The WARN Act and COVID-19: What Employers Need to Know as the Business Impacts of the Pandemic Continue

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COVID-19 Task Force

By Peabody & Arnold on May 19, 2020

The continued efforts of state and government efforts to slow and prevent the spread of COVID-19 through stay-at-home, shelter-in-place, or other similar orders and advisories have long-lasting and varied operational and economic impacts on employers. Many businesses have been forced to take such drastic measures as dramatically reducing operations, closing workplaces, and laying off or furloughing employees. Some employers were forced to make these difficult decisions early on in the crisis, many with the expectation that the measures would be temporary. As the damaging effects of the virus continue and worsen, those employers – and employers considering taking such measures now or in the months to come – must consider federal and state laws governing closings and mass layoffs.

The Worker Adjustment and Retraining Notification Act (WARN Act) is the primary federal law governing notice obligations for employers in the event of plant closings and mass layoffs. Employers must be aware that, in addition to the WARN Act's requirements, many states have similar laws that often include additional or different requirements from the WARN Act. This post, however, focuses only on the federal WARN Act and some of its implications during the pandemic. Employers should consult with a member of Peabody & Arnold's Employment Law and Litigation Practice Group with any questions or for further information about state-specific laws.

The WARN Act – Generally

The WARN Act requires covered employers to provide advanced written notice to certain individuals and entities at least 60 calendar days before covered plant closings and mass layoffs that result in employment loss.

What employers are covered by the WARN Act?

- A WARN Act notice is required when:
  - A business with 100 or more full-time workers (excluding workers who have less than 6 months on the job or who work fewer than 20 hours per week) is laying off at least 50 workers at a single site of employment; or
  - A business employs 100 or more workers who work at least a combined 4,000 hours per week (excluding overtime).
  - These thresholds are subject to a 90-day aggregation period, described in further detail below.

What events are considered "triggering events" requiring a WARN Act notice?

- The WARN Act's notification requirements are triggered by either a "plant closing" or a "mass layoff" as defined by the Act.

- Plant Closing: A plant closing is a permanent or temporary shutdown resulting in an "employment loss" of at least 50 full-time employees during a 30-day period at either (1) a single site of employment; or (2) facilities or operating units within a single site of employment.

- Mass Layoff: A mass layoff is a reduction in force, not caused by a plant closing, which results in "employment loss" at a single site of employment during any 30-day period for either (1) 50 full-time employees who comprise at least 33% of active employees; or (2) at least 500 full-time employees.

- "Employment loss," as applicable to both plant closings and mass layoffs, includes:

  - An employment termination, except a discharge for cause, a voluntary separation, or a retirement;

  - A layoff exceeding 6 months; or

  - A reduction in work hours of more than 50% during each month of a 6-month period.

To whom must the employer provide notice?

- If a covered employer has an employment loss that triggers the WARN Act, the employer must provide timely notice to:

  - The union representative of each affected employee (if applicable);

  - Each affected employee not represented by a union;

  - The state dislocated worker unit or officer or state entity designated to carry out rapid response activities; and

  - The chief elected official of the unit of local government where the closing or layoff will occur.

- The notice may be served by any reasonable method of delivery designed to ensure receipt at least 60 days before the employment loss.

What employees are entitled to WARN Act notices?

- The following employees (including part-time employees who fall into the below categories) **are** generally entitled to WARN Act notices:

  - Employees who are terminated or laid off for more than 6 months;

  - Employees who have their hours reduced by 50% or more in any 6-month period as a result of a plant closing or mass layoff;

  - Employees who may reasonably be expected to experience an employment loss as a result of a proposed plant closing or mass layoff; and

  - Workers who are on temporary layoff but have a reasonable expectation of recall (including those on workers' compensation, medical, maternity, or other leave).

- The following employees are generally **not** entitled to WARN Act notices:

- Strikers or workers locked out as a result of a labor dispute;
- Workers working on temporary projects or facilities of the business who clearly understand the temporary nature of their work when hired;
- Business partners, consultants, or contract employees assigned to the business but who have a separate employment relationship with another employer; and
- Federal, state, and local government employees.

How do I determine when WARN notice is required?

- The WARN Act follows a 90-day aggregate period in order to ensure that employers are unable to circumvent its notice requirements by staggered layoffs.
- Employers should look ahead and behind 90 days to determine whether employment losses trigger the WARN Act notice requirement. If multiple employment losses occur during that period, which are not caused by *separate and distinct actions*, they will be considered together to determine whether a WARN Act triggering event has occurred. On the other hand, employment losses falling below WARN's loss threshold that are the result of *separate and distinct actions* and are *not part of an attempt to evade the WARN Act's requirements*, will not require WARN notices.

Are there any exemptions or exceptions to the WARN Act's notice requirements?

- There are both exemptions (which relieve an employer of the notice requirements) and exceptions (which may delay an employer's notice obligations) to the WARN Act's 60-day notice requirement.
  - Exemptions: The WARN Act notice requirements do not apply if:
    - A plant closing affects only a temporary facility;
    - A plant closing or mass layoff occurs because a particular facility or undertaking is complete and affected employees were hired with the understanding that their employment was limited to that facility or undertaking; or
    - A plant closing or mass layoff constitutes a strike or lockout not meant to evade the WARN Act.
  - Exceptions: The 60-day notice period may be reduced in some circumstances – requiring an employer to provide notice "as soon as practicable" – if an employer can establish:
    - Faltering Company: It was actively seeking capital or business (and had a realistic opportunity to obtain it) to allow the employer to avoid or postpone a *plant closing*, and the employer reasonably believes advanced notice would preclude its ability to obtain such capital or business.
    - Unforeseeable Business Circumstances: Its *plant closing or mass layoff* was caused by business circumstances that were not reasonably foreseeable at the time that the 60-day notice would have been required.
    - Natural Disaster: Its *plant closing* or *mass layoff* was the direct result of a natural disaster.

COVID-19 Pandemic and WARN Act

Although the WARN Act is enforced by private rights of action in the U.S. District Courts, the U.S. Department of Labor (DOL) provides assistance to employers and employees in interpreting and understanding the law and its regulations. In this role, the DOL published WARN Act COVID-19 Frequently Asked Questions to provide guidance regarding the pandemic's impact on the WARN Act requirements. Below is a summary of some of the key guidance that the DOL has provided to employers.

I am considering a temporary layoff or furlough; do I need to provide workers with a WARN Act notice?

- Yes, if the temporary layoff or furlough is expected to and/or does last longer than 6 months.
- If a temporary layoff or furlough is initially not expected to last 6 months or longer but is extended beyond 6 months due to business circumstances not reasonably foreseeable at the time of the initial layoff, the employer must prove the WARN Act notice as soon as it becomes reasonably foreseeable that the extension is required.
    - Cases involving questions of whether COVID-19's impact on workforces was reasonably foreseeable or not will be determined on a case-by-case basis depending on the unique and specific facts and circumstances involved in the employment dispute.

Can I claim an exception to the WARN Act's notice requirements because of the pandemic? If I do, what are my responsibilities?

- Employers may consider invoking the "unforeseeable business circumstances" exception to the 60-day notice requirement. If they do so, they will be required to show that their plant closings or mass layoffs were caused by business circumstances – the COVID-19 pandemic – that were not reasonably foreseeable, as determined by the employers' business judgment, at the time the 60-day notice would have been required.
    - As stated above, questions regarding whether COVID-19's impact on workforces was reasonably foreseeable will be determined on a case-by-case basis depending on the unique and specific facts and circumstances involved in the employment dispute.
    - According to the federal regulations implementing the WARN Act, examples constituting unforeseeable business circumstances include the unexpected termination of a major contract with an employer, a strike at a major supplier of the employer, or an unanticipated and dramatic, major economic downturn.
- Employers may also consider invoking the "natural disaster" exception to the 60-day notice requirement. In doing so, employers would be tasked with proving that their plant closings or mass layoffs were the "direct result" of a natural disaster, which is defined as "floods, earthquakes, droughts, storms, tidal waves or tsunamis and similar effects of nature." It is currently unclear under the DOL's guidance whether the pandemic would squarely fit within the narrow confines of this exception.
- If an employer invokes an exception to the 60-day notice rule, it still must provide notice as soon as practicable and include, among other requirements, a brief statement in the notice of the reason for giving less than 60-days' notice.

Is it appropriate to send a WARN notice by email?

- Yes, so long as the email is reasonably designed to ensure receipt of the notice. Given the pandemic-related guidelines and orders by many states, email may be the preferred method of notifying the required individuals (and specifically to the required government personnel).

Further Information about WARN Act Compliance during COVID-19 for Employers

We will continue to monitor issues related to the WARN Act and how employers should best position themselves for compliance with its provisions during this unprecedented time. This post provides a high-level summary of the WARN Act and its provisions, and it is not a substitute for legal advice. Employers should be aware that the WARN Act and similar state statutes are complex and can be difficult to navigate, especially during the stress of the current global crisis. Employers are encouraged to consult with a member of Peabody & Arnold's Employment Law and Litigation Practice Group with any questions or for further information.

