

Sequestration and the WARN Act:
Practical Advice for Federal Government Contractors

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In the Washington, DC metropolitan area, where federal government contracts account for a significant share of the private industry, the federal budget cuts that went into effect on March 1, 2013 (also known as “sequestration”) are likely to have a profound effect on the regional business community.

Among the multitude of uncertainties presented by sequestration is the issue of whether government contractors must comply with the federal Worker Adjustment and Retraining Notice (WARN) Act in the event that sequestration results in the loss or modification of a government contract and an associated reduction in force.

Under the WARN Act, employers with 100 or more full-time employees are typically required to provide employees with 60 days advance notice before implementing a “mass layoff,” which is defined as a reduction in force that does not result from a plant closing and results in an employment loss at a single employment site during any 30-day period for (1) at least 33% of the employees *and* at least 50 employees, *or* (2) at least 500 employees (all numbers exclude part-time employees). As a further complication, the WARN Act’s “aggregation rule” provides that if two or more groups of employees at a single employment site suffer employment losses and the aggregate number of losses exceeds these numbers in a 90-day period, a mass layoff is deemed to have occurred unless the employer can show that the losses are the result of separate and distinct actions.

There are three exceptions to the WARN Act’s 60-day notice requirement, including where the mass layoff is caused by business circumstances that were not reasonably foreseeable at the time notice would have been required. Sequestration presents an interesting dilemma in this context because the budget cuts were long anticipated, but only recently confirmed, and many government contractors are only gradually learning which programs and contracts will be eliminated or modified. In the face of uncertainty regarding the applicability of the WARN Act, some businesses have chosen to issue “contingent” WARN notices notifying employees of *potential* mass layoffs resulting sequestration.

Unfortunately, the guidance provided by the federal government to contractors who may be affected by sequester is somewhat confusing. The federal regulations related to the WARN Act suggest that a WARN notice should be given in “ambiguous” situations. However, in June 2012, the Department of Labor (DOL) issued a guidance letter advising government contractors *not* to preemptively issue WARN notices. In September 2012, the Office of Management and Budget (OMB) released a memorandum suggesting that any WARN Act liability costs, including litigation costs, incurred by contractors who followed the DOL guidance letter would be reimbursed by the contracting agency. While potentially comforting, these reassurances might ultimately ring hollow because it is the courts – not the DOL or OMB – that are responsible for enforcing the WARN Act.

Moreover, the WARN Act does not impose penalties on employers who provide preemptive WARN notices that ultimately turn out to be unnecessary because a mass layoff does not occur. For this reason, government contractors should attempt to provide WARN notices to employees whenever they have a reasonable basis for believing that a mass layoff will occur, as may be the case for some federal government contractors in the context of sequestration.

In the event that a WARN Act notice is appropriate, such notice must be provided to all affected employees as well as the State Rapid Response Dislocated Workers Unit and the chief elected official of the local government unit where the mass layoff is to occur (both of which will vary based on state/locale). Some states impose notice requirements beyond those imposed by the federal WARN Act. For example, Maryland law requires employers to give notice to their local unemployment insurance office when laying off 25 or more employees for the same reason at or about the same time for periods exceeding seven days.

Businesses that may be impacted by sequester should consult with their attorneys regarding ensuring compliance with the WARN Act. For more information on sequestration and WARN or advice on a specific employment related question, please contact: Maureen Carr at mcarr@reesbroome.com or Susan Richards Salen at ssalen@reesbroome.com.

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