

A WARN Act Warning

January 10, 2019 – Cross-Border Counselor

by Aaron Goldstein

Under U.S. law, large employers have an obligation to notify their employees at least 60 days before a “plant closing” or “mass layoff.” This requirement can have serious implications for Canadian companies engaged in M&A deals with U.S. companies.

The U.S. Federal Worker Adjustment and Retraining Notification Act (“WARN Act”) requires employers with 100 or more employees to give at least 60 days’ notice before a “plant closing” or “mass layoff” to employees affected by the action. Part-time employees who work less than 20 hours per week and employees who work fewer than 6 of the 12 months preceding the date when notice would be required do not count toward the 100 employee threshold.

A “plant closing” is any “permanent or temporary shutdown of a single site of employment, or one or more facilities or operating units within a single site of employment” that results in an “employment loss” of 50 or more full-time employees during any 30-day period. A mass layoff is any layoff at a single work site which results in an “employment loss,” during any 30-day period, for: (a) at least 33% or more of the workforce and at least 50 full-time employees, or (b) at least 500 employees at the site. An “employment loss” is any loss in employment that lasts longer than six months. It is important to note that to constitute a “mass layoff,” both the 50 full-time employee threshold *and* the 33% of the workforce thresholds must be met. If fewer than 50 employees lose their jobs, it is not a “plant closing” or a “mass layoff” under the WARN Act.

The penalties for failing to give the required notice under the WARN Act can be substantial. Employers must pay each employee to whom they failed to give notice a full day’s pay and benefits for every day of notice the employer failed to provide—that is, up to 60 days’ worth of back pay and benefits per affected employee. Employers are additionally liable for a penalty of up to \$500 for each day the employer is in violation of the WARN Act’s notice requirements, up to a \$30,000 maximum.

Related People

- Aaron Goldstein

Related Capabilities

- Canada Cross-Border Transactions

In an M&A transaction, the seller is responsible for providing the WARN Act notice for any layoffs that meet the requirements of the statute and occur before the close of the transaction, and the buyer is responsible for providing the notice for any layoffs that meet the requirements of the statute and occur after the close of the transaction.

This rule, unfortunately, can give buyers a false sense of security, especially in asset sale transactions. While the buyer is ordinarily not liable for the debts of the seller in an asset sale transaction, the buyer can be deemed a successor to the selling entity and liable for the seller's failure to give WARN Act notice. Where the buyer purchases the seller's assets intending to continue the seller's business essentially intact, courts may deem the buyer responsible for the seller's liabilities to its employees, including the seller's liability to its employees for failure to provide the required WARN Act notice. U.S. courts will consider several factors when determining whether the buyer is a successor employer, including: (a) whether the work force is substantially the same; (b) whether there is a substantial continuity of the business operation; (c) whether the work is being performed in the same plant; (d) whether the buyer uses the same supervisors, machinery, and equipment that the seller used; and (e) whether the buyer makes the same products or offers the same services that the seller used to make or sell.

While the sale of a business results in a technical termination of employment for all of the seller's employees (the seller's employees no longer work for the seller), the WARN Act does not treat such a technical termination of employment as a "loss of employment" if the employees are immediately employed by the buyer after closing. However, where the seller's business is not sold as a going concern, the seller will be liable for failing to provide WARN Act notice to employees who suffer an employment loss on or prior to the close of the transaction, even if the seller thought the buyer would be hiring its employees if the buyer does not, in fact, do so.

To complicate things even further, many states have their own "Mini-WARN" statutes, many of which are stricter than the Federal WARN Act. For example, the California WARN Act applies to employers who employ only 75 or more people, rather than the 100 employee threshold under the Federal WARN Act. The California WARN Act also defines a "mass layoff" as one involving 50 or more employees, regardless of the percentage of employees laid off. The New York WARN Act applies to employers who employ only 50 or more employees and requires employers to provide 90 days' notice, rather than the 60 days' notice required under the Federal WARN Act.

The Federal WARN Act and its state law counterparts create many traps for the unwary M&A participant. Buyers and sellers alike should be aware and make sure they have knowledgeable legal counsel to avoid these pitfalls.