

Selected Employment Issues

For Real Property Section of the Idaho State Bar

Tara Martens Miller

Spink Butler, LLP

Boise, Idaho

(208) 388-0230

tmiller@spinkbutler.com

WARN ACT

- Worker Adjustment and Retraining Notification Act
- Scenario – Asset Purchase Agreement

- The Worker Adjustment and Retraining Notification Act (“WARN”) was enacted in 1988 and became effective in 1989. In general, WARN offers protection to workers, their families and communities by requiring employers to provide notice in advance of covered plant closings and/or covered mass layoffs.

- the WARN Act requires businesses that have at least 100 employees to give 60 days advance notice of any mass layoff to affected employees, unions and local and state governments.
- To determine how many employees an employer “has” under the WARN Act, it must count all employees at every location, not just the location where the employees are being laid off.
- Layoff notice is required when an employer experiences a mass layoff in which at least 50 employees lose their job during a 30-day period.

Where there is a sale of a business

- In each situation, there is always an employer responsible for giving notice.
- If the sale by a covered employer results in a covered mass layoff, the required parties must receive at least 60 days notice.
- The seller is responsible for providing notice of any covered mass layoff which occurs up to and including the date/time of the sale.
- The buyer is responsible for providing notice of any mass layoff which occurs after the date/time of the sale.
- No notice is required if the sale does not result in a covered mass layoff.
- Employees of the seller on the date/time of the sale become, for purposes of WARN, employees of the buyer immediately following the sale. This provision preserves the notice rights of the employees of a business that has been sold.

Asset Sale

- While a technical reading of the WARN statute appears to require WARN analysis in an asset sale transaction, the statute has been interpreted to suggest that the WARN statute is unlikely to be interpreted in the most draconian manner so as to require notice even when there is no functional employment loss.
- Pursuant to WARN exceptions/exclusions from “employment loss” and the accompanying regulation, 20 C.F.R. § 639.6: This provision preserves the notice rights of employees of a business that has been sold, but creates no other employment rights. *Although a technical termination of the seller’s employees may be deemed to have occurred when a sale becomes effective, WARN notice is only required where the employees, in fact, experience a covered employment loss.*
- The Ninth Circuit has applied the same to circumstances whereby a sale of assets occurs rather than a sale of a business, as a going concern.

State-specific statutes

- Idaho has no state-specific statute for notice of layoffs.
- However, be aware that a number of states also have WARN layoff notice laws that may be stricter than the federal law and may apply to smaller employers.

Important Components of Employment Handbooks

At-will disclaimers

Acknowledgments

Progressive discipline policies

Workplace discrimination procedures

Confidentiality provisions

Social media

Anti-discrimination or equal employment opportunity policy

Computer, internet and e-mail use

Benefits

Workplace violence

Family and Medical Leave Act

Substance abuse policies

Harassment Policies, Investigations and Litigation

- **Scenario:** *Dawson v. Country Club of Rancho Bernardo* (unreported decision from California) – a case involving a country club's food and beverage manager's sexual harassment case against the Club and her supervisor.

Takeaways from *Dawson*

- The case serves as a reminder to employers to take sexual harassment complaints seriously and to strongly consider full outside investigation where appropriate.
- The need to fully investigate complaints is true whether the employee is harassed by a co-worker, a supervisor, a vendor or a customer

When Confronted with a Harassment Complaint

- Carefully and fairly follow the procedures set forth in the employer's policies
- Document, document, document – especially intervening performance issues
- Conduct prompt, thorough and fair investigations
- Know when to ask for help
- Separate the Complainant and the alleged harasser to prevent further harassment.
- Do not retaliate against an employee for making a complaint