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California Offers Some Clarity Regarding Revised Notice Requirements Under Cal-WARN

Article By:

Sage Stone

On March 23, 2020, the California Department of Industrial Relations (DIR) issued "Guidance on [the] Conditional Suspension of California WARN Act Notice Requirements under Executive Order N-31-20." The DIR provided guidance to further clarify Governor Gavin Newsom's Executive Order N-31-20 (March 17, 2020), which temporarily suspended Cal-WARN's typical 60-day notice requirement for layoffs or business closures. The guidance may assist employers in understanding their Cal-WARN obligations when faced with making temporary or permanent staffing reductions (or relocations) as a result of COVID-19 prevention and mitigation efforts.

The DIR guidance explains that Cal-WARN is *not* suspended in its entirety, but rather that the executive order "only suspends [Cal-WARN's] 60-day notice requirement for those employers that satisfy the [o]rder's specific conditions." In essence, the governor's order has temporarily adopted the "unforeseeable business circumstances" exception to the federal Worker Adjustment and Retraining Notification (WARN) Act. The "unforeseeable business circumstances" exception as adopted by the governor's order requires that employers give notice as soon as practical and be able to show that a closure (i.e., a mass layoff, relocation, or termination) was due to "unforeseeable business circumstances" relating to COVID-19.

The "unforeseeable business circumstances" exception under federal WARN includes "[a] government ordered closing of an employment site that occurs without prior notice," and may include layoffs and business closures that could not have been anticipated prior to the pandemic and would not have occurred but for the COVID-19. The DIR's guidance outlines the specific additional requirements an employer must satisfy to comply with the California governor's executive order, including to whom the employer must give notice, the content of such notices, and acceptable methods to deliver the notices.

Although the guidance does not explicitly address whether Cal-WARN notices must be issued for unpaid furloughs, such notices may be required. California case law has interpreted Cal-WARN to require notices for unpaid furloughs anticipated to last even brief periods of time.

The guidance does not offer a clear path forward for those employers that have not issued Cal-WARN notices for closures that occurred *before* Executive Order N-31-20 was issued on March 17, 2020, but *after* the state of emergency declaration on March 4, 2020, except to say that employers

may now avail themselves of the suspension of the 60-day notice period, *provided they can satisfy the requirements specified in the order*. The guidance further suggests that Executive Order N-31-20 does not affect the "physical calamity" exception to Cal-WARN, which holds that no notice is required when the closure is due to a physical calamity. As pointed out by the guidance, however, no cases offer any insight on what constitutes a "physical calamity"—therefore, an employer would have to prove that the COVID-19 pandemic is a "physical calamity," and it is not clear that the COVID-19 pandemic would satisfy this exception.

For employers facing anticipated layoffs, furlough, relocation, or closures of business operations due to COVID-19, the guidance does articulate how to take advantage of the new exception to Cal-WARN. However, for employers that have not issued Cal-WARN notices but have already implemented mass layoffs, relocations, or terminations, the guidance does not offer clarity on how to move forward.

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