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JONES DAY
COMMENTARIES

California's New Plant Shutdown/Mass Layoff Law

California has enacted its own version of the Worker Adjustment and Retraining Notification (WARN) Act, 29 U.S.C. §§ 2101-2109, the federal law that requires employers to give a 60-day notice before ordering a plant closing or mass layoff. The new law, AB 2957, adds Sections 1400-1408 to the California Labor Code. It will become effective on January 1, 2003.

There are two main purposes behind the new state law—(1) to lower the threshold for coverage by imposing the notice requirement on smaller companies that are not subject to WARN because of their size, and (2) to extend the notice requirement to business decisions that affect smaller groups of employees than the decisions that are subject to WARN. (See the legislative history of AB 2957 at www.leginfo.ca.gov.)

While the state law is patterned after WARN, there are many differences between the two statutes, and the California version is generally more restrictive than the federal law. Because most employers that have operations in California will be required to comply with both laws, this report will compare the provisions of the new state law with their counterparts in WARN.

Differences in Coverage

WARN applies to any "employer," which is defined primarily as a business enterprise that employs 100 or more employees, excluding part-time employees. "Part-time employee" is defined in an unusual way—it means an employee who (1) is employed for an average of fewer than 20 hours per week or (2) has been employed for fewer than six of the 12 months preceding the date on which notice is required. Thus, in determining coverage under the statute, an employee who works an average of 20 hours per week is considered full-time, while an employee who works 40 hours per week, but has been employed for less than six months, is considered part-time. The regulations adopted under WARN state that the period to be used in calculating whether an employee has worked an average of fewer than 20 hours per week is the most recent 90 days or the actual time the worker has been employed, whichever is shorter. 20 CFR 639.3(h).

Under an alternative test, a business enterprise that employs 100 or more employees who in the aggregate work at least 4,000 hours per week, excluding overtime hours, will qualify as an "employer" covered by WARN. Contrary to the primary definition explained above, the hours worked by part-time employees are not excluded from this calculation.

Coverage under the new California law also applies to an "employer." However, that statute defines the term "employer" as any person who, directly or indirectly, owns and operates a "covered establishment." In addition, a parent corporation is treated as an "employer" for any covered establishment that is directly owned and operated by its corporate subsidiary. A "covered establishment" is any industrial or commercial facility, or part thereof, that employs, or has employed within the preceding 12 months, at least 75 "persons."

The state law's definition of "covered establishment" is ambiguous in several respects. First, coverage under that definition depends on the number of "persons" employed within the preceding 12 months. The term "person" is broadly defined in the California Labor Code as any person, association, organization, partnership, business trust, limited liability company, or corporation. Labor Code § 18. On the other hand, the new statute defines the term "employee" more narrowly, as a "person" employed for at least six of the 12 months preceding the date on which notice is required. It is not clear in the statute whether the Legislature intended to distinguish between "persons" and "employees" when it adopted the definition of "covered establishment." However, it can be argued that no distinction was intended because the definition uses the term "employs" in referring to the minimum number of workers needed for coverage. Moreover, there is support for this interpretation in the legislative history of the statute, since some of the legislative reports used the terms "persons" and "employees" interchangeably in describing this definition. (See the legislative history at the Web site listed above.) Nevertheless, if the statutory language is interpreted literally, it appears that coverage will depend on the number of "persons" employed within the preceding 12 months, not the number of "employees." Under that interpretation, the threshold for coverage would be easier to reach, since "person" is a more inclusive term under the statute than "employee."

Second, the requirement in the definition that 75 persons be employed "within the preceding 12 months" is ambiguous. Under one interpretation, this could mean that the facility (or part thereof) must have had a full complement of at least 75 persons on its payroll at one point during the 12-month period. On the other hand, it might mean that all persons employed at *any* time during the 12-month period are aggregated in determining whether a total of 75 was reached, regardless of the total number of persons on the payroll at any one time.

Third, the definition is limited to "industrial or commercial" facilities. The scope of these terms is also unclear. For example, would a hospital be regarded as an "industrial or commercial" facility?

Finally, the definition applies only if the employer "owns and operates" the facility, directly or indirectly. This terminology introduces another ambiguity. For example, if an employer *leases* a facility that it operates, it is not clear whether that would qualify as indirect ownership of the facility.

In summary, aside from these ambiguities in the California law, there are several coverage distinctions between that statute and WARN:

- Under both statutes, whether a business qualifies as a covered "employer" depends on whether it employs the requisite number of workers. But under WARN, that determination is made on a company-wide basis, while under the state law, coverage is determined at the "establishment" level.
- Under WARN, a business enterprise must have at least 100 employees, excluding part-time employees (or must qualify under the alternative test discussed above) to be a covered employer. But under the California law, an establishment is covered if it has employed at least 75 "persons" within the preceding 12 months. Unlike WARN, there is no exclusion for part-time employees.
- In one respect, the separate legal status of related corporate entities is disregarded in determining coverage under the California law, since a parent corporation is treated as an "employer" with respect to any covered establishment that is directly owned and operated by its corporate subsidiary. WARN is silent on this subject, although the WARN regulations take a different approach by stating that whether corporate subsidiaries are treated as separate employers or as part of the parent will depend on the degree of their independence from

the parent. 20 CFR 639.3(a)(2). Thus, corporations with subsidiaries that are independently managed and have operations in California may now be faced with notice obligations and possible liability that did not exist under WARN. In addition, even if a parent corporation is required by the state law to give a notice, it appears that the subsidiary that owns and operates the covered establishment will also be required to do so, since the statute does not relieve the subsidiary of the status of "employer" under these circumstances.

- Coverage under the state law is limited to industrial and commercial facilities. WARN does not directly address this subject, but the WARN regulations state that (1) the term "employer" includes nonprofit organizations of the requisite size, and (2) while "regular" governments are not covered by WARN, the term "employer" includes public and quasi-public entities that engage in business, are separately organized from the "regular" government, have their own governing bodies, and have independent authority to manage their personnel and assets. 20 CFR 639.3(a)(1). Thus, in this respect, it appears that the coverage of the state law may be somewhat narrower than the coverage of WARN.
- Coverage under the state law applies only if the employer owns and operates the facility. In contrast, coverage under WARN does not depend upon ownership of the facility by the employer. Thus, it appears that coverage of the state law may be somewhat narrower than coverage under WARN in this respect also.

Events Triggering Notice Requirements

The 60-day notice requirement of WARN applies in the event of a "plant closing" or "mass layoff," as those terms are defined in the statute. The new California law involves similar concepts, but it uses different terminology and significantly different definitions. The notice requirements of that statute apply in the event of a "mass layoff, relocation, or termination" at a covered establishment.

Mass Layoff. The California law borrows this term from WARN, and the concepts are similar in the two statutes, but the definitions are different in significant ways. Under WARN, a mass layoff exists if there is a reduction in force (not the result of a plant closing) that results in an employment loss at a single site of employment during any 30-day period for (1) at least 33 percent of the employees, with a minimum of 50, or (2) at least 500 employees, without regard to the percentage. Thus, the minimum number for a mass layoff under WARN will range from 50 to 500 employees, depending on the size of the workforce at that site. In addition, part-time employees (using WARN's unusual definition of that term) are excluded from these computations.

The threshold for a mass layoff under the California law will be much lower in many cases. The term is defined in this statute as a layoff during any 30-day period of 50 or more employees at a covered establishment. Thus, regardless of the size of the workforce, a layoff of 50 employees at such an establishment will satisfy the definition. Moreover, there is no exclusion for part-time employees, as there is under WARN. As noted above, any person employed for at least six of the past 12 months qualifies as an "employee" under the state law, and thus is included in the minimum number of 50.

In addition, aside from the minimum number required by the definition, the nature of the employment action encompassed in the term "layoff" is significantly different under the two statutes. WARN contemplates a reduction in force that results in an employment loss for the requisite number of employees. The term "employment loss" is defined as (1) an employment termination (other than a discharge for cause, voluntary departure, or

retirement), (2) a layoff exceeding six months, or (3) a reduction in work hours of a specified amount.

The term "layoff" under the California law is much less precise, and it is fraught with ambiguity. It is defined simply as "a separation from a position for lack of funds or lack of work." This definition raises several questions of interpretation. First, what is a "separation from a position"? Does this mean a termination of employment, as distinguished from a temporary layoff? Apparently so, since "separation" is generally used in the employment context as meaning the termination of an employment relationship.

On the other hand, if "separation" does not mean termination of employment, how long must the interruption of employment last to qualify as a "layoff"? Unlike WARN, the state law does not include a six-month minimum for an employment loss. This raises the disturbing possibility that a court might consider a shutdown of one day or one week—a typical event in many California companies—to be a "mass layoff." Thus, until the courts clarify the meaning of "separation," California employers will need to give careful consideration to whether a 60-day notice should be given prior to a short-term shutdown of a facility.

Finally, what is a "lack of funds or lack of work"? For example, if a company has adequate financial resources but simply wants to cut payroll expenses to improve its bottom line, would that be a lack of funds?

Termination. The use of this term in the California law is misleading. It refers to a termination of operations, not a termination of employment. It is defined as the cessation, or substantial cessation, of industrial or commercial operations in a covered establishment. Thus, a "termination" under the state law is roughly equivalent to WARN's "plant closing."

Under WARN, the term "plant closing" means the permanent or temporary shutdown of a single site of employment (or one or more facilities or operating units within a single site of employment), if the shutdown results in an employment loss at that site during any 30-day period for at least 50 employees, excluding part-time employees. In contrast, the California definition of "termination" does not specify a minimum number of employees who must suffer an employment loss, nor a period of time for measuring the number of affected employees. Nevertheless, it seems likely to accomplish roughly the same objective as WARN's definition of "plant closing" under most circumstances, because it requires the cessation of operations in a covered establishment, and, as explained above, a covered establishment is a facility, or part thereof, that has employed at least 75 persons within the preceding 12 months. Although in some cases a facility that has employed that number of employees in the past 12 months will not have at least 50 employees when the cessation of operations occurs, it seems likely that such a facility will have at least 50 employees in the typical case.

Relocation. The California law defines this term as the removal of all, or substantially all, of the industrial or commercial operations in a covered establishment to a different location at least 100 miles away. This concept does not appear in WARN (except that WARN permits an exception under some circumstances for employees who are offered a transfer when a closing or layoff results from a relocation or consolidation of part or all of the employer's business). However, in some cases, a "relocation" under state law will result in a "plant closing" under WARN, because it will involve a shutdown of a site of employment, or a facility or operating unit within such a site, with the consequences specified in WARN's definition of that term.

The state law's use of the term "relocation" raises an additional question: If an employer removes all of the industrial or commercial operations in a

covered establishment to a different location *less than* 100 miles away—for example, 90 miles from the establishment—and as a result the employer ceases all operations in the establishment, is that a "termination" requiring a notice, even though it does not qualify as a "relocation"? Presumably not, since otherwise there would have been no point in creating a separate category of "relocation," distinct from "termination."

Single Site of Employment

As discussed above, WARN's notice requirements apply if a shutdown or workforce reduction affects the requisite number of employees at a "single site of employment," or, in the case of a shutdown, at a "facility or operating unit" within such a site. WARN does not define these terms, but the WARN regulations explain how they are to be interpreted. 20 CFR 639.3(i), 639.3(j). The California statute does not use the same terminology. Instead, as explained above, that law applies at a "covered establishment," which is defined as "any industrial or commercial facility or part thereof" that employs the requisite number of persons. The statute does not provide any guidance on what these terms mean.

Alternative 90-Day Period

In addition to the distinctions between WARN and the California law discussed above, there is one other significant difference in the manner in which the state law treats mass layoffs and shutdowns. Under WARN, there is an alternative 90-day period—in addition to the basic 30-day period—for measuring whether a reduction in force or plant closing causes the requisite employment loss. Employment losses for two or more groups at a single site of employment, each of which is less than the minimum number of employees needed for a plant closing or mass layoff, but which in the aggregate exceed the minimum number, and which occur within any 90-day period, will be considered to be a plant closing or mass layoff, unless the employer demonstrates that the employment losses are the result of separate and distinct actions and causes, and are not an attempt to evade the statute's requirements.

The California law does not include a similar provision. Of course, such a provision would have been relevant under that law only in the case of a mass layoff, since the 30-day period is not included in the definition of "termination" or "relocation."

Required 60-Day Notices

Contents of Notice. Under the California law, an employer must give a 60-day notice in writing in the event of a mass layoff, relocation, or termination. The law provides that the notice must include the elements required by WARN for a notice given under that statute. These elements are not literally set forth in WARN, but the WARN regulations specify in detail what the notice must contain. 20 CFR 639.7.

Persons to be Notified. The persons and entities that must be given a 60-day notice under the state law are different in some respects from those that must be given a WARN notice. The notice required by state law must be given to:

- The affected employees. (In contrast, WARN requires that the notice be sent to the representative of the employees if there is one; otherwise, it must be sent to each affected employee. "Representative" means an exclusive representative under the National Labor Relations Act or the Railway Labor Act—*i.e.*, a labor union. The notice is to be sent to the representative's chief elected officer. 20 CFR 639.6(a), 639.6(b).)
- The California Employment Development Department (EDD). (WARN requires that the notice be sent to the entity designated by the state to carry out rapid response activities under the federal Workforce Investment Act. According to

the EDD's Web site (www.edd.ca.gov), sending the notice to the WARN Act Coordinator at that agency's Automation and Local Support Section, Workforce Investment Division, satisfies this notice requirement. Thus, compliance with this WARN requirement would also seem to satisfy the less specific California requirement.)

- The Local Workforce Investment Board. Contact information for the appropriate Local Workforce Investment Board can be obtained from the EDD's Web site (see above). (WARN does not contain this requirement.)
- The chief elected official of each city *and* county government within which the termination, relocation, or mass layoff occurs. (In contrast, WARN requires that the notice be sent to the chief elected official of the unit of local government within which the closing or layoff is to occur; however, if there is more than one such local government unit, the employer is to notify the unit to which it pays the highest taxes for the preceding year.)

Methods for Providing Notice. WARN states that mailing the notice to an employee's last known address or including it in the employee's paycheck will be considered acceptable methods for fulfilling the employer's notice obligation. In addition, the WARN regulations provide further guidance on how the notice is to be served. 20 CFR 639.8. The California law does not address this subject.

Extended Notices. The WARN regulations require that an additional notice be given when the date, or schedule of dates, of a planned plant closing or mass layoff is extended beyond the date, or the ending date, announced in the original notice. The regulations also contain rules for extending a notice, and they require a new notice if a postponement is for 60 days or more. In addition, "rolling" notices—*i.e.*, routine periodic notices given whether or not a plant closing or mass layoff is impending, and with the intent to evade the purpose of the statute—are prohibited by the regulations. 20 CFR 639.10. The California law is silent on these subjects.

Exceptions

WARN includes a number of partial and complete exceptions from the notice requirement, which are referred to in the statute as exclusions from the definition of "employment loss," reductions of the notification period, and exemptions. The California law contains exceptions that are similar to some of those in WARN, as well as some that do not appear in that statute. Thus, before relying on an exception in either of these statutes, it will be critical for covered employers to determine that the exception is available under both of them, and that it meets the requirements for both exceptions.

Sale of Business. WARN provides an exclusion from the definition of "employment loss" for the sale of a business. It provides that, in the case of a sale of part or all of an employer's business, (1) the seller will be responsible for providing a notice for any plant closing or mass layoff up to and including the effective date of the sale; (2) after the effective date of the sale, the purchaser will be responsible for providing the notice; and (3) any employee of the seller (other than a part-time employee) as of the effective date of the sale will be considered an employee of the purchaser immediately after the effective date of the sale. The WARN regulations state that "effective date" of the sale means the "time" of the sale. 20 CFR 639.4(c), 639.6. In addition, the regulations state that, although a technical termination of the seller's employees may be deemed to occur when the sale becomes effective, a WARN notice is required only when the employees in fact experience a covered employment loss. 20 CFR 639.6.

This important exception is absent from the new California law. As a result, it is unclear what a seller's notice obligation will be upon the sale of a business. For example, when a company sells a plant

that qualifies as a covered establishment to another company, and the buyer hires the seller's employees, will that be a "mass layoff" by the seller if 50 or more employees experience a "separation" from the seller's payroll, even though they continue to have employment at that facility?

Transfer of Employees. WARN also provides that an employee will not experience an employment loss if a closing or layoff is the result of the relocation or consolidation of part or all of the employer's business, and, prior to the closing or layoff, (1) the employer offers to transfer the employee to a different site of employment within a reasonable commuting distance with no more than a six-month break in employment; or (2) the employer offers to transfer the employee to any other site of employment, regardless of distance, with no more than a six-month break in employment, and the employee accepts within 30 days of the offer, or of the closing or layoff, whichever is later. The WARN regulations provide criteria for determining a "reasonable commuting distance" under this exception. 20 CFR 639.5(b)(3). In addition, they provide that an offer of a reassignment to a different site of employment will not be deemed a "transfer"—and thus the exception will not apply—if the new job would constitute a "constructive discharge." 20 CFR 639.5(b)(2).

This exclusion is also missing from the California law. However, it appears that the same subject is addressed indirectly in the state's definition of "relocation," which is discussed above.

Faltering Company. WARN provides for a reduction in the notice period, known as the "faltering company" exception, if (1) as of the time that the notice would have been required, the employer was actively seeking capital or business, (2) the capital or business would have enabled the employer to avoid or postpone the action, and (3) the employer reasonably and in good faith believed that giving the notice would have precluded it from obtaining the needed capital or business.

This exception also appears in the California law. However, that statute also provides that (1) the Department of Industrial Relations (DIR) must make a determination that the required conditions existed; (2) the DIR may not do so unless the employer provides it with a written record of all documents relevant to the determination, and an affidavit verifying the contents of the documents; and (3) the affidavit must contain a declaration signed under penalty of perjury that the affidavit and the content of the documents are true and correct.

WARN's faltering company exception applies to "shutdowns," and thus it does not apply to mass layoffs. 20 CFR 639.9(a). Similarly, the California exception excludes mass layoffs from the scope of the exception, thus limiting it to relocations and terminations.

WARN provides that if an employer relies on this exception, it must give as much notice as is practicable, and at that time it must also give a brief statement of the basis for reducing the notification period. The California law does not contain such a requirement.

Unforeseeable Business Circumstances. WARN also provides for a reduction in the notice period if a closing or mass layoff is caused by business circumstances that were not reasonably foreseeable at the time that the notice would have been required. The employer is required to give as much notice as is practicable, and a brief statement of the basis for reducing the notification period. However, the California law does not contain a similar exception. Thus, employers will not be able to rely on this important exception in facilities that are subject to the California law.

Extended Layoffs. Under WARN, a layoff of more than six months that, at its outset, was

announced to be for six months or less will be treated as an "employment loss" unless (1) the extension beyond six months is caused by business circumstances (including unforeseeable changes in prices or cost) not reasonably foreseeable at the time of the layoff; and (2) notice is given at the time it becomes reasonably foreseeable that the extension beyond six months will be required.

The California statute does not include a similar exception. However, this exception would not be relevant under the state law because, unlike WARN, it does not require a layoff of six months as one of the criteria for an "employment loss."

Natural Disaster/Physical Calamity. A notice is not required under WARN if a plant closing or mass layoff is due to any form of natural disaster, such as a flood, earthquake, or drought (of the type that was ravaging U.S. farmlands when WARN was enacted). The California law provides for a similar exception if a mass layoff, relocation, or termination is necessitated by a "physical calamity."

Although WARN provides that "no notice" is required if the closing or layoff is due to a natural disaster, it further provides that the employer must give as much notice as is practicable and a brief statement of the basis for reducing the notification period. Here again, the state law does not contain such a requirement.

Act of War. The California law provides that a notice is not required if a mass layoff, relocation, or termination is necessitated by an act of war. However, WARN does not contain a similar exception. Thus, California employers that are covered by WARN will not be able to rely on this exception. Nevertheless, in some cases, an act of war might create "unforeseeable business circumstances" that would enable the employer to rely on that exception (see above).

Temporary Facilities/Limited Projects. WARN does not apply if (1) a closing is of a temporary facility, or (2) a closing or layoff results from the completion of a particular project or undertaking, and the affected employees were hired with the understanding that their employment was limited to the duration of the facility or the project or undertaking. The WARN regulations provide that the employer will have the burden of proving that the temporary nature of the project or facility was clearly communicated to the employees. 20 CFR 639.5(c)(2).

The California law contains a similar, but much more limited, version of this exception. That statute does not apply if (1) a closing or layoff results from the completion of a particular project or undertaking that is subject to Industrial Welfare Commission Wage Order 11 (broadcasting industry), Wage Order 12 (motion picture industry), or Wage Order 16 (on-site occupations in the construction, drilling, logging, and mining industries); and (2) the employees were hired with the understanding that their employment was limited to the duration of that project or undertaking.

Because the exception in the state law is strictly limited to six specified industries, it will not be available to most of the employers with operations in California, and thus they will need to comply with the notice requirements even though a temporary facility is being closed, or a closing or layoff affects only temporary employees. However, if their temporary employees are "seasonal," these employers might be able to rely on the exception in the California law for seasonal employment, discussed below.

Workers who are exempt from WARN's notice requirement because of this exemption are nonetheless counted under the WARN regulations as "employees" for purposes of determining coverage of a company as an "employer" under the statute, and also for determining whether a covered mass layoff or plant closing exists. 20 CFR 639.3(a)(3), 639.3(c)(2). The California law does not contain a similar provision.

Seasonal Employment. The California law does not apply to seasonal employees if they were hired with the understanding that their employment was seasonal and temporary. WARN does not contain a similar provision, but the WARN regulations state that seasonal employment can fall under the exemption discussed above for projects or undertakings with a limited duration. 20 CFR 639.5(c)(3).

Strikes and Lockouts. WARN does not apply if a closing or layoff "constitutes a strike or constitutes a lockout not intended to evade the requirements" of the statute. In addition, WARN does not require an employer to give a statutory notice when permanently replacing an economic striker under the National Labor Relations Act (NLRA). Moreover, WARN states that it will not be deemed to validate or invalidate any ruling on the hiring of permanent replacements for economic strikers under the NLRA.

The WARN regulations explain that a "lockout" occurs when, for tactical or defensive reasons during the course of collective bargaining or a labor dispute, an employer lawfully refuses to utilize employees for the performance of available work. A lockout not related to collective bargaining that is intended as a subterfuge to evade WARN does not qualify for the exemption. 20 CFR 639.5(d).

In addition, the WARN regulations state that (1) a plant closing or mass layoff at a site of employment where a strike or lockout is taking place, which occurs for reasons unrelated to the strike or lockout, is not covered by the exemption; (2) non-striking employees at the same site who experience a covered employment loss as a result of a strike are entitled to notice (although the unforeseeable business circumstances exception might apply, resulting in a reduced notice requirement, and the faltering company exception may also apply in strike situations); and (3) employees at other plants that have not been struck are not subject to the exemption if a covered plant closing or mass layoff occurs as a result of the strike or lockout (although the unforeseeable business circumstances exception might also apply to that situation). 20 CFR 639.5(d).

The California law is completely silent on these subjects. Thus, employers in California must consider the requirements of that law when a strike or lockout occurs. For example, would a "mass layoff" result under the state law if an employer locks out 50 or more employees at a covered establishment? Presumably not, since under the NLRA, employees who are locked out are not terminated, and thus they are not "separated" from their positions. Moreover, even if they were deemed to be "separated," that would not result from a "lack of funds or lack of work," as required under the California definition of "mass layoff," but instead from the employer's tactical or defensive refusal to use their services. In any event, if a mass layoff did result, the state law might be preempted by the NLRA under these circumstances.

As in the case of the exemption for temporary workers discussed above, workers who are exempt from WARN's notice requirement because of this exemption are nonetheless counted as "employees" for determining (1) whether a company is an "employer" covered under WARN, and (2) whether a covered mass layoff or plant closing exists under that statute. 20 CFR 639.3(a)(3), 639.3(c)(2).

Enforcement

Back Pay and Benefits. Under both WARN and the California law, an employer that fails to give a required notice is liable for back pay to an employee who suffers an employment loss as a result of the action. Back pay is calculated at the employee's average regular rate of compensation during the last three years of employment, or the final rate of compensation, whichever is higher.

In addition, under both laws, the employer is liable for any benefits that the employee would have been entitled to if employment had not been lost, including the cost of medical expenses that would have been covered under an employee benefit plan. However, under WARN, the liability for benefits is limited to ERISA plans.

Liability under both laws is calculated for the period of the violation up to a maximum of 60 days, or one-half the number of days that the employee was employed by the employer, whichever period is shorter.

The back pay requirement is ambiguous under WARN because the statute provides that the employer will be liable "for each day of violation," up to the 60-day maximum (or the shorter period described above). This language has led to a disagreement among the federal courts as to whether WARN requires (1) a make-whole remedy—*i.e.*, back pay for the work days during the period of the violation—or (2) back pay for each calendar day of that period up to 60 days. For example, see *Burns v. Stone Forest Industries*, 147 F.3d 1182 (9th Cir. 1998), cert. den. 525 U.S. 1040 (1998) (work days); *United Steelworkers of America v. North Star Steel Co.*, 5 F.3d 39 (3rd Cir. 1993), cert. den. 510 U.S. 1114 (1994) (calendar days). The state law avoids this ambiguity by omitting the phrase "for each day of violation." Thus, it appears likely that back pay under the state law will be awarded only for work days during the period of the violation.

The amount of the employer's liability will be reduced under WARN by any wages that the employer pays to the employee for the period of the violation. The California law contains the same provision, but it does not reduce liability for vacation pay accrued prior to that period and paid to the employee during that period.

The employer's liability will also be reduced under both laws by any voluntary and unconditional payment made to the employee that is not required by any legal obligation, and by any payment to a third party or trustee (such as premiums for health benefits or payments to a defined contribution pension plan) on behalf of the employee for the period of the violation.

In addition, under WARN, any liability under a defined benefit pension plan may be reduced by crediting the employee with service under the plan for the period of the violation. However, the California law does not contain a similar provision.

The California law provides that (1) back pay and benefit payments by an employer that failed to provide a notice of a facility closure, as required by either that statute or WARN, will not be construed as wages or compensation for personal services under the Unemployment Insurance Code; and (2) unemployment insurance benefits will not be denied or reduced because the employee receives payments related to the employer's violation of either that statute or WARN.

Civil Penalties. Under WARN, an employer that fails to give a required notice to a unit of local government is subject to a civil penalty of up to $500 for each day of violation. The California law includes the same penalty, but it applies to a failure to give a required notice to the Employment Development Department, the Local Workforce Investment Board, or the chief elected official of the affected city and county.

The civil penalty does not apply under either law if the employer pays to each aggrieved employee the amount it is liable for within three weeks from the date the employer "orders" the action that resulted in the violation.

Good Faith Defense. WARN provides that a court may reduce the amount of the liability or penalty if it determines that the act or omission that violated the statute was in good faith, and that the employer had reasonable grounds for believing that it was not a violation. The California law contains a more limited defense that allows a court to reduce

only the penalty. Additionally, the defense applies only if the court also determines that the employer conducted a reasonable investigation in good faith.

Attorney's Fees. WARN authorizes the court to award attorney's fees to the prevailing party in a lawsuit to enforce the statute. The California law contains a similar provision, but it allows attorney's fees to be awarded only to a prevailing plaintiff.

Exclusive Remedies. WARN provides that the remedies discussed above are the exclusive remedies for any violation of that statute. In addition, under WARN, a federal court does not have the authority to enjoin a plant closing or mass layoff. The California law is silent on these subjects.

Other Rights of Employees. The rights and remedies provided to employees by WARN are in addition to, and not in lieu of, other contractual or statutory rights and remedies, and they are not intended to alter or affect those rights or remedies. However, the period of notification required by WARN is intended to run concurrently with any notice period required by a contract or any other statute. The California law does not address these subjects.

Regulations. WARN authorizes the Secretary of Labor to prescribe regulations to carry out the statute. As a result, the Department of Labor has issued extensive regulations interpreting WARN. 20 CFR Part 639. The California law does not include a similar provision.

Other Laws. WARN states that giving a notice pursuant to that statute, if done in good faith compliance, will not constitute a violation of the National Labor Relations Act or the Railway Labor Act.

Investigations. The California law states that, in any investigation or proceeding under the statute, the Labor Commissioner has the authority to examine an employer's books and records. WARN does not deal with this subject.

Further Information

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