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E-ALERT | Government Contracts

July 31, 2012

DEPARTMENT OF LABOR ISSUES GUIDANCE ON APPLICATION OF WARN ACT TO SEQUESTRATION

On July 30, 2012, the Department of Labor (DOL) issued Training and Employment Guidance Letter 3-12 ("DOL Ltr."), which concluded that contractors are not required to issue blanket layoff notices in anticipation of the expected cuts from sequestration. The cuts for FY 2013 (October 1, 2012 through September 30, 2013) would take effect on January 2, 2013, when OMB issues its sequestration order. OMB's order would cancel a portion of the funds that have been appropriated, or otherwise made available, to U.S. government agencies for FY 2013. The agencies would then have to implement OMB's order.

In its guidance, DOL stated that although it is currently known that sequestration may occur, it is not necessarily foreseeable as to particular programs and contracts. As a result, DOL advised that "[C]ontractors' obligation to provide notices under the WARN Act would not be triggered until the specific closings or mass layoffs are reasonably foreseeable" and that blanket notices were neither appropriate nor required in this instance. DOL Ltr. at 4, 5. As a basis for its decision, DOL concluded that it is unlikely that employers will have enough information to predict which particular contracts would be affected and therefore which plants and employees would experience job losses.

The purpose of the WARN Act is to provide notice to displaced workers so that alternative employment or training can be obtained. In general, the WARN Act requires employers with at least 100 employees to provide written notice of layoffs to employees, state agencies, and local governments at least 60 days before closing a plant or otherwise implementing a mass layoff. The WARN Act also recognizes that there will be instances when an employer is unable to give 60 days advance notice. These instances include situations where the company is faltering, when natural disasters strike, and in unforeseeable business circumstances. It is this last exception upon which DOL relied to excuse blanket WARN notices with regard to sequestration. "Of these three exceptions, the unforeseeable business circumstances exception is the one that would apply to plant closings or mass layoffs occurring before or in the wake of the potential sequestration on January 2." DOL Ltr. at 3.

The unforeseeable business circumstance exception applies when the closing or layoff is caused by business circumstances that "were not reasonably foreseeable as of the time that notice would have been required." 29 U.S.C. § 2102(b)(2)(A). The WARN regulations further define reasonably foreseeable as whether it was "caused by some sudden, dramatic, and unexpected action or condition outside the employer's control." 20 C.F.R. § 639.9(b)(1). In the case of sequestration, DOL determined that because efforts are being made to avoid sequestration and because federal agencies will have some discretion on how to implement cuts in funding, it remains very unclear as to which contracts would be impacted and the actual contract terminations or cutbacks that will need to occur in response to sequestration are "speculative and unforeseeable." DOL Ltr. at 4.

Even if federal agencies announce specific contract terminations or cutbacks (either before or after January 2) DOL found that such federal announcements would be "sudden and dramatic" and

employers would not have to provide the full period of notice. Id. DOL recognized that agencies will require time to determine how to operate ongoing programs within the constraints of sequestration and that agencies have up to 120 days to implement actions in response to a sequestration order. Thus, a blanket notice would be inconsistent with how sequestration will be implemented. DOL noted that providing such notice to workers who may never suffer a job loss, "both wastes the states' resources in providing rapid response activities where none are needed and creates unnecessary uncertainty and anxiety in workers." Id.

Although the DOL Guidance Letter makes clear that current uncertainties surrounding the implementation and effect of sequestration excuse businesses from providing 60 day notice in advance of January 2, 2013, each contractor should continue to evaluate for itself at what point after (or possibly before) that date it will possess sufficient information to conclude that specific closings or mass layoffs are reasonably likely; at such point, WARN notice requirements would be triggered even if the period of notice is less than 60 days. Moreover, several states have their own plant closing laws ("baby-Warn" statutes), some of which have different or more stringent requirements. Clients should analyze the potential application of such laws in states where significant employment losses may occur.

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