KAUFMAN | DOLOWICH


# Employer Obligations Under the Worker Adjustment and Retraining Notification (WARN) Act in Light of Coronavirus Pandemic

As a result of the economic turmoil caused by the onset of the coronavirus pandemic, many employers across the country are faced with the difficult decision of whether to lay off employees or temporarily close. In lieu of closing, employers are also considering whether to lay off employees for a period until the outbreak subsides. When grappling with such decisions, employers must be aware of what the law requires of them. One such obligation that employers must consider is whether they are required to provide a Worker Adjustment and Retraining Notification Act (WARN) notice under either federal or state law.

Under federal law, the Worker Adjustment and Retraining Notification (WARN) Act requires qualified employers that intend to carry out plant closings or mass layoffs to provide 60 days' advance notice to affected employees, the state entity responsible for carrying out the rapid response activities and the chief elected office of the local government within which the layoffs are to occur. Employers should also be aware that many states have their own WARN laws that may also apply. These states include Illinois, New Jersey, New York, Maryland, Tennessee and California. While this article focuses on the federal WARN Act, employers in states with their own WARN laws will need to carefully consider these state laws as they generally provide more protections than the federal WARN law. If you are in one of the affected states, please call our office for an analysis of your state's requirements.

## Which Employers Fall under the Federal WARN Act?

Not every employer is subject to the requirements of the federal WARN act. Only employers of at least 100 full-time employees, or 100 or more employees, including part-time employees, who total at least 4,000 hours per week, exclusive of overtime, are subject to the federal WARN act. Federal, state, local, and federally recognized tribal governments are not subject to the federal WARN Act even if they meet the employer-size threshold. However, public and quasi-public entities that engage in business and that function independently of those governments are covered if they meet the employer-size threshold.

## What Events Trigger Required Notification under the WARN Act?

There are three types of events that require notification under the WARN Act: (1) a plant closing[1] resulting in employment losses of at least 50 employees; (2) a mass layoff of at least 50 employees where the employment loss consists of at least 33% of employment at the site; or (3) a mass layoff with an employment loss of 500 or more at a single site of employment, regardless of its proportion of total employment at the site or if the employment loss is part of a plant closing. Employment losses are defined as involuntary separations of workers exceeding six months, or a reduction in hours worked of at least 50% during each month for a six-month period. Thus, as may be the case for temporary furloughs or closures related to coronavirus, employers are not required to give WARN notice if employees are going to be laid off for less than six months.

However, given the uncertainty of the spread of the coronavirus and its effect on the economy, it can be hard to know whether a layoff will indeed only last six months. Employers may find themselves in a situation where they are forced to extend a temporary layoff of less than six months into a layoff of over six months. With this uncertainty in mind, employers must be aware that the WARN Act can be applied retroactively. If an employer announces layoffs that are for less than six months but otherwise meet the federal WARN Act criteria and then subsequently extend the layoffs past six months, the employer may be subject to federal WARN Act notification responsibilities. Unless the employer can establish that the layoff extension was due to circumstances that were unforeseeable at the time of the original layoff, the case is treated as if notice was required for the original layoff. Accordingly, if there is a chance that the layoff could last longer than six months, even if it is initially less than six months, it is always best to err on the side of caution and issue the proper notice.

**Which Employees Are Required to Receive Notice Under the WARN Act?**

**Employees covered by the statute include hourly and salaried employees, managers, and supervisors on the employer's payroll. The law does not apply to an employer's business partners, contract employees/independent contractors and self-employed individuals. It is also important to note that the law does apply to part-time employees and even employees who have worked for less than 6 months in the preceding twelve months of the date on which notice is required. However, employees who have been clearly told upon being hired that their employment is temporary are not entitled to receive notice under the federal WARN Act, i.e. seasonal workers.**

**What Are the Notification Requirements Under the WARN Act?**

**Under the federal WARN Act, written notice of WARN events must be provided to each affected employee 60 calendar days prior to layoff. If the affected employees are covered by a collective bargaining agreement, notification can instead be issued through the employees' bargaining representative. In addition to the affected employees or their representative, an employer must notify the state entity responsible for carrying out rapid response activities and the chief elected official of the local government within which the layoffs are to occur. All notifications must include (1) a description of the planned action and a statement as to whether the planned action is expected to be permanent or temporary; (2) the expected date or dates when the layoffs will commence; and (3) the name and telephone number of a company official to contact for more information.**

**Are There Any Exceptions to the WARN Act?**

**The WARN act specifies three exceptions that allow employers to provide less than 60 days' notice to otherwise covered employees: (1) the faltering company exception; (2) the unforeseeable business circumstances exception; and (3) the natural disaster exception.**

***Faltering Company Exception***

***Employers can provide reduced notice for plant closings, but not mass layoffs, if they had been actively seeking capital or business for their faltering enterprises at the time the 60 day notice went out, thought they had a realistic chance of obtaining funds or new business sufficient to allow the facilities to remain open, and believed in good faith that giving notice would have prevented them from getting the capital or business necessary to continue their operations. If you feel that you fall under this exception, please contact our office to discuss the specific parameters that must be met.***

***Unforeseeable Business Circumstances Exception***

***Employers can provide reduced notice if they could not reasonably foresee the business circumstances that caused the plant closings or mass layoffs and they are outside the employers control. These circumstances could include, but are not limited to, (1) a major client terminating a large contract with the employer; (2) a strike at a supplier of key parts to the employer; (3) the swift onset of a deep economic downturn or a non-natural disaster; or (4) a government ordered closing of an employment site that occurs without prior notice.***

***Natural disaster exception***

***Employers may also provide reduced notice if the layoff is due to a natural disaster such as a flood, earthquake, drought, or storm.***

**Do Any of the Exceptions Under the Federal WARN Act Apply in Light of the Coronavirus Pandemic?**

**At this time, it remains to be seen whether a pandemic and/or a public health crisis relieves an employer's obligations under the Federal WARN Act. Whether a pandemic and/or public health crisis would fall under an exception to the federal WARN Act would be a matter of first impression. It is certainly likely that the effects of the coronavirus pandemic, and possible resulting deep economic downturn, could fall under one of these exceptions, especially if the employer is ordered to be closed by its local, state or federal government. However, employers need to be aware that even if one of these exceptions does apply, they still need to provide "as much**

notice as practicable", as soon as the triggering event is foreseeable and provide a statement explaining the circumstances of why a more extensive notice was not provided. Given the uncertainty regarding whether this exception applies and the rapidly changing circumstances surrounding the pandemic, employers looking to reduce risk of possible future lawsuits should still provide the required notices under the federal WARN act, if at all possible.

[1] A plant closing is defined as the permanent or temporary shut down of a single site of employment, or one or more facilities or operating units within a single site of employment, if the shut down 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.