

# Insights

## You have been WARNed. Complying with the Worker Adjustment and Retraining Notification Act for COVID-19 Shutdowns

April 2, 2020

By: Elizabeth M. Roberson, Shelley M. Jackson, and Kate Trinkle

As many employers are considering temporarily shutting down their workplaces or laying off employees, it is important to ensure compliance with the Worker Adjustment and Retraining Notification (WARN) Act. The failure to comply could cost employers as much as keeping their workforce employed. There are both federal and state WARN Acts and each has specific requirements for compliance.

### A. The Federal WARN Act.<sup>1</sup>

#### 1. Covered Employers.

The federal WARN Act applies to employers with 100<sup>2</sup> or more full-time employees or 100 or more employees who work in total at least 4,000 hours per week, excluding overtime. Private for-profit businesses and non-profit organizations are covered. Local, state, and federal government entities generally are not covered, although quasi-public entities which operate separately from the general government are.

#### 2. Triggering Events.

The WARN Act requires covered employers to give 60 days' written notice of the intention to initiate a "plant closing" or "mass layoff" which will cause "employment loss" at any single site of employment over a 30-day period. Each of these terms is defined by the Act.

A plant closing is 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 during any 30-day period for 50 or more employees excluding any part-time employees." 29 U.S.C. § 2101 (a)(2).

A mass layoff is a "reduction in force which— (A) is not the result of a plant closing; and (B) results in an employment loss at the single site of employment during any 30-day period for— (i) (I) at least 33 percent of the employees (excluding any part-time employees); and (II) at least 50 employees (excluding any part-time employees); or (ii) at least 500 employees (excluding any part-time employees)." 29 U.S.C. § 2101 (a)(3).

For WARN to be triggered, there also must be an employment loss, which means: (i) an employment termination, other than a discharge for cause, voluntary departure, or retirement, (ii) a layoff exceeding 6 months, or (iii) a reduction in hours of work of individual employees of more than 50% during each month of any 6-month period. 20 C.F.R. § 639.3. When an employee is offered a transfer to another location, such as at the time of a business relocation or consolidation, the employee may not have suffered an employment loss for purposes of the WARN Act, depending on the circumstances.

Determining whether there has been an employment loss sufficient to constitute a plant closing or mass layoff under WARN is a fact-intensive process and depends on a number of variables. Generally, short-term, temporary

layoffs or work slowdowns will not trigger WARN, but they can eventually result in an employment loss. Likewise, layoffs or work slowdowns affecting fewer than 50 employees at a site also generally will not trigger WARN but can aggregate over a 90-day period and result in a WARN obligation.

### 3. Notice Requirements.

When the WARN Act is triggered, written notice must be given to (a) the union representative or, if there is none, each affected employee, (b) the state dislocated worker unit, and the (c) chief elected official of the unit of local government within which the action is to occur.

Notice to employees must be written in language that is understandable to the employee and must include, at a minimum:

- (a) 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;
- (b) The expected date when the plant closing or mass layoff will commence and the expected date when the individual employee will be separated;
- (c) An indication whether or not bumping rights exist; [and]
- (d) The name and telephone number of a company official to contact for further information.

20 C.F.R. § 639.7. Employers may wish to include additional helpful information for employees, such as available dislocated worker assistance and, if the action is temporary, expected duration.

Required content for written notice to other parties, including a union representative (if applicable), the state disclosed workers unit, or the chief elected official of the local government, may also include job titles of the positions affected, the number of employees in each job classification, and/or the names of the employees<sup>3</sup> currently holding those jobs.

Employers should carefully evaluate which parties must receive WARN Act notice and should ensure that each notice contains the required information.

### 4. Exemptions.

There are two circumstances in which a plant closing or mass layoff is exempt from WARN: (a) when a temporary facility closes and the employees were hired with the knowledge that the work was temporary; or (b) when the closing is a result of a strike or employer lockout that is not intended to evade WARN requirements.

### 5. Reduced Notice Requirements.

In addition to the exemptions, there are three circumstances in which a covered employer is not required to provide 60-days' notice in advance of a plant closing or mass layoff:

- (a) A shutdown at a single site of employment may occur prior to the end of the 60-day notice period if, at the time notice would have been required, an employer was actively seeking capital or business which, if obtained, might have avoided or postponed the shutdown and the employer reasonably believed that making the required disclosures would have precluded the employer from obtaining the capital or business;
- (b) An employer may order a plant closing or mass layoff before the end of the 60 day notice period "if the closing or mass layoff is caused by business circumstances that were not reasonably foreseeable as of the time that notice would have been required[:]"
- (c) No notice is required when the plant closing or mass layoff is the result of natural disaster, such as a flood, earthquake, or drought.

29 U.S.C. § 2102(b).

Employers relying on any of these exceptions must give as much notice as is practicable and include a brief explanation for the reduced notice period.

### 6. Extension of Layoff.

If an employer announces a temporary layoff lasting six months or less which then extends beyond six months, it will trigger WARN liability unless both of the following conditions are met:

- (1) the extension beyond 6 months is caused by business circumstances (including unforeseeable changes in price or cost) not reasonably foreseeable at the time of the initial layoff; and
- (2) notice is given at the time it becomes reasonably foreseeable that the extension beyond 6 months will be required.

19 U.S.C. § 2102(c).

## 7. Other Provisions.

WARN requires employers to aggregate employment losses for two or more groups at a single site of employment that might not be large enough on their own to trigger WARN but occur within a 90-day period, so employers should be vigilant to look back and forward 90 days before any planned slowdown or reduction in force. The seller of all or part of a business subject to WARN is responsible for compliance up to the effective date of sale; after that, the buyer is responsible.

In addition to the federal WARN Act, some states have enacted mini-WARN Acts with additional requirements.

## **B. Various State WARN Acts.**

### **Illinois**

Fewer than 10 states have their own mini-WARN Acts and one of them is Illinois. The Illinois Worker Adjustment and Retraining Notification Act ("Illinois mini-WARN Act") requires employers to provide employees with 60 days' written notice before ordering any mass layoff, relocation, or employment loss. 820 ILCS 65/1 to 65/99. The 60-day notice requirement applies to employers with: (i) 75 or more full-time employees or (ii) 75 or more employees who work at least 4,000 hours per week in the aggregate, excluding overtime hours. 820 ILCS 65/5(c). The Illinois mini-WARN Act does not apply to federal and state governments, federal and state political subdivisions, and charitable or tax-exempt institutions and organizations.

There are several different events that trigger the Illinois mini-WARN Act and its 60-day notice requirement, including:

- a. Plant closing. A plant closing involves the temporary or permanent shutdown of a single site of employment that results in an employment loss of 50 or more full-time employees during any 30-day period. 820 ILCS 65/5(f).
- b. Mass layoff. A mass layoff is a reduction in force that is not the result of a plant closing and results in an employment loss at a single site of employment of at least: (i) 33% of the full-time employees including at least 25 full-time employees; or (ii) 250 full-time employees. 820 ILCS 65/5(d).

Under the Illinois mini-WARN Act, an "employment loss" includes the following: (i) an employment termination other than a discharge for cause, voluntary departure, or retirement; (ii) a layoff exceeding 6 months; or (iii) a reduction in work hours of more than 50% during each month of any 6-month period.

If the Illinois mini-WARN Act is triggered, employers must provide notice to each affected employee, the union representative of affected employees, the Illinois Department of Commerce and Economic Opportunity, the elected official of each municipal and county government where the employment loss occurs, and the Illinois Department of Labor. 820 ILCS 65/10(a); Ill. Admin. Code tit. 56, §§ 230.210 and 230.220). The employer may be required to provide the same notice to additional recipients if the business receives state or local economic incentives. The contents of the notice differ based on the recipient. For an affected employee, the notice must include:

- i. a statement specifying whether the planned action will be permanent or temporary;
- ii. a statement specifying whether the entire plant will be closed;
- iii. the date when the plant closing or mass layoffs begin;
- iv. the date of the individual employee's separation;

- v. an indication of whether senior employees affected by a layoff may replace junior employees not affected by the layoff;
- vi. the telephone number of a company official to contact for further information.

There are a few exceptions to the Illinois mini-WARN Act where less than 60 days' notice is required, including where, in the case of a plant closing, the Illinois Department of Labor determines that the need for notice was not reasonably foreseeable at the time the notice would have been required. 820 ILCS 65/15(a)(2). This exception is similar to the unforeseeable business circumstances exception under the federal WARN Act. Additionally, less notice is required if the mass layoff, relocation, or employment loss is necessitated by a physical calamity or an act of terrorism or war. 820 ILCS 65/10(c). Under these exceptions, an employer must still provide as much notice as is practicable and must provide a brief statement for reducing the notification period. 820 ILCS 65/15(d).

While the Illinois mini-WARN Act mirrors its federal counterpart, the definition of a covered employer, the triggering events, the notice recipients, and the required notice content differ slightly. However, employers must be aware of the differences to ensure that they are in compliance with both federal and Illinois law. In light of the COVID-19 public health emergency, Illinois may lessen its mini-WARN Act requirements.

## Indiana

Indiana, unlike Illinois, does not have its own mini-WARN Act. Instead, Indiana follows the federal WARN Act. For Indiana businesses that fall under the WARN Act, notice must be sent to the Indiana Department of Workforce Development ("IN DWD") either by mail or to the [warn-notice@dwd.in.gov](mailto:warn-notice@dwd.in.gov) email. The IN DWD provides a list of a list of the current WARN notices, which is available [here](#).

## C. What happens if employers don't comply?

As mentioned previously, it is important to comply with both federal and state WARN Acts because there can be costly penalties. It appears that states have been relaxing their WARN notice requirements in the midst of COVID-19 due to the unforeseen business circumstance exception; however it is important that you provide as much notice to your workforce as possible. The consequences for not doing so are that you could be required to pay affected employees for up to 60 days of lost wages and benefits, civil penalties of up to \$500 per day for a failure to give 60 days' notice to the local government, and the employer opens themselves up to civil actions which include attorneys fees for the prevailing party.

Determining when WARN is applicable, what the notice should say, and how much notice is needed can be difficult and making the wrong decisions are likely costlier than seeking legal assistance ahead of time. Should you have any questions or need assistance with complying with the Federal WARN Act or a state equivalent, please contact **Elizabeth M. Roberson, Shelley M. Jackson** or an attorney from our **Labor & Employment Law Practice Group**.

*Disclaimer. The contents of this article should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult with counsel concerning your situation and specific legal questions you may have.*

*[1] The WARN Act is codified at 29 U.S.C. § 2101-09 and implementing regulations are located at 20 C.F.R., Chapter V, Part 639. The U.S. Department of Labor maintains an online compliance assistance website at <https://www.dol.gov/agencies/eta/layoffs/warn> and an Employer Guide at [https://www.dol.gov/sites/dolgov/files/ETA/Layoff/pdfs/\\_EmployerWARN2003.pdf](https://www.dol.gov/sites/dolgov/files/ETA/Layoff/pdfs/_EmployerWARN2003.pdf).*

*[2] The threshold for 100 full-time employees does not include those who have been employed with the employer for less than six months or those who work fewer than 20 hours per week. It also must be calculated in light of the relationship among related businesses, such as a subsidiary and parent relationship which can, in certain circumstances constitute a "single employer" for purposes of the WARN Act.*

*[3] Employers should be careful not to include personal information of other employees in an individual employee's notice.*