

WARN Act, CARES Act, and Reductions in Force Litigation: Notice, Exceptions, Triggering Events, State Actions

TUESDAY, JUNE 16, 2020

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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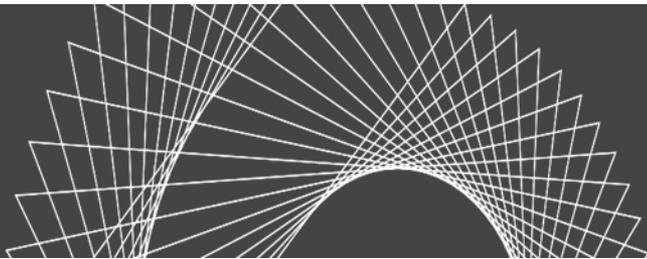
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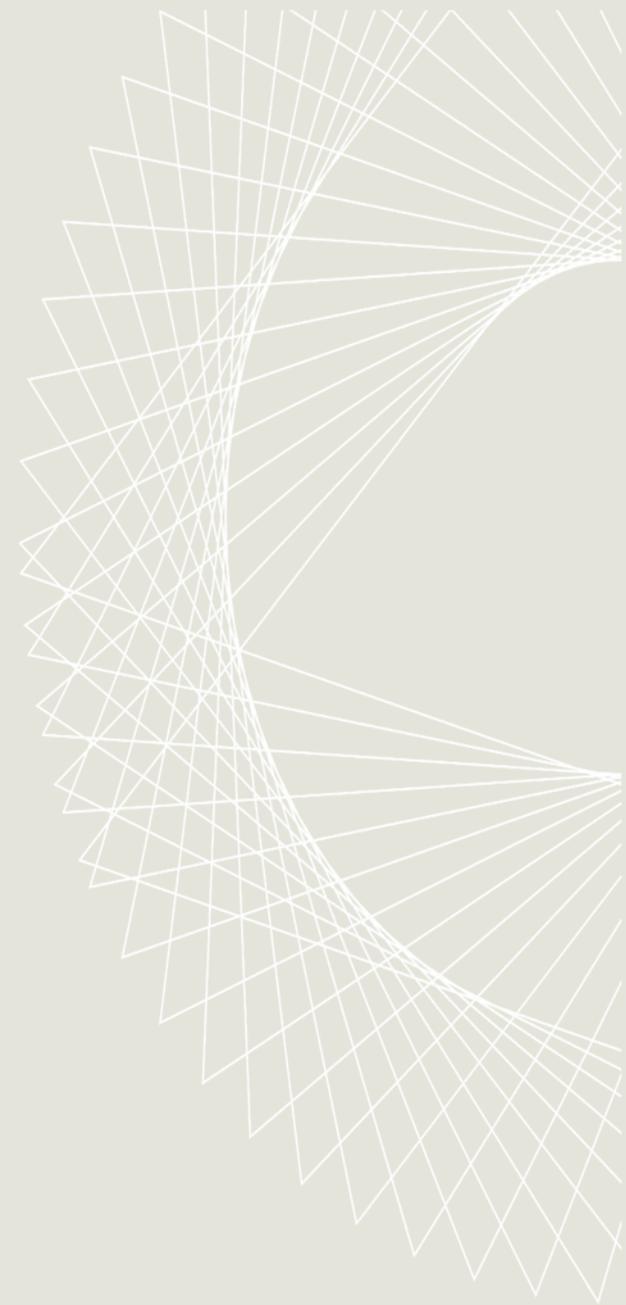
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June 16, 2020

WARN Act COVID-19 Litigation

- ***Siers v. Velodyne Lidar, Inc.*, No. 5:20-cv-02290 (N.D. Cal. filed April 3, 2020)** (class action challenging failure to provide timely WARN notice and pretextual COVID-19 reasoning for terminations)
- ***Scott et al. v. Hooters III, Inc.*, No. 8:20-cv-00882 (M.D. Fla. filed April 16, 2020)** (class action alleging failure to provide as much written WARN notice as practicable and failure to provide basis for reduced notice)
- ***Green v. The Hertz Corp.*, No. 8:20-cv-01006 (M.D. Fla. filed April 30, 2020)** (class action challenging lack of advance WARN notice and failure to provide basis for reduced notice)
- ***Butler, et al., v. Portfolio Recovery Associates, LLC et al.*, No. 2:20-cv-00861 (D. Nev. filed May 12, 2020)** (class action alleging failure to provide timely WARN notice and challenging pretextual COVID-19 reasoning for mass layoff)
- ***De La Cruz et al. v. Hometown Buffet, Inc. et al.*, No. 2:20-cv-04558 (C.D. Cal. filed May 21, 2020)** (class action alleging violation of California mini-WARN Act notice requirements)
- ***Benson v. Enterprise Holdings, Inc. et al.*, No. 6:20-cv-00891 (M.D. Fla. filed May 27, 2020)** (class action challenging failure to provide timely WARN notice and lack of reasoning for reduced notice)

COVID-19 Fact Pattern: Does WARN Apply?



March 2020: The US Economy Comes to a Grinding Halt

- State and local orders shutter non-essential businesses with little notice
- Non-essential workers are told to stay home
- With no time to pre-plan, employers implement myriad permanent and temporary cost-saving measures:
 - Temporary worksite shutdowns
 - Workforce reductions
 - Furloughs
 - Reduced work schedules
 - Pay cuts
- Does WARN apply?

What is the WARN Act?

- Requires employers to provide 60-days advanced written notice (with full pay and benefits) before employees suffer an employment loss due to a “plant closing” or “mass layoff”
 - Employers must comply with WARN if they employ 100 or more full-time employees (not counting workers who have spent fewer than 6 months on the job)

When is WARN Triggered?

Plant Closing

- Shutting down an employment site or operating unit at a single location permanently or temporarily; *and*
- 50 or more full-time employees at that location suffer an “*employment loss*” during any 30-day period

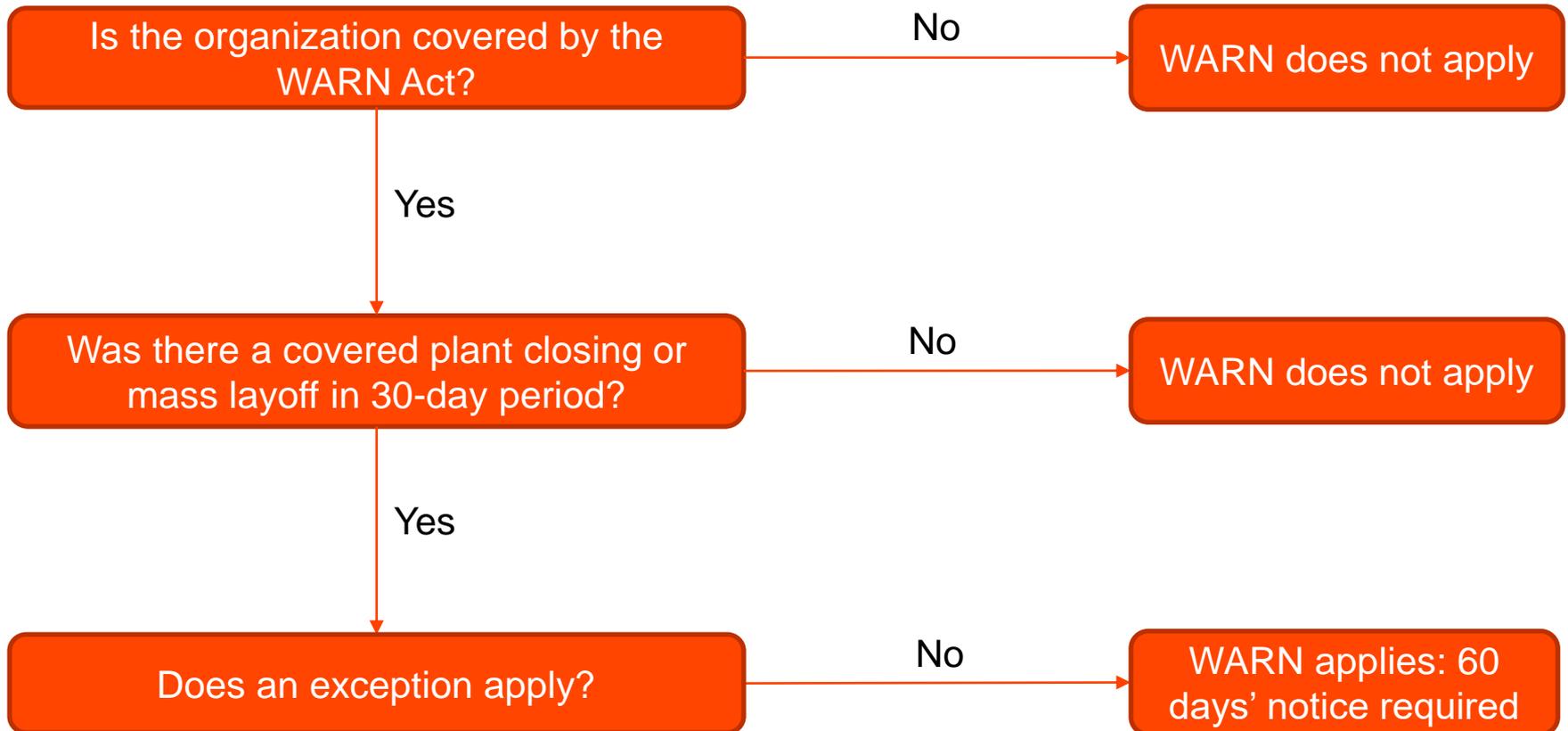
Mass Layoff

- 500 full-time employees suffer an “*employment loss*” at a single location during any 30-day period; *or*
- 50-499 full-time employees suffer an “*employment loss*” if they constitute 33% of the active workforce

What is an “Employment Loss?”

- A termination that is not a discharge “for cause,” voluntary departure, or retirement
 - Certain transfers and transfer offers are excluded from definition of “employment loss”
- A furlough that exceeds six months
- A reduction of an employee’s hours of work by more than 50% in each month of any six month period

March 2020: Does WARN apply?



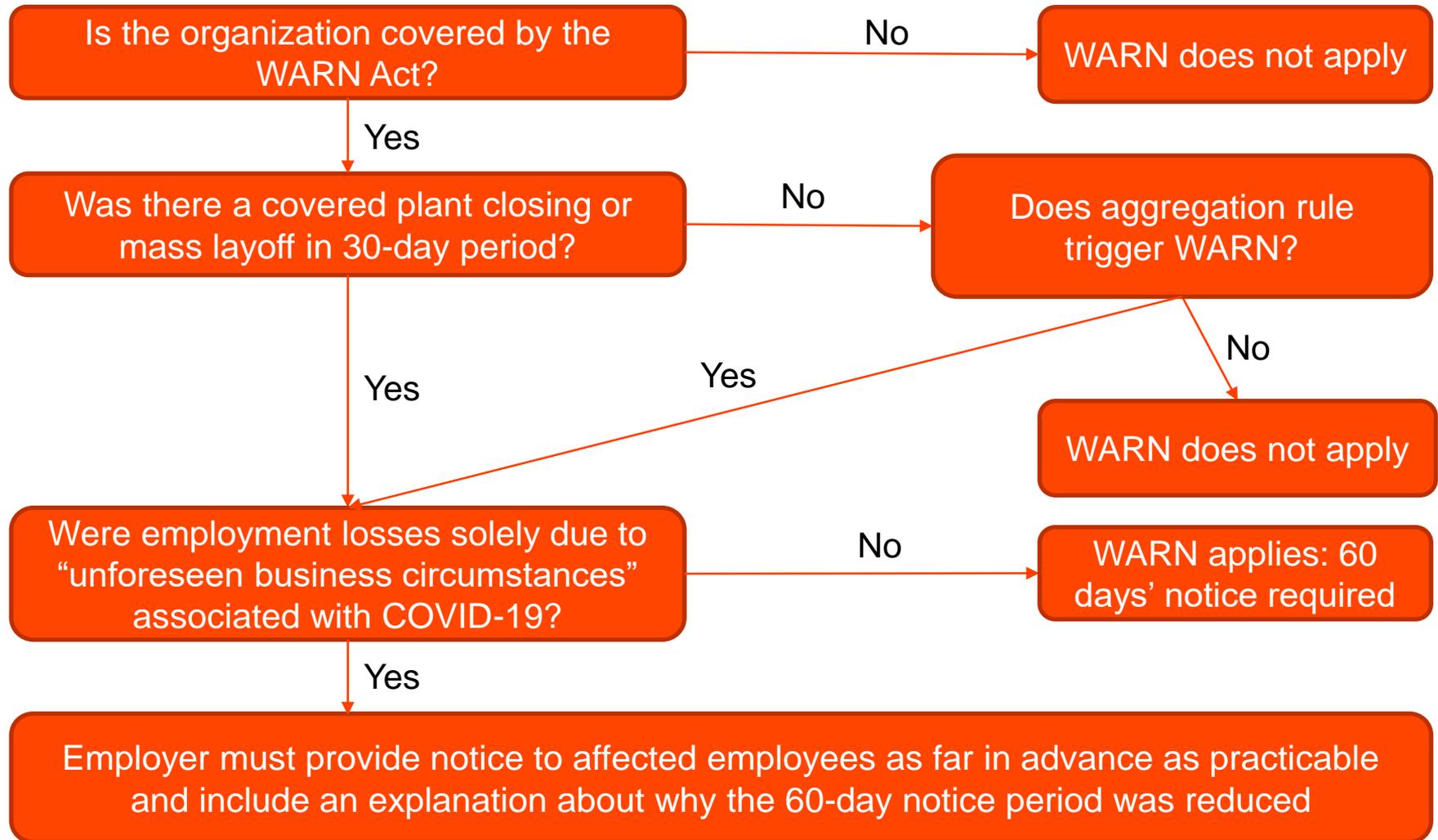
WARN Exceptions to 60-days' Notice

- Three WARN exceptions:
 - Faltering company, a plant closing, where a company has sought new capital or business to stay open and giving notice would have ruined the opportunity
 - Unforeseeable business circumstances, that were not reasonably foreseeable at the time notice would otherwise have been required;
 - Natural disaster, where a closing or layoff is the direct result of a natural disaster, such as a flood, earthquake, drought or storm
- Notice is still required:
 - As far in advance as is practicable
 - Must include an explanation about why the 60-day notice period was reduced

April-May 2020: Community spread grips the United States

- Shut down and stay at home orders are extended
- The CARES Act offers loans to small businesses to keep employees on payroll, but the money is gone within days
- Employers implement additional cost-saving measures:
 - Permanent worksite shutdowns
 - Additional workforce reductions
 - More furloughs
 - Deeper reductions in scheduled hours
 - Steeper pay cuts
- *Does WARN apply?*

April-May 2020: Does WARN apply?



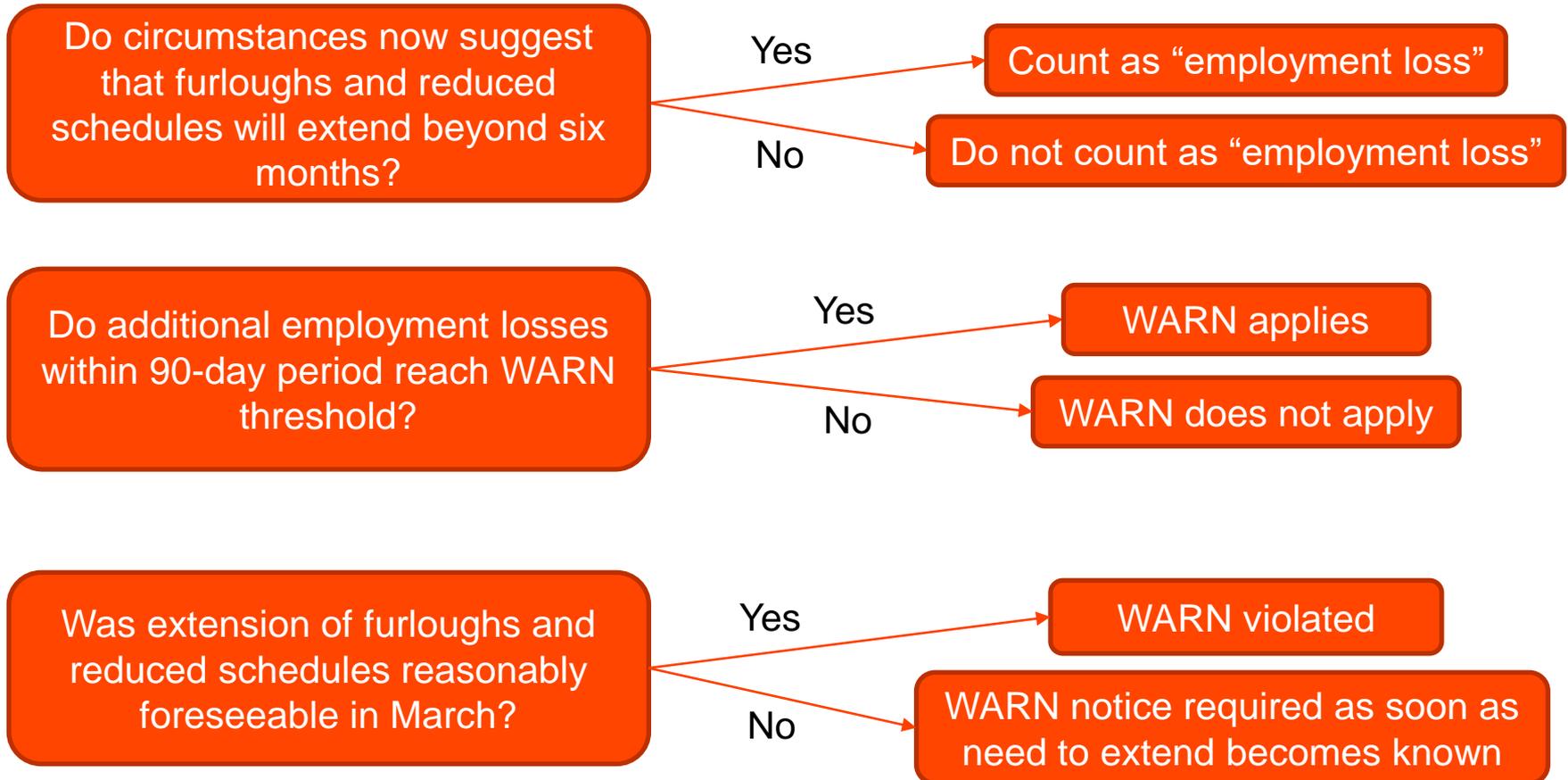
Aggregation Rule

- General rule: The employer must count the number of “employment losses” during a 30-day period to determine whether the WARN thresholds are triggered
- Aggregation rule: Where successive “employment losses” occur, which each alone are too small to trigger WARN thresholds, the employer must aggregate over a 90-day period (looking backwards and forwards) to see whether WARN thresholds are met when successive employment losses are combined together
 - Employment losses do not need to be counted if the employer can demonstrate that they were due to separate and distinct actions and causes

June 2020 and beyond: America starts to reopen

- As of today, all 50 states have started to reopen
- Most states have only partially reopened and in “phase one,” but significant restrictions remain in place
- If there is a resurgence of the virus in the coming months...
 - Reopening could be stuck in the early phases or we could regress
 - More locations or business will close
 - Furloughs and reduced schedules will be extended or re-implemented
- June enters the *fourth month* of pandemic-related employment losses
- Does WARN apply?

June 2020 and beyond: Does WARN apply?



Furloughs Extended Beyond Six Months

- Consequences when furloughs originally announced as less than 6 months are extended beyond six months
 - They become “employment losses” for WARN threshold counting purposes
 - If WARN is triggered, and the circumstances causing the extended furlough were not reasonably foreseeable when the furlough was originally announced, notice need only be given when the need for the extension becomes known

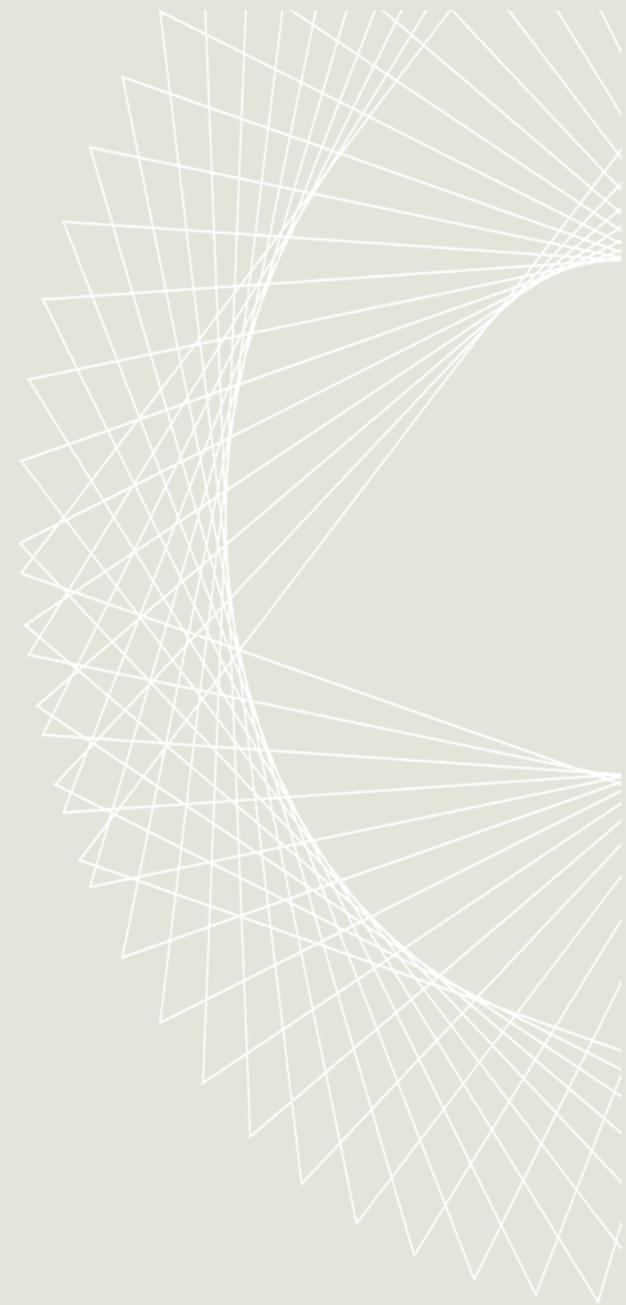
State Mini-WARN Acts

- Employers must also comply with state versions of the WARN Act:
 - Lower coverage thresholds
(e.g., California, Illinois, Iowa, New York)
 - Employment losses include furloughs for fewer than six months
(e.g., California, Wisconsin)
 - No exceptions for unforeseen business circumstances
(e.g., California, Hawaii)
 - However, California already has passed legislation aimed at applying an exception to full notice for employment losses due to the pandemic

Other COVID-Related Litigation Risks

- **Discrimination:** challenging decisions about who to furlough and who to bring back first
- **Worker's comp, OSHA, negligence lawsuits:** claiming employers failed to take adequate measures to protect returning employees from exposure to the virus
- **Disability claims:** challenging employers failure to provide reasonable accommodations to employees with medical conditions who cannot comply with safety precautions or who want work from home

New Restrictions on RIFs: The CARES Act Loan Programs



The CARES Act Loan Programs

- Paycheck Protection Program (“PPP”)
- Industry-Specific Programs (Loans and Grants)
- Main Street Lending Program
- Mid-Sized Business Loan Facility

Each of these programs includes restrictions on, or penalties for, reductions in force.

CARES Act: Paycheck Protection Program

- Available to small businesses (fewer than 500 employees) or NAICS Code 72 businesses (restaurants and hotels) and certain franchises with fewer than 500 employees per location
- Provides loans equal to 2.5x average monthly payroll to pay for payroll costs, rent/mortgage interest, and utilities
- Loan amounts subject to forgiveness if certain conditions are met
 - Proportional reduction in forgiveness ratio if average Full-Time Equivalents (“FTEs”) reduced during forgiveness period (8-to-24-week period after receiving loan)
 - Measured against baseline period (February 15, 2019-June 30, 2019 or January 1, 2020-February 29, 2020)
 - Reductions in compensation also reduce forgiveness level
- FTE and Compensation Reduction “Safe Harbors”
 - FTE or compensation reduction “cured” by 6/30 (now 12/31)
 - FTE laid off and did not accept bona fide offer to return to work, and employer unable to find “similarly qualified” worker
 - Employer unable to return to normal business activity due to worker or customer safety restrictions
 - FTE terminated for cause, voluntarily resigned, or voluntarily accepted reduced schedule/compensation

CARES Act: Industry-Specific Programs

- **Loan Program:** Available to passenger air carriers, cargo air carriers, and businesses “critical to maintaining national security”
- Borrower must “maintain its employment levels as of March 24, 2020, to the extent practicable, and in any case shall not reduce its employment levels by more than 10 percent” until September 30, 2020
- **Grant Program:** Payroll support for airline and airline contractor employees.
- Recipient must “refrain from conducting involuntary furloughs or reducing pay rates and benefits” until September 30, 2020

CARES Act: Main Street Lending Program

- Open to businesses with fewer than 15,000 employees or less than \$5 billion in 2019 annual revenue
- Borrowers must make “commercially reasonable efforts to retain employees” during the term of the loan
- “Commercially reasonable efforts” determined “in light of [the borrower’s] capacities, the economic environment, its available resources, and the business need for labor”

CARES Act: Midsized Lending Facility

- Available to businesses between 500-10,000 employees
- CARES Act requires Secretary of Treasury to “endeavor” to create program, but no program currently in effect
- Several statutory restrictions related to employment
 - Borrower must use funds to “retain at least 90 percent” of workforce, “at full compensation and benefits,” until September 30, 2020
 - Borrower must “intend[] to restore not less than 90 percent of the workforce” that “existed as of February 1, 2020,” at full compensation and benefits, within 4 months of end of public health emergency
 - Borrower may not abrogate any collective bargaining agreement for term of loan and two years after repayment
 - Borrower must remain neutral in any union election

CARES Act: Limitations on RIFs

	PPP	Industry Loan	Industry Grant	MSLF	Midsized Bus.
Permitted to Conduct RIF	Yes	Yes (limited)	No	Yes	Yes (limited)
Limitations on RIF	None (but will affect forgiveness)	10 percent of workforce as of March 24, 2020	-	Must use “commercially reasonable efforts” to avoid RIF	10 percent of workforce
Permitted to Reduce Compensation	Reduction in FTE will affect forgiveness (unless subject to safe harbor)	Yes*	No	Must use “commercially reasonable efforts” to maintain payroll	No
Other Restrictions	Forgiveness reduced if FTEs or compensation reduced (subject to safe harbor)	Restrictions apply until 9/30	No involuntary furloughs or comp reductions until Sept. 30, 2020	-	Restrictions apply until 9/30 Rehire 90% of recent RIFs within 4 months

Thank You

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