

You've Been WARNed: Lawsuits Loom as COVID-Related Furloughs Approach Six-Month Mark

As many furloughs implemented in the spring continue due to ongoing economic uncertainty and government-imposed restrictions, employers should think about when even temporary furloughs trigger obligations under the Worker Adjustment and Retraining Notification Act (WARN). If triggered, the WARN Act requires employers to provide 60 days of advance notice of plant closings or mass layoffs—which include, in some instances, furloughs or layoffs that exceed six months in duration. Below are answers to six common questions from businesses faced with COVID-19-related layoffs.

How do we know if our business is covered by the WARN Act?

The federal WARN Act covers “business enterprises” with 100 or more employees. This includes private sector employers, non-profits, and quasi-public entities engaging in business activities that are separately organized from the government itself (e.g., housing or transportation authorities). For purposes of meeting the 100-employee threshold, businesses may exclude part-time employees who have worked fewer than 20 hours per week in the preceding 90 days and certain short-term employees and seasonal workers.

What triggers the requirement to send a WARN Act notice?

Covered employers must send WARN Act notices at least 60 days prior to the occurrence of a plant closing or mass layoff.

A “plant closing” is the permanent or temporary shutdown of an entire site of employment, or one or more facilities (i.e., buildings) or operating units (i.e., distinct product or work function) within a site of employment, if the shutdown creates an employment loss at the site during any 30-day period for 50 or more full-time employees.

A “mass layoff” is a reduction in force that creates an employment loss at the single site of employment during any 30-day period for at least 33% of the full-time employees and at least 50 employees at the site. A mass layoff also occurs if at least 500 full-time employees at an employment site experience an employment loss.

What if we have employees who have resigned or declined to return to work?

Employees who have voluntarily resigned, retired, or were discharged for cause are not considered to have experienced an “employment loss” for purposes of the WARN Act. This may occur, for example, if the employee finds new employment during a short-term furlough or voluntarily decides not to return to work for reasons related to COVID-19. Thus, employers may exclude these employees in determining whether a plant closing or mass layoff has occurred.

What if we need to extend a furlough we implemented in the spring?

A layoff exceeding six months is considered an “employment loss” for purposes of the WARN Act. If a business implemented a short-term furlough and it later becomes probable that it will need to extend this furlough due to previously unforeseeable reasons (e.g., economic downturn caused by COVID-19), it must issue WARN Act notices as soon as it believes the furloughs will need to exceed six months. This determination is likely to become more difficult as the pandemic continues. Businesses must include an explanation in their notices of the reason for not giving the full 60-day required notice.

What exceptions might apply to excuse a business providing late notice in light of COVID-19?

Two WARN Act exceptions might apply in this situation: “unforeseeable business circumstances” or “natural disaster.” These exceptions have not (yet) been applied to a pandemic, including its economic consequences.

The “unforeseeable business circumstances” exception may apply if the plant closing or mass layoff was caused by circumstances not reasonably foreseeable at the time the 60-day notice was required. Such circumstances may include, depending on the facts, a “sudden, dramatic, and unexpected” condition outside of the business’s control or an “unanticipated and dramatic major economic downturn.”

The “natural disaster” exception may apply to a plant closing or mass layoff caused by any form of natural disaster, such as floods, earthquakes, storms, or other similar effects of nature. The Department of Labor requires that the triggering event must be the “direct result” of a natural disaster.

How can our business obtain waivers of WARN Act claims?

Businesses may obtain releases or waivers of WARN Act claims from employees similar to the way in which they would obtain releases or waivers of other employment-related claims. A common method of doing so is through severance and release agreements. Employers should check with counsel to ensure there is sufficient consideration to support the release, the timing of the release aligns with any potential claims, and the release complies with the group release requirements of federal law.