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WARN ACT: Employer's Guide to Advance Notice of Layoffs and Closing

This brochure presents an overview of the WARN Act (Worker Adjustment and Retraining Notification). It also answers FAQs about employee rights and employer requirements under the WARN Act.

Disclaimer:

The guide is not intended and does not constitute legal advice; instead, all information, content, and materials available on this site are for educational, attorneys advertisement, and general informational purposes only.

Every person and company's facts and circumstances are unique. Readers should contact their attorney to obtain advice with respect to any particular legal matter. No reader should act or refrain from acting on the basis of information on this guide without first seeking legal advice from counsel in the relevant jurisdiction. Only your individual attorney can provide assurances that the information contained herein – and your interpretation of it – is applicable or appropriate to your particular situation.

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Introduction

The U.S. Economy is a constantly growing and changing entity. For businesses to stay successful, they need to adapt and streamline their company in response to the economy. Sometimes, this includes eliminating jobs and facilities. The WARN Act, which was passed by Congress in 1988, allows workers sufficient time to adjust to losing their job and to plan for their future.

The U.S. Department of Labor provides services to workers and their communities in order to stabilize the economy through these times. As an employer, it is important to understand your obligations under the WARN Act. By performing the correct actions, affected employees have access to all the services and assistance they need to help them transition.

This brochure provides a general overview but does not replace the expertise of legal counsel.

The WARN Act

How the WARN Act Provides Assistance

Under the WARN Act, employers must provide written advance notice of 60 calendar days of any mass layoffs or plant closings. This ensures workers, their families, and communities receive assistance from the State Rapid Response Dislocated Worker Unit. It also provides workers and their families with enough time to enter training programs or find another job.

Once the State Rapid Response Dislocated Worker Unit receives a WARN notice, they co-ordinate with the employer to provide information about retraining and employment services. These services assist dislocated employees in finding new jobs. These services may include:

- Job search assistance
- Job placement assistance
- Classroom training
- On-the-job training
- Entrepreneurial training
- Referral to education services
- Labor market information

Employers Required to Provide WARN Notification

An employer must provide a WARN Notification if:

- They employ at least 100 full-time workers and are laying off 50 people or more at one location. This does not include workers who work under 20 hours a week, or those who have worked for less than 6 months.
- They employ at least 100 workers whose combined work hours are 4,000 a week or more and is a private business separated from the government. This includes private non-profits and quasi-public entities.

Employees Protected by WARN

The WARN Act protects affected employees (ie. Those who are expected to lose their jobs). This includes hourly workers, salary workers, supervisors, managers, and non-strikers.

Affected employees include:

- Employees who can be reasonably expected to lose their jobs in the mass layoff or location closing. If the employer has a policy based on seniority or time-served as to who will lose their jobs, they should do their best to notify those who are expected to lose their job. At the very least, they should notify those who hold positions at risk of downsizing or elimination.
- Employees who over 6 months have their hours reduced by at least 50% in a mass layoff or plant closure.

- Employees who are laid off or terminated for 6 months or more.
- Workers who are being temporarily laid off but are expected to be recalled eg. Those on maternity, medical, or workers' compensation leave.
- Part-time workers.

Employees Not Protected Under WARN

Some employees may not be protected under WARN. These include:

- Workers who are striking or have been locked out in a labor dispute
- Workers who have been hired on a temporary contract to work at a temporary facility or on a temporary contract. It is important that they realize their employment is temporary when hired.
- Consultants, business partners, or contractors who are working in the business but are employed by another employer and their payment comes through them. This also includes self-employed workers.
- Local, state, and federal government employees.

Employees Not Counted Under WARN

When counting the number of employees or affected employees, the following types of employees are not counted.

- Retired workers
- Part-time workers
- Workers who have resigned
- Workers who were terminated for cause
- Workers who have been offered a transfer to another location that is within reasonable commuting distance. This is only the case if both:
 - The layoff or plant closure is due to consolidation or relocation of the business
 - There will be less than 6 months break in employment
- Workers who have been offered a transfer to another location that is not within reasonable commuting distance. This is only the case if all 3 of the below are met:
 - The layoff or plant closure is due to consolidation or relocation of the business
 - There will be less than 6 months break in employment
 - The employee accepts the transfer within 30 days of the offer.

Circumstances That Trigger WARN

The following circumstances trigger WARN:

- An employer discontinues a department or closes a facility permanently or temporarily, and this affects at least 50 full-time employees at one employment site.

- An employer discontinues a department permanently or temporarily, and there are less than 50 workers in the department, but more than 50 people will be laid off during this decision.
- An employer lays off more than 500 full-time workers at one site of employment within a 30-day period.
- An employer lays off between 50-499 (inclusive) full-time workers, and this means they are laying off 33% of the workforce at that single employment site.
- An employer announces a temporary lay off that meets the preceding two criteria and then decides to extend the layoff past 6 months. This would be only the case if the reason for the extension was not reasonably foreseeable.
- An employer reduces work hours by 50% or more for at least 50 employees for a 6-month period.

Circumstances That Do Not Trigger WARN

WARN is not triggered when an employer:

- Completes a temporary project or closes a temporary facility and lays off staff that were hired on temporary contracts. It is important that these staff know that their contract will end when the contract is finalized, or the facility closes.
- Closes a facility or department due to a lockout or strike.

If the thresholds for the size of business or facility are not met, then likewise, WARN is not triggered. This includes:

- If less than 50 people lose their jobs because of the mass layoff or facility closing.
- If 50-499 people lose their jobs and account for less than 33% of the single workplace's workforce.
- If the layoff is temporary and will not last for longer than 6 months.
- If employees' work hours are not reduced by 50% or more within 6 months.

Calculating the Timeframe to Determine When WARN Notice Is Required

The WARN Notice covers job losses that happen over a 30-day period. For example, if an employer has a plant of 50 workers where they lay off 40 workers and then 25 days later lay off the remaining 10 workers, it is covered under the WARN Act.

An employer must also give advance notice if there are several small layoffs or terminations over a 90-day period which accumulatively add up to numbers covered under the WARN Act. The only exception is if the employer can prove there are distinct causes for each layoff or terminations rather than it being an excuse to evade WARN.

The following example is of separate terminations covered under WARN.

Day 1: Company has 200 employees

Day 2: Company terminates 20 employees (there is now 180 employees)

Day 31: Company terminates 36 employees (144 employees now remain)

Day 60: Company terminates 10 employees (134 employees remain)

Day 89: Company terminates 2 employees (133 employees remain)

If these employees weren't given notice, then the company is liable to all 67 employees who were terminated. This is because over 50 employees were laid off during the 90 day period, and the company cannot prove they were due to separate causes. This means that the terminations are counted as a mass layoff, and all employees require 60 days' notice before their termination.

Exceptions to the 60-Day Notice

There are three exceptions to the 60-day notice rule. That being said, even when the exceptions apply, notice must be provided as soon as possible.

The three exceptions are:

1. **Faltering Company:** If the company is seeking business or capital and in good faith believes that it will postpone the shutdown or that giving notice would prevent them from receiving this capital.
2. **Unforeseeable Business Circumstances:** When the circumstances behind a mass layoff or closing is not foreseeable 60 days in advance, then notice must be given as soon as possible.
3. **Natural Disaster:** When a natural disaster such as storm, drought, tidal wave, earthquake, or floods. Notice must be given as soon as reasonable after the event.

Contents of the Notice to Employees When Not Represented

The notice must be written in clear language that can be easily understood by employees and leaves no ambiguity. The contents of the notice is required to have the following:

- A statement about whether the action will be temporary or permanent
- The expected date of the commencement of the mass layoff
- The expected date of the individual separation
- Whether or not bumping rights exist
- The full name and contact details of the company official who can answer employee questions
- Optional information includes the estimated duration of the action is temporary, and services available to the affected employees.

Contents of the Notice to the Dislocated Worker Unit and the Local Chief Elected Official

Along with giving advance notice to the employees, employers must give advance notice to the State Rapid Response Dislocated Worker Unit and the chief elected official of the local government. If many employees live in surrounding local government jurisdictions, then the employer may need to notify multiple local government officials.

This notice must contain the following information:

- The name and address of the location where the mass layoff or facility closure will occur
- The name and contact details of a company contact for additional information
- Whether the job losses will be permanent or temporary
- If the entire location will be closed
- The expected schedule of job losses
- The positions being affected (job titles) and the number of employees affected in each position
- If bumping rights exist
- The name of all unions and employee representatives.
- The name and address of the chief elected officer of all of the unions

Under the WARN Act, the employer may provide alternative notice to the local government official and the State Rapid Response Dislocated Worker Unit. This written notice must include:

- The name and address of the location where the mass layoff or facility closure will occur
- The name and contact details of a company contact for additional information
- The expected date of separation
- The number of employees affected

If the employer gives an alternative form of notice, then they must provide all the extra details if either the local government or State Rapid Response Dislocated Worker Unit requests them.

What The Notice to the Union Representative May Contain

The employer must provide notice to any union representative if affected employees are unionized.

This notice must contain the following information:

- The name and address of the location where the mass layoff or facility closure will occur
- The name and contact details of a company contact for additional information
- Whether the job losses will be permanent or temporary
- If the entire location will be closed
- The expected schedule of job losses
- The positions being affected (job titles) and the number of employees affected in each position

The notice can also include information about any assistance or services available to dislocated employees.

Dates of Termination or Layoff

The WARN Notice states that when it is not possible to identify an exact termination date, the employer can identify a two-week period when the layoffs or terminations may happen.

Errors in the Notice

The employer should endeavor to make the notice as accurate as possible. However, minor errors may occur because of unforeseeable changes in circumstances during the 60-day notice period. These errors or changes do not violate the WARN Act.

Extension of Notice

If the schedule for mass layoff or plant closure is extended beyond the scheduled date or the two-week period originally given, then the employer must provide additional notice. The following requirements apply:

- If it is postponed for less than 60 days, then notice should be given as soon as reasonably possible. The new notice should give the reason for postponing, and the new action date. It must provide all information to employees.
- If it is postponed for 60 days or more, then the employer must issue a new notice.

Serving Notice

Employers may use any reasonably delivery methods for providing written notice at least 60 days before the action. Verbal notices and preprinted notices included in paychecks do not meet the WARN requirements.

Sale of a Business

The WARN Notice applies to selling all or part of a business, even an asset sale. However, the party responsible for providing notice may vary depending on the situation.

If the mass layoff or plant closure occurs before the sale becomes effective, the selling employer must give notice.

If the mass layoff or plant closure occurs after the sale becomes effective, the buying employer must give notice.

For the purpose of WARN, the seller's employees automatically become the buyer's employees once the sale is effective.

Penalties For Violating WARN

When an employer violates WARN, they are liable to each employee affected by the violation. They must pay back pay and benefits for the period of violation, up to a maximum of 60 days. If the employer pays any wages over the notice period, the penalty is reduced by that number of days. If the employer provides an unconditional and voluntary payment, the WARN liability will be reduced by that amount.

If the employer fails to provide sufficient notice to the local government, then they will receive a civil penalty capped at \$500 per day of the violation. If the employer satisfies liability to each employee within three weeks of closure, then they may avoid the civil penalty.

WARN Enforcement

The U.S. District Courts enforce the WARN Act. Local government, workers, and their unions or representatives may bring lawsuits or class-action suits against employers who violate the Act.

Frequently Asked Questions

Other Laws and Contracts

Does WARN replace other notice laws or contracts?

The WARN Act does not supersede any collective bargaining agreements or laws that require additional notice periods or rights. However, the WARN Act requirements must not be reduced by any contracts, laws, or collective bargaining agreements.

For example, collective bargaining may require a 70 day notice period. However, if a collective bargaining agreement requires a 40 day notice period, then the WARN Act supersedes that. In cases where the WARN Act applies, employees must be given at least 60 days' notice as per WARN requirements.

Employer Prohibited From Ordering a Plant Closing

Can an employer be forced to keep a plant open or retain employees?

No, employers cannot be required to keep a plant open or keep employees under the WARN Act. The only thing the WARN Act can force an employer to do is to give sufficient notice.

Labor Disputes, Strikes, and Lockouts

Is a labor dispute such as a lockout or strike considered a WARN mass layoff?

No, employers on strike or in a lockout are not covered under the WARN Act. This also includes employees involved in labor negotiations that led to the strike or lockout.

If employees are involved in labor negotiations, but not part of a strike, they are still entitled to the WARN Act advanced notice.

Timing

When do I need to determine if WARN applies to my business

As an employer, you must decide if WARN applies to employment actions at least 65 days before it occurs. If WARN does apply, then this gives you time to give the employees advance notice. You will need to rely on the facts as they stand when you decide. You cannot assume things like employees taking early retirement if you offer it. You must decide based on the facts and what you can reasonably assume is highly likely.

Employees – Part-Time and Full-Time

What timeframe is to be used in calculating whether an employee works an average of fewer than 20 hours per week and is, therefore, a part-time employee?

The timeframe the average must be calculated by is the shorter of either:

- The most recent 90 days
- The actual time the worker has been employed

We have provided two examples to clarify

Week number	Example 1	Example 2
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
90 days worked	Total: 223 hours	Total: 265 hours

To calculate whether an employee is eligible for WARN notice, divide the total hours worked by 13 weeks to get the average hours per week.

Example 1:

Total hours worked /13 weeks

$223/13 = 17.2$ hours per week

The average hours worked per week is 17.2 hours. Therefore, as the average hours per week worked is less than 20 hours, they are considered part-time.

Example 2:

Total hours worked /13 weeks

$265/13 = 20.4$ hours per week

The average hours worked per week is 20.4 hours, as this is above 20 hours per week, albeit marginally, the employee is considered full-time.

In a mass layoff of less than 500 workers, do you exclude part-time workers from the total workforce, the group of workers laid off, or both?

Both. When calculating the 33% threshold for a mass layoff affecting less than 500 workers, divide the number of full-time workers by the number of full-time workers.

Employee Transfers

How do I determine if the transfer I am offering employees is of a reasonable commuting distance? Is it based on time, mileage, local custom, or some kind of combination?

It is calculated on a case by case basis. However, employers should keep in mind the following things:

- Geographic accessibility
- Road quality
- Reasonably available transportation
- Travel time from the employee's house.
- Applicable collective bargaining agreements

When Affected Employees Cannot Be Identified

Should I give notice to everyone when affected employees cannot be identified?

Employers must give notice to workers who may lose their jobs due to employer policies. However, employers should not provide a blanket notice.

Bumping

What obligations do I have to give notice when there is an established rights system?

When there is no union, employers must identify and notify workers who may lose their job in a bumping system. If they cannot identify this, they must notify employees who hold a position that will be eliminated. However, if the employee is unionized, then notice will be provided to the union representative.

Increased Workers' Compensation Claims and Potential Sabotage

Should I be concerned about increased workers' compensation claims when notice is given.

Generally, workers' compensation claims do not increase when employers give advance notice. Also, giving advance notice shows goodwill on the employer's part, and workers are less likely to sabotage.

Is sabotage a concern when notice is given?

Generally providing advance notice and any employee support services will make your employees think highly of you. This will increase employee morale, productivity, and paint your company in a positive light to the local community.

Sale of a Business

In a hostile takeover situation, if the seller refuses to give notice, should the buyer give notice before actually buying the company?

Yes, the buyer is responsible for providing notice for any mass layoffs or plant closures after the sale. However, if the notice must be given while the buyer is not the employer, then they might need to give written notice. This poses a problem, as the buyer may not know the names and addresses of the affected workers.

When the employee is offered employment with the buyer but refuses, is this considered an employment termination or a voluntary departure?

This would be considered a voluntary departure. However, if there are significant changes to an employee's job description, wages, working conditions, or benefits, then it is a constructive discharge.

If employees are terminated without notice at the instant the sale becomes effective, which party is liable – the seller or the buyer?

The seller is the liable party. The seller is liable for notifying affected employees of mass layoffs or plant closures up to and including the effective date of sale. The buyer is responsible for providing notice of any mass layoffs or plant closures after the effective date of sale.

If the buyer retains the employees for a brief period after the sale but then terminates them within 60 days after the sale, is the buyer liable for the full 60-day notice or is liability allocated between the seller and the buyer based upon time of employment with each during the 60-day period preceding the termination?

The buyer is liable for providing 60 days' notice, even if that notice period starts while the seller is still the employer. If the seller knows about the planned layoff or closure, they may provide notice to their employees. However, it is the buyer's responsibility, so they are legally liable for WARN notice.

When a buyer chooses to continue the seller's employees in their previous jobs but at a substantial reduction in wages and fringe benefits, has the buyer constructively discharged the employees, and what would constitute a constructive discharge/involuntary departure?

If the worker believes that they were being fired or unable to work for the new employer because of a drastic change in wages or working conditions, then this would be constructive discharge.

Bankruptcy

How is WARN applicable to bankruptcy situations?

In some circumstances, WARN still applies to an employer that declares bankruptcy. There are two situations where WARN still applies to a mass layoff or plant closure after a company declares bankruptcy:

1. The employer knew about the mass layoff or closure before filing for bankruptcy and uses bankruptcy to avoid giving notice.
2. The employer continues to run a company as a debtor in possession through the bankruptcy.

The WARN notice does not apply to a trustee whose only function is to wind up the business. Also, WARN claims will be filed in Bankruptcy Court instead of the District Court.

Waiving the Right to WARN Notice

Can I ask my employees to waive their rights to notice under WARN?

No, employees cannot be required to waive their rights under the WARN notice. Under the WARN Act, there are no alternatives to advanced notice. However, you can ask employees to sign a document that waives their rights to make claims against the company. This waives their rights to make any claim, including a WARN claim. Offer benefits or additional pay in exchange for the employees signing these waivers.

Pay in Lieu of Notice

Can I pay my workers their salary and benefits for 60 days in lieu of notice?

The WARN Act requires notice, and does not recognize any alternatives, including pay instead of notice. Failing to give notice undermines any other services offered and does a disservice to employees.

The WARN requires damages of back pay and benefits for the number of days the violation occurred. This is capped at the maximum required 60 day notice period. Therefore, by paying your employees full back pay and benefits for the full amount, you would sidestep any violation.

What if I pay my workers for 60 days in lieu of notice and employee gets another job within what would have been the notice period, am I required to continue making payments to the employee through the notice period?

No, if any employees get jobs during the notice period, this becomes a voluntary termination, and the employee is ineligible for damages.

Can severance pay offset WARN damages?

The WARN allows employers to offset voluntary and unconditional payments against their backpay damages. However, severance pay is given as a condition of signing a contract, therefore is not eligible to be offset.

Employee Access to Accrued Vacation Time

Can I decide not to give employees paid vacation in a closing or layoff situation?

Vacation pay may be considered as a fringe benefit or wages in select circumstances. If the employee has earned the vacation pay as stipulated by contract or legal right, then it must be paid as part of WARN damages.

Single Site of Employment

Where is the "single-site" of an office whose employees travel widely within large geographic regions—for example, salespersons?

If employers are "out-stationed," travel from point to point as part of their primary duties, or who work outside of the employer's employment sites as part of their main duties, their home base is their single site of employment. Their home base is the base where they report, or their work is assigned.

Notice Mailing Requirement

When notice is mailed, at what point does the 60-day timeframe commence—from the date of mailing, the date of receipt, or a reasonable time after the mailing?

The 60-day notice period begins when the worker receives their written notice. If a few notices are not delivered, and it is due to no fault of the employer, then there is no violation. However, employers should consider sending written notice by a method that allows receipts of delivery.

Attorney Fees in WARN Cases

Are attorney's fees available in WARN cases?

Employers may be liable for costs incurred and attorney fees if the employees prevail in a WARN lawsuit.

Glossary of WARN Terms

Affected Employees

This is defined as the employees who may reasonably be expected to lose their jobs during the action. It also includes employees who may lose their job due to bumping rights. This does not include business partners, contract, or consultants who are self-employed or employed by another employer.

Bumping Rights

Bumping rights mean an employee may displace other employees due to their status in employer policy or collective bargaining agreement. The most common of these is seniority rights.

Constructive Discharge

A constructive discharge is where a worker resigns but it is not found to be a voluntary quit because of an intolerable or hostile work environment. Due to employer coercion, or pressure, the employee resigns or quits, so it is not voluntary.

Employer

Under the WARN Act, an employer is defined as a company that employs at least 100 full-time workers. It could also be defined as a company whose part-time and full-time employees work a combined 4,000 hours a week. This includes private non-profit, profit, or quasi-governmental organizations.

Employment Loss

An employment loss could mean any of the three things:

1. Any termination of employment
2. A layoff of more than 6 months
3. A reduction of more than 50% of an employee's hours during a 6 month period.

If the employee is transferred to employer-sponsored programs or reassigned and continues to be paid, and the reassignment is not constructive discharge or involuntary termination, then this is an exception.

Facility and Operating Unit

A facility may be a building or collection of buildings depending on how it operates.

An operating unit is defined as departments who operate distinctly from other departments or teams at the site. Defining whether a unit is distinct factors in organizational structures, and collective bargaining agreements.

Mass Layoff

A mass layoff is defined as a force reduction that:

1. Results in job losses at one employment site during a 30-day period for:

- a. At least 50-499 full-time employees who represent at least 33% of the total active workforce
- b. 500 or more full-time employees
2. The layoff is not as a result of a plant closure

Part-Time Worker

A part-time worker is defined as an employer who:

- Works an average of less than 20 hours per week
- Has been employed for less than 12 months before the notice is due

Plant Closing

A plant closing is a temporary or permanent closing of an employment site. It also includes at least one operating unit or facilities at one employment site if this results in 50 or more full-time employees losing their job.

All of the job losses do not have to occur in one single unit.

Single Site of Employment

A single site of employment is defined as:

1. A single location or a group of locations within a small geographical area that conduct similar activities.
2. Separate buildings or areas within proximity that share equipment and staff
3. If a worker travels as part of their primary duties:
 - a. a home base where the worker is assigned their duties
 - b. a home base that workers report to when not traveling

State Rapid Response Dislocated Worker Unit

This is defined as a governor assigned unit in each state which enforces the WARN Act.