Legal Update Article

Employer Reactions to Federal Funding Freeze Could Have WARN Act Consequences

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Takeaways

- Employers must be aware of the WARN Act and state counterparts when taking employment actions in response to the potential federal funding freeze.
- Although certain WARN Act exceptions may be available, employers must act quickly regarding notifications in order to rely on those exceptions.
- Employers should consult with attorneys experienced in the WARN Act when considering any employment actions in response to the federal funding freeze.

Links

- Detail Matters: Recent Court Decision Finds Insufficient Information Limits Employer Reliance on WARN Exceptions
- Updated New York WARN Act Regulations Address Post-Pandemic Environment, Add Employer Obligations
- WARN Act Issues to Navigate for the Restaurant Industry

As President Donald Trump's proposed federal funding freeze may take effect within the coming days, organizations that rely upon federal funding may be forced to consider layoffs, furloughs or hours reductions for employees. Employers should be cautious in considering any such actions as they all have potential federal or state WARN Act implications (along with other employment-related concerns) that could result in massive liability.

Under the federal Worker Adjustment Retraining Notification (WARN) Act, with certain exceptions for new and low-hour workers, entities that employ at least 100 employees are subject to the WARN Act. An employment loss for 50 or more full-time employees at a single site of employment, or that work remotely and report into a single site of employment, has the potential to constitute a WARN-triggering plant closing or mass layoff. The WARN Act requires employers to provide 60 days' written notice to affected employees, any union that represents the affected employees, and various government entities prior to effectuating a plant closing or mass layoff.

Certain state law mini-WARN Acts have lower coverage and triggering thresholds and can require up to 90 days of advanced notice, as well as mandatory severance payments. However, employers should also be mindful that a temporary furlough that exceeds six months or a reduction in employees' hours by more than 50 percent for six consecutive months also would potentially be deemed an "employment loss" for WARN purposes.

Planning will be critical because, even if the employer does not anticipate the hours

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reduction or furlough to last that long, if it does, there could be a WARN issue. Additionally, employers should be mindful that the federal WARN Act and most state equivalents have a 90-day aggregation period. Thus, even if an initial wave does not, by itself, trigger WARN Act requirements, later waves in the aggregate could. Employers that effectuate a plant closing or mass layoff without providing the statutorily prescribed amount of notice can be liable for the value of pay and benefits for the period of the WARN Act violation, as well as civil money penalties, and attorneys' fees.

There are certain exceptions that will allow employers to provide less than the full 60 days' notice, such as the unforeseeable business circumstances exception, which would potentially be most relevant to employment actions in response to a federal funding freeze; the faltering company exception; and the natural disaster exception.

However, these exceptions are narrowly construed and require a fact-specific inquiry to determine whether any applicable exception is available. Moreover, the WARN Act exceptions do not absolve employers of their obligation to provide WARN notices. Instead, the exceptions just allow employers to provide less than the full 60 days of WARN notice. In order to rely on these exceptions, employers must send WARN notices as soon as practicable after the event necessitating the layoffs and provide a detailed explanation for why the applicable exception is available to them. Employers can lose their ability to rely on these exceptions if they unduly delay providing the WARN notices. Moreover, certain state mini-WARN Acts do not provide for any such exceptions, while others require employers to specifically obtain leave from the government in order to rely on any such exceptions.

Due to the technical nature of determining whether a layoff, furlough or hours reduction triggers the WARN Act, as well as the potential for relying upon a potential exception to the WARN Act, employers should consult with employment counsel as early as possible in the planning stages of any such employment action.