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Newly Issued Guidance on Applicability of California WARN Act to COVID-19 Layoffs and Furloughs

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The COVID-19 outbreak and resulting disruption of normal economic activity is forcing many employers to furlough or lay off employees on short notice. Given the unpredictable nature of this global pandemic, California employers have wondered whether they will be excused from complying with the 60-day notice provisions set forth in the California Worker Adjustment and Retraining Notification Act ("Cal-WARN").

On March 17, 2020, California Governor Gavin Newsom issued Executive Order N-31-20, which suspended Cal-WARN's notice obligations, ***in part***. This alert highlights key takeaways from the Executive Order and the California Labor Commissioner's recent Guidance on Conditional Suspension of California WARN Act Notice Requirements.

Brief Overview of Cal-WARN

Cal-WARN requires 60-days' notice to an employee and various state and local officials before an employer orders a **mass layoff**, **relocation** or **termination** of a **covered establishment**.

- **Covered establishment**: Cal-WARN is applicable to a "covered establishment," which is any industrial or commercial facility that employs or has employed in the preceding 12 months, 75 or more full and part-time employees. Cal-WARN, as written, is unclear regarding whether there is a length of employment requirement in counting the 75-employee threshold. According to the California Employment Development Department, "employees must have been employed for at least 6 months of the 12 months preceding the date of required notice in order to be counted" toward this 75-person threshold.
  (*See* https://www.edd.ca.gov/Jobs_and_Training/Layoff_Services_WARN.htm.)

- **Mass layoff**: A layoff (defined as a separation from a position for lack of funds or lack of work) during any 30-day period of 50 or more employees at a covered establishment. Although no California court has directly addressed whether a furlough (i.e., temporary leave of absence) will be deemed a layoff under Cal-WARN, it is prudent to do so – i.e., the safest approach is to count furloughed employees in the mass layoff 50-person minimum threshold determination.

- **Relocation**: 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.

- **Termination**: Cessation or substantial cessation of industrial or commercial operations in a covered establishment. The definition of termination does not specify a minimum number of impacted employees, but the facility must be a covered establishment, as discussed above.

Employers whose employment actions constitute a mass layoff, relocation or termination of a covered establishment must provide Cal-WARN notice. The Governor's Executive Order tempered the notice requirements in some circumstances.

If Cal-WARN Applies, How Much Notice Must Be Given?
It depends. If the employer's mass layoff, relocation or termination is caused by COVID-19-related "business circumstances that were not reasonably foreseeable at the time that notice would have been required," the employer is excused from Cal-WARN's 60-day notice requirement. The employer, however, still must "give as much notice as is practicable (i.e., reasonably possible)."

To Whom Must The Employer Send Notices?
Cal-WARN notices must be given to: (a) the employees affected by the mass layoff, relocation or termination; (b) the employees' representatives (*i.e.*., union), if applicable; (c) the California Employment Development Department; (d) the Local Workforce Development Board; and (e) the chief elected official for each city and county government where the mass layoff, relocation or termination occurred.

What Information Must Be Included In The Notices?
The Labor Commissioner's Guidance provides a detailed list of the information that must be included on the notices. In addition to standard Cal-WARN notice information, the Executive Order also requires that the notice include:

- A brief statement as to why the 60-day notice notification period could not be met, which should include language that explains that the Cal-WARN triggering event was caused by COVID-19-related business circumstances that were not reasonably foreseeable as of the time that notice would have been required; and

- This language: "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."

What Method of Delivery May An Employer Use?
Notices to employees may be sent by any reasonable method of delivery that ensures receipt of notice (e.g., first class mail, personal delivery with optional signed receipt, electronic mail, etc.). The Labor Commissioner's Guidance provides information regarding delivery to the EDD and local officials.

What About Cal-WARN's Physical Calamity Exception?
Cal-WARN provides for a *total exemption* from its notice requirements if the mass layoff, relocation or termination was caused by a "physical calamity." In many ways, the COVID-19 pandemic feels like a "physical calamity." According to the Labor Commissioner's Guidance, employers seeking to avoid Cal-WARN under the physical calamity exception do so at their own risk because no court has analyzed this exception and the employer has the burden to establish that the exemption applies. (The Governor's Executive Order does not address the "physical calamity" exception.)

What About the Federal WARN Act?
Although an analysis of the Federal WARN Act is beyond the scope of this alert, as a general matter, employers who have complied with Cal-WARN will typically have complied with any notice obligations triggered under the federal WARN Act.

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