When to WARN employees about the effects of Sequestration

In July 2012, we advised contractors on how to prepare for potential sequestration.\(^1\) Now that sequestration is a reality, the Congressional Budget Office predicts that 750,000 jobs will be eliminated\(^2\) as the sequester cuts more than US$25 billion from discretionary spending over the next six months.\(^3\)

As defense and other government contractors prepare for significant impacts in the short term, many have renewed concerns about their ability to comply with the Worker Adjustment and Retraining Notice (WARN) Act, 29 U.S.C. §§ 2101-2109. If an executive agency suddenly terminates a large contract or drastically reduces its funding, contractors may find it necessary to respond by making similarly drastic reductions in their workforce in short order, leaving them unable to provide their employees with the full 60-day advance written notice that the WARN Act requires. This situation exposes contractors to potential liability, including fines and lawsuits by former employees demanding back pay and benefits.

In an abundance of caution, some contractors are issuing “contingent” WARN Act notices to notify employees of the potential for mass layoffs and/or plant closings in the event of sequester-related cuts. But, questions remain over whether contingent WARN notices based merely on the fear that sequestration may lead to employment losses are legally required.

WARN Act Requirements and Enforcement

- A covered employer (employers with at least 100 employees) must provide written notice to affected employees 60 days before ordering certain plant closings or mass layoffs that are reasonably foreseeable.\(^4\)
- The WARN Act has an exception to the 60-day notice requirement for “unforeseeable business circumstances,” defined as a plant closing or mass layoff caused by business circumstances that were not reasonably foreseeable at the time that 60-


\(^3\) Id. See also OMB Memorandum M-13-05 (Feb. 27, 2013), available at http://www.whitehouse.gov/sites/default/files/omb/memoranda/2013/m-13-05.pdf.

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day notice would have been required (i.e., a business circumstance that is caused by some sudden, dramatic, and unexpected action or conditions outside the employer’s control).§

- Hourly and salaried workers are entitled to WARN notice, as are managerial and supervisory employees. However, notice is not required for employees who worked less than 6 months in the last 12 months, or for employees working less than 20 hours per week on average.§

- For a “plant closing,” a covered employer must give notice of a shut down that will result in an employment loss for 50 or more employees during any 30-day period.§

- For a “mass layoff,” a covered employer must give notice of a mass layoff that will result in a loss of employment during any 30-day period for 500 or more employees, or for 50-499 employees if they make up more than 33% of the employer’s active workforce.§

- The law prohibits employers from staggering or splitting up layoffs to avoid WARN Act requirements. Thus, 2 or more groups of layoffs “at a single site of employment” during any given 90-day period are “considered to be a plant closing or mass layoff” unless the employer can demonstrate that the actions arose from distinct causes and were not attempts to avoid the WARN Act.§

- The term “employment loss” means (1) an employment termination, other than a discharge for cause, voluntary departure, or retirement; (2) a layoff exceeding 6 months; or (3) a reduction in an employee’s hours of work of more than 50% in each month of any 6-month period.§

**Department of Labor and Office of Management and Budget Guidance**

Relying on the “unforeseeable business circumstances” exception, the Department of Labor (DOL) published guidance on July 30, 2012 (Training and Employment Guidance Letter No. 3-12) advising against the issuance of contingent WARN notices 60 days prior to the initial sequestration deadline of January 2, 2013.11 DOL reasoned that such contingent notices would not be meaningful if issued before sequestration actually occurred, or even after the sequester, during the time when contractors would lack certainty about how sequestration would affect their particular contracts. The DOL guidance stated that contingent WARN notices are inconsistent with the purpose of the statute, which is to provide meaningful advance notice to employees of their prospective loss of employment to afford them sufficient time to transition and adjust, seek and obtain other employment, and potentially obtain additional training to better enable them to compete in the job market.

In September 2012, the Office of Management and Budget (OMB) issued similar guidance, urging federal contractors to follow the DOL guidance, and assuring them that, in the event a court were to find that a contractor failed to give WARN notice when it should have, “employee compensation costs for WARN Act liability as determined by a court” would qualify as allowable costs and be covered by the contracting agency.12

**Assessing the Reasonableness of Relying on the DOL and OMB Guidance**

Although the DOL and OMB guidance advises contractors not to issue contingent WARN notices based on the fact of the sequester, many contractors remain concerned about whether it is prudent to rely on that guidance.

On the one hand, the DOL and OMB guidance appears reasonable. Although sequestration is upon us, many if not most contractors have yet to learn how sequestration will impact specific federal contracts. In the face of such uncertainty, issuing a WARN notice may be a form-over-

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5 Id. at § 2102(b)(2).
7 Id. at § 2101(a)(2).
8 Id. at § 2101(a)(3).
9 Id. at § 2102(d).
10 Id. at § 2101(a)(6).
substance exercise, and lead to needless instability in the contractor’s workforce.

Congress and the White House may yet find ways for federal agencies to implement the sequester in a manner less disruptive than large-scale, indiscriminate cuts. In this regard, the Continuing Resolution legislation (HR 933) signed by the President on March 26, 2013 gives some agencies a modicum of flexibility in terms of how to implement sequestration. Certain agencies (Defense; Military Construction; Veterans Affairs; Agriculture; Commerce; Justice; and Homeland Security) will not operate strictly at their FY 2012 levels, and the Department of Defense and the Department of Veterans Affairs will have authority to transfer funds from lower to higher priorities.

On the other hand, the DOL guidance is not binding on federal courts, nor is it clear whether or to what extent courts will defer to that guidance. Further, the DOL guidance provides only blanket assurance, and does not compel a court to reach a particular result in any particular case. Therefore, the DOL guidance may be of little utility in a litigation action brought against a contractor by a former employee, and DOL declines to weigh in on specific cases. 13

Bottom Line: Should You WARN Employees?

Sending contingent WARN notices based solely on the fact of sequestration is not a prudent approach. Rather, a contractor, working in conjunction with legal counsel, must remain vigilant of the requirements of the WARN Act, and identify the precise time when the contractor has sufficiently specific information that suggests that a plant closing or mass layoff is reasonably foreseeable. Every affected federal agency is scrambling to plan its budget and provide contractors and other interested parties with exactly this kind of information. Once agencies announce which contracts will be terminated or curtailed and a contractor determines that a related plant closing or mass layoff is reasonably foreseeable, the contractor should provide WARN notice at that time (even if there is less than 60 days between the date the contractor learns of such announcement and the date of the actual contract termination or curtailment).

If you have any questions about any of the topics discussed in this advisory, please contact your Arnold & Porter attorney or any of the following attorneys:

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13 See 20 C.F.R. § 639.1(d) (“The Department of Labor has no legal standing in any enforcement action and, therefore, will not be in a position to issue advisory opinions in specific cases.”).