

Avoiding Costly WARN Act Missteps in an Era of Economic Uncertainty

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KEY POINTS

- The federal WARN Act requires covered employers — those with 100 or more employees — to provide 60 days' advance written notice before a qualifying plant closing or mass layoff, with liability of up to 60 days of back pay and benefits per affected employee for noncompliance.
- Many state mini-WARN statutes impose lower employee thresholds than federal law, with Iowa covering employers with as few as 25 employees, and California and Illinois covering those with 75 or more.
- Employers conducting phased restructurings should account for the WARN Act's 90-day aggregation rule, under which a series of smaller terminations that individually fall below the threshold may collectively trigger notice obligations.
- Three narrow exceptions permit shorter than 60-day notice — faltering company, unforeseeable business circumstance, and natural disaster — but each carries a high burden of proof and still requires the employer to provide as much notice as practicable.
- The Department of Labor is considering regulatory revisions that would clarify how remote workers factor into the "single site of employment" definition, an unsettled question employers should monitor carefully when layoffs affect distributed workforces.

As economic uncertainty prompts employers to evaluate workforce restructuring options, compliance with federal and state notification requirements should be top of mind. The federal [Worker Adjustment and Retraining Notification \(WARN\) Act](#) imposes strict advance notice obligations when a qualifying layoff or plant closing occurs. Failure to comply can result in significant back pay and benefits liability. Employers may face additional obligations under state "mini-WARN" statutes, which can create a patchwork of differing requirements for employers operating in multiple states.

Understanding when WARN applies, what circumstances permit shorter notice periods, and what a compliant notice must contain is vital to avoiding WARN compliance mistakes.

WHICH EMPLOYERS ARE SUBJECT TO WARN ACT OBLIGATIONS?

The WARN Act covers private-sector employers, including nonprofit organizations, that employ 100 or more full-time employees, or 100 or more employees (including part-time employees) who in the aggregate work at least 4,000 hours per week, excluding overtime hours. This is not as straightforward as it might sound. An employee is considered part-time if they work an average of less than 20 hours per week or have been employed for less than six of the last 12 months.

Many states have enacted so-called mini-WARN acts, with obligations that are sometimes broader than federal law. For example, the following states have lower employee thresholds than the federal 100-employee minimum: California and Illinois cover employers with 75 or more employees; Hawaii, Maryland, New York, Vermont, Washington, and Wisconsin cover employers with 50 or more employees; and Iowa extends coverage to employers with as few as 25 employees. Given that notice periods, covered employment actions, and recipient obligations vary significantly by jurisdiction, employers conducting multistate reductions in force should start early to determine all of the potentially relevant WARN laws that may apply.

WHEN DOES THE WARN ACT APPLY?

A covered employer triggers the federal WARN Act's notice requirements by taking one of the following actions:

- **Plant Closing:** A permanent or temporary shutdown of a single site of employment that results in employment loss for 50 or more employees during any 30-day period; or
- **Mass Layoff:** A reduction in force at a single site of employment that results in employment loss for: (i) 500 or more workers (not counting part-time workers) during a 30-day period; or (ii) 50 to 499 workers (not counting part-time workers), where such layoffs constitute at least 33% of the employer's total active workforce (not counting part-time workers) at the single site.

Not every separation constitutes an "employment loss" under the WARN Act. The statute identifies three qualifying situations: (i) an employment termination, other than a discharge for cause, voluntary departure, or retirement; (ii) a layoff exceeding six months in duration; or (iii) a reduction in an employee's hours of more than 50% during each month of any six-month period.

Two common areas where WARN Act obligations arise unexpectedly warrant attention. First, WARN Act obligations may apply when an employer conducts a series of small terminations or layoffs over a 90-day period, none of which would individually be covered but that in the aggregate meet the required threshold. Employers planning phased restructurings should account for this aggregation rule early in the planning process.

Second, a temporary layoff initially expected to last less than six months may require WARN Act obligations if it is later extended beyond six months. Where the extension occurs for reasons that were not reasonably foreseeable at the time of the original announcement, the employer's WARN Act obligations arise only once it becomes aware of the need for the extension.

Finally, a question that has puzzled employers is how remote worksites fit into the definition of a "single site of employment." Is the single site each employee's remote office? The worksite into which they report or where their manager sits? Headquarters? Courts have, to date, not reached consensus even after the COVID-19 pandemic. The Department of Labor (DOL) is [considering revisions to the WARN regulations](#) that would, among other things, clarify that remote workers meet the definition of out-stationed employees, meaning they could be aggregated with others reporting into a central location. Until the DOL or courts clarify, however, employers should pay special attention to WARN thresholds where layoffs affect remote workers.

WHAT ARE A COVERED EMPLOYER'S OBLIGATIONS UNDER WARN?

The federal WARN Act requires covered employers to provide 60 days' advance written notice before a plant closing or mass layoff to affected employees, their union representatives (if applicable), the state dislocated

worker unit, and the chief elected official of the local government in which the affected site of employment is located.

While 60 days is the standard notice period, three circumstances may permit a shorter notice period: (i) a faltering company that is actively seeking sufficient capital or business to avoid or postpone the shutdown and that reasonably believes in good faith that advance notice would preclude its ability to obtain such capital or business; (ii) an unforeseeable business circumstance, meaning a sudden, dramatic, and unexpected action or conditions outside the employer's control; or (iii) a natural disaster. These exceptions have a high burden of proof and require evidence of specific facts to be established. And, even if an exception is met, the employer must still provide as much notice as possible, along with a statement of the reason for reducing the notice requirement.

The contents of the notices vary depending on the recipient. For notices to affected employees, the notice must contain the following:

- A statement as to whether the planned action is expected to be permanent or temporary and, if the entire plant is to be closed, a statement to that effect;
- The expected date when the plant closing or mass layoff will commence and the expected date when the individual employee will be separated;
- An indication of whether bumping rights exist; and
- The name and telephone number of a company official to contact for further information.

State mini-WARN acts may impose additional or different content requirements than those mandated under federal law. Employers should review the requirements of each applicable jurisdiction when implementing a multistate workforce restructuring.

WHAT HAPPENS IF A COVERED EMPLOYER FAILS TO COMPLY?

WARN Act noncompliance carries significant financial exposure. Affected employees have a private right of action to enforce the statute in federal court, and an employer that violates the WARN Act notice requirement may be liable to each affected employee for back pay and benefits for the period of violation up to 60 days. Employers that fail to provide notice to the local government unit may be subject to a civil penalty not to exceed \$500 for each day of violation.

HOW SHOULD EMPLOYERS APPROACH WORKFORCE RESTRUCTURING TO AVOID WARN ACT MISSTEPS?

Employers considering a workforce restructuring should keep the following considerations in mind at the outset:

- **Begin planning early.** Early identification of whether a restructuring may cause WARN Act obligations to apply is critical to timely and complete compliance.
- **Review the statutory notice requirements.** WARN notices have specific content requirements, and deficient notices can expose employers to liability.
- **Understand state-specific requirements.** The triggering requirements, notice periods, and notice contents vary by jurisdiction, and each applicable mini-WARN act warrants independent review to determine whether the restructuring implicates state-level notice obligations independent of those imposed by federal law.

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