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First Reported Cal-WARN Decision: Holds That Cal-WARN Is Not Triggered by an Asset Sale

By Ethan Lipsig and Stephen Harris

California's version of the Federal Worker Adjustment and Retraining Notification Act (Cal-WARN)[1] is one of the most confusing employment acts yet enacted by the California Legislature. It is like a meal of leftovers: part Federal WARN Act and part other states' mini-WARN Acts, with a touch of California flavor added for good measure. It is just different enough from these other laws to be virtually incomprehensible. To make matters worse, there are no regulations interpreting Cal-WARN, and, until just now, no reported court decisions. Although there are countless ambiguities and issues under Cal-WARN, this alert focuses on just one: Does an asset sale in which the buyer hires all of the seller's employees trigger Cal-WARN's notice requirements?[2]

The Issue

The Federal WARN Act and most state analogs require an employer to provide 60 days' written notice to its employees (and various other parties) if it is going to terminate more than a specified number of employees at a single site of employment within a specified period. For example, Cal-WARN provides that a layoff of 50 or more employees at a "covered establishment" within a 30-day period constitutes a "mass layoff" for which notice is required.

Sales of businesses create special issues under Federal and state WARN-type acts. When an employer sells all or part of its business in an asset sale, it usually lays off the staff of the business it has sold. Often, the buyer hires or offers to hire some or all of them. The WARN issues raised by such asset sales include whether notice must be given of the layoff, and who is responsible for giving such notice. In contrast, stock sales generally are of no concern because the same "employer" continues to employ the employees; because the employees are not terminated, there is no need to provide them notice. Other kinds of acquisitions, such as mergers, might present asset purchase-type WARN issues.

The Federal WARN Act contains a special "sale-of-business" exception that often exempts sellers, including asset sellers, from having to provide WARN Act notice to persons laid off at the time of the sale.[3] The exception accomplishes this by providing that employees of a seller on the effective date of an asset sale are deemed to be employees of the buyer immediately after the effective date of the sale. Thus, the asset sale does not itself result in any employment losses. If the buyer then offers employment to enough of the seller's employees, a mass layoff for which the WARN Act notice would be required would not occur.[4]

The Cal-WARN notice obligation, however, is not triggered by "employment losses." Instead, it is triggered by a "mass layoff," as well as other circumstances not very relevant in the business sale context. A "layoff" is "a separation from a position for lack of funds or lack of work."[5] Because Cal-WARN does not contain an explicit "sale-of-business" exception as the Federal WARN Act does, and because Cal-WARN damages (up to 60 days' worth of pay and benefit equivalents) can be significant, asset sellers and buyers often find themselves at odds over whether a Cal-WARN notice should be provided. Cautious asset sellers want either to provide a protective Cal-WARN notice or to obtain a Cal-WARN indemnity from the buyer. Asset buyers, on the other hand, often do not want the seller to provide notice for fear that it would disrupt the work force the buyer hopes to hire, and buyers are reluctant to provide an indemnity that could result in material liability. Instead, they often attempt to secure an indemnity from the seller.[6]

Many viable arguments exist as to why Cal-WARN might not require notice in sale situations, such as: (i) there would be no separation from a position, i.e., the employees would keep their same jobs, just with a different employer;[7] or (ii) it was not a "layoff" because the separation was not due to "lack of funds or lack of work."[8]

The *Waste Management* Decision Addressed the Question of Whether Cal-WARN Notice Must Be Given In Asset Sale Situations

The California Court of Appeal recently weighed in on this issue in *MacIsaac v. Waste Management Collection & Recycling, Inc.*, 36 Cal. Rptr. 3d 650 (Cal. Ct. App. 2005). Waste Management Collection and Recycling, Inc. (Waste) had a contract with the City of Santa Rosa to provide refuse collection, dis-

posal, and recycling services, but Santa Rosa hired North Bay Disposal Corporation (North Bay) to perform these services beginning in 2007 (at the end of Waste's contract term).

After being awarded the Santa Rosa contract, North Bay offered to buy out the remaining years of Waste's contract. Waste and North Bay reached a deal, and Waste sold its contract and operating assets (e.g., garbage trucks) to North Bay. North Bay agreed to offer employment to 42 of Waste's garbage truck drivers at the same rate of pay, same seniority, same benefits, and same schedule that they had enjoyed at Waste. The employees also were to drive the same routes. North Bay also agreed to offer employment to the Waste mechanic who worked on the garbage trucks.

Waste terminated the 42 employees on January 31, 2003 without providing them with Cal-WARN notice and immediately "transferred" them to North Bay. On February 21, 2003 (21 days after the North Bay deal closed), in an unrelated layoff, Waste terminated an additional 20 employees (who presumably worked at, or reported to, the same employment site[9] as the employees who were transferred to North Bay).

One of the employees who was "transferred" to North Bay refused to accept North Bay's offer of employment and instead sued Waste, asserting that there were 62 layoffs in a 30-day period and, therefore, there was a mass layoff under Cal-WARN for which Waste was required to provide advance notice.

The California Court of Appeal disagreed. It concluded that the language of Cal-WARN is unambiguous and the 41 transferred employees were not "laid off" because they kept their same "position," albeit with a different employer. In the court's mind, under "the Legislature's chosen definition of 'layoff,' the determining factor is whether the employee has been separated from 'a position,' not whether the employee is separated from an 'employer.'"[10] Because the 41 employees were not "separated" from their positions, they were not laid off within the meaning of Cal-WARN. Accordingly, no advance notice was required as there were not enough layoffs to constitute a Cal-WARN mass layoff.

Employers Still Need to Assess Cal-WARN Liability in the Asset Sale Context

Employers who sell assets still need to carefully consider whether the transaction may trigger Cal-WARN's notice requirement for reasons other than mass layoff. For example, advance notice is required for a "termination," which occurs when there is a "cessation or substantial cessation of industrial or commercial operations in a covered establishment."[11] Had the 20 employees laid off on February 21, 2003 been the only employees remaining at the particular covered establishment, that layoff may have constituted a "termination" requiring Cal-WARN notice.[12] No minimum number of employees have to be affected by a termination in order to trigger Cal-WARN's termination notice requirements.[13]

Moreover, because *Waste Management* is a California Court of Appeal decision, it is possible that another court could disagree with it. Even a court following *Waste Management* might conclude that the employment terms offered by the buyer were different enough to rebut an inference of continued employment in the same position.[14] If either happened, the employer might be able to convince the court that it acted reasonably in relying on *Waste Management,* and, hence, it is entitled to a reprieve from paying Cal-WARN damages under California Labor Code Section 1405, which provides that if

> *the court determines that an employer conducted a reasonable investigation in good faith, and had reasonable grounds to believe that its conduct was not a violation of this chapter, the court may reduce the amount of any penalty imposed against the employer under this chapter.*

Section 1402 damages (those payable to employees for failure to give proper notice) may not be "penalties" subject to reduction. Cal-WARN characterizes the $500 per-day damages for failing to provide proper notice to governmental agencies as a "penalty,"[15] but characterizes Section 1402 damages as a "liability." The WARN Act also characterizes its $500 per-day damages as a "penalty" and the damages to employees as a "liability"; however, its damage reduction provision allows a court to reduce both liabilities and penalties.[16] A court might conclude that, by not including the term "liability" in Section 1405, the California Legislature intentionally restricted the damages that can be reduced to the $500 per-day penalty.

Conclusion

Waste Management is the very first reported court decision interpreting Cal-WARN. It suggests that California courts may be unlikely to interpret Cal-WARN in the most draconian manner so as to require notice even when there is no functional employment loss. This case, therefore, should give asset sellers and buyers some comfort that there would not be a Cal-WARN mass layoff if the asset buyer will employ the seller's work force in the same positions, and at the same rate of pay, seniority, and benefits.

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Notes:

1. Cal. Lab. Code § 1400 et seq. Cal-WARN took effect on January 1, 2003.
2. This alert assumes a working knowledge of the Federal WARN Act and state analogs. For a detailed discussion of the Federal WARN Act, see Chapter 10 in ETHAN LIPSIG & MARY C. DOLLARHIDE, DOWNSIZING (BNA 1996) and its supplement. For a detailed discussion of the Federal WARN Act and state analogs, see the new edition of this work, which will be titled "Reductions in Force in Employment Law." It will be published by BNA later this year.
3. 29 U.S.C. § 2101(b).
4. Of course, if the employment offers are so deficient as to constitute constructive terminations, WARN Act notice might be required.
5. Cal. Lab. Code § 1400(c).
6. Asset buyers, however, potentially could be held liable for the seller's failure to provide Cal-WARN notice under a successor employer theory. *See, e.g., McCaffrey v. Brobeck, Phleger & Harrison, L.L.P.,* No. C 03-2082 CW, 2004 WL 345231, at *4-5 (N.D. Cal. Feb. 17, 2004) (holding that successor employer theory of liability is viable under Cal-WARN).
7. Cal-WARN, however, is unclear as to whether a "position" is a job function or a position with a particular employer.
8. Cal-WARN, however, is unclear as to whether an employment termination in an asset sale context would, in fact, be due to lack of work. Because the seller has sold its business, it arguably no longer has work for the employee.
9. Referred to as a "covered establishment" by Cal-WARN. Cal. Lab. Code § 1400(a).
10. *Waste Management,* 36 Cal. Rptr. 3d at 658. The court concluded that, given this reading of the statute, Cal-WARN had no need for an explicit "sale-of-business" exception.
11. Cal. Lab. Code § 1400(f).
12. Of course, in order to constitute a covered establishment, the location would have had to have had at least 75 employees in the prior 12 months. Cal. Lab. Code § 1400(a).
13. Cal-WARN defines a "relocation" as "the removal of all or substantially all of the industrial or commercial operations in a covered establishment to a different location 100 miles or more away." Cal. Lab. Code § 1400(e). Although ambiguous, the only rational reading of this provision is that it provides an exception to the "termination" notice requirements for a relocation to a location less than 100 miles distant from a covered establishment. Admittedly, there are legitimate arguments as to why this hypothetical transaction would not constitute a "termination" under Cal-WARN. For example, a court faced with this question easily could conclude that, taken as a whole, Waste relocated "substantially all" of the industrial or commercial operations to North Bay's facility across the street, and, thus, the implicit exception for relocations would apply. On the other hand, a court could conclude that there were two separate transactions. First, a relocation associated with the North Bay deal, followed by a termination of all of the remaining industrial or commercial operations.
14. The court specifically limited its holding to "the situation . . . in which all of the [t]ransferred [e]mployees retained their former positions with no change in the terms of their employment. A different situation might be presented if North Bay had offered 'to rehire the workers at a wage *so much lower* than their previous wage, or on conditions so much inferior as to rebut an inference of continuity of employment.'" *Waste Management,* 36 Cal. Rptr. 3d at 659 n.8 (emphasis added).
15. Cal. Lab. Code § 1403.
16. 29 U.S.C. § 2104(a)(4) ("[i]f an employer which has violated this chapter proves to the satisfaction of the court that the act or omission that violated this chapter was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of this chapter the court may, in its discretion, reduce the amount of the liability or penalty provided for in this section").

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