

# WARN

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# THE WARN ACT

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*This booklet should not be construed as legal advice or legal opinion on any specific facts or circumstances. You are urged to consult competent counsel concerning your particular situation and any specific legal questions you may have. Employers are specifically encouraged to consult an attorney to determine whether they are subject to other unique state requirements that extend beyond the scope of this booklet.*



ompanies are often faced with a need to restructure, reorganize, or streamline their operations. Perhaps the most obvious effect of these changes is the elimination of jobs or a reduction in force.

In 1988, in response to a number of plant closings and mass layoffs, Congress enacted the Worker Adjustment and Retraining Notification Act (WARN). The purpose of WARN was to lessen the impact of such actions on individuals, their families, and their surrounding communities.

Generally, WARN requires employers who anticipate a “plant closing” or “mass layoff” to give advance notice. This notice period is intended to provide workers an opportunity to find new employment or obtain job training before their termination. Employers who fail to provide the required notice under WARN are liable for back pay and benefits for the period for which notice was not given, in addition to civil money penalties.

This booklet provides an overview of the requirements of this important Act. Of course, no brief summary can serve to replace specific legal advice, and you should consult an attorney rather than this booklet for situations affecting your company.

# OVERVIEW OF THE ACT

WARN requires covered employers who anticipate a plant closing or mass layoff to give notice to affected employees (or their bargaining representatives), to the state’s agency designated to carry out rapid response activities, and to the chief elected local government official at least 60 days beforehand. There are several exemptions limiting which employees must receive notice, and how much notice must be given.

# ARE YOU COVERED BY WARN?

WARN generally applies to private employers with 100 or more employees. It can also apply to public and quasi-public entities if they are engaged in business and are organized separately from the regular government. This includes the entity having its own governing body and independent authority to manage its own personnel and assets.

The first step in evaluating whether an employer has the requisite number of employees is to determine what constitutes the “employer.”

## A. Related Entities

When determining coverage, independent contractors and subsidiaries that are wholly or partially owned by a parent company may be treated as part of the parent or contracting company depending on their particular relationship. The WARN regulations instruct the courts to consider the following factors in making this determination:

- common ownership;
- common directors and/or officers;
- de facto exercise of control of one entity by the other;

- unity of personnel policies emanating from common sources; and
- dependency of operations.

## **B. Number Of Employees**

Once you have determined the scope of your enterprise, then you can count the number of employees.

WARN applies to business enterprises that employ at least 100 full-time employees, or 100 or more full-time and part-time employees who work at least 4,000 hours per week in the aggregate exclusive of overtime hours.

The employer's size is determined by counting the number of employees on the date on which notice of the layoff or closing would be due, unless that number is not representative of the normal level of employees. For example, if the number of employees on a particular date is higher because of additional seasonal help, then you should use an average number of employees over a recent period of time or choose an alternative date.

WARN obligations arise in two situations – plant closings and mass layoffs. As discussed below, a reduction in force will not qualify as a plant closing or mass layoff unless at least 50 employees suffer an employment loss within a particular time period at a single site of employment.

### **A. Employment Loss**

For purposes of the WARN Act, an employment loss includes:

- the termination of an individual's employment for any reason other than a discharge for cause, voluntary departure, or retirement;

# **EVENTS TRIGGERING NOTICE OBLIGATIONS**

- a layoff exceeding 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.

Notably, a layoff of six months or less is not an employment loss under WARN. However, a plant closing or mass layoff need not be permanent to trigger WARN. Moreover, if a temporary layoff that is announced as being for less than six months turns out to exceed six months, it will trigger WARN obligations.

Whether notice was required for the original layoff will then depend on whether the reasons for the extension were reasonably foreseeable at the time. If the employer could not reasonably foresee the need for the extended layoff, it still must give WARN notice regardless of the notice of the temporary layoff. However, this WARN notice need be given only when the need for the extension arises.

Generally, employees are not deemed to have suffered an employment loss where they accept a reassignment or transfer, or decline one within a reasonable commuting distance from their homes, so long as the reassignment does not constitute a constructive discharge or other involuntary termination. In determining a reasonable commute, a court may look at factors such as the ease of the commute and the amount of time involved.

For example, geographic accessibility of the place of work, quality of the roads, commonly available transportation, and the usual travel time are all factors that will be considered. The transfer also must be the result of a relocation or consolidation of the employer's business and involve no more than a six-month break in employment. In addition to these issues, collective bargaining agreements may have additional requirements that must be taken into consideration.

Under WARN, any employees that are reassigned or transferred to employer-sponsored programs in which they receive training or search for new employment while the employer continues to compensate them, have not experienced a loss of employment. Furthermore, employees that accept offers for early retirement usually do not experience an employment loss.

## **B. Single Site Of Employment**

Whether an action triggers WARN obligations depends in large part on what is considered a single site of employment. This analysis is highly fact-specific.

A single site of employment may include either a single location *or* a group of contiguous locations. Separate buildings may be considered a single site of employment if they are reasonably close in proximity, are used for the same purpose, and share the same staff and equipment. On the other hand, separate buildings in close proximity that do not share the same staff or operational purpose generally should not be considered a single site of employment.

Thus, although the regulations describe a single site in geographical terms, ultimately a court will look at multiple facts to determine whether separate structures are part of a single site of employment. For employees who usually work offsite or primarily travel, their site of employment will be the building from which work is assigned or where they report.

## **C. Counting Employees**

For purposes of determining whether a plant closing or mass layoff triggers WARN obligations, you must count the number of employees that 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.

When determining the number of employees that have experienced an employment loss, employees on temporary projects are included. WARN may be inapplicable if you hired the affected employees with the understanding that the employment was limited, such as if you hired temporary employees for a particular project and there was a plant closing or mass layoff at the completion of the project.

However, part-time employees are not included. For purposes of WARN, the term “part-time employees” is limited to those employees who are employed for an average of fewer than 20 hours per week *or* have been employed for fewer than six of the preceding 12 months.

The period of time for determining whether an employee averages fewer than 20 hours per week is the last 90 days, unless the individual has not been employed long enough, in which case it is the period of employment. The U.S. Department of Labor provides the following examples:

<b>Week Number</b>	<b>Example 1 Hours Worked</b>	<b>Example 2 Hours Worked</b>
1	15	24
2	20	25
3	11	17
4	10	20
5	20	15
6	20	19
7	22	24
8	16	18
9	15	17
10	12	15
11	24	26
12	18	23
13	20	22
<b>90 Days Worked</b>	<b>223 Hours</b>	<b>265 Hours</b>

The calculation to determine whether an employee may be eligible for WARN notice is as follows:

Total Hours Worked ÷ 13 Weeks = Average Hours/Week

Example 1:  $\frac{223 \text{ Hours Worked}}{13 \text{ Weeks}} = 17.2 \text{ Hours}$

The worker in Example 1 is a part-time worker because the average hours worked per week was less than 20 hours, assuming that the worker has been employed there for at least six of the preceding 12 months.

Example 2:  $\frac{265 \text{ Hours Worked}}{13 \text{ Weeks}} = 20.4 \text{ Hours}$

The worker in Example 2 is a full-time worker because the average hours worked per week was over 20 hours.

Therefore, if both workers experienced an employment loss, only the worker in Example 2 would count for purposes of determining whether the threshold number of employees has been affected.

#### **D. Plant Closing**

WARN defines a plant closing 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. In addition, if an employer does not shut down an entire site of employment, but only shuts down one or more facilities or operating units among a single site of employment, WARN obligations still would arise if the shutdown results in a loss for 50 or more employees. Again, when counting the number of employees to meet the threshold of 50 or more, you exclude part-time employees, but include temporary employees.

It also is important to consider layoffs that are the direct or indirect result of a closing of another department within a single site of employment. For example, the company closes Department A and, as a result, terminates the 45 employees in Department A *and* 10 employees in Department B at the same location within 30 days of the closing. In such a case, the total number of employees affected is 55, thus triggering WARN obligations.

## E. Mass Layoffs

WARN obligations also can arise as a result of a mass layoff. A mass layoff is a reduction in force (termination or layoff exceeding six months) that is not a plant closing, but which results in an employment loss at a single site of employment for a threshold number of employees. The requisite number will be met if, in any 30 day period, the following numbers of employees suffer an employment loss as the result of the reduction in force:

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

As with a plant closing, these numbers include temporary employees but exclude part-time employees as described above. This is both for purposes of determining the number of employees and the percentage of employees affected.

## F. Strikes Or Lockouts

A plant closing or mass layoff that results from a strike or lockout does not necessarily trigger WARN obligations so long as the employer is not attempting to evade the purposes of the WARN Act. Nonetheless, if the strike or lockout also affects employees not on strike or represented in the lockout, WARN obligations still may arise as to those individuals.

## G. Merger Or Acquisition

WARN can apply when an employer sells a part of its business or its assets. For purposes of WARN, if the employees of the seller become employees of the buyer, notice obligations are not triggered. However, if a plant closing or mass layoff results from the sale, then WARN would apply.

Whether the seller or the buyer is responsible for giving notice depends on when the plant closing or mass layoff is to occur. Generally, if it is before or on the day the sale becomes effective, then the seller is responsible. If it is after the day the sale becomes effective, then the buyer is responsible. In such a case, the buyer would be responsible for the full 60 days. If the seller knew of the buyer's intentions and was empowered to give notice as the buyer's agent, it could give notice on behalf of the buyer. Even so, under WARN, responsibility would remain with the buyer.

If an employee is offered, but refuses, employment with the buyer, this is considered a voluntary departure and does not constitute an employment loss. However, this situation could constitute constructive discharge if employment with the buyer would result in a significant change in wages, benefits, working conditions, or position.

## H. Bankruptcy

Generally WARN applies if an employer declares bankruptcy either before or after ordering a plant closing or mass layoff. Of course, the unforeseeable business circumstances and faltering company exceptions discussed below may be applicable to bankruptcy situations. In addition, WARN does not apply to a trustee that is winding up the business.

## I. Calculating The Timeframe

In order for the requisite number of employment losses to trigger WARN obligations, these employment losses must occur during any “rolling” 30-day period. For example, if an employer with 100 employees lays off 40 workers and then lays off an additional 20 workers 25 days later, the 50 employee threshold has been met and WARN would apply. Notice would be required for both sets of employees. An exception exists if on the date of the first layoff or the date the first WARN notice is due, the number of employees is unrepresentative of the ordinary or average number of employees such that the employer would not normally have been covered by the Act.

On the other hand, under some circumstances the 30-day window is enlarged to 90 days. Once the 50 employee threshold is met, the 30 day window period closes. Then, if additional employment losses occur at a single site of employment within 90 days, the groups may be aggregated even if the later layoffs alone are not large enough to trigger WARN obligations. You are not required to give notice if you can show that the individual events occurred as a result of separate and distinct actions and causes, and were not an attempt to evade WARN obligations.

Therefore, 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. The U.S. Department of Labor provides the following example of a mass layoff over a 90-day period:

- DAY 1 Company has 180 employees
- DAY 2 Company terminates 30 employees  
(150 remaining employees)
- DAY 31 Company terminates 29 employees  
(121 remaining employees)
- DAY 60 Company terminates six employees  
(115 remaining employees)

DAY 90 Company terminates five employees  
(110 remaining employees)

If the company did not give notice, then it would be liable to all 70 employees it terminated even though each wave of terminations alone would not have met the 50-employee threshold. Each employee terminated within the 90 days suffered a mass layoff and was entitled to notice. Moreover, each subsequent layoff starts another 90-day rolling period.

Remember, you also must consider layoffs that are the direct or indirect result of a closing of another department within a single site of employment.

## WARN NOTICE OBLIGATIONS

Generally, employers must provide at least 60 days' notice prior to any covered plant closing or mass layoff.

### A. Determining Whether And When To Give Notice

If all employees are not terminated on the same date, the 60-day notice requirement is triggered as of the date of the *first* employment loss within the 30-day (or 90-day) determination period. Realistically, you need to decide whether WARN applies to an employment action about 65-70 days prior to the first employment loss in order to have time to distribute notice 60-days in advance.

It may not always be possible to identify the exact date a termination or layoff will occur, particularly 60 days in advance. Therefore, the notice may identify a two-week (14-day) period during which each termination or layoff is to take place. In addition, notice may be conditioned upon the occurrence or non-occurrence of some specific event, such as the renewal of a major contract, only where the effect of the occurrence or non-occurrence will necessarily lead to a covered plant closing or mass layoff within 60 days of the event.

Be careful to assess the situation as thoroughly as possible and not to assume too much. For example, suppose you plan to close a plant with 53 workers but to offer five of them early retirement. While no liability will occur if only 48 workers suffer an employment loss, if two or more of the employees offered early retirement do not accept, you may be liable to 50 workers for a failure to give the required notice. Thus, you should cautiously weigh the risk of liability if you are depending on factors outside of your control to avoid notice obligations.

## **B. Exceptions Where Shorter Notice Is Permitted**

WARN provides for three situations in which the notification period may be less than 60 days. These three situations are: 1) natural disasters, 2) unforeseeable business circumstances, and 3) a faltering company. Even if one of these exceptions applies, however, you must still give as much notice as practicable. Also, the notice must contain a brief statement summarizing the reason(s) why giving the normal 60 days of notice was not possible in addition to the content discussed below.

### **1. Natural Disasters**

Under the natural disaster exception, an employer may give less than 60 days' notice of a plant closing or mass layoff that results from a natural disaster such as a flood, earthquake, drought, or storm. The employer can give notice after the event if it can establish that the closing or layoff is a direct result of the natural disaster.

Although this exception will not apply if a plant closing or mass layoff occurs as an indirect result of a natural disaster, the unforeseeable business circumstances exception might.

## 2. Unforeseeable Business Circumstances

The unforeseeable business circumstances exception is intended to apply to situations where a plant closing or mass layoff is caused by some “sudden, dramatic, and unexpected” event that, at the time notice would otherwise have been due, was a) not reasonably foreseeable, and b) outside the employer’s control. Whether or not business circumstances were reasonably foreseeable depends on the employer’s business judgment and what a similarly-situated employer facing the same situation would foresee.

Examples of such situations would include the unexpected termination of a major contract, a strike at the business of a major supplier, or an unannounced government-ordered closing.

## 3. Faltering Company

The faltering company exception is construed narrowly and applies only to plant closings. Unlike the other exceptions, it does *not* apply to mass layoffs. Under the faltering company exception, the notice period may be reduced if, at the time notice would have been due, the employer a) was actively seeking capital or business that would have prevented the plant closing, and b) reasonably believed that giving notice would have precluded it from obtaining the needed capital or business.

However, in relying on the faltering company exception, an employer may not restrict its analysis to the financial condition of the facility, operating unit, or site to be closed. In addition, a causal connection must exist between the ultimate plant closing and the employer’s failure to obtain capital or business.

Under any of these exceptions, the employer still has the responsibility to provide as much notice as practicable.

### C. Determining Those Employees Entitled To Notice

Most affected employees are entitled to notice. The term “affected employees” means those who may reasonably be expected to experience an employment loss as a consequence of a proposed plant closing or mass layoff. This includes both management and non-management employees, but does not include business partners.

Each employee is entitled to a full 60 days’ notice, including part-time employees, employees on temporary layoffs who have a reasonable expectation of recall, and regular full-time employees. For example, you must provide notice to employees out on workers’ compensation, medical, maternity, or other similar leave. Importantly, although part-time employees are not counted and temporary employees are counted in determining whether a mass layoff or plant closing has occurred, it is part-time employees and *not* temporary employees who are entitled to notice.

This also includes employees who will likely lose their jobs because of bumping rights. If you cannot reasonably identify who may ultimately lose their jobs because of another employee’s right to displace them or a seniority system, you must give notice to the incumbent employee in the position being eliminated. You should not provide a blanket notice where you can reasonably assess which employees are at risk of an employment loss.

The WARN Act does not require employers to give notice to the following employees:

- those employees that strike or are part of the bargaining unit involved in the labor negotiations that led to a lockout;
- temporary workers; or
- non-employees assigned to, or contracting with, the

business.

Again, note that the employees entitled to notice are not necessarily the same employees that are counted when determining whether a plant closing or mass layoff has occurred. For example, part-time employees are entitled to notice and temporary employees are not.

## **D. Notice Content**

Once an employer determines which employees are entitled to 60-days' notice, it must determine what type of notice is required. While any notice must include certain information, other content requirements vary depending on whether the employees are represented by a collective bargaining representative.

### **1. Notice To Non-Represented Employees**

These notices must contain the following information:

- whether the planned action is expected to be permanent or temporary;
- whether the plant is being closed;
- the expected date the plant closing or mass layoff will commence, as well as the date that the affected employee will be laid off or terminated (or set forth a two-week window during which the termination will occur);
- an indication as to whether or not bumping rights exist; and
- the name and telephone number of a company official who can be reached for further information.

Notice to individual employees must be written in clear

and specific language such that employees can easily understand the terms. In addition to the information above, you may include information regarding available dislocated worker assistance. Moreover, if the action is temporary in nature, it would be useful to inform employees of the estimated duration.

## **2. Notice To Collective Bargaining Representatives**

These notices must 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 who can be reached for further information;
- whether the planned action is expected to be permanent or temporary;
- if a plant is being closed, the notice must include a statement to that effect;
- the expected date of the first separation and the anticipated layoff schedule if the layoffs are to occur on more than one date; and
- the job titles of the positions to be affected and the names of the workers currently holding those positions.

As with notice to non-represented employees, in addition to the information above, you may include information regarding available dislocated worker assistance and the estimated duration if the action is expected to be temporary.

## **3. Notice To Dislocated Worker Unit And Local Chief Elected Official**

In addition to giving notice to the affected employees or their collective bargaining representative, employers must give notice to the state agency designated to carry out rapid

response activities (referred to as the dislocated worker unit) and the chief elected official of the local government. This notice must contain the following:

- 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 who can be reached for further information;
- whether the planned action is expected to be permanent or temporary;
- whether the plant is being closed;
- the expected date of the first separation and the anticipated layoff schedule if the layoffs are to occur on more than one date (or a two-week window during which all layoffs will occur);
- the job titles of the positions that are to be affected and the names of the workers currently holding those positions;
- an indication as to 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 such union.

The U.S. Department of Labor suggests providing notice to other local governments if many affected employees live in other jurisdictions. This way those employees' access to services are not delayed.

The WARN regulations also provide for a short form notice to state agencies and local government officials that may simply include the name and address of the employment site, the name and telephone number of a company official to contact for further information, the expected date of the first separation, and the total number of affected em-

ployees. Under this option, the employer must also make available to government officials the information that would have been included in the full notice. A failure to provide the necessary information upon request is deemed a failure to give the required notice.

The state agency or dislocated worker unit should coordinate with the employer to provide information to the affected employees about services designed to help with the transition. Some such services are:

- dissemination of labor market information;
- job search and placement assistance;
- on-the-job training;
- classroom training;
- entrepreneurial training; and
- referral to basic and remedial education.

## **E. Extension Of Notice**

If an employer needs to extend the date of the plant closing or mass layoff beyond the date or period in the original notice, additional notice is required. This notice should contain the following:

- If you postpone the action for less than 60 days, it should reference the earlier notice, the reason for postponement, and the new anticipated date or two-week period for the action. The notice must be given as soon as possible and in an effective manner.
- If you postpone the action for 60 days or more, you must give a new notice that complies with the normal 60-day notice requirements.

## **F. Serving Notice**

You must deliver notice in a reasonable manner such that affected employees will receive the written notice at least 60 days before separation. Including this notice with employees' paychecks or giving verbal notice will not meet these requirements. If you decide to mail the notice, it is not effective until it is received. Therefore, you must send the notice prior to the start of the 60-day period.

You cannot require employees to waive their rights to WARN notice. Therefore, you cannot require employees to agree not to sue you based on a lack of notice. However, employees may voluntarily and knowingly waive any claims under WARN in exchange for something of value such as additional severance pay or extended health benefits.

While notices should be as accurate as possible, minor errors in the notice or errors that are due to a subsequent change in circumstances do not violate WARN.

A failure to give notice or issuing a notice with major errors, however, can result in liability. Employers who violate WARN are liable for back pay and benefits for each day of violation up to a maximum of 60 days. Employers also may face civil penalties of up to \$500 per day.

In addition, the amount of liability may be reduced 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. Thus, although WARN does not specifically allow pay in lieu of notice, as it would defeat the purpose of the WARN Act, you can preclude relief if you pay full pay and benefits for the 60-day period. Nonetheless, you cannot offset your WARN obligations with payments

## WAIVERS

## PENALTIES

that already were due, i.e., severance payments that are required by contract or your policies.

Moreover, you can avoid the civil penalty if you satisfy your liability by making such payments to each affected employee within three weeks after separation. In addition, the courts have the 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. Courts also have the discretion to award reasonable attorneys' fees to the prevailing party.

WARN does not contain a specific statute of limitations. The U.S. Supreme Court has held that courts should apply the statute of limitations for the most analogous statute in the forum state. Therefore, the limitations period will vary depending on where the lawsuit is filed.

In addition to obligations under WARN, some states and municipalities have adopted plant closing or mass layoff laws. None of these laws can reduce an employer's obligation under WARN, but they may place additional obligations on employers covered by WARN. Moreover, these laws may place the same or additional obligations imposed by WARN on employers not covered by WARN. You also should keep in mind other considerations when conducting a reduction in force, whether the particular employment action is covered by WARN or not. For example, eliminating certain positions may have an adverse impact on a particular protected group.

Knowing when to apply WARN can be complicated, particularly because there is variation in which employees count

## STATUTE OF LIMITATIONS

## STATE OR LOCAL LAWS

## CONCLUSION

for coverage, which employees count for triggering notice obligations, and which are entitled to notice. In addition, you may implicate WARN obligations without realizing it if you do not carefully analyze the relationships between each reduction in force. Therefore, the key to WARN compliance is examining the repercussions of such decisions in advance so you can best determine the likelihood of WARN applying and have time to act accordingly.

*For more information contact any office of Fisher & Phillips LLP, or visit our website at [www.laborlawyers.com](http://www.laborlawyers.com)*

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(Employment Aspects)

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Business Immigration

COBRA

Employment Discrimination

Fair Labor Standards Act  
(Exemptions & Recordkeeping)

Fair Labor Standards Act  
(Wage & Hour Provisions)

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