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Governor Temporarily Modifies California's WARN Act for Employment Actions Taken in Response to COVID-19

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Under the federal Worker Adjustment and Retraining Notification (WARN) Act and its California equivalent, employers of a particular size must provide 60 days' advance notice before closing a plant, conducting a mass layoff or (for California only) relocating their operations. Employers that fail to provide such advance notice and fail to qualify for one of the exceptions to the statutes can be liable to affected employees for up to 60 days of back pay and benefits.

The California WARN Act applies to employers that operate a "covered establishment," defined as a California facility or part of a facility that employs, or employed within the preceding 12 months, 75 or more persons.

Such employers must provide the 60 days' advance notice if they:

1. Layoff 50 or more employees within a 30-day period at a covered establishment;
2. Remove all or substantially all of a covered establishment's operations to a different location 100 miles or more away; or
3. Cease or substantially cease industrial or commercial operations in a covered establishment.

Recent case law indicates that temporary layoffs also may trigger California's WARN Act. A layoff, closing or relocation that does not fall within the scope of 1 – 3 above would not require advance notice.

The current COVID-19 pandemic has unfortunately created significant economic disruption and uncertainty, which has led some employers to conduct (or consider conducting) mass layoffs and facility closings. There have been concerns as to whether such employers are in a position to provide the requisite advance notice under federal or state WARN laws and whether employers can qualify for one of the exceptions to the WARN statutes. Notably, while the federal WARN Act has exceptions for unforeseen business circumstances or natural disasters, the California WARN Act only has a more limited exception in the event of a "physical calamity."

On March 17, 2020, California Governor Gavin Newsom issued Executive Order N-31-20, declaring that due to the COVID-19 state of emergency and related rapid changes in workforce needs, certain provisions of the California WARN Act will be temporarily "suspended" on the following conditions:

- **Temporary and limited change:** The suspension only applies if the below conditions are met and only applies from March 4, 2020, through the end of the current state emergency.
- **Notice still required:** Employers must still give notice to employees of a layoff, plant closing or relocation that ordinarily would have triggered the California WARN Act. The notice must still contain the elements required under federal and state law and be sent to the affected employees and relevant government officials. However, rather than providing 60 days' advance notice, employers can instead provide ***as much advance notice as is practicable***, as long as they also provide a ***brief statement of the basis for reducing the notification period***.
- **COVID-19-related unforeseen business circumstances must exist:** The employment action must be a result of COVID-19-related ***"business circumstances that were not reasonably foreseeable as of the time that notice would have been required***," i.e., 60 days before the notice is sent. Employers that were planning a layoff, plant closing or relocation before the COVID-19 pandemic for different reasons may not be able to take advantage of this Executive Order. Also note that, since the Order requires that the business circumstances not be reasonably foreseeable, it is open to interpretation how long employers may be able to benefit from this Executive Order as the COVID-19 pandemic continues.
- **Notice must reference unemployment insurance benefits:** The notice must contain the following statement:

If you have lost your job or been laid off temporarily, you may be eligible for Unemployment Insurance (UI). More information on UI and other resources available for workers is available at labor.ca.gov/coronavirus2019.

Governor Newsom also ordered the California Labor and Workforce Development Agency to provide additional guidance on its implementation of the Executive Order by March 23, 2020.

Note that this Executive Order does not affect or alter the federal WARN Act or other states' WARN laws.

What does this mean for employers?

California employers who were considering taking actions that may have otherwise triggered the California WARN Act may now be able to rely on this Executive Order if they can meet the criteria above. However, the same actions may still trigger the federal WARN Act or similar laws in other states (such as New York, for example). Employers should consult with counsel as to the effect of this Executive Order on their business operations and work with counsel to ensure compliance with this and all other applicable laws.

Coronavirus resource hub

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