



ANALYSIS

Key Points for Employers Planning Layoffs

Ending the employment status of a company’s employees is a difficult decision-making process for corporate employers in normal times. A time of world change and uncertainty makes navigating the legal framework and messaging of a large layoff even more difficult.

With the continued spread of COVID-19, business activity worldwide has slowed and, in some sectors, stopped altogether. Many businesses facing these disruptions are considering layoffs to stay afloat. This alert discusses the continuing federal (and some state) requirements for employers who engage in layoffs during this challenging time. Employers of various sizes have notice obligations in the event of large employment losses. They must also disclose detailed information when they offer severance and releases to older workers.

The WARN Act

Employers with 100 or more full-time employees are subject to the federal Worker Adjustment and Retraining Notification Act (WARN Act). The WARN Act, passed in 1988 to protect workers from large and sudden layoffs, requires employers to provide 60 days’ notice of an “employment loss” if they will be pursuing a “mass layoff” or “plant closing” affecting 50 or more employees over a 90-day period. A “mass layoff” involves the job loss of at least 50 full-time employees and at least 33% of the full-time

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Shook, Hardy & Bacon understands that companies are facing many challenges related to the global COVID-19 pandemic.

employees at a “single site of employment.” If the layoff affects 500 or more employees, the one-third requirement does not apply.

Under the WARN Act, an “employment loss” is: (1) an employment termination, other than a discharge for cause, voluntary departure or retirement; (2) a layoff exceeding six consecutive months; or (3) a reduction in hours of more than 50% during each month of any six-month period. The WARN Act includes strict requirements detailing who must be notified and the content of the notifications.

The WARN Act continues to be in effect during the spread of COVID-19. But, as explained below, the WARN Act also provides exceptions for employers that may apply, albeit temporarily, during this pandemic.

“Mini-WARN” Acts

A number of states have their own “mini-WARN” acts, including California, Connecticut, Georgia, Hawaii, Illinois, Iowa, Maine, New Hampshire, New Jersey, New York, Tennessee, Vermont and Wisconsin. The District of Columbia and the City of Philadelphia also have WARN acts. The patchwork of state and local laws vary in terms of the size of the employers covered, the number of employees affected, the amount of advance notice required and to whom notice must be given.

California’s WARN Act, for example, is broader than the federal WARN Act. Among other differences, it applies to employers with 75 employees and its definition of a “mass layoff” includes 50 or more employees who suffer from employment loss during any 30-day period regardless of the percentage of the workforce affected. California’s WARN Act also applies to the relocation of employees more than 100 miles away. Likewise, New York’s Warn Act is more protective than its federal counterpart. For instance, employers with only 50 full-time employees are covered and 90 days’ written notice is required prior to a mass layoff or plant closing and certain relocations or reductions of work hours.

Exceptions to Notice Obligations

The federal WARN Act has exceptions for unforeseen business circumstances and natural disasters.

Unforeseen Business Circumstances: Employers do *not* have to provide 60 days’ notice “if the closing or mass layoff is caused by *business circumstances that were not reasonably foreseeable as of the time that notice would have been required.*” Where this is the case, employers are only required to provide “as much notice as is practicable...” rather than 60 days. Under the relevant

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regulations, “[t]he employer must, at the time notice actually is given, provide a brief statement of the reason for reducing the notice period, in addition to the other elements....” Of significance to the current COVID-19 pandemic is that the federal WARN Act expressly acknowledges that “an unanticipated and dramatic major economic downturn might be considered a business circumstance that is not reasonably foreseeable.” Thus, it is more than likely that this exception applies. It remains to be seen, however, when a closing or mass layoff *will* be considered “reasonably foreseeable.” In other words, the unforeseen business circumstances exception, assuming it currently applies, may not be available to employers for the duration of the crisis. At some point, layoffs will be foreseeable.

Natural Disasters: The “natural disaster” exception applies where job losses result from a natural disaster (such as a flood, earthquake or drought, for example). It is less likely that a pandemic would fall under this exception.

California’s WARN Act has a “natural disaster” exception, however, it does not have an “unforeseen business circumstances” exception. In the face of this uncertainty, California’s governor has issued [Executive Order N-31-20](#), which temporarily suspends California’s state-specific WARN Act provided that the employer still meets some basic requirements (e.g., provides as much notice as possible, gives a brief description of the reason for shortened notice, etc.). The governor’s executive order makes explicit reference to the federal “unforeseeable business circumstances” exception, which is a good indicator that employers who are forced to engage in sudden layoffs because of COVID-19 can make use of this exception—at least for a period of time. How long remains to be seen.

OWBPA

The federal Age Discrimination in Employment Act (ADEA), which includes the Older Workers Benefit Protections Act (OWBPA), applies to all employers with 20 or more employees. When a waiver of ADEA claims is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the OWBPA requires employers to provide certain detailed disclosures.

To obtain a waiver of an age claim under the ADEA, employers must provide a release that: (1) is in writing; (2) refers to the ADEA; (3) does not require the worker to waive claims that may arise after the date of execution; (4) is in exchange for something of value in addition to what the worker is already entitled; (5) advises the worker to consult an attorney before executing the release; (6) allows the worker 21 days to consider the release; and

(7) allows the worker a 7-day revocation period after signing the release.

When seeking a waiver from two or more workers age 40 or older, more is required under the OWBPA. Employers must satisfy all of the above listed criteria. In addition, employers must give 45 days to consider the release, along with details about the group termination. A written disclosure must be provided that explains: (1) the class, unit or group of workers covered by the termination; (2) the factors affecting eligibility; (3) any time limits that apply; (4) the job titles and ages of all workers eligible; and (5) the ages and job titles of workers in the same class, unit or group who are not eligible or not selected.

Employers who do not carefully follow the strict requirements of the OWBPA will pay employees for releases that are not legally enforceable. As a result, they may pay employees in exchange for releases, but still wind up defending age-discrimination claims.

Conclusion

Employers with questions about layoffs should consult with counsel before implementing any plant closings, mass layoffs or severance and release programs. While the spreading pandemic may justify diverting from some of the federal WARN Act requirements (at least for a period of time), the law remains in place and missteps could lead to litigation. State and city WARN acts must also be navigated appropriately unless and until they are suspended. Additionally, compliance with the OWBPA's requirements is critical in order to obtain valid age claim waivers.

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Cary Silverman

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[Tom Sullivan](#)

RESOURCES

Selected Bench Guides

Georgia Pandemic Bench Guide

[Co-Authored by Shook Partner [Josh Becker](#)]

Preparing for a Pandemic: An Emergency Response Benchbook and Operational Guidebook for State Court Judges and Administrators

[National Center for State Courts]

Additional State Public Health Bench Books

[Centers for Disease Control and Prevention]

Resources for Employers

Equal Employment Opportunity Commission

[Americans with Disabilities Act; Rehabilitation Act]

Department of Labor

[Unemployment; Workplace safety]

Department of Labor Wage & Hour Division

[Families First Coronavirus Response Act]

Occupational Safety and Health Administration

[Work safety and exposure risk]

California Employment Development Department

New York Labor Department

Additional Resources

Association of Corporate Counsel COVID-19 Resource Center

[Bloomberg Law Coronavirus Outbreak News](#)

[Bain & Co. Coronavirus Economic Impact Report](#)

[Law360 Court Status and Closures List](#)

[National Center for State Courts: Court News Updates](#)

[WestLaw Global Coronavirus Toolkit](#)

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Justice Department Files Its First Enforcement Action Against COVID-19 Fraud

[Justice Department - March 22, 2020] Federal Court Issues Temporary Restraining Order Against Website Offering Fraudulent Coronavirus Vaccine... »

As Coronavirus Surveillance Escalates, Personal Privacy Plummets

[New York Times - March 23, 2020] Tracking entire populations to combat the pandemic now could open the doors to more invasive forms of government snooping later... »

WHO launches global megatrial of the four most promising coronavirus treatments

[Science - March 22, 2020] A drug combo already used against HIV. A malaria treatment first tested during World War II. A new antiviral whose promise against Ebola fizzled last year. Could any of these drugs hold the key to saving COVID-19 patients from serious harm or death?... »

Why this Nobel laureate predicts a quicker coronavirus recovery: 'We're going to be fine'

[Los Angeles Times - March 22, 2020] Michael Levitt, a Nobel laureate and Stanford biophysicist, began analyzing the number of COVID-19 cases worldwide in January and correctly calculated that China would get through the worst of its coronavirus outbreak long before many health experts had predicted... »

Coronavirus Has Opened the Corporate Email Floodgates

[New York Times - March 22, 2020] Maybe it was that one store where you shopped while on vacation a few years ago, or perhaps that online service that you used just last week, but it's all the same message: Businesses have flooded everyone on their email lists with coronavirus updates, tips on staying healthy and words of encouragement — much to people's dismay.... »

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