Management Alert

FISCAL CLIFF NO. 1: WARNing, WARNing

As 2013 approaches, government contractors and others are beginning to plan for a deficit-driven plunge over the "fiscal cliff." Bipartisanship reigned in and outside the Beltway following recent election results, but only for a few days. Since then, the markets have been frothy, reflecting most immediately the possibility of automatic tax increases at the end of December and federal spending cuts early next year.

In this first in a series of Management Alerts, we address the Budget Control Act of 2011 ("BCA") in relation to the federal WARN Act and state law notice requirements. Federal WARN mandates that covered employers provide 60 days' notice of a "mass layoff" or "plant closing." If the BCA's federal spending cuts take effect, a number of government contractors, subcontractors, other employers heavily dependent on federal funds, and private employers more generally, will need to consider plant closings and/or layoffs.

The Department of Labor ("DOL") has assured employers that they need not give notice *at this time* in the face of sequestration concerns. Unfortunately, the legal effect of DOL's assurance is uncertain, and its stance may have little bearing on state law notice requirements. As the pressure mounts in Washington, more than a few employers may conclude they have no prudent choice but to issue advance notice of plant shutdowns or mass layoffs.

The Meaning and Threat of Sequestration

The BCA, which amended the Balanced Budget and Emergency Deficit Control Act of 1985, requires that certain steps be taken if Congress fails to enact deficit-reduction measures slashing the federal deficit by at least $1.2 trillion. Unless an agreement is reached, President Obama 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) and (8). The Congressional Budget Office estimates that this would cut discretionary defense spending approximately 10 percent and discretionary non-defense spending approximately 8 percent.

Sequestration and the Federal WARN Act

Under federal WARN, employers must give notice in a form and manner consistent with DOL regulations. If a compliant notice is given, the employer will not be liable under WARN. (NOTE: An employer's pre-existing severance obligations cannot be used to satisfy WARN liability if the employer has failed to give notice where required.)

WARN applies to employers with 100 or more employees. Only losses of "full-time" employment at a single site get counted in ascertaining whether a WARN event has occurred. Broadly speaking, if at least 50 full-time workers at a particular location lose employment within any rolling 90-day period, there may be a WARN-covered event. As noted below, however, "employment losses" under federal WARN do not include layoffs of less than 6 months duration.

An employer that fails to provide required WARN notice may be liable to each affected employee for back pay for the period for which notice was not given (up to 60 days), plus any out-of-pocket medical expenses incurred during that period. Given the potential commonality of claims, many WARN cases are brought as class actions, which heightens employer exposure and thus the plaintiffs' settlement leverage. An employee can proceed directly to court without first filing an administrative charge. Prevailing plaintiffs are entitled to reasonable attorney's fees in addition to damages. Further, the relevant local government entity can issue a fine of up to $30,000. Many state mini-WARN statutes entail similar monetary exposure.

The DOL's Sequestration Guidance: Safe Harbor or Possible Shipwreck?

In an attempt to allay employer concerns, DOL's Employment and Training Administration issued a July 30, 2012 Guidance Letter addressing whether federal contractors must give WARN Act notice of potential layoffs occurring as a result of sequestration. According to that Guidance Letter, contractors need not do so before or at the time of sequestration because:

- The occurrence of a Sequestration Order was not reasonably foreseeable when the Guidance Letter was issued (July 30);
- Even if a Sequestration Order were issued, its impacts are unknown because they will depend in part on FY 2013 funding that has not yet been enacted by Congress;
- Because federal agencies have not announced which contracts will be affected by a Sequestration Order, federal contractors cannot currently assess the specific impact on their contracts; and
- It will take substantial time for federal agencies to implement a Sequestration Order and determine how it affects specific programs, thus affording contractors time to provide WARN notice after those determinations are made.

Accordingly, DOL stated that the threat of sequestration would fall within WARN's "unforeseeable business circumstances" exception, which would excuse employers from providing WARN notice until they receive additional information regarding the specific contracts to be affected and the particular closings or mass layoffs become reasonably foreseeable.

However, employers that rely on DOL's Guidance -- particularly those with large facilities in states that have their own WARN-type laws -- may be at substantial risk. The Guidance Letter may not be binding on any court, and some courts may view it as a political statement designed to influence partisan negotiations rather than a legal interpretation entitled to controlling or even substantial judicial deference.

On September 28, 2012, the Office of Management and Budget issued a Memorandum stating that if sequestration causes an agency to terminate or modify a contract, thereby leading the contractor to initiate a plant closing or mass layoff that would otherwise be subject to WARN, any court-ordered damages and costs (including attorney's fees) would be paid by the contracting agency. This Memorandum provides employers limited solace, however, insofar as the government's authority to indemnify contractors is unspecified and unclear. Moreover, one wonders how the various contracting agencies would find funds to indemnify private employers while the agencies themselves are fiscally strapped by sequestration (or afterwards, assuming the budget crisis is resolved through a compromise that reduces federal spending).

Neither DOL's Guidance nor OMB's Memorandum provides federal contractors a complete defense to WARN Act violations resulting from sequestration-related layoffs; the Administration still expects employers to provide notice once a specific plant closing or mass layoff becomes reasonably foreseeable. Presumably, that would occur sometime after federal agencies announce those contracts to be affected by sequestration. How soon thereafter an employer would be required to give notice, however, is yet another unknown.

Additional State Law Uncertainties

Even if DOL's Guidance provides a safe harbor against federal WARN Act claims, state mini-WARN laws leave many employers concerned. A number of states, including but not limited to California, New York, Illinois, Wisconsin, New Hampshire, Iowa, and New Jersey, have notice requirements that differ from federal WARN. In New York, Illinois, and Wisconsin, for example, 25 full-time employment losses at an employment site within a rolling 90 day period may trigger such requirements. California WARN does not limit covered layoffs to those over six months (nor does it provide any other threshold time period). Rather, a layoff is a "separation from a position," the meaning of which is unclear.

Thus, even if DOL's Guidance provides employers a valid defense under federal law, contractors with facilities in states having their own WARN statutes remain at risk by not complying with those statutes.

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Next up

Seyfarth Shaw's next Management Alert in this series discussing the potential impact of the Fiscal Cliff on employers in their employment relations will focus on the FLSA.