Friction builds

On February 1, 2018, Owens reported an incident involving a Circassia account director whom she claimed spoke to her in a hostile and abusive tone. She claimed she couched the issue as one involving sexist and discriminatory comments, while her supervisor denied that she raised any issue related to her being a woman or Asian.

Owens' report was referred to an HR employee who likewise denied Owens complained about mistreatment based on her gender or race. When the HR employee followed up with her on March 22, she replied that things were "good" with the account director and that communication had improved.

Less than one week later, Owens' two supervisors met with two other directors and decided to place Owens on a performance improvement plan (PIP) based on the aforementioned performance issues and her lack of improvement.

Circassia's national sales director agreed with the PIP decision based on two team conference calls he personally attended in which he believed Owens performed poorly because the calls lacked structure, she didn't address a new company initiative or go over current business, and members of her team focused on stories unrelated to a product Circassia was prioritizing at the time. The PIP warned that her employment could be terminated if her performance didn't improve within 60 days.

When handed the PIP on April 18, Owens claimed she was being discriminated against. In addition to raising the earlier example of hostile treatment, she claimed she was unfairly passed over for promotion and that she received differential treatment compared to male regional sales managers. She further expressed her belief that the PIP was designed to push her out.

Several weeks later, Owens repeated her complaints about the PIP, pointing to its subjective components and her team's successful sales numbers. She also alleged Circassia was engaging in unlawful pricing, sales, and billing practices.

Days before the PIP expired, Owens was fired during a meeting to discuss progress under the PIP. An email memorializing the meeting noted that, while she had improved in some areas, she hadn't satisfactorily improved overall.

Legal proceedings

Owens filed suit in federal district court, which dismissed her discrimination and retaliation claims without need for a trial. She then appealed to the 5th Circuit.

Q & A: Tips for small private companies conducting layoffs

By Lisa Berg, Stearns Weaver Miller Weissler Alhadeff & Sitterson

Q We're a privately owned company with fewer than 100 employees. Do we have to follow the Worker Adjustment and Retraining Notification (WARN) Act regulations if we decide to conduct a temporary layoff in the near future?

If your company doesn't satisfy the WARN Act's definition of "employer," you aren't obligated to provide a WARN Act notice. The federal WARN Act generally requires an employer to give affected employees (or their bargaining representatives) and local government officials a 60-day advance notice of employment losses that meet the definition of a "plant closing" or "mass layoff." Private, for-profit employers and private, nonprofit employers are covered, as are public and quasi-public entities which operate in a commercial context and are separately organized from the regular government.

The WARN Act defines a covered employer as a business enterprise that employs (1) 100 or more employees, excluding part-time employees; or (2) 100 or more employees, including part-time employees, who in the aggregate work at least 4,000 hours per week (exclusive of hours of overtime).

The term "part-time" in the WARN Act is tricky because the definition includes not only employees who work for an average of fewer than 20 hours per week, but also all employees who have been employed for less than six of the 12 months preceding the date on which WARN notice is required.

In addition, in some cases, subsidiary companies that are wholly or partially owned by a parent company are treated as separate employers or as a part of the parent or contracting company depending upon the degree of their independence from the parent.

In evaluating whether your business is a covered employer, you should count as employees those workers who are on temporary layoff or on leave who have a reasonable expectation of recall. Employees have a "reasonable expectation of recall" when they understand, through notification or through industry practice, that their employment with the employer has been temporarily interrupted and that they will be recalled to the same or to a similar job.

Small employers, like your company, that don't meet this test on the date notice is due (i.e., 60 days prior to the plant closing or mass layoff), are not covered by the WARN Act. The number of employees is typically determined based on the number of employed individuals on the date of the layoff or plant closing, unless that number isn't representative of the normal level of employees.

Lastly, although your company may not be covered under the federal WARN Act, you should check state law. Many states have "mini-WARN Acts" that differ significantly from the federal law, have a lower threshold for employer coverage, and include additional protections for employees.

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