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Workplace Policy Institute: What the New March 1 Sequestration Deadline May Mean for Federal Contractors

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With the January 1 passage of the American Taxpayer Relief Act of 2012, Congress addressed the expiration of the Bush-era tax cuts, but kicked sequestration down the road. To help our clients prepare for what might happen in two months, we are sending this updated alert regarding the potential effects of "sequestration" of federal funds on March 1, 2013.

Defense and other federal contractors stand to be significantly impacted by massive budget cuts that, by virtue of the new law, are now scheduled to begin on March 1, 2013, unless Congress acts before then to prevent them. If the sequestration of federal funds occurs, affected employers face potentially dramatic cuts in federal contracts and, as a possible result, may need to implement significant furloughs or layoffs, or even close some facilities. The prospect of sudden and dramatic downsizing raises important employment law concerns, including Worker Adjustment and Retraining Notification Act (WARN) compliance and employee eligibility for unemployment insurance benefits.

Drawing upon the input and advice of Littler attorneys with experience and insight in this area, Littler's Workplace Policy Institute has prepared this brief update for our clients. Please contact your usual Littler attorney for additional information.

The WARN Act

To avoid penalties, a required WARN notice generally must be given 60 days in advance (90 days in New York and the Virgin Islands) of a covered employment loss that occurs as part of a WARN-triggering job action (mass layoff or plant closing). A WARN notice must be specific, including such information as the employees who will be affected and the timing of the expected separation from employment. The notice may be given contingent on the occurrence of a future event, such as the potential but uncertain cancellation of a federal contract.

In light of the additional two months of sequestration breathing room provided by the tax bill, employers potentially affected by sequestration who have not previously provided contingent WARN notices may now wish to consider doing so. Employers who gave contingent WARN notice in October, effective January 2, will generally wish to issue new contingent notices effective in early

March. An optimal strategy will take into consideration both the developing facts regarding sequestration, and the considerations discussed in this Alert.

Many federal contractors have elected not to give contingent WARN notices, relying in part on the federal WARN unforeseeable business circumstances provisions. Under federal WARN, if layoffs are triggered by the occurrence of an unforeseeable business circumstance, such as a customer's unforeseeable cancellation of a contract, an employer may give less than 60 days advance WARN notice. This ability to shorten the notice period is available only if the circumstances requiring the employment reductions were not reasonably foreseeable at the time notice was otherwise due; shorter notice is required by the circumstances; the employer gives the WARN notice as soon as possible under the circumstances; and certain other technical requirements are met. Practitioners differ as to whether sequestration would qualify for shortened notice under federal WARN. Two government-issued guidance documents, however, have expressed support for the applicability of the unforeseeable business circumstances provision under these circumstances, and encouraged employers not to issue layoff notices unnecessarily.

On July 30, 2012, the U.S. Department of Labor (DOL) issued Training and Employment Guidance Letter No. 3-12, which offered guidance on the applicability of WARN to potential layoffs by federal contractors in the wake of sequestration. Among other things, the DOL's guidance letter concludes that, given the federal WARN unforeseeable business circumstances exception, employers would not be required to provide the full 60-day notice period and the obligation to provide notice would not be triggered until specific layoffs or facility closures became reasonably foreseeable. In addition to the DOL's guidance letter, the President's Office of Management and Budget (OMB) issued a memo on September 28, 2012, outlining additional measures intended to prevent the "potential for waste and disruption associated with issuance of unwarranted layoff notices." Specifically, the OMB stated that compensation, litigation and other costs resulting from federal WARN Act liability for those employers who followed the DOL guidance letter would qualify as allowable costs and be covered by the contracting agency.

Lawmakers and commentators have expressed concern and skepticism about the DOL's legal conclusions and the commitments made by the OMB. It is also not clear what degree of deference courts will give to the DOL's guidance letter, and employers may still find themselves subject to a court's individualized assessment of WARN compliance. The WARN-notice debate has also involved charges of political motivation on all sides. Some have charged that the DOL guidance letter was a partisan attempt to support the President, while others have said that employers who elected to issue contingent notices did so in an equally partisan attempt to elicit fear and criticism of the Obama administration.

The provisions of state mini-WARNs also must be considered as an employer decides whether to rely on providing shortened WARN notice, in reliance on the federal unforeseeable business circumstances provisions, in the event sequestration is actually invoked. Some state mini-WARNs do not include an express provision permitting such shortened notice. This is the case, for example, in California, Illinois, New Jersey and the Virgin Islands.

Temporary furloughs of less than six months do not trigger a notice obligation under federal WARN. If a temporary furlough continues for more than six months, it is treated as an employment loss for federal WARN purposes retroactively to the time the furlough commenced, thus making it too late to issue timely WARN notices. A temporary furlough may be extended, however, for another period of less than six months, based on unanticipated circumstances. The extent to which temporary furloughs are an exception to obligations under state mini-WARNs is less well defined.

Unemployment Insurance

Although there are variations from state to state, employees subject to layoff or unpaid leave following sequestration may be eligible for unemployment insurance benefits. Assuming that the layoff or unpaid leave lasts longer than the common seven-day waiting period, an employee in most states will be eligible for benefits, so long as the employee: (1) was working and being compensated prior to sequestration; (2) is no longer working and no longer being compensated as a result of the sequestration; and (3) otherwise qualifies for unemployment insurance benefits.

Some employers have inquired whether employees allowed to take accrued, paid leave during this time would still be eligible for unemployment benefits. If the employer allows employees to take accrued, paid leave under these circumstances and if the employee elects to use the paid time off, the employee generally will still be considered employed and, therefore, ineligible for unemployment compensation benefits. That analysis would change, however, if the employee elected to cash out, rather than use, any accrued leave.

Other Potential Issues with a Short-Term Layoff or Furlough

There are other legal issues that an employer must consider if forced to place employees on temporary furlough. It is advisable to provide advance notice to employees and have employees sign an agreement regarding the terms of the furlough. If the employer wishes the time to be unpaid, it should expressly inform employees, preferably in writing, not to do work while on the furlough. Making or answering calls or email, checking voicemail, drafting documents, and similar tasks are considered work and non-exempt and exempt employees must be compensated for the time spent in such activities. Non-exempt employees may be compensated in hourly or less increments depending on the employer's policy, while exempt employees generally must be paid their full salary for the entire workweek if they perform work at any time during the workweek.

Some state laws require advance notice of changes in pay (the longest being a 30-day advance notice obligation in Missouri), and it is unresolved whether placing employees on an unpaid furlough may trigger those notice obligations. Employers arguably may have an excuse for failing to provide required notice for reasons similar to those addressed above related to WARN obligations, but employers should provide as much notice as possible to maintain defenses to these notice obligations.Employers also may have obligations to bargain with unions representing furloughed employees and may have obligations under existing individual employment agreements that should be considered. Finally, employers should consider whether to maintain benefit coverage during periods of a furlough, and how to administer such benefits during periods of time where employees are not working and not paid.

Ilyse Schuman, a Shareholder in the Washington, D.C. office, and Michael Lotito, a Shareholder in the San Francisco office, are Co-Chairs of Littler Mendelson's Workplace Policy Institute (WPI), and Daniel Thieme is a shareholder in the Seattle office. WPI is devoted to developing and influencing workplace legislative and regulatory developments at the federal and state levels. WPI provides the employer community with advocacy services, including litigation support. In addition, WPI closely monitors important labor, employment and benefits policy initiatives and provides clients, trade associations, and policymakers with timely and thoughtful analysis of the practical implications of such proposals. If you would like further information, please contact your Littler attorney at 1.888.Littler or info@littler.com, Ms. Schuman at ischuman@littler.com, Mr. Lotito at mlotito@littler.com, or Mr. Thieme at dthieme@littler.com.