

Labor and Employment

COVID-19 – Employer Guidance for Addressing Possible Layoffs and Closures



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As employers grapple with staffing while dealing with the current COVID-19 crisis, they need to be mindful of their obligations under federal and state legislation addressing certain closures and layoffs.

Under the federal Work Adjustment and Retraining Notification (WARN) Act, 29 U.S.C. §2101, covered employers must provide at 60 calendar days written notice of a covered “plant closing” or “mass layoff.” WARN contains various definitions that establish:

- Which employers must give notice;
- When such notice must be given;
- Who must receive notice;
- What must the notice contain; and
- When notice may be excused

I. Covered Employers

WARN defines “employer” as any business that employs: (a) 100 or more employees, excluding part-time employees; or (b) 100 or more employees who, in the aggregate, work at last 4,000 per week, exclusive of overtime.

“Part-time” employee is defined as an individual who works an average of fewer than 20 hours per week, or who has worked fewer than six of the 12 months prior to date when notice must be given.

II. Covered Events

WARN requires notice be given in the event of a “plant closing” or “mass layoff.”

A. Plant closing

A plant closing is defined as a permanent or temporary closing of a single site of employment if the closure causes an “employment loss” for 50 or more employees (excluding part-time employees).

“Employment loss” includes:

- Termination;
- A layoff exceeding six months; or
- A reduction in hours of more than 50% during each month of any six month period.

B. Mass layoff

WARN also covers mass layoffs, which are defined as any employment loss that occurs during a 30-day period for: (a) at least 500 employees (excluding part-time employees); or (b) at least 50

employees (again excluding part-timers) with the affected employees constituting at least 33% of the employees at that site of employment.

III. Notice Recipients

Notice of a covered layoff or closing must be given to any employee “who may reasonably be expected to experience an employment loss.”

Notice must also be given to: (a) any unions that may represent the affected employees; (b) the State entity designate to receive such notice; and (c) the chief elected official of the local government where the closing or layoff is to occur. Note that the latter notice should include any city, county or state officials.

IV. Notice Contents

A compliant notice must include:

- The name and address of the site of the closing or layoff;
- A statement of whether the action is expected to be temporary or permanent;
- A statement as to whether the entire location is to be closed;
- The expected date of the first termination or layoff, and any planned schedule;
- The job titles and names of all affected employees;
- Whether employees have any “bumping” rights; and
- The name and phone number of a company official who can be contacted for further information.

V. When Notice May Be Reduced or Excused

An employer may institute a covered closing or layoff before the 60-day notice period has concluded if:

- The employer was actively seeking capital or business that, if obtained, would have obviated the need for notice, if the employer reasonably and in good faith believed giving notice would have prevented it from obtaining the needed capital or business;
- The closing or layoff was caused by business circumstances that were not reasonably foreseeable; or
- The closing or layoff was caused by a natural disaster.

V. State Law WARN Requirements

Employers should also determine if the city, county or state where they operate has imposed any similar or additional WARN requirements beyond those discussed above. For example, California’s WARN law requires employers to provide 60 days advance notice if they close an office affecting any number of employees or if they implement a mass layoff affecting 50 or more employees in 30 days. California’s WARN law does not contain the “unforeseen business circumstances” exception but has an exception for a plant closure or layoff “necessitated by a physical calamity or act of war.” It remains to be seen whether that exception will be deemed to apply to a closing caused by the COVID-19 pandemic.

VI. Conclusion

Compliance with WARN obligations requires a close examination of the relevant facts and circumstances. Employers should consult with counsel if they are anticipating any large closings or layoffs to make sure they comply with any applicable federal, state or local laws.

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