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Layoffs in the Time of the Coronavirus

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Whether due to a loss or decrease in production or to state government mandates stemming from COVID-19, an increasing number of companies are being forced to suspend business operations. Employers covered by the Worker Adjustment and Retraining Notification (WARN) Act that are forced to shut down their operations or engage in mass layoffs are generally required to give certain notices at least 60 days before the plant shutdown or mass layoffs occur. But this obligation is going to be difficult, if not impossible, to meet given the swift and crippling impact that COVID-19 has had upon the economy and the lives of everyone in our country. Under these circumstances, employers may well be relieved of those WARN Act obligations either because the layoffs are expected to be temporary, at least when initially implemented, or because the global pandemic was a truly unexpected event.

Under normal circumstances, the WARN Act imposes a notice obligation on employers with 100 or more full-time employees (not counting workers who have less than 6 months on the job and workers who work fewer than 20 hours per week) who implement a "plant closing" or "mass layoff" affecting 50 or more employees at a single site of employment, as defined by the Act. A "plant closing" is the permanent or temporary shutdown of a single site of employment, or one or more facilities or operating units within a single site of employment, if the shutdown results in an employment loss at the single site of employment during any 30-day period for 50 or more employees, excluding part-time employees. A "mass layoff" is defined as reduction in force that (1) does not result from a plant closing; and (2) results in an employment loss at the single site of employment during any 30-day period for either (a) at least 50-499 employees if they represent at least 33% of the total active workforce, excluding any part-time employees; or (b) 500 or more employees (excluding any part-time employees). This notice obligation is generally triggered by a "plant closing" or when a "mass layoff" will last more than six months. In such a situation, an employer is generally required to provide at least 60 calendar days' notice.

The WARN Act provides certain exceptions including for "unforeseen business circumstances" and natural disasters. Department of Labor guidance has provided that an example of an unforeseen business circumstance is one that is caused by some sudden, dramatic, and unexpected action or conditions outside the employer's control, like the unexpected cancellation of a major order. Given the huge stimulus bills recently passed by Congress, it appears unlikely that any Federal agency, including the Department of Labor, would take the position that sudden layoffs or shut downs triggered by the impact of COVID-19 were covered by the WARN notice requirements. This is particularly true if one considers the rationale for the passage of the WARN Act to begin with – to give workers who may be affected by the loss of their jobs a chance to look for a new job; give their union, if any, a chance to bargain over the effects of a plant closing, shutdown, or layoff; and to allow the unemployment bureaus in the state affected to prepare for large numbers of applications for unemployment benefits. Due to COVID-19, people will have a difficult time finding a job in this economy no matter how much notice they are given. The unemployment bureaus are expecting, and have already received, a deluge of applications for unemployment benefits. Congress has set aside enormous amounts of money to support the provision of unemployment benefits to workers impacted by the coronavirus. Accordingly, the WARN Act requirements are unlikely to be deemed triggered as a result of a shutdown or mass layoffs in response to this global pandemic.

Although it is unlikely, in our opinion, that the 60-day notice requirement generally contained in WARN will apply to plant closings and mass layoffs related to the coronavirus pandemic, it would be prudent for employers to provide as much notice of a plant closing or mass layoff as possible, not only to the employees, but to any union, local government officials, and the unemployment bureau. Under the National Labor Relations Act, employers are required to notify any union representative of a mass layoff or plant closing in advance of telling affected union employees. But given the emergency nature of this pandemic, the "advance" notice does not have to be very far in advance. Employers should provide notice to all other required parties immediately after notifying *employees* of what is intended.

In addition, most companies that are shutting down their facilities or engaging in mass layoffs currently anticipate (and hope) that the layoffs or shutdowns will be temporary and under six months. Again, however, what started out as temporary may become permanent as the effects of COVID-19 on Americans' lives and the economy become more fully known. Therefore, employers who may feel the need to extend a shutdown or layoff beyond six months or make it permanent may wish to reassess an obligation to provide WARN notices at the time.

Finally, employers who know now that a plant closure or mass layoffs from a reduction in force is going to be permanent, should obtain advice concerning whether their WARN notice obligations are implicated.

If the WARN notice obligations are triggered, employers must provide notice to managers, supervisors, hourly and salaried workers, employees' representatives, the local chief elected official, and the state dislocated worker unit. The Act expressly sets out the specific information that must be included in each notice.

Employers should also check whether the state in which they are located mandates notice requirements. If you desire to discuss how this law might apply to your organization, any notification requirements you might have, or anything else related to the obligations an employer might have arising from the COVID-19 virus, please contact any of the Roetzel Employment Attorneys listed at the side of this Alert.

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