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Warning about the WARN Act

When must notice be given?

by John A. Anthony and Nicholas Lafalce

The Worker Adjustment and Retraining Notification Act of 1988, more commonly referred to by its acronym, the WARN Act, broadly requires that failing employers provide sixty days of advance notice of potential termination or layoff to employees.[1] Congress' stated goal in enacting the WARN Act was to assist employees in personal financial planning when facing potential large-scale layoffs. The WARN Act's well-intentioned but problematic standards present continuing challenges for distressed employers and their employees, as well as creditors and other business partners. Professionals and business executives confronting possible downturns must have basic familiarity with the WARN Act, how it works, and how to best meet or avoid its requirements.

Which employers are covered?

With limited exceptions, the WARN Act applies to employers with a threshold number of at least 100 full-time employees anticipating layoffs affecting at least 50 employees over a 30-day period. Layoffs under the statute include terminations, furloughs exceeding six (6) months, or a 50 percent reduction in hours exceeding six months. The government that enacted the WARN Act has hypocritically exempted all governmental employers from its scope. Apart from this, there are no distinctions.[2] Publicly-owned companies and private employers are covered. All types of businesses are covered. Sometimes, the determination of whether the layoffs affect the threshold number of employees, so as to require notice, can be complicated by questions of fact. Part-time employees, strikers, retiring employees, single-project employees, and those terminated for cause are among those excluded from the threshold employee number computation. The impact and duration of a layoff can also be difficult to ascertain. But the analysis is fundamentally the same.

What type of conduct triggers a notice requirement?

The second consideration involves the specific employer conduct that triggers WARN Act notification. Broadly speaking, the law is intended to objectively measure materiality of plant closings and other similar business contractions in terms of duration, number of jobs affected, aggregate work hours reduced, and percentage of jobs affected. For example, if an employer is not closing an employment site, and the number of affected workers does not exceed the lessor of five hundred (500) employees or one third (1/3) of all employees, notice is not required. Similarly, if a plant closing is involved, but the closing results from strikes or certain other developments, notice is not required. The calculus can be complicated in "close" situations.

What exclusions may apply?

Certain exceptions to WARN Act liability exist, even as to which employers and layoff events are covered. An employer that encounters unforeseen business circumstances may sometimes be excused. The unexpected non-renewal of an operating line of credit, cancellation of a major contract, or a natural disaster may excuse the employer from WARN Act notification requirements. However, bad business is not a carte-blanche license to avoid compliance. Significantly,

the filing of a Chapter 11 petition by the employer does not provide any categorical exception to application of the WARN Act. And schemes to evade compliance are expressly prohibited.

Because the ramifications of giving notice are often serious, and because the consequences of not giving notice when required are often even more serious, upfront analysis is required to assist in planning through hard times and corresponding hard decisions.

What are the business and legal risks of compliance and non-compliance?

Assuming that Warn Act notification is necessary, employers are generally required to provide 60 days of notice to affected employees. Not all employees are subject to mandatory notice: Consultants, striking workers, and part-time workers can be excluded. On the other hand, union leaders and local elected officials are required to receive notice when their constituencies are affected, with sometimes disappointing results. When

news of employer distress spreads from the boardroom into the public domain, the best intentions of Congress often backfire.

What can be expected when notice is given as required?

When notice is given as required, many employees will leave, even if layoffs might have otherwise been avoided. This is one of the harmful unintended consequences of the statute. WARN Act notice forces the employer to prematurely signal potential failure to competitors that the competitors can then exploit. Customers may be prompted to cancel orders, reduce volume, or hold up payment. All of this can leave creditors on edge. Bad legislation is often motivated by virtuous goals; in the case of the WARN Act, consequences were not adequately thought through. The very problem that the WARN Act's drafters sought to address is generally worsened by forcing distressed employers to anticipate and publicly report challenging times.

What can be expected when notice is required but not given?

The failure to give notice, when required, generally gives rise to catastrophic consequences for a distressed business. If a WARN Act notice is required and not given in a timely manner, or is not given at all, compensation is generally due to employees for every day the employer was short of the required 60 days of notice. Even if workers have obtained new positions, and even if the employer is struggling to meet payroll for its remaining workforce, that employer will be held liable for back pay, benefits, and even legal fees. WARN Act claims can inflict costly federal class-action litigation, federal bureaucratic involvement, and bad press for a struggling employer. When failure to warn produces the final death knell for an employer, lawyers continue to pursue contingent-fee/class-action claims, often tied to insurance coverages, even after the doors are closed. A typical strategy of management defending WARN Act claims involves blaming circumstances or blaming others. Major customers, competitors, and lenders are frequently accused. Accordingly, while lenders and other strategic business partners may wish to point out these issues in advance, third parties must take care not to provide legal advice or assert control. Even good advice can backfire.

In Conclusion

WARN Act analysis can be complicated after the layoff has occurred. Forensic accountants are often required to analyze the financial status of the employer as of the specific reach-back date that is postulated. There is a distinction between structuring a business at the outset to avoid WARN Act requirements, as opposed to scheming to evade its requirements. So many of these issues can be easily avoided with solid advance analysis and planning, in legal, business, and financial terms.

In the name of something as laudable as giving notice to workers, distressed employers face tremendous risks as they warn employees of potential layoffs, and even more tremendous risks if they don't. The 60-day lookback seemingly requires management to be partially omniscient and clairvoyant. Yet, despite all these considerations, thoughtful business, financial, and legal planning can assist employers and other business partners in better understanding the WARN Act, so as to avoid it or properly comply. Being generally cognizant of the WARN Act is the first step. Calling Anthony & Partners when needed can be your second.

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[1] Our focus in this brief article is on employers experiencing financial reversals, in part because this is the primary reason for layoffs and plant closings; however, the motivation for layoffs is largely irrelevant. In fact, sometimes businesses that are in acquisition mode unexpectedly encounter the WARN Act when consolidation is occurring, such as in the context of large bank acquisitions and consolidations.

[2] Several of our liberal states have enacted their own versions of the WARN Act, adding yet another dimension to the challenges facing struggling employers. Thankfully, Florida is not one of them.

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