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**WARN Act and Workplace Restructuring**

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## **I. Introduction.**

The COVID-19 pandemic has presented an abundance of economic challenges for employers. Since the onset of the pandemic, many employers have instituted furloughs, layoffs, reorganizations, and other cost-savings measures to curb economic pressures. This paper examines several issues that arise in connection with the management of downsizing pressures during challenging economic times.

## **II. Overview Of The Worker Adjustment And Retraining Notification Act.**

Under the federal Worker Adjustment and Retraining Notification Act (“WARN”), employers with 100 or more employees (excluding part-time employees) or 100 or more employees (including full-time and part-time employees) that in the aggregate work at least 4,000 hours per week (excluding overtime hours) must provide advance notice to employees in the event of a plant closing or mass layoff.<sup>1</sup> A plant closing occurs when 50 or more employees (excluding part-time employees) experience an employment loss caused by a cessation of operations at a worksite, or a cessation of operations of an operating unit within a worksite.<sup>2</sup> A mass layoff occurs when there is not a plant closing but there are: (1) 500 or more employees experience employment losses at a single worksite; or (2) 50 or more employees experience employment losses at a single worksite, if those employment losses constitute 33 percent or more of the employees at the site.<sup>3</sup>

Notably, covered employers must provide at least 60 days’ advance written notice of a plant closing or mass layoff to each representative of the affected employees (such as a labor union), or, if there is no such representative, to each affected employee.<sup>4</sup> Additionally, notice must be provided to the State dislocated worker unit and the appropriate local government unit, which is usually a mayor or city council.<sup>5</sup> Failure to provide the required notice can result in employer liability for the value of wages and benefits owed to affected employees for the period that the notice was not provided.<sup>6</sup>

The notification period for a plant closing or mass layoff may be reduced if one of the following exceptions apply: (a) faltering company; (b) unforeseeable business circumstances; or (c) natural disaster.<sup>7</sup> The “faltering company” exception applies when, before a plant closing, an employer is actively seeking capital or business and reasonably, in good faith, believes that advance notice would preclude its ability to obtain such capital or business, and the new capital or

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<sup>1</sup> 29 U.S.C. §§ 2101(a), 2101.

<sup>2</sup> 29 U.S.C. § 2101(a)(2).

<sup>3</sup> 29 U.S.C. § 2101(a)(3).

<sup>4</sup> 29 U.S.C. § 2102(a).

<sup>5</sup> *Id.*

<sup>6</sup> 29 U.S.C. § 2104(a).

<sup>7</sup> 20 C.F.R. § 639.9.

business would allow the employer to avoid or postpone a shutdown for a reasonable period of time.<sup>8</sup> The “unforeseeable business circumstances” exception applies when a plant closing or mass layoff is caused by business circumstances that were not reasonably foreseeable at the time that the 60-day notice would have been required.<sup>9</sup> Finally, the “natural disaster” exception applies when a plant closing or mass layoff is the direct result of a natural disaster such as a flood, earthquake, drought, storm, tidal wave, or similar effects of nature.<sup>10</sup>

**A. Extended Furloughs May Trigger WARN Notice Requirements.**

WARN notification requirements not only arise in the context of layoffs, but also may be required when implementing furloughs. Employers that implement a furlough should pay close attention to certain WARN definitions. First, the term “employment loss” includes layoffs that exceed 6 months and reductions in hours of work of more than 50% during each month of any 6 month period.<sup>11</sup> Additionally, a plant closing includes a temporary shutdown at a single site of employment that triggers an “employment loss” during any 30-day period for 50 or more employees (excluding part-time employees).<sup>12</sup> Finally, a mass layoff includes an “employment loss” at a single site of employment during any 30 day period for 50 or more employees (excluding part-time employees), if those employees make up at least 33% of the employer’s employees or 500 or more employees are affected (excluding part-time employees).<sup>13</sup> Taken together, these definitions mean that certain long-term furloughs may trigger WARN notification requirements—even if the affected employees eventually return to work or continue to work, but at a reduced rate.

**B. Application Of WARN Notice Exceptions In Light Of COVID-19 Pandemic.**

Employers may be excused from providing 60 days advance notice of a plant closing or mass layoff under certain circumstances, including in the event of a natural disaster or the imposition of unforeseeable business circumstances. The application of those notice exceptions during the COVID-19 pandemic were examined in two recent cases. In *Benson v. Enterprise Leasing Co. of Florida, LLC, et al*<sup>14</sup> former employees of Enterprise filed a putative class action lawsuit against the company in the United States District Court for the Middle District of Florida. The former employees allege that Enterprise terminated their employment with no or insufficient notice, in violation of WARN. In the early months of the pandemic, Enterprise instituted a layoff of hundreds of employees due to the decline in travel caused by the COVID-19 pandemic. Enterprise filed a Motion to Dismiss, pursuant to Federal Rules of Civil Procedure 12(b)(1) and

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<sup>8</sup> 20 C.F.R. § 639.9(a).

<sup>9</sup> 20 C.F.R. § 639.9(b).

<sup>10</sup> 20 C.F.R. § 639.9(c).

<sup>11</sup> 20 C.F.R. § 639.3(f).

<sup>12</sup> 20 C.F.R. § 639.3(b).

<sup>13</sup> 29 U.S.C. § 2101(a)(3); 20 C.F.R. § 639.3(c).

<sup>14</sup> No. 6:20-cv-00891, 2021 WL 1078410 (M.D. Fla. Jan. 4, 2021).

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