

COVID-19: Navigating WARN Act Issues During These Uncertain Times

Law and the Workplace Blog on April 6, 2020

COVID-19: Navigating WARN Act Issues During These Uncertain Times

As the outbreak of COVID-19 affects the country and states, counties and cities take various measures to slow the transmission, many employers are facing uncertainty and considering business contingency measures. To the extent layoffs, reductions of hours and closures are under consideration, employers need to be ready to navigate their obligations under the intricate requirements of the federal Worker Adjustment and Retraining Notification (“WARN”) Act and its state analogues.

The WARN Act

The WARN Act requires employers with 100 or more full-time employees to provide 60-days’ notice to employees affected by a plant closing or mass layoff. WARN is triggered when a threshold number of employees suffer an “employment loss” that amounts to a “plant closing” or a “mass layoff.” Here are the key triggering events:

- “Employment loss” is defined as: (1) an employment termination; (2) a mass layoff exceeding six months; or (3) a reduction in an employee’s hours of work of more than 50% in each month of a six-month period.
- A “plant closing” is defined as the shutting down of a single site of employment (or an operating unit within a site) that results in an employment loss for 50 or more full-time employees during any 30-day period.
- A “mass layoff” is defined as an employment loss at a single site of employment during any 30-day period for 500 or more full-time employees, or 50-499 full-time employees if such employees comprise at least 33% of the full-time workforce at the site.

Multiple employment losses that take place over time must be aggregated when, during any 90-day period, each of the employment losses would affect fewer than the minimum number of employees necessary to trigger notice, but taken together the employment losses would exceed the minimum thresholds required for notice to be issued.

Mini WARN Acts

Employers also must comply with state “mini” WARN Acts. For example, California, Delaware, Hawaii, Illinois, Iowa, Maine, Massachusetts, Minnesota, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oregon, Tennessee, Vermont and Wisconsin all have statutes that require covered private employers to take certain actions when conducting plant closings and layoffs. WARN does not preempt state law or regulations. Thus, any state or local law that imposes additional requirements must also be followed in addition to WARN.

Here are examples to illustrate some differences between the federal WARN Act and its state analogues or additional requirements imposed by the state laws:

- Under the **New York WARN (“NY WARN”) Act**, employers with 50 or more employees within New York, excluding part-time employees, or 50 or more employees including part-time employees within the state that work in aggregate at least 2,000 hours per week, are covered and must provide 90-days notice in advance of NY-WARN covered business closings and layoffs.
- Under the **California WARN (“Cal-WARN”) Act**, only a covered establishment which is “any industrial or commercial facility” that employs or has employed at least 75 people in the preceding 12 month period is covered.
- Under the **Illinois WARN Act**, employees with 75 or more full-time employees or 75 or more employees who work at least a combined 4,000 per week (exclusive of overtime) are covered.
- Under the **Massachusetts Advance Notification Law**, employers that have been in business for at least one year with 50 or more workers at a facility must submit WARN notices in connection with covered plant closings or partial closings.

Is Notice Required for an Employment Loss that Is Expected to Be Shorter than Six Months?

The federal WARN Act and some of its state counterparts, including New York WARN, are not triggered if a mass layoff has a duration of six months or less, or if work hours are not reduced 50% in each month of any 6-month period.

If a layoff that is intended to last for less than six-months extends beyond six months, it is treated as a qualifying employment loss and included in calculating whether a mass layoff occurred unless, “[t]he extension beyond 6 months is caused by business circumstances . . . not reasonably foreseeable at the time of the initial layoff; and . . . notice is given at the time it becomes reasonably foreseeable that the extension beyond 6 months will be required.” The NY WARN Act mirrors the federal WARN Act in this regard.

If circumstances change and an employer later realizes that its layoff will exceed six months, it must still provide WARN notice to its employees at that time.

The rules in California are different. There is no similar temporal requirement under Cal-WARN, which has been interpreted to apply to temporary layoffs (*e.g.*, mass layoffs that span a period of under 6 months). Therefore, the Cal-WARN notice should be provided for temporary layoffs.

What if COVID-19 Prevents a Company from Providing the Required WARN Notices?

One exception to the need to provide 60-days notice pursuant to the WARN Act that merits consideration in the COVID-19 context is the “unforeseeable business circumstances” exception.

This exception applies if a plant closing or mass layoff is caused by “sudden, dramatic, and unexpected” business circumstances not reasonably foreseeable and outside the employer’s control. Regulations to the WARN Act provide that whether a circumstance is reasonably foreseeable focuses on an employer’s “business judgment,” and that “[t]he employer must exercise such commercially reasonable business judgment as would a similarly situated employer in predicting the demands of its particular market.” An example of an unforeseeable business circumstance listed in the regulations is a government-ordered closing of an employment site that occurs without prior notice.

Whether the unforeseeable business circumstances exception applies due to the COVID-19 related closures and layoffs remains untested, and the U.S. Department of Labor has not issued guidance related to the application of the exceptions in light of the COVID-19 pandemic. Importantly, the exception does not eliminate the requirement to send out WARN notices. Rather, it renders shortened notices sufficient.

- *New York Considerations.* The NY WARN Act contains an unforeseeable business circumstances exception. However, the NY DOL has posted guidance stating that the NY WARN Act requirement to provide 90 days' notice has not been suspended due to the coronavirus pandemic. Consequently, the NY DOL advises employers to provide the required notices and include as much information as possible so that the NY DOL can determine if an exception to the WARN Act applies to the situation. Pursuant to the guidance, covered employers should provide required notices as soon as possible and should email them to WARN@labor.ny.gov.
- *California Considerations.* There is no unforeseeable business circumstances exception under Cal-WARN. However, on March 18, 2020, California Governor Gavin Newsom issued an Executive Order that allows a California employer that is conducting layoffs due to the COVID-19 pandemic to use a newly created "unforeseen business circumstances" exception to the Cal-WARN requirements. According to the Order, despite the exception, California employers must still provide notice under the Cal-WARN as soon as practicable (even if less than 60 days) and include in the notice all of the information already required by Cal-WARN, and further state that the mass layoff, relocation or termination/closure is caused by COVID-19-related "business circumstances that were not reasonably foreseeable as of the time that notice would have been required." The notice must also include language about eligibility for unemployment insurance benefits.

* * *

Employers should consult with counsel to determine which steps, including steps in addition to those listed above, may be necessary given their individual circumstances.

Proskauer's cross-disciplinary, cross-jurisdictional Coronavirus Response Team is focused on supporting and addressing client concerns. If you have additional questions, please visit Proskauer's [Coronavirus Resource Center](#) or contact a member of our [Coronavirus Taskforce](#) for guidance on risk management measures, practical steps businesses can take and resources to help manage ongoing operations.

[View Original](#)

[Related Professionals](#)

- **Jurate Schwartz**
Senior Counsel
- **Joseph Baumgarten**

- **Guy Brenner**

Partner

- **Steven J. Pearlman**

Partner