

Mass Layoffs and Worksite Closures



Where everything checks out.

THE WARN ACT

The federal Worker Adjustment and Retraining Notification Act (WARN Act) generally requires covered employers to provide written notice at least 60 days in advance of covered plant closings and mass layoffs. The notice must be given to specific persons; affected workers or their representatives (e.g., a labor union), the state Rapid Response Dislocated Worker Unit, and to local elected officials. The purpose of the WARN Act is to provide displaced workers and their families some time to prepare for the prospective loss of employment by looking for alternative employment and, if necessary, entering a training or retraining program to obtain necessary skills to compete for available jobs. The advance notice also allows time for state and local officials to provide dislocated worker assistance.

New York has its own version of the WARN Act, which is administered by the New York State Department of Labor. While the NY WARN Act contains similar provisions to those contained in the federal legislation, there are certain significant differences, particularly to the extent the NY WARN Act affects a greater number of employers, regulates a smaller number of employment losses and provides more expansive notice requirements.

COVERAGE UNDER THE FEDERAL WARN ACT

The federal WARN Act applies to private for-profit businesses, private nonprofit businesses and governmental or quasi-governmental entities that function in a commercial context and are separately organized from the regular government, if they employ either:

1. 100 or more employees, not counting part-time employees (a term that is oddly defined to mean those who have worked fewer than six out of the last 12 months or who average fewer than 20 hours per week or
2. 100 or more employees who work at least a combined 4,000 hours per week.

Regular federal, state or local government entities that provide public services are not covered by the WARN Act.

Employees covered by and entitled to notice under the WARN Act include all hourly and salaried workers, as well as managerial and supervisory employees. Part-time employees who are not counted for purposes of determining whether an employer is required to provide notice under the WARN Act are nonetheless entitled to notices if they work for a covered employer.

Employees on temporary layoff or leaves of absence who have a reasonable expectation of recall (e.g., employees on workers' compensation, medical or maternity leave) are covered by the WARN Act.

The WARN Act does not apply to the following persons:

- strikers or workers who have been locked out in a labor dispute
- workers on temporary projects or working at temporary facilities who were informed of the temporary nature of the work when hired
- business partners, consultants or contract employees paid by a different employer or who are self-employed
- regular federal, state or local government employees.

WHEN NOTICE IS REQUIRED UNDER THE FEDERAL WARN ACT

The notice requirements of the WARN Act are triggered when a covered employer does any one of the following:

- 1. Plant closings:** A plant closing occurs for purposes of the WARN Act if an employer closes a facility (a separate building or buildings) or discontinues an operating unit (a distinct product, operation or specific work function within or across facilities at a single site) within a single site of employment and lays off at least 50 full-time employees.
- 2. Mass layoffs:** A mass layoff occurs for purposes of the WARN Act if an employer:
 - a. lays off 500 or more employees (excluding part-time employees) at a single site of employment during a 30-day period, or
 - b. lays off 50 to 499 employees (excluding part-time employees) at a single site of employment if that number is 33% or more of the number of employees (excluding part-time employees) at the single site of employment.
- 3. Extensions of temporary layoffs:** A temporary layoff of less than six months that meets this criteria, which is then extended by an employer for more

than six months, will be treated as triggering the notice requirements under the WARN Act for the original layoff, unless the reasons requiring the extension were not reasonably foreseeable at the time the layoff was originally announced.

- 4. Reductions in hours:** A WARN notice is also required if an employer reduces the hours of work for 50 or more employees by 50% or more for each month in any six-month period. In determining the number of employees who have suffered an employment loss as a result of a plant closing or mass layoff, the employer need not consider any employee who is terminated for cause or who voluntarily resigns or retires.

THE WARN ACT DOES NOT APPLY WHEN:

- a covered employer closes a temporary facility or completes a temporary project for which employees were hired with the understanding that the facility or project would be temporary, and their employment would end with the closing of the facility or completion of the project
- a covered employer closes a facility or operating unit due to a strike or lock-out
- a plant closing or mass layoff results in fewer than 50 layoffs at a single site of employment
- 50 to 499 workers are laid off at a single site of employment, but that number is less than 33% of the employer's total active workforce at that site
- a layoff is for six months or less.

Special Circumstances

Sale of a Business

The notice requirements of the WARN Act may or may not be triggered by the sale of a business. No notice is required if the sale does not result in a covered plant closing or mass layoff. If the sale does result in a covered plant closing or mass layoff, the seller is responsible for providing notice of any closing or mass layoff that occurs up to and including the date of the sale. The buyer is responsible for providing notice of any covered plant closing or mass layoff that occurs following the date of the sale.

Successor Obligations

New York City has adopted laws providing special protection to certain employees following the sale of their employer's business.

The New York City Displaced Building Service Worker Protection Act requires that any buyer, transferee or successor employer of most New York City commercial and residential properties offer the incumbent employees jobs after the change in ownership. In May 2016, the definition of covered employees was expanded and now includes watchmen, guards, doormen, building cleaners, porters, handymen, janitors, gardeners, groundskeepers, stationary firemen, elevator operators and starters, window cleaners, superintendents, security officers and fire safety directors. The law itself does not apply to commercial office buildings of less than 100,000 square feet, lessees of commercial office space with leases for less than 35,000 square feet or residential buildings with fewer than 50 units. Employees paid more than \$37.29 per hour or who work fewer than eight hours per week are not covered, and this hourly rate cap will be adjusted for inflation each year. The new owner may set its own wage rates and benefits, but it must continue to employ those individuals for at least 90 days unless it has cause for discharge during that "probationary" period.

EXCEPTIONS TO THE FULL 60-DAY NOTICE REQUIREMENT

There are three exceptions to the requirement that a WARN notice be provided 60 days before a plant closing or mass layoff. An employer bears the burden of proving that the exception applies and must provide as much notice as is practicable.

- **Faltering company.** This exception applies to circumstances in which a company is actively seeking new capital or business in order to continue operating and reasonably believes that providing advance notice would preclude its ability to obtain the new capital or business. This exception applies only to plant closings and is narrowly construed.
- **Unforeseeable business circumstances.** This exception applies to a plant closing or mass layoff caused by business circumstances outside the employer's control that were not reasonably foreseeable at the time 60 days' notice otherwise would have been required (for example, the sudden cancellation of a large order by a major customer).
- **Natural disaster.** This exception applies when a plant closing or mass layoff is the direct result of a natural disaster, such as a flood, earthquake, drought, storm or other similar act of nature or weather-related event.

CONTENTS OF FEDERAL WARN NOTICE

The WARN Act's basic requirement is that an employer must provide written notice to affected employees, including part-time employees, at least 60 calendar days prior to a plant closing or mass layoff. The notice may identify a 14-day period during which the employment loss will occur, without providing a specific date. When the employee is represented by a union, the employer must provide notice to the union – not the employee. The union then decides when and how to notify the employee. The local government's chief elected official where the employment site is located, and the State Rapid Response Dislocated Worker Unit must also receive notice of plant closings or mass layoffs.

A verbal announcement does not satisfy the notice requirements, even when the announcement occurs at an all-employee meeting. Notices to the media also do not satisfy the requirements of the WARN Act.

1. Notice to Unrepresented Employees

A notice sent to individual, unrepresented employees must be written in clear and easily understood language and must contain the following information:

- a statement as to whether the layoff is permanent or temporary (six months or less)

- if the entire plant is to be closed, a statement to that effect
- the expected date when the plant closing or mass layoff will begin and the expected date when the individual employee will be laid off
- an explanation of any "bumping rights" an employee may have to displace other employees, such as those with less seniority
- the name and telephone number of a company official to contact for further information.

2. Notice to State Dislocated Worker Unit/Chief Local Official/Union Representative

A WARN notice must also be sent to the state Rapid Response Dislocated Worker Unit and the chief elected official of the local government unit where the plant closing or mass layoff will take place and must contain the following information:

- the name and address where the plant closing or mass layoff will take place, along with the name and telephone number of a company official to contact for further information
- a statement as to whether the layoffs will be temporary or permanent and whether the entire plant will be closed
- the expected date of the first layoffs, along with a schedule of any additional layoffs
- the job titles of positions affected and the number of employees in each
- a statement as to whether employees have any bumping rights
- the name of each union representing affected employees and the name and address of the chief officer of each union.

3. Notice to Represented Employees

The requirements for the notice to be sent to the bargaining agent or union representative of affected employees are essentially identical to the requirements for the notice to the state Dislocated Worker Unit and local government officials.

COVERAGE UNDER THE NEW YORK STATE WARN ACT

The NY WARN Act covers any private employer (for profit or not-for-profit) with 50 or more employees within New York, excluding part-time employees or with 50 or more employees within New York that work in the aggregate at least 2,000 hours per week. For coverage purposes, the number of employees is measured as of the date the first notice is required to be given. The NY WARN Act does not cover the federal or state government or any local government, school districts or public authority, board or commission.

NOTICES REQUIRED UNDER THE NY WARN ACT

Unless it falls within an enumerated exception, the NY WARN Act requires a covered employer to provide at least 90 calendar days' written notice to any affected employee before any mass layoff, plant closing, plant relocation or covered reduction in hours that results in a planned employment loss. The NY WARN Act provides for notice to be given in circumstances involving relocations, unlike its federal counterpart.

The NY WARN Act defines an affected employee as an employee who may reasonably be expected to experience an employment loss as a result of a proposed plant closing, mass layoff, relocation or covered reduction in hours by the employer. Managers and supervisors are covered, but officers, directors and shareholders are not. The NY WARN Act and its implementing regulations further define the various terms as follows:

1. Employment loss

- The termination of employment, other than a termination for cause, a voluntary resignation or retirement
- a mass layoff exceeding six months

- the reduction in hours of work of more than 50% during each month of any consecutive six-month period.
- Mass layoff
- A layoff that does not result from a plant closing.
- A layoff that results in an employment loss at a single site during any 30-day period for at least 33% of employees at the site and at least 25 employees or at least 250 employees regardless of whether they comprise 33% of the workforce at the site. Part-time employees are excluded in making this determination.

2. Plant closing

The 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 during any 30-day period at such site for 25 or more employees, excluding any part-time employees. An employment action that results in the effective cessation of production or the work performed by a unit, even if a few employees remain, is a shutdown. A temporary shutdown triggers the notice requirement if the minimum number of terminations, layoffs exceeding six months or reductions in work hours would constitute an "employment loss" under the Act.

3. Plant relocation

Means the removal of all or substantially all of the industrial or commercial operations of an employer to a different location 50 miles or more away from the original site of operation. For the purposes of this part, relocation of substantially all of the operations of an employer shall include the relocation of an entire unit, product line, division or other segment of the employer's operation.

A covered employer must look ahead 90 days and behind 90 days to determine whether a particular action constituting an employment loss will reach the minimum standards to trigger a notice requirement for any 90-day period. The required notice under the NY WARN Act must be served on all affected employees in a manner sufficient to ensure its receipt. The regulations expressly provide that first-class mail, personal delivery with optional signed receipt and

insertion of the notice into pay envelopes, are sufficient means of service. The regulations expressly prohibit serving notice by email.

The required notice must be served to the following:

- affected employees
- any representative(s) of the affected employees
- the local Workforce Investment Board where the affected site of employment is located, as listed on the Department's website address and
- the Department of Labor's representative

The notice is required to be based on the best information available to the employer at the time of the notice and must contain certain information depending on the recipient.

NOTICES TO AFFECTED EMPLOYEES

With respect to notices being sent to each affected employee, the notice must specify:

- The expected date of the first separation of employees and the date when the individual employee will be separated.
- A statement as to whether the planned action is expected to be permanent or temporary and whether the entire plant is to be closed. If the planned action is expected to affect identifiable units of employees differently (for example should the employer expect a layoff of one unit to be temporary and the layoff of another unit to be permanent), the notice shall so indicate.
- A statement as to whether bumping rights exist.
- The name and telephone number of an employer representative to contact for further information.
- Information concerning unemployment insurance, job training and reemployment services for which affected employees may be eligible. Such information shall, at a minimum, include the following notice:

You are also hereby notified that, as a result of your employment loss, you may be eligible to receive job retraining, reemployment services or other assistance with obtaining new

employment from the New York State Department of Labor (NY DOL) or its workforce partners upon your termination. You may also be eligible for unemployment insurance benefits after your last day of employment. When possible, the NY DOL will contact your employer to arrange to provide additional information regarding these benefits and services to you through workshops, interviews and other activities that will be scheduled prior to the time your employment ends. If your job has already ended, you can access reemployment information and apply for unemployment insurance benefits on the Department's website or you may use the contact information provided on the website or visit one of the Department's local offices for further information and assistance.

Notice to affected employees is to be provided in a language understandable to the employee.

NOTICES TO REPRESENTATIVES OF AFFECTED EMPLOYEES

The notices must include the following:

- The name and address of the employment site where the plant closing, mass layoff, relocation or covered reduction in work hours will occur.
- The name and telephone number of the employer representative to contact for further information.
- A statement as to whether bumping rights exist.
- A statement as to whether the planned action is expected to be permanent or temporary and whether the entire plant is to be closed. If the planned action is expected to affect identifiable units of employees differently (e.g., should the employer expect a layoff of one unit to be temporary and the layoff of another unit to be permanent, the notice shall so indicate).
- The expected date of the first separation of employees and the anticipated schedule of separations.
- The names of the affected employees and their job titles.
- Information concerning unemployment insurance, job training and reemployment services for which affected employees may be eligible. Such information shall, at a minimum, include the following notice:

You are also hereby notified that, as a result of their employment loss, individuals represented by you may be eligible to receive job retraining, re-employment services or other assistance with obtaining new employment upon termination. These individuals may also be eligible for unemployment insurance benefits after their last day of employment. Whenever possible, the New York State Department of Labor will contact the employer to arrange to provide additional information regarding these benefits and services to these individuals through workshops, interviews and other activities that will be scheduled prior to the time their employment ends. If their jobs have already ended, they can also access reemployment information and apply for unemployment insurance benefits on the Department's website or they may use the contact information provided on the website or visit one of the Department's local offices to obtain further information and assistance.

- A statement as to whether the notices to the Commissioner of Labor and the local Workforce Investment Board have been given, including the date notices were sent.
- A statement as to the means of delivery utilized to deliver notice to affected employees.

Notice to the Commissioner of Labor

The notices to the Commissioner of Labor must include the following:

- The name and address of the employment site where the plant closing, mass layoff, relocation or covered reduction in work hours will occur.
- The name and telephone number of an employer representative to contact for further information.
- The name and telephone number of an employee representative to contact for further information.
- The name of the employer's liaison with the Department for purposes of providing rapid response services to affected employees.
- The names of the affected employees and their job titles.

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- The expected date of the first separation of employees and the anticipated schedule of separations.
 - A statement as to whether bumping rights exist.
 - A statement as to whether the planned action is expected to be permanent or temporary and whether the entire plant is to be closed. If the planned action is expected to affect identifiable units of employees differently (for example should the employer expect a layoff of one unit to be temporary and the layoff of another unit to be permanent), the notice shall so indicate.
 - A statement as to whether the other notices required under the act and this Part have been given, including the date notices were sent.
 - A statement as to the means of delivery utilized to deliver notice to affected employees.
 - A sample notice provided to employees and employee representatives.

The notice to the DOL must contain an original signature of the employer.

NOTICE TO THE LOCAL WORKFORCE INVESTMENT BOARD

The notice to the Local Workforce Investment Board must include the following:

- The name and address of the employment site where the plant closing, mass layoff, relocation or covered reduction in work hours will occur.
- The name and telephone number of the employer representative to contact for further information.
- The name and telephone number of the employee representative to contact for further information.
- A statement as to whether the planned action is expected to be permanent or temporary and whether the entire plant is to be closed. If the planned action is expected to affect identifiable units of employees differently (e.g., should the employer expect a layoff of one unit to be temporary and the layoff of another unit to be permanent), the notice shall so indicate.

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- The expected date of the first separation of employees and the anticipated schedule of separations.
 - The job titles of positions to be affected and the number of affected employees in each job title.
 - A statement as to whether bumping rights exist.
 - The name of each union representing affected employees and the name and address of the chief elected officer of each such union.
 - A statement as to whether the other required notices required have been given, including the date notices were sent.
 - A statement as to the means of delivery utilized to deliver notice to affected employees.

In general, all notices must be sent on official letterhead of the employer and must be signed by an individual with authority to represent the employer in this regard. The notice to the Department of Labor must contain an original signature of the employer representative. Acceptable forms of delivery include first class mail or personal delivery with optional signed receipt. Notice to the affected employees may also be served by insertion of the notice into envelopes containing pay or envelopes containing receipts for direct deposit of pay. Notices may not be sent via email unless all affected employees have regular access in the workplace to personal computers at which email may be received and viewed during work hours. If, after notice has been given, an employer determines that it will continue operations after the date for the announced action, the employer is required to give a notice of rescission as soon as possible after the determination has been made. Such notice must include reference to the earlier notice and provide the reason why the action is no longer required. It must meet all the requirements of the original notice as to the parties entitled to receive notice.

EXCEPTIONS TO NY WARN ACT REQUIREMENTS

The NY WARN Act authorizes a reduction in the 90-day notice period if an employer falls within certain enumerated exceptions. The burden is on the employer to show evidence and documentation that each requirement has been met for the particular exception, although, in any case, as much notice as possible should be given.

1. Faltering company exception. An employer need not provide the required 90 days' notice if it proves that it was actively seeking capital or business at the time notice would have been given, that there was a realistic opportunity to obtain such capital or business, that the new capital or business would have enabled the employer to avoid the event that triggered the notice obligation and that it reasonably and in good faith believes that giving the required notice would have precluded the ability to obtain the capital or business sought.
2. Unforeseen business circumstances exception. An employer need not provide the required 90 days' notice if it proves that the event triggering the notice requirement was caused by business circumstances that were not reasonably foreseeable at the time the notice would have been required.
3. Sale of a business. Second notice requirements of the New York WARN Act may or may not be triggered by the sale of a business. The comments and changes in the Emergency Regulations published in the July 15, 2009 NYS Register provide that notice is not required under the NY Warn Act merely because of a sale of a business, but it is required where employees suffer a job loss. The document is not specific, but it presumably is intended to refer to a job loss affecting enough employees to meet the threshold for a plant closing, mass layoff or covered reduction in hours. Employers should consult counsel if dealing with this potential exception.
4. Natural disaster and strike exception. An employer need not provide the required 90 days' notice if it proves that the event triggering the notice requirement was directly caused by a natural disaster and the employer nevertheless provided as much notice as was practical and available under the circumstances or that it is replacing an individual who is deemed to be an economic striker under the federal National Labor Relations Act (NLRA).

ENFORCEMENT OF THE FEDERAL WARN ACT

The WARN Act is enforced through the federal or state courts. Employees, their unions and local governments may bring individual or class action lawsuits against employers they believe are in violation of the WARN Act. However, a court does not have the authority to stop a plant closing or mass layoff.

Instead, failure to provide notice to an employee subjects the employer to liability in the amount equal to back pay and benefits for the period of violation, up to 60 days. For this reason, while

not authorized by the WARN Act, some employers choose to provide these benefits instead of providing notice. While notice is required under the statute, if the employer pays the benefits then it has satisfied the penalty provided under the WARN Act.

Failure to provide notice to a unit of local government subjects the employer to a civil penalty not to exceed \$500 for each day of the violation. The employer may avoid this penalty if it satisfies its liability to each affected employee within three weeks from the date of the plant closing or mass layoff. The court also has the discretion to reduce the penalty if it determines that the employer acted in good faith and reasonably believed that it had not violated the WARN Act by failing to provide notice. In any suit, the court may, in its discretion, award the prevailing party reasonable attorneys' fees.

ENFORCEMENT OF NY WARN ACT

Unlike the federal WARN Act, which provides only for a private right of action, the NY WARN Act allows for an administrative enforcement proceeding to be brought by the New York State Department of Labor, in addition to a private action that may be filed by an aggrieved employee. Any covered employer that fails to provide the required notice is subject to a maximum civil penalty of \$500 for each day of a violation. An employer also may be liable to each employee who fails to receive the required notice in an amount equal to back pay owed for up to 60 days and the cost of any benefits to which the employee would have been entitled for the duration of 60 days had he/she not been separated from employment.

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