

# Article Reprint

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## Valuing Payments In Lieu of Warn Notice

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The Worker Adjustment and Retraining Notification Act (the WARN Act) generally requires an employer with 100 or more full-time workers to provide 60 days' notice to employees who will be affected by a mass layoff or plant closing at a single site of employment. If an employer violates the notice requirement, each terminated employee is entitled to damages equal to: 1) back pay; and 2) benefits under employee benefit plans subject to the Employee Retirement Income Security Act of 1974 (ERISA), for the period of such violation up to 60 days (which, according to a majority of courts, is calculated based on the number of working days in such period). The WARN Act's notice requirement does not, however, mandate that employers continue to employ employees during the notice period, and the regulations promulgated by the U.S. Dept. of Labor (the DOL) explicitly state that the WARN Act does not dictate the nature of work to be performed - or whether work must be performed - after notice is provided. Further, the DOL has recognized that providing employees with full pay and benefits in respect of the 60-day

notice period effectively precludes any damages under the WARN Act.

As a result, in lieu of providing notice of termination, many employers pay employees an amount equal to base salary and benefits for 60 days, and terminate them immediately. As a technical matter, this approach is not impermissible; nonetheless, employers often fail to take into account all elements of compensation and benefits when valuing payments in lieu of notice. This article addresses certain elements of such payments that are often overlooked by employers.

### "Back Pay" Includes More Than Simply Wages

Under the WARN Act, damages for failure to provide notice include "back pay" for the notice period, and thus the sufficiency of any payment in lieu of notice must focus on the scope of "back pay." The WARN Act and regulations promulgated thereunder do not, however, define "back pay" and the courts have, therefore, been tasked with delimiting the scope of the term. Courts have uniformly included wages

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as an element of back pay, but many have further extended its reach. Relying on the definition of "back pay" in other federal statutes such as Title VII, the Age Discrimination Employment Act and the National Labor Relations Act, certain courts have found that "back pay" also encompasses other elements of compensation that an employee would have earned had he or she continued to work during the notice period. For example, in *United Mine Workers of Amer. Int'l Union v. Midwest Coal Company*, No. TH 99-C-141-T/H, 2001 U.S. Dist. LEXIS 18180 (S.D. Ind. Aug. 31, 2001), the district court held that, in addition to wages, aggrieved employees were entitled to overtime, vacation pay and birthday pay. The court emphasized that the calculation of damages under the WARN Act should be "based on the wages the employee would have received absent the plant closing or [with] deferral of the layoff until after the 60 day notice period." Similarly, in *Local Joint Executive Board of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152 (9th Cir. 2001), the court stated that the WARN Act is equivalent to "business interruption insurance" and provides employees with a "stream of income" for the 60-day notice period. The court noted that the source of such "stream of income," whether paid by the employer or by customers through tips, or as regular or holiday pay, was irrelevant. The court acknowledged, however, that in order to receive damages encompassing such other compensation, terminated employees must be able to prove the amount of tips they would have received and their entitlement to holiday pay. In contrast, however, in *United Mine Workers of America v. Eighty-Four Mining Co.*, 150 Fed. Appx. 345 (3rd Cir. 2005), the Third Circuit held that vacation, holiday and birthday pay are not components of "back pay." The court noted that the computation of "back pay" focuses on historical compensation and is not concerned with pay that the employee would have received during the notice period.

Therefore, while the courts are not in complete agreement, when determining the appropriate value of "back pay," employers should give consideration not only to wages, but all other forms of compensation typically received by the affected employees.

### **"Benefits" May Include Those Under ERISA and Non-ERISA Plans**

Unfortunately, the compensation related components of "back pay" only present half the story regarding payments in lieu of notice. Under the WARN Act, employers are also required to provide employees with payment in lieu of benefits under plans subject to ERISA. Furthermore, some courts have held that, while not explicitly required under the WARN Act, benefits under plans not subject to ERISA can be an element of "back pay," which must be included in the payment in lieu of notice.

#### **Benefits Under Plans Subject to ERISA ("ERISA Plans")**

The WARN Act provides that a violation of the notice provisions will entitle an aggrieved employee to benefits under an employee benefit plan described in ERISA (including the cost of medical expenses incurred) during the period of any violation. Thus, in providing payment in lieu of notice, employers must provide employees with a payment equal to the value of benefits under plans subject to ERISA for the notice period.

#### **Health and Welfare Benefits**

Health and welfare plans are one example of plans subject to ERISA that must be included in any payment in lieu of notice. For employers with insured plans, this amount would likely equal the cost of insurance premiums that the employer would have paid during the 60-day period and the cost of medical expenses incurred during the notice period that would have been covered

had the affected employee continued to be employed during such period. Alternatively, if an employer is self-insured, it will likely need to provide a payment equal to not only the actual costs incurred by the affected employee during the 60-day notice period (which could be zero), but also the actuarial cost of coverage for such individual under the plans. As a result, employers should give consideration to any benefits under their health and welfare plans and the structure of such plans when determining the amount of the payment in lieu of notice, recognizing that it may not be sufficient solely to pay the medical or disability costs incurred (if any) during the notice period.

#### **Retirement Benefits**

In addition to health and welfare benefits, aggrieved employees may also be eligible to receive benefits that they would have received during the notice period under pension and other retirement plans, and employers should incorporate the value of any such benefits into any payment in lieu of notice. While there is little case law discussing the valuation of such benefits, some courts have discussed various resolutions agreed upon by employers and their former employees. For example, in *Jones v. Kayser-Roth Hosiery, Inc.*, 748 F.Supp. 1292 (E.D. Tenn. 1990), the parties agreed that the aggrieved employees were entitled to a cash payment and recognition of a specific level of employer contributions in lieu of their benefits under two retirement plans. Further, in *Association of Western Pulp and Paper Workers v. Grays Harbor Paper Company*, No. C93-5226-B, 1994 U.S. Dist. LEXIS 13094 (W.D. Wash. March 14, 1994), the company continued employees' accrual of service credits for the purposes of its pension plan for the 60-day period. Accordingly, employers should consider whether it is possible to provide continued participation in applicable retirement plans during the notice period or, if not possible pursuant to the terms of the applicable retirement plan,

confirm that pension-related benefits are included in any payment in lieu of notice.

#### **Plans Not Subject to ERISA ("Non-ERISA Plans")**

The WARN Act explicitly provides aggrieved employees with payment equal to the amount of benefits received under ERISA plans; it does not, however, discuss an employee's entitlement to benefits under non-ERISA plans. Some commentators have concluded that the lack of discussion of non-ERISA plan benefits implicitly precludes benefits under such plans from being included as damages under the WARN Act. Other commentators, however, have indicated that benefits based on non-ERISA plans are an element of "back pay" under the WARN Act, and some courts have agreed.

#### **Vacation Pay**

For example, vacation policies are one common form of non-ERISA plan. In its *Employer's Guide to Advance Notice of Closings and Layoffs*, the DOL has indicated that vacation pay "may be considered wages or a fringe benefit in some situations." Unfortunately, this statement provides little clarity on the availability of vacation pay as damages under the WARN Act and the courts have provided little more guidance. In *United Mine Workers of America v. Eighty-Four Mining Co.*, 150 Fed. Appx. 345 (3rd Cir. 2005), the Court of Appeals held that damages under the WARN Act do not include vacation pay because such pay is provided pursuant to a non-ERISA plan. The court held that any contrary interpretation of the WARN Act would run counter to the plain text of the statute which specifically refers to benefits under ERISA plans. In contrast, in *United Mine Workers of America Int'l Union v. Midwest Coal Company*, No. TH 99-C-141-T/H, 2001 U.S. Dist. LEXIS 18180 (S.D. Ind. Aug. 31, 2001), a district court held that vacation pay, while a non-ERISA benefit, is within the definition of "back pay." Therefore,

while the courts have not provided clear guidance, employers should determine any vacation that would have accrued to affected employees during the notice period and consider incorporating the value of any such accrual into any payment in lieu of notice.

### **Equity Compensation**

Given the growing use of equity compensation, employers must also consider whether the failure to permit affected employees to participate in equity incentive plans during the notice period could result in damages under the WARN Act. While equity compensation plans typically are not subject to ERISA, the benefits the plans provide could potentially be considered an element of "back pay." We are not aware of any cases addressing this issue at present. Nonetheless, the growing use of equity compensation will no doubt push this issue to the forefront and employers should at least consider including continued participation and vesting of equity awards in any payment in lieu of notice.

### **Conclusion**

In sum, employers must be aware of all elements of compensation that may be included as damages under the WARN Act and should take a proactive approach when providing pay in lieu of notice. For example, an employer should review its current compensation and benefit programs to anticipate the effect of a plant closing or a mass layoff. By doing this, the

employer may be able to reduce any payments required in connection with the WARN Act by carefully drafting or amending severance or benefit plans to make clear that any obligations under such plans do not apply in the event of a plant closing or mass layoff under the WARN Act. Second, prior to any decision to make payments in lieu of notice under the WARN Act, an employer should assess the value of all forms of compensation and benefits to determine the appropriate components of such payments. It may be necessary for the payments in lieu of notice to take into account not only the wages, but also other forms of cash compensation, including tips, overtime and holiday pay, and other benefits, including payment of accrued, but unused vacation and participation in retirement and equity compensation plans. Given the variability of each jurisdiction's interpretation of the WARN Act and the growth in the number of similar, and often more onerous, state laws, employers should discuss these steps thoroughly with counsel before implementing a covered plant closing or mass layoff. Following such discussions, implementation of the above steps by employers should minimize the risk of WARN Act litigation from disgruntled former employees.

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