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Global Workplace:
Outperforming the Markets – and the Competition

This monthly newsletter from the Paul Hastings Employment Law practice discusses major employment law issues facing employers due to the economic downturn. Follow the links below to read articles regarding recent developments in the employment sector. For more information on our Global Employment Law practice, click here.

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Employers Beware, and Be Proactive: Major WARN Act Expansion in the Wings for 2009

BY LARRY SIDMAN, J. MARK POERIO, JASON ROSENSTOCK AND MICHAEL STEELE

With unemployment rising and few expecting a workforce recovery in 2009, there is a serious risk that the early days of the Obama administration may see Congress turn attention to the FOREWARN Act (S. 1792, H.R. 3662), which is short for the Federal Oversight, Reform, and Enforcement of the WARN Act.

In a nutshell, FOREWARN would prospectively extend WARN protections to smaller employers, trigger worker protections under broader circumstances, and expand WARN's advance notice requirement from 60 to 90 days before plant closings and mass layoffs. FOREWARN also promises to dramatically raise the enforcement stakes – by doubling the back-pay penalties for WARN violations. It doesn't stop there. FOREWARN would further authorize the DOL and state attorneys general to file civil actions to enforce WARN.

The Senate version of FOREWARN was originally introduced by Sen. Brown (D-OH) and later co-sponsored by eight additional Democrats, including President-elect Obama. A companion measure introduced by Rep. McHugh (R-NY) (H.R. 3796) was ultimately overridden by the stronger measure, H.R. 3662, introduced by Rep. Miller (D-CA). However, a modified version of H.R. 3796 was included in the Trade and Globalization Assistance Act, which passed in the House but did not advance in the Senate.

Despite these past stalls in worker protection legislation, our government affairs group reports that a continued cascading of job losses could see some version of FOREWARN steamroll through Congress within the first quarter of 2009. The employer community will face a heavy burden in order to shape or soften the details of FOREWARN. Moreover, employers should not expect success from last-minute lobbying efforts.

Our overall counsel is to be proactive and communicate your interests/concerns about this legislation to the relevant Members and staff of the House and Senate and the Obama Transition Team as soon as possible. We stand ready to assist you in that endeavor. We are closely tracking all 2009 legislative and regulatory developments related to WARN, employee benefit, and executive compensation.

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Temporary Layoffs and the WARN Act

BY STEPHEN HARRIS AND ETHAN LIPSIG

The Federal WARN Act generally requires that employers provide employees who will suffer "employment losses" (discharge, a layoff of more than 6 months, or a 50% reduction in work hours in each of 6 months) with 60 days advance notice if the employer is large enough and will cause enough employment losses in a short enough period of time at a single site of employment. Employers often struggle with what to do when a layoff large enough to trigger the WARN Act is expected to be temporary in nature (i.e., 6 months or less), but for one reason or another turns into a longer-than-6-month layoff. Employers faced with this situation may wish to consider whether there are viable alternatives for reducing WARN Act risk. A few possibilities are discussed below.

Unforeseeable Business Circumstances Exception

Employers that need to extend a layoff beyond six months may find solace in a special notice reduction rule for extensions that are the result of a business circumstance (including a change in price or cost) that was not reasonably foreseeable at the time the layoff commenced. If that special rule applies, the employer can provide shortened notice at the time the need for the extension became reasonably foreseeable, and avoid WARN Act liability altogether. 20 C.F.R. § 639.4(b). *See also* 29 U.S.C. § 2102(c). While this special rule does not require – as does the normal unforeseeable business circumstances rule – that the employer explain the basis for reducing the notification period, it normally would be prudent to do so. If this "unforeseeable business circumstances" notice reduction rule does not apply, the employer should consider alternative strategies.

Temporarily Recall Enough Employees

If the employer can recall enough of the workforce before the expiration of the 6-month deadline, it should be able to avoid a mass layoff. It could then provide actual WARN Act notice to the group that was recalled to work. Doing so should protect the employer from WARN Act liability, at least as long as recalling the employees to work would not be viewed by a court as an attempt to evade the WARN Act's requirements (and, possibly even if it is).

For example, in *Oil, Chemical & Atomic Workers International Union v. American Home Products Corp.*, 790 F. Supp. 1441 (N.D. Ind. 1992), the union demonstrated that one of the reasons that the defendant employer recalled a group of employees to work was to undermine an already-filed lawsuit claiming WARN Act damages. The court rejected the union's argument, holding that:

- Congress did not draft the WARN Act so as to make any employer's stumble an irrevocable fall. Nothing in the Act or accompanying regulations forbids an employer that prematurely terminated employees from recalling those employees to assure their receipt of sufficient notice. Bringing someone back to work so as to comply with the WARN Act is not evasion of the Act; it is compliance. *Id.* at 1447.

Doing so might be substantially less expensive than facing full WARN Act damages as to the initial group of layoffs. Imagine an employer with a single production facility with 1,000 employees that announced a temporary 5-month layoff for 400 of its employees on Day 1. Shortly before the 5-month mark, the employer determines that business has not improved as much as it had anticipated and that it only needs 700 employees. Unless the employer does something, in another month, it will owe 60 days of WARN Act damages to the 400 employees. If it recalls 100 of the employees to work, it will not have ordered a

mass layoff (because only 300 employees will have been laid off for more than 6 months; a number below the relevant WARN Act threshold – 33% of the employees at the site of employment). The employer should then be able to provide those 100 employees with actual WARN Act notice. Under this scenario, the employer only would pay 100 of the original 400 laid-off employees for 60 days of work, rather than paying the entire 400 employees 60 days of WARN Act damages.

If the employer instead realizes that it really only needs the 600 employees who are then at work (having already temporarily laid off the poorest performers), if it is more adventurous, it could consider the following, or variants on the same theme: Recall 100 of the temporarily-laid off employees and temporarily lay off 100 other active employees for 60 days. When the first 100 employee group returns to work, give them notice that they will be laid off in 60 days and, at the end of those 60 days, recall the second group of 100 employees. Assuming the employees at issue make the same amount, doing so will accomplish the employer's cost savings, while literally complying with the statute (absent a determination that the employer illegally sought to evade the WARN Act).

These outcomes find some analogous support in a number of cases in addition to the *Home Products* case. In *United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC v. Ainsworth Engineered (USA), LLC*, No. 07-4731, 2008 WL 4857905 (D. Minn. Nov. 10, 2008), the Court concluded that a temporary recall to work for seven days restarted the 6-month clock as to those employees, even though – putting aside that week of work – they were laid off for over 7 months. Similarly, in *Office & Professional Employees International Union, AFL-CIO v. Sea-Land Service, Inc.*, No. 90 Civ. 2559, 1991 WL 136036 (S.D. N.Y. July 18, 1991) the court concluded that an employer had not engaged in a plant closing where it initially laid off 54 employees, but temporarily recalled six of them for varying periods of time before ultimately permanently laying them off, because the ultimate employment losses for the group of six were outside of the maximum 90-day aggregation period. Further lending support to these outcomes, Judge Easterbrook recently noted that the WARN Act's numerical tests must be strictly applied: "[U]sing sharp lines makes the [WARN] Act easier to administer. Bright lines must be enforced consistently or they won't work. If employees can lose because of a difference between 99 and 100 workers that seems inconsequential, employers likewise must lose when what seems an inconsequential difference (the closing date) comes out the employees' way." *Phason v. Meridian Rail Corp.*, 479 F.3d 527, 530 (7th Cir. 2007).

Seasonal Employees

The rules for seasonal employees who are permanently laid off during their seasonal layoff appear to be different, although the rules are far from clear. If an employer has commenced a seasonal layoff and it provides those seasonally-laid-off employees with 60 days' notice that they will be permanently laid off during what otherwise would be their seasonal layoff, it may be able to successfully demonstrate that it complied with the WARN Act.

For example, in *Teamsters Local 838 v. Laidlaw Transit, Inc.*, 156 F.3d 854 (8th Cir. 1998), the defendant regularly laid its seasonal bus drivers off in June at the end of the school year, only to recall them again in September at the beginning of the following school year. Apparently, in January of 1995, the defendant learned that it likely would lose its contract with the school district. In June it laid off its seasonal bus drivers. In July, it notified them that it would not recall them to work and that they would be permanently laid off in September (exactly 60 days from the date of notice). The bus drivers claimed that their temporary layoff had been converted to a

layoff of more than 6 months and that they were entitled to WARN Act damages. The court disagreed, finding that the employees suffered an employment loss in June, when they were laid off but that because they normally would have been laid off in June, that employment loss was not "because" of the plant closing in September. The court further concluded that if the employees actually suffered an employment loss in September, it was of no importance, because they received 60 days' notice (even though they were not working or being paid during the notice period).

Similarly, in *Marques v. Telles Ranch, Inc.*, 131 F.3d 1331 (9th Cir. 1997), the employer regularly laid off a group of lettuce harvesters at the end of its April through November lettuce harvesting season. In November of 1991, the employer laid off the employees as usual. Shortly thereafter, it provided them notice that it would not recall them in April of 2002. The employees sued, claiming that they had not been provided the required 60-days' advance notice. The court disagreed, concluding that if they suffered any employment loss, it was when they were not recalled to work in April and that the employer had provided them with more than the required 60 days' notice.

Employers must take care, however, not to lay seasonal employees off less than 60 days from their projected recall dates or nominally terminating their employment within 60 days after notifying them that they would not be recalled, or the notice may be deemed insufficient. At least one employer fell into this trap.

In *Kalwaytis v. Preferred Meal Systems, Inc.*, 78 F.3d 117 (3d Cir. 1996), *cert. denied*, 519 U.S. 819 (1996), the employer – like the employer in *Laidlaw* – regularly laid off a group of food service operations employees at the end of the school year in May and June, only to recall them again in the Fall, at the end of the summer break. After laying off the employees in May and June, the employer sent them a letter on June 26, 1992, notifying them that they would be laid off on August 1, 1992, because it was outsourcing its food service operations and that the new food service operation provider had a job offer for them. On July 10, the employer sent a second letter informing the employees that they had no guaranteed offer of employment with the new food service operations provider. The employees sued, claiming that they were entitled to 60 days of WARN Act damages. On appeal, the court rejected the employer's argument that because the employees were notified on June 26, but would not normally have been recalled to work until late August or early September they actually received at least (or close to) 60 days' notice and instead found that the employer should be held to its representation that the employees were laid off on August 1, and held that the employees were entitled to WARN Act damages, offset by actual notice they received measured from the date of effective notice, which the court found was July 10, when the employer clarified the employees' future job prospects with the new food service operations.

Similarly, in *Washington v. Aircap Industries Corp.*, 831 F. Supp. 1292 (D. S.C. 1993), the employer seasonally laid off a group of employees at the start of the summer and recalled them at the end of the summer. On June 17, 1991, the employer notified these employees (at the start of the normal summer layoff), that they were being laid off for a period that was expected to be in excess of six months. The employees sued, claiming that they did not receive adequate notice of layoff. The court agreed with the employees, finding that they were laid off on June 17 and found the fact that they would not have been employed during the ensuing 60 days irrelevant. This holding might be explained by the fact that the employer unfortunately indicated that the layoff was taking place on June 17, rather than mid-August.

Due to trying economic times, many employers are faced with the need to reduce their

workforce, including by extending what originally were contemplated to be six-month-or-less layoffs. Such employers may wish to engage in careful, strategic, WARN Act planning in an effort to minimize their WARN Act exposure.

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Last Chance for Complying with Section 409A: Year-End Checklist

BY J. MARK POERIO, ETHAN LIPSIG, STEPHEN H. HARRIS AND ERIC R. KELLER

Now is truly the last chance for getting employment agreements, severance programs and expense reimbursement arrangements into compliance with Internal Revenue Code (Code) Section 409A. December 31st also is the end of a transition period for changing payment schedules for benefits payable under these and other arrangements that are subject to Section 409A ("NQDC"). If compliance does not occur by December 31st, individuals will be subject to accelerated taxation, interest penalties, and a 20% excise tax on their noncompliant NQDC benefits and any compliant NQDC benefits under plans of the same type.

The most troublesome NQDC programs generally are:

- *Employment agreements, severance agreements and bonus arrangements* – 409A likely applies to payments that vest during the year but would be paid more than 2.5 months after year-end.
- *Settlement agreements with former employees* – Some agreements entered into between 2005 and now involve inadvertent 409A violations (such as cashing-out NQDC, or violating 409A's six-month delay rule for some severance).
- *Stock awards* – Stock options and SARs that (i) had an exercise price below fair market value when granted, and (ii) first vested, or were granted, after 2004, normally violate 409A.
- *Deferred compensation plans, SERPs and stock plans with deferral features* – These programs generally are subject to 409A. If they have not been amended to comply with 409A, they likely will be noncompliant.

If an NQDC arrangement has any of the following features, it likely would be Section 409A noncompliant unless amended before 2009:

- The payment time or form is not completely fixed, or payment options are available.

- The employer or employee has the discretion to accelerate or delay payouts.
- Severance would be paid for "good reason" resignations.
- Payment would be triggered by occurrences, such as:
  - a change in corporate control,
  - the employee's disability,
  - the employee's execution of a claims release as a condition for collecting benefits, or
  - an event unrelated to either the employee's services or the employer's business activities or organizational goals (such as the attainment of a prescribed earnings level or completion of an IPO).
- Reimbursement rights (or post-employment benefit continuation rights) that do not include a time frame within which reimbursement requests must be made or that impose a maximum multiyear limit.
- Tax gross-ups payable pursuant to golden parachute or other provisions.
- Severance commitments for key employees of public companies, unless all severance and benefits are paid within 2-1/2 months after termination of employment and there is no preexisting agreement to pay them over a longer period.
- Post-termination consulting service arrangements or promises.
- Evergreen provisions that automatically renew the agreement, if benefits will be paid if the agreement is not renewed.

Conclusion

It will be too late to fix existing 409A problems after 2008 or to alter the time for payment for existing NQDC arrangements except as narrowly permitted under Section 409A.

Unless companies are confident that all their NQDC arrangements are 409A-compliant, they really need to undertake final compliance check right now, and take any needed compliance steps before year-end.

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