JONES DAY

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WHEN TO WARN? WARN ACT NOTICE AMID THE THREAT OF SEQUESTRATION

Unless Congress reaches agreement on a budget deficit reduction plan by January 2, 2013, automatic spending cuts will go into effect, causing significant reductions to both defense and non-exempt spending. One of many questions raised in connection with this potential sequestration concerns whether government contractors, who anticipate plant closures or mass layoffs due to the sequestration-related reduction in spending, must comply with the federal WARN Act's notification requirements and provide notice to affected employees 60 days in advance of the January 2 sequestration date. The U.S. Department of Labor ("DOL") issued a Guidance Letter in July in which it attempted to clarify its position that the impending sequestration alone does not trigger WARN Act notice requirements for government contractors; however, the Letter may instead have raised as many new questions as it answered.

THE THREAT OF SEQUESTRATION

The Balanced Budget and Emergency Deficit Control Act of 1985 ("BBEDCA"), which was amended by the Budget Control Act of 2011 ("BCA"), requires that certain action be taken if Congress cannot reach agreement and enact a budget deficit reduction plan that would achieve at least $1.2 trillion in deficit reduction. Specifically, the BBEDCA, as amended by the BCA, requires that unless an agreement is reached, the President must issue a sequestration order on January 2, 2013 that would reduce non-exempt defense and non-defense spending by a uniform percentage. 2 U.S.C. §§ 901a(7)(A) & (8). The Congressional Budget Office has estimated this percentage to represent a cut of approximately 10 percent to discretionary defense spending and 8 percent to discretionary non-defense spending.

While both Congress and the Obama administration have indicated that their goal is to avoid the sequester, to date no budget agreement has been reached.

THE WARN ACT REQUIREMENTS AND IMPLICATIONS OF SEQUESTRATION

The WARN Act's purpose is to provide notice to employees of impending job loss, "so alternative employment or necessary training can be obtained on a timely basis." 53 Fed. Reg. 49078 (Dec. 5, 1988). The Act generally requires that employers with 100 or more employees provide "affected employees," i.e., those "who may reasonably be expected to experience an employment loss," with written notice at least 60 days prior to a plant closing or mass layoff, as those terms are defined by the statute. 29 U.S.C. §§ 2101(a)(5), 2102(a).

The WARN Act's regulations require that the WARN notice contain specific information, including (i) the name and address of the employment site where the plant closing or mass layoff will occur; (ii) the expected date of the first separation from employment and a schedule of separations; and (iii) the job titles of affected positions and the names of employees holding those positions. 20 C.F.R. § 639.7. The preamble to the final WARN Act regulations states that "it is not appropriate for an employer to provide blanket notice to workers." 54 Fed. Reg. 16042, 16058 (April 20, 1989). Accordingly, the WARN notice requirements also provide for an exception in the case of unforeseeable business circumstances, where the employer would not be certain of either the mass layoff or plant closing, or the employees to be affected, in time to give the otherwise required 60 days' notice. 29 U.S.C. § 2102(b); 20 C.F.R. § 639.9(b).

After the BCA was passed, federal contractors began to raise questions as to whether they would be required to provide WARN Act notice to employees working under government contracts funded from sequestrable accounts 60 days in advance of the anticipated January 2, 2013 sequestration date—i.e., on November 3, 2012, despite the fact that they do not yet know precisely which contracts (and thus which employees) will definitely be affected.

THE DEPARTMENT OF LABOR'S JULY GUIDANCE LETTER

In response to the questions being raised by employers, on July 30, 2012, the Employment and Training Administration ("ETA"), a division of the DOL, issued a Guidance Letter that addressed the issue of whether federal contractors must give WARN Act notice of potential layoffs occurring because of the sequestration. The ETA concluded that federal contractors are not required to give WARN Act notice at this time in connection with sequestration, for the following reasons:

- The occurrence of a Sequestration Order is not reasonably foreseeable at this time, as the government is currently making efforts to avoid a Sequestration Order.
- Even if a Sequestration Order were issued, the impacts of such an Order are unknown at this time, as they will depend at least in part on Fiscal Year 2013 funding, which has not yet been enacted by Congress.
- Federal agencies have not announced which contracts will be affected by a Sequestration Order, and so federal contractors cannot currently discern the specific impact on their contracts.
- It will take a substantial amount of time for federal agencies to implement a Sequestration Order and determine its effect on specific programs, which may provide federal contractors with time to provide WARN notice after those determinations are made.

Based on these considerations, the ETA concluded that the threat of sequestration would fall within the "unforeseeable business circumstances" exception to WARN, excusing employers from providing WARN notice until they receive additional information on the specific contracts to be affected and the specific closings or mass layoffs become reasonably foreseeable.

POST-JULY DEVELOPMENTS

After the ETA issued its Guidance Letter, it was sharply criticized by some Republican lawmakers, who questioned the authority of the ETA to issue such guidance, and argued that

it was intended to mask the number of sequestration-related jobs that would be lost until after the election.

Nevertheless, new questions were raised by the ETA's Guidance Letter as to the potential liability for employers who rely upon it, and some federal contractors have already indicated that they will provide sequestration-related WARN notices anyway, due to the uncertainties. On September 28, 2012, the Office of Management and Budget ("OMB") issued a Memorandum that stated that if sequestration occurs and an agency then terminates or modifies a contract, leading the government contractor to initiate a plant closing or mass layoff that would otherwise be subject to WARN Act requirements, any subsequent court-ordered employee compensation costs for WARN Act liability, in addition to reasonable attorneys' fees and litigation costs, will be paid for by the contracting agency, provided that the contractor "has followed a course of action consistent with DOL guidance."

UNCERTAINTY REMAINS

The ETA's Guidance Letter and OMB's Memorandum are likely not the final word on this issue, as several questions remain.

First, questions have been raised about whether the courts will defer to DOL/ETA's Guidance Letter. Federal courts generally follow and apply DOL's WARN Act regulations if the regulation is a reasonable interpretation of the Act. Different standards govern the Letter. The Supreme Court has held that courts should follow an agency opinion letter when it has the power to persuade the courts. Thus, while there are strong arguments for why courts should find the ETA's Guidance Letter to be persuasive and should give it substantial weight in any subsequent litigation over sequestration-related WARN notice, it is impossible to predict with certainty that the courts will agree with the Letter.

Second, questions have also been raised about whether the government had authority to issue its September 28, 2012 Memorandum. The government's authority to indemnify contractors is not exactly clear.

Third, in addition to the WARN Act, many states (most notably, California, Illinois, and New York) have their own laws governing plant closings or mass layoffs, and many of these state "mini-WARN" statutes contain more stringent requirements than the federal statute. It is unclear whether courts considering whether notice was properly given under a state's mini-WARN statute would find the ETA's Guidance Letter to be persuasive. Nor does the OMB's Memorandum address whether government agencies would also make payments in connection with potential liability under state mini-WARN Acts when following the ETA's Guidance Letter.

Finally, the ETA's Guidance Letter does not completely eliminate federal contractors' WARN Act notice obligations in connection with sequestration-related layoffs, as it anticipates that notice will be provided as soon as the specific plant closing or mass layoff does become reasonably foreseeable, which presumably would be some time after federal agencies announce which contracts would be affected by sequestration.

LAWYER CONTACTS

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