

John Wright: Welcome to Business Better; a podcast designed to help businesses navigate the new normal. I'm your host, John Wright. After serving nearly 15 years as senior vice president and general counsel at Triumph Group Incorporated, a global aerospace components supplier, I'm now a member of the Securities and M&A groups at Ballard Spahr, a national law firm with clients across industries and across the country.

John Wright: On today's episode, we'll be discussing the next wave in employer liability, as employers work to bring employees back to the physical workplace, including claims about workplace safety, vaccination policies, overtime claims arising from work from home, and activity created by the new Biden administration, Labor and Employment Policies. Leading this discussion is Louis Chodoff, a partner in Ballard Spahr, New Jersey office. He handles labor and employment law counseling and litigation associated with harassment, discrimination, wage and hour, whistleblower, wrongful discharge, and restrictive covenant disputes.

John Wright: Louis is joined by two of his colleagues, Tara Humma, an associate in Ballard's New Jersey office, who defends clients in all phases of employment litigation from initial pleadings, discovery and motion practice to trial preparation and appeals; and Karli Lubin, an associate at the firm's litigation department in the Philadelphia office, who focuses her practice on labor and employment litigation, as well as on investigation and reports in various areas of labor and employment law, and conducting client treading on compliance with federal state and local employment laws. So with that, I'll turn the program over to Louis.

Louis Chodoff: Welcome to the next wave of Employer Liability Podcast. My name is Louis Chodoff, I'm a partner at Ballard Spahr. I'm resident in our New Jersey office and the labor and employment group. I'm happy to be joined today by my colleagues, Tara Humma, who is with me in the New Jersey office in the labor and employment group, and Karli Lubin, who is in the labor and employment group. And she's resident in the Philadelphia office.

Louis Chodoff: As many of you are aware, I'm sure, we've seen a wave of pandemic related lawsuits from months and months now. Some of you may also be aware with actions such as lay-offs comes an uptick in unhappy employees, which in turn, may result in an uptick in employment litigation for employers, which we have definitely seen in the past few months. Now with employers trying to bring employees back or continuing to work with remote employees and trying to bring employees back, there's a host of other potential issues with onboarding that can lead to other claims against employers.

Louis Chodoff: And even those employers that are not planning on onboarding employees anytime soon, but are continuing to work remotely, there are a variety of issues and concerns that employers have with those types of work situations and we'll address potential claims that arise in those contexts as well. So for example, in the past few months and what we expect to continue for the foreseeable

future, lawsuits related to the COVID-19 pandemic are in the following categories... Again, when this first started employers were contemplating lay-offs and either individual lay-offs or mass lay-offs.

Louis Chodoff: So with that comes more unrelated issues in plant closings, and what types of notifications must be given to employees in those contexts. Also with regard to ADA failure to accommodate disability and age discrimination cases, along with other types of discrimination claims, some do occur in the context of mass lay-offs. Some in the context of employees who might refuse to return to the physical workplace, because they're concerned about contracting the virus, or other situations where employees are requesting accommodations in order to return to the workplace.

Louis Chodoff: And we're also seeing lawsuits arise in the federal state and local paid leave laws. Another area that's burgeoning lately are safety complaints by either retaliation or whistleblower actions. These would be in the OSHA context where an employee might file an OSHA complaint and then OSHA investigates. Sometimes these occur when employees either refuse to return to work, employees who do return to work, make complaints about not feeling safe in the workplace for some reason, perhaps the employer is not cleaning properly or implementing other protocols, which they should in order to maintain a safe workplace.

Louis Chodoff: We're also seeing many wage and hour claims arise, particularly with the remote work place. So for example, non-exempt employees who may be doing work when they're not technically "on the clock." There's various record keeping and timekeeping issues that may arise with keeping track of employees' daily or weekly hours of work tracking overtime, for example. Other issues may arise where employees may work through their scheduled break times. There's other issues regarding productivity and monitoring issues that employers are dealing with in the wage and hour context.

Louis Chodoff: We expect these lawsuits to continue and we expect to see vaccine related claims joining the list of COVID-19 related lawsuits, now that the vaccine is beginning to be rolled out and employees are beginning to get vaccinated. So we also wanted to mention possible claims with the Biden administration coming into shape now. We kind of have the triple whammy effect of your general COVID 19 related lawsuits, now that may arise in the context of employers requiring vaccines and now different types of lawsuits, which may arise now that the Biden administration has taken hold.

Louis Chodoff: And with the latter, for example, with the Biden administration, not only is there the possibility of increased lawsuits, but we expect to see more vigilant enforcement by your state local and particularly federal agencies such as OSHA, the Equal Employment Opportunity Commission, Department of Labor. So we think with this increased enforcement effort, we're going to see an uptick in litigation. For example, we expect OSHA, which has been relatively quiet thus

far, to send out increased guidance as to how employers need to safeguard their workplaces for bringing employees back. We also expect to see activity in the wage and hour space, including minimum wage increases.

Louis Chodoff: We see that the Biden administration has just proposed a \$15 minimum wage for federal employees. We expect that to be the wave, \$15 an hour with States, overtime rule changes and new federal wage theft provisions. President Biden has also promised to sign the protecting the right to organize the ProAct, which will enhance the ability of unions to organize workers. I think one of the areas that is in the top of the mind for employers right now, are vaccines to get back to this issue. Karli, what do you think employers need to keep in mind when considering how vaccinations affect their workplace and what types of issues and trouble can employers get themselves into with these vaccine programs?

Karli Lubin: Thanks, Lou, I think there's a number of considerations when it comes to vaccines. And I think vaccinations will impact the workplace in a variety of ways, whether employers choose to implement a mandatory program or sort of take a more hands-off approach. For employers who implement a mandatory vaccine policy, we are expecting to see an uptick of discrimination claims under the ADA and Title VII. Under the ADA, employers are required to reasonably accommodate workers who cannot get the vaccine due to a disability.

Karli Lubin: Similarly, under Title VII, employers must accommodate employees who can't get the vaccine due to their sincerely held religious belief. And I think it's important to note for Title VII, the sincerely held religious belief of the employee doesn't need to be something that's widely accepted or even widely known about. The standard is that it's sincerely held and that it's religious within the employees own scheme of things.

Karli Lubin: So I think that will be forefront for employers as far as accommodations go. There is an undue hardship require analysis under each of these laws, which employers do not need to accommodate an employee's disability or religious belief if it poses an undue hardship. And sometimes this can mean extreme difficulty or expense or increased safety risks to the employee or others at the workplace. So all of that will need to be considered in the rollout of a mandatory vaccination policy. How employers are planning to accommodate employees with disabilities or sincerely held religious beliefs, which prevent them from obtaining the vaccine.

Karli Lubin: Sort of in tandem with this, there's also increased risk of discrimination concerns for workers wanting to return to the office or the physical workspace and how people who aren't getting vaccinated, affect the safety of those workers and how accommodations should continue to be this interactive process when considering access to the workplace. And just practically speaking, employers need to sort of think through the timing of when they expect compliance for mandatory vaccination policy.

- Karli Lubin: Right now there's stages of a rollout of the vaccine of who can get vaccinated when, and that will tell employers maybe more than they already know and more than they would want to know about employees. So those practical considerations of when to mandate compliance, is it within a reasonable time after vaccination is available and sort of, how do you document that, records related to vaccination must be kept confidentially, that is, confidentiality of medical records requirements will apply to employee vaccination information, and as well as to information provided about a disability that triggers an exemption from the vaccine requirement.
- Karli Lubin: So employers need to be cognizant that these records will need to be stored separately from the personnel file and then access must be limited. In addition, there are also likely protections for employees who oppose the vaccine. For example, workers who join together to oppose vaccination or mandatory vaccination policy, could be engaged in protected concerted activity, and any action taken based on that opposition could give rise to a retaliation claim.
- Karli Lubin: Similarly, state lawful off duty conduct statutes will come into play and could increase risk of retaliation claims for employees who maybe publicly opposed the vaccine outside of work. And should they suffer an adverse action at work, they could claim that this action is based on their refusal to comply with a mandatory vaccine policy, but instead because they were vocal outside the workplace about their opposition to the vaccine. So all of these are considerations that an employer needs to be cognizant of in a vaccination policy in the workplace, but on the flip side of mandating the vaccine, employers also have a duty to maintain a safe workplace for their employees, under OSHA.
- Louis Chodoff: Thanks, Karli. I got one comment, and then one follow-up question for you. So the comment is, you mentioned that employees that band together and oppose the vaccination could be engaged in concerted protected activity, which is absolutely true. Just to note for employers out there, many employers believe that these protections, which come under the national labor relations act, only apply to unionized employers, but that is not true. Section 7 rights under the National Labor Relations Act apply to all employers, whether you're union or not.
- Louis Chodoff: So if you have non-union employees who are banding together to make some type of complaint about workplace conditions and the safety of the vaccine may be one of them, they could be engaged in concerted protected activity and any disciplinary action that you take against that employee then could be deemed as retaliation under the National Labor Relations Act. And the followup question is, rather than mandating vaccinations, I've seen some employers get kind of creative in this space and they are now offering incentives.
- Louis Chodoff: I've seen things such as \$25 of pay, giving them a gift card to Starbucks, pay for a few hours, days off after they take the vaccine as incentivizing the employees

to take the vaccine rather than mandating it. What are the legal issues you think that are related to such a program of incentives?

Karli Lubin: Right. So I think two of the foremost issues that come up when thinking about incentive programs is first going back to employees who cannot get the vaccine based on a disability or a sincerely held religious belief, that could give rise to a claim of discrimination, and also sort of how you handle those payments to employees, if the incentive is compensation based. So for employees who cannot get the vaccine based on a disability or religious belief, probably the easiest way to sort of nip that liability is to offer those same incentives to those employees, as to other employees who are able to get the vaccine.

Karli Lubin: Then similarly, those compensation questions whether or not those incentives are included in the regular rate of pay, that's something that also employers need to consider.

Louis Chodoff: Thanks, Karli. As I mentioned in the opening, safety has been a major theme in COVID related litigation. Tara, what is an employer's obligation to its workers in this context and keeping them safe, and what types of lawsuits have we seen in this context?

Tara Humma: Yes, thanks Lou. There are a number of sources businesses must be considering with regard to safety standards and COVID. I know a lot of employers are worried about some of the more recent issues like the vaccine issue that we just talked about and also what the new administration is going to be doing. But I think that safety plays into that second category with regard to the new administration, especially when we talk about OSHA safety issues for instance. As many of the people listening know, OSHA is the Occupational Safety and Health Administration, which is the federal agency that deals with safety issues in the workplace.

Tara Humma: The OSHA act has what we call a general duty clause, which states that employers must provide workplaces that are free of known dangers that could harm their employees. If an employee feels they are being exposed to the coronavirus at work, OSHA has encouraged them to talk to the employer as a first step.

Tara Humma: And OSHA does generally recognize that employers can require employees to come to work during the pandemic. Although there is an exception, for instance, if the employee has a reasonable belief that they're facing death or serious injury related to the coronavirus. The employee has to have unsuccessfully tried to get their employer to correct the condition, and there has to have been insufficient time for the employee to file an OSHA complaint.

Tara Humma: So employees can file OSHA complaints related to safety issues with regard to the coronavirus, and in addition to that, if employees are retaliated against for complaining, they may be able to file a whistleblower protection complaint,

which we have seen. OSHA does have guidance out related to COVID safety measures based on the type of risks within the workplace, and employers should be sure to conduct risk and hazard assessments and create plans to address such hazards related to COVID.

Tara Humma: Another thing employers need to be thinking about with regard to OSHA and COVID liability are OSHA reporting requirements. So specifically reporting COVID cases in the workplace, or purposes of OSHA's record keeping requirements. COVID-19 is a reportable illness, if it is a confirmed case and the case is work-related. And then in addition, the case must involve one or more of the general recording criteria in the OSHA regulations, such as requiring medical treatment beyond first aid and or missing time from work.

Tara Humma: Employers investigating whether COVID case is work-related, should be doing a full investigation and considering how the employee contracted the virus and OSHA will look into the reasonableness of the employer's investigation into the work relatedness of the COVID case. OSHA will look into the evidence that was available to the employer, and will look into the evidence that a COVID illness was contracted at work, to determine whether an employer is appropriately reporting COVID illness in the workplace.

Tara Humma: So employers should really be careful about recording COVID illness within the workplace and should be making sure that they're doing an appropriate investigation in order to make a determination as to whether a COVID case is recordable under OSHA. With regard to OSHA since the spring of 2020, so almost a year now, there have been thousands and thousands of complaints filed with OSHA, and very few citations issued. OSHA has been criticized about this, and some think that OSHA has not been as proactive in addressing COVID concerns as it should have been throughout pandemic so far.

Tara Humma: So to circle back with regard to that new administration, as you mentioned earlier, Lou, businesses can and should expect to see much greater enforcement of federal safety guidelines, including OSHA requirements. So employers now more than ever, I think, need to make sure that they are in compliance with OSHA requirements, taking their reporting obligations seriously, as well as taking the general duty clause and employee complaints seriously.

Tara Humma: Employers also have many other sources of safety, guidance and requirements such as CDC guidance, state and local health department guidance, and state and local executive orders for instance, CDC guidance, as well as the state and local orders and guidance are updated very frequently, especially with regard to business restrictions, reopening restrictions and travel restrictions, for instance.

Tara Humma: With regard to safety concerns, we've seen employee lawsuits alleging whistle blowing, so retaliation for employees who have complained where their employer is allegedly not following the safety guidance, whether it be the CDC guidance, the state and local orders. So we've seen a number of these lawsuits

come up over the months of the pandemic. In addition to whistleblower lawsuits, there's the potential for OSHA and state health agency complaints and lawsuits and investigations, as well as Karli mentioned previously, unfair practice charges and retaliation claims under the national labor relations act, if employees are banding together and engaging in protected concerted activity related to safety issues.

Tara Humma: So again, I think the bottom line here is just that employers and businesses really need to be careful to make sure that they are in compliance with all recommended safety guidance, OSHA guidance, CDC guidance, state and local guidance, orders, and laws in the jurisdictions where they're operating, and to make sure that they are taking employee complaints about these issues very seriously and addressing them appropriately before making any hasty employment decisions.

Louis Chodoff: So Tara, one of the issues that I get asked about a lot by clients in this safety spectrum is what about employees with disabilities and other employees who may be at higher risk either that are currently in the workplace or with thoughts of onboarding? What are your thoughts on those issues?

Tara Humma: Sure. Age and disability discrimination in particular and failure to accommodate claims have been at the forefront of employer COVID related litigation. Based on the latest statistics I've seen this category of charges and lawsuits has been the highest with regard to employer COVID litigation. So employers really need to be sure that they're considering all requests for accommodations and engaging in the interactive process with employees and applicants before making any employment decisions. As well, I have been also dealing with these issues with a number of clients on an almost daily basis and places where we see issues arising in particular, are requests to continue working remotely based on underlying conditions or disabilities and risk factors. We've also seen requests for some other type of accommodation based on underlying disabilities or health conditions, for instance.

Tara Humma: We've seen requests for leaves of absence on the basis of disabilities. And then also employers need to be careful about policies, preventing employees, who have or are perceived to have underlying conditions or risk factors, which would include advanced age from returning to the workplace. One issue that I have personally not dealt with, but that I think could come up in dealing with COVID-19 is where an employee says that COVID-19 is actually a disability requiring an accommodation for them.

Tara Humma: Another thing to note is that while we've heard all along that a generalized fear of COVID is not protected under the Americans with disabilities act, employees with anxiety disorders, for instance, could require a reasonable accommodation or at least require that an employer engage in the interactive process under either the ADA or state law related to disability discrimination. So again, I think employers in this space must just be extra vigilant about taking employee



requests or applicant requests into consideration and also making sure their policies are lawful in making employment decisions.

Tara Humma: Also in talking about discrimination, we've heard from the new administration that president Biden is planning to issue a memo, directing the Department of Housing and Urban Development, also known as HUD to promote equality among housing and disavowing discrimination against Asian-Americans. And this came to the forefront early in the pandemic when Asian Americans said that they were being harassed due to the fact that the virus originated in China. So that's just something else to be aware of with the change in the administration, as I know that's been something that a lot of businesses and employers are thinking about trying to be proactive in considering what may come up as a result of the change in the administration.

Louis Chodoff: Thanks, Tara. I think one of the more interesting points you've raised is this notion of whether COVID-19 is itself a disability. And I had a recent case where we were successful on a motion to dismiss not on the issue of whether COVID-19 itself was a disability, but the employee was claiming that he had come into close contact with somebody who was positive for COVID-19. And that that his risk of exposure was the basis for his termination.

Louis Chodoff: In other words, he was claiming that the employer was perceiving him as being disabled because he had come into close contact with somebody that had tested positive for COVID-19. And we were successful on a motion to dismiss in federal court where the judge, again, not determining whether COVID-19 itself was a disability, but he held that the risk of exposure was not a protected disability under the Americans with Disabilities Act. So another issue that we see arise in this kind of worker-safety issue is the extent to which claims related to contracting the virus in the workplace are covered by workers' compensation. Karli, what have you been seeing in this area?

Karli Lubin: Sure. Workers' compensation is an employee's exclusive remedy for injuries arising within the scope and course of employment. So generally an employee who contracts COVID in the workplace will be covered by workers' comp. On its face, that's simple enough, but in practice, tracking where an employee was exposed to COVID is not as easy. So some States like New Jersey have created a rebuttable presumption that workers' compensation covers COVID-19 cases for essential employees. So essentially a presumption that an essential employee, if they got COVID, that they got it at work.

Karli Lubin: Similarly, going back to the mandatory vaccination policies, adverse reactions to the vaccine and administration issues, injuries may fall within workers' compensation for a mandatory vaccination policy because in that context, most likely such injuries would arise in the course and scope of employment.

Tara Humma: And if I may, I did also want to add that some states' workers' compensation laws do provide ways to get around the exclusivity of workers' compensation for



employees. For instance, if an employer has engaged in intentional conduct, which caused the injury or illness. And I think it's yet to be seen whether a failure to comply with all of those safety regulations and safety guidance, and safety orders related to COVID, whether that could get an employee over the intentional act, exceptions convened in some states' workers' compensation laws. The suits have been filed. I just think this is important as it reinforces the idea, again, as we've been saying that employers really, and businesses really need to be making sure that they're in compliance with the safety guidance and regulations and executive orders in the jurisdictions that they're operating in.

Louis Chodoff: Great. So in addition to protecting the safety of employees and having obligations with regard to your employees, could businesses also find themselves in hot water with regard to protecting the safety of customers or other third parties that may have access to their premises? Tara, what are your thoughts on that?

Tara Humma: Yup. I mean, I think there definitely is a concern that businesses will face suits from third parties, including customers, instance vendors or even family members of employees for negligence. This is another reason why I think it's so important for employers again, to be following all of the safety guidance to make sure that they are limiting their potential for liability to the greatest extent possible. It's anticipated that third parties such as customers, vendors, or family members of employees and even courts would consider COVID safety guidance and executive orders, for instance, to be the standard of care in negligence actions brought by these third parties.

Tara Humma: So to put an example on the table, if a business was in a jurisdiction where masking was required and it did not tell its employees for instance, or its customers that they were required to wear masks, and then one of those third parties were to contract COVID and get sick and potentially pass away, or be severely injured, there could be the potential for a negligence action, where the third party would claim that the entity failed to follow its duties with regard to the safety requirements, and then would claim that the failure to follow those duties resulted in this death or injury, for instance. So I think third-party suits are something that we will be seeing and something that employers really need to consider when thinking about following safety guidelines.

Louis Chodoff: Thanks, Tara. Now let's turn back to employees for a second, if we could. What about leave for employees? Are employers still obligated to provide leave under the FFCRA? Tara, I know you've been tracking the FFCRA since the start of pandemic for the group, and its different iterations, and I believe there was some talk that president Biden was going to extend the FFCRA. What do you have on that front?

Tara Humma: So currently, as some of you may know, the FFCRA leave expired at the end of 2020. As of December 31st, 2020, there's no longer a mandatory requirement for employers to provide the emergency paid sick leave and the expanded

family medical leave under the FFCRA. However, there has been talk and president Biden has said that he plans superpose additional FCRA leave with expanded benefits actually. So this is something that could be coming down the pike. However, as of right now, there is no mandatory requirement. The FFCRA was extended on a voluntary basis through the end of March, so employers may provide that type of leave if they would like to continue to do so and get the tax credits for that.

Tara Humma: One thing to consider though, is that just because the leave is no longer mandated as of today, employers who were supposed to be complying with the leave through December 31st, 2020 do still have the potential for liability if they were not complying with it. There is a two year statute of limitations, so any employees who feel that they were not provided leave, that they were due under the FFCRA have up to two years to make such a claim.

Tara Humma: In addition, many state and local governments have passed laws or ordinances providing either additional mandatory paid leave for employees for COVID related reasons or amending current paid leave laws to provide that that paid leave may be used for COVID related reasons. So for example, some states have amended their paid sick leave laws to provide that the leave under those laws may be taken for certain COVID related reasons.

Tara Humma: The takeaway here is that employers should be cognizant of their federal state and local leave obligations for employees in order to avoid claims related to failure to provide leave, and then also to avoid potential retaliation or interference claims as some of the statutes and ordinances provide that employers can not retaliate or interfere with employees attempting to take these leaves. So again, employers just want to be sure that they're aware of their obligations and complying with them.

Louis Chodoff: Thanks Tara. Now, one of the staple lawsuits that we saw, particularly at the beginning of the pandemic were a host of wage and hour issues that arose, particularly as employers were transitioning from employees in the workplace to a remote workplace that led to a variety of wage and hour issues and therefore lawsuits that came from those issues that arose. Karli, what are some of the more important takeaways that businesses should be aware of?

Karli Lubin: Right. So in the first wave, as you mentioned, we saw a number of wage and hour related lawsuits initially alleging failure to pay employees for hours that they worked before, the close of the business. That's still relevant as businesses continue to struggle with different state and local shutdown orders. And as businesses continue to operate in the pandemic, we've seen issues related to off the clock work by non-exempt employees. This is particularly true in the remote work environment. Same for failure to comply with meal and rest requirements.

Karli Lubin: Often employees in this remote environment may work through mandated meal and rest break times and where employees are working partial work weeks or where compensation is reduced in pursuant to these shutdown orders, not paying salaries to exempt employees or not maintaining the salary threshold to maintain the exemption can be an issue. Also now with employers starting to bring people back or thinking about bringing people back need to consider whether preliminary activities related to screening, temperature screening, health checks, things like that, and even vaccinations under mandatory policy, whether those activities are compensable as work time.

Karli Lubin: And then finally, the failure to reimburse business expenses has been a claim that we've been seeing state to state those requirements vary. So employers with operations in multiple states need to be cognizant of their obligation to reimburse their employees for necessary business expenses.

Tara Humma: And I did just want to add, this is Tara again, that I think employers should be aware that there has been in recent years increased legislation in states on the wage and hour front, particularly with regard to states enacting wage theft statutes, where employers can face significant penalties and potentially even criminal liability for failing to pay employees the appropriate wages.

Tara Humma: I think a lot of the time businesses and especially smaller, or even mid-sized businesses are not aware of the type or the potential liability they can face with regard to wage and hour suits, so again, I just think it's important that businesses be making sure that they're in compliance with the wage and hour laws and also be aware of the potential liability that they could face if they are in violation of those laws.

Louis Chodoff: Thanks, Tara and Karli, I agree that this is an area where employers really need to be vigilant, particularly to the extent they still have workers working remotely in terms of keeping track of the hours worked by employees and making sure that your supervisors are being vigilant in enforcing whatever policies you may have, particularly with regarding overtime. And just to follow up on a point that Karli made about the preliminary activities with regard to vaccinations, screenings, temperature screenings, things of that nature, I think the safest course is to treat that as compensable work time, particularly if we're mandating that employees go through these particular screenings. And final topic we wanted to touch upon are issues related to lay-offs and mass closings. Tara, what have you been seeing in that area?

Tara Humma: Sure. So when we talk about lay-offs, employers must be cognizant of the Worker Adjustment and Retraining Notification Act, The WARN Act. Warren requires employers to give 60 calendar days advance written notice to affected employees when there's a triggering event. Just to give a brief overview, an entity is covered by Warren, if it employs a hundred or more employees.

Tara Humma: There are factors to be considered when determining whether multiple entities should be counted as a single employer for Warren purposes and Warren covers either a temporary or permanent shutdown of a single site of employment, if it results in an employment loss for 50 or more full-time employees during a 30 day period or a mass lay-off that is expected to exceed six months and results in an employment loss at a single site of employment within a 30 day period of either 500 full-time workers or between 50 and 499 full-time workers that make up at least 33% of the workforce. And employment loss is either a termination, lay-off exceeding six months or a reduction in hours of 50% or more during a six month period.

Tara Humma: There are some exceptions to WARN Act notice provisions. One that we've heard about a lot during the pandemic is whether the closing or lay-off was reasonably foreseeable. There's an exception for the 60 day notice where the lay-off or closing was not reasonably foreseeable. However, this is a very fact-specific inquiry. There are a number of factors to be considered when we're talking about whether closing or lay-off was reasonably foreseeable. And this is why we've counseled employers to be careful about relying on this exception to the WARN notice requirements.

Tara Humma: Another consideration that we've been seeing recently, we've actually been seeing cases where temporary lay-offs that were expected to last less than six months, and were not therefore considered to be covered by WARN are now extending beyond that time or where employers are needing to convert temporary lay-offs to permanent lay-offs, for instance.

Tara Humma: And in some of these situations, WARN issues may arise, depending on the facts of the situation. There are also state and local mini WARN acts, so some of those laws in states follow the federal law, some have additional requirements other than those contained in the federal law, and then some states have also enacted right to recall laws.

Tara Humma: So for people who are laid off, some states have laws in effect that deal with which employees need to be recalled from lay-offs first. The city of Philadelphia and a number of states have adopted special WARN rules or guidance specifically related to the pandemic, which have been helpful to businesses in situations where there have been an unexpected business shut downs, for instance, related to the pandemic. Some of the states that have eased notice requirements under the WARN laws are New York, New Jersey and California. So the takeaway here with regard to the WARN laws is that if your business either has done a lay-off or is planning to do a lay-off, businesses should just make sure that you're meeting the requirements under both the federal and WARN, if that's applicable to you, as well as the state and local WARN notice requirements.

Louis Chodoff: Thanks, Tara. And thanks to both of you for all the great information that you provided today. Just to wrap up, we wanted to give you some take-aways from

our podcast today. A few of the main ones are: one, you really need to make sure that the business is complying with all federal state and local safety ordinances, orders, guidance, things of that nature. So it's best we believe that you appoint somebody or several people within your organization to be the gatekeepers for all of this information. Things are changing on a daily basis, particularly now with the vaccine coming out, so it's important that you all stay on top of everything that's happening in the federal, state and local sphere in this area.

Louis Chodoff: And also with regard to the change in administration, again, we suspect that there's going to be a ramp up in enforcement, so with that keep in mind, I believe the employers need to be more vigilant now with training, now that enforcement is going to be ramped up, particularly in the federal sphere with the EEOC, Department of Labor, OSHA, things of that nature. So to the extent that you have not done harassment training or discrimination training, retaliation training, union avoidance training, or even just general supervisory training about how to document disciplinary situations, what to do when wage and hour issues come up, how to handle complaints, things of that nature. I think you need to be more vigilant with your training now that we think enforcement is going to be ramped up.

Louis Chodoff: And with that, I'd just like to thank everybody for listening in to our podcast and hope everybody out there is staying safe.

John Wright: Thanks again to Louis Chodoff, Tara Humma and Karli Lubin. Make sure to visit our website, [www.ballardspahr.com](http://www.ballardspahr.com), or you can find the latest news and guidance from our attorneys. Subscribe to the show in Apple podcasts, Google Play, Spotify, or your favorite podcast platform. If you have any questions or suggestions for the show, please email [podcast@ballardspahr.com](mailto:podcast@ballardspahr.com). Stay tuned for a new episode coming soon. Thank you for listening.