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Job Cuts Expose Employers To Liabilities:
Remembering WARN, the OWBPA and Other Employment Rights Laws

The Labor Department's Bureau of Labor Statistics recently reported more than 200,000 job losses so far in 2008. If they haven't already, many employers may soon find themselves having to make decisions about job cuts in the coming months. These decisions can expose employers to various liabilities. Focusing solely on finances and operations to the exclusion of employment laws can have a significant impact. By way of example, a week after filing for bankruptcy protection, ATA Airlines Inc. was hit with a putative class action brought by an employee who claimed ATA failed to give workers proper notice under the Worker Adjustment and Retraining Notification Act (WARN), *Kevin Batman et al. v. ATA Airlines, Inc. et al.*, case number 08-50208, in the U.S. Bankruptcy Court for the Southern District of Indiana.

WARN

What is WARN? WARN is a federal law that became effective in 1989. The law was designed to protect workers, their families and communities by requiring employers to provide 60 days advanced notice of covered plant closings and covered mass layoffs. The notice must be provided to either affected workers or their representative, such as a labor union, to the State dislocated worker unit and to the appropriate unit of local government. In general, an employer is covered by WARN if it has 100 or more employees.

An employer that fails to give proper notice is liable to each aggrieved employee for an amount including back pay and benefits for the period of the violation, up to 60 days. The employer may also be subject to a civil penalty up to $500 for each day of a violation.

Several states also have "baby-WARN" laws. These state laws vary as to the definitions of covered employer, plant closing and mass layoff, with regard to whom notices must be provided, and liabilities and penalties. Some states define covered employers as employers having as few as 50 employees. Examples of states having baby-WARN laws include California and Illinois.

OWBPA

When making job cuts, an employer may decide to offer an affected employee severance money or benefits in exchange for the employee agreeing to give up any claims he or she may have against the employer, including age discrimination claims. In these situations, employers must be careful in drafting the paperwork waiving these claims in order to ensure compliance with the Older Workers Benefits Protection Act (OWBPA). The OWBPA was passed in 1990 as an amendment to the Age Discrimination in Employment Act of 1967 (ADEA). The OWBPA was designed to protect older workers entering into agreements promising important economic benefits in exchange for waiving their ADEA rights. The OWBPA sets forth specific information that must be included in a waiver in order for the waiver to be valid. There are different requirements depending on whether the waiver is being requested of an individual or whether a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees . A group is simply more than 1 employee. If a waiver is not in compliance with the OWBPA and deemed invalid, the employee may sue the employer

for age discrimination and potentially keep the severance money and benefits provided to him or her by the employer. The employer receives no benefit or protection from the severance money and benefits it provided the employee.

Other Employment Laws

Finally, when making decisions about job cuts, an employer must not forget equal employment opportunity laws such as Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act of 1990, state human rights laws and city ordinances. These laws are designed to protect individuals based on protected characteristics such as race, color, religion, sex, national origin, disability and sexual orientation, from discrimination with regard to the terms and conditions of their employment, which includes firing decisions. Employers must ensure their decision-making with regard to job cuts does not take into account protected characteristics or have a disparate impact on individuals within a protected category, otherwise, they may expose themselves to liability for compensatory, punitive and equitable damages.

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