Memo To: Doble & Doble LLP, Daniel Diamond
File: TEST
Research ID: #400020766745ca
Jurisdiction: Ontario, Canada
Date: August 25, 2020
Regarding: Back-Pay for COVID-19 Mass Layoff Employees

Issue

In the state of California, how much back-pay can an at-will employee expect if terminated due to a mass layoff as a result of the COVID-19 pandemic with only 7 days notice?

Facts

Client is an employee of a large clothing manufacturer, working on an assembly line. There is no employment contract in place. Due to downturn in retail clothing demand and loss of a major customer, the employer terminated a third of the assembly line workers with only 7 days notice.

Conclusion

Section 1401(a) of the California Labor Code provides that, generally, employers must give employees 60 days' notice of a mass layoff. "Mass layoff" is defined as a layoff of 50 or more employees within a 30-day period by an employer with 75 or more employees. (Labor Code).

Section 1400 of the Labor Code defines "employee" as a person employed by the employer for at least six of the 12 months prior to the notice. There is no indication that the protections of § 1401 do not apply to at will employees, especially given that § 2922 of the Labor Code sets out a presumption that all employment relationships without a specified term are at will. (Labor Code).

Employers who fail to give the required notice are liable for back pay that would have been earned during the notice period, or, back pay for one-half of the number of days that the employee was employed by the employer, if less than the remainder of the notice period. (Labor Code).

However, in response to the COVID-19 pandemic Governor Newson issued Executive Order N-31-20 on March 17, 2020, which suspended sections 1401(a) and 1402 of the Labour Code. For the period beginning on March 4, 2020 and extending through the end of the state of emergency, covered employers are only required to give as much notice as is practicable if the mass layoff is the result of a COVD-19-related business circumstances that were not foreseeable at the time that notice would have been required. (Executive Order N-31-20). This is an adoption of the unforeseen business circumstances defence in the federal WARN Act. (COVID-19: WARN FAQs; Labor Code).

No California state court decisions applying or interpreting the Executive Order could be identified. However, the COVID-19: WARN FAQs issued by the California Employment Development Division indicate that case law interpreting the unforeseeable business circumstances provision of the federal WARN Act can provide guidance. While no federal decisions interpreting the federal WARN Act in the context of the COVID-19 pandemic could be identified, pre-pandemic case law is instructive.

The unforeseen business circumstances exception permits a reduced notice period but does not eliminate the notice period completely. Employers may still be liable if they fail to give as much notice as is practicable. The determination of what is a practicable notice period is fact-intensive. The court must examine any delays an employer undertakes in giving notice, and the period of notice actually given before termination. (*Carlberg v. Guam Indus. Servs.*).

Circumstances are unforeseeable if they are caused by sudden, dramatic, and unexpected action outside the employer's control. In making the determination, courts are to evaluate whether similarly situated employers, exercising reasonable business judgment in predicting the demands of the particular market, could have foreseen the circumstances causing the layoff. An employer's recognition of the possibility of a layoff-triggering event, in other words, will not render the statutory exception inapplicable, but recognition of probability will. The determination is heavily

fact-driven. (*Carlberg v. Guam Indus. Servs.*).

A government-ordered closing of an employment site that occurs without prior notice may be an unforeseen business circumstance. (Code of Federal Regulations; COVID-19: WARN FAQs). However, not all government-ordered closings will fall within the unforeseen business circumstances exception. The regulations appear to contemplate two factors in determining an employer's responsibilities: the amount of government involvement in the closing and the amount of notice the employer had of that involvement. The regulations and commentary distinguish among closings involving different levels of government action. Those closings which are the direct result of governmental action and which occur without notice should be counted as government ordered closings to which after the fact notice is applicable. Government-ordered closings which are preceded by some notice may constitute unforeseeable business circumstances to which reduced notice applies. (*Hotel Employees Local 54 v. Elsinore Shore*).

Law

Section 1401(a) of the California Labor Code provides that, generally, employers must give employees 60 days' notice of a mass layoff:

> 1401. (a) An employer may not order a mass layoff, relocation, or termination at a covered establishment unless, 60 days before the order takes effect, the employer gives written notice of the order to the following:
>
> (1) The employees of the covered establishment affected by the order.
>
> (2) The Employment Development Department, the local workforce investment board, and the chief elected official of each city and county government within which the termination, relocation, or mass layoff occurs.
>
> (b) An employer required to give notice of any mass layoff, relocation, or termination under this chapter shall include in its notice the elements required by the federal Worker Adjustment and Retraining Notification Act (29 U.S.C. Sec. 2101 et seq.).

(c) Notwithstanding the requirements of subdivision (a), an employer is not required to provide notice if a mass layoff, relocation, or termination is necessitated by a physical calamity or act of war.

"Mass layoff" is defined as a layoff of 50 or more employees within a 30-day period by an employer with 75 or more employees:

1400. The definitions set forth in this section shall govern the construction and meaning of the terms used in this chapter:

(a) “Covered establishment” means any industrial or commercial facility or part thereof that employs, or has employed within the preceding 12 months, 75 or more persons.

...

(c) “Layoff” means a separation from a position for lack of funds or lack of work.

(d) “Mass layoff” means a layoff during any 30-day period of 50 or more employees at a covered establishment.

Section 1401(a) of the Labor Code defines "employee" as a person employed by the employer for at least six of the 12 months prior to the notice. There is no indication that the protections of § 1401 do not apply to at will employees, especially given that § 2922 of the Labor Code sets out a presumption that all employment relationships without a specified term are at will:

2921. An employment, having no specified term, may be terminated at the will of either party on notice to the other. Employment for a specified term means an employment for a period greater than one month.

Pursuant to § 1402, employers who fail to give the required notice are liable for back pay that would have been earned during the notice period, or, back pay for one-half of the number of days that the employee was employed by the employer, if less than the remainder of the notice period:

1402. (a) An employer who fails to give notice as required by paragraph (1) of

subdivision (a) of Section 1401 before ordering a mass layoff, relocation, or termination is liable to each employee entitled to notice who lost his or her employment for:

(1) Back pay at the average regular rate of compensation received by the employee during the last three years of his or her employment, or the employee's final rate of compensation, whichever is higher.

(2) The value of the cost of any benefits to which the employee would have been entitled had his or her employment not been lost, including the cost of any medical expenses incurred by the employee that would have been covered under an employee benefit plan.

(b) Liability under this section is calculated for the period of the employer's violation, up to a maximum of 60 days, or one-half the number of days that the employee was employed by the employer, whichever period is smaller.

(c) The amount of an employer's liability under subdivision (a) is reduced by the following:

(1) Any wages, except vacation moneys accrued prior to the period of the employer's violation, paid by the employer to the employee during the period of the employer's violation.

(2) Any voluntary and unconditional payments made by the employer to the employee that were not required to satisfy any legal obligation.

(3) Any payments by the employer to a third party or trustee, such as premiums for health benefits or payments to a defined contribution pension plan, on behalf of and attributable to the employee for the period of the violation.

However, in response to the COVID-19 pandemic Governor Newson issued Executive Order N-31-20 on March 17, 2020, which suspended sections 1401(a) and 1402 of the Labour Code. For the period beginning on March 4, 2020 and extending through the end of the state of emergency, covered employers are only required to give as much notice as is practicable:

> 2) Because of the need to prevent or mitigate the spread of COVID-19, employers have had to close rapidly without providing their employees the advance notice required under California law. Thus, for the period that began March 4, 2020 through the end of this emergency, Labor Code sections 1401(a), 1402, and 1403 are hereby suspended for an employer that orders a mass layoff, relocation, or termination at a covered establishment on the condition that the employer:
>
> (i) Gives the written notices specified in Labor Code section 1401(a)-(b);
>
> (ii) Consistent with United States Code, Title 29, section 2102(b)(2)(A) and Code of Federal Regulations, Title 20, section 639.9(b), orders that such a mass layoff, relocation, or termination that is caused by COVID-19-related "business circumstances that were not reasonably foreseeable as of the time that notice would have been required;" and
>
> (iv) For written notice given after the date of this Executive Order, in addition to the other elements detailed in Labor Code section 1401(b), such written notice must contain the following statement: "If you have lost your job or been laid off temporarily, you may be elegible for Unemployment Insurance (UI). More information on UI and other resources available for workers is available at labor.ca.gov/coronavirus2019."
>
> Unless otherwise specified, Labor Code section 1400 provides definitions for the terms used in this suspension.
>
> By March 23, 2020, the Labor and Workforce Development Agency shall provide guidance to the public regarding how this Executive Order will be implemented.

The guidance issued by the California Employment Development Department (EDD) in accordance with the Executive Order (COVID-19: WARN FAQs) confirms that section 2(ii) of the Executive Order adopts the unforeseeable business circumstances defence in the federal WARN Act, codified at § 2102(b)(2)(A) of the Labor Code, 29 U.S.C. § 2102, which states:

(b) Reduction of notification period

(1) An employer may order the shutdown of a single site of employment before the conclusion of the 60-day period if as of the time that notice would have been required the employer was actively seeking capital or business which, if obtained, would have enabled the employer to avoid or postpone the shutdown and the employer reasonably and in good faith believed that giving the notice required would have precluded the employer from obtaining the needed capital or business.

(2)

(A) An employer may order a plant closing or mass layoff before the conclusion of the 60-day period if the closing or mass layoff is caused by business circumstances that were not reasonably foreseeable as of the time that notice would have been required.

No California state court decisions applying or interpreting the Executive Order could be identified. However, the EDD's COVID-19: WARN FAQs indicates that case law interpreting the unforeseeable business circumstances provision of the federal WARN Act can provide guidance:

> An employer seeking to rely on the Executive Order's suspension of the California WARN Act's 60-day advance notice requirement must satisfy the following three conditions:
>
> The employer's mass layoff, relocation or termination must be caused by COVID-19-related "business circumstances that were not reasonably foreseeable at the time that notice would have been required."
>
> Note: The Executive Order states that such "business circumstances" should be understood to be consistent with the identical exemption under the federal WARN Act. Exec. Order N-31-20 § 2(iii) (noting 29 U.S.C. § 2103(b)(2)(A) and 20 C.F.R. § 639.9(b)). Notably, the U.S. Department of Labor has interpreted such "business circumstances" to include "[a] government ordered closing of an employment site

that occurs without prior notice." 20 C.F.R. § 639.9(b).

...

Note: The Executive Order provides that this condition should be read to be consistent with its usage in the federal WARN Act. Exec. Order N-31-20 § 2(ii) (noting 29 U.S.C. § 2102(b)(3)). Thus, case law interpreting this provision of the federal WARN Act can provide guidance. *See, e.g., Carlberg v. Guam Indus. Servs.*, 2017 WL 4381667, at *3 (D. Guam Sept. 30, 2017) (citing cases).

No federal decisions interpreting the federal WARN Act in the context of the COVID-19 pandemic could be identified. However, pre-pandemic case law regarding the federal WARN Act's unforeseeable circumstances exception is instructive.

The decision cited as an example by the EDD in the COVID-19: WARN FAQs is *Carlberg v. Guam Indus. Servs.*, CIVIL CASE NO. 14-00002 (D. Guam Sep. 30, 2017) ("*Carlberg*"), a decision of the District Court in Guam that explains what constitutes a practicable notice period for the purpose of reduced notice under the unforseeable business circumstances exception. The unforeseen business circumstances exception permits a reduced notice period but does not eliminate the notice period completely. Employers may still be liable if they fail to give as much notice as is practicable. The determination of what is a practicable notice period is fact-intensive (*Carlberg* at 5-7):

A. *WARN Act.*

The WARN Act aims to give employees working for large employers advance notice of layoffs so as to allow time to adjust to the loss of employment, to seek and obtain alternative employment and, where necessary, to seek appropriate retraining for the job market. See *Alarcon v. Keller Industries*, 27 F.3d 386, 388 (9th Cir. 1994), 20 C.F.R. § 639.1(a). In promoting that goal, the Act generally requires that covered employers give affected employees sixty days written notice of any plant closure or mass layoff. 29 U.S.C. § 2102(a); *Alarcon*, 27 F.3d at 388. But the Act also allows for "reduction of the notification period" in certain exceptional circumstances and sets forth several categories of exception, two of

which Defendants contend apply here. See 29 U.S.C. § 2102(b)(1)-(3). One potentially applicable exception, often called the "unforeseeable business circumstances" exception, permits a reduced notice period if a layoff is caused by business circumstances not reasonably foreseeable at the time notice would normally be required. *Id.* § 2102(b)(2)(A); see also *Alarcon*, 27 F.3d at 388-89. A second exception, called the "faltering business" exception, permits a reduced notice period when an employer is "actively seeking capital or business" to avoid or postpone the layoff and reasonably believes giving notice would prevent the employer from obtaining the necessary capital or business. 29 U.S.C. § 2102(b)(1); *Alarcon*, 27 F.3d at 388-89.

B. Notice.

Before taking up the question of whether either of these exceptions applies here, the court notes the Act does not eliminate the notice requirements altogether for employers facing exceptional circumstances. See, e.g., *Weekes-Walker v. Macon Cty. Greyhound Park, Inc.*, 877 F. Supp. 2d 1192, 1205 (M.D. Ala. 2012) (rejecting interpretation of WARN that "makes room for a scenario where the giving of § 2102(b)(3) notice can be excused altogether and the employer can nevertheless rely on one of the defenses"); see also *Alarcon*, 27 F.3d at 389. Instead, when an employer reduces the notice period under one of the statutory exceptions, the Act requires that the employer "give as much notice as is practicable" (the timing requirement) and, at the time notice is actually given, requires that the employer "provide a brief statement of the reason for reducing the notification period," (the substance requirement) in addition to the various other notice requirements set forth by regulation. 29 U.S.C. § 2102(b)(3); *Alarcon*, 27 F.3d at 389. Even where one of the statutory exceptions applies, in other words, an employer may be liable for the various penalties the Act contemplates for failure to comply with its requirements for reduced notice scenarios. See, e.g., *Childress v. Darby Lumber Inc.*, 126 F. Supp. 2d 1310, 1317 (D. Mont. 2001), aff'd, 357 F.3d 1000 (9th Cir. 2004) ("*Darby Lumber* would still be liable even if any of the exceptions applied because its notice was inadequate."). The parties dispute whether Defendants' short standard-form notice of termination given on the morning of October 15, 2013—four days after

competitor Cabras had been awarded the new MSC contract—satisfied either of the Act's timing and substance requirements.

With respect to timing, various courts have observed determinations of what constitutes a "practicable" period for purposes of notice is "necessarily fact-intensive." See, e.g., *Serv. Employees Int'l Union Local 6 v. Andrews Int'l, Inc.*, 2013 WL 12107630, at *4 (W.D. Wash. July 25, 2013). The practicability determination, the court notes, must examine both any delays an employer undertakes in giving notice, and the period of notice actually given before termination. Id. Regarding the former, a delay of even a week in giving notice after receipt of layoff-triggering information may be too long under certain circumstances—even where several weeks' notice of the impending layoff is then actually given. See, e.g., *Wholesale and Retail Food Distrib. Local 63 v. Santa Fe Terminal Services, Inc.*, 826 F. Supp. 326, 333 (C.D. Cal 1993). In other scenarios, a week- or even month-long delay might be appropriate, so as to allow an employer time to determine how best to respond to unfavorable news before giving notice. See, e.g., *Roquet v. Arthur Andersen LLP*, 398 F.3d 585, 589-90 (7th Cir. 2005); *United Steel Workers of Am. Local 2660 v. U.S. Steel Corp.*, 683 F.3d 882, 885 (8th Cir. 2012). And with respect to the period of notice actually given, the courts have explained, just a day's notice or less may be all that is practicable—as, for example, in the case where company learns of the loss of 95% of its business only the day before notice is given. See *In re Advanced Accessory Sys.*, 443 B.R. 756, 766 (Bankr. E.D. Mich. 2011); *Hotel Employees & Rest. Employees Int'l Union Local 54 v. Elsinore Shore Assocs.*, 173 F.3d 175, 187 (3d Cir. 1999) (noting "notice period may be reduced or eliminated" in event unforeseeable business circumstance arises); *In re Old Electralloy Corp.*, 162 B.R. 121, 126 (Bankr. W.D. Pa. 1993) ("[N]otice was not given until the day of closing. However, the decision to close, caused by the exhaustion of available cash, was made only late the night before closing. The notice was short, but there was no opportunity for greater notice."). The upshot, of course, is that the practicability determination is heavily fact-driven. See *Andrews Int'l*, 2013 WL 12107630, at *4.

Circumstances are unforeseeable if they are caused by sudden, dramatic, and unexpected action outside the employer's control (*Carlberg* at 10-11):

> With respect to the "unforeseeable business circumstances" exception, the Department of Labor has provided guidance for determining when the exception applies. See 20 C.F.R. § 639.9(b). Circumstances may have been unforeseeable, the agency observes, if caused by "sudden, dramatic, and unexpected action," outside an employer's control. *Id.* Sudden and unexpected termination of a major contract, or a strike at a major supplier, or a dramatic downturn, might all constitute the kind of "sudden, dramatic, and unexpected action" that would satisfy the exception. *Id.* In making the determination, the agency has explained, courts are to evaluate whether similarly situated employers, exercising reasonable business judgment in predicting the demands of the particular market, could have foreseen the circumstances causing the layoff. *Id.* § 639.9(b)(2); see also *Roquet* 398 F.3d at 588. An employer will not typically be liable, in other words, if when confronted with potentially devastating financial news, it reacts just as other reasonable employers in its market would react. See *Roquet*, 398 F.3d at 588. But as in most cases involving tests of reasonable foreseeability, per se rules are to be discouraged; the determination is again heavily fact-driven. *Pena v. Am. Meat Packing Corp.*, 362 F.3d 418, 421 (7th Cir. 2004).
>
> Attempting to further refine the foreseeability inquiry, various courts have observed the distinction between foreseeability and unforeseeability may be understood as a distinction between probability and possibility—an employer's recognition of the possibility of a layoff-triggering event, in other words, will not render the statutory exception inapplicable, but recognition of probability will. See, e.g., *Roquet*, 398 F.3d at 589. Others add that the Act is intended to allow leeway for an employer's exercise of reasonable business judgment, and the regulations are designed to encourage employers to take various reasonable actions to preserve jobs. See *In re Flexible Flyer Liquidating Trust, No. 12-60242*, 2013 WL 586823, at *4 (5th Cir. February 11, 2013) (unpublished). And, as still other courts have observed, the "rather unique, politically charged area of defense contracts" may call for an even

> more refined foreseeability inquiry, because reasonable defense contractors may often have good reason to believe they will retain or procure business where the government has expressed a specific need. *See, e.g., Loehrer*, 98 F.3d at 1062.

Section 639.9(b)(1) of the *Code of Federal Regulations*, 20 CFR § 639.9 provides that a government-ordered closing of an employment site that occurs without prior notice may be an unforeseeable business circumstance. The EDD cited this regulation in the COVID-19: WARN FAQs. Section 639.9(b)(1) states:

> (b) The "unforeseeable business circumstances" exception under section 3(b)(2)(A) of WARN applies to plant closings and mass layoffs caused by business circumstances that were not reasonably foreseeable at the time that 60-day notice would have been required.
>
> (1) An important indicator of a business circumstance that is not reasonably foreseeable is that the circumstance is caused by some sudden, dramatic, and unexpected action or condition outside the employer's control. A principal client's sudden and unexpected termination of a major contract with the employer, a strike at a major supplier of the employer, and an unanticipated and dramatic major economic downturn might each be considered a business circumstance that is not reasonably foreseeable. A government ordered closing of an employment site that occurs without prior notice also may be an unforeseeable business circumstance.
>
> (2) The test for determining when business circumstances are not reasonably foreseeable focuses on an employer's business judgment. The employer must exercise such commercially reasonable business judgment as would a similarly situated employer in predicting the demands of its particular market. The employer is not required, however, to accurately predict general economic conditions that also may affect demand for its products or services.

Whether a government-ordered closing qualifies as an unforeseen business circumstance was discussed by the Third Circuit of the United States Court of Appeals in *Hotel Employees Local 54 v. Elsinore Shore*, 173 F.3d 175, 182 (3d Cir. 1999). Not all government-ordered closings will fall within the unforeseen business circumstances exception to WARN's notice provisions (at

182-183):

> Plaintiffs also contend the Department of Labor implementing regulations and commentary promulgated under 29 U.S.C.A. § 2107 (Supp. 1998) (delegating to the Department of Labor the power to "prescribe such regulations as may be necessary to carry out [WARN]") subject government-ordered closings to WARN. As noted, the Department of Labor regulations and commentary place most government-ordered closings within the scope of the statute. Discussing the suggestion that the regulations should exempt all government-ordered closings from WARN, the commentary says "[n]o language recognizing such an [exemption] appears in WARN and the Department is reluctant to create such an [exemption]." 54 Fed.Reg. 16,054 (1989). Instead, the commentary suggests that some government-ordered closings fall within the unforeseen business circumstances exception to WARN's notice provisions. See *id.*; 20 C.F.R. § 639.9(b)(1) (1998). The need to find an exception for a government-ordered closing implies, of course, that such a closing is subject to WARN. Giving a specific example (and tracking legislative history), the commentary states that the government closing of a savings and loan would be exempt from WARN. See 54 Fed.Reg. 16,054 (1989). Whether other types of government-ordered closings are exempt is unclear from the commentary, but it would seem that the exemption should not be limited to that one type.
>
> The regulations appear to contemplate two factors in determining an employer's WARN Act responsibilities: the amount of government involvement in the closing and the amount of notice the employer had of that involvement. The regulations and commentary distinguish among closings involving different levels of government action. Those closings which are the "direct result of governmental action and which occur without notice should be counted as government ordered closings to which after the fact notice is applicable." 54 Fed. Reg. 16,054. Government-ordered closings which are preceded by some notice "may constitute unforeseeable business circumstances to which reduced notice applies." *Id.* Examples of direct closings are the "closing of a restaurant by a local health department or the closing of a nuclear power plant by the Nuclear Regulatory Commission." *Id.* The Department of Labor

> observed that "[o]ther agencies do not take such direct action. . . . These agencies do not directly order the closing of the plant and they usually give some notice of the violation and an opportunity to contest the findings." *Id.* These closings can result from, for example, Occupational Safety and Health Administration and Environmental Protection Agency enforcement actions and these agency actions may cause the employer to close a plant either to remedy the violation or because the employer "cannot continue to operate." *Id.* The commentary provides that "[d]epending on the length of the notice given, [indirect] closings [may] qualify for reduced notice under the unforeseeable business circumstances exception." *Id.*
>
> As noted, under the commentary, only one type of government-ordered closing is exempt from the WARN Act: "the absolute closing of a savings and loan institution by the [Federal Home Loan Bank Board]." *Id.* In an "absolute closing," "the previous ownership is ousted from control of the institution and the FSLIC assumes control of the enterprise." *Id.* In such a closing, WARN does not apply because there is no employer to give notice. But other direct government closings may be less dramatic than the example cited and we do not read the regulations as foreclosing consideration of whether other situations may also be exempt. Indeed, it is difficult to discern the difference between the government closing of a savings and loan institution and the government closing of a nuclear power plant. In both, the government action is direct and final.

This was further explained by the United States Court of Appeals, Seventh Circuit in footnote 3 of *Pena v. American Meat Packing Corp.*, 362 F.3d 418, 421 (7th Cir. 2004):

> 3 In discussing such government actions, the Department of Labor differentiated government actions that directly order the closing of a business (as contemplated in the Regulations) and government actions that indirectly do so (as discussed in the Commentary). Indirect closings occur in such situations where an agency, "take[s] enforcement actions which might result in the closing of a plant by the employer either to remedy the violation or because it cannot continue to operate." 54 Fed.Reg. 16,042, 16,053-54 (April 20, 1989). The commentary goes on to state, "[s]uch [indirect] closings, although they may result from a government action, are not

government ordered and are not subject to the same treatment." *Id.* ...

Authorities

Labor Code, § 1400 - 1408

Executive Order N-31-20, March 17, 2020

Labor Code, 29 U.S.C. § 2102

COVID-19: WARN FAQs, Employment Development Department

Carlberg v. Guam Indus. Servs., CIVIL CASE NO. 14-00002 (D. Guam Sep. 30, 2017)

Code of Federal Regulations, 20 CFR § 639.9

Hotel Employees Local 54 v. Elsinore Shore, 173 F.3d 175, 182 (3d Cir. 1999)

Pena v. American Meat Packing Corp., 362 F.3d 418, 421 (7th Cir. 2004)

Labor Code, § 2920 - 2929