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Understanding Your Company's Obligations Under the Worker Adjustment and Retraining Notification Act

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What is WARN?

A “notice” statute; nothing more, nothing less . . .

General Rule: Employers are required to give employees and certain elected officials 60 days notice of a plant closing or a mass layoff.

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What is the Purpose of WARN?

- Allows workers and families to plan in advance for layoffs
- Allows time for job searches and retraining
- Provides advance notice to local community leaders
- Give state dislocated worker agencies time to respond

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What Employers are Covered by WARN?

Employers who have:

- 100 or more employees, excluding part time workers; or
- 100 or more employees, including part-time workers, if they work 4,000 per week in aggregate, excluding overtime.

Applies to private for-profit entities, private non-profit organizations, and quasi-public entities separately organized from regular governments

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How do you Count ‘Workers’ to Determine ‘Employer’ Status?

- Workers on temporary layoff or leave with a reasonable expectation of recall (such as workers compensation, FMLA leave) are considered;
- Independent contractors are not considered;
- Separate entities, such as parents and subsidiaries, are ordinarily treated as separate employers;

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What is a ‘Plant Closing’?

A permanent or temporary shutdown of a ‘single site of employment’, or of one or more facilities or operating units within a single site of employment, if the shutdown results in an ‘employment loss’ at that single site of employment during any 30-day period for 50 or more employees.

An action that results in the effective cessation of operations of a plant or unit is a plant closing, even if a few employees remain employed.

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What is a ‘Mass Layoff’?

A reduction-in-force which results in an ‘employment loss’ at a ‘single site of employment’ during any 30-day period for (i) at least 33 percent of the active employees and (ii) at least 50 employees (also excluding part-time employees).

- Key Point: A “double trigger”
- Where layoff affects 500 or more employees, the 33% trigger does not apply.
- While the layoff is calculated by looking to a single site of employment, it may cross divisions and operating units.

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What Employees are Excluded from the Calculation of ‘Employment Loss’?

- Workers who retire, resign voluntarily, or are discharged for cause
- Workers whose layoff is less than six months; or
- Workers who suffer a reduction in working hours of less than 50% during each month of any six-month period
- Part-time employees
 - WARN defines ‘part time’ as any employee who averages fewer than 20 hours per week

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What Employees are Excluded from the Calculation of ‘Employment Loss’?

- Employees who are terminated or laid off, but are reassigned or transferred to an employer sponsored program for retraining or job search, as long as the reassignment does not constitute a constructive discharge or involuntary termination.
- *What?*

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What Employees are Excluded from the Calculation of ‘Employment Loss’?

- Employees who are affected by relocation or consolidation of part or all of the employer’s business and:
 - (i) are offered the opportunity to transfer to another site of employment within a reasonable commuting distance with no more than a six-month break in employment, or
 - (ii) are offered the opportunity to transfer to another site of employment regardless of distance with no more than a six-month break in employment, and the employee accepts the offer within 30 days of the offer or of the closing or layoff, whichever is later.

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What Is A ‘Single Site of Employment’?

- A single location
- A group of contiguous locations (such as a multi-building campus or multi-building plant)
- A group of non-contiguous facilities that are in reasonable geographic proximity and share common purpose, staff and equipment.

Note that workers who travel are considered employed at their home base site or the site from which they receive their instructions.

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What Workers are Entitled to Notice?

- All ‘affected employees’, which means employees who may reasonably be expected to experience an employment loss as a consequence of a plant closing or mass layoff. Includes:
 - Managerial and supervisory employees;
 - Part-time employees;
 - Workers on temporary layoff or leave with a reasonable expectation of recall (such as workers compensation, FMLA leave).
- Use best guess to account for union ‘bumping rights.’
- Employees actually impacted may be different in some cases.

Lesson: Be over-inclusive

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Are Certain Workers Not Entitled to Notice?

- Strikers
- Workers on temporary projects who knew temporary nature of work when they were hired
- Business partners, consultants and contract employees

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Who Else is Entitled to Notice?

- The State Dislocated Worker Unit
- The chief elected official of the local government
- The chief elected representative of each affected labor union

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The WARN-Event Timeline: 30-day Rule

All related layoffs within a 30-day time period count.

For example, if the employer closes a plant and lays off 40 workers immediately and 10 within 30 days thereafter, the employer has effected a covered ‘plant closing.’

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The WARN-Event Timeline: 90-day Look-Back

For any layoff, whether or not a ‘mass layoff’ standing alone, employer must look back 90 days to determine if related layoffs have occurred that, when aggregated, pull the double triggers of ‘plant closing’ and ‘mass layoff.’

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The WARN-Event Timeline: 90-day Look-Back

- Day 1: 180 Employees working full-time
- Day 2: 30 Employees terminated
- Day 31: 29 Employees terminated
- Day 60: 6 Employees terminated
- Day 90: 5 Employees terminated

Results: 70 employees terminated in 90-day period for reasons that are not separate and distinct.

Conclusion: All 70 were entitled to WARN notice.

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When Is WARN Notice Due?

- At least 60 days before the employment loss is reasonably expected to occur.
- Exceptions:
 - Faltering company
 - Unforeseeable business circumstances
 - Natural disaster
- Exceptions are incredibly narrow.
- Even if an exception applies, employer still must give as much notice as practicable.

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What Information Must be Provided to Employees in a WARN Notice?

- Whether the planned action is expected to be temporary or permanent and whether the entire plant is to be closed.
- Expected date of the plant closing or mass layoff.
- The anticipated date of each employee’s separation.
- Whether “bumping” rights exist.
- Company official’s name and telephone number.

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What Information Must be Provided to the State Dislocated Workers Unit, Chief Elected Local Official, and Chief Elected Union Official?

- Company name and address of affected site.
- Company official’s name and telephone number.
- Whether the planned action is expected to be temporary or permanent and whether the entire plant is to be closed.
- The anticipated date of first job loss and schedule of additional reductions.

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What Information Must be Provided to the State Dislocated Workers Unit, Chief Elected Local Official, and Chief Elected Union Official?

(cont'd)

- List of job titles of affected positions, including number of employees in each category.
- Whether “bumping” rights exist.
- For each union, name and address of each union representative and chief elected union officer.

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What Should an Employer do if the Specific Terminations are not Known?

- When it is not possible to determine in advance when specific terminations may occur, a WARN notice may identify a two-week window during which the termination is most likely to happen.
- Employers will not be held liable for minor inaccuracies or errors in the WARN notices that are the result of unforeseeable or changed circumstances.

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What Happens When a Business is Sold?

- Up to the point of sale, WARN responsibility rests with the seller.
- After the sale, WARN responsibility rests with the buyer.
- When the seller’s employees are transferred to the buyer and there is no break in employment, WARN is not triggered, even though there is a technical termination of employment.

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How is WARN Enforced?

- Court actions authorized
- No agency proceedings as with Title VII
- Employers or local government may initiate actions
- DOL has no legal standing

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How is WARN Enforced?

- WARN does not supersede:
 - Local ordinances or state laws that require more notice;
 - Contracts, such as CBAs, that require more or different notice.
- Unions can waive members WARN rights through, for example, plant closing agreements.

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What Liability do Employers Face for Failure to Comply with WARN?

- Up to 60 days pay & benefits for period without notice
- Civil penalty of up to \$500 per day
- Attorneys’ fees to prevailing party

Employers, unions and local governments are not entitled to injunctive relief to halt business sales.

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What Liability do Employers Face for Failure to Comply with WARN?

Consider interplay of WARN & severance plans:

- Employee gets WARN notice.
- Employee resigns before end of 60-day period and claims entitlement to severance under ERISA plan.
- Employee might be entitled to severance under ‘constructive termination’ rationale.
- Sixth Circuit has addressed the issue: A post-WARN-notice resignation is treated as a ‘voluntary resignation,’ and severance that is tied to discharge is accordingly not due.

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Once You Get Past WARN, is There Anything Else to Worry About?

WARN is only one of many employment laws

- Title VII
- ADEA
- ADA
- Sarbanes-Oxley
- FMLA and other leave statutes

Fundamental Problem: Defending your inclusion of workers in the RIF against claims of discrimination, retaliation.

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Pre-Reduction Strategies

- Understand where your company is today.
- Understand your long-term and short-term goals.
- Understand the goals for the reorganization or RIF.
 - Strategic realignment
 - Abandonment of line of business
 - Consolidation of facilities
 - Streamlining of departments

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Pre-Reduction Strategies

- Develop selection strategies to meet goals:
 - Should be business related
 - Should be consistent with company practice and history
 - Seniority / “LIFO” are easy to justify
 - Subjective selection criteria can be problematic
- Assess statistical impact of your criteria before implementation

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Pre-Reduction Strategies

- Remember other legal hurdles:
 - Union contracts
 - Individual employment contracts
 - Severance agreements/policies
 - Stock options

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Carrying Out the Terminations

- Consider that involuntary terminations are difficult for employers and employees.
- Consider a voluntary termination or early retirement plans when possible.

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Carrying Out the Terminations

- Identify managers charged with terminations
 - Effect focused training and scripts
 - Develop list of FAQs
- Focus on communication
 - Cast RIF in positive light
 - Squelch rumors and innuendo
- Consider announcing terminations individually or in groups
- Consider security issues

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Waivers and Releases

- Formal waiver of claims against the company
- Must be supported by consideration
- Pros:
 - Defense against litigation
 - Sometimes helps soothe hard feelings
- Cons:
 - Some employees interpret as admission of guilt
 - Encourages employees to seek counsel
 - Encourages employees to “negotiate” severance

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Waivers and Releases

- Must be ‘knowing and voluntary’
- Can apply only to existing claims
- Special rules for workers age 40 and over
 - Plain language
 - Attorney consultation
 - Consideration period (21 or 45 days)
 - Revocation period (7 days)
 - Disclosure of related terminations
 - No “tender back”

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Waivers and Releases

- How to secure signatures:
 - Offer meaningful severance
 - Give a plan for re-employment
 - Treat employees fairly, consistently, and professionally

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Post-Reduction Strategies

- Develop plan for reference checks
- Be careful of future hiring
- Communicate with remaining employees to maintain morale