Threshold WARN Act Issues in a Down Economy

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Fifty-person-or-more layoffs often trigger the federal Worker Adjustment and Retraining Notification (WARN) Act\(^1\) (and also possibly individual state “mini-WARN” statutes, which can even apply to smaller layoffs). These high-impact layoffs are on the rise nationwide. According to the U.S. Labor Department, “mass layoffs” – those affecting at least 50 people from a single employer in a given month – surged to 2,269 in September alone – their highest level in seven years.\(^2\) Indeed, 157,000 private jobs were lost in the month of October 2008 alone.\(^3\) These layoffs are not confined to predictable industries, like housing or finance. Instead, widely-varying industries are shedding jobs: “Layoffs have spread to sock makers, book publishers, airlines and hydraulic-parts makers.”\(^4\) This trend is expected to continue for the foreseeable future.\(^5\)

The federal WARN Act, significantly in play once again, will celebrate its 20-year anniversary in February 2009. Yet the law continues to confound employers striving to comply with its provisions, mainly because determining when the WARN Act or a state mini-WARN Act is triggered often is very difficult. The Questions & Answers below address some threshold issues related to the WARN Act’s application to employee layoffs and plant closings.

Q: My company is planning to lay off a number of employees at different locations, some within the same state and some outside the state. How do we determine if and when employees from different locations should be combined as part of one plant closing or one mass layoff under the federal WARN Act?

A: Your question raises the often-litigated issue of whether different employment locations can be treated as a “single site of employment,” so that job losses at such locations can be aggregated to trigger the WARN Act.

The WARN Act requires employers to give employees 60 days advance written notice of an upcoming plant closing\(^6\) or a mass layoff\(^7\) at a “single site of employment.”\(^8\) The WARN Act does not define “single site of employment,” yet an understanding of its meaning is extremely important: The WARN Act’s notice requirement can trigger based on how an employment site is defined. Indeed, the larger the site, the less likely it is that a layoff will amount to a “mass layoff” and trigger the WARN Act notice requirements (because “mass layoffs” must result in employment losses for either (a) at least 50 employees and at least 33% of the employees at a single site of employment or (b) at least 500 employees at a single site of employment). Nor has clarity surrounding the meaning of “single site of employment” resulted from a separate provision in the WARN Act Regulations stating that “[t]he term ‘single site of employment’ may also apply to truly unusual organizational situations where the [normal] criteria do not reasonably apply.”\(^9\)

Nevertheless, some guidance is available in regulations issued by the Department of Labor, as well as case law. According to the WARN Act Regulations, a “single site of
employment” generally is either a group of contiguous or adjacent facilities, or a single location (though on the flip side, a single office building with 20 different employers conducting 20 different businesses can contain 20 separate WARN Act “single sites of employment”).

With regard to two or more facilities, whether they can be considered a “single site of employment” often turns on the proximity of the buildings to one another and the extent to which the business operations in those buildings are integrated with each other. For example, the regulations indicate that groups of buildings that form a campus or industrial park, or separate facilities across the street from one another, may be considered a single site of employment. On the other hand, these types of buildings, even if they are located very close together on a single campus, may not constitute a single site of employment if they have separate management, produce different products and have separate workforces.

Also, a “single site of employment” generally does not refer to unconnected buildings or those that are not in immediate proximity. Thus, clearly employment locations in different states separated by hundreds of miles will not be aggregated as a “single site of employment” under the WARN Act. Likewise, courts have also rejected “single site” claims due to lack of proximity when the employment sites are not in the same “locality.”

However, two or more non-congruous, non-adjacent facilities that are in reasonable geographic proximity may constitute a single WARN site when they are used for the same purpose and share the same staff and equipment. For example, last year, a federal court concluded that fact issues precluded summary judgment to the employer on the issue of whether two grocery stores six miles apart qualified as a single WARN site. Evidence showed substantially integrated business operations: more than half of the two stores’ combined workforce worked at least occasionally at both stores; the same manager managed both stores simultaneously for several months; the stores shared catering, other equipment and inventory and both shared the common purpose of serving the Rochester retail grocery market.

Q. What about traveling employees?

A. Laid-off employees whose job duties entail travel occasionally claim that their layoff should be attributable to a single site of employment where a WARN Act event occurred, such that they, too, are entitled to notice. The Department of Labor issued a regulation, which provides: “For workers whose primary duties require travel from point to point . . . (e.g., railroad workers, bus drivers, salespersons), 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 will be the single site in which they are covered for WARN purposes.”

Despite this regulation, the rules relating to these types of workers are still developing, with plaintiffs’ attorneys often making creative arguments, such as that construction workers in one state should be assigned to a corporate office in another state, because they travel from job to job. Employers who have significant employees in the field should carefully examine the facts to determine whether those employees might have a legitimate claim that they should receive WARN Act notice.

You can use the suggested methodology set forth below in Exhibit A to assist your company in evaluating some of these threshold issues related to the application of the WARN Act to proposed employee job losses.
Exhibit A

Suggested Methodology for Determining What Constitutes a Single Site of Employment

While there is no bright-line rule, the determination of whether two or more buildings or facilities constitute a single site of employment generally turns on building proximity and operation integration.

As noted above, contiguous facilities or those in close geographic proximity are generally single sites of employment and geographically separate facilities are generally separate sites. However, these presumptions (if they really are presumptions) can be reinforced or defeated by operational, managerial, and labor variables.

With this in mind, with respect to any one building, an employer should first determine which other buildings are connected or contiguous. The employer should then exclude from this group any buildings that (1) have separate management, (2) produce different products, and (3) have separate work forces. Generally, the remaining group of buildings (Group A) will be part of the same site of employment.

The employer should then determine what other buildings are (1) in reasonably close geographic proximity to each such site, (2) used for the same purpose, and (3) share the same staff and equipment, if any. Generally, these buildings (Group B) should be aggregated with Group A to form a single site of employment.

In determining which buildings constitute Group B, the following appear to be important factors: (1) whether the employees regularly are rotated among buildings, and (2) whether they have the same managers, department heads, controllers, quality control, engineering, operations, secretarial support, etc. The greater the sharing of management, employees and equipment, the more likely a Group B building would be deemed, along with the Group A buildings, to be a single site.

Sharing equipment that is not integral to operations appears unlikely to materially affect the analysis. Other relevant factors may include whether the buildings share parking lots or cafeterias, the amount of daily interaction between employees in the different buildings, whether the buildings have a centralized phone system or centralized payroll and whether administrative agencies treat each building separately.

Finally, the employer should consider whether traveling employees reasonably could point to either the Group A or Group B buildings as their single site of employment. If so, such employee should also be deemed part of such single site of employment for WARN Act planning purposes.
If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

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3 “ADP Report Indicates Large Drop in Private Sector Jobs” (Wall St. Journal, 11/5/08).

4 “Job Losses Buffet U.S. Early, Compounding the Downturn” (Wall St. Journal, 10/29/2008) (“This month, consumer-products companies PepsiCo Inc. and Whirlpool Corp. announced job cuts of 3,300 and 440, respectively. On Thursday, Goldman Sachs Group Inc. said it would cut 3,260 jobs, or about 10% of its workforce, Xerox Corp. said it would cut 3,000 people and Chrysler LLC said it would eliminate 1,825 jobs.”). American Express and Motorola just announced their intent to cut their workforces by 10% and 4.5%, respectively. "Amex, Motorola to Cut Work Force" (Taipei Times, 11/1/08).

5 Id. (“What worries many economists is that labor markets usually reach their weakest point after a recession has ended. During the so-called ‘jobless recovery’ following the 2001 recession, jobs continued to be shed after it was officially declared over. But the current weakness comes as the country heads into a recession that is now forecast to be deeper and longer than previously thought.”); “Mass Layoffs Highest Since 9/11” (CNNMoney.com, 10/22/2008) (“At large firms, basically what I see is an across-the-board, shotgun approach,’ said Paul Sarvadi, chairman and CEO of human resources outsourcing firm Administaff in Houston. ‘If they anticipate revenues going down, then they see how much they need to cut to reach operating targets, and equate that cost to a number of people.’

6 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 results in an employment loss at the single site of employment during any 30-day period for 50 or more employees excluding any part-time employees.” 29 U.S.C. §2101(a)(2). See also 20 C.F.R. §639.3(b) (stating that a plant closing is an action “that results in the effective cessation of production or the work performed by a unit, even if a few employees remain”).

7 A mass layoff is “a reduction in force,” other than a plant closing, that, within the employment loss testing period (normally any 30-day period), results in an employment loss at a “single site of employment” of either one-third or more of the site’s active employees, but at least 50 employees, or 500 or more employees. 29 U.S.C. §2101(a)(3); 20 C.F.R. §693.3(c)(1).

8 29 U.S.C. §§2101(a)(2), (a)(3); 2102(a).

9 20 C.F.R. §639.3(i)(8) (warning that invoking this exception “with the intent to evade the purpose of the [WARN] Act to provide notice is not acceptable”).

10 20 C.F.R. §639.3(i)(1).

11 20 C.F.R. §639.3(i)(1). See, e.g., Gorini v. AMP Inc., No. 02-3431, 02-3900, 2004 WL 834633, at *5, 94 Fed. Appx. 913 (3d Cir. Apr. 16, 2004) (holding that, if the property on which the buildings are located is contiguous under state property law, the buildings constitute a single site of employment).


13 Ritkin v. McDonnell Douglas Corp., 78 F.3d 1277, 1280 (8th Cir. 1996) (“As a general rule . . . geographically separate facilities are separate sites.”).

14 See Williams v. Phillips Petroleum Co., 23 F.3d 930, 934 (5th Cir. 1994).

15 Bader v. Northern Line Layers, Inc., 503 F.3d 813, 818-19 (9th Cir. 2007) (“[N]one of the projects was in the same locality as any other project; all but two represented the only . . . project located in a given state, and the two projects in California were hundreds of miles apart.”).

16 See, e.g., Viator v. Delchamps Inc., 109 F.3d 1124 (5th Cir. 1997); Marques v. Telles Ranch, Inc., 867 F. Supp. 1438 (N.D. Cal. 1994), aff’d, 131 F.3d 1331, aff’d in part, 133 F.3d 927 (9th Cir. 1997).

18 *Id.* at 406-07.

19 “Home base” is not defined in the regulations, but is generally understood to be “the place from which [the employee] leaves at the start of the work period and/or returns to at the end of the work period, or at the very least, where he is physically present at some point during a typical work period.” *Bader v. Northern Line Layers, Inc.*, 503 F.3d 813, 819-20 (9th Cir. 2007).