Stuart + Branigin LAWYERS

COVID-19 & LAYOFFS

The COVID-19 pandemic has thrust many unforeseen challenges on employers, and none is more jarring that the sudden need to lay off works.

The Worker Adjustment and Retraining Notification ("WARN") Act, 29 U.S.C. § 2101 *et seq.*, is a federal law that prohibits certain employers from closing or conducting layoffs until after it has given sixty (60) days' notice to applicable union officials or the employee, and local government officials. The WARN Act was enacted to protect American workers and families by providing advance notice to them and some transition time to adjust to the prospective loss of employment, to seek and obtain alternative jobs and, if necessary, to enter skill training or retraining that will allow these workers to successfully compete in the job market. Though Indiana does not, several states also have complimentary "mini-WARN Acts," which sometimes place additional responsibilities on the employer.

Employers with at least one hundred (100) full time employees or at least one hundred (100) employees who work at least four thousand (4,000) hours per week are covered by the Act. What counts as a closing and a layoff is defined by the statute, and notice will generally be required for any layoff that will exceed six (6) months, or for significant reductions in hours for a workforce. The WARN Act does not encompass terminations for cause, retirements, or voluntary resignations, and there are special considerations afforded in situations regarding the sale and acquisition of business assets or the transfer of a job to a different location.

The WARN Act permits a worker or their representative to seek a wide variety of damages, including back-pay, loss of benefits counting medical expenses that would have been covered by employee benefits, and reasonable attorney's fees. While the Act provides discretion to courts to limit or reduce these damages, this is only when the court determines that the violation was in good faith.

Not every instance involving a mass layoff or closing will implicate the WARN Act. The Act makes specific exceptions for instances where these events are caused "by business circumstances that were not reasonably foreseeable as of the time that notice would have been required," by natural disasters, or where the notice was withheld in a good faith attempt to seek revenue or funding to prevent the layoff or closure.

The WARN Act and these exceptions are particularly relevant during the outbreak of the Covid-19 ("Coronavirus") epidemic, which has seen many businesses have to temporarily shut down, and where others may not be able to survive the economic impact of the epidemic. Though it is likely

that the Coronavirus outbreak—or at least the immediate consequences, including the economic recession and "stay-home" orders—will be considered circumstances that were not reasonably foreseeable, or potentially a natural disaster, it is important to remember that these provisions are not licenses to disregard the statute. Employers are always obliged to "give as much notice as is practicable," as well as "a brief statement of the basis for reducing the notification period."

Additionally, while the Coronavirus epidemic has seen many businesses shut down for less than a month, and while conservative estimates believe that most businesses will be reopened by June, businesses already in financial hardship and which may not be able to survive (or maintain the status quo) during the loss of several months' worth of business may need to begin preparing now for compliance with the WARN Act. At the very least, a business should identify a date for deciding on whether it will need to close or lay off employees and attempt to give as much notice as is reasonably possible to limit potential liability.

If you have any specific questions on the order, please call us.

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