Top Five WARN Act Mistakes

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While the economy appears to be turning around, employers across the country continue to make difficult decisions concerning mass layoffs and plant closings. Employers that forget about the Worker Adjustment and Retraining Notification Act (the "WARN Act") and applicable state  "baby" WARN Acts do so at their peril. This article will address five common mistakes employers make when dealing with plant closings and mass layoffs under the federal WARN Act.

A Plant Closing Doesn't Always Mean Closing The Entire Plant

Things are not always what they seem. The WARN Act's definition of a "plant closing" is not limited to just those situations where the entire facility is closed. Instead, a plant closing can also occur if one or more "facilities" or "operating units" within a single site of employment is shut down and at least 50 employees (excluding part-time employees) experience an employment loss as a result of the shutdown. For example, a manufacturer has three lines in its facility, each making different parts for different customers. If the cancellation of a contract with one of the customers results in that customer's designated line shutting down, and the requisite number of employees (i.e., at least 50) experience an employment loss, a plant closing may have occurred. The critical factor in determining what constitutes an operating unit will be the organizational or operational structure of the single site of employment. Relevant to this inquiry is any applicable collective bargaining agreement, the employer's organizational structure and industry understandings of what constitutes distinct work functions. This sort of WARN Act analysis is appropriate anytime you have a department or unit that closes, if employment

losses amount to 50 or more.

To Count Or Not Count Part-Time & Temporary Employees

One of the most confusing WARN Act rules is that part-time employees are not counted for purposes of triggering the WARN Act (but they are entitled to notice), while temporary employees are counted for purposes of triggering the WARN Act (but they are not entitled to WARN notice). The WARN Act defines a “part-time” employee as one who is employed for an average of fewer than 20 hours per week or who has been employed for fewer than 6 of 12 months preceding the date on which notice is required, including workers who work full-time. Part-time employees are not counted for purposes of whether the WARN Act is triggered. However, if WARN is triggered, those part-time employees experiencing an employment loss are entitled to notice. On the other hand, temporary employees are counted for purposes of whether the WARN Act is triggered. However, temporary employees are not entitled to notice even if they experience an employment loss.

Hindsight is 30/90

While employers need to initially look at employment losses within a 30 day period of the proposed layoff or plant closing, employers should not forget about layoffs that occur within 90 days of the proposed layoff or plant closing as those can be added together to reach the WARN Act thresholds. The employment losses that are eligible to be added together include all employment losses within a 90 day period each of which separately is not of sufficient size to trigger WARN coverage. If an employer can demonstrate that the separate employment losses during the 90 day period were the result of separate and distinct causes and actions, then the employment losses do not need to be added together. However, demonstrating “separate” causes cannot be an attempt by the employer to evade the WARN Act and the burden is on the employer to demonstrate the separate nature of the layoffs.

Changes In Your Layoff Plans May Require Further Notice

Sending out the required WARN notices is not always the end of the line for your potential WARN Act responsibilities. Changes in the layoff schedule after the initial notices are sent (many of which are inevitable) may require the employer to issue re-notices or brand new notices depending on the difference in the initial layoff date and new layoff date. If the layoff date is going to be extended 59 days or less, the employer must provide notices as soon as possible to those who received the initial notice of the new layoff date. If the new layoff date will be 60 days or more from the initial layoff date, brand new WARN notices, including the requirement to provide notice 60 days in advance of the layoff date, are required. Employers must keep track of the layoff dates and issue the appropriate re-notices or new notices when necessary.

“Baby” WARN Acts Can Provide Adult Headaches

Some states have “baby” WARN Acts that provide additional requirements and/or

protections for employees faced with a plant closing or mass layoff. For example, while the WARN Act provides that notice to the Union is sufficient for notice to all of the Union's members, the Illinois baby WARN Act requires that each individual Union member receive an individual WARN notice. Failing to comply with the baby WARN Act can come with similar penalties as those imposed for failing to comply with the federal WARN Act (i.e., back pay, medical benefits, etc.). The following states have some form of plant closing laws or baby WARN Acts that should be considered in addition to the federal WARN Act: California, Connecticut, Hawaii, Illinois, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New York, Ohio, Oregon, Tennessee and Wisconsin. It should be noted that some of these baby WARN Act laws are no more restrictive than federal WARN. Some of the states that have more restrictive baby WARN Act statutes include California, Illinois, New York and Wisconsin.

When In Doubt, Send Them Out

As a practical note, if an employer is in doubt as to whether to send out WARN notices, the employer should do so. It is better to send out the notices and not need them than to fail to send them out and then realize that the WARN Act was triggered – and face potential WARN Act penalties.