

WARN Act: Class Action Lawsuits Loom as Furloughs Approach Six Month Mark

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Agenda

- WARN Act basics
 - Applicability/coverage
 - Definitions and triggering events
 - Notice and consequences of failing to provide it
 - Employer defenses
- COVID-19-specific scenarios
 - New DOL Guidance
 - Temporary to permanent layoffs
 - Government-ordered closures
 - Recalling employees
 - Waiving WARN Act claims



What Does WARN Require?

Covered employers

must provide **60 days** advance **notice**

of a **plant closing** or **mass layoff**

at a **site of employment**

to **affected employees**, any unions and certain governmental offices and officials

State and Local “mini-WARN” Acts

- Many states and larger municipalities have their own versions of WARN requirements
- Some provide longer notice periods
- Many provided lower thresholds for coverage or smaller triggers for notice than the federal law
- Employers covered by state, local and federal laws must comply with each of them

Is My Business Covered by WARN?

- Private Sector Employers
- Non-profits
- Excludes Governments

Includes quasi-public entities engaging in “business” activities which are separately organized from the Government itself:

- Transportation Authorities
- Housing Authorities
- Utilities
- Similar entities that provide a “business” service or independently manage public assets
- Excludes School Boards and similar “non-business” bodies

Is My Business Covered by WARN? (cont.)

- 100 or more employees (across all facilities)
- Excludes part-time employees (less than 20 hours per week in prior 90 days)
- Excludes short term employees and certain seasonal workers (employed less than 6 of the prior 12 months) (dates are measured from the date notice would be due)
- Includes employees on leaves or layoff

Or

- 100 or more employees (across all facilities) (including part-time employees) who work at least 4,000 hours per week combined

Site of Employment

- A single physical location
Or
- A group of contiguous locations (business campus)
Or
- Separate physical locations in reasonable geographic proximity which share employees



Employment Loss

Termination of employment (excludes voluntary quit, termination for cause or retirement)

Or

Layoff exceeding 6 months

Or

Reduction in hours of work of more than 50% during each month of a 6-month period

Plant Closing

- Permanent or temporary shutdown of an entire site of employment
 - Or
- One or more facilities (buildings) or operating units (product, operation or specific work function) within a site of employment
 - Resulting in
 - An employment loss during any 30-day period at the site of employment for 50 or more employees (excluding part-time employees)
- Note: Effective cessation of production or the work performed by a unit (product, operation or specific work function), even if a few employees remain, is considered a shutdown

Mass Layoff

- Employment loss for at least 33% (not 1/3) of full-time employees **and** at least 50 at a site of employment
- Or
- Employment loss for at least 500 full-time employees at a site of employment



Notification Requirements

60 days before a plant closing or mass layoff, provide notice to:



1. Affected [non-union] employees
2. Representative(s) of affected unionized employees
3. State entity carrying out rapid response activities
4. Chief elected official of the unit of local government

Notification Requirements - Tips & Reminders

- Notice to “affected employees” = notice to “employees who may reasonably be expected to experience an employment loss”
- Notices must be “specific” and “based on the best information available to the employer at the time the notice is served”
- Send notices via a “reasonable method of delivery,” *e.g.*, email specific to the individual employee
- Check state and local laws

Consequences of Failure to Provide Notice

- Private cause of action available to employees, unions, and local government unit, individually or as a class
- Remedies:
 - Up to 60 days' back pay, plus benefits
 - Attorneys' fees
- Civil penalty:
 - Up to \$500/day to the unit of local government

. . . a perfect storm for class actions?

Employer Defenses and Exceptions

1. Faltering Company

- Applies only to plant closings, not mass layoffs
- Focuses on employer's efforts to seek capital/business
- "Narrowly construed"

2. Unforeseeable Business Circumstances

- Most likely defense applicable to COVID-19 layoffs

3. Natural Disaster

- Plant closing or mass layoff must be the *direct result* of a natural disaster; if an *indirect result*, the UBC exception may apply
- Natural disaster = "floods, earthquakes, droughts, storms, tidal waves or tsunamis *and similar effects of nature . . .*"

Definition of “Unforeseeable Business Circumstances”

- When the event at issue was “caused by business circumstances that were not reasonably foreseeable at the time that 60-day notice would have been required”
- An “important indicator” is that the “circumstance is caused by some *sudden, dramatic, and unexpected* action or condition outside the employer’s control”
- Focuses on an employer’s commercially reasonable business judgment
- Probability standard, not possibility standard

Reduced Notice



The unforeseeable business circumstances exception applies to LATE NOTICE

There is no statutory defense for providing NO NOTICE (except maybe natural disaster)

DOL Guidance re: Unforeseeable Business Circumstances

- “[R]ecommends that employers review” this exception
- Fact-specific determination
- Suggests that the following may be unforeseeable business circumstances:
 - “unanticipated and dramatic major economic downturn”
 - “a government ordered closing of an employment site that occurs without prior notice”
 - “similarly sudden, dramatic, and unexpected action outside the employer’s control, announced and implemented swiftly”

Unforeseeable Business Circumstances – Real Life Examples

- **Economic crisis:** Economic crisis of 2008, when coupled with dramatic and “unprecedented” decline in customer orders for steel producer, excused employer from giving 60 days’ notice. Even though employer was aware of economic downturn and that it would reduce demand for its products, this “free fall” in demand was not clear until after the 60-day deadline. United Steel Workers of Am. Local 2660 v. U.S. Steel Corp., 683 F.3d 882 (8th Cir. 2012).
- **Asset sale falls through:** Insufficient notice to employees excused where aircraft manufacturer was forced to lay off its employees when sale of its assets fell through, despite a binding agreement and long-standing relationship with the buyer. The state-owned Russian bank financing the sale became unexpectedly insolvent. In re AE Liquidation, Inc., 866 F.3d 515 (3d Cir. 2017).
- **Loss of biggest customer:** Unforeseeable business circumstances exception applied where wholesale grocer’s largest, long-standing client told grocer that it would stop using it as its primary supplier on Jan. 15, employer provided employee notice on Jan. 21, and layoffs occurred on Jan. 22. Gross v. Hale-Halsell Co., 554 F.3d 870 (10th Cir. 2009).

Invoking Defenses

Remember to:

1. give as much notice as practicable (even if after the fact), and
2. include a brief statement of the reason for giving less than 60 days' notice



COVID-19 & Extended Furloughs/Layoffs

- Layoffs intended to be less than 6 months at the outset, which extend beyond 6 months, will require notice under WARN
- **Notice is due when the employer can reasonably determine that the layoff will exceed the 6-month limitation**
- Failure to provide 60 days' advance notice (at the 4-month mark of the layoff) must be justified by one of the WARN Act exceptions

Department of Labor COVID-19 Guidance

- “Unforeseeable business circumstances” exception may apply
- Confirms that, if an employer could not reasonably foresee that a layoff would extend beyond 6 months when the layoff was implemented, an employment loss under WARN did not occur when the layoff was implemented and no notice was required at that time
- Confirms that notice is still required when it becomes foreseeable that the layoff will exceed 6 months

Problems with Department of Labor COVID-19 Guidance

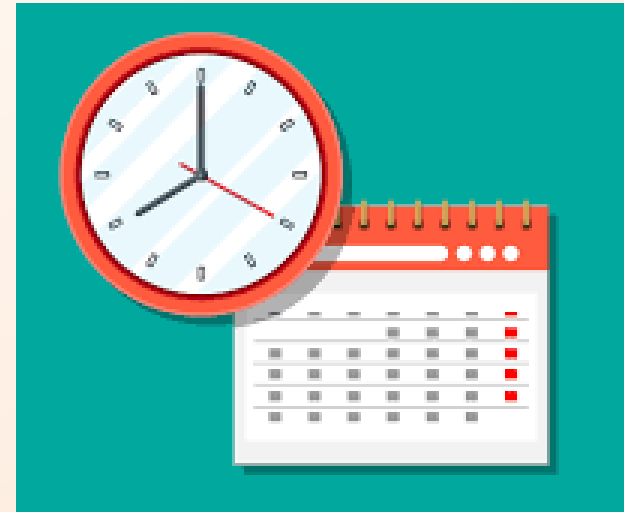
- Is not a law or regulation, not binding on courts or entitled to deference
- Does not address possible applicability of the “natural disaster” exception which may permit no notice
- Does not address some case law indicating that government-mandated closures may not require notice

Shutdowns, Closures, and Other Government Orders

- DOL regulations: “A government ordered closing of an employment site that occurs without prior notice also may be an unforeseeable business circumstance”
- Case law: Indefinite government closure orders that negatively impact profitability may excuse lack of timely notice under the unforeseeable business circumstance exception

Recalling Employees within Six Months

- Can an employer “restart” the 6-month clock by temporarily rehiring employees?
 - In certain limited situations, some cases say “yes”
- Rehiring within 6 months ≠ “employment loss”
- But rehiring can be an employment loss if it is a constructive discharge or bad faith



Waiving WARN Act Claims

- “Pay in lieu of notice”
 - Not recognized by the WARN Act, but can essentially nullify remedies
 - Wages and other voluntary and unconditional payments may be offset against damages
- Employees can waive WARN Act claims in releases (e.g., severance agreements)
 - But beware of consideration and timing issues
 - Do not forget ADEA/OWBPA principles – e.g., time to consider, revocation period, disclosures, representations re: “knowing and voluntary”

Questions?

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