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Worker Adjustment and Retraining Notification Act (WARN)

Who, What, Why . . .

Who does it apply to: All employers with 100 or more full-time employees (not counting workers who have less than 6 months on the job and employees who work fewer than 20 hours per week) or employ 100 or more employees that work 4,000 hours per week combined.

What is the purpose of the law: When a business covered by the Act is laying off a large number of people at a single worksite, the Act requires the employer to give advance notice so that the employees can begin looking for other work.

What circumstances trigger the notice requirement: Of course, it is complicated, but the following represent most of the possibilities:

- Closing a facility or operating unit on a temporary or permanent basis in a way that will affect 50 or more employees (at that location or that location plus other places);
- Making a mass lay-off unrelated to closing a facility that affects 500 or more employees within a 30 day period, or a lay-off of 50 – 499 employees if they make up at least 33% of the employer's active workforce.
- A combination of a facility closing and mass lay-off during a 90 day period that would meet either threshold.
- Sale of a business which will result in a facility closing and/or mass lay-off as part of or shortly after a sale.

Employers do not have to give notice when closing a facility or location due to completion of the project for which it was created (think construction site), if the facility was originally temporary, or in certain circumstances, involving unions.

Who counts as an employee: Anyone who will be laid off for more than six months, whose hours will be reduced by 50% or more, or who has been temporarily laid off with an expectation to be recalled that will no longer be recalled (including employees on worker's comp, FMLA, or other leave). That said, "employee" does not include part-time employees, individuals who have

worked less than 6 months in the last 12 months, people who are contractors or understand that their position is temporary, striking union employees, or employees who will be offered a transfer (in certain circumstances).

Who gets notice and when: Deliver notice, timed to reach the following parties, 60 days or more before the lay-off:

- Affected employees;
- Employees who may be laid off if seniority allows an affected employee to bump another employee out ("bumping");
- The Dislocated Worker Services Department at the Texas Workforce Solutions office for your region;
- The highest ranking elected official at the local level of government in which the site is located (probably the Mayor or County Commissioner); and
- The chief representative of the union or bargaining organization for union employees.

What is the notice supposed to say: To affected employees, the notice must explain whether the planned action is temporary or permanent, whether the entire facility will be closed, the expected date when the closing or lay-off will begin and conclude, information about bumping rights (if any), and the name of the company representative employees may contact for more information. To the other recipients listed above, the notice should include the items above, the address of the site, and what positions will be affected.

Are there exceptions to giving notice 60 days in advance: You still have to give notice, but the notice may be shorter if the lay-off is the result of a natural disaster, unforeseeable business circumstances, or if the company falters. Understand, however, that the Department of Labor will take a very narrow view of what meets these exceptions and when the business really knew about the need to lay-off employees.

What happens if I do not give notice: Companies may be liable for up to 60 days back pay and benefits for the affected employee, plus possible penalties and attorney fees. That said, the Act specifically prohibits the government from attempting to prevent an employer from engaging in either a facility closing or mass lay-off.

Common Situations:

We may pull it out: MegaBrands has determined that it must make a mass lay-off at its Dallas ice cream making plant because Americans have flipped over Italian gelato and business is down. They prepare the required notice under the WARN Act and send it out. A month into the warning period an earthquake in Italy levels its biggest competitor. MegaBrands can hang on for a little longer. Will its past notice suffice? It depends. If the date the lay-offs are to begin is for some reason postponed by less than 60 days, notice must be given to that effect as soon as possible. If the date the lay-offs are to begin is postponed by more than 60 days, a completely new notice will be required.

No one can know: Secrets, Inc. is going to have to close one of its plants in Lubbock, but it fears advance notice of the closing will be a sign of weakness to its competitor who has been angling for a hostile stock purchase. Secrets, Inc. decides to pay all of the employees at the Lubbock facility 60 days pay but provides no notice before closing its plant. Employees are required to sign a release of all claims against the company in exchange for the payment. Can Secrets, Inc. avoid the WARN notice requirement by paying off its employees? Yes, but in

this instance they did it wrong. Secrets, Inc. could make an unconditional payment to the employees effectively cancelling whatever recovery they would be entitled to under the Act. By requiring a release of all claims, however, Secrets, Inc. made the payment about more than just avoiding the WARN notice which does leave the employees with a compensable claim.

Will it happen this month: GigantiCo has facilities all over the country and has been trying to sell its Midwest division for the last two years. Hoping to find a suitable buyer and close quickly, GigantiCo has been providing WARN notices to its employees all over the United States every 60 days since the division went up for sale. Has the company overstepped? Yes, an employer may not attempt to circumvent the timing provided by the WARN act while driving its employees totally insane.

What should I do:

Good, Better, and Best: Comply with the notice requirements above if the act becomes applicable to your business. Be careful to consider this issue in a sale of the business. Most buyers require termination of all employees before the sale so that the buyer may pick and choose who it wants to keep.



Michael Kelsheimer is a Shareholder in the employment law section at Looper Reed & McGraw where he is joined by a number of employment law attorneys with experience in all areas of employment and labor law. Michael recognizes that the cost and expense of litigation makes resolving employment disputes challenging. To help avoid these concerns, he utilizes his experience in and out of the courtroom to prevent or quickly resolve employment disputes through proactive employer planning and timely advice. When a dispute cannot be avoided, Michael relies upon his prior experience as a briefing attorney for the United States District Court and his extensive experience in employment and commercial lawsuits to secure favorable resolutions for his clients.

This guide is one in a series. For more information, or to receive the entire collection contact Michael Kelsheimer by email at mkelsheimer@lrmlaw.com or by phone at 214.237.6346