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Facilitating Fair Warning

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The Federal WARN Act generally requires that employers provide employees 60 days' advance notice of "employment losses" (certain discharges, layoffs or hour reductions) if enough employment losses are occurring. Layoffs large enough to require WARN Act notice are exempt if they are not expected to last more than six months, but sometimes they last longer, causing WARN Act notice to be required. This can cause employers problems because the employment loss is considered to have occurred at the beginning of the layoff period (meaning that, if required, WARN Act notice was due 60 days before the layoff period commenced). Employers faced with this should consider alternatives for reducing WARN Act risk.

Unforeseeable Circumstances Exception

Employers might be able to rely on a notice reduction rule for extensions mandated by business circumstances (including a change in price or cost) not reasonably foreseeable when the layoff commenced. If so, the employer can provide shortened notice at the time the need for the extension became reasonably foreseeable, and avoid WARN Act liability altogether. This special rule does not require that the employer explain why shorter notice was permitted, but it normally would be prudent to do so.

Temporarily Recall Enough Employees

If the employer recalls enough of the workforce before the six-month deadline, it should be able to avoid a mass layoff. It could then provide actual WARN Act notice to the recalled employees. Doing so should protect the employer from WARN Act liability, possibly even if the recall were viewed by a court as an attempt to evade the WARN Act.

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 reason that the employer recalled employees 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."

This strategy might be less expensive than paying WARN Act damages as non-recalled employees. Imagine an employer that temporarily lays off 400 of the 1,000 people it employs at a site. Shortly before the five-month mark, the employer determines that business has not improved as much as it had anticipated

and that it only needs 700 employees. If the employer does nothing in about another month, it will owe 60 days of WARN Act damages to 400 employees. If it recalls 100 of the employees to work, it will not have ordered a mass layoff (below the relevant WARN Act threshold).

If the employer really only needs the 600 employees who are then at work, 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 strategies have case law support. 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*, 2008 WL 4857905 (D. Minn. Nov. 10, 2008), the court concluded that a temporary recall to work for seven days restarted the six-month clock as to those employees, even though – putting aside that week of work – they were laid off for more than seven months. Similarly, in *Office & Professional Employees International Union, AFL-CIO v. Sea-Land Service, Inc.*, 1991 WL 136036 (S.D.N.Y. July 18, 1991), the court concluded that no notice was due when an employer initially laid off 54 employees, but temporarily recalled six of them before ultimately permanently laying them off, because their ultimate employment losses were outside of the 90-day aggregation period. Further, Judge Frank Easterbrook recently noted in *Phason v. Meridian Rail Corp.*, 479 F.3d 527 (7th Cir. 2007), 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."

Seasonal Employees

Seasonal employees present special issues, although the rules are unclear. An employer might have complied with the WARN Act if it gives seasonally laid-off employees notice that they will be permanently laid off during that seasonal layoff if it gives that notice at least 60 days before the seasonal layoff would have ended.

For example, in *Teamsters Local 838 v. Laidlaw Transit, Inc.*, 156 F.3d 854 (8th Cir. 1998), the defendant regularly laid school bus drivers off from June to September. 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 six 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, as was its custom, laid lettuce harvesters off at the end of its April through November harvesting season. Shortly thereafter, it notified them that it would not recall them the following April. The court concluded that, if the employees 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 permanently lay off seasonal employees less than 60 days from their projected recall dates, and they should not nominally terminate 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), the employer – like the employer in Laidlaw – regularly laid off school employees for the summer. 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. The court rejected the employer's argument that, because the employees 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 held the employer to its representation that the employees were laid off on August 1. It awarded the employees WARN Act damages, offset by actual notice.

Similarly, in *Washington v. Aircap Industries Corp.*, 831 F. Supp. 1292 (D.S.C. 1993), the employer seasonally laid off employees for the summer. On June 17, 1991, at the start of the normal summer layoff, the employer notified these employees that they were being laid off for more than 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 have been due to the employer unfortunately stating that the layoff was taking place on June 17, rather than mid-August.

Due to trying economic times, many employers 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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