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PH COVID-19 Client Alert Series: The WARN Act and Similar State Laws

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As employers around the globe prepare their businesses and workforces for the unprecedented Coronavirus ("COVID-19") pandemic, some of these employers will face the prospect of layoffs, reduction in pay or hours or other workforce reductions that implicate the Worker Adjustment and Retraining Notification ("WARN") Act[1] and similar state laws, even if such actions are anticipated to be temporary. States that have mini-WARN laws include: Alabama,[2] California,[3] Connecticut,[4] Georgia,[5] Hawaii,[6] Illinois,[7] Iowa,[8] Kansas,[9] Maine,[10] Maryland,[11] Massachusetts,[12] Michigan,[13] Minnesota,[14] New Hampshire,[15] New Jersey,[16] New York,[17] Ohio,[18] Oregon,[19] Pennsylvania,[20] Tennessee,[21] Washington,[22]and Wisconsin.[23]

This Client Alert first provides an overview of the Federal WARN Act and commentary regarding differences with certain mini-WARN provisions. Next, the Client Alert analyzes several exceptions and strategies that may be available to mitigate WARN Act risks.

A comprehensive summary of all the Federal WARN Act's requirements and of all differences in the many mini-WARN laws is beyond the scope of this Client Alert. Employers should consult with their Paul Hastings partner before implementing any layoff or other workforce reductions.

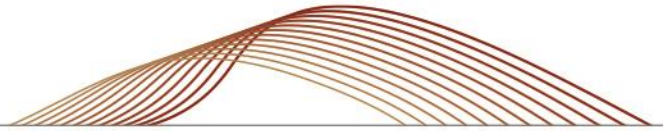
Overview of Federal WARN Act

The Federal WARN Act applies to employers that have (a) 100 or more full-time employees or (b) 100 or more employees, including part-time employees who, in the aggregate, work at least 4,000 hours per week (fewer total employees, such as only 50 employees in New York, may cause the application of certain mini-WARN statutes). Under the Federal WARN Act, a full-time employee is an employee who works more than 20 hours per week and has been employed for at least 6 out of the last 12 months (some states have different definitions; for example, California doesn't have the 20 hours-per-week requirement).

When its numerical requirements are triggered, the Federal WARN Act requires advance notification of an "employment loss," which is:

1. an employment termination, other than a discharge for cause, voluntary departure, or retirement;

2. a layoff exceeding 6 consecutive months; or



3. a reduction in hours of more than 50% during each month of any 6-month period.

The Federal WARN Act's requirements are triggered if, within a 90-day period (or in certain circumstances a 30-day period):

1. Plant Closing: 50 or more full-time employees experience an employment loss at a single site of employment as a result of 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; or

2. Mass Layoff: At least 33% of the active full time employees, but at least 50 full time employees, experience an employment loss at a single site of employment; however, if 500 or more employees are affected, the 33% requirement does not apply.

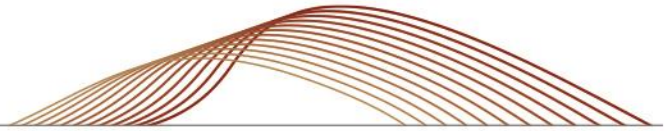
If one of the above requirements will be triggered, the Federal WARN Act requires the employer to provide at least 60 days' advance notice to all employees who will experience an employment loss (including the part time employees, even though they are not counted in the above tests). Damages for employers that fail to provide the required notice can include back pay, benefits, and civil penalties for each affected employee for each day of defective notice, subject to many technical rules.

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. In addition, one or more state mini-WARN laws may be triggered even when the Federal WARN Act is not triggered. For example, the California WARN Act defines a layoff as a "separation from a position for lack of funds or lack of work" and at least one California court has held this requirement is triggered by a layoff as short as four to five weeks, rather than six months under the Federal WARN Act. *The Internat. Brotherhood of Boilermakers, etc. v. NASSCO Holdings Inc.*, 17 Cal. App. 5th 1105 (4th Cal. App. 2017). Another example is the New York WARN Act, which can apply if only 25 employees experience an employment loss rather than the minimum 50 required under the Federal WARN Act. Further, the New York WARN Act requires 90 days' advance notice, rather than 60. Likewise, amendments to the New Jersey WARN Act that will take effect in July of this year count all employees (regardless of tenure or hours worked), requires 90 days' advance notice, counts all layoffs within the state, requires severance (which likely is preempted by ERISA), and makes obtaining a release of New Jersey WARN Act claims much more difficult. N.J.S.A. § 34:21-1 *et seq.*

Given the uncertainty of the duration for any layoffs caused by the COVID-19 pandemic, conservative employers should consider giving legally-compliant advance notice whenever possible. However, there will invariably be instances where advance notice will not be either possible or practical. As a result, employers faced with the prospect of layoffs and other reductions in force as a result of COVID-19 or related business disruptions may wish to consider whether there are viable alternatives for reducing WARN Act risk. A few possibilities are discussed below.

No Layoffs

Many employers will ask their workforce to voluntarily take vacations, accept reductions in pay, work fewer hours, voluntarily furlough to take care of family members, accept voluntary termination packages, engage in community efforts to slow the pandemic, and other measures in response to the pandemic. Often, such pro-active efforts will avoid having these employees count as "employment



losses" under the Federal and state WARN Acts. There are a host of potential wage and hour issues that can arise with respect to many of these actions.

No Employer Action

There may be circumstances where the employer does not take the action requiring layoffs or other reductions in force. For example, if a government-mandated closure is ordered for a location (e.g., airport, building) where workers are located, and such workers are not able to perform their duties remotely (e.g., gate agents, restaurant workers, et al.), the layoffs may not be considered initiated by the employer. *See, e.g., Pearson v. Component Tech. Corp*., 247 F.3d 471, 505–06, 17 IER Cases 769 (3d Cir.) (recognizing that a creditor can be an employer, but refusing to treat a parent corporation's secured lender as an employer because the lender did not have "de facto exercise of control" to warrant liability under the WARN Act regulation factors), *cert. denied*, 534 U.S. 950, 17 IER Cases 1696 (2001); *Adams v. Erwin Weller Co*., 87 F.3d 269, 272, 11 IER Cases 1437 (8th Cir. 1996) (recognizing that a creditor can be an employer, but refusing to treat a lender as exercising operational control merely because of the financial covenants and controls it had imposed on the borrower, the proposals the lender had made to the borrower as to how it could improve its financial condition, or the lender's ultimate decision to cease making loans to the borrower: "We thus reject the employees' suggestion that a major lender must timidly sit on the sidelines and watch its loan unravel and its security erode, or otherwise incur WARN responsibility"); *see also* WARN Regulations Preamble at 16,045 (concluding that the liquidator of a failed business is not an employer that must give WARN Act notice unless it continues to operate the business for the benefit of creditors).

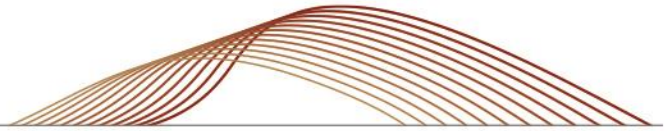
Natural Disaster Exception

The Federal WARN Act does not require 60 days' notice for employment losses that are the direct result of "natural disasters" (defined as "floods, earthquakes, droughts, storms, tidal waves or tsunamis, and similar effects of nature"). In such instances, the employer is required to provide as much notice as is practicable, containing as much of the required information as is available in the circumstances of the disaster, whether in advance or after the fact. While the COVID-19 pandemic very likely qualifies as a natural disaster, plaintiffs' attorneys may assert that the employment losses are not the direct result of the COVID-19 pandemic, but rather the deteriorating economic and business conditions that follow the spread of the pandemic. However, we believe the better view is that the deterioration of economic and business conditions often will be the direct result of COVID-19.

The California WARN Act does not have a natural disaster exception; however, it does have an exception for layoffs, relocations, and terminations caused by a "physical calamity." There is no definition of the term "physical calamity" under the California WARN Act. The phrase often invokes thoughts of fire, flood, earthquake, etc. However, COVID-19 is physical and it causes physical damage to people. Therefore, in many situations, we believe that there will be a credible argument that the pandemic qualifies as a physical calamity. As with the Federal WARN Act's natural disaster exception, plaintiffs' attorneys may assert that COVID-19 did not necessitate the layoffs, but we believe the better view is that it will have done so in many circumstances.

Unforeseeable Business Circumstances Exception

Fewer than 60 days' notice can be given due to unforeseeable business circumstances under the Federal WARN Act, but employers must give as much notice as possible and also explain the reason for the shorter notice. The WARN Act regulations expressly recognize that "an unanticipated and



dramatic major economic downturn might be considered a business circumstance that is not reasonably foreseeable."

Employers that need to extend a layoff beyond six months may find solace in a special notice reduction rule for extensions of layoffs that are the result of a business circumstance (including a change in price or cost) that was not reasonably foreseeable at the time the initial 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.

Employers that rely on the unforeseeable business circumstances exception often face litigation.

Mini-WARN laws may not have a similar exemption. For example, the California WARN Act does not have a comparable exception for unforeseeable business circumstances.

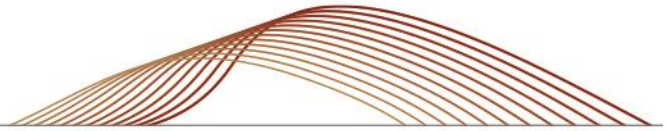
Actively Seeking Business or Capital Exception

An employer may order the shutdown of a single site of employment before the conclusion of the 60-day period, if as of the time that notice would have been required, the employer was actively seeking capital or business which, if obtained, would have enabled the employer to avoid or postpone the shutdown and the employer reasonably and in good faith believed that giving [WARN Act notices] would have prevented the employer from obtaining the needed capital or business.

It is likely that many employers impacted by the COVID-19 pandemic will be able to rely on this exception. However, there are several important limitations. First, the exception applies only in the plant closing context, not the mass layoff context. Second, the exception is applied on a company-wide basis. "Thus, a company with access to capital markets or with cash reserves may not avail itself of this exception by looking solely at the financial condition of the facility, operating unit, or site to be closed."[24] Third, there must be a causal connection between the employer's failure to obtain capital or business and the ultimate reduction in the work force.[25] Finally, even when the exception applies, it does not totally eliminate the need for giving WARN Act notice; the employer still must give employees as much notice as is practicable and its WARN Act notice must explain why the employer is giving fewer than 60 days' notice.

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 plant closing or mass layoff under the Federal WARN Act. 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.[26]

We are well versed in the WARN Act and wage and hour issues surrounding the choices employers now face. For advice applicable to your particular situation, please contact your Paul Hasting partner or any of the individuals listed below.

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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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1 29 U.S.C. §§ 2101-2109.

2 ALA. ADMIN. CODE 480-4-1-.06(ah).

3 CAL LABOR CODE § 1400 *et. seq.*

4 CONN GEN. STAT. §§ 31-51n and 31-51o.

5 Georgia Department of Labor Rule 300-2-3.10.

6 HAW. REV. STAT. § 394B-1, *et seq.*

7 ILL COMP. STAT. 65/1 *et seq.*

8 IOWA CODE §§ 84C.1 *et seq.*

9 KAN. STAT. ANN. § 44-616.

10 ME. REV. STAT. § 625-B-1, *et seq.*

11 MD. CODE. ANN., Lab. & Empl. § 11-301 *et seq.*

12 MASS. GEN. LAWS. Ann. Ch. 151A, § 71A *et seq.*

13 MICH. COMP. LAWS ANN. § 450.732(a).

14 MINN. STAT. § 116L.976.

15 N.H. REV. STAT. Ann. 275-F *et seq.*

16 N.J. REV. STAT., Ch. 34, § 21-1 *et seq.*

17 N.Y. LABOR LAW § 860 et seq.

18 OHIO REV. CODE ANN. § 4141.28(C).

19 2017 OR. REV. STAT. § 285A.516.

20 15 PA. CONS. STAT. § 2581; PHILA. MUN. CODE tit 9 9-1501.

21 TENN CODE ANN. § 50-1-601 *et seq.*

22 WASH. REV. CODE § 23B.19.010 *et seq.*

[23] WIS. STAT. § 109.07.

[24] 20 C.F.R. § 639.9(a)(4).

[25] *Carpenters Dist. Council (New Orleans & Vicinity)*, 15 F.3d at 1281 (refusing to apply the actively seeking business or capital exception because the layoff was caused by a merger, rather than a search for more capital).

[26] 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.