Legal Update Article

Maryland Adds Teeth to State Mini-WARN Law

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Maryland Governor Larry Hogan has announced his decision to allow Senate Bill 780 (New Mini-WARN Law) to become law, resulting in key changes to Maryland's Economic Stabilization Act. The New Mini-WARN Law will take effect on October 1, 2020.

Significantly, pursuant to the New Mini-WARN Law, Maryland employers implementing a "reduction in operations" will be required to provide advance written notification of the reduction to affected employees and others or face monetary penalties. Previously, compliance with Maryland's Economic Stabilization Act was completely voluntary.

Coverage

The New Mini-WARN Law applies to employers with at least 50 employees operating an industrial, commercial, or business enterprise in Maryland for at least one year.

Similar to the federal Worker Adjustment and Retraining Notification Act (WARN Act), the New Mini-WARN Law allows the exclusion of certain employees when determining coverage and whether notice requirements will be triggered. Employees who work fewer than an average of 20 hours per week or who have worked for the employer for less than six months in the immediately preceding 12 months are not counted.

Triggering Event

Notice obligations under the New Mini-WARN Law are triggered when a covered employer implements a "reduction in operations," which is either:

- The relocation of part of an employer's operation from one workplace to another existing or proposed site (currently, regardless of distance); or
- The shutting down of a workplace or a portion of the operations of a workplace that reduces the number of employees, over any three-month period, by *the greater of*: (1) at least 25 percent; or (2) 15 employees (not counting employees working fewer than an average of 20 hours a week or who have worked less than six months in the preceding 12-month period).

A "workplace" includes a factory, plant, office, or other facility where employees produce goods or provide services. It does not include a construction site or other temporary workplace.

The New Mini-WARN Law does not apply to reductions in operations that:

- Result solely from labor disputes;
- Occur in a commercial, industrial, or agricultural enterprise operated by the state or its political subdivisions;
- Result from seasonal factors that are determined by the state Department of Labor to be customary in the industry; or
- Result when an employer files for bankruptcy.

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Related Services

Reductions-in-Force/WARN Act
Wage and Hour

Contents of Mandatory Written Notices

Under the New Mini-WARN Law, if notice obligations are triggered, a covered employer *must* provide at least 60 days of advance written notice of the reduction in operations to:

- All employees at the workplace that are subject to the reduction in operations (*including* individuals working on average fewer than 20 hours per week and individuals who have worked for the employer for less than six months in the immediately preceding 12-month period);
- Each exclusive representative or bargaining agency that represents employees at the workplace who are subject to the reduction in operations;
- The Maryland Workforce Development's Dislocated Worker Unit; and
- All elected officials in the jurisdiction where the workplace that is subject to the reduction in operations is located (the term "jurisdiction" is undefined).

The notices must include:

- The name and address of the affected workplace;
- A supervisor's name, telephone number, and email address to contact for further information;
- A statement explaining whether the reduction in operations is expected to be permanent or temporary, and whether the workplace is expected to shut down; and
- The expected date when the reduction in operations will begin.

Significantly, unlike the federal WARN Act, the New Mini-WARN Law contains no unforeseeable business circumstances, natural disaster, or faltering company (other than perhaps a bankruptcy filing) exceptions to the notice requirements. These exceptions in the federal WARN Act are particularly relevant now in the midst of the COVID-19 pandemic and the resulting government restrictions limiting or prohibiting business operations, which likely will continue well into the fall. (See our article, What Employers Should Know About Furloughs, Layoffs, and WARN Act Obligations in Light of COVID-19.)

Moreover, while the federal WARN Act and its regulations set specific and different content for each of the required WARN notices to employees, unions, the state dislocated worker unit, and the chief elected official of local government, the New Mini-WARN Law requires an employer to include the same information in its notices, regardless of the recipient of the notice. If an employer's "reduction in operations" triggers both the federal WARN Act and the New Mini-WARN Law, the employer's advance written notices must comply with the requirements of both laws.

Maryland employers implementing mass lay-offs will continue to be subject to the existing requirement to provide a separate bulk separation notice to their local office of Unemployment Insurance if laying-off, at the same time, at least 25 employees at a single establishment permanently, indefinitely, or for more than seven days. This notice must be provided 48 hours in advance of the layoff or at the time of the layoff, if the employer has no advance knowledge. The definition of a "mass layoff" for this bulk separation notice is entirely different from the definition of a "reduction in operations" under the New Mini-WARN Law. For example, when determining if a bulk separation notice is triggered, all affected employees at the affected site are counted without

regard to whether they are part-time or have worked for less than six months. In comparison, under the New Mini-WARN Law, these part-time and newly hired employees are excluded when determining employer coverage and if notice is triggered, as discussed above. As a result, depending on the details of the lay-off implemented, an employer may be required to provide one or both notices.

Guidelines on Continuation of Benefits

The New Mini-WARN Law instructs the Maryland Secretary of Labor, in cooperation with the Workforce Development Board, to develop mandatory guidelines for employers facing a reduction in operations. These guidelines will include the continuation of benefits (such as healthcare, severance, and pension) that an employer facing a reduction in operations should provide to employees whose employment will be terminated and the specific mechanisms that employers can use to request assistance from Maryland's quick response program. It will be interesting to see whether any benefits-related guidance may be subject to ERISA preemption challenges.

Enforcement

If the Secretary determines that the New Mini-WARN Law has been violated, the Secretary is authorized to issue an order compelling compliance and to assess a discretionary civil penalty of up to $10,000 for each day the employer was not in compliance. The New Mini-WARN Law does not specify whether this penalty is per employee or per violation.

In determining the amount of the penalty, the Secretary will consider the following factors:

- The gravity of the violation;
- The size of the business;
- The employer's good faith; and
- The employer's history of prior violations of the New Mini-WARN Law.

The Secretary's penalty will be subject to notice and hearing requirements.

The federal WARN Act has no administrative enforcement scheme and is enforced only through lawsuits in federal courts. The New Mini-WARN Law does not specify whether it allows a private right of action or, instead, only claims be presented to the Secretary.

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Jackson Lewis attorneys are committed to helping employers make the best business decisions. Please contact a Jackson Lewis attorney if you have questions about the new law or need guidance handling workplace issues.