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COVID-19 & COMPLIANCE:
THE WARN ACT

The Worker Adjustment and Retraining Notification Act (WARN Act) is a federal law that offers protection to workers, their families and communities by requiring covered employers to provide a 60-day advance notice of imminent covered plant closings and covered mass layoffs. In general, employers are covered by the WARN Act if they have 100 or more employees.

The 60-day notice must be provided directly to union representatives of all affected workers (or directly to employees who do not have a union representative), to the state dislocated worker unit and to the appropriate unit of local government.

While no particular form of notice is required, the notice must be in writing and it must be specific. The notice must be provided to both hourly and salaried workers, as well as managerial and supervisory employees, by any reasonable method of delivery.

COVERED EMPLOYERS

In general, employers are covered by the WARN Act if they have 100 or more employees. If, in the aggregate, an employer's workforce works at least 4,000 hours per week (not counting overtime hours), the employer must count full-time and part-time employees to determine whether it is covered by the WARN Act.

If an employer's workforce works less than 4,000 hours per week, the employer can disregard part-time employees who work less than 20 hours per week and employees who worked less than six months in the last 12 months to determine WARN Act coverage.

The WARN Act does not apply to regular, state and local government entities that provide public services.

Article Source: U.S. Department of Labor

HIGHLIGHTS

NOTICE TRIGGERS

- Plant closings where the shutdown will cause 50 or more employees to suffer an employment loss
- Mass layoffs that will result in an employment loss during any 30-day period for 500 or more employees, or for 50-499 employees if they make up at least 33 percent of the employer's active workforce

NOTICE REQUIREMENTS

- Any reasonable method of delivery designed to ensure receipt is acceptable, except for preprinted notices included in an employee's paycheck or pay envelope.
- All notices must be in writing.
- Notices that are given directly to unrepresented employees must be in a language the employees understand.

LINKS & RESOURCES

- Department of Labor (DOL) webpage on WARN Act compliance
- Employer's Guide to the WARN Act
- WARN e-laws Advisor (an interactive tool provided by the DOL)
- WARN Act Fact Sheet

NOTICE TRIGGERS

Covered Plant Closings and Mass Layoffs

A covered plant closing is the permanent or temporary shutdown of a single site of employment (or one or more facilities or operating units within a single site of employment) if the shutdown causes at least 50 employees to suffer an employment loss during any 30-day period. An employer does not need to count part-time employees to determine how many employees are affected by a covered plant closing.

The WARN Act's 60-day advance notice requirement is triggered by covered plant closings and covered mass layoffs, whether permanent or temporary.

A covered mass layoff is the reduction of an employer's workforce that:

- Is not the result of a plant closing;
- Takes place within a 30-day period for a single employment site (or within a 90-day period for certain multiple related layoffs); and
- Results in employment loss of:
  - Between 50 and 499 employees that collectively represent at least 33 percent of the employer's total active workforce; or
  - 500 employees or more.

Employment Loss

Under the WARN Act, an employment loss occurs when an employee is terminated, is laid off for more than six months or is assigned to work less than 50 percent of his or her regular work hours during each month of any six-month period.

An employment loss does not occur when an employee is discharged for cause, retires or resigns. In addition, an employee transfer is not considered an employment loss when:

- The closing or mass layoff will take place because the employer is relocating or consolidating all or part of its business;
- The employer offers a transfer that results in no more than a six-month break in employment; and
- The transfer is:
  - Within a reasonable commuting distance; or
  - Outside of a reasonable commuting distance but the employee accepts the transfer within 30 days of the offer or the date when the closing or layoff takes place, whichever is later.

NOTICE REQUIREMENTS AND EXCEPTIONS

The WARN Act not only requires employers to provide a 60-day advance notice before a covered plant closing or mass layoff, it also dictates who must receive this notice, the content of the notice and any allowable exceptions or adaptations to the 60-day rule.

Notice Delivery

Any reasonable method of delivery designed to ensure receipt at least 60 days before a closing or layoff is acceptable, except for preprinted notices included in an employee's paycheck or pay envelope.

Advance notice must be given to:

- The chief elected officer of each union representing an affected employee;
- Each affected employee that is not represented by a union or other collective bargaining organization (including part-time employees);
- The state's dislocated worker unit; and
- The locality's chief elected government official.

Affected employees include hourly and salaried employees, as well as managers and supervisors. The rule allowing employers to disregard certain part-time employees when determining their coverage under the WARN Act does not exempt employers from notifying all affected employees directly or through a labor representative.

However, the WARN Act's notice requirements do not extend to business partners, strikers and workers who have been locked out in a labor dispute, employees working on a temporary project (who clearly understood the temporary nature of their job when they were hired) or any federal, state and local government employees.

Form and Content of Notice

No particular form of notice is required. However, all notices must be in writing, and, if given directly to unrepresented employees, they must be in a language the employees understand.

A WARN Act notice must include the following specific information:

- The name and address of the employment site where the plant closing or mass layoff will take place;
- The name and telephone number of a company official to contact for further information;
- A statement indicating whether the closing or layoff is permanent or temporary and whether the entire plant will be closed;
- The expected date of the first termination or layoff and the anticipated schedule for additional employment separations (usually in 14-day increments);
- The job titles of positions that will be affected and the names of the workers currently holding these positions;
- An indication of whether bumping rights exist (for employees who do not have a representative); and
- The name of each union representing an affected employee and the name and address of its union chief elected officer.

Exceptions

Notice is not required when a plant closing or mass layoff does not meet the requirements described above for a covered plant closing or covered mass layoff. In addition, the WARN Act does not apply to:

- The completion of a temporary job or project;
- A lockout if the closing is not designed to evade the WARN Act's requirements; and
- The need to replace economic strikers (individuals striking solely to obtain an economic concession such as higher wages, shorter hours or better working conditions).

Reduction of Notification Period

The WARN Act recognizes that it may be impossible or impracticable for employers to provide a 60-day advance notice when an employer is faltering or unexpected circumstances affect its regular operations. In these cases, employers are still required to provide notice within a reasonable and practicable time frame.

A faltering employer is an employer that is actively seeking capital, reasonably and objectively believes that advanced notice would hinder its ability to obtain capital and believes in good faith that obtaining the capital it seeks will prevent covered closings and mass layoffs.

Unexpected and unforeseeable circumstances that disrupt an employer's regular operations must be sudden, dramatic and outside of the employer's control. These circumstances may include natural disasters, the unexpected cancellation of a major order and unexpected extended layoffs that cause employees to suffer more than six months of employment loss.

Sale of Business

The WARN Act may apply when all or part of a business is sold. However, the mere technical termination of an employment relationship between the seller of a business and its employees is not sufficient to trigger notice requirements.

The sale of a business triggers the WARN Act if the sale results in a covered plant closing or covered mass layoff. The timing of the closings and layoffs determines who is responsible for providing the advanced notice. The seller must give notice for covered closings or layoffs that occur before the sale becomes effective. The buyer is responsible for advance notices when covered closings or layoffs take place after the sale becomes effective.

PENALTIES

An employer who violates the WARN Act's provisions by ordering a plant closing or mass layoff without providing appropriate notice is liable to each aggrieved employee for an amount including back pay and benefits for the period of violation, up to 60 days. An employer's liability may be reduced by the amount of wages and other voluntary or unconditional payments the employer provides to its employees during the period of the violation.

An employer that fails to provide notice to a unit of local government, as required by the WARN Act, is subject to a civil penalty of up to $500 for each day of violation. This penalty may be avoided if the employer satisfies the liability to each aggrieved employee within three weeks after the closing or layoff is ordered by the employer.

ENFORCEMENT

The WARN Act's requirements are enforced through the federal district courts. Workers, employee representatives and local government units may bring individual or class action suits. In any suit, the court has the discretion to allow a prevailing party to recover reasonable attorney's fees.

Please be advised that any and all information, comments, analysis, and/or recommendations set forth above relative to the possible impact of COVID-19 on potential insurance coverage or other policy implications are intended solely for informational purposes and should not be relied upon as legal advice. As an insurance broker, we have no authority to make coverage decisions as that ability rests solely with the issuing carrier. Therefore, all claims should be submitted to the carrier for evaluation. The positions expressed herein are opinions only and are not to be construed as any form of guarantee or warranty. Finally, given the extremely dynamic and rapidly evolving COVID-19 situation, comments above do not take into account any applicable pending or future legislation introduced with the intent to override, alter or amend current policy language.