Podcast

RIF/WARN and the Manufacturing Industry – Your Questions Answered

By Emily S. Borna, Patrick O. Peters & Penny Ann Lieberman

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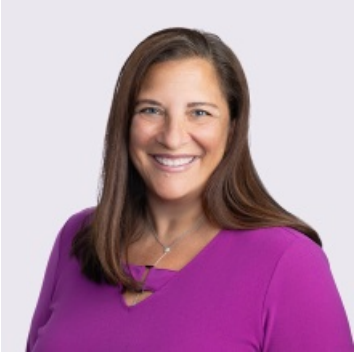
Meet the Authors



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Details

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INTRO

Manufacturing employers are facing more uncertainty than ever as the threats of reciprocal tariffs and supply shortages loom. Reductions in force may appear to be the most expedient solution but competing federal and state regulations may challenge that notion.

On this episode of We get work®, we discuss the most common RIF/WARN issues and provide practical guidance for employers considering a reduction in force.

Our hosts today are co-leaders of the firm's Manufacturing group, Emily Borna and Pat Peters, principals respectively, in Jackson Lewis' Atlanta and Cleveland offices. They are joined by Penny Lieberman, a principal in the White Plains office, whose practice focuses primarily on advising clients on RIF/WARN issues.

Emily, Pat and Penny, the question on everyone's mind today is: What key steps should manufacturing employers considering a reduction in force take now to remain compliant with WARN statutes and other legal obligations, and how does that impact my business?

CONTENT

Emily S. Borna
Principal, Atlanta

Greetings and welcome everyone. I'm Emily Borna from the Atlanta office of Jackson Lewis. I'm delighted to be here with my Manufacturing Group co-leader, Pat Peters, from our Cincinnati office, and one of our firm's subject matter experts on RIFs and WARNs, Penny Lieberman, from our White Plains office.

We thought it would be timely to gather and discuss some important

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considerations regarding workforce evolutions, particularly contractions like Reductions in Force and WARN, in light of some evolving developments and initiatives that the new Trump 2.0 administration is implementing.

We see a specific impact on the manufacturing industry; in particular, new trade policies, proposed regulations and tariffs are expected to have a significant impact on our manufacturing industry sectors, both good, bad and otherwise. Whether it's reducing compliance costs, fostering more business-friendly environments, encouraging domestic production and reducing reliance on international supply chains or having difficulty sourcing certain necessary components in various industries including pharmaceuticals, semiconductor chips, automotive parts and otherwise.

With that, I'm going to turn it over to my partner, Pat, and we'll get some important information from Penny.

Patrick O. Peters
Principal and Office Litigation Manager, Cleveland

Hey, thanks, Emily. We're delighted to have Penny, who is one of our subject matter experts, here in the studio today for this podcast on Reductions in Force and, specifically, the WARN Act. Penny, we want to start off by talking about the trends that you're seeing as one of the go-to lawyers in our firm of 1,100 lawyers with offices spanning the country. You have your finger on the pulse of what's happening with broad-scale reductions. What's going on in the current market?

Penny Ann Lieberman
Principal, White Plains

I'm seeing an uptick in the reductions. Interestingly, I'm also seeing a downtick because we have clients that had employees who are on layoff and/or they were planning more layoffs or Reductions in Force. Now, they're on hold a little bit to see what's going on with the tariffs and whether or not they're going to be able to reinvigorate some of their businesses. I also have clients who were planning on reconfiguring some of their businesses and moving some work out of the U.S. Some of that is on hold. Some are going forward and saying, we're just going to forge forward and see where we land on that. But I've had some Reductions in Force that have been delayed, and I have some that have been completely canceled.

However, we also have an issue with raw materials coming into the United States. So, it's balanced out pretty much. Reductions in Force, unfortunately for our economy, are still happening. However, employers are treading cautiously and trying to plan better.

Peters

So, it sounds like there's a lot of uncertainty. We'll get into the specifics in terms of RIFs or Reductions in Force and the WARN Act, but would you agree with me that with this uncertainty, now more than ever, planning ahead is most important?

Lieberman

Planning ahead is extremely important, particularly since not only are notifications required under union contracts in unionized environments but there are also federal, and state WARN statutes that require an employer to plan. If they're thinking about saying, we're going to rely on one of the exceptions that those statutes may provide, which would allow us to provide a reduced notice period here, they're almost certain to invite litigation over that.

Peters

So, we're seeing a lot of clients calling with questions about 'what if?' We see on the news that there may be tariffs from the United States, there may be reciprocal tariffs in Canada and we're getting a lot of our supply chain coming to manufacturing across the northern border or the southern border. Also, as we know, there's been talk of reciprocal tariffs. What are clients doing to get ahead of that?

Lieberman

Some clients are just moving forward, but others have contingency plans. I have drafted Reduction in Force plans and WARN notices based on scenario A and based on scenario B. We have weekly meetings with many of our clients to see what the status is and what's changed from an operational perspective.

Peters

Very interesting. I'll turn it over to Emily to talk to you a little bit about the last time we faced this kind of uncertainty. Emily?

Borna

Thanks, Pat. It is hard to believe that we're now five years post-pandemic. The last time we saw this much activity and contractions in the workforce, particularly in the manufacturing industry, was in the wake of the COVID-19 pandemic. Penny, with that in mind, what lessons have employers and we learned from furloughs, layoffs and Reductions in Force that were effectuated in the wake of the pandemic?

Lieberman

Well, Emily, it's pretty interesting because, during the pandemic, everybody assumed that in two or three weeks, everyone would be back to work. Then they found out, unfortunately, that it wasn't two to three weeks for many. It was more like months and months. Some businesses, unfortunately, did not survive, or some locations within businesses did not survive. So, everyone is more mindful of that. More mindful of whether we are just going to ignore federal or state WARN statutes, just move ahead, put people out on layoff and assume it is going to be temporary or not.

Also, you have insurance carriers who, during the pandemic, said, okay, we'll send benefits. I'm not so sure the carriers are willing to do that anymore. So, we have learned a lot. We have learned that just putting people on layoffs or furloughs,

which you thought were going to be temporary, triggers a whole host of issues. From benefits issues to labor issues, wage and hour issues and advanced notification issues. States that have predictive scheduling require advanced notice, at least sometimes a certain amount of pay periods, to let people know that they're either going to be furloughed, laid off or terminated.

Borna

Penny, it sounds like employers have learned the hard way from the pandemic, which is the importance of workforce flexibility, whether it's more staggered shifts, adaptable workforce strategies, reshoring and nearshoring to consider more reliable supply chains and reduce dependence on some of these global logistics.

What is the biggest takeaway for employers, particularly in the manufacturing industry, in the wake of some of these hard-learned lessons?

Lieberman

The biggest takeaway is still that you need to plan. This is not the pandemic where employers think that they can spin on a dime and get this all covered, but not necessarily so. They need to consult not only with their finance people but also with their in-house and outside counsel and their human resources.

Borna

So, more comprehensive contingency plans to be prepared for future disruptions certainly sounds like a good approach.

Lieberman

Absolutely, Emily. I'm on the phone daily with clients considering what-ifs.

Borna

Stronger communication and collaboration, both for customer-centric and internal communications with employees, sounds really crucial to managing some of this uncertainty.

Lieberman

More and more now, employers are very concerned with the public perception of what they're going to do. They are as concerned as they are with the employees' perception of what's going to be communicated. Communication plans are very, very, very important. We work very closely with clients on lawful communications and just coordinate. What are we telling the federal government? What are we telling the local government? What are we telling our employees? What are we telling the unions that represent our employees? What does this do to our workforce for recruitment and retention purposes?

Borna

Thanks, Penny. One other thought here. With the advent of so much automation, digital transformation, AI and robotics, have you seen that really have an impact on employers' abilities to handle workforce disruptions?

Lieberman

In manufacturing, not so much. It's interesting because I have had clients who had full plans to move to a more robotic workforce. They're putting that on hold, partially because the components might not be coming from the United States.

Borna

Interesting. Thanks, Penny.

Pat, you've got some questions for Penny about some best practices if it is necessary to implement a Reduction in Force.

Peters

Absolutely. Penny, one of the things that we often talk to clients about when they are contemplating a Reduction in Force is to consider alternatives. What are some of those alternatives that you've talked to clients about in connection with planning for a reduction?

Lieberman

Some of them are wage reductions, assuming you're able to do that. This is not necessarily so in a collectively bargained scenario, although you can have discussions with the union about that. Some are changing the work hours and eliminating shifts. We're going back to the shared work concept. Can we reduce hours, and are we in a state that allows for supplemental unemployment or modified unemployment, where we reduce hours and avoid a layoff in that scenario? Employers are very concerned, Pat, about what happens with employee benefits. Just slashing hours or slashing pay is one thing, but there's an impact on employee benefits, and that's significant.

Peters

Right, there are some downstream effects when we're looking at cost-cutting that also require analysis and planning. Both are in terms of the benefits, as you mentioned, as well as various state laws and even some federal wage and hour laws. Obviously, some states are more aggressive in that space than others, right?

Lieberman

That's correct. For example, I won't point out the states, but in particular, there are states that have enforcement mechanisms for their mini-WARN statutes. There are certain states that have really been inactive in that regard. I have seen an uptick in states really reaching out. When they even read about a layoff, they'll reach out to an employer and say, did you provide a WARN notice? If not, why not?

Peters

Right. Once an employer's figured out that we've tried to save money, we've ended some temporary contract labor, we've had a shortfall in orders due to tariffs or for whatever other reason, business is down and we have looked at all these opportunities to save money. We actually need to move forward with the

reduction and have done everything we can do. Primarily, would you agree that drafting and agreeing on legitimate business interest for that reduction is important?

Lieberman

I always tell clients there should be a business case for the underlying reduction and for each separation that is going to happen. It needs to be well documented. I've had a couple of clients recently who said we don't have the time to document it right now, and I said I don't think anything is any different than it's been in the past. You should be documenting all of that as to why people were selected, and you should come up with legitimate business-related selection criteria as to why people are being selected for the Reduction in Force.

Peters

When you mention documents, do some companies also have a fabric or a framework and policies in place that should be considered when implementing a reduction?

Lieberman

Some do. That is important, Pat, and I'm glad that you mentioned it; take a look at that and say, can we live with the policy? What if we have a Reduction in Force or a layoff policy, and it's a written policy in our SOPs or our employee handbook? Can we still live with that? Do we need to modify that? Have the times changed so that we can't comply with it? We don't really want to be in a situation where we say to our employees that it's too bad we didn't comply with it. So, it's a policy review that needs to happen as well.

Peters

Most people who have followed the news are aware of the federal government offering voluntary resignation programs for their employees. What about a private employer? Are you familiar with any type of voluntary attrition programs that can help get us to where we need to be in terms of reduction?

Lieberman

Absolutely. Interestingly, I've had clients say we're not offering a voluntary program. They've had people come forward and say, can we volunteer? Particularly surprisingly, I'm seeing a lot of that in unionized settings as well. You are doing this in accordance with our collective bargaining agreement, which requires reverse seniority. There are some tweaks somewhere along there regarding whether the person's qualified for another job, etc. The union is coming forward and saying we don't want to live through this again. We had this during the pandemic; we don't want to live through this again. People potentially want to leave, so can we put in place a voluntary separation program or a voluntary early retirement program? So, I am seeing a lot of inquiries about that. Sometimes, employers don't plan on offering that, and they find out that their workforce is interested.

Peters

Right. Every time I've experienced either a voluntary buyout program as a lawyer, counseling clients, or even as an employee, I am always surprised who takes the buyout and who does not. Sometimes, it's not the folks that you think are going to take it because you've got to make the eligibility criteria such that it truly is voluntary.

Lieberman

It has to truly be voluntary. I'm like a stuck record when I talk to clients about this, but please tell your managers, do not tap somebody on the shoulder and say, I think you should take this. My worst fear is that the involuntary list already existed. Then, all of a sudden, somebody got the idea to have a voluntary separation program, and whoever didn't take the voluntary separation program somehow ended up on the involuntary list after that.

Peters

I am going to turn it over to Emily here in a minute, but assuming that we go through with a reduction, we get a release. I'm often still surprised today that folks who have dealt with single-employee terminations don't realize the nuance when it comes to group termination under the Older Worker Benefits Protection Act. Any insight you want to share with our listeners on that?

Lieberman

That is something not to be ignored. I am seeing more and more challenges under it. I'm also seeing a lot of employers say we want to save money and do a Reduction in Force, so we're going to dust off something that we had on the shelf and use the separation agreement. Lo and behold, it does not comply with the requirements of the Older Worker Benefit Protection Act. It's a separation agreement that they used four years ago for somebody who was under age 40, or even if they were over age 40; they were not used in a group termination program. The disclosure is wrong, or they rushed to get it. We are finding that advanced planning is really, really important. Also, stopping and saying I've got the right documents in place, not just the documentation of the Reduction in Force. Do I have the right separation agreements? Are they updated? Do they have illegal provisions in them? Are they going to comply with group termination programs for employees who are age 40 or older?

Peters

Right, and as lawyers, we love it when clients call us at five o'clock and tell us that they are doing a group termination the next day, and we are happy to help. However, the best advice would be for clients who think a reduction might be coming to get those documents in order to be ready to go and move forward.

Emily, I'm going to turn it over to you now to talk more nuancedly about what the WARN Act is and how that might apply to group terminations as well.

Borna

Thanks, Pat. The WARN Act, the Worker Adjustment Retraining Notification Act, is a piece of legislation that's been on the books for some time. Penny, I was hoping you could review some of the basics with us. When is a WARN Act notice triggered? When is it required for an employer that may be looking at restructuring the workforce and, as a result, having a number of positions eliminated?

Lieberman

The basic concept is that if you're an employer who has to worry about the WARN Act, you have hundreds of employees nationwide throughout the U.S., and I won't go into the nuances of how the hundreds are calculated. That just means you need to worry about it. So, am I going to have a plant closing or a mass layoff? What is a plant closing? A permanent or temporary shutdown of a facility or an operating unit within a facility where fifty or more full-time employees suffer employment losses over a 30-day period. The WARN regulations have extended that to a rolling 90-day period of time. The WARN regulations do not define who a full-time employee is, but they define a part-time employee. A lot of employers get stuck with all of those definitions. What also triggers is a mass layoff. A mass layoff is specifically not a plant closing; it is your run-of-the-mill Reduction in Force. Fifty or more full-time employees, as they satisfy WARN's definition of full-time employees, suffer employment losses in a single site of employment during a rolling 30-day period, which is extended to 90 days. 33% of the active full-time workforce is in that facility. At least 33% or 500 employees in a single site of employment are being terminated.

Borna

That's a lot of math. So, an employer really needs to be focused on looking at the impact on its workforce 30 days before the action is taken and 30 days after this?

Lieberman

Well, let me correct that. It's 90 days after and 90 days forward because our regulations have extended that. So, it does require a lot of advanced planning. The concept of just stretching out the layoffs and staying under the WARN statute is not that easy to satisfy.

Borna

If notice is required, how much notice has to be given and to whom, Penny?

Lieberman

A 60-day advance written notice needs to be provided to the impacted employees, the State Dislocated Worker Unit, which is usually a division of the Department of Labor in that state, the chief elected officials of local government and, if the employees are represented by a union, the local and international unions. Those are written notices, and their contents are prescribed by the WARN Regulations.

Borna

We're talking a minimum of two months of advance planning to get these notices

out in time if WARN Act obligations are triggered. Now, what about when there are unforeseeable business circumstances, or a company is faltering? Are there some exceptions to those requirements?

Lieberman

The federal WARN statute has exceptions that provide an employer with the opportunity to provide fewer than 60 days of notice. It's not no notice, Emily; it's fewer than 60 days of advance written notice.

The faltering company exception only applies to an entire plant closing, so it's not going to help an employer who is simply downsizing their workforce unless they have an entire plant closing. It will be looked at in a companywide context. So, just because one location isn't doing well, and the others remain open does not mean it's available to an employer.

The unforeseeable business circumstances exception is something that came up a lot during the pandemic, and I'm seeing a lot of employers call me about it. That is for when there is some sudden and dramatic event not reasonably anticipated to have occurred at the time WARN notices do.

For all of these, there's also a natural disaster exception, which right now things could seem like a natural disaster, but fortunately, we're not having one. Again, that allows you to provide fewer than 60 days of notice, but the notice has to be a detailed written notice explaining why you could not have provided more notice and relying on the elements of the exception. It's not that easy to meet these requirements, and the employer will always bear the burden of proof. This is where we see litigation or investigations if they are under a state warrant statute that has a similar exception.

Borna

Penny, if an employer is unable to satisfy the notice obligations of WARN, what exposure or penalties might they be facing?

Lieberman

Depending upon what jurisdiction an employer is in, it's either 60 days of back pay or benefits. The big ticket to me is the benefits because some of them are unquantifiable. It's not just the cost of premiums. It could be the actual medical expenses an employee incurs in that regard. Also, should the chief elected official of the local government sue, there's a $500/day civil penalty.

But what's the big ticket in WARN litigation? They are almost always class actions. That means attorney's fees. So, not only is an employer paying its attorneys to defend, but it's also going to pay the prevailing plaintiff's attorney's fees if it loses or generally in a settlement. That's very often what drives these litigations and increases the cost.

Borna

Again, in the wake of the pandemic, Penny, have we seen more developments in terms of the enforcement mechanisms, which seem to be through the judiciary, for

WARN violations? Also, since the act was promulgated, some new developments that it didn't contemplate the realities we see today of some remote workforce issues. So, what are you seeing in terms of recent developments in that regard?

Lieberman

That's right. I'm seeing, Emily, a lot more class actions. Why? WARN was this sleepy statute that I knew about, and I advised on it for many, many years, but a lot of plaintiffs' lawyers didn't really know about it. There were some that specialized in it, but many didn't. Well, the pandemic woke everyone up. So, people, not only lawyers but also employees, are aware of WARN notices. People had never even heard of them before, but all of a sudden, during the pandemic, they saw them. So, I've definitely seen an uptick in litigation with respect to WARN.

Borna

Are there many WARN statutes or state or local WARN equivalents that are even more onerous than the federal obligations?

Lieberman

Yes, I used to say that I'm from the great state of New York, where we have a 90-day advanced written notice requirement, and the thresholds are a lot lower. But welcome to the tri-state area. New Jersey has come in with an even more onerous WARN statute.

Borna

We don't want to forget about the country of California.

Lieberman

Right. California actually almost tracks the federal statute, and it's not as crazy, but it is a 60-day advance written notice. But what is important about some of these state laws is the triggers can be lower for what results in a WARN notice obligation. Not all states recognize every single exception.

Borna

For those, even in the manufacturing industry, who may have some element of a remote workforce, particularly their administrative teams, how are they assigned to a site of employment for the purposes of the WARN Act?

Lieberman

That's interesting. There is something in the federal WARN regulations that talked about this scenario, but it really did not anticipate anything other than traveling salespeople, people who drove trucks from depots to depots or worked on oil rigs and moved around. So, generally, there's not a lot of case law on it, and it is evolving. Generally, it is the site from which their work is assigned or into which they report.

Now, that becomes difficult when you have different levels of remote workforces.

So, I work remotely, I report to a manager, my manager works remotely and my manager's manager works remotely. I've actually had clients say to me our back-office staff is 100% remote. Nobody works in a factory; they could be all over the country and support all of our plants all over the country.

We do a lot of alternative analyses with our clients on where to count people. But the concept of they're remote, so their single site of employment is their living room, is never going to fly.

Borna

Thanks, Penny. Pat, what's an employer to do? What can we, as lawyers at Jackson Lewis, do to help our clients as they try to plan for these changes and pivots in their workforce?

Peters

Thank you, Penny, for all of that valuable insight. But my takeaway from today's discussion is that there are a ton of nuanced issues, the WARN Act being the one that jumps out because of its technical compliance nature. But other things that we've only brushed on, Penny mentioned employee benefits plans. All of those have their own requirements and procedures, and the number of employees affected needs to be reviewed. I'm thinking about organized sites; you're going to have to negotiate some of these layoffs with the union. So, that takes planning and preparation. Finally, if you've got employees here who have immigration status, that can also be affected. If someone loses their employment and they're an H1B employee or some other type of non-citizen status, that has ramifications.

So, these are all issues that employers should consider. Fortunately for them, Jackson Lewis has subject matter experts like Penny who can quarterback and bring in even more niche subject matter expertise when needed to advise on all of these issues we are seeing in manufacturing. That's why we thought today's podcast was important and timely, but we're happy to follow up. We'll be speaking about these issues and much more at our Workplace Horizons event in New York City at the end of April. But absolutely, our firm is ready, willing and able to assist clients who are navigating these changes.

Borna

Over the years, many of our excellent subject matter experts like Penny and others have developed task forces for these issues and put together checklists and templates that we are constantly developing as the laws evolve, which are really helpful as well.

OUTRO

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