

COVID-19 RESTRUCTURING AND THE WARN ACT

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As the world changes in the wake of the COVID-19 crisis, many employers will be forced to consider restructuring workforces, closing facilities and other employment-related options. But despite the unexpected nature of these difficult options, employers must nonetheless be aware of their notice requirements under the Worker Adjustment and Retraining Notification Act (WARN) and state mini-WARN acts. These regulations govern when (and how) an employer must notify its employees and government agencies of a planned layoff or plant closing.

WARN only applies to employers with at least 100 employees, excluding part-time (less than 20 hours per week) employees. Under WARN, a mass layoff is defined as a countable employment loss at a single site of employment in a 30-day period for either (i) 500 or more employees or (ii) 50-499 employees, who comprise at least 33% of the active workforce. A plant closing, on the other hand, is defined as 50 or more countable employment losses at a single site of employment in a 30-day period that results from ceasing operations in one or more operating units. "Countable" employees do not include those working less than 20 hours per week, employees with less than 6 months service, and any temporary layoffs of less than 6 months.

Caution: Remote employees may have multiple single sites. If an employee is a "mobile worker," then the single site for WARN purposes is the single site to which the employee is assigned as their home base, from which the employee's work is assigned, or to which the employee reports. For example, if a mobile employee works from home in San Antonio, is assigned the Austin office as home base, is assigned work from a supervisor in the Dallas office, and reports to a manager in the Houston office, that mobile employee is a "countable" employee in Austin, Dallas, and Houston.

Caution: As with all employment decisions and actions, take care that no discrimination occurs on the basis of any protected class, such as race, color, religion, sex (including pregnancy, sexual orientation, or gender identity), national origin, age (40 or older), disability and genetic information. Employment counsel can help an employer ensure that no protected class is disproportionately impacted by any layoff, furlough, or reduction in hours or pay. <https://www.haynesboone.com/alerts/covid-19-and-discrimination-issues>

An "employment loss" means (a) an employment termination, other than a discharge for cause, voluntary departure, or retirement, (b) a layoff exceeding six months, or (c) a reduction in hours of work of more than 50% during each month of any six-month period. Employees placed on paid leave do not suffer an employment loss until the end of the paid leave (i.e., when employment terminates). Employees who decline an offer to transfer to another site within a reasonable commuting distance do not experience an employment loss for purposes of WARN. An employee

who accepts a transfer to another site, at any distance, within 30 days of the later of the offer or the layoff or closing likewise does not experience an employment loss.

Caution: WARN provides an “aggregation” rule designed to prohibit scheduling “rolling” layoffs/terminations to avoid WARN. This aggregation rule provides that if employment losses occur over time such that the employee number and/or percentage limits (for both mass layoffs and plant closings) are reached in a 90-day period, a proper advance WARN notice is still required. This rule does not apply if the losses result from separate and distinct causes. From a practical perspective, an employer should always look at its near-future plans for restructuring and consult an employment attorney before determining whether WARN applies.

Accordingly, whether a “furlough” or layoff is subject to WARN depends on the employer’s size, the nature of the employment action, its duration, and the number of affected employees. If the employer furloughs or lays off fewer than 50 employees, there is no WARN event. If the layoff or reduction in hours lasts six months or less, there is no WARN event. An employer implementing a layoff because of COVID-19 may think it is announcing a short-term layoff, but if the pandemic lasts longer than expected, the furlough or layoff could span more than six months and be deemed permanent under WARN. If an employer previously undertook an anticipated short-term layoff of six months or less and it is later extended beyond six months, notice under WARN is required as soon as the extension beyond six months is reasonably foreseeable. Depending on your location, the reaction and disposition of local and state officials, and publicly-available information regarding the spread of COVID-19, it may be difficult to assert a belief that everything will return to normal quickly, particularly if the current trend towards closures and isolation orders continues.

Caution: As an alternative (or supplement) to layoffs, employers may look at reducing exempt employees’ salaries as the business needs also reduce. To satisfy the salary basis requirement under the FLSA, a salaried, exempt employee must receive a predetermined amount that does not vary based on the quality or quantity of work performed. However, an employer may reduce an employee’s normal scheduled workweek and reduce the employee’s salary amount accordingly. The change must be prospective, based on long-term business needs, and not frequently occur. Under the FLSA, the salary must remain at least \$684 per week, although some states impose a higher minimum salary than federal law.

But there are exceptions to WARN’s advance notice requirements: (a) business circumstances that were not reasonably foreseeable as of the time notice would have been required or (b) a natural disaster. These exceptions do not mean that notice is not required in those situations; rather, the employer must give as much advance notice as is practicable (even after the fact) and must give a brief statement of the basis for reducing the notice period. An unforeseen business circumstance is typically caused by some sudden, dramatic, and unexpected action or condition outside of the employer’s control. To qualify for the natural disaster exception, the closing or layoff must be a direct result of a natural disaster. If indirect, the employer should determine if the unforeseen business circumstance applies. Employers may assert unforeseen business circumstances caused by the COVID-19 pandemic, but they must be mindful to give notice as soon as practicable. If the

employer had already planned the closing or layoff before the COVID-19 pandemic, the exception may not apply.

Some states have also enacted their own WARN statutes, known as “mini-WARN” acts. These state statutory obligations are in addition to the federal requirements and may be triggered by a lower threshold of total employees or impacted employees, or a shorter length of layoff. These requirements may also provide exceptions to or increase WARN’s notice requirements. Some states have recognized the unique situation that COVID-19 has caused and issued temporary relief from their mini-WARN requirements for those impacted by the pandemic (most notably, California). Again, as the regulatory and legislative responses to COVID-19 are changing on a daily basis and the COVID-19 situation is dynamic, employers should consult with counsel for the latest developments and advice on this topic.

California: Known as Cal-WARN, it requires 60 days’ notice and defines a mass layoff or plant closing as 50 or more terminations out of 75 or more employees or a substantial cessation of operations at a worksite with at least 75 employees in the year. California ordinarily does not permit any exceptions to the notice requirement for unforeseen business circumstances or natural disaster (except physical calamity). California also does not provide a six-month exception, with furloughs of three to five weeks held as subject to Cal-WARN previously. However, the Governor’s March 17, 2020 Executive Order, retroactive to March 5, 2020, suspends some of the more restrictive elements of Cal-WARN, including specifically allowing shorter notice for layoffs and closings due to unforeseen business circumstances caused by COVID-19, when employers follow very specific instructions.

Connecticut: Connecticut follows the federal WARN threshold and notice requirements but does not recognize unforeseen business circumstances as an exception.

Hawaii: Hawaii’s mini-WARN act applies to any business with 50 or more workers and does not recognize unforeseen business circumstances or natural disaster as an exception to the 60-day notice requirement.

Illinois: Illinois’ mini-WARN act applies to any business with (1) 75 or more workers when at least 50 workers lose their jobs due to a plant closing, (2) mass layoffs of more than 1/3 of a workforce that is comprised of 25 or more workers, or (3) layoffs of 250 or more workers. Illinois’ 60-day notice requirement can be shortened by a showing of unforeseen business circumstances, such as COVID -19.

Iowa: Iowa’s mini-WARN act requires 30 days’ notice and applies to a layoff of 25 or more full-time employees in a 30-day period or an employment loss for 25 or more full-time employees. Iowa’s 30-day notice requirement can be shortened by a showing of unforeseen business circumstances, such as COVID -19.

Maine: Maine’s mini-WARN act requires 90 days’ notice for closing or relocations and 7 days for mass layoffs. Closing only applies to a business with 100 or more workers. While Maine does not recognize an exception to the notice requirements for a faltering business,

it does permit a shortening of notice by a showing of unforeseen business circumstances, such as COVID -19.

Maryland: Maryland's mini-WARN act requires 90 days' notice when possible for layoffs of the greater of 25% of a workforce or 15 workers at any business with 50 or more workers. Maryland does not recognize unforeseen business requirements or natural disaster as an exception to the 90-day requirement but does allow for shortening by a showing of impossibility to notify workers sooner, such as the rapidness of COVID -19.

Massachusetts: Massachusetts' mini-WARN act requires 60 days' notice for any business with 50 or more workers when there is a separation of at least 90% of employees within 6 months. Massachusetts does not recognize any exceptions to its notice requirement.

Michigan: Michigan's mini-WARN act requires notice as soon as possible for any layoff or closing and applies to any employee-owned business with 25 or more workers. Employers will need to show that they gave notice at their first notice that layoffs or closures were foreseeable.

Minnesota: Minnesota's mini-WARN act requires notice as soon as possible for any plant closing or layoff of 50 or more employees. Employers will need to show that they gave notice at their first notice that layoffs or closures were foreseeable.

New Hampshire: New Hampshire's mini-WARN act requires 60 days' notice for employers: (1) with 100 or more workers when at least 50 workers lose jobs in 30 days due to a plant closing, (2) mass layoffs of 250 or more workers in 30 days, or (3) layoffs of 25 or more workers if they are 33% or more of full-time workforce. New Hampshire's 60-day notice requirement can be shortened by a showing of unforeseen business circumstances, such as COVID -19.

New Jersey: New Jersey's mini-WARN act implements new regulations effective July 19, 2020. Before July 19, 2020, New Jersey's act requires 60 days' notice when there are (1) 50 or more full-time employee terminations due to a transfer or termination of employment, (2) 500 or more full-time employee terminations at an establishment, or 50 or more full-time employee terminations comprising at least one-third of full-time employees of an establishment in a 30-day period. As of July 19, 2020, New Jersey will require 90 days' notice when there are (1) 50 or more terminations due to a transfer or termination of employment, or (2) 50 or more terminations of employees at or reporting to an establishment. New Jersey provides a six-month layoff exception but only when the employer guarantees reinstatement of the impacted employee within six months. New Jersey does not recognize unforeseen business circumstances as an exception.

New York: New York's mini-WARN act requires 90 days' notice when there are (1) more than 25 layoffs comprising at least one-third of full-time workforce, or (2) layoffs of 250 or more full-time workers at a business. New York's 90-day notice requirement can be shortened by a showing of unforeseen business circumstances, such as COVID-19.

Rhode Island: Rhode Island follows the federal WARN except that it requires wages paid within 24 hours in the event of a mass layoff or closure.

Tennessee: Tennessee's mini-WARN act requires 60 days' notice when there are more than 50 workers affected at a business with 50 to 99 workers. Tennessee does not recognize unforeseen business circumstances as an exception.

Vermont: Vermont's mini-WARN act requires 30 days' notice when there are more than 50 layoffs within 90 days. It does not apply to layoffs of less than 90 days. Vermont's 30-day notice requirement can be shortened by a showing of unforeseen business circumstances, such as COVID -19.

Wisconsin: Wisconsin's mini-WARN act requires 60 days' notice when there are closings or layoffs (1) affecting more than 25 workers at a business with over 50 workers, (2) affecting the greater of 25% or 25 workers, or (3) affecting over 500 employees. It does not apply to layoffs of less than 60 days. Wisconsin's 60-day notice requirement can be shortened by a showing of unforeseen business circumstances, such as COVID -19.

In short, the federal WARN Act and state mini-WARN acts create a minefield for employers as they restructure their workforces. Experienced employment counsel can help employers consider both federal and state law in managing their workforce through the COVID -19 crisis.