



# EMPLOYMENT & LABOR LAW GROUP

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## RECENT DEVELOPMENTS

### SUPERVISOR liability: who should pay?

In *Thomas v. EDI Specialists, Inc.*, the Massachusetts Supreme Judicial Court (SJC) recently addressed the question of whether a company can hold an employee, who has been alleged to have violated Massachusetts anti-discrimination laws, financially responsible for possible damages that a complaining party might win. Although the SJC established that a right to contribution does not exist under the Massachusetts state anti-discrimination statute, the SJC did indicate that if an employer wanted additional protection, it could enter into an indemnification agreement with its supervisory employees concerning such issues.

The specifics of the Thomas case are as follows: Ms. Thomas filed suit against her employer, EDI Specialists, Inc. (“EDI”), alleging she was discriminated against after she announced that she had become pregnant. She alleged that Mr. Mills, also an EDI employee, called her “company prego” and told her that her inability to travel while pregnant was harmful to EDI. After it was served with Thomas’ complaint, EDI filed a complaint against Mr. Mills, seeking reim-

bursement for damages in the event that it was found liable because of his alleged illegal actions. EDI argued that if Ms. Thomas’ suit under the state discrimination statute was successful, Mr. Mills should be required to pay part of the damages because he had engaged in the harassing conduct.

The Supreme Judicial Court, in deciding that a right to contribution did not exist for EDI, explained that the purpose of the Massachusetts state anti-discrimination statute is to encourage employers to reduce discrimination, and therefore, the Company must be held responsible for the discriminatory actions of their employees. Indeed, the SJC reasoned that to allow a claim for contribution under a tort law theory in these circumstances would undermine the Legislature’s intent to hold employers liable for the unauthorized and illegal conduct of their work force. However, the SJC did not foreclose an ability to seek indemnification from employees responsible for discriminatory conduct in the workplace, stating that an employer could enter into an indemnification agreement with its employees that would require them to reimburse it if their actions resulted in liability to the Company.

**The Lesson:** Although the Company in this case was unsuccessful in seeking contribution from Mr. Mills and was therefore unable to hold him financially responsible for the damages that might arise out of this discrimination lawsuit, given the SJC’s ruling, it is a good idea to have employees enter into indemnification agreements that confirm that they will indemnify the company if it is charged with discrimination based on their illegal actions. If you would like to include such a provision in your employment agreements, consult with employment counsel.

is having  
EMPLOYEES  
CALL IN  
worth  
21 million  
dollars?

What’s the cost of a phone call these days? If one of your employees has been involved in an car accident while making a business-related phone call, the answer might come as a surprise! For example, an Arkansas employer was recently ordered to pay \$21 million to a woman injured after its employee caused a car accident while talking on his cell phone. Evidence that an employee was making a work-related call at the time of an accident has prompted other employers to settle lawsuits for amounts in excess of \$500,000.

Although it may be too early to tell whether such lawsuits represent a new trend in employer liability, the staggeringly high jury verdict against the Arkansas employer is a clear warning sign for employers who require or encourage their employees to stay in touch with clients or the office while on the road. As a result, employers would be well-advised to consider adopting a policy governing employees' use of cell phones while driving.

For some employers, a ban on using cell phones for any purpose while driving is the safest option. However, if your sales employees frequently travel by car, it may be impracticable to adopt a total ban on cell phone use. In that case, employers may consider providing employees with hands-free headsets, or requiring employees to park their car before making or accepting a call on their cell phone.

Employers should also consider adopting a policy that is broad enough to cover other tools used by employees to "plug in" to the workplace while traveling. For example, if your employees use a personal digital assistant to check e-mail or to keep track of phone numbers and appointments, you should make clear that these tools should not be used while driving.

**The Lesson:** Employers should contact employment counsel to discuss whether to adopt a cell phone use policy. Employers that already have a policy should ensure that employees are abiding by the policy, and that the policy is consistent with any laws and regulations governing cell phone use in your state.

## Avoid Exposure:

### **Employers Have Obligations When Laying Off Workers Or Closing Down Plants Under The Worker Adjustment And Retraining Notification Act**

In these times of economic uncertainty and market fluctuations, many employers have had to make difficult decisions regarding laying off workers or closing production plants. The Worker Adjustment and Retraining Notification Act, 29 U.S.C. § 2101 et seq., ("WARN") offers protection to workers, their families, and communities by requiring employers to provide advance notice of covered mass layoffs and plant closings. As the economy continues to suffer, employers must familiarize themselves with the WARN requirements in order to navigate the issues that arise when employees must be laid off or plants must be shut down.

## who is covered BY WARN?

Employers with 100 or more employees are covered by WARN. In determining whether an employer meets this requirement, part-time employees (those who work fewer than 20 hours a week) and short-term employees (those that have worked fewer than 6 out of the past 12 months) are excluded. WARN applies to all eligible private employers, both for-profit and nonprofit.

WARN also applies to some public or quasi-public entities, though it is limited to those which operate in a commercial context and are separately organized from the regular government. Regular federal, state, and local government entities that provide public services are not covered.

WARN covers both hourly and salaried workers, including those in managerial and supervisory positions. Business partners, however, are not entitled to WARN protection.

# What TRIGGERS **notice** UNDER WARN?

Two circumstances trigger WARN's notice requirements: mass layoffs and plant closings.

## 1. Mass Layoffs

A layoff, as defined by WARN, is "an employment termination, other than a discharge for cause, voluntary departure, or retirement; a layoff exceeding 6 months; or a reduction in an employee's hours of work of more than 50% in each month of any 6-month period."

In order to trigger WARN protection, certain requirements must be met. A mass layoff under WARN constitutes a reduction in force of 500 or more employees in any 30-day period. For employers with fewer employees, a mass layoff entails a reduction in force of between 50 and 499 employees, if they make up at least 33% of the employer's

total workforce. While these numbers exclude part-time and short-term employees, these employees are still entitled to notice if they are affected by the mass layoff.

If the number of layoffs do not meet the WARN threshold within 30 days, but do meet the requirements over a 90-day period, WARN notice is still triggered. Job losses within any 90-day period will count together toward WARN threshold levels, unless the employer demonstrates that the employment losses during the 90-day period are the result of separate and distinct actions and causes. The cumulative layoff period exists to deter employers from staggering layoffs in order to avoid WARN requirements.

## 2. Plant Closings

A plant closing under WARN exists when an employment site will be shut down and will result in an employment loss for 50 or more employees during any 30-day period. Shutting down facilities or an operating unit within any employment site will also count as a plant closing under WARN. Again, employees who work part-time or short-term are not included in the calculation of employment loss. However, these employees are still entitled to notice under WARN.

# What IF THE REDUCTION IN FORCE IS A **result** of selling the business?

Frequently, mass layoffs or plant closings are the result of the sale of all or part of a business. In such circumstances, WARN applies much as it does during a standard reduction in force. As in a standard layoff or plant closing, if the sale by a covered employer results in a covered plant closing or a mass layoff, the required parties must receive at least 60 days notice. The seller is responsible for providing notice of any covered plant closing or mass layoff that occurs up to and including the date and time of the sale. The buyer is responsible for providing notice of any covered closing or layoff that occurs after the date and time of the sale. If the sale does not result in a mass layoff or plant closing, no notice is required. Finally, the seller's employees become the buyer's employees for the purposes of WARN immediately following the sale. This provision preserves the notice rights of the employees of a business that has been sold.

## ARE THERE **any** exceptions to WARN?

There are a number of exceptions to WARN. For example, in the case of consolidation or relocation of an employer's business, an employee who refuses a transfer to a different employment site within reasonable commuting distance does not experience an employment loss. An employee who accepts a transfer outside this distance within 30 days after it is offered or within 30 days after the plant closing or mass layoff, whichever is later, also does not experience an employment loss. In both cases, the transfer offer must be made before the closing or layoff, there must be no more than a 6-month break in employment, and the new job must not be deemed a constructive discharge.

An employer is exempt from WARN requirements if a reduction in force results from closing a temporary facility, or if the closing or mass layoff is the result of the completion of a particular project or undertaking. An employer, however, cannot label an ongoing project "temporary" in order to evade its obligations under WARN.

Employers are also exempt from WARN with regard to striking workers. An employer is not required to provide notice to strikers or to workers who are

part of the bargaining unit(s) that are involved in labor negotiations leading to a lockout, when the strike or lockout is equivalent to a plant closing or mass layoff. Additionally, an employer does not need to give notice when permanently replacing a person who is an "economic striker" as defined under the National Labor Relations Act. However, other workers who lose employment as a direct or indirect result of a strike, though they are not themselves striking or part of the relevant bargaining unit, are still entitled to WARN notice.

## How DOES AN EMPLOYER give notice under WARN?

An employer must provide notice to each worker, to the state dislocated worker unit and to the chief elected official of the unit of local government in which the employment site is located. If a company's employees are unionized, an employer must give written notice of a mass layoff or plant closing to the chief elected officer of the exclusive representative(s) or bargaining agency(s) of affected employees. This includes employees who may lose their employment due to "bumping," or displacement by other workers, to the extent that the employer can identify those employees when notice is given. If these employees cannot be identified, the employer must provide

notice to employees holding jobs that are being eliminated. Part-time and short-term employees are entitled to notice under WARN.

## When MUST AN EMPLOYER give notice under WARN?

Notice must be given to the required parties at least 60 days before a closing or mass layoff. If employees are going to be laid off over the course of more than one day, the representatives, state dislocated worker unit and local government must be notified at least 60 days before each layoff or closing. If the workers are not represented, each worker must be notified at least 60 days before his or her individual layoff.

There are three exceptions to the 60-day notice requirement: 1) in the case of a faltering company; 2) due to unforeseeable business circumstances; and 3) due to natural disaster.

Courts have held the faltering company exception to be construed very narrowly. It excepts employers from the 60-day period when a company has sought new capital or business in order to stay open, and giving notice to employees would ruin the opportunity to get the new capital or business. This exception applies only to plant closings.

The unforeseeable business circumstances exception to 60-day notice applies to closings and layoffs caused by business circumstances that were not reasonably foreseeable at the time notice would otherwise have been required.

The natural disaster exception applies when a closing or layoff is the direct result of a natural disaster, such as a flood, earthquake, drought or storm.

## How must THE EMPLOYER GIVE notice under WARN?

All notice must be given in writing, though there is no specific form that is required. Any reasonable method of delivery that ensures receipt of notice at least 60 days before the layoff or closing is acceptable. It is best practice to have a receipt form signed by the employee confirming that he/she was given notice. Notice can be made conditional upon the occurrence or nonoccurrence of an event, but the event must be definite and its occurrence or nonoccurrence must result in a covered employment action occurring in fewer than 60 days after the event.

An employer is not obligated to record the notice of a layoff or plant closing in any certain way. The information used by employers to determine who gets notice and when notice is given is normally retained in the ordinary course of business and in compliance with other laws and regulations.

## What ARE THE PENALTIES for failure to comply WITH WARN?

An employer who fails to provide required notice to workers before ordering a mass layoff or plant closing is liable to each aggrieved employee for an amount including back pay and benefits for the period of violation, up to the 60-day notice period. The employer's liability may be reduced by such items as wages paid to the employee during the period of violation, and other voluntary and unconditional payments made by the employer to the employee.

Failure to provide notice to the local government is subject to a civil penalty not to exceed \$500 for each day of violation. This penalty may be avoided if the employer satisfies the liability to each aggrieved employee within three weeks after the closing or layoff is ordered by the employer.

## How is WARN ENFORCED ?

WARN is enforced through the United States District Courts. Individual and class action claims may be brought by workers, employee representatives and units of local government. In any suit, the court may award the prevailing party reasonable attorneys' fees as part of the costs.

Employers should familiarize themselves with the requirements of WARN and see that their decisions to lay off workers or close plants are in compliance with the law. Compliance will ensure that an employer is not subject to liability for damages.

## Avoiding Wage and Hour Litigation:

# THE **Top three** mistakes companies MAKE

## Mistake Number **1**

*Only hourly employees get paid overtime.*

No. Whether an employee is salaried or hourly has nothing to do with whether that employee is eligible for overtime. An employee is only exempt from overtime requirements if his or her job duties qualify for a specific exemption under the law.

## Mistake Number **2**

*Independent contractors do not have to be paid overtime.*

No. Just because you employ a person on a contract basis and you call them an “independent contractor” does not mean that you do not have to pay those workers pursuant to the wage and hour laws and regulations. Indeed, if the Department of Labor should decide that the folks you call “independent contractors” are actually “employees” who are not exempt under the law, you may have to pay them the overtime they would have been due, among other penalties.

## Mistake Number **3**

*Managers and supervisors are not entitled to overtime.*

No. The title you give an employee does not signify anything with regard to the wage and hour laws. It is the specific job duties that will determine whether the manager/supervisor is entitled to overtime pay under the wage and hour legislation.

**The Lesson:** Litigation under the Federal Fair Labor Standards Act and state analogs is exploding. Consult employment counsel to ensure that you are in compliance with the Fair Labor Standard Act and any particular laws in your jurisdiction.

### **The Sarbanes-Oxley Act:**

## **WHAT** Human Resources needs to know

If your organization is a public company or is a private company preparing for an initial public offering, you have probably studied the requirements of the Sarbanes-Oxley Act in some detail. Nevertheless, many companies and human resource professionals are unaware that the Sarbanes-Oxley Act does more than punish bad acts in the board room— it also protects certain activities by lower-level employees.

### **For example, you be aware that the Act:**

- Absolutely prohibits retaliation against employees who file or assist in proceedings regarding violations of SEC rules or violation of federal law relating to fraud against shareholders
- Prohibits retaliation against employees who report conduct that they reasonably believe to be a violation of SEC rules or of federal law relating to fraud against shareholders, as long as the employees report such conduct to certain government representatives or agencies
- Prohibits retaliation against employees who report “truthful information” pertaining to the commission or possible commission of any federal offense to law enforcement officers.

**The Lesson:** Employers should make sure their Human Resource Department is well-versed in the Act’s anti-retaliation provisions. In addition, employers should contact employment counsel to make sure their compliance with these provisions is well-documented in both employee handbooks and personnel files.

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