

Reproduced with permission from Daily Report for Executives, 48 DER B-1, 03/12/2013. Copyright © 2013 by The Bureau of National Affairs, Inc. (800-372-1033) <http://www.bna.com>

**Government Contracts****Sequestration, Layoffs, and the WARN Act: Basic Rules for the Weary**

By TODD A. BROMBERG AND JILLIAN VOLKMAR

**O**n March 1, President Obama issued the long-awaited sequestration order mandating some \$85 billion in spending cuts across the federal government.<sup>1</sup> Despite months of assurances that a political deal could be struck, sequestration has finally arrived and budget cuts will undoubtedly occur in the near future that will significantly impact the availability of funding for future and current government contracts.

As contract terminations and reductions occur, contractors will be confronted with negotiating the com-

plexities of the federal Worker Adjustment and Retraining Notice (WARN) Act and numerous state mini-WARN statutes. Contractors will also want to consider various alternatives to laying employees off in a manner that can eliminate the need to provide WARN notice and avoid the difficult issues and decisions associated with mass layoffs.

*Coverage and Application of the Federal WARN Act*

The federal WARN Act requires employers to provide employees 60 days' advance notice of an expected plant closing or mass layoff.<sup>2</sup> The Act generally applies to employers with 100 or more employees (not counting part-time employees).<sup>3</sup> The federal statute defines a "mass layoff" as a reduction in force that does not result from a plant closing and "results in an employment loss at the single site of employment during any 30-day period," excluding part-time employees, for either: (1) at least 50 employees *and* at least 33% of the employees, or (2) at least 500 employees.<sup>4</sup> Thus, layoffs of 50

<sup>1</sup> See Sequestration Order for Fiscal Year 2013 Pursuant to Section 251A of the Balanced Budget and Emergency Deficit Control Act, as amended (March 1, 2013) (available at <http://www.whitehouse.gov/the-press-office/2013/03/01/presidential-order-sequestration>). <http://www.whitehouse.gov/sites/default/files/2013sequestration-order-rel.pdf>

**Todd A. Bromberg**, chair of the *Employment & Labor Practice* at Wiley Rein LLP in Washington, DC, has over 20 years of experience litigating a wide range of business-related disputes on behalf of both plaintiffs and defendants, including government contracting issues. He can be reached at 202.719.7357 or [tbromberg@wileyrein.com](mailto:tbromberg@wileyrein.com).

**Jillian Volkmar**, an associate in the *Employment & Labor Practice*, counsels and represents government contractors and subcontractors on a broad range of issues including contract claims, disputes and government and internal investigations. She can be reached at 202.719.7527 or [jvolkmar@wileyrein.com](mailto:jvolkmar@wileyrein.com).

<sup>2</sup> 29 U.S.C. §§ 2101-2109.

<sup>3</sup> *Id.* § 2101(a)(1) ("the term 'employer' means any business enterprise that employs— (A) 100 or more employees, excluding part-time employees; or (B) 100 or more employees who in the aggregate work at least 4,000 hours per week (exclusive of hours of overtime).") In addition, the WARN Act applies only to workplaces within the United States and its possessions; however employees working outside the United States are counted for determining whether an employer is subject to the WARN Act. 20 C.F.R. § 639.3(i)(7) ("Foreign sites of employment are not covered under WARN. U.S. workers at such sites are counted to determine whether an employer is covered as an employer under § 639.3(a).")

<sup>4</sup> 29 U.S.C. § 2101(a)(3).

or more employees may trigger the WARN notice requirement.

---

**While there is no clear-cut rule, whether two or more buildings or facilities constitute a single site of employment typically is determined by building proximity and operation integration.**

---

The WARN Act does not define “single site of employment,” yet an understanding of its meaning is important in determining whether the threshold to trigger WARN Act notice is met. According to the WARN Act regulations, a “single site of employment” generally is either a group of contiguous or adjacent facilities, or a single location.<sup>5</sup> The regulations further note that “separate buildings or areas which are not directly connected or in immediate proximity may be considered a single site of employment if they are in reasonable geographic proximity, used for the same purpose, and share the same staff and equipment.”<sup>6</sup> An example cited is an employer who manages a number of warehouses in an area but who regularly shifts or rotates the same employees from one building to another. The regulations further note that “[n]on-contiguous sites in the same geographic area which do not share the same staff or operational purpose should not be considered a single site.”<sup>7</sup> For example, assembly plants located on opposite sides of a town and managed by a single employer are separate sites if they employ different workers. While there is no clear-cut rule, whether two or more buildings or facilities constitute a single site of employment typically is determined by building proximity and operation integration.

The WARN Act has three exceptions to its 60-day notice requirement. The “unforeseen business circumstances” exception is most applicable to a situation where contracts are terminated or curtailed by government agencies unexpectedly. This exception allows an employer to order a mass layoff or a plant closing without giving the full 60 days’ notice if the layoff or closing is caused by business circumstances not reasonably foreseeable at the time that notice would have been required.<sup>8</sup> Notice must be given as soon as the triggering event, *i.e.*, a contract termination or reduction, is foreseeable.

**Federal Agencies Offer Guidance.** The Department of Labor (DoL)<sup>9</sup> and the White House Office of Management and Budget (OMB)<sup>10</sup> issued guidance in the Sum-

<sup>5</sup> 20 C.F.R. § 639.3(i)(1).

<sup>6</sup> *Id.* § 639.3(i)(3).

<sup>7</sup> *Id.* § 639.3(i)(4).

<sup>8</sup> 29 U.S.C. § 2102(b)(2)(A).

<sup>9</sup> See DoL Training and Employment Guidance Letter No. 3-12 (July 30, 2012) (available at [http://wdr.doleta.gov/directives/attach/TEGL/TEGL\\_3a\\_12.pdf](http://wdr.doleta.gov/directives/attach/TEGL/TEGL_3a_12.pdf)).

<sup>10</sup> See Guidance on Allowable Contracting Costs Associated with the Worker Adjustment and Retraining Notification (WARN) Act, No. M-12-19 (Sept. 28, 2012) (available at <http://www.whitehouse.gov/sites/default/files/omb/memoranda/2012/m-12-19.pdf>).

mer and Fall of 2012 adopting the position that WARN notice was not required to be issued to workers employed under government contracts in advance of any sequestration announcements because of the uncertainty of whether sequestration would actually occur and if so, which contracts would be affected. Per this guidance, WARN notices were not required immediately at the moment the sequester was ordered because contractors still could not foresee which contracts would be affected. Once federal agencies announce which contracts will be terminated or curtailed, WARN notices will be required at that time to the extent any portion of the 60 days of WARN notification remains between the date of announcement and the date of contract termination or reduction.

Even though the sequestration order has now been executed, contract cuts will likely occur intermittently instead of all at once. When trying to determine whether there has been or will be a sufficient number of employees suffering an employment loss, contractors facing contract losses must be aware of the federal WARN Act “aggregation rule.” Under this rule, during any 90-day period, if two or more groups of employees at a single site of employment suffer employment losses and the aggregate number of layoffs or terminations exceeds the minimum number required for a mass layoff or plant closing, a “mass layoff” or “plant closing” will be deemed to have occurred unless the employer can demonstrate that the employment losses are the result of “separate and distinct” actions and are not an attempt to evade the requirements of the Act.<sup>11</sup> The aggregation rule requires WARN notice even where there was no reason to believe that WARN would be triggered at the time each individual contract was cut. Given that employers bear the burden of showing that layoffs were the result of separate and distinct causes in the event they failed to provide WARN notice, employers should carefully monitor and calculate the number of layoffs that occur due to contract reductions and note the rationale for each layoff decision.

### *More Stringent State Mini-WARN Acts May Also Apply*

The complexity of the federal WARN Act requirements are compounded by the numerous and often more demanding state law provisions addressing the same notice issues. Several states (including California, Hawaii, Illinois, Iowa, Maine, Massachusetts, Minnesota, New Hampshire, New Jersey, New York, Tennessee and Wisconsin), territories and localities have enacted WARN-like statutes and regulations that require advance notice or severance payments to employees facing job loss from a mass layoff or plant closing.<sup>12</sup>

For example, some states, such as New York, Illinois and New Hampshire, set a lower trigger for mass layoffs than federal law, defining a mass layoff as: (1) at least 25 full-time employees if they constitute at least 33% of full-time employees or (2) at least 250 full-time employees regardless of the percentage during any 30-

<sup>11</sup> 29 U.S.C. § 2102(d).

<sup>12</sup> A number of states have laws that create ancillary obligations at the time of layoffs, but these laws generally do not require advance notice to workers in a manner similar to the federal WARN Act.

day period.<sup>13</sup> California defines a “mass layoff” as a separation from a position during any 30-day period of 50 or more employees.<sup>14</sup> Maine requires notice of a mass layoff of 100 or more employees.<sup>15</sup> New Jersey requires notice if a mass layoff terminates employment for 500 or more full-time employees or 50 or more full-time employees representing one third of the employees of the employer during any 30-day period.<sup>16</sup>

Although many states follow the federal WARN 60-day notice requirement, New York requires 90 days’ notice,<sup>17</sup> while Maine requires only 7 days.<sup>18</sup> Minnesota’s statute incorporates the federal WARN notice requirements but is entirely voluntary.<sup>19</sup> Additionally, some state laws, unlike the federal WARN Act, do not include, or severely limit, the “unforeseen business circumstances” exception to the notice requirement, including the laws in California and New Jersey.

### *Possible Alternatives to Layoffs: Pros and Cons of Furloughs, Salary and Hour Reductions*

Many contractors are considering a variety of alternatives to laying off employees, such as implementing furloughs and reducing hours and salaries of affected employees. One advantage of issuing furloughs is that if the contractor is able to find other employment for the affected employees, WARN notice is not required. Also, any employee on furlough who voluntarily resigns would not have to be given WARN notice.

The negative side of furloughs is that the contractor would have to track how many employees at each separate job site are terminated within a 30-day period, or 90-day period for multiple related layoffs, in order to determine whether WARN notice is required. Another downside is if the contractor cannot find other employment for the affected employees who are furloughed, the full 60 days’ WARN notice would then be required at the end of the furlough period. Contractors who choose to furlough employees cannot then rely on the “unforeseen business circumstances” exception of the WARN Act after the triggering event occurred, given that they should have foreseen such layoffs were necessary at the time the contract was cut.

Other alternatives include reducing employees’ salaries or converting employees’ status from full-time to part-time. Contractors considering these options may

<sup>13</sup> N.Y. Comp. Codes R. & Regs. tit. 12, § 921-1.1(f)(i)-(iii); 820 Ill. Comp. Stat. 65/5(d), 65/10(a); N.H. Rev. Stat. Ann. § 275-F:3(IV).

<sup>14</sup> Cal. Labor Code §§ 1400(c), (d).

<sup>15</sup> Me. Rev. Stat. tit. 26, § 625-B(10).

<sup>16</sup> N.J. Stat. Ann. § 34:21-1.

<sup>17</sup> N.Y. Comp. Codes R. & Regs. tit. 12, § 921-1.1.

<sup>18</sup> Me. Rev. Stat. tit. 26, § 625-B(10).

<sup>19</sup> Minn. Stat. § 116L.976 *et seq.*

have to provide notice of a change in employment status or reduction in salary under applicable state or local law. Contractors should also examine their benefit plans to determine whether a reduction in hours will trigger a loss of coverage.

In addition, contractors should be cautious about potentially endangering the status of employees who are exempt from the minimum wage and overtime requirements of the Fair Labor Standards Act (FLSA) and applicable state laws by inadvertently violating the salary basis requirement. To meet the salary basis test under the FLSA an exempt employee must receive for each pay period a “predetermined amount” constituting all or part of the employee’s compensation, the amount of which is not subject to reduction because of “variations in the quality or quantity of the work performed.”<sup>20</sup> For instance, if an employer sets up a partial-week furlough and deducts the pay of exempt employees for the furlough days, the employees are at risk of losing their exempt status and may be entitled to overtime. On the other hand, employers may set up a permanent change in an employee’s usual weekly schedule, such as changing the weekly work schedule from five days to four days, and altering the employee’s salary to match. As long as the exempt employees receive at least the \$455 weekly salary required by the FLSA for exemption, they will remain exempt.<sup>21</sup> For these reasons, contractors should consult with counsel about potential layoff alternatives to ensure they comply with all applicable federal and state employment laws and recognize the legal risks of each option.

### *Conclusion: Be ForeWARNed and Prepared*

Now that sequestration has hit, contractors should carefully monitor government announcements and information to determine when contract terminations or cutbacks to their specific contracts are sufficiently foreseeable to trigger WARN Act notice obligations. Contractors should also be mindful of the federal WARN Act requirements and the applicable WARN-like state law requirements that often have varied triggering events, notice requirements and exceptions to the notice requirements. Given the significant potential employer liability for failure to comply with WARN—a violating employer may be liable for back pay and benefits to each affected employee for the period of violation up to 60 days, attorneys’ fees, and in some cases, punitive damages—the importance of fully understanding the various complexities of WARN and other statutes that can come into play cannot be overstated.

<sup>20</sup> 29 C.F.R. § 541.602(a).

<sup>21</sup> See generally Wage and Hour Opinion Letters, FLSA 2009-2, January 14, 2009; FLSA 2009-14, January 15, 2009; and FLSA 2009-18, January 16, 2009.