The Performance Review Podcast
Episode 24
Greenberg Traurig

Ryan Bykerk (00:01):

Everyone, welcome back to the Performance Review podcast. As always, I'm joined by my partner, Philip here, and we are in the middle of a series that we're doing on reductions in force and layoffs and all manner of large groups of people leaving their employment. So in our last episode, which was the first, in this three mini episode series, we've discussed what companies should be thinking about when they're considering initiating a reduction in force. And in this episode, what we're going to do is discuss the Federal WARN Act and State Mini WARN Acts and WARN is an acronym that we'll talk about here in a minute. But the WARN Act and State Mini WARN Acts is what we're going to be talking about. Look as with nearly all of our episodes, but particularly I think with this one, it's just important that look, RIFs are a highly complex area of law.

(00:52):

It's very technical, as I think you probably took away from our last episode, there are a lot of different moving parts, a lot of statutes, a lot of statutes that overlay other statutes. So what we're doing here is really just providing a high level overview about the issues. It's not exhaustive, but we're trying to just sort of identify some of the main issues to consider and just be aware of that are out there as we've stressed a few times. Planning is really important. Consistent implementation is very important. Communication is very important and of course, getting legal advice at all stages is really highly recommended. So hopefully this offer is a really good start, but it's certainly not the final word on what an employer needs to know when thinking about a RIF.

Philip Person (01:32):

And sticking to that theme of very high overview, let me give a very high overview of the WARN act, right? So what we need to tell you all is that the WARN Act, which stands for the Worker Adjustment and Retraining Notification, is really a statute that's designed to give employees notice when there is a mass layoff or a reduction in force. And what it requires is a 60 day notice, et cetera. We'll go into the notice requirements later in this episode, I'm sure of that. But it requires the employer, when they're aware of this mass layoff or reduction in force that's going to happen is to provide that notice to the employees, provide that notice to the government, and just to give the employees that opportunity to kind of move on and get ready to go to a different job, to transition to a different job. Not everybody qualifies for WARN, it depends on the size of the employer, size of the location. We'll go into all that, but that is generally what WARN is.

Ryan Bykerk (02:42):

Yeah, it's a great overview and the WARN Act, we're we're lawyers. We're not historians, but I do always think it's interesting to at least look back at the initial background and purpose of the act here. The WARN Act was passed in 1988. It was passed during the Reagan administration. Interestingly, the WARN Act got a 66% super majority to overcome President Reagan's refusal to sign the bill into law. So it was predominantly, I think a democratic bill, but there was enough Republican support and abstentions on their part to allow for a 66% majority. So the law ended up becoming effective February 4th, 1989.

Again, we're not historians, but the '80s were a particularly busy time with the savings and loan crisis and a lot of fallout that related from that. And presumably that informed what ultimately became the WARN act.

(03:38):

Which as Philip mentioned, is really about trying to protect workers' rights during layoffs and giving workers some advanced notice so that they can either obtain further training or look for other positions or do whatever they can do to just recognizing the fact that a mass layoff can harm a family and a community in pretty short order. So notice where possible has to be given under the WARN Act.

Philip Person (04:05):

You say we're not historians, but that was a great history lesson and I was really listening with bated breath just to learn more about what was going on in the '80s. I was born in the eighties, but I don't have a great memory of that. And I appreciate that, Ryan.

Ryan Bykerk (04:20):

Hey, well, I'm in the same boat, so you are very welcome.

Philip Person (04:25):

So let's talk about the notice requirements. I kind of gave a preview about that, but let's dive a little bit deeper. For qualified employers, for covered employers, they have to provide advanced written notice to the affected employees to those who are going to be impacted by this RIF or layoff to their representatives, if there are any representatives such as unions. And then they also have to provide that specific written notice to state and local authorities. And depending on your state, and depending on your city or your county, there's typically an email address or somewhere else that you have to send that to. Now, what does the notice have to have? The notice, it must include the reason for the layoff, or sometimes it could be a plant closure, the expected date of the action, so in that written notice, you need to say, "We expect to lay you off on whatever day." And the number of employees who are actually going to be affected by this RIF, this layoff or this plant closure.

(05:38):

The notice period generally has to be 60 days. There are some exceptions, and there are some situations where you could have a shorter notice period in certain situations. Under federal, that's a lot of times is the unforeseeable business circumstances situation. So that's one that people often talk about, but there are some exceptions, but generally it's a 60 calendar day notice. So an employee has to think about the timeframe for providing that notice to the effective employees, the unions, the local authorities. But one point to note is that the notice is not required if the government forces the employer to take a mass layoff, right? There's other exceptions, arguments about temporary employees. We won't get into all that, but those are the general notice requirements that are under WARN.

Ryan Bykerk (06:38):

Yeah, and let's talk a little bit now too about triggering events and the WARN statute, having reviewed it a few times over the years, is a little bit mind-bending and so this is just speaking very generally. The WARN Act applies when there is a plant closure that results in an employment loss for 50 or more employees, or when there's a mass layoff that affects 50 or more employees at a single site of employment and one third of the work site's total workforce or 500 or more employees at the single site of employment during any 90-day period. So if you caught all that, you're doing better than me on most

days. But just kind of generally speaking, there's just some key numbers in there and a lot of nuance. But a plant closure that results in employment loss for 50 or more employees or a mass layoff that affects 50 or more employees is kind of a good place to start if you're looking for just some handles to put on this concept.

(07:40):

Now, an employment loss occurs when there's an employment termination, which of course is obvious, okay, that's an employment loss. But it also occurs when there's a layoff, which is again, we talked about this last episode, a temporary loss of employment where maybe there's a right to recall or the thought is that you'd be brought back. But when a layoff exceeds six months, it becomes an employment termination for purposes of WARN. Also, when there's been a reduction in work hours of more than 50% during each month of a six-month period, that also is referred to under WARN or considered under WARN and Employment Loss. So as you can see, there's just a lot hidden in some of these words in this statute. So when you talk about an employment loss for 50 people, that can actually mean a lot of different things. A major reduction in hours for a sustained period, a six-month period is an employment loss.

(08:37):

So all of that is really important to keep in mind. Now, of course, it also is important to think about, okay, well what exactly is a plant closing? Well, a plant closing occurs at a facility or an operating unit level. A single site of employment is the phrase that's often used, but what does that mean? So if you have a campus that has maybe a group of structures in a single business park, well, that can be a single site of employment. There needs to be some reasonable proximity. When courts are looking at this, some of the factors that they look at are things like whether the management is shared among those different sites that are close in proximity, whether there might be distinctive production lines or products that are made or used at these different facilities, whether there are common employees that maybe move among the different sites. So there's quite a bit that even goes into determining what constitutes a single site of employment under WARN.

(09:37):

So again, there's just a lot of different pieces and parts to the definitions of WARN. WARN by itself is not a particularly long statute, but every word in it is important. So again, important to look at that carefully.

Philip Person (09:52):

And one of the important terms and definitions and sections of the statute to look at is what's the definition of a covered employee. Who's covered under WARN? And you need to identify which employers and employees fall under that purview of the WARN Act. Under WARN, it really applies to private for-profit employers with a hundred or more full-time employees. That's who WARN applies to part-time. Employees are counted towards the threshold calculation, but those who have worked less than six of the last 12 months calendar year proceeding the date, the requirement for the notice is excluded. Now that being said, we are a California podcast. Ryan's in LA, I'm up here in San Francisco, and the California warn, the Mini State WARN also applies, and that's a little bit different for that one to be considered a covered establishment. That is any establishment that employs or has employed in the last 12 months, 75 or more full-time and part-time employees.

(11:09):

So that's a little bit different. So it's kind of a lower threshold. So going back to it, the WARN Act covers all employees affected by a plant closure or a mass layoff. And that includes hourly, salaried workers, supervisors, managers, covers them all. Employees who've worked less than six months in the

proceeding 12 month period or have worked less than 20 hours are excluded from that coverage. Now as complicated as WARN and [inaudible 00:11:47] WARN get. So there are still exceptions and exemptions to the rule, if not, it wouldn't be fun. Some of them are the WARN ACT provides exceptions and exceptions that may relieve employers from providing notice or shorten the notice period in specific circumstances. We talked about some of that that may be emergency situations or it could be temporary employees, you may want to look at that. Exceptions include unforeseeable, business circumstances, natural disasters, faltering companies.

(12:24):

Sometimes a bankruptcy may come out of nowhere and you may not be able to give that notice. So you may want to look into the exceptions there. And temporary layoffs, strikes, lockouts, seasonal employment, that typically falls under some of the exemptions there. Getting the groundwork of who's covered as an employer who's covered as an employee is really critical when you're doing your WARN analysis.

Ryan Bykerk (12:51):

Yeah, so if you've figured out you're a covered employer, you have some covered employees, you figured out that you have a triggering act, which is what I was talking about just moments ago, you got to get this notice done because if you don't, there are penalties for violations of the Federal WARN Act. And we alluded to this really in our first episode, where it's like, man, it's tough for an employer who's hit a rough patch and is having to do these things, to really prioritize meeting some of these technical legal requirements. Because the business is almost inevitably suffering if you're actually having these discussions. But enter the penalties, so if you didn't want to think about it, the penalties will encourage you to think about it, which is why they are penalties. It's why they exist. So the penalties for violations of the Federal WARN Act include lost wages and benefits and back pay for up to 60 days.

(13:45):

So that's your 60-day notice period. You're supposed to give that advance 60 day notice. And so the penalties can include those lost wages and benefits and back pay for the employees who should have received the notice, and that can apply to all of the affected employees. Now, one of the things, an employer might run into a situation where they say, "Look, we've got to do this layoff, but it's got to happen within the next 45 days. We can't afford to give 60 days notice, or there won't be a company left to do any of this." Well, in that instance, employers can provide payment of those penalties in lieu of notice. So where you provide less than 60 days notice, you can pay wages and benefits during the full 60-day period in order to alleviate legal exposure there just by paying the penalties.

(14:34):

Those payments though, they have to be in addition to any payments you might offer by way of severance or payouts of vacation, which under California law is mandatory to do at the termination of an employment or any other salary continuation obligations you may have under law or contract. So again, it's got to be a totally separate payment, but you can pay in lieu of providing the notice, so the penalties should grab your attention. Here's another attention grabber, there are often State Mini WARN Acts, and Philip mentioned one already. He mentioned the California one, and we'll talk about that a little bit more in just a moment. But a lot of states looked at the Federal WARN Act and said, "You know what? That's a good idea. We want to increase the application. We want to maybe cover more employers and employees." And so there are some state variations of the WARN Act that you should be aware of as well.

(15:27):

And just as a non-exhaustive list, California has one, as do Connecticut, the District of Columbia, Georgia, Hawaii, Illinois, Iowa, Maine, Maryland, New Hampshire, New Jersey, New York, Tennessee, Vermont, and Wisconsin. In any of those states, you're going to have to be mindful that there might be some additional requirements based on the specific state notice. But since we are a California focused podcast here at The Performance Review, let's talk about that one, the California Mini WARN Act.

Philip Person (15:58):

Yeah, and it's interesting that we call it the Mini WARN Act. That's what everybody calls it for the state equivalents, but they're no less important. And in fact, they oftentimes expand on the coverage and impose a stricter obligation on employers. So let's talk kind of the differences with California WARN, or actually just run through the requirements. So in California, the California WARN Act, Mini WARN as we call it is for recovered employees which we talked about, they have to provide that written notice to affected employees, the representative, the State Department, which here would be the Employment Development Department and local workforce investment boards at least 60 days in advance of a qualifying event. Some of those events that Ryan talked about earlier. The notice must contain that specific information. A lot of what we talked about, including the reason for the layoff or closure, the reduction force, the expected date of the action and the job titles of the affected employees.

(17:06):

Talking a little bit more about the triggering events, California WARN Act applies to employers who carry out a covered establishment, which we talked about earlier for a closure or a mass layoff. The cover establishment is defined as any industrial or commercial facility that employees or has employed in the last 12 months, 75 or more full or part-time employees. The mass layoff occurs when there's a separation from the employment that affects 50 or more employees within a 30-day period. So that's a really short timeframe. And the California WARN Act applies to all private for-profit employees, as we talk about with 75 or more employees across the board. It's a lower threshold than Federal WARN, and it also extends the coverage to a broader range of employees compared to Federal WARN. As we said, it covers all employees full and part-time, who have been employed there for at least six months and have worked an average of at least 20 hours per week.

(18:11):

Additionally, employees and their representatives, the California WARN Act requires employers to provide notice to the EDD investment board. All of those have to be recipients, so it's not just you have to notify employees, which is a common misconception for employers. It's everybody else that's listed, which would be government and the representatives. What happens if you don't do that? California WARN, it provides for a private right of action to sue employers for these violations. And if you're in violation, you may be liable for back pay, and you may be liable for missed benefits all throughout the period of the violation. And California WARN also allows for statutory penalties. So it can be pretty hefty on an employer. It's a pretty strict requirement. As I said at the beginning, it's Mini WARN, but it's pretty big to me.

Ryan Bykerk (19:14):

Yeah. Oh, yeah. It really is striking when you put the acts next to each other and you try and synthesize them. The way they define things, the groupings, the thresholds, all of it's just slightly different and it's conceived of slightly differently in the California WARN version. So you really do have to be on your toes and think it through almost completely independently of the Federal WARN Act. So yeah, so thank you for taking us through that, Philip. So yeah, that's WARN. That's Cal WARN. I don't suppose you have up your sleeve another wild California employment story for this episode. Do you, Philip?

Philip Person (19:54):

I have another employment story again.

Ryan Bykerk (19:57):

Does it involve fireworks?

Philip Person (19:59):

No fireworks on this one. No fireworks on this one, so there's nothing to WARN you about.

Ryan Bykerk (20:04):

Oh, I see what you did.

Philip Person (20:05):

Sorry, sorry, sorry. That was pretty corny, but I went for it. This one's a pretty short one. Again, it's not something I worked on, it's just something I read. It involved a school teacher who brought an action against his employer at the school because he was claiming that he was harassed by his students due to his lack of hair, him being bald. The teacher said he was forced to resign, he was constructively discharged because the students perceived his baldness as a weakness. And he argued that he couldn't stand in front of his class with confidence and do his job because the students who we all know children are ruthless, they bullied him about his baldness, and they were laughing at him the entire time. So his argument was that his baldness had a substantial and long-term effect on his ability to do his job. The judge, I would say rightfully so, did not agree with that argument, and also noted that his follicle impairment or his baldness was not a recognized disability under the applicable law, and so there was no recovery there, at least none that I could see.

Ryan Bykerk (21:35):

Wow. Yeah, I was wondering how you do that, but yeah, follicle impairment, I like that phrase.

Philip Person (21:41):

I don't know if that was in the case, but I just put that in there. Follicle impairment.

Ryan Bykerk (21:46):

Well, that's the trial lawyer in you, Philip, you came up with the term. So follicle impairment as a disability. All right, well, be warned, it's not a protected category to have follicle impairment. Okay.

Philip Person (22:01):

Yeah. And I respect teachers because like I said, those students can be ruthless, and I didn't know they were making fun of somebody just because they're bald.

Ryan Bykerk (22:11):

That's rude. Kids these days. All right. Well, thank you Philip. And hey, thank you all for joining us here on the Performance Review. As always, you can email us @theperformancereview@gtlaw.com. We'd love to hear from you if you have your own employment related stories, stories about baldness or fireworks, or whatever else you may have on your mind, and we'll catch you on the next one.