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Layoffs Likely To Spark Legal Wrangles

By **Jacqueline Bell**

Law360, New York (October 01, 2008) -- With the financial crisis prompting dire predictions of mass layoffs on Wall Street, companies and employees are bracing themselves not only for the possibility of pink slips, but also the legal battles that are likely to follow.

Wall Street was already under strain even before turbulence in the subprime mortgage market became a storm threatening the stability of the U.S. financial system. The financial sector has racked up the highest number of job cuts so far this year, more than 110,000, according to a report released Wednesday by employment consulting firm Challenger Gray & Christmas Inc.

But the numbers have yet to reflect the full fallout predicted from the collapse of some of Wall Street's biggest firms. The financial industry only announced some 8,244 job cuts last month, according to the Challenger report. Wall Street, still waiting for Washington to decide the fate of the promised bailout program, is largely anticipating more layoffs to come.

If the layoffs do come en masse, as many are expecting, the legal fights will likely center on just how much notice a company has given its workers, and what their severance packages look like, experts say.

Steven W. Sufas, partner at Ballard Spahr Andrews & Ingersoll LLP, said rapid layoffs with little notice to the workforce could easily spark litigation under the federal plant closing law — the Worker Retraining and Notification Act, or WARN.

That law requires companies to give workers and the relevant authorities 60 days notice prior to a layoff or shutdown. An additional potential pitfall for employers operating in the midst of a full-blown financial upheaval, said Sufas, is that a few states, like New Jersey and New York, and even some cities, have recently passed their own versions of WARN laws, with their own legal coverages and

entitlements.

New York's state WARN law is brand new, signed by Gov. David A. Paterson just last week. The state law requires private employers with 50 or more workers to notify employees and the U.S. Department of Labor at least 90 days prior to a mass layoff. Businesses that fail to file a WARN notice will face penalties of up to \$500 per day for each violation.

"That is the real concern and the real point large national employers need to keep in mind," said Sufas. "It is easy for employers operating in a crisis mode to focus only on WARN and to lose sight of compliance with these state and local measures."

The federal WARN Act does include exceptions for companies in dire straits. One is the "faltering company" exception, which covers struggling companies attempting to obtain emergency financing, where giving public notice of mass layoffs could threaten the firm's ability to get new capital. Another potentially relevant exception to WARN covers companies whose closings and layoffs are caused by business circumstances that were not reasonably foreseeable.

Still, these exceptions are narrowly drafted and construed, Sufas noted, and could easily become a battleground in WARN litigation stemming from mass layoffs.

Doug Dexter, partner and chair of the Employment Practice Group at Farella Braun & Martel LLP in San Francisco, said that a slew of layoffs could potentially also prompt lawmakers on Capitol Hill to take another look at the WARN Act.

"We are also looking at layoffs at a level that have not been seen outside the manufacturing sector. It will be interesting to see whether they result in legislation to protect workers beyond the current WARN notice statutes," Dexter said.

Other legal wrangles are likely to stem from laid-off employees frustrated by the size of their severance packages. Those fights are likely to play out in arbitrations run by the Financial Industry Regulatory Authority, or FINRA, experts say, since many financial service sector employees are subject to mandatory arbitration agreements.

All registered securities dealers, for example, have to sign a so-called U-4 — the "uniform application for securities industry registration or transfer" — when they start work at a new firm. The U-4 contains a standard arbitration clause, requiring registered representatives to settle disputes with their firm through arbitration guided by FINRA.

Traders and brokers often have smaller salaries and work to secure a large discretionary year-end bonus. If a laid-off employee's severance package includes just salary calculations, with only a small bonus payment, or no bonus at all, the employee may seek to file an arbitration claim to cover a significant loss.

Michael Deutsch, partner and co-founder of New York law firm Singer Deutsch LLP, said that bonus claims have often been very well received by FINRA arbitrators.

"Arbitration panels have shown a tendency to give awards to claimants who are employees who have been treated unfairly by their firms," Deutsch said.

Those arbitration agreements also are unlikely to block employees from filing statutory employment claims in court, since most arbitration agencies like the National Association of Securities Dealers and NYSE, consolidated into FINRA last year, modified their rules so that those types of claims, including potential WARN Act claims, could be taken outside of the arbitration context and filed in court, noted Sarah A. Kelly, employment attorney at Cozen O'Connor.

"If there are big claims to be made here, they're going to be aggregated by classes or groups of employees," Kelly said. "So if there is a challenge to a failure to give WARN act notice, that's a claim likely to be brought by a group of individuals and filed in a court."

Still, while the scope of the current crisis has raised alarm bells on Wall Street, the financial services industry is certainly no stranger to large layoffs, Kelly added, pointing to the significant downsizing in the early 1990s after a spate of bank takeovers and mergers.

"These organizations have the experience to do this and to do it right. And they would almost uniformly have a written severance program that requires an employee to sign a release of claims in order to be eligible for the severance that's being offered," Kelly said.

Still, the force and speed of the current crisis will undoubtedly raise questions over whether companies are sufficiently able to put their current policies and programs into practice, should mass layoffs hit Wall Street.

Employees pursuing legal actions in the wake of layoffs may also be inspired to question the legality of a wide variety of their employer's practices, noted Lorie Almon, co-chair of the national wage & hour litigation practice group and co-managing partner of Seyfarth Shaw LLP's New York office.

"While many people may initially seek legal counsel for purposes of reviewing separation

agreements following group layoffs, it is almost inevitable that some will walk out of their attorneys' offices with the plan of challenging the employer's pay practices and employment policies on a class-wide basis," Almon said.

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