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Short-Term Layoffs Require Advance Notice Under California WARN

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***Seyfarth Synopsis**: Like the Federal WARN Act, California's WARN Act (Cal-WARN) requires employers to notify employees of certain covered layoffs that will affect them. The California Court of Appeal has now confirmed that Cal-WARN requires sixty days' notice of a wide range of short-term layoffs (such as furloughs). Failure to provide that notice triggers liability for back pay, lost benefits, medical expenses, civil penalties, and attorneys' fees.*

The Facts

In early 2014, NASSCO Holdings, because of a lack of work, needed to temporarily reduce its workforce—much of it represented by the Boilermakers Union. NASSCO ultimately laid off ninety employees for four to five weeks. During this furlough, employees did not receive wages, did not earn vacation pay, and did not accrue service credit for purposes of pension benefits. NASSCO did not give prior notice of the furlough.

The Boilermakers Union and three individual employees sued NASSCO under Cal-WARN for failing to provide a sixty-day notice of the furlough. The plaintiffs sought back pay and millions of dollars in civil penalties. When the parties cross-filed for summary judgment, the trial court ruled for the plaintiffs, holding that the laid-off employees were entitled to back pay and lost pension benefits, but not to civil penalties.

The Court of Appeal's Decision

NASSCO argued that the furlough was not a "separation from a position" that would trigger Cal-WARN's sixty-day notice obligation. The Court of Appeal disagreed. Looking to the plain meaning of "separation," the Court of Appeal noted that separation could be "an action of moving apart" that need not be either "permanent" or "temporary." Thus, being "separated *from a position*" does not mean that the employment relationship must entirely end. Instead, under Cal-WARN, a triggering separation "encompasses a temporary job loss, even if some form of the employment relationship continues and the employees are given a return date."

The Court of Appeal was not willing to specify how long a furlough need be to constitute a "separation" that would trigger Cal-WARN. Rather, the Court of Appeal advised more generally that Cal-WARN applies to temporary layoffs "where advance notice would provide the workers time to plan and prepare for their sudden wage loss," even if workers subject to a temporary layoff would not need training for a new job. In reaching this conclusion, the Court of Appeal underscored the California Legislature's "judgment that California employers, not California employees, should bear the risk of surprise

resulting from an unexpected layoff," and that Cal-WARN is a remedial statute akin to "a wage workers' equivalent of business interruption insurance." In so holding, the Court of Appeal dismissed the employer's argument that pointed to language in the statute deeming employers "liable to each employee entitled to notice who lost his or her employment." It concluded that this language does not actually trigger liability or affect the definition of "mass layoff," which is defined elsewhere in the statute. While the Court of Appeal indicated that the *de minimis* doctrine would keep extremely short furloughs from triggering Cal-WARN, the Court of Appeal did not specify a threshold.

What *NASSCO* Means for Employers

As an initial consideration, not every workforce reduction or temporary layoff is covered by Cal-WARN. Among other triggers, the statute requires a "mass layoff," which includes layoffs of at least fifty employees over a rolling thirty-day period. Additionally, those layoffs must be due to a "lack of funds or lack of work." Further, the layoffs must occur at a "covered establishment," which is an industrial or commercial facility that has employed seventy-five or more people within the preceding twelve months.

Assuming that the number and location of layoffs potentially implicate Cal-WARN, *NASSCO* suggests that an employer should consider providing a sixty-day WARN-compliant notice for planned layoffs of any length, particularly where income loss equivalent to the kind of furlough in *NASSCO* is a possibility. While the Court of Appeal's reference to a *de minimis* exception suggests that furloughs lasting just a few days may not trigger the statute, the decision does not identify the tipping point. In any event, the Court of Appeal's discussion implies that an employer will get less leeway if it lacks a very good reason why it could not have provided compliant notice.

While certain short-term events announced to employees well in advance (more than sixty days) that arguably do not involve separations from positions "for lack of funds or lack of work"—such as planned holiday shutdowns, equipment turnarounds, and scheduled long weekends—probably do not need to be formalized through WARN-compliant notice, *NASSCO* highlights that reliance on this position it not free from doubt or legal risk.

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