



It's Midnight. Do You Know Where Your Company's Sensitive Information Is?

By John McLachlan (San Francisco)

You may say that it is in the company's files which are locked in _____'s office or the information is in a certain directory on the company's server. We hope you're right. But according to a recent survey, information you believe is confidential may be in a number of other places as well, including your competitor's offices.

A recent report suggests employers may be losing much more sensitive and confidential information than they imagine.¹ The report's conclusion – "[C]ompanies are doing a very poor job at preventing former employees from stealing data. . ." seems amply confirmed by the results of its survey.

Some details from the report should give every employer cause for concern, particularly in this time of sharply increased staff reductions. Approximately 945 former employees were contacted during the survey and the answers should trouble any employer who has lost employees in the last year.

Of the employees surveyed

- 59% of those who were terminated or who voluntarily left employment, stole sensitive and confidential company data;
- of those who took data, 79% said that they were aware that company policies did not permit them to take the data but they took it anyway;
- the most frequent reason for taking the information (67%) was "to leverage a new job";
- 69% of respondents reported finding a new job, and of those, 67% used the information in their new job; and
- employees' views of their former employer influenced the frequency with which they took data. Of those who admitted to taking data, 61% of employees reported having an unfavorable view of their previous employer, versus 26% of those with a favorable view of the previous employer.

The actual information taken was email lists (65%), non-financial business information (45%), and customer information, including business contact lists (39%). The method of capture was reported to be CDs or DVDs (53%), data transferred to a USB memory stick (42%), attaching documents to an e-mail sent to a personal e-mail account (38%).

Show Them You Care

The report describes the problem, but what is an employer to do?

As an initial matter, you should identify for yourself what information is most essential to the way you do business. Stated another way, "What information would I most not want my competitors to know about?"



From a legal perspective there are two essential sources of protection of trade secrets/confidential information: the Uniform Trade Secrets Act (UTSA) and common-law principles used in various states. The rules are not uniform, and each state's statutes should be consulted for details but the UTSA defines a trade secret as information that 1) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and 2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

As you can see, the formula has two parts: information which has actual or potential economic value because it is not generally known and information which the employer has taken steps to protect. Unless you have paid attention to both parts of the equation, a court isn't going to be of much help in limiting the use of important information carried to your competitor by a former employee.

Since the law is generally designed to help those who help themselves, what should an employer do to help itself in this area? Listed below are a number of areas we recommend as a starting point for instituting a credible information protection strategy:

1. Have employees sign confidentiality agreements, non-solicitation agreements, covenants not to compete and assignment-of-invention agreements which are lawful in your particular jurisdiction.

¹ *Data Loss Risks During Downsizing: As Employees Exit, So Does Corporate Data*, released by the Ponemon Institute.

A WARN Act Refresher Course

By Christina Kotowski (San Francisco)

As the steady drumbeat of grim economic news continues, more and more employers are forced to face the unpleasant prospect of laying off valued employees to survive. When times are tough, the last thing a struggling business needs is a class-action lawsuit claiming that the former employees are entitled to 60 days' additional pay under federal or state law.

When groups of employees are laid off or facilities are closed altogether, larger employers must provide advance notice and/or pay under the federal Worker Adjustment and Retraining Notification (WARN) Act except in certain defined circumstances. Many states have so-called "mini-WARN Acts" that cover smaller employers and smaller layoff groups than the federal WARN.

In general, WARN requires employers to give affected employees (or their union representatives) and local government officials 60 days' advance notice of a "plant closing" or "mass layoff" that results in an "employment loss" to a specified number of employees. If the required notice is not provided, or not properly provided, employers can be liable for up to 60 days of pay and benefits, plus civil penalties and attorney's fees.

This article will cover the key components of the federal WARN Act to consider when planning a layoff, and describe the mini-WARN Acts at the state level. If you foresee dramatically reduced staffing needs 60 days in the future you should analyze your potential WARN Act liability.

Which Employers Are Covered?

WARN generally applies to private employers with 100 or more employees, not counting employees who have worked less than 6 months in the last 12 months nor employees who work an average of fewer than 20 hours per week. WARN can also apply to public and quasi-public entities if they are engaged in business and are organized separately from the regular government. In some cases, independent contractors and subsidiary companies may be treated as part of the employer when counting the number of employees for coverage purposes.

The 100-employee threshold can be met with at least 100 full-time employees, or with 100 or more full- and part-time employees who work at least 4,000 hours per week in the aggregate (exclusive of overtime hours). Temporary employees are counted for purposes of WARN Act applicability, but are not entitled to WARN notice. Conversely, part-time employees are not counted for purposes of WARN Act applicability (except by aggregating their hours as noted above), but are entitled to receive WARN notice. Seasonal employees may or may not be counted, depending on their status.

The number of employees is typically determined as of the date notice of the layoff or plant closing would be due, unless that number is not representative of the normal level of employees.

What Is An Employment Loss?

WARN applies when an "employment loss" affects the requisite number of employees. The statute defines an employment loss to include:

- the termination of an individual's employment for any reason *other than* discharge for cause, voluntary departure, or retirement;
- a layoff of more than six months; or
- a reduction in hours of work of an individual employee of more than 50 percent during each month of a six-month period.

Employees who volunteer for layoff or early retirement are not considered to have been involuntarily terminated, and so do not count against the "employment loss" numbers. Accepting a reassignment or transfer likewise is not considered an involuntary termination, nor is declining a reassignment or transfer within reasonable commuting distance from home, in most circumstances.

A temporary layoff of six months or less is not an "employment loss" under WARN. But a plant closing or mass layoff that is intended to be temporary will trigger WARN obligations if it later turns out to exceed six months.

Events Triggering Notice Obligations

1) Plant Closings

A plant closing is defined as the permanent or temporary shutdown of a site of employment that results in an employment loss for 50 or more employees during any 30-day period. This can include the shutdown of one or more facilities or operating units at a single site of employment if the shutdown affects 50 or more employees.

2) Mass Layoffs

A "mass layoff" is defined as a reduction in force that is not a plant closing, but which results in an employment loss at a single site of employment for:

- 500 or more employees; or
- at least 50 or more employees and at least 33% of active full-time employees.

Counting Employees

To determine whether a plant closing or mass layoff triggers WARN notice obligations, you must count the number of employees who experienced an employment loss. Different rules apply when counting employees for this purpose than when counting employees to establish whether your business is covered by the Act.

Continued on page 4

It's Midnight. Do You Know Where Your Company's Sensitive Information Is?

Continued from page 1

2. Implement appropriate security policies which address use of computers, email, voice mail and the internet; which define physical and electronic access to trade secrets; which cover telecommuting and employee privacy concerns; and which control vendors' and third-party access to confidential information.
3. Train company employees in the policy and proper handling of company confidential information, and their security responsibilities.

4. Secure the physical environment which includes steps such as restricting access to servers, routers and other network technology, to those whose job responsibilities require access; keeping an equipment inventory; locking file cabinets and offices that store sensitive information; labeling all documents containing trade secrets or confidential information as "Confidential"; cross shredding all paper documents containing sensitive information; and making sure that all magnetic media data is erased before discarding
5. Secure the company's computer systems and network by limiting access to sensitive information to only those who have a need to know or use the information, and keep audit logs of all access requests to critical systems and sensitive information.

Continued on page 3

It's Midnight. Do You Know Where Your Company's Sensitive Information Is?

Continued from page 2

6. Protect company information upon an employee's termination by disabling all accounts and access privileges of the terminated employee and changing all access codes and possibly VPN (virtual private network) and dial-in numbers; examine the employee's computer or laptop to determine if the employee has accessed or copied sensitive information in recent months; conduct an exit interview during which you remind the employee of continuing obligations not to improperly use company confidential information and get the departing employee's agreement not to do so. Ask the employee if he or she has any company confidential information.

These steps won't guarantee that you will never lose important confidential information to departing employees, but consideration of the problem and implementation of controls will certainly make it much harder for a departing employee to do what so many other departing employees are doing in this struggling economy.

Implementing controls will help ensure that your departing employees are the 41% of individuals who do NOT take confidential information with them. Also remember that state laws concerning protection of trade secrets or confidential information, non-compete and non-solicitation covenants, etc. are not uniform – one size definitely does not fit all in this situation.

Of course, your Fisher & Phillips attorney will be glad to provide further information appropriate to your jurisdiction.

For more information email the author at jmclachlan@laborlawyers.com or call 415.490.9000.

Bringing It To You

As those of you on our mailing list know, because of the difficult economic times being suffered by companies everywhere, our firm has decided not to schedule our traditional national seminars in 2009. Instead, in a series of smaller breakfast briefings and webinars throughout the country, we are "bringing it to you."

Set out below is a schedule of the various webinars and breakfast briefings we will be presenting over the next two months. We will continue

this pattern throughout the year. These dates and topics are also available on our website, www.laborlawyers.com. Since we are adding topics and dates frequently, we urge you to check the website often for topics being presented in your area. Or, of course as always, check with your regular Fisher & Phillips lawyer.

Webinars

Topic	Location	Dates (All times EDT)	Time	Presenter
Making the Best Use of Non-Competition and Confidentiality Agreements	North Carolina	April 1	2:00 PM	Mike Honeycutt
	South Carolina	April 23	10:00 AM	Fred Manning
	Nevada	April 24	4:00 PM	Jeff Winchester & Shaun Haley
	Illinois	April 30	1:00 PM	Joel Rice & Brian Jackson
	Georgia	May 5	2:00 PM	Joe Shelton & Walter Kruger
	Texas	May 6	3:00 PM	Steve Roppolo & Mike Royal
	New Jersey	May 7	1:00 PM	Kathleen Caminiti
	Oregon	May 12	4:00 PM	Mitch Baker
	Colorado	May 13	3:30 PM	Todd Fredrickson & Darin Mackender
	Kansas/Missouri	May 14	1:00 PM	Brian Finucane
	Louisiana	May 19	3:00 PM	Tim Scott
	Maine, New Hampshire, Massachusetts	May 21	12:00 PM	Jonathan Shapiro
Florida	May 27	12:00 PM	Benton Wood & Steve Siegel	
Benefits	Webinar	April 2	1:00 PM	Bob Christenson
	Webinar	April 16	2:00 PM	Bob Christenson
Reducing the Legal Risks in Reductions in Force	Webinar	April 3	1:00 PM	Andria Ryan & Hagood Tighe
Immigration Visas	Webinar	April 14	2:00 PM	Kim Thompson
Immigration Basics	Webinar	May 20	11:00 AM	Kim Thompson

Breakfast Briefings

Topic	Location	Dates (All times EDT)	Time	Presenter
2009 Will Bring Substantial Change to Workplace Regulations	Chicago, IL	April 8	7:30 AM	Chicago Office
	Griffin, GA	April 9	9:00 AM	Tillman Coffey & Myra Creighton

A WARN Act Refresher Course

Continued from page 2

Temporary employees are typically included, while part-time employees (those employed for fewer than six months or working on average fewer than 20 hours per week in the last 90 days) are typically excluded.

Rolling Layoff Windows

Generally, you must provide at least 60 days' notice prior to any covered plant closing or mass layoff affecting the requisite number of employees. Typically WARN looks to the number of employment losses occurring in any rolling 30-day period.

For example, if an employer with 100 employees laid off 40 workers and then laid off 20 more workers 25 days later, WARN would apply and notice would be required for both sets of employees.

Under some circumstances the 30-day window increases to 90 days. If two or more groups suffer employment losses at a single site of employment within 90 days, and neither group alone is large enough to trigger WARN obligations, the groups will be aggregated together. WARN notice will be required unless the employer can show that the individual events occurred as a result of separate and distinct actions and causes, and were not an attempt to evade its WARN obligations.

Thus, when an employer makes a reduction in force, it must look forward and backward 90 days from each employment loss to determine whether WARN obligations arise and notice must be given. Each individual layoff triggers another rolling 90-day window.

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What Do You Send, And To Whom?

WARN notices must be provided in writing and must contain specific information as set forth in the WARN regulations, which varies by recipient. Notices must be given to the affected employees, their bargaining representatives, if applicable; to the designated State worker displacement agency, and to the chief elected official of the unit of local government where the mass layoff or plant closing will occur.

Exceptions To The Notice Requirement

WARN provides a few exceptions in which 60-day advance notice is not required: 1) faltering company exception (for plant closings only), when the employer was actively seeking new business or capital and providing notice of the impending shutdown would make it impossible to obtain the business or capital; 2) the unforeseeable business circumstances exception, for mass layoffs and plant closings caused by business circumstances that were not reasonably foreseeable at the time notice would otherwise have been required; and 3) when a plant closing or mass layoff is the direct result of a natural disaster, such as a flood, earthquake, drought or storm.

Notice is also not required when a temporary facility is closed, or a particular project has been completed, provided that the affected employees were hired with the understanding that the employment was for a limited period only. Plant closings or layoffs that result from strikes or lockouts also do not trigger WARN notice requirements as to the striking bargaining unit employees.

WARN also contains a special sale-of-business exception that is beyond the scope of this article.

The Cost Of Getting It Wrong

Employers who fail to comply with WARN's notice provisions, or issue notices with major errors, are liable to employees for back pay and benefits for each day of the violation up to a maximum of 60 days, plus civil penalties of up to \$500 per day and reasonable attorney's fees. Back pay liability may be offset by any wages or benefits paid to employees during the period of violation, and by any "voluntary and unconditional payment" by the employer to the employee that is not required by any legal obligation.

The civil penalty can be avoided by paying the required back pay to each affected employee within three weeks after separation. The courts also have discretion to reduce the amount of an employer's liability if the employer can establish that it acted in good faith and reasonably believed that its conduct did not violate WARN.

States With Mini-WARN Acts

In addition to federal WARN, a significant number of states have enacted "mini-WARN" legislation extending notice requirements to layoffs involving smaller businesses or fewer employees at a time. These mini-WARN Acts often impose requirements on employers that can vary significantly from federal law, and it is important to check your compliance with all laws that may apply in a layoff situation.

A comprehensive review of all the various state laws isn't possible within the scope of this article, but a list of those states which have such laws includes these: California, Connecticut, Hawaii, Illinois, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New York, Ohio, Pennsylvania, South Carolina, Tennessee and Wisconsin.

Final Thoughts

WARN and mini-WARN requirements are not the only things to be addressed when employees must be laid off. For example, when providing group severance packages, you must also comply with the Older Worker Benefits Protection Act. In addition, the recently-enacted stimulus bill requires employers to subsidize 65% of employees' COBRA-continuation-coverage premiums for a period of nine months for employees who were involuntarily terminated between September 1, 2008 and December 31, 2009.

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