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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Companies Face Uphill Battle For Pandemic Layoff Coverage

By **Shane Dilworth**

Law360 (June 15, 2022, 11:28 AM EDT) -- Businesses facing putative class actions over workforce reductions spurred by the COVID-19 pandemic are unlikely to obtain insurance coverage for the suits, legal experts say, pointing out that exclusions in general liability, directors and officers and employers' liability policies could relieve carriers of their obligations.

Since the pandemic struck the U.S. in March 2020, a number of companies have faced proposed class suits under the WARN Act, which requires employers with 100 or more workers to provide 60 days notice before a mass layoff unless the reduction is the result of a natural disaster or unforeseeable business circumstances. If a company is basing the layoff on an unforeseeable business circumstance, the statute requires the employer to prove that its decision was reasonable.

"The pandemic forced many employers to make difficult decisions about the permanence of furloughs or shutdowns," Latosha M. Ellis of Hunton Andrews Kurth, who represents policyholders, told Law360. "Some of those decisions were not black-and-white, were made in a significantly constricted time frame and were the result of a gradual and amorphous series of events — such as government orders."

To this point, courts have split in early rulings on the viability of pandemic-era WARN Act claims. In a March 18 decision, a Florida federal judge denied a promotional product supplier's request to toss a putative class action brought by former employees, finding that more evidence was necessary to determine if the WARN Act's natural disaster exception applies. Conversely, a Delaware bankruptcy judge found on March 21 that a home furnishing retailer didn't violate the act when laying off 700 workers with only two days notice, saying the layoff was in response to an unforeseeable business circumstance.

While insurance coverage disputes over WARN Act suits have yet to crop up in court, experts say companies face an uphill fight for coverage, given a panoply of policy exclusions and conditions that could apply to claims brought under the statute.

Clear Exclusions

Michael Miguel of McKool Smith told Law360 the litany of lawsuits spurred by the pandemic remind him of the "most precious thing" he learned as a first-year law student: "The limits of liability lie within the imagination of the plaintiff's bar."

"A plaintiff's lawyer will think up a new way to skin a cat," said Miguel, who represents policyholders.

"There's always going to be someone thinking outside the box about ways to impose liability."

Unfortunately for companies embroiled in WARN Act litigation, though, the theories of liability asserted in these cases are not the sort that would generally be covered by their various insurance policies.

Legal experts say a workforce reduction that could elicit allegations of WARN Act violations would not trigger coverage under a typical commercial general liability policy, which covers only claims over accidental occurrences resulting in bodily harm or property damage. Those are generally absent from these cases.

Even if a layoff event that runs afoul of the WARN Act could be considered an occurrence, legal experts explain, carriers could attempt to evade coverage under the standard CGL exclusion for expected or intended acts.

Perhaps even more troublesome for companies, two commonly held types of specialty insurance, employment practices liability, or EPL, and directors and officers, or D&O, policies, have carve-outs specifically tailored to address suits brought under the WARN Act.

Eric Cheng of Wilson Elser Moskowitz Edelman & Dicker LLP, who represents insurers, told Law360 these exclusions have been around for some time after the statute's enactment in 1988.

"Generally, exclusions are necessary because the type of policy was never intended for certain risks," Cheng said, explaining that provisions relieving insurers of the obligation to cover a suit are often created as a remedial measure.

Hunton Andrews' Ellis said the WARN Act exclusion can be sweeping, especially when it comes to D&O policies.

"Courts are holding that employment claims and fiduciary duty claims are the same claim," Ellis explained, "which means the WARN Act exclusion can be triggered under D&O policies with just an allegation of breach of fiduciary duty against a company's officers and directors for causing a mass layoff."

Beyond the WARN Act exclusion, companies could face additional hurdles to securing coverage under EPL policies for any settlement or judgment paid to the plaintiffs. According to Cheng, disputes could arise over coverage for penalties imposed against a company found liable for violating the act. Companies guilty of violating the WARN Act could be ordered to provide back pay to employees in addition to other statutory penalties. Cheng pointed out that some states refuse to allow insurers to cover punitive damages or statutory penalties as against public policy.

Windows to Limited Coverage

Companies may, however, be able to obtain limited coverage for WARN Act suits under some circumstances, according to experts. Ellis said there could be some wiggle room to plead around the exclusion for violations of the statute.

"It will depend on the policy language, but generally the policyholder should try to demonstrate that damages under the EPL or D&O policy are distinct from those damages associated with the laid-off employees," she said.

In addition, on the front end, provisions in some EPL and D&O policies may obligate an insurance carrier to fund a company's costs to defend a WARN Act suit, even if the carrier is ultimately not liable for any settlement or judgment, according to experts. Accordingly, the policyholder can "argue entitlement to defense costs," Ellis said.

Wilson Elser's Cheng said that regardless of the lack of case law on coverage for WARN Act suits, carriers should not be quick to shrug off the duty to defend despite the availability of exclusions. Carriers "usually have panel of defense counsel with agreed upon rates, compared to the insured who may decide to hire the most expensive firm available," he said.

"The usual dilemma faced by the carrier is whether to deny coverage outright and lose control of the choice of defense counsel," said Cheng. "There is a risk of having to reimburse the attorney's fees incurred by the insured if the carrier loses the coverage dispute."

--Editing by Roy LeBlanc.
