Alert

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COZEN O'CONNOR

Employers Must Vigilantly Evaluate WARN Obligations As Pandemic Continues

American employers are in their fifth month of dealing with the impact of the coronavirus pandemic. Government limitations aimed at minimizing the spread of the virus and drops in product demand due to the coronavirus pandemic have forced many employers to take action that has adversely impacted their employees. With the virus expected to continue impacting our lives at least through the remainder of 2020, employers need to evaluate whether new employee obligations might be triggered, particularly if an employer has furloughed employees for months.

Specifically, the federal Worker Adjustment and Retraining Notification (WARN) Act requires employers with 100 or more full-time employees to provide at least 60 days' advance written notice of a worksite closing affecting 50 or more employees, a mass layoff affecting at least 50 employees and one-third of the worksite's total workforce, or 500 or more employees at the single site of employment during any 90-day period. This notice must be provided to impacted employees, local and state government entities, and, if applicable, the union representing impacted employees. Under certain circumstances, an employer may not be required to provide 60 days' notice for such worker dislocations but is still required to provide such notice as soon as possible. These exceptions apply when employers can show that the layoffs or worksite closing is occurring because of a faltering business, unforeseen business circumstances, or natural disaster.

The coronavirus pandemic has caused a host of unforeseen business circumstances for employers and they continue to deal with the unknown as we see additional outbreaks of the coronavirus pandemic. When this ongoing impact results in job losses, it may trigger a WARN notice obligation that was not originally foreseen by employers. For instance, a temporary layoff or furlough that lasts longer than six months is considered an employment loss pursuant to the WARN Act. Additionally, a reduction in hours of more than 50 percent for each month of any six month period is an employment loss. Therefore, a temporary furlough that initially was not anticipated to last more than six months but is extended beyond six months because of lagging demand triggers a WARN notice obligation if such furloughs otherwise meet the definition of a mass layoff. Therefore, once an employer reasonably foresees its actions will meet the definition of a mass layoff, the employer must provide WARN Act notices as soon as possible.

To complicate this further, employers must continually monitor their actions to evaluate whether multiple force reductions considered together will trigger WARN notice obligations. In particular, employers should look ahead and behind 90 days to review their past actions and anticipated actions to see if WARN notice obligations have been triggered by the aggregate of affected employees.

Employers should also be mindful of any state or local WARN Act notice requirements. Many states have mini-WARN Acts that have different requirements and typically lower thresholds for when an employer's notice obligation is triggered.

Therefore, as the coronavirus pandemic continues to impact our lives, employers should be consulting with counsel to discuss their future plans and ensure they are complying with all applicable laws that may be implicated.

Cozen O'Connor's Labor & Employment attorneys are available to provide counsel to your company to ensure you comply with these laws and strategically meet your goals.

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