Challenges for New Jersey Employers Facing COVID-19 Related Workforce Reductions

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Employers operating in New Jersey who find themselves needing to reduce their workforces for reasons related to COVID-19 should seek guidance from counsel with regard to the application of obligations set forth in New Jersey's WARN Act ("NJ WARN"). In addition to the federal law, New Jersey's version, which is considered one of the nation's most stringent, requires employers to provide employees with notice of a mass layoff, termination, or transfer of operations, affecting 500 or more full-time employees, or 50 or more full-time employees if such represents one-third or more of the employees at the business establishment. Presently, the law requires employers to provide at least 60 days' notice, and requires that employers pay certain severance in the event that they do not fully comply with the notice requirement.

The federal WARN Act contains a provision that may permit employers to reduce the notice requirement due to unforeseeable business circumstances. However, while NJ WARN provides exceptions for certain circumstances including "natural disaster" and "national emergency," these exceptions apply only where the employer undertakes a "termination of operations," rather than simply a "mass layoff" where the company continues to operate, or a "transfer of operations." Notably, a "termination of operations" need not result in a complete shut-down of the employer's New Jersey operations. Depending on the circumstances, it may include the termination of operations at a single establishment, or even a business unit within a single establishment.

Here are some issues to consider in analyzing whether the obligations of NJ WARN are applicable:

- Is the length of the layoff anticipated to last longer than 6 months? If yes, it is considered a "Termination of Employment" under NJ WARN. However, if the layoff currently is anticipated to be for less than 6 months, then it is not a Termination of Employment under NJ WARN. If, circumstances then cause a layoff originally believed to be for less than 6 months, to extend beyond 6 months, and the extension beyond 6 months is caused by business circumstances not reasonably foreseeable at the time of the initial layoff, notice obligations may kick in when it becomes reasonably foreseeable that the layoff will extend beyond 6 months.
- Is the layoff due to termination of operations? Here, there is an exception in NJ WARN for the termination of operations due to a national emergency. However, this analysis is fact sensitive depending on whether the Company continues some operations. Here, whether or not your business is considered non-essential, and therefore ordered closed by the government, also may impact the analysis.
- Timing and Number of Employees Involved: Be aware that the aggregate number of employees laid off in a 30-day period will be used in assessing whether or not the Company has engaged in a mass layoff or transfer of operations.

- Big Change This July: NJ WARN currently requires advance notice to employees impacted by a mass layoff, and has financial implications for failing to do so. Importantly, New Jersey recently has expanded this law, described below, that will become effective this July. The expanded law provides for increased notice periods and increased financial implications for mass layoffs or transfers of operations. As such, timing must be considered in your business strategy.

Expansion of NJ WARN takes effect in July 2020. Starting in July 2020, covered employers will be required to provide 90 days' notice to employees, and will have to pay certain severance to impacted employees, regardless of whether employers meet the notice requirement. The expanded law also extends the obligations of notice and severance to workforce reductions impacting 50 or more employees, regardless of full-time or part-time status.

Employers who find themselves needing to terminate 50 or more employees in New Jersey for reasons related to COVID-19 -- including as a result of temporary layoffs and government-ordered shut downs -- should contact legal counsel for assistance with analyzing the application of, and possible exceptions to, NJ WARN.