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BRANN & ISAACSON CLIENT ALERT: WARN Act: Layoffs, Reduction in Pay or Hours, and Workforce Reductions

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Employers worldwide are now faced with the need to prepare their businesses for disruption due to the Coronavirus (COVID-19) pandemic. Some of these employers will face the unfortunate necessity of layoffs, reduction in pay or hours, or other workforce reductions that implicate the Worker Adjustment and Retraining Notification (WARN) Act—even if such actions are expected to be, and hopefully are, temporary.

Please note that there are a number of states with "mini-WARN" laws, including Alabama, California, Connecticut, Georgia, Hawaii, Illinois, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, Tennessee, Washington, and Wisconsin. Depending on where you are located, you will need to consider the impact of these laws as well. We are happy to provide more information if this is relevant to your business.

This alert is intended to provide a high–level overview of the WARN Act. A comprehensive summary, and advice for your specific situation, is beyond the scope of this alert. Please consult with an attorney before implementing a layoff or workforce reduction.

When does the WARN Act apply?

The WARN Act is a federal law which requires an employer to give notice to all employees who may reasonably be expected to experience an employment loss as the result of a proposed plant closure or mass layoff event. The WARN Act applies to employers that have (a)

100 or more full-time employees or (b) 100 or more employees, including part-time employees who, in the aggregate, work at least 4,000 hours per week.

What does the WARN Act require?

When its numerical thresholds kick in, the WARN Act requires advance notification of an "employment loss," which includes:

1. Employment termination (other than discharge for cause, voluntary departure, or retirement);
2. Layoff exceeding 6 consecutive months; or
3. Reduction in hours of 50% or more during each month of any 6–month period.

What are those numerical thresholds?

A plant closing, occurs when 50 or more full-time employees experience an employment loss at a single site of employment as a result of a permanent or temporary shutdown of a single site of employment (or one or more facilities or operating units within a single site of employment).

A mass layoff, occurs when, during any 30-day period, an employer lays off at a single site of employment (1) 500 or more employees, or (2) 50-499 employees *if* they make up at least 33 percent of the employer's active workforce at that single site of employment, as measured on the day immediately preceding the first layoff.

A mass layoff event also occurs when an employer engages in *multiple, related* layoffs within a 90-day period at the same single site of employment which combined reach the same thresholds. With limited exceptions for unforeseeable business circumstances and natural disaster, notice must be given at least 60 days before the first affected employee is laid off. This

means that when an employer lays off a group of employees, it must look 90 days into the future from the date a layoff is scheduled to occur and anticipate any additional potential layoffs.

Does COVID-19 count as a natural disaster?

Potentially, but the WARN Act's examples of natural disaster are geared more towards physical calamities such as floods and earthquakes. Expect litigation over the extent to which a pandemic is analogous (a "similar effect of nature"). Assuming the natural disaster exception applies, employers are required to provide as much notice as is practicable, containing as much of the required information as is available in the circumstances of the disaster.

Please also keep in mind that not every "mini-WARN Act" contains a similar exception, so the rules may vary from state to state.

I expect (and hope) that my layoffs will be temporary in nature (*i.e.* less than six months). Do I still need to worry about the WARN Act?

First, it is important to recognize that the length of time before action may be required by employers varies from state to state, depending on the dictates of the applicable mini-WARN Act.

With respect to the federal WARN Act, however, given the present uncertainty of the duration for any layoffs caused by the COVID-19 pandemic, risk-adverse employers may wish to consider giving advance notice whenever possible. We recognize, however, that advance notice is not always possible or practicable.

In addition to the "natural disaster" exception, described above, the WARN Act provides that fewer than 60 days' notice can be given due to unforeseeable business circumstances.

Employers must give as much notice as possible and explain the reason for the shortened notice period.

Employers that need to *extend* a layoff beyond six months may find some comfort in knowing that the regulations provide that notice may be given at the time when it becomes reasonably foreseeable that the extension is required. This only applies to extensions due to business circumstances (including unforeseeable changes in price or cost) not reasonably foreseeable at the time the initial layoff occurred. We can expect litigation after-the-fact, however, as to when it was "reasonably foreseeable" than an extension would be required.

Who does an employer count for purposes of establishing the number of employees affected by a mass layoff?

An employer must count all laid-off regular and temporary employees, and possibly contract employees, who worked at least 6 months in the past year *or* at least 20 hours average per week in the past 90 days. This may include seasonal employees who meet this threshold. The period to be used in calculating whether an employee has worked "an average of fewer than 20 hours per week" is the shorter of the actual time the employee has been employed or the most recent 90 days.

Employees who are *not* counted are (1) employees who retire, resign, or are terminated for cause, (2) employees who are offered a transfer to another site within reasonable commuting distance if the layoff is a result of a relocation or consolidation of all or part of the employer's business and the transfer involves no more than a 6 month break in employment, *whether or not they take the job*, and (3) employees who are offered a transfer to another site of employment outside of a reasonable commuting distance if the layoff is a result of a relocation or consolidation of all of part of the employer's business, the transfer involves no more than a 6

month break in employment, and the employee accepts the offer within 30 days of the offer or the closing or layoff, whichever is later.

What is a "single site of employment?"

Federal regulations define a single site of employment as "either a single location or a group of contiguous locations. Groups of structures which form a campus or industrial park, or separate facilities across the street from one another, may be considered a single site of employment." However, non-contiguous sites in the same geographic area which do not share the same staff or operational purposes should not be considered a single site. For example, assembly plants which are located on opposite sides of town and which are managed by a single employer are *separate* sites if they employ different workers.

Who gets a WARN Act notice?

All *affected employees* must receive a WARN Act notice. Affected employees are defined as those employees who may reasonably be expected to experience an employment loss as a consequence of a proposed mass layoff, to the extent such employees can be identified at the time notice is required to be given. This includes hourly and salaried employees, including managerial and supervisory employees; the WARN Act makes no distinction between exempt and non-exempt employees. This also includes all regular employees, whether part-time or full-time. Affected employees also include workers who are on temporary layoff but have a reasonable expectation of recall, including employees on worker's compensation, medical, maternity, and other leave, and part-time employees who, although not counted for determining whether there is a mass layoff, are entitled to receive WARN notice if there is one.

Affected employees do *not* include business partners or consultants, or, whether part-time or full-time, contract employees or employees working on temporary projects who clearly understood the temporary nature of the work when hired.

What is the content of a WARN Act notice?

The content of a WARN Act notice must be based on the best information available to the employer at the time that the notice is given. If the notice is sent to represented employees, it must contain:

- The name and address of the employment site where the plant closing or mass layoff will occur, and the contact information of a company official;
- A statement as to whether the planned action is expected to be permanent or temporary;
- The expected date of the first separation and the anticipated schedule for making separations;
- The job titles of positions to be affected and the names of the employees currently holding affected jobs.

If the notice is sent to non-represented employees, it must contain all of the foregoing information plus an indication as to whether or not bumping rights exist. In all cases, the notices may contain additional information that may be helpful to the employees, such as information regarding dislocated worker assistance.

What are the penalties for a failure to comply with the WARN Act?

Any employer who fails to send a timely notice to all affected employees is liable to each employee for back pay and benefits for each day of violation. If the employer fails to send a timely notice to the state agency designated to run the Rapid Response for Dislocated Worker Program or the local government, the employer shall be subject to a civil penalty of up to $500 per day of violation. However, if the employer satisfies any liability it has with any aggrieved employees within 3 weeks from the date that the employer orders the shutdown or mass layoff, this $500 per day penalty will not apply.

Will this law really be enforced as a result of the outbreak?

Several states are or are considering suspending enforcement of their respective mini-WARN Acts in light of the crisis. Whether and to what extend the US Department of Labor will focus on enforcement of the WARN Act after the dust has cleared remains to be seen, but the potentially stiff penalties for non-compliance suggest that the law should be taken seriously unless and until notice of a suspension of enforcement is promulgated.

We are glad to discuss any questions you may have.