UNDERSTANDING THE WARN ACT

WARN ACT - SUMMARY

The **Worker Adjustment and Retraining Notification Act (WARN Act)** provides protection to workers, their families, and communities by requiring employers to provide advance notification of plant closings and mass layoffs.

Advance notice is designed to provide workers and their families some transition time to adjust to the prospective loss of employment, to seek and obtain alternative jobs and, if necessary, to enter skill training or retraining that will allow these workers to successfully compete in the job market.

The Act also provides for notice to state dislocated worker units so that dislocated worker assistance can be promptly provided.

Not all plant closings and layoffs are subject to the Act, and certain thresholds must be met before the Act applies.

WARN ACT – IN DETAIL

A layoff is a termination of employment at the will of the employer. It may be temporary or permanent and can occur for several reasons including downsizing, changes in market conditions, or new technology.

The federal **Worker Adjustment and Retraining Notification Act (WARN Act)** imposes restrictions on the way layoffs are handled (*29 U.S.C. Sec. 2101 et seq.*; *29 U.S.C. Sec. 639.1 et seq.*).

WARN is designed to give employees advance notice of layoff to allow them to find other employment and/or seek retraining in a new occupation. This notice also gives state dislocated-worker units adequate preparation time to better assist affected workers.

Who Is Covered?

Employers must comply with the WARN Act if they have 100 or more full-time employees *or* 100 or more employees, including part-time employees, who regularly work a total of 4,000 hours per week, exclusive of overtime.

Part-time employees. The Act defines "part-time employees" as those who work an average of fewer than 20 hours per week or who have been employed for fewer than 6 of the 12 months preceding the date on which notice is required (*29 U.S.C. Sec. 2101*).

Temporary employees. Temporary employees are individuals hired with the understanding that their jobs will end when a specific project ends.

Workers on temporary layoff who have a reasonable expectation of recall are counted as employees.

An employee has a reasonable expectation of recall when he or she understands, through notification or industry practice, that his or her employment has been temporarily interrupted and that he or she will be recalled to the same or a similar job (*20 CFR Sec. 639.3*).

Public employers. Regular federal, state, and local government entities that provide public services are not covered by the Act (*20 CFR Sec. 639.3*).

Employees covered. Employees entitled to notice under the WARN Act include hourly and salaried workers, as well as managerial and supervisory employees.

Multiple employment sites. An employer may have several sites of employment under common ownership or control, yet there is only one "employer" for purposes of the Act.

Independent contractors and subsidiaries. Independent contractors and subsidiaries that are wholly or partially owned by a parent company may be considered separate employers or part of the parent or contracting company depending upon their degree of independence.

Some of the factors to be considered in making this determination are (1) common ownership, (2) common directors and/or officers, (3) *de facto* exercise of control, (4) unity of personnel policies emanating from a common source, and (5) the dependency of operations (*20 CFR Sec. 639.3*).

WARN responsibility upon sale of the business. In the event of a sale of part or all of an employer's business, the *seller* is responsible for providing notice of any plant closing or mass layoff that takes place up to and including the effective date of the sale, and the *buyer* is responsible for providing notice of any plant closing or mass layoff that takes place after the effective date of the sale (*29 U.S.C. Sec. 2101*).

Employers should note that the requirements of the WARN Act may be interpreted strictly by the courts. Therefore, employers should work closely with an employment law attorney when planning and negotiating a business transaction that may involve layoffs.

Effect of state laws and collective bargaining agreements. The WARN Act does not replace state laws or collective bargaining agreements that may require additional notice.

Several states have enacted "mini-WARN" laws providing employees with greater protections than the federal WARN Act. Employers should check to see if their states of operation have any additional advance notice requirements.

What Is Required?

The law requires covered employers to give affected employees 60 days' notice of a “mass layoff” or a “plant closing” that is expected to last 6 months or longer.

Employers must also notify local government officials and the appropriate state dislocated worker unit(s).

Additional notice is needed if the planned layoff date is extended.

An employer may not order a plant closing or mass layoff until the end of the 60-day notice period and after the employer has served written notice of such an order.

When all employees are not terminated on the same date, the date of the first individual termination within the statutory 30-day or 90-day period triggers the 60-day notice requirement.

A worker's last day of employment is considered the date of that worker's layoff.

The first and each subsequent group of affected employees is entitled to a full 60 days' notice.

The point in time at which the number of employees is to be measured for purposes of determining coverage under the Act is the date on which the first notice is required to be given (*20 CFR Sec. 639.5*).

Definitions. The WARN Act defines the preceding terms as follows:

• "Mass layoff" is defined as a reduction in force that (a) does not result from a plant closing, but (b) will result in an employment loss at a single site of employment during any 30-day period for (1)

between 50 and 499 employees if they make up at least 33 percent of the workforce (excluding part-time employees) *or* (2) at least 500 employees (excluding any part-time employees).
• "Plant closing" is defined as a permanent or temporary shutdown of a single site of employment, or one or more facilities or operating units within a single site of employment, if the shutdown results in an employment loss at the single site of employment for 50 or more employees, excluding part-time employees, during any 30-day period.
• "Employment loss" is defined as (1) an employment termination other than a discharge for cause, voluntary departure, or retirement; (2) a layoff exceeding 6 months; or (3) a reduction in work hours of more than 50 percent during each month of any 6-month period.

Employment loss does *not* occur if the closing or layoff is the result of the relocation or consolidation of part or all of the employer's business and, before the closing or layoff:
(a) the employer offers to transfer the employee to a different site within a reasonable commuting distance with no more than a 6-month break in employment; or
(b) the employer offers to transfer the employee to any other site of employment regardless of distance with no more than a 6-month break in employment and the employee accepts within 30 days of the offer or of the closing or layoff, whichever is later

(*29 U.S.C. Sec. 2101*).

Separate and distinct actions. Employment losses for two or more groups at a single site within a 90-day period, each of which involves fewer than the minimum number of employees to qualify as a plant closing or mass layoff but, in the aggregate, do exceed the minimum number of employees, will be considered a mass layoff or plant closing *unless* the employer can demonstrate that there were two separate and distinct actions and there was no attempt to evade the WARN Act requirements (*29 U.S.C. Sec. 2102*).

What is a single site of employment? According to federal regulations, a "single site of employment" is either a single location or separate facilities that are in geographic proximity, used for the same purpose, and that share staff and equipment (*20 CFR Sec. 639.3*).

Determination of these factors is fact specific. For example, in one case, an employer was found not to be subject to WARN because the employers' multiple construction sites were not geographically near (to headquarters or each other), employees were not assigned to the headquarters, work was not assigned at headquarters, and employees did not report to headquarters.

Yet, had any of the factors been different, the sites would have been considered a single site of employment, and WARN would have applied. (*Bader v. Northern Line Layers Inc.,* 503 F.3d 813 (9th Cir. 2007)).

Employers should carefully consider any obligations that may apply to their specific circumstances under a strict interpretation of the law.

Determining whether a departure was "voluntary." Federal courts have interpreted "voluntary departure" to include employees' entering into severance agreements following layoff announcements; however, failure to report to work after announcement of layoff, without reasons other than the shutdown, may not be enough to constitute voluntary departure. (*Ellis v. DHL Express,* 633 F.3d 522 (7th Cir. 2011)); (*Collins v. Gee West Seattle,* 631 F.3d 1001 (9th Cir. 2011)).

Thus, employees who stop coming to work when a plant closing is imminent may still need to be counted for purposes of determining if the WARN Act applies.

Under these circumstances, employers should consult with an experienced employment law attorney in their jurisdiction for advice on their obligations under the WARN Act or similar state law.

Extension of layoff period. When a layoff that was initially announced to be a layoff of 6 months or less lasts more than 6 months, it is treated as an employment loss unless:

• The extension to longer than 6 months was caused by a business circumstance not reasonably foreseeable at the time of the initial layoff; *and*

• Notice was given when it became reasonably foreseeable that the layoff would last longer than 6 months (*29 U.S.C. Sec. 2102*).

Notice Requirements

Employers must provide different types of information to employees depending upon whether or not they are unionized.

Employers must always notify the state.

Notice may be sent by any method designed to ensure receipt at least 60 days before separation, e.g., first-class mail, personal delivery, or insertion of a notice into pay envelopes (*20 CFR Sec. 639.6 to 639.8*).

Union employees. If employees are unionized, only the chief elected union representative must be given notice. The notice must contain:

• The name and address of the employment site where the plant closing or mass layoff will occur and the name and telephone number of a company official to contact for further information;

• A statement as to whether the planned action is expected to be permanent or temporary and whether the entire plant is to be closed;

• The expected date of the first separation and the anticipated schedule for making separations; *and*

• The job titles of positions to be affected and the names of workers currently holding these jobs.

Unionized employers should seek additional legal advice because the WARN Act and the **National Labor Relations Act** may have different notice and bargaining requirements.

The Supreme Court has ruled that unions may sue on behalf of their members for WARN Act violations (*United Food and Commercial Workers Union Local 751 v. Brown Group, Inc.,* 517 U.S. 544 (1996)).

Nonunion employees. Employees who may reasonably be expected to experience an employment loss and who are not represented by a union must be notified individually in writing.

While part-time employees are not counted in determining if a plant closing or mass layoff had occurred, these workers must still receive notice if they will experience an employment loss.

The notice must include:

• A statement as to whether the planned action is expected to be permanent or temporary and whether the entire plant is to be closed;

• The expected date when the plant closing or mass layoff will begin and the expected date when the individual employee will be separated;

• An indication of whether bumping rights exist; *and*

• The name and telephone number of a company official to contact for further information.

State notification. Employers must also notify the state dislocated worker unit and the chief elected official of the local government unit within which the closing or layoff will occur.

The notice must include:

- The name and address of the employment site where the plant closing or mass layoff will occur;
- The name and telephone number of a company official to contact for further information;
- The nature of the planned action, including whether it is a plant closing or a mass layoff and whether it is expected to be permanent or temporary;
- The expected date of the first separation and the anticipated schedule for making separations;
- The job titles of positions to be affected and the number of employees in each job classification;
- An indication of whether or not bumping rights exist; *and*
- The name of each union representing affected employees and the name and address of the chief elected officer of each union.

Exceptions to the WARN Act Notice Requirements

The WARN Act's notice requirements do not apply if:

- The closing is of a temporary facility;
- The closing or layoff is the result of the completion of a particular project when the employees involved were hired with the understanding that employment was limited to the duration of the facility or the project; *or*
- The closing or layoff constitutes a strike or lockout (*29 U.S.C. Sec. 2103*).

Additionally, there are three other important exceptions to the 60 days' notice requirement that are explained in the U.S. Department of Labor's regulations interpreting the WARN Act (*20 CFR 639.9*).

Employers claiming these exemptions are required to give as much notice as they can, along with a brief statement of why the notification period has been reduced. The employer has the burden of proving that the conditions for an exception have been met.

These exceptions are:

- The faltering company exception;
- The unforeseen business circumstances exception; *and*
- The natural disaster exception.

Faltering company exception. The faltering company exception, which is narrowly construed, applies only to plant closings and not mass layoffs.

In order for it to apply, the employer must have been actively seeking capital or business, at the time notice would have been required, that was realistically obtainable and, if obtained, would have allowed the employer to avoid or postpone the shutdown.

In addition, the employer must have reasonably and in good faith believed that giving the required notice would have prevented the employer from obtaining the financing or business.

This means that the employer must be able to objectively show that it believed that a potential customer or source of financing would have been unwilling to provide business or financing to the new business if the public knew that there might be a closing.

Practice tip: One way to satisfy the faltering company exception is by showing that the finance or business source would not choose to do business with a troubled company or with a company whose workforce would be looking for other jobs.

This exception will be viewed in a companywide context, so a company with access to financing or with cash reserves may not use it based solely on the financial condition of the plant that is being closed.

Unforeseen business circumstances exception. This exception applies to plant closings and mass layoffs caused by business circumstances that were not reasonably foreseeable at the time that the 60-day notice would have been required.

An important indicator that a circumstance is not reasonably foreseeable is that it is caused by some sudden, dramatic, and unexpected action or condition outside the employer's control.

Examples include a principal client's sudden termination of a major contract, a strike at a major supplier, or an unexpected and dramatic economic downturn.

The test for determining when circumstances are reasonably foreseeable focuses on an employer's business judgment.

The employer must exercise the same commercially reasonable business judgment that a similarly situated employer would in predicting the demands of its particular market. The employer, however, does not have to accurately predict general economic conditions.

Government actions. A government-ordered closing of an employment site that occurs without prior notice may also fall under the unforeseen business circumstances exception.

Natural disaster exception. This exemption applies to plant closings and mass layoffs due to any form of a natural disaster. Examples include floods, earthquakes, droughts, storms, tidal waves or tsunamis, and similar events.

The employer must be able to demonstrate that its plant closing or mass layoff was, in fact, due to the natural disaster.

While a disaster may preclude full notice, as much notice as possible must be given.

Plant closings or layoffs that are the indirect result of a natural disaster are not covered by this exception, but may fall under the unforeseen business circumstances exception.

Damages

Any employer that violates the Act's notice requirements may be liable to each affected employee who suffers an employment loss.

An aggrieved employee may claim back pay for each day of the violation period in an amount equal to his or her average regular rate for the previous 3 years or final regular rate. The employer may also be held liable for lost benefits and be subject to civil fines for each day it is in violation of the Act.

Damages paid to any aggrieved employee will be reduced by any wages paid by the employer to the employee during the violation period, any voluntary and unconditional payment by the employer to the employee that is not required by some legal obligation, and any payment by the employer to a third party or trustee on behalf of the employee during the violation period (*29 U.S.C. Sec. 2104*).

Computation of damages. The damages an employer may have to pay if it violates the WARN Act have been the subject of several court cases.

The majority of federal circuit courts of appeal have ruled that employers are liable for each "work" day within the violation period.

However, the 3rd Circuit has held that employers are liable for each "calendar" day during the violation period.

At least one court has held that back pay includes tips and holiday pay that employees would have earned had they been working (*Local Joint Executive Board of Culinary/Bartender*

Trust Fund v. Las Vegas Sands, Inc., 244 F.3d 1152 (9th Cir. 2001)). In the same case, the court held that WARN Act damages may not be reduced by severance pay or accrued vacation pay that the employer was otherwise obligated to pay.

Waivers. Employers often ask their employees to sign releases waiving their rights under the WARN Act in return for additional consideration.

The Department of Labor (DOL) has stated that employees cannot be required to waive their right to the WARN Act notice. However, employees may agree to waive their rights to make claims against the employer.

OTHER ISSUES TO CONSIDER

Employers need to be aware of other considerations when laying off employees, whether or not the requirements of the WARN Act apply.

Discrimination

Employers should always avoid unlawful discrimination when considering layoffs. Each layoff decision should be made according to objective, business-related criteria and be well-documented.

Avoiding bias in layoff selection. Once an employer has determined that a layoff is necessary, it should identify the supervisors who will facilitate the layoff. These supervisors should be directed to select employees for layoff on the basis of nondiscriminatory criteria such as job performance, employee skills, or seniority.

Additionally, the selection should be made with any policies or employment contracts in mind.

Note that the EEOC has stated that if productivity is a layoff criterion, employees with disabilities cannot be penalized if their productivity has been negatively affected as a result of an accommodation.

Once employees have been selected for layoff, a statistical analysis should be done to determine if the layoff would have a disparate impact on employees within a protected group (race, gender, national origin, workers over the age of 40, etc.).

If so, the selections should be reexamined.

Remember, the employer may be required to show that a business necessity justifies the criteria that have a disparate impact on a protected group.

Employees on Leave

An employer may lay off an employee who is out of work on short-term disability, even in cases when the leave is qualified under the **Family and Medical Leave Act (FMLA).**

The test is whether the employee would have been selected for layoff if he or she was not out of work on disability. Therefore, the employer should make sure the reasons for selecting this employee are job-related and well documented.

If an employee on leave is the only employee selected for layoff in a unit or at a facility and there are others in similar jobs not being laid off, the employer is vulnerable to a claim that this employee was selected because he or she was exercising rights under the FMLA, workers' compensation, or other leave law.

Foreign Workers

Employers instituting layoffs must be particularly careful if they employ foreign workers. Depending on the type of visa, employers may need to notify the Department of Labor or the U.S. Citizenship and Immigration Service of layoffs, reduced hours, or reduced pay.

There are several different types of visas for foreign workers, each with its own rules and regulations.

Therefore, employers with foreign workers should consult with experienced counsel when considering a layoff that will include foreign workers.

Health Insurance Continuation

The Consolidated Omnibus Budget Reconciliation Act (COBRA) requires employers with 20 or more employees to offer continued group health insurance after terminations for any of a number of reasons, including some layoffs.

State continuation laws may provide additional rights.

Outplacement Services

As a matter of goodwill, some companies provide outplacement services to laid-off employees.

Outplacement counseling is designed to help terminated employees prepare themselves for a new job or a new career, to lend assistance in providing outside resources, to receive training, and to help employees cope with the stress of leaving the company.

Outplacement services include assistance in rewriting resumes, job placements, career counseling, conducting employee skill surveys, and providing pre-layoff employment service registration.

Larger organizations may hire outplacement services to assist employees, whereas smaller organizations may hire a single counselor or use existing resources to assist employees.

Employers should consider providing outplacement services if employees have been working at the same company for a long period of time and may not have the tools necessary to successfully find another job.

Severance Pay

Severance benefits are payments made to employees upon termination of employment caused by events that are beyond their control, such as workforce reductions, plant closings, company takeovers, and mergers.

Severance benefits are not required by federal law and are only required by a handful of states.

However, many companies do offer severance pay. The payments themselves may be paid in a lump sum or over a period of time.

These benefits are usually calculated by the employee's length of service with the company (e.g., 1 week of severance pay given for every year employed with the company).

Final Paychecks

Most states have laws regarding when final paychecks must be given to terminated employees.

Some states specify when laid-off employees must be paid.

Employers need to make sure that they are aware of these laws when conducting a layoff.

Uniformed Services Employment and Reemployment Rights Act

Regulations issued under the **Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA)** specifically address an employer's obligations in the event of a layoff or reduction in force.

The regulations provide:

• If an employee is laid off with recall rights, he or she is still an employee for purposes of USERRA. If the employee is on layoff and begins service in the uniformed services or is laid off while performing service, he or she may be entitled to reemployment on return if the employer would have recalled the employee to employment during the period of service.

• If the employee is sent a recall notice during a period of service in the uniformed services and cannot resume the position of employment because of the service, he or she remains an employee for purposes of USERRA. As a result, if the employee is otherwise eligible, he or she is entitled to reemployment following the conclusion of the period of service even if he or she did not respond to the recall notice.

• If the employee is laid off before or during service in the uniformed services, and the employer would not have recalled him or her during that period of service, the employee is not entitled to reemployment following the period of service simply because he or she is a covered employee. This is because reemployment rights under USERRA cannot put the employee in a better position than if he or she had remained in civilian employment (*20 CFR Part 1002.42*).

CALIFORNIA WARN ACT

California has adopted provisions similar to the federal **Worker Adjustment and Retraining Notification Act (WARN Act)** that require industrial or commercial facilities employing 75 or more workers within the previous 12 months to provide 60 days' written notice to employees in the following circumstances:

• Before conducting a mass layoff of 50 or more employees during any 30-day period; *or*

• Before a plant closing or a relocation to a new location 100 miles or more away that affects all or substantially all workers at the facility (CA Lab. Code Sec. 1400 *et seq.*).

Note: A California Court of Appeals held that an employer does not have to provide 60 days' notice to employees when, as a result of a sale of a business, the employees are transferred to another operation and have essentially the same position, benefits, and compensation (*MacIsaac v. Waste Management Collection and Recycling, Inc.*, 134 Cal. App. 4th 1076 (2005)).

However, the court also indicated that employers may still be bound to the law's notice requirements if employees are transferred to new jobs with inferior wages and different benefits as a result of a sale. As such, employers must remain vigilant in making sure that they are in compliance with the state WARN law.

Furloughs. A California Court of Appeals opinion has found that temporary furloughs may also trigger the state's notice requirements.

In the opinion, the court noted that the state WARN Act "does not state that a separation must occur for a specified time period" and that "the concept of being separated from a position does not suggest a requirement that the employment relationship be severed" (*The International Brotherhood of Boilermakers v. NASSCO Holdings, Inc.,* 17 Cal. App. 5th 1105 (2017)).

Notice must be provided to the affected employees; the California Employment Development Department (EDD); the local workforce investment board; and the chief elected official of each city and county government in which the termination, relocation, or mass layoff occurs.

The notice must be in writing and contain all the elements required by the federal WARN Act. The same notice may be used to comply with both laws. However, the notice provided to the State Dislocated Worker Unit and chief elected official of the local government should contain the following information:

- The name and address of the employment site where the plant closing or mass layoff will occur;
- The name and telephone number of a company official to contact for further information;
- A statement as to whether the planned action is expected to be permanent or temporary and whether the entire plant is to be closed;
- The expected date of the first separation and the anticipated schedule for making separations;
- The job titles of the affected positions and the number of affected employees in each job classification;
- An indication as to whether bumping rights exist;
- The name of each union representing affected employees; *and*
- The name and address of the chief elected officer of each union.

Exceptions. Notice does not have to be provided if the layoff, relocation, or termination is because of war or physical calamity. Employers that can demonstrate that they were actively seeking capital or business that would have enabled them to avoid or postpone relocations or terminations are also exempt, but this exemption does not apply to mass layoffs.

The California notice requirements also do not apply to a closing or layoff that is the result of the completion of a particular project of an employer that is covered by Wage Order 11 (Broadcasting Industry), Wage Order 12 (Motion Picture Industry), or Wage Order 16 (On-Site Construction) or to employees involved in seasonal employment who were hired with the understanding that their employment was seasonal and temporary.

Employers claiming an exemption based on their attempts to seek capital or business that would have enabled them to avoid terminations must show that they were actively seeking capital or business at the time notice should have been given. Moreover, the employer must have a reasonable, good-faith belief that giving required notice would have precluded the employer from obtaining the needed capital or business. The employer's subjective beliefs will not meet this requirement.

Penalties. Employers that fail to provide the notice may be liable for up to 60 days' back pay, civil penalties, attorneys' fees, and court costs. Damages may also include the cost of benefits to which the employee would have been entitled, including medical expenses incurred that the employee's health plan would have covered. The employer can avoid a civil penalty if it pays all applicable employees the amounts due within 3 weeks from the date the employer ordered the mass layoff, relocation, or termination.

Penalty reductions. Note that if a court determines that an employer conducted a reasonable good-faith investigation and had reasonable grounds to believe that its conduct did not violate California WARN, the court may reduce the penalty imposed on the employer.

Federal WARN Act Compared

While the intent behind the California WARN Act is similar to that of the federal act, there are important differences between the laws. For instance:

• The California WARN Act applies to covered establishments with 75 or more full- or part-time employees, while the federal WARN Act applies to employers with 100 or more full-time employees, who must have been employed for at least 6 of the 12 months preceding the date of the required notice.

• The California WARN Act's notice requirements are triggered by a plant closing, layoff, or relocation of 50 or more employees within a 30-day period regardless of what percentage of the workforce is affected. The federal WARN Act requires that layoffs within a 30-day period involving 50 to 499 full-time workers constitute 33 percent of the full-time workforce at a single site of employment for the law's notice requirements to be triggered.

• The federal WARN Act exempts a sale of part or all of an employer's business from the definition of an employment loss for purposes of the law's notice provisions. California law provides no such exception. (Although, as explained above, one state court has held that the California WARN Act does not apply to a sale of a business if employees are transferred to another operation and have essentially the same position, benefits, and compensation.)

• In addition to the notifications required under the federal WARN Act, California law requires that notice also be given to the Local Workforce Investment Board and the chief elected official of each city and county government within which the termination, relocation, or mass layoff occurs.