce at that site.

- A "plant closing" is the permanent or temporary shutdown of a single site of employment, or one or more facilities or operating units within a single site of employment, if the shutdown results in an employment loss during any 30-day period at the site for at least 25 employees, if they comprise at least 33% of the workforce at that site.

- A covered "reduction in hours" refers to a reduction by more than 50% in hours of work during each month in any consecutive six-month period for at least 250 employees, or at least 25 employees, if they comprise at least 33% of the workforce at that site.

- A covered "relocation" refers to the relocation of an employer to a location at least 50 miles away, causing an employment loss for at least 25 employees.

B. Which employers are required to comply with New York State's mini-WARN?

Private sector employers in New York State that employ more than 50 employees are subject to New York State's mini-WARN requirements. With some limitations, these calculations do not include part-time workers.

For the purposes of New York State's mini-WARN, an "employer" is any business enterprise, whether for-profit or not-for-profit, that employs 50 or more employees within New York State, excluding part-time employees. For these purposes, all individuals employed at a single site of employment, other than part-time employees, are counted as employees for the purposes of determining coverage. Individuals on temporary layoff or on leave who have a reasonable expectation of recall, other than part-time employees, are also counted as employees for coverage.

In addition, employers with 50 or more employees, *including* part-time employees, within the state that work in aggregate at least 2,000 hours per week are also subject to mini-WARN. For the purposes of New York's mini-WARN, part-time status is defined as working fewer than 20 hours per week or being employed for fewer than six of the twelve months preceding the date on which notice is required. This threshold for determining part-time status is much lower than that used by many employers.

The point in time at which the number of employees is to be measured for the purpose of establishing coverage is the date the first notice is required to be given. The calculation of total weekly hours includes overtime hours earned on a regular basis.

C. State notice requirements

Under New York's mini-WARN, employers must give a mini-WARN notice 90 days prior to a mini-WARN triggering event (described above) to:

- All affected employees;
- Any employee representative(s);
- The New York State Department of Labor ("DOL"); and
- The Local Workforce Investment Board ("LWIB")

Notice must be provided using a reasonable and timely method of delivery designed to ensure its receipt. As with the federal provisions, acceptable forms of delivery include first class mail or personal delivery with optional signed receipt. Notice to the affected employees may also be served by: (1) insertion of the notice into envelopes containing pay or envelopes containing receipts for direct deposit of pay, or (2) email.

As a general matter, email notification may be used only where all affected employees have regular access in the workplace to personal computers at which e-mail may be received and viewed during work hours. There are strict requirements as to how email notice may be effectuated.

Exceptions to the Notice Requirement Under Both Federal and State Law

Both the federal WARN Act and the State's Mini-WARN Law provide for certain exceptions under which the notice period may be reduced. Even when an exception is properly invoked, however, an employer must provide as much notice as possible in advance of the layoff or covered reduction in work hours to all required parties.

Both federal and New York law recognize exceptions to the notice requirements for unforeseeable business circumstances and natural disasters. A business circumstance that is not reasonably foreseeable includes the occurrence of some sudden, dramatic, and unexpected action or condition outside the employer's control. Examples include an unanticipated and dramatic major economic downturn or a government-ordered closing of an employment site that occurs without prior notice. New York State's Department of Labor has recognized that the COVID-19 public health crisis would likely constitute such an exception to the normal notice timing requirements.[1]

Importantly, other states may not recognize these exceptions, and employers must consult the laws of each specific jurisdiction that may be implicated.

[1] *See* https://www.labor.ny.gov/workforcenypartners/warn/warnportal.shtm.

Next Steps

Employers who are considering or have already implemented closures or furloughs should carefully weigh whether WARN and mini-WARN notice is required, and whether it is advisable to issue such notice as soon as possible.

- Because it may be difficult to predict how long an employer will experience financial pressure and/or shuttered locations caused by COVID-19, employers should carefully consider whether a furlough or layoff can realistically be expected not to exceed 6 months. If not, notice may be warranted as soon as possible.

- Employers should carefully review existing notices to ensure compliance with the detailed federal and state requirements concerning the contents and service of such notice.

- In general, the new federal and state leave requirements relating to COVID-19 do not preclude employers from implementing layoffs or reducing hours provided employers treat employees who have taken leave in a similar manner to those who have not taken leave. Employers should consult Patterson Belknap's Resource Center for additional guidance on these issues.

- State-specific mini-WARN statutes should be consulted for additional local requirements.

This alert is for general informational purposes only and should not be construed as specific legal advice. If you would like more information about this alert, please contact one of the following attorneys or call your regular Patterson contact.

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