



For your information

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DOL Clarifies Federal Contractors' WARN Obligations in the Event of Sequestration

Unless Congress finds an alternative solution, the Budget Control Act of 2011 will trigger an estimated \$110 billion in federal spending cuts on January 2, 2013. These deep across-the-board reductions will affect federal contractors in defense and non-defense industries. Contracts may be terminated or reduced, plants may close, and layoffs or furloughs may occur in the event of sequestration. On July 30, 2012, the Department of Labor issued guidance on how employers can satisfy their WARN Act notice obligations in the face of sequestration-related layoffs.

Background

The Balanced Budget and Emergency Deficit Control Act of 1985, as amended by the Budget Control Act of 2011, set deficit targets and stipulated that a process known as sequester would go into effect if government spending exceeded those targets. The process imposes automatic cuts to federal programs to cut the deficit. Last year, as part of a deal to raise the nation's debt ceiling, Congress agreed on \$900 billion in spending cuts and charged a bipartisan Joint Select Committee on Deficit Reduction with finding an additional \$1.2 trillion in cuts over a decade. However, the committee failed to agree on a deficit-cutting plan.

Unless Congress and the administration find a way to avoid them, automatic cuts to defense and domestic programs will start on January 2, 2013. On August 7, 2012, President Obama signed into law the [Sequestration Transparency Act of 2012](#), requiring the administration to report to Congress within 30 days on how the administration will implement the cuts if the sequester occurs.

DOL Guidance

Generally, the Worker Training Adjustment and Retraining Notification (WARN) Act requires private sector employers with at least 100 employees to provide at least 60 days' advance notice of covered-plant closings or mass layoffs to affected employees, their collective bargaining representatives, and state and local governments. The Department of Labor's (DOL's) regulations provide certain limited exceptions to the 60-day requirement, including an exception for "employment losses" caused by unforeseeable business circumstances. For this purpose, an employment loss is a termination (other

than for cause, voluntary resignation, or retirement), a layoff exceeding six months, or a reduction in hours of more than 50% in each month over a six-month period. In unforeseeable business circumstances, the regulations permit less than 60 days' notice.

On July 30, 2012, the DOL's Employment and Training Administration issued [guidance](#) on the WARN Act's applicability to sequestration-related closings or layoffs and how government contractors can satisfy their statutory notice obligations. The guidance recognizes that sequestration may be avoided altogether if the budget issue is resolved. In the event of sequestration, a number of unknowns would make it difficult for a contractor to identify affected employees and provide accurate WARN notices. For example, some contracts would be considered exempt and others nonexempt. Contracts could be terminated or simply cut back. Layoffs could be immediate or implemented over time. According to the DOL, these unknowns, when taken together, amount to "business circumstances that were not reasonably foreseeable as of the time that notice would have been required." Citing relevant case law, the DOL concluded that, under these circumstances, federal contractors are not obligated to provide WARN notices to their employees 60 days in advance of the sequestration order.

In an August 2, 2012 [letter](#) to the Secretary of Labor, the Chairmen of the House Committee on Education and the Workforce, the Subcommittee on Workforce Protections, and the Subcommittee on Health, Employment, Labor and Pensions expressed concern that the DOL's recent guidance may mislead contractors with respect to their WARN Act obligations and add "greater uncertainty to the many questions surrounding sequestration." On August 3, Sen. Michael Enzi (R-WY) sent a [letter](#) to Secretary Solis raising similar concerns as well as questions about the DOL's outreach to states that have their own WARN Acts or other laws that impose obligations on employers prior to plant closings and mass layoffs. Because many states (including New York and California) have their own mini-WARN Acts, contractors potentially affected by sequestration must be prepared to comply with federal and varying state requirements.

Conclusion

Federal contractors and their employees face uncertainty as to the potential impact of sequestration on existing contracts and jobs. In view of that, the DOL's guidance provides that the WARN Act's unforeseeable business circumstances exception would apply to plant closings or mass layoffs that occur before or in the wake of sequestration. Even though the DOL would allow the exception, an individual could challenge a contractor's failure to provide 60 days' advance notice of the closings or layoffs in federal court. Whether or to what extent courts will defer to the DOL's guidance remains to be seen.