Obligations and Risks When Conducting LAYOFFS

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Some of the most stressful times for human resources professionals and in-house attorneys arise when their employer is terminating a group of employees. This article summarizes some important legal considerations that employers should keep in mind when separating multiple employees.

Reduction in Force Selection Methods

Once a company determines that a reduction in force (RIF) is necessary, it must determine selection criteria. Examples of selection methods include self-select, manager's absolute discretion, tenure, multiple-factor matrix, multi-level model, skills only, performance only, totem, least impact, and some combination of the above. The selection method should be as objective as possible. Alternatively, the selection method may be outlined in a collective bargaining agreement between the employer and a union. Regardless of the method utilized, the company should make a record of how the decisions were made, who the decision-makers were, and what training was provided to those making the selections.

After completing the selection process, a review committee should evaluate the chosen group for indications that one or more protected employee class has been impacted. If such a trend or pattern is discovered, the selection criteria and/or methods should be re-examined to determine why such a disparate impact resulted. Such re-examination would help employers avoid liability under multiple federal statutes, such as the Age Discrimination in Employment Act, the Americans with Disabilities Act, and Title VII of the Civil Rights Act of 1964.

Depending on the number of affected employees and their location, another important consideration for employers is the Worker Adjustment and Retraining Notification Act (WARN).

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Federal Worker Adjustment and Retraining Notification Act (WARN)

Who Has to Abide by WARN?

Business enterprises that employ at least 100 employees, excluding part-time employees; or at least 100 employees who, considered together, work at least 4,000 hours per week, excluding overtime, are subject to WARN. All qualifying employees, regardless of their work location, must be counted in making this determination. Employees who are on a temporary layoff or a leave of absence also count if they have a reasonable expectation of recall.

When Does WARN Apply?

Notice is only required where an employer is contemplating a "plant closing" or a "mass layoff," and only when a certain number of employees will experience an "employment loss" due to the planned event. For WARN purposes, a "plant closing" is a 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 causes an "employment loss" at the single site of employment during any 30-day period for 50 or more employees, excluding part-time employees. On the other hand, a "mass layoff" means a reduction in force that does not result from a plant closing and leads to an employment loss at a single site of employment during any 30-day period for (a) least 33 percent (but no less than 50 percent) of the employees (excluding any part-time employees), *or* (b) at least 500 employees (excluding part-time employees). Where a mass layoff affects 500 or more employees, the 33 percent requirement does not apply. Employers should be mindful that remote employees may be deemed affiliated with the single site of employment to which they are assigned as their home base, from which their work is assigned, or to which they report.

Under WARN, an "employment loss" is an employment termination (other than a discharge for cause, voluntary departure, or retirement); a layoff exceeding six months; or a reduction in work hours by more than 50 percent during each month in a six-month period. Employment losses occurring within any 90-day period will be considered in the aggregate to determine whether the number of affected employees reaches the WARN minimum, unless the employer shows that these losses resulted from separate and distinct actions and causes, and are not an attempt to circumvent WARN. A layoff of more than six months that was originally expected to be a layoff of less than six months will be deemed an employment loss unless the extension was caused by unforeseeable business circumstances. In that case, employers must still give notice when the extension becomes reasonably foreseeable.

> "Employers who fail to abide by WARN may face civil actions by each aggrieved employee and may be compelled to cover back pay and any losses incurred because of benefits termination."

Are There Any Exemptions or Exceptions?

WARN does *not* apply when the closing is a temporary facility or when the closing or layoff occurred because a particular project was completed. The employer must show that the affected employees were hired with the understanding that employment would only last temporarily while the facility was open, or the project was ongoing.

In addition to this exemption, the following exceptions apply:

- **Sale of business** — when a seller terminates all its employees, but the buyer immediately rehires them (or at least enough of them not to trigger the WARN requirements). Employers should be aware that this exception only applies where the number of employees who remain terminated is less than 50 and the remaining employees have been immediately rehired with no loss of wages, benefits, seniority, etc.

- **Natural disaster** — when the employer demonstrates that the plant closing or mass layoff was a direct result of a natural disaster (e.g., floods, earthquakes, tsunamis, etc.). Notice to employees is still required, as much as practicable, even if it occurs after the fact.

- **Faltering company** — applies in cases of plant closings (but not mass layoffs) where, as of the time the notice was required, the employer was actively seeking capital or business that, if obtained, would have allowed the employer to avoid or postpone the shutdown. The employer must have believed, in good faith, that giving the notice would have precluded the employer from securing the requisite capital or business. An employer invoking this exception must be able to identify the steps taken to obtain capital or business and demonstrate that the amount of capital or business sought would have enabled the employer to operate for a reasonable period. Employers cannot escape the WARN provisions if they would have still needed to terminate 50 or more employees, who comprise at least 33 percent of the workforce at the site, or where employers could have borrowed or otherwise obtained capital or business from their other locations.

- **Unforeseeable business circumstances** — involves circumstances where a closing or layoff is caused by business

circumstances that were not reasonably foreseeable as the time notice would have been required. For this exception to apply, there must have been a sudden and unanticipated action or event beyond the employer's control.

An employer who is unable to provide a 60-day notice under the "faltering company" and "unforeseen business circumstances" exceptions must still provide as much notice as practicable and briefly explain why the 60-day notification period could not be met.

What Do Employers Have to Do for WARN Notification Purposes?

An employer must provide a 60-day written notice to each affected employee or their labor representative (if any), to the state or the state's Rapid Response team, and to the chief elected official of the unit of local government within the closing or layoff is set to occur. Notice generally must contain: (1) the specific date or period when the closing or layoff will begin and the expected date of separation for each specific employee; (2) the name and address of the employment site where the plant closing or mass layoff will occur; (3) the name and telephone number of a company official to contact for further information; (4) a statement as to whether the planned action is expected to be permanent or temporary (if the entire plant is to be closed, a statement to that effect); (5) the job titles of positions to be affected, the names of the workers currently holding affected jobs, and the total number of employees in each job classification; (6) whether or not bumping rights exist; and (7) the name of any union representing affected employees and the name and address of the chief elected officer of each union.

What If an Employer Does Not Comply with the WARN Act's Provisions?

Employers who fail to abide by WARN may face civil actions by each aggrieved employee and may be compelled to cover back pay and any losses incurred because of benefits termination. An employer who fails to provide the requisite notification to the local government unit *shall be* subject to a civil penalty up to $500 for each day of the period in violation of WARN, unless the employer pays each aggrieved employee the amount owed to them within three weeks from the date when the employer orders the shutdown or layoff.

Are There Any State Counterparts to Federal WARN?

Many states have their own laws modeled after the federal WARN Act (e.g., California, Illinois, Maryland, New Jersey, New York, Tennessee, and Wisconsin), which generally offer more protections to employees. Accordingly, state laws should also be considered in reduction decisions.

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