

WARning Signs When Building Your Post-Pandemic Workforce

By Michael Jakowsky & Cepideh Roufougar

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Details

May 25, 2021

Beginning with the onset of the pandemic in March 2020, employers were left with little choice but to make tough decisions about the size and composition of their workforce. In many cases, employers were forced to shutter operations entirely. Reductions in force, furloughs, and the WARN Act became the topics of discussion around many a virtual conference table. While states begin the deliberate and inexorable process of reopening, and as the economy recovers, employers continue to need viable options to manage their workforce as their businesses bounce back.

Jackson Lewis P.C. · Building Your Post-Pandemic Workforce



Takeaways

Beginning with the onset of the pandemic in March 2020, employers were left with little choice but to make tough decisions about the size and composition of their workforce. In many cases, employers were forced to shutter operations entirely. Reductions in force, furloughs and the WARN Act became the topics of discussion around many a virtual conference table. As our country and the economy recovers, employers continue to need viable options to manage their workforces.

What Employers Need to Know

- As businesses and the country reopen, some organizations are finding they can operate successfully with a reduced or streamlined workforce. Discussions about how to reduce labor costs are becoming common.
- The challenge is in how to adjust staffing levels when the future is unclear.
- Should you decide to take reduction measures, be mindful of media and employee relations surrounding such initiatives.
- Be aware of the differences and/or similarities in state and federal WARN

laws.

- Generally, the federal WARN Act counts how many employment **losses**, not just terminations, an employer has in any rolling 90-day period. What are the events that can trigger application of the federal WARN Act?
 - If 50 or more full-time employees suffer an employment loss as a result of a layoff and they constitute 33% of the full-time workforce at a single site.
 - If 50 or more full-time employees suffer an employment loss because of a closure of a facility or definable operating unit at a single site.
 - An employee loss could occur on the date of termination. An employment loss could also occur on some other date if the employee is on a furlough or an hours reduction of more than 50% for six consecutive months. In such instances, the employment loss date for WARN purposes may revert back to the first date of the furlough or hours reduction.
- There are limited and burdensome exceptions to the federal WARN Act notice requirements including:
 - Unforeseeable business circumstance, which requires a sudden and dramatic event that is unforeseeable at the time notice would have been given;
 - Faltering company; and
 - Natural disaster.
- There are other considerations related to employment level management programs.
 - Immigration
 - An employee here on a work visa may not be able to remain in or return to the U.S. after exit
 - Benefits
 - COBRA extension
 - Severances and release agreements
 - The Older Workers Benefit Protection Act
 - Requires certain disclosures be provided to individuals who are aged 40 or over if a waiver of an age claim is sought

Transcript

Alitia ([00:00](#)):

Welcome to Jackson Lewis' podcast, We get work™ focused solely on workplace issues everywhere. And under any circumstances, it is our job to help employers develop proactive strategies, strong policies, and business oriented solutions to cultivate a workforce that is engaged, stable, and diverse.

Our podcast identifies the issues, dominating the workplace and its continuing evolution and helps answer the question on every employer's mind. How will my business be impacted? Beginning with the onset of the pandemic in March 2020, employers were left with little choice, but to make tough decisions about the size and composition of their workforce. In many cases, employers were forced to shut our operations entirely reductions in force, furloughs, and the WARN act became the topics of discussion around many of virtual conference

table. While states begin the deliberate and inexorable process of reopening. And as the economy, recovers employers continue to need viable options to manage their workforce as their businesses bounce back. This episode of We get work™ explores what every employer needs to consider before engaging in any labor cost reduction initiative.

Our host today, our Cepideh Roufougar and Mike Jakowsky. Cep and Mike are principals respectively in the San Francisco and New York city offices of Jackson Lewis. Cep acts as counselor, coach, and confidant for clients calmly guiding them through emotionally charged and highly complex disputes and helping them prevent costly litigation while working with them to achieve short and long-term business goals and strategies. Mike wants his clients to know that they can rely on him for support, no matter the concern and works with management teams on achieving and maintaining compliance, including when and how employers need to warn employees when terminations are imminent. Cep and Mike, the question on everyone's mind today is what do employers need to know to help them make critical decisions about the size and structure of their workforce without running a foul of federal and state statutes? And if they don't, how will that impact my business?

Mike Jakowsky ([02:21](#)):

Welcome everyone. I'm joined today by my colleague our Cep. And we're going to talk about probably one of the most upbeat topics we've had on the Jackson Lewis podcasts, COVID-19 and reductions in force. I suggested Bubonic plague and bankruptcy, but was rejected. But I'm hoping to do something like that next week. So we're, we're going to talk a little bit about today is how COVID-19 over time has changed, how employers are adjusting and adapting to impact on their business.

So I think, I don't know about you Cep, but I've seen sort of a dramatic change, I'd say over the last three months from, let's say a year and a half ago or 15 months ago when this first started. About 15 months ago, who was panicking and running, right? And it was just hoarding toilet paper, gathering rice, waiting for the end of the world and then laying everyone off for furloughing folks. But I think businesses are now taking a more strategic approach. And I don't know, I mean, I've seen some items that clients are sort of using, but I'm curious as to what you're seeing in terms of how clients are managing sort of the unpredictable business levels that they're currently having.

Cepideh Roufougar ([03:38](#)):

Yeah, Mike, I mean 15 months ago, it was just heartbreaking, especially being in California. And we were one of the first to shut our economy down essentially. And so many businesses and industries across the entire state had to close their operations. It was just so difficult having conversation after conversation with employers who are really making these incredibly hard decisions to lay off people. It's been nice in the last couple of months to have stuff reopened and to have the conversation shift a little bit, but 15 months ago was really rough.

Mike Jakowsky ([04:16](#)):

Yeah. Two months ago was more... We have to do this thing. And so let's best figure it out. Now I'm getting a lot of calls about, okay, we're returning, we're really excited about it, but I don't need the same size workforce. So I don't need the same labor costs. And I'm having discussions about what can we do to sort of reduce some labor costs over an unpredicted period of time. 2021 seems as weird as 2020, we have ships stuck in canals. We have hacking on pipelines. And I think businesses aren't really sure what their business levels are going to look like. So I know I've talked to folks about reduction in force, hours reduction, staggered shifts, furloughs if folks are on furloughs, hiring freezes, some voluntary programs, but it's sort of all over the board I think with businesses. And I think businesses are struggling with how to adjust the staffing levels when they don't know what the future holds for their business,

Cepideh Roufougar ([05:22](#)):

I would agree with that. I will say that I'm not seeing as many hours reductions as maybe you're seeing, I do see the staggered shifts. I do see folks who... But unfortunately are still on furloughs, whether they were furloughs that happened with the initial closures or happened subsequently. And then, I am talking to a couple of employers about some voluntary programs and what they can do to reorganize in a way that is sensitive to employees as well.

Mike Jakowsky ([05:56](#)):

Yeah. It's a really good point because I think one of the things that companies have to be more mindful of now when they're doing that reduction in force programs that they're restructurings is the media impact on it, right in March last year, it was, everyone was sort of doing the same thing and whether it was a furlough or termination. And now, I think companies have to be more mindful of media relations, employee relations surrounding some of their initiatives.

For clients that are doing reduction in force, I'm asking them to kind of go through the exercise of, well, what's the goal, what's the end goal? What's the agenda, right? What are you trying to reduce labor costs? Is it regionally targeted? And I'm also asking them to think about what they've done over the last 15 months in terms of selection process, policies and unlike, let's say 15 months ago where it was just more of a reaction, it's also think through what you've done in the past, what policies apply or collect the bargaining agreements apply as companies start to develop their reduction in force plan.

And I can tell you that there's some hot topics that I've given clients sort of the initiative, which are a little complicated. My favorite topic is born. I felt like I don't know about you. I felt like two years ago, I had to walk around the streets of New York, looking for random people to talk to me about WARN. No one really wanted to talk to me about it, but now I feel like it's one of the big hot topics and how to manage it. Are you seeing the same thing?

Cepideh Roufougar ([07:28](#)):

I am seeing a bit of the same thing. And being in California, our state WARN law is a little bit different than the federal law. And so, there has been a lot of

discussion about those differences and how you may have circumstances where federal law, federal WARN is not applicable, but California WARN is because unlike some other places in California, the word furlough really has the same legal effect as an actual layoff. Because temporary layoffs are really treated in the same manner as permanent layoffs for purposes of our state WARN. So having those conversations with folks was a real eye opener for people. I think a lot of folks sometimes use terms because they think it'll make people feel a little better, but when the reality of that term is not what they thought it was. Having those conversations of do you really want to call it a furlough when the reality of it is, it's a layoff, at least in this state.

So certainly having a lot of those discussions. Like you, I also oftentimes counsel clients, really let's articulate the legitimate business reasons why are we undertaking this exercise right now, especially when you are having a partial lay off of your workforce. It's one thing when an entire location is closing, but when there's only going to be a partial reduction, it's going to impact certain employees, not all employees. Really having a clear, legitimate business reason for the action that you're taking is going to help you in so many ways, not just the processes of WARN, but helping to make sure that you're in a defensible position in the event of any claims that may arise.

Mike Jakowsky (09:22):

And I think that's important because I think it's important to understand the the practical thing is I think we're focused on now versus let's say 15 months ago is, there was a lot of state benefits or state provided benefits, like the enhanced unemployment insurance for folks when they were terminated or maybe they weren't as likely to file a claim because they were getting unemployment insurance, they're getting an extra \$600 a week. And as that subsides, I think you may see more employees who are challenging or questioning their selection process through it. And so, I've obviously often encourage clients to sort of map out where do we need impacts is it by location, is it by department, is it by division? And that helps I think all the way through, because if we think about some of the legal points such as WARN, for those that have never heard of WARN, bless you, but it's the Worker Adjustment and Retraining Notification Act.

And it's important, because I think when businesses are mapping out their plan and when they want to roll things out, they need to be mindful on limitations on when they can roll it out. And I think WARN is challenging because it creates an outside limitation on when and businesses can roll out a reduction in force program. Particularly now state, the federal WARN requires 60 days advance written notice to employees, certain government officials in a union, if any, prior to a layoff, anytime you have a covered event.

And so, I think it's important to understand for businesses on the same, what they're doing and what they've done. WARN has a 90 day aggregation period, which means all layoffs and employment losses that occur within that 90 days have to be factored in. And I don't know about you Cep, but one of the biggest challenges that I faced with businesses trying to calculate the number is what 90

day period am I looking at, right? I got folks who are furloughed and I'm terminating them. I got folks on an hours reduction. I got folks who I am working and I'm terminating them. And I think a big challenge is that one point you calculate a measure that for WARN purposes.

Cepideh Roufougar ([11:31](#)):

Yeah. I would confer with that. I mean, doing that math and looking forwards and backwards and knowing that it's not just a fixed, it can be a sort of a rolling aggregate number that that is something that is certainly challenging for a lot of employers. But Mike, I think it might be helpful for those of us who haven't heard much about WARN for us to maybe talk a little bit about what are the triggering types of events. So do you want to maybe walk us through the events that could trigger application of WARN?

Mike Jakowsky ([12:07](#)):

I would love to, I love talking about the WARN Act. So generally speaking, WARN counts, employment losses, not just termination. So WARN counts, how many employment losses you have in any rolling 90 day period. And generally speaking, it counts terminations that occur in 90 days, but it could also count hours reductions or furloughs that occur within any 90 day period. And so, if someone's actively working, their employment loss date is easy, it's the date that they're terminated. That's the date you're sort of counting to see if you have a WARN covered event. If they are on a furlough though, or an hours reduction, it's a little bit more complicated because for hours deductions of furlough, they suffer an employment loss, even if they're not terminated. Once they've been on a furlough for six consecutive months, and once they've suffered a more than 50% reduction in their work hours for six consecutive months, but their employment loss date isn't that six months, it reverts back to the first date of the furlough.

So when you're trying to figure out, do I have X number of employees impacted any 90 day period of time, you could have some complicated factual scenarios. And then, WARN is generally triggered in one of two ways. If you're closing a plant, which is almost a misnomer, because it's either... It could be the closure of a physical location or definable operating unit at a single site. And WARN, it's single site specific means it's looking at physical locations, which also could get a little bit complicated and I guess we could talk about in a second, how to deal with remote employees.

But if you're closing a physical site or a department at any location under the federal WARN Act, you need 50 or more full-time employees suffering employment loss. If you do, then you may have a WARN event under the federal WARN law. WARN is also triggered, even if you're not closing at the department or a location. If you're conducting just sort of your generalized reduction in force, if you've got 50 or more full-time employees that impacted at that location, that constitute 33% of the full-time workforce at that location. I know we've given you a lot. It's a mouthful to kind of digest their... I guess, Cep. Do you want to talk a little bit about maybe that full-time part-time status and how that's like that?

Cepideh Roufougar ([14:40](#)):

Yeah. So, when we're looking at counting employees, what we're really looking for is a couple of things first to even be covered by WARN, an employer needs to have a hundred or more employees excluding part-time employees. So how am I doing this count? Well, a part-time employee is someone who is employed for an average, fewer than 20 hours a week, or has been employed for fewer than 6 of the 12 months before the date that notice has to be provided. So you really need to kind of run your employee roster lists and see how many people do you have on there, and what are their hours and their dates of hire, because that's going to be your initial threshold to figure out if you have the a hundred or more employees to then be subject to WARN. Then when you are counting, whether or not you have a plant closing, that's going to trigger WARN or mass layoff, that's going to trigger WARN.

You again, need that part-time full-time information because people who are part-time are not going to count towards your calculation of if you have 50 or more employees who are impacted by that plant closing or 50 or more employees that qualify for at least 33% of the workforce, a third of your workforce. So, we're really, ultimately, we're really looking at part-time employees or... Sorry, full-time employees who have been with you for more than six months or what we're counting as those who are impacted to figure out if WARN is triggered or not. Mike, did I get that right?

Mike Jakowsky ([16:19](#)):

Sounds good enough to me. But I think one of the biggest challenges I'm facing with clients now is, okay, let's assume we're covered, because I don't want to do the headache of trying to calculate where the furloughs fall in where the determinations fall in. But I don't have 60 days, or if you're in New York, 90 days notice, I don't have that time. I got to do this tomorrow. And my general counsel to them is let's see what we can create a time machine and go back. But most clients don't have the financial resources to help me create a time machine. Also, I think if we created a time machine, I'd go back to time and I wouldn't be sitting here talking about reductions in force. I would have invested in a BitCoin, but here we are. And so, one does have, I think, some exceptions to it, and that's going to vary from some state laws.

Don't acknowledge all the federal exceptions. I guess the ones that I've seen that are most applicable are the unforeseeable business circumstance exception, which requires a sudden and dramatic event that is unforeseeable at the time notice would have needed to have been given. That I think most likely applied back in March when there was these shutdowns that they had to happen. And then, there was no foreseeability for it. But I think it's more individualized in assessment now, on whether the unforeseeable business circumstance exception applies. You still have to give them the oldest, even in if an exception applies and the notice has to articulate why you're giving less than that full notice period. Any other exceptions that you could think of that might apply?

Cepideh Roufougar ([18:06](#)):

Yeah. I mean, one other exception that I've seen in... And I see this happen more often with... Sometimes in the startup circumstance where you've got a company that could meet that faltering company exception, where they are actively trying to seek funding to maintain their operations. And so, they're not issuing faltering company exception notices because it could impact their melony to obtain that funding. but that I think is a very relatively rare circumstance. Because most of the time when you do have those companies that are seeking funding, they may not meet the hundred employee full-time threshold to be subject to WARN, but, being here on the West Coast, I have seen some of that and have seen it impact us more under Cal-WARN because Cal-WARN is again, slightly different than federal WARN in terms of its thresholds. It's got some lower thresholds than federal WARN.

Mike Jakowsky ([19:07](#)):

Yeah. The one that I think I'm interested to see how it plays out is the natural disaster exception. And I know there's some Florida court cases that have found that COVID-19, isn't a natural disaster for WARN purposes. I'm curious to see how other courts kind of look at that. WARN has an exception that talks about things like fires and hurricanes and of the nature qualifying for the natural disaster, but I'm not sure that anyone... Because WARN wasn't around in 1913, I guess on the last pandemic came into play. So I don't know where a pandemic fits within the natural disaster exception, I guess that'll have to play out as businesses make arguments under the WARN Act for that exception to apply.

Cepideh Roufougar ([19:59](#)):

Yeah. And when exception that we've had here in California that shortens the notice requirement is that, related to the COVID-19 pandemic, Governor Newsome did issue an executive order that allowed for the time periods for notice to be significantly shortened to not have to follow the 60 days. Because of the COVID-19 pandemic, California is scheduled to open up again in May, June. And so, if our state of emergency is lifted, then I expected that executive order will also go by the wayside. So, I think employers do really need to be thoughtful in planning ahead for these types of things and really think about what are the available options or exceptions that might be applicable.

Mike Jakowsky ([20:50](#)):

And while I love a good WARN discussion, there's some other things that I think we're also... I'm also talking about with clients to try to think through, for example, like immigration, they're terminating someone who's on a visa or other authorization that allows them to work here in this country. And they're being terminated. In some instances, they can no longer remain in this country after they're exited. And so, I think employers need to take a look at that and also to take a look at whatever travel restrictions arise from those situations. For example, if there's a travel ban in the country to which that individual would need to return if their employment were terminated here. And so, I'm encouraged clients that they a look at that aspect and then to also be mindful of ever moving parts, federal legislation regarding benefits. I think now employers that terminate employees have to cover their health insurance through

September. I think is correct now.

Cepideh Roufougar ([21:51](#)):

Yeah. Under the Biden's stimulus package, there's a provision that provides for a COBRA subsidy for health insurance can benefit continuation. Employers can apply for that tax reimbursement, I believe is the mechanism that's been set up, but it will... Employers do need to keep that in mind in terms of the benefits that will need to be offered. And really that does come into play when employers are thinking about what they might offer laid off employees as part of a severance package, no many employers will offer severances that will include compensation, additional compensation, and they'll include continuing health insurance benefits as a perk underneath that severance agreement. But whether or not that offer right now would be sufficient consideration for any release agreement is a concern that employers should really be prepared to address.

Mike Jakowsky ([22:52](#)):

Yeah, I agree. I think employers need to think through if and what they're going to offer exited employees from severance package. And I think they also need to think through the process. There's a different law, which often gets confused with WARN called the Older Workers Benefit Protection Act, which requires certain disclosures be provided to individuals who are aged 40 or over if you're going to seek a waiver of the claims. And some of that disclosure information is the job titles and ages, not names of everyone selected, but also the reasons those individuals were selected and the job titles and age of everyone that they work compared to that was not selected.

You basically have to tell people the process by which that selection took place. And you can't kind of think about that afterwards, because you've got to tell the person, but this is who you were compared to. And this is how we made the selection process to determine that you're going to be exited. And so, it's got to be a little bit more thoughtful, especially if you're going to ask for releases of that Older Workers Benefit Protection Act through the Americans... The Age Discrimination and Employment Act, the ADEA. I have some clients that... Not a lot, but I do have some clients that forego getting the ADEA a waiver because they don't want to do those disclosures.

Cepideh Roufougar ([24:09](#)):

Yeah, I do as well, but typically those are the circumstances where an entire facility is being closed, right? Everybody is being separated when there is just part of a facility or a part of a work site is going to be impacted by the reduction in force. I do find that most, the clients that I work with are in fact asking for those releases and the OWBPA Waiver Language is included in the documentation.

Mike Jakowsky ([24:42](#)):

Agreed, because the ones that I found that haven't asked. So the ones that wait for the last minute, and they're just like, well, I don't want to do the disclosures. And then, you're sort of giving money away and having an extra added risk area

out there, because if you don't do the disclosures, you don't get the age waiver. And I think it's important, especially if you're going to do a disparate impact analysis, have all that information lined up, ahead of time, as opposed to I do. And I'm sure you commonly get phone calls, "Hey, we're doing this tomorrow afternoon. What do I need to know?"

Cepideh Roufougar ([25:12](#)):

I actually had one of those calls on Monday. But speaking of those adverse impact analyses, what I always encourage employers to do. And Mike, I'd love to know if you approach this differently is, I think it is always helpful to do that analysis, but make your decisions as to who it is that is going to be selected for layoff and the rationale as to why you made those selections before you do that analysis. And then, yes, we'll look at the analysis but... I find that when employers are actually doing this the right way in terms of doing that reason, logical, I can explain why I've made these decisions process. Even if the statistics show that there might be a slight impact on one group or another. Most employers feel comfortable with, "Nope, this is the process. This is how we've come up with this. This is our plan." I find, is it helpful information to have those statistics. I try to discourage employers from making decisions based solely on the statistics. I really want them to make these decisions based on their legitimate business needs.

Mike Jakowsky ([26:28](#)):

I almost always recommend that they do the adverse impact analysis because it sort of tests the rationale, right? Because if you do get an adverse impact, then it's sort of gut checks them on how comfortable are we with the selection process? Because you're right, just because there's an adverse impact, does not necessarily mean there's discrimination at play, just means you got to go back and take a look at the numbers. And more importantly, take a look at the selection process by which you were able to arrive at those numbers. And so, I like it because, like I said, it's a good way for employers to gut check how comfortable they are with the selection process. And I guess the last thing that I want to mention before we wrap up here today is... And it's unique, I think the COVID times, but I think employers need to give a real thought to how they're going to communicate these exit programs if they're going to run them.

Because a lot of folks who are working remotely, right? And we talked about... I want to mention you for remote employees for one purposes, right? They have to be allocated somewhere, right? You can't just have folks counting at their house and saying we don't trigger WARN. So they have to get allocated somewhere, and that's usually where they reporting to, or get the direction from. But because folks have so many remote employees, I think businesses need to think through logistically how they're going to communicate it. You can't just bring someone into an office with two representatives from the company to communicate that. So I've been encouraging employers to think through, are you going to do it by zoom? Or you going to ask employees to come in? Can you ask employees to come in, based on whatever jurisdiction? And what if they're under some sort of an accommodation that requires them or states that they should work remotely.

So I've been encouraging employers to think through the logistics of how they're going to communicate that to someone that they've been selected for termination.

Cepideh Roufougar ([28:14](#)):

Yeah. I mean, look at any time you have ending of the employment relationship, communication is going to be key, right? Whether it is, if the ending is because of a mass layoff or a facility closure or the ending is because of a one-off termination related to performance issues. I always encourage employers to be mindful of how they do those communications. I am a firm believer that a personal communication is really best to me, greatest extent possible. I do recognize that in the mass layoff contexts, that may not always be possible, but having very clear communication to employees can really go a long way. It's all about making sure that this process is handled in a manner that helps preserve the employee's dignity. It's amazing how many times claims arise simply because an employee felt that something was unfair or they were disrespected. So communication is always key.

Mike Jakowsky ([29:23](#)):

And I think with that, I think probably most folks have had enough of listening to us, communicate about reductions in force. I know, Cep and I do this on a regular basis. We kind of get together and we just talk about reductions in force, because we need hobbies. But I want to thank everyone. I think for joining us, I think our podcast as a Fearless Firing. So have a nice segue from this one. There'll be my Mike Abitabile and our Richard Landau. And obviously, if anyone has any questions or concerns, they could always reach out to Cep. I have no interest in talking about reduction in force any further. And I told Cep, I was going to get the last word in to encourage people to call her. And I did. So I went.

Cepideh Roufougar ([30:02](#)):

Well, perhaps Mike, I will be one who will actually win, because I'll get to talk to our wonderful clients.

Alitia ([30:09](#)):

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