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COVID-19 and Notice Requirements under the WARN Act

With the ongoing COVID-19 crisis in full swing, state governments are imposing serious restrictions on people and businesses in an effort to slow the spread of the virus. There is great uncertainty regarding when restrictions will be lifted and whether the modification of restrictions will permit businesses to re-open. Employers are facing increasingly difficult decisions about the viability of their businesses, what to do with their existing workforce, and how to proceed if restrictions continue. These issues implicate several laws, including the federal Worker Adjustment and Retraining Notification Act ("WARN"). Employers subject to the WARN Act who have imposed temporary layoffs or furloughs may be required to provide notices that temporary layoffs are becoming permanent.

The Federal WARN Act

The WARN Act applies to employers with 100 or more employees, excluding part-time employees (defined as employees employed for an average of fewer than 20 hours per week or who have been employed for fewer than 6 of the 12 months preceding the date of notice), or 100 or more employees, including part-time employees, who work at least 4,000 hours per week in the aggregate, exclusive of overtime hours. We refer to such entities as "covered employers."

The WARN Act requires a covered employer to provide its workforce with advance notice in the event of a qualifying plant closing or mass layoff. A "plant closing" occurs when an employer shuts down a facility or operating unit within a single site of employment and lays off 50 or more full-time workers during any 30-day period. A "mass layoff" is defined as a reduction in force that is not the result of a plant closing but leads to an employment loss at the employment site of 500 or more employees during a 30 day period, or a loss of 50-499 employees if they make up at least 33 percent of the employer's active workforce.

Under the notice requirement for a plant closing, a covered employer must give notice if 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 (termination or layoff exceeding 6 months) for 50 or more employees during any 30-day period. Note that this does not count employees who have worked less than 6 months in the last 12 months or employees who work an average of less than 20 hours a week for such employer. There is a 6-month look-back period to determine which employees are included in deciding whether there is an employment loss for 50 or more employees.

Under the WARN Act, covered employers must provide to the affected employees written notice of at least 60 calendar days in advance while keeping such employees on the payroll or paying them severance for the 60 days preceding the layoff. This notice requirement applies in several instances, including a temporary layoff of 50 or more employees for a period exceeding 6 months that qualifies as a "plant closing" or "mass layoff", as well as a temporary layoff of 50 or more employees initially planned for less than 6 months, but that is extended to exceed 6 months, if the affected employees make up at least 33 percent of the employer's active workforce.

In addition to providing written notice to affected employees, the WARN Act also requires employers to provide notice to the state dislocated worker unit as well as the chief elected official of the unit of local government where the mass layoff or plant closing is to occur.

The notice requirement of the WARN Act is especially relevant during the COVID-19 crisis. A number of covered employers may have effectuated temporary layoffs or furloughs that originally were planned to last less than 6 months but, due to the ongoing nature of the COVID-19 crisis and its impact on business, now may need to extend the layoff past 6 months or close altogether.

Exceptions to the Notice Requirement

There are certain exceptions to the notice requirement of the WARN Act that might apply to employers in these situations.

First, the "**faltering company exception**" might exempt an employer from the 60-day notice requirement of the WARN Act. This exception applies to a company actively seeking capital or new business that would allow it to avoid closing for a reasonable period. Under this exception, the faltering company would be excused from providing 60-day notice if the company *reasonably believes* that issuing the notice would prevent it from obtaining necessary capital or business being sought. Importantly, the employer's actions must be due to a company-wide need for additional capital or business, not just at a certain facility or division of the company.

Second, the "**unforeseeable business circumstances exception**" might also exempt an employer from providing 60 days' notice. Under this exception, employers will be exempt from the 60-day requirement when the closing or mass layoff is caused by business circumstances that were not *reasonably foreseeable* at the time the 60-day notice would have been required. In other words, this exemption applies in cases of a "sudden, dramatic, and unexpected action or condition outside of the employer's control." Arguably, this would include state-imposed closures of employment sites and restrictions on the movement and gathering of people as well as a pandemic.

In the case of a layoff of 50 or more employees initially planned for less than 6 months that has been extended or has turned into termination of employment, the WARN Act requires notice for the *initial* layoff if such an extension beyond six months was reasonably foreseeable at the time that the 60-day notice would have been required. Otherwise, the employer is only required to give notice when it becomes reasonably foreseeable that the extension is required by changed circumstances.

Employers relying on these exceptions to the 60-day notice requirement of the WARN Act must be aware that they are not excused from providing any written notice of the plant closing or mass layoff. The employer is still obligated to provide as much notice as is practicable, even if after the plant closing or mass layoff, and explain why such affected employees are receiving less than 60 days' notice.

Enforcement of the WARN Act

Given the fact that the COVID-19 crisis is unprecedented situation and the U.S. Department of Labor has yet to offer further guidance regarding these issues, it is still unclear how these issues will eventually be resolved in litigation. Employers faced with these issues must understand that violations of the notice requirement under the federal WARN Act are serious: an employer in violation of the WARN Act's notice requirements is liable to each aggrieved employee for back pay and employment benefits for the period of violation, up to 60 days. Many WARN Act claims are brought on a collective or class action basis, so that the impact of litigation may be especially severe.

The Connecticut WARN Act

If the federal WARN Act is triggered, employers of covered establishments in Connecticut are subject to additional requirements set forth in the Connecticut WARN Act. A covered establishment is defined as any industrial, commercial or business facility which employs, or has employed at any time in the preceding 12-month period, 100 or more persons. The Connecticut WARN Act imposes an obligation on employers of covered establishments that permanently close to pay for continued group health insurance for a period of 120 days from the date of closing or until the time the employee becomes eligible for other group coverage, whichever is sooner.

If a Connecticut employer is seriously considering or has decided to conduct layoffs, the Connecticut Rapid Response Team, led by the Connecticut Department of Labor, is a resource designed to lessen the impact of layoffs and provide assistance to ensure that affected employees are offered a full range of benefits and services. Prior to layoffs, the Rapid Response Team is available to conduct "early intervention" services and advise employees about unemployment benefits, job search assistance, and training opportunities. The Rapid Response Team is federally funded by the U.S. Department of Labor and provides assistance free of charge.

For further information and specific advice on the implications of COVID-19 on employment, the application of the WARN Act, or other employment related questions, please contact Andrew L. Houlding, Principal in the Employment Law Practice Group at (203) 786-8315 or ahoulding@uks.com , Christopher L. Brigham, Chair of the Employment Law Practice Group at Updike, Kelly & Spellacy, P.C. at (203) 786-8310 or cbrigham@uks.com , Valerie M. Ferdon, Associate Attorney in the Employment Law Practice Group at (860) 548-2607 or vferdon@uks.com ; or Jeffrey E. Renaud, Associate Attorney in the Employment Law Practice Group at (860) 548-2629 or jrenaud@uks.com.