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'BABY' WARN ACT MIGHT BE GROWING UP

by D. Gregory Valenza

The economic downturn results in increased layoffs and business closings. Employers must consider whether they are required to give legally required advance notice of these events. Federal law includes the Worker Adjustment and Retraining Notification Act, known as WARN. However, California employers may be covered by an analogous state law, informally known as the "baby" WARN Act. Labor Code Sections 1400-1408. Both laws require employers to give advance "notice" to affected employees and certain government entities of future employment losses. These laws' purpose is to give workers time to seek new employment, and to facilitate the government's programs for the unemployed to absorb a large influx of unemployed workers.

Unlike federal WARN, there are no regulations interpreting California's law, which is not a model of clarity. The Legislature is considering AB 1989, which will expand California's WARN law if passed. Perhaps the Legislature will consider some amendments to clarify the law as well. This article covers the basics of the California WARN Act, highlights some ambiguities, and provides a summary of AB 1989.

Covered Events Requiring Notice

California's baby WARN Act applies to "mass layoffs," "relocations" and "terminations." These events must occur at a "covered establishment," defined as "any industrial or commercial facility or part thereof that employs, or has

employed within the preceding 12 months, 75 or more persons." Labor Code Section 1400(a). It is unclear whether that means 75 persons at the same time, or a total of 75 people over the course of a year.

A "mass layoff" is a "layoff" during any 30-day period of 50 or more employees at a covered establishment. "Layoff" means "a separation from a position for lack of funds or lack of work." Presumably, that means that resignations and involuntary terminations for reasons such as performance do not count toward the 50-employee minimum. Employees with fewer than six months of service are not counted toward the 50-employee requirement. "Termination" under Section 1400(f) means "the cessation or substantial cessation of industrial or commercial operations in a covered establishment." That means that as long as the facility counts as a "covered establishment," it does not matter how many employees are employed when the facility shuts down. In MacIsaac v. Waste Management Collection & Recycling, Inc., 134 Cal. App. 4th 1076, 1087 (2005), the court of appeal held that merely transferring employees from one employer to another without changes to their pay or benefits was not a "layoff" and notice was not required.

A "relocation" is "the removal of all or substantially all of the industrial or commercial operations in a covered establishment to a different location 100 miles or more away." Are all "relocations" also "terminations?" In both situations, a "covered establishment" shuts down.

What if a business were to decide to move its facility a few blocks? Such an event would not qualify as a "relocation" because of the short distance. But it might be a "termination," requiring notice even though no one would lose his or her job.

Notice

The employer must give at least 60 days' notice of the mass layoff, termination or relocation, subject to exceptions discussed below. Notice is due to "the employees of the covered establishment affected by the order." It is unclear, however, whether the employer must give notice to "employees" who were employed for fewer than six months.

The employer also must provide notice to the California Employment Development Department, the local workforce investment board and the chief elected official of each city and county government within which the termination, relocation or mass layoff occurs" Labor Code Section 1401. Contact information for these entities generally is available on the Internet.

With respect to content, the Legislature expressly incorporated federal WARN's notice requirements, set forth in the Department of Labor's WARN regulations at 20 C.F.R. Section 639.7. The elements of the notice vary by recipient. Employers may have to provide amended or even a new notice as circumstances change.

Exceptions to the Notice Requirement

The law does not apply "where the closing or layoff is the result of the completion of a particular project or undertaking of an employer subject to IWC Wage Orders 11, 12 and 16, "if the employees were hired with the understanding that their employment was limited to the duration of that project or undertaking." The law also does not apply to "seasonal employment where the employees were hired with the understanding that their employment was seasonal and temporary." Labor Code Section 1400(g).

Employers are not required to give notice when "a mass layoff, relocation, or termination is necessitated by a physical calamity or act of war." Additionally, employers need not give notice of a "termination" (plant closing) or relocation when the employer proves it was actively seeking capital or business that would have avoided the event, and giving notice would prevent the employer from obtaining that capital or business.

Consequences

Employers who fail to provide required notice may be liable for back pay and the value of benefits lost during the violation period. Pay and benefits are

due for the lesser of the number of days for which the employer failed to provide notice, or one-half the number of days the employee was employed. The law fails to define "benefits" and how their "value" is calculated. Regarding "back pay," the statute specifies the rate of pay, but does not say how to calculate hours if the employee's schedule varies.

The statute reduces liability by wages (excluding vacation) paid during the defective notice period. Thus, if the employer gives only 20 days' notice but employees are fully employed or paid during the remaining 40 days, then only 20 days' back pay and benefits may be due. Liability also is offset by "voluntary and unconditional" payments to employees (e.g., severance that is not required to be paid and not conditioned on a release), and by payments by the employer to a third party or trustee, such as premiums for health benefits or payments to a defined contribution pension plan, on behalf of and attributable to the employee for the period of the violation." Employers also may be liable for a civil penalty of \$500 per day of violation. The law does not say whether that is \$500 per employee or per event. However, the penalty is not incurred if the employer pays employees compensation due under Section 1402. The penalty also may be reduced if the employer proves it acted in "good faith."

Finally, Section 1404 authorizes civil litigation, costs and attorney fees.

AB 1989

The Legislature is currently considering AB 1989, which would make significant changes to the law. A "mass layoff" would be defined as involving only 25 employees rather than 50. The measuring period to determine the layoff's size would increase to 90 days. The amount of notice would be increased to 90 days as well. The proposed law would require notice in the case of "offshoring": relocation to another country regardless of the mileage involved. The civil penalty would increase from \$500 to \$1,000 per day. Potential liability for back pay and benefits would increase concomitantly because of the new 90-day notice period. Finally, employers would be required to distribute a pamphlet to be designed by the state, describing benefits and services available to affected employees.

It is unclear whether the governor will sign this bill, which has cleared the Assembly but has received little attention. Before the Senate takes a final vote, perhaps the members will consider clearing up some of the ambiguities in the existing law outlined above.

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