Seyfarth

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WARN Requirements In The Event Of Furloughs, Layoffs, Mass Employment Separations And Facility Closures

Introduction

This document and the FAQs are intended to provide general information for California hospital who are consider furloughs, layoffs, mass employment separation or facility closures as a result of the 2019 Novel Coronavirus disease, also known as COVID-19. It does not constitute legal advice.

This document is not intended to be exhaustive and we encourage you to supplement your knowledge by visiting the California Department of Public Health website at https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/Immunization/ncov2019.aspx or one of the other government websites containing information about the labor and employment issues associated with COVID-19.

The following information is provided based upon currently known information. The progress of this disease is constantly evolving. The foregoing information is subject to change based upon such evolving information.

Summary

Under the Federal and California WARN Acts, an employer may be required to provide advance notice and take other actions in the event of furloughs, layoffs, mass employment separations and/or facility closures. The two laws differ from one another in material respects and employers must comply with both in the event of a triggering event covered by the laws. In this regard, and as explained below, some of the Cal-WARN obligations recently were suspended in light of the current pandemic. The terms "furlough" and "layoff" mean different things to different people. Some treat the terms as having the same meanings, while others assume that a furlough is a short-term period in which the employee retains their employment status but does not work. Regardless of how the terms are defined, the WARN laws may still apply.

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1. FEDERAL WARN

(a) What is Federal WARN and does it apply in the COVID-19 pandemic if an employer conducts mass layoffs, furloughs or temporarily closes the business? What are the potential penalties?

Furloughs, layoffs, mass employment separations, and/or facility closures resulting from COVID-19 can trigger obligations under the federal Worker Adjustment and Retraining Notification ("WARN") Act and/or state mini-WARN Acts. Ordinarily, WARN liability exists for failure to provide at least 60 days' advance notice of covered mass layoffs and closures to designated government representatives, as well as to affected employees, and any labor unions representing the impacted employees.

WARN liability for failure to give required notice can be significant, i.e., back pay, benefits, and out of pocket medical expenses for each affected employee for up to 60 days, as well as the possibility of a $30,000 civil fine. Liability is similar under most state WARN-type statutes. Prevailing employees in WARN-type litigation are entitled to attorney's fees, and such litigation is readily susceptible to class actions. Unions typically have standing to bring WARN class claims on behalf of their bargaining unit members.

(b) What are WARN's triggering thresholds?

Many employment loss situations will not trigger WARN -- either because they do not involve enough employees or temporary employment losses are not long enough. (Some state triggering thresholds are different and we will highlight some of those below.) The following is a broad, generalized explanation -- the actual statutory definitions are more refined.

First, truly small employers (assessed on essentially a control group basis) may be excluded from potential coverage. For example, under federal WARN, a business enterprise has to employ at least 100 full time employees (FTEs) or the hours equivalent across all of its facilities and related businesses to be subject to WARN.

Next, even if an employer is a large enough employer to potentially be covered by federal WARN, most of them look at the number of "full-time" employment losses that occur at a "single site of employment" (or roughly similar location-dependent concept, not across an employer's separate facilities) over a rolling period (typically 30 or 90 days). The single site of employment requirement means that even if a large national employer were forced to lay off a few employees at, e.g., 100 different locations, a WARN-type statute would not be triggered because not enough employment losses occurred at a single location.

For WARN-type purposes, employees who work at home or remotely typically are sited at the bricks-and-mortar employer location from where they are supervised, to where they report, and/or where they are allocated within the employer's self-organization.

WARN has two prongs that must be analyzed separately: a "mass layoff" test and a "plant closing" test.

In a nutshell, a "mass layoff" is a headcount reduction where either the entire facility is not being closed, or enough discrete departments, functions, product lines, or other organizationally distinct units at the site are not being closed. To qualify as a "mass layoff," an employer must lay off for at least 6 months or discharge at least 50 full-time employees (defined under WARN as employees who average at least 20 hours of work per week and have worked for the employer or its predecessor for at least 6 of the 12 months prior to when notice, if it is required, would be due) at an employment site, with those employment losses comprising at least 1/3 of the full-time workforce at the location, within any rolling 30-day period. (For example, then, at a facility with 300 full-time employees, at least 100 employment separations would need to occur.) Alternatively, a mass layoff would occur if at least 500 employment losses occur at a site within a rolling 30-day period.

Even if there is no mass layoff, an employer also must assess whether a covered "plant closing" exists. A plant closing under federal WARN occurs if at least 50 full-time employees at a site (regardless of the percentage of full-time workers at the site) experience an employment loss within any rolling 30 day period -- and those losses are the result of the closure or substantial closure (maintaining a skeleton crew will not avoid liability) of the entire site, or a building on the site, or one or more departments, product lines, functions, or other organizationally distinct units on the site. In other words, there can be a qualifying "plant closing" even if the entire location is not closed, e.g., the closure of 5 departments with 10 full-time employees each.

Importantly, the federal WARN mass layoff and plant closing tests have an alternative 90 day employment loss aggregation test which provides that if the employer does not have enough losses at a site within any rolling 30 day period to trigger the statute, but does have enough causally related losses within any rolling 90 day period to trigger, there is a WARN event.

(c) Will a reduction in employee hours result in a WARN event?

Under WARN, an hours reduction of at least 50% in each month of a 6-month period constitutes an employment loss. Importantly, some states may find an employment loss has occurred with a smaller or shorter hours reduction.

(d) How do I treat employees who were discharged for cause?

Under WARN, a discharge for "cause" is not an employment loss. However, an employer should be cautious in not counting such a termination because if it is scrutinized, the employer may need to show that the discharge was not an attempt to evade the purposes of WARN.

(e) What if I don't know how long a layoff will last, e.g., if it will last at least 6 months?

Under WARN, and pursuant to 20 CFR 639.4(b), "[a]n employer who has previously announced and carried out a short-term layoff (6 months or less) which is being extended beyond 6 months due to business circumstances (including unforeseeable changes in price or cost) not reasonably foreseeable at the time of the initial layoff is required to give notice when it becomes reasonably foreseeable that the extension is required. A layoff extending beyond 6 months from the date the layoff commenced for any other reason shall be treated as an employment loss from the date of its commencement."

In other words, if at the time of a layoff an employer -- based upon the best information available to it, and exercising commercially reasonable judgment -- reasonably concludes that a layoff will not last at least 6 months, it will not have to provide WARN notice at that time. If, based upon circumstances reasonably unforeseeable at the time of the beginning of the layoff, the layoff is to be extended beyond 6 months, the employer then must give WARN notice as soon as possible, while presumably invoking the UBC notice reduction provision.

Many but not all state WARN-type statutes include similar provisions.

(f) What information must a WARN notice contain? What about state WARN-type statutes?

WARN requires employers to provide at least sixty (60) calendar days advance written notice prior to any covered "plant closing" or "mass layoff" occurring at a "single site of employment" to:

(i) all affected non-union employees;

(ii) union representatives of affected employees;

(iii) the "dislocated workers unit" of the state in which the affected employment site is located;

(iv) the chief elected official of the municipality in which the affected employment site is located; and

(v) the chief elected official of the county in which the affected employment site is located.

Content-wise, the same notice can be utilized to comply with most state WARN-type statutes. California is an especially notable (but not the only) exception.

(g) What if I need to postpone employment separations previously announced in a WARN notice?

If certain employees will need to be retained beyond the dates of separation announced in an employer's initial WARN notices, supplemental notices may be required under WARN. The DOL's applicable regulations under WARN address postponement of previously announced closing dates. This section states:

> Additional notice is required when the date or schedule of dates of a planned plant closing or mass layoff is extended beyond the date or the ending date of any 14-day period announced in the original notice as follows:
>
> (a) If the postponement is for *less than 60 days*, the additional notice should be given as soon as possible to the parties identified in Sec. 639.6 [*i.e.*, affected non-union employees, union representatives, and state and local governmental units] and should include reference to the earlier notice, the date (or 14-day period) to which the planned action is postponed, and the reasons for the postponement. The notice should be given in a manner which will provide the information to all affected employees.
>
> (b) If the postponement is for *60 days or more*, the additional notice should be treated as new notice subject to the provisions of [Sections] 639.5, 639.6 and 639.7 [general regulations specifying when notice is required, who must receive notice, and what notices must contain] of this part. Rolling notice, in the sense of routine periodic notice, given whether or not a plant closing or mass layoff is impending, and with the intent to evade the purpose of the Act rather than give specific notice as required by WARN, is not acceptable.

20 C.F.R. § 639.10 (emphasis and explanatory brackets added).

The DOL added the following explanation in its commentary that accompanied the issuance of its regulations:

> To ensure that the parties who are due notice have the most current and helpful data available and, thus, can make appropriate plans, additional notice is due if the original date or the ending date of the 14-day period is not met. If the postponement is for less than 60 days, the notice need only contain a reference to the earlier notice, the date to which the planned action is postponed, and the reasons for the postponement. This type of notice will provide the parties with needed information and be less burdensome to the employer. If the postponement extends for 60 days

or more, the additional notice should be treated as new notice and meet the specified requirements."

54 Fed. Reg. at 16063 (April 20, 1989).

(h) Does the COVID-19 pandemic qualify for one or more of the notice reduction provisions under WARN and/or state WARN-type statutes, e.g., "unforeseeable business circumstance" and/or "natural disaster?" If so, what are the implications?

Workforce reductions caused by sudden and dramatic business losses outside an employer's control due to COVID-19 likely constitute an "unforeseeable business circumstance" (UBC) under WARN. This includes employment losses resulting from government-ordered shutdowns.

The DOL's "natural disaster" regulation does not explicitly reference pandemics; but, rather mentions floods, earthquakes, and other disasters. If a particular natural calamity qualifies, the employment losses must be the "direct result" of the disaster itself. If COVID-19 is a natural disaster under WARN, it is unclear what constitutes a "direct" causal result, e.g., employees themselves becoming infected, an employer's facility becoming unusable for health reasons, etc.

Importantly, where WARN's UBC and/or natural disaster provisions are properly invoked in a situation where there is a WARN event, it does not mean that an employer need not give WARN notice. Rather, the employer still must provide as much advance notice as possible under the circumstances. If commercial reasonableness (e.g., following a rapid unforeseeable government shutdown) would not permit advance notice, notice after the reductions are implemented may be compliant.

(i) What are some other common WARN considerations?

If there are sufficient employment losses – based on counting only "full time" employees – to trigger WARN, any "part time" employees who also suffer employment losses as part of the same WARN event are entitled to notice on the same basis as full-time employees.

Temporary employees hired with the understanding that their employment would be limited to a particular project or undertaking do not need to be provided WARN notice. However, such project-based temporaries are counted in determining whether other employees may be entitled to WARN notice if they are otherwise "full time" (as defined under WARN). Temporary employees hired for an indefinite duration are counted for WARN purposes if they are otherwise are "full time" and are entitled to WARN notice if part of a WARN-covered event.

Bona fide contractor employees (i.e., individuals employed by and paid by a contractor who have an ongoing employment relationship with the contractor) are not counted in determining whether WARN notice is due and are not entitled to notice. As an important caveat, however, is that many purported contractor employees arguably are joint employees of the contractor and the employer for which services are being provided.

WARN expressly encourages employers to give voluntary WARN notice in situations where notice is not required. Therefore, in "close situations," an employer should consider providing WARN notice; it is not conceding liability if it does so.

The fact that affected employees will be receiving severance pay does not obviate the need to provide notice of a WARN-covered event. Moreover, pre-existing severance obligations cannot be used to offset liability for a failure to give WARN notice. (However, in certain circumstances, WARN liability can be integrated with/"backed out" of the amount of severance to be paid).

2. CAL-WARN

(a) What are some Cal-WARN Basics?

The scope of Cal-WARN exceeds the scope of federal WARN in two major respects: (1) Cal-WARN applies to companies that are too small to be covered by the federal WARN Act, and (2) Cal-WARN applies to business decisions affecting groups of employees that are too small to be covered by federal WARN.

Cal-WARN is triggered by:

- the layoff of at least 50 employees (who worked for at least 6 out of the 12 months prior to when a California WARN notice would be due) at a "covered establishment" over a rolling 30-day period due to "lack of funds or lack of work"
- a "termination," defined as the "cessation or substantial cessation of industrial or commercial operations in a covered establishment."
- a "relocation," defined as the removal of all or substantially all of the operations at the facility to a different location 100 miles or more away

A "covered establishment" means "any industrial or commercial facility or part thereof that employs, or has employed within the preceding 12 months, 75 or more persons." There is no authority clarifying whether this definition of "covered establishment" refers to 75 persons at any single point in time over the 12 month period, or 75 separate persons over the course of the 12 months.

Unlike federal WARN and most other state mini-WARN laws, the California law contains no express minimum length of layoff that can trigger the notice obligations. At least one California court stated that it would not read the federal WARN's 6-month layoff standard into California WARN law, and while not committing to any particular standard, indicated that even a "brief" layoff was sufficient. *The International Bd. of Boilermakers v. NASSCO Holdings Inc.*, 17 Cal. App. 5th 1105, 1122–25, 226 Cal. Rptr. 3d 206, 216–18 (Ct. App. 2017). Thus, under California WARN, a furlough of at least 50 employees at a "covered location" even of a short duration (e.g., 7-10 days) could trigger notice obligations.

As the foregoing discussion indicates, compliance with federal and state WARN acts presents a range of complex issues for employers. Where any doubts arise as to whether a state or federal WARN statute might be triggered by a potential furlough or any other employment action, employers are strongly advised to consult counsel.

(b) What effect did Executive Order N-31-20 have on California WARN Act Obligations?

On March 17, 2020, Governor Newsom signed Executive Order N-31-20 suspending certain obligations employers have under the California WARN Act (Cal-WARN). The Order acknowledges that because of COVID-19, employers have had to close rapidly without providing the notice required under California law. In recognition of the current circumstance, as of March 4, 2020 through the end of the current emergency, the Governor suspended the provisions requiring an employer to provide 60 days' notice to employees and other individuals before an employer orders a mass layoff, relocation or termination (definitions of these terms is discussed below). Cal. Lab. Code § 1401(a). The Order also suspends the provisions providing for backpay and other damages and the provision imposing civil penalties on employers for noncompliance with the Act's notice requirements. Cal. Lab. Code §§ 1402-03. The suspension of these provisions only applies to employment actions that are caused by COVID-19 related "business circumstances that were not reasonably foreseeable as of the time that notice would have been required."

Executive Order N-31-20 still requires that employers give the notice required by the California Act and that employers give as much notice as is practicable under the circumstances. Notice must be provided to (i) affected employees, (ii) the California Employment Development Department, (iii) the local workforce investment board, and (iv) the chief elected official of each city and county government within which the termination, relocation or mass layoff occurs.

The notice must include:

- All of the information required by the federal WARN Act
- A brief statement of the basis for reducing the notification period
- The following statement: "If you have lost your job or been laid off temporarily, you may be eligible for Unemployment Insurance (UI). More information on UI and other resources available for workers is available at labor.ca.gov/coronavirus2019."

On March 23, 2020, the California Labor and Workforce Development Agency provided additional guidance regarding how Executive Order N-31-20 will be implemented. According to the guidance:

- Employers who gave less than 60 days' notice before the issuance of the Executive Order will apparently not be able to rely on the unfair business circumstances exception. However, if they give subsequent notice that complies

with the order, there is a possibility that the exception may apply. The state of emergency began on March 4, 2020. Between that date and the issuance of the Executive Order on March 17, 2020, because the California WARN Act was not subject to suspension, employers should have been providing notice as specified under the Act. (i.e. 60 days). Now that the Executive Order is in effect, an employer seeking to avail itself of the suspension must satisfy the conditions specified in the Executive Order.

- The DIR broadly interprets the definition of "employer" in the statute to mean: "The California WARN Act is applicable to employers that employ, or have employed in the preceding 12 months, 75 or more full-time or part-time workers." More precisely, however, the statutory notice requirements apply to triggers ordered by employers that occur at a "covered establishment." "Covered establishment" means any industrial or commercial facility or part thereof that employs, or has employed within the preceding 12 months, 75 or more persons. "Employer" means any person ... who directly or indirectly owns and operates a covered establishment...."

- Employers who rely solely on the "physical calamity" exception, and are not giving as much notice as practicable under the unforeseeable business circumstances exception, are taking the risk that the exception may not be interpreted to apply to the COVID-19 pandemic.

- The unforeseeable business circumstances exception under the Executive Order will remain viable as long as the state of emergency exists.

- Federal WARN precedent will instruct how the unforeseen business circumstances exception applies, including, how much notice is reasonable.

- Email can be a reasonable method of delivery that ensures receipt of the notices provided to employees.

- Despite the statute permitting use of the "short form" government notice by incorporating the content requirements of federal WARN notices, the long form (including a list of all positions affected and their numbers) is listed by the LWDA as a requirement for providing compliant notice. Notably, the Executive Order does not require this, and explicitly references the requirements of federal WARN, which expressly permits use of the short form. So the LWDA's guidance appears to overreach and in so doing adopts this aspect of the EDD's pre-existing website summary of Cal-WARN, which contained a similar summary of the statute suggesting the long form was a requirement. Nevertheless, although use of the short form is supported by the statute and the Executive Order itself, employers that issue the long form government notices will not need to confront the argument that the short form is arguably insufficient under the LWDA's guidance.