



Worker Adjustment and Retraining Notification Act Summary

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Employment + Labor Group

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The federal Worker Adjustment and Retraining Notification Act (“WARN”) requires covered employers to provide advance notice of “plant closings” and “mass layoffs” that resulting in an “employment loss” at a single site of employment during any 30-day period. *See* 29 U.S.C. § 2101, *et seq.* In addition to the statutory provisions, the U.S. Department of Labor has issued regulations establishing basic definitions and rules for giving notice. This paper does not address “mini-WARN” acts that exist in some states, which may contain different requirements.

Practice Pointer: In practice, the statute and regulations cannot adequately address every business practice that will arise. Accordingly, the Department of Labor encourages notice in ambiguous situations as “civically desirable” and as a “good business practice.”¹

1. Applicability

The WARN Act applies to employers with:

- (a) 100 or more workers, excluding part-time employees;² or
- (b) 100 or more workers (whether full-time or part-time) who in the aggregate work at least 4,000 hours per week, excluding overtime.

Included in the 100 worker threshold are employees who are on temporary layoff with a reasonable expectation of recall. An “employer” includes non-profit organizations and public and quasi-public entities which engage in business, but does not include Federal, State, local and federally recognized Indian tribal governments. Independent contractors and wholly or partially owned subsidiaries are separate employers depending on their degree of independence from the parent. Additionally, courts have indicated that a lender who provides financing to an employer may be liable as an employer if the lender exercises sufficient control over the employer. *See Smith v. Ajax Mannathermic Corp.*, 144 F. App’x 482 (6th Cir. 2005).

2. The Triggers

Covered employers must give the requisite notice in the event of a “**plant closing**” or “**mass layoff**” that result in an “**employment loss**” during a 30-day window period. It is important to note that not all layoffs or plant closings are subject to the Warn Act.

An “**employment loss**” includes:

¹ 29 C.F.R. 639.1 (e).

² The regulations define a “part-time employee” as an employee who works fewer than 20 hours per week or has been employed for fewer than 6 of the previous 12 months.

- (a) a termination;
- (b) a layoff exceeding 6 months; or
- (c) a greater than 50 percent reduction in hours for any individual employee during each month of a 6-month period.

Importantly, “employment loss” does not include terminations for cause, voluntary departures or retirements. Furthermore, a layoff or a termination does not count as an “employment loss” if an employee is transferred or reassigned, so long as the transfer does not constitute a constructive discharge or an involuntary termination. As an example, the regulations indicate that the reassignment of an employee to a retraining program may not count as an employment loss. Finally, an employee does not suffer an employment loss if the plant closing or layoff is the result of a business consolidation or relocation and the employer offered a transfer to an employment site within a reasonable commuting distance (with no more than a 6 month break in employment) or the employer offers a transfer to any site (with no more than a 6 month break in employment), regardless of distance and the employee accepts the offer.³

A “**plant closing**” includes the permanent or temporary shutdown of single site of employment or one or more facilities within a single site of employment that results in an “employment loss” for at least 50 employees during a 30-day window period. Defining a “single site of employment” can be tricky and the regulations attempt to provide clarity. For example, a salesperson generally performs work outside his/her employer’s business location. A salesperson’s “single site of employment” is where his/her home base is, where his/her work is assigned from or where they report.

A “**mass layoff**” involves a reduction in force other than a plant closing that results in an employment loss, during a 30-day window period of (a) at least 33% of active employees (excluding part-time employees) and (b) at least 50 employees (excluding part-time employees). If, however, there is a reduction of 500 or more employees, the 33% requirement does not apply. Mass layoffs differ from plant closings because there need not be a shutdown of a unit at an employment site.

Rolling Layoffs - Aggregation. An employer cannot implement rolling layoffs if the purpose is to evade the WARN Act. While employers must consider whether a plant closing or mass layoff results in the minimum number of employment losses during a 30-day window period, WARN also contains provisions for aggregating separate actions during a 90 day window. For example, if an employer with 100 full-time employees first

³ Special provisions in the statute and the regulations apply in the event of a sale of all or part of an employer’s business. In the event of a sale, the notice is imposed on the seller through the effective date of the sale, at which time the buyer is responsible for providing notice.

decides to layoff 40 employees effective January 1, 2019 and later decides to layoff 20 employees on March 1, 2019, neither of these actions, by themselves, would trigger WARN's notice requirements. The statute, however, would consider this example to be a mass layoff entitling all 60 employees to 60 days advance notice unless the employer is able to demonstrate that the employment losses resulted from separate and distinct actions and were not an attempt to avoid providing notice.

Practice Pointer: The operation of the 90 day window period makes it advisable for an employer to look 90 days in the past and 90 days in the future to determine if WARN requires it to provide notice.

The following circumstances do not⁴ trigger the WARN Act's notice requirements:

- When an employer closes a temporary facility or project, if the employees were hired with the understanding that their employment was limited; and
- When a facility or unit is closed due to a strike or lockout not intended to evade the WARN Act.

3. The Notice

WARN requires covered employers anticipating a plant closing or mass layoff to provide notice **60 days** in advance. Notice must be given to:

- The affected employees (or their bargaining representative);
- The state dislocated worker unit; and
- The chief elected official of the local unit of government.

The term "affected employees" includes certain employees who are not included in determining whether a plant closing or mass layoff triggers the Act. Rather, "[n]otice is required to be given to employees who may reasonably be expected to experience an employment loss."⁵ Consequently, circumstances may require an employer to provide notice to part-time employees. Additionally, "affected employees" includes those who might lose their job due to operation of a seniority system involving bumping rights as well as workers in temporary layoffs with a reasonable expectation of a recall (e.g., workers on workers' compensation and medical, maternity or other leave).

⁴ While these workers are exempt from notice, they are counted as employees for determining coverage as a "plant closing" or "mass layoff." 29 C.F.R. 639.3(b)(2).

⁵ 20 C.F.R. 639.6(b).

Content. The content of the notice varies depending on who is receiving the notice, but in all circumstances it must be “specific.” Furthermore, “[t]he information provided in the notice shall be based on the best information available to the employer at the time the notice is served.”⁶ Thus, inadvertent errors will not result in a WARN violation.

- *Notice to Non-Represented Employees.* The notice must be written in “in language understandable to the employees” and contain the following:
 - (1) A statement as to whether the planned action is expected to be permanent or temporary and, if the entire plant is to be closed, a statement to that effect;
 - (2) The expected date when the plant closing or mass layoff will commence and the expected date when the individual employee will be separated;
 - (3) An indication whether or not bumping rights exist;
 - (4) The name and telephone number of a company official to contact for further information.⁷

- *Notice to Representatives of Affected Employees:*
 - (1) 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;
 - (2) A statement as to whether the planned action is expected to be permanent or temporary and, if the entire plant is to be closed, a statement to that effect;
 - (3) The expected date of the first separation and the anticipated schedule for making separations;
 - (4) The job titles of positions to be affected and the names of the

⁶ 20 C.F.R. 639.7(a)(4).

⁷ 20 C.F.R. 639.7(d).

workers currently holding affected jobs.⁸

- *Notice to State Dislocated Worker Unit and the Chief Elected Official of the Unit of Local Government:*

(1) 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;

(2) A statement as to whether the planned action is expected to be permanent or temporary and, if the entire plant is to be closed, a statement to that effect;

(3) The expected date of the first separation, and the anticipated schedule for making separations;

(4) The job titles of positions to be affected, and the number of affected employees in each job classification;

(5) An indication as to whether or not bumping rights exist;

(6) The name of each union representing affected employees, and the name and address of the chief elected officer of each union.⁹

The regulations permit an employer to provide alternative notice to the aforementioned entities which includes the following information:

(1) 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;

(2) The expected date of the first employee separation; and

(3) The number of affected employees.¹⁰

The Date of Termination or Layoff. The time at which the number of employees is measured for the purposes of determining whether a threshold has been

⁸ 20 C.F.R. 639.7(c).

⁹ 20 C.F.R. 639.7(e).

¹⁰ 20 C.F.R. 639.7(f).

reached is the date the first notice is required. Recognizing that employers may be unable to determine, in advance, the precise date of the planned separations, the regulations permit an employer to use a 14-day period. If a 14-day period is used, notice must be given 60 days in advance of the first day of the period.

In the event the date of a plant closing or a mass layoff is extended beyond the original planned date or at the end of a 14-day period, an employer is required to provide additional notice. If the postponement is less than 60 days, then an employer must give notice as soon as possible and reference the earlier notice. If the postponement is greater than 60 days, then new notice is required. The regulations explicitly stated that “rolling notice” is not acceptable.

Serving Notice. The regulations provide that an employer may provide acceptable notice using “[a]ny reasonable method of delivery . . . which is designed to ensure receipt of notice at least 60 days before separation.”¹¹ Accordingly, first class mail or personal delivery would generally be sufficient. If an employer is notifying affected employees individually, a notice in their paycheck is a viable option. Nonetheless, notice does not meet the requirements of WARN if it is a “ticketed notice,” defined as a preprinted notice regularly included in each employee’s paycheck.

Reductions to the 60-Day Notice Period. Three situations permit an employer to provide less than 60-days advance notice. It is an employer’s burden, however, to show that it should be relieved of the 60-day notice period. In each situation, the employer must give as much notice as is reasonably practicable under the circumstances as well as a brief statement explaining the reason for reducing the notice period.

- *The “faltering company” exception.* Under this exception, which applies to plant closings but not mass layoffs, a company must be actively seeking capital or business, and have a realistic opportunity to obtain the capital or business. Additionally, the financing, if obtained, must have been sufficient to avoid a shutdown and the employer must, in good faith, reasonably believe that advance notice would preclude its ability to obtain the financing.
- *The “unforeseeable business circumstances” exception.* This exception, which applies to plant closings and mass layoffs, permits an employer to reduce notice of a business circumstances was not “reasonably foreseeable.” An employer must be prepared to show that the circumstances are based on sudden and expected actions outside of its control, such as a strike at a major supplier or the termination of a major contract. *See Watson v. Michigan Industrial Holdings*, 311 F.3d 760 (6th Cir. 2002)(applying unforeseeable business

¹¹ 20 C.F.R. 639.8

circumstances exception). In a separate section, the regulations provide that an employer who previously announced a short-term layoff of 6 months or less and decides to extend the layoff beyond 6 months because of unforeseeable circumstances must give notice when it becomes reasonably foreseeable that the extension is required.

- *The “natural disaster” exception.* This exception also applies to plant closings and mass layoffs and encompasses events such as floods, earthquakes, droughts, storms, tidal waves or tsunamis.

4. Penalties and Civil Enforcement

Employers who fail to give notice pursuant to WARN may be held liable to each affected employee for full back pay and benefits (including the cost of medical expenses incurred) for the period of the violation and may not exceed 60 days. Total liability is reduced by: (a) wages paid during the period of the violation; (b) any voluntary or unconditional payment by an employer that is not compelled by a legal obligation; and (c) any payments made to a third party or a trustee on behalf of the employee (e.g., health insurance premiums or contributions to a defined contribution pension plan). On the other hand, this penalty is not reduced by unemployment insurance or contractually required severance benefits.

Additionally, an employer is subject to civil penalties of up to \$500 per day for failure to provide notice to a unit of local government. This penalty, however, does not apply if each employee receives the required amount of back pay and benefits within three weeks from the date of the plant closing or mass layoff.

Employees who fail to provide the requisite notice may be able to secure a reduction in the amount of its liability if it establishes that its actions were in good faith and it had reasonable grounds for believing its actions did not violate the statute. *See Kildea v. Electro-Wire Products*, 238 F.3d 422, 2000 WL 1909383 (6th Cir. 2000).

Importantly, the payments and remedies provided by WARN are non-cumulative and are in addition to any payments, rights or remedies provided by contract or other statute. If a contract requires advance notice of layoffs, the period of the notice under WARN runs concurrently with the notice required by the contract.

Aggrieved employees (or a representative of the employees) may enforce the statute by filing a lawsuit in federal district court individually, or as a class action and the court may, in its discretion, award attorneys’ fees to the prevailing party. In granting relief, a court may not preliminarily or permanently enjoin a plant closing or mass layoff.