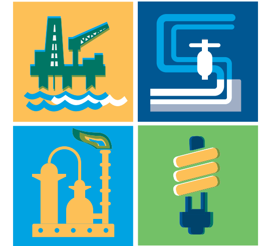
SEYFARTH SHAW

Energy Employment Update

Energy Employment Law Group



Warning Of Expected Mass Layoffs

With oil prices recently hitting a five year low, many energy companies are planning large-scale layoffs over the next few months. When implementing these layoffs, employers should consider whether they are required to send advance notice to affected employees under the federal Worker Adjustment and Retraining Notification Act ("WARN"), 29 U.S.C. § 2101 et seq. and 20 C.F.R. Part 639. Failure to do so may result in costly class-action litigation and civil penalties.

As explained below, WARN requires certain employers to provide qualifying employees and governmental agencies with written notice at least 60 days prior to a qualifying "plant closing" or "mass layoff."

Which employers are covered?

WARN applies to enterprises that employ 100 or more employees, excluding "part-time employees." Part-time employees are those who average fewer than 20 hours per week, as well as those who have worked fewer than 6 of the preceding 12 months. Employers are also covered if they employ more than 100 employees (including part-time employees) who work at least 4,000 hours per week in the aggregate.

What events require notice?

Covered employers must issue notice 60 days before a "plant closing" **or** "mass layoff." To determine whether notice is required, employers must carefully examine the definitions of each term.

Plant Closing - A plant closing is any shutdown of a single site of employment, or one or more facilities or operating units within the site of employment, if the shutdown results in an "employment loss" at the site during any 30-day period for 50 or more employees (excluding part-time employees). Note that the term "plant" is somewhat misleading because WARN is not limited to manufacturing plants.

Mass Layoff - A mass layoff is any reduction in force that results in an "employment loss" at a single site of employment during any 30-day period for: (a) 500 or more employees (excluding part-time employees) **or** (b) 50 to 499 employees (excluding part-time employees) if that number constitutes at least 33 percent of the active employees at the site (excluding part-time employees).

Employment Loss - An employment loss is a layoff (but not a temporary layoff of less than six months), a voluntary departure or retirement, or a greater than 50-percent reduction in work hours. However, under certain conditions, an employment loss does not occur if the employer offers to transfer the employee to a different employment site.

Compliance Tip: Follow the 90-Day Aggregation Rule

When planning layoffs, employers should consider all employment losses that have occurred in the prior 90 days and those that are reasonably expected to occur in the next 90 days. WARN creates a presumption that a plant closing or mass layoff

©2015 Seyfarth Shaw LLP. All rights reserved. "Seyfarth Shaw" refers to Seyfarth Shaw LLP (an Illinois limited liability partnership). Prior results do not guarantee a similar outcome.

has occurred when separate employment losses occur within the same site of employment, if—*when the employment losses over a 90-day period are added to together*—they meet the minimum thresholds to trigger coverage. In such circumstances, the employer must then demonstrate that the employment losses resulted from separate and distinct activity. Employers should also be aware that the 90-day aggregation rule precludes the aggregation of two events if either one itself is large enough to trigger coverage.

Who should receive the notice?

Employers should issue the written notice to all "affected employees"—either directly to the employees or to their union representatives if they are represented. Affected employees are those whom the employer may reasonably expect to experience an employment loss as a consequence of a proposed plant closing or mass layoff. In addition, the employer must provide notice to applicable State and local authorities.

What are the general rules for the timing and contents of the notice?

Generally speaking, the notices must be received at least 60 days before the plant closing or mass layoff. The required content of the notices is listed at 20 C.F.R. § 639.7.

What are the penalties for failing to comply?

Employers who fail to properly issue written notice to affected employees are required to pay up to 60 days of back pay and benefits to each aggrieved employee, and employers who fail to provide written notice to the applicable government authorities are subject to a civil penalty not to exceed $500 for each day of violation. The back-pay awards and civil penalties are subject to reductions and offsets under limited circumstances. In addition, the prevailing party in WARN litigation is entitled to recoup its reasonable attorneys' fees, which can be fairly significant in the class-action context.

What should employers do to ensure compliance?

Compliance with WARN requires careful and detailed planning. Among other considerations, the employer must evaluate: (1) whether a site of employment should be considered a single site or multiple sites; (2) whether a single site of employment, facility, or operating unit will be shut down; (3) whether and to what extent an employment loss will occur; (4) whether the number of employment losses within a 30-day period will trigger coverage; and (5) whether the employer can sufficiently demonstrate that qualifying employment losses within a 90-day period resulted from separate and distinct activities. When in doubt about the length of a layoff or the number of people involved, the U.S. Department of Labor advises employers to send the WARN notice as a precaution to avoid potential violations.

Employers should also take note that a number of states, including but not limited to California, New York, Illinois, Wisconsin, New Hampshire, Iowa, and New Jersey, have enacted mini-WARN statutes with requirements that differ from the federal WARN. Thus, given the complexity of WARN and the varying state-law requirements, it is advisable to consult with experienced employment counsel when planning large-scale layoff activities.

By: *Dennis A. Clifford*

Dennis A. Clifford is a partner in Seyfarth's Houston office. If you would like further information, please contact your Seyfarth Shaw LLP attorney or Dennis A. Clifford at *dclifford@seyfarth.com*.

www.seyfarth.com

Attorney Advertising. This Energy Employment Update is a periodical publication of Seyfarth Shaw LLP and should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only, and you are urged to consult a lawyer concerning your own situation and any specific legal questions you may have. Any tax information or written tax advice contained herein (including any attachments) is not intended to be and cannot be used by any taxpayer for the purpose of avoiding tax penalties that may be imposed on the taxpayer. (The foregoing legend has been affixed pursuant to U.S. Treasury Regulations governing tax practice.)

©2015 Seyfarth Shaw LLP. All rights reserved. "Seyfarth Shaw" refers to Seyfarth Shaw LLP (an Illinois limited liability partnership). Prior results do not guarantee a similar outcome.