Worker Adjustment and Retraining Notification Act Frequently Asked Questions

Introduction

The federal Worker Adjustment and Retraining Notification (WARN) Act (or Act) is enforced by private legal action brought in the U.S. District Court for any district in which the violation is alleged to have occurred or in which the employer transacts business. Any dispute regarding the interpretation of the WARN Act including a closing or layoff's foreseeability will be determined on a case-by-case basis in the particular court proceeding. The role of the U.S. Department of Labor (Department) is limited to providing guidance and information about the WARN Act; such guidance is not binding on courts and does not replace the advice of an attorney. Some States have their own laws addressing layoffs and worksite closures. Information on State notice requirements can be obtained by contacting the applicable state dislocated worker unit.

Employer Questions for COVID-19

Am I covered by the WARN Act?

The WARN Act requires employers with 100 or more full-time employees (not counting workers who have fewer than 6 months on the job) to provide at least 60 calendar days advance written notice of a worksite closing affecting 50 or more employees, or a mass layoff affecting at least 50 employees and 1/3 of the worksite's total workforce or 500 or more employees at the single site of employment during any 90-day period. Not all dislocations require a 60-day notice; the WARN Act makes certain exceptions to the requirements when employers can show that layoffs or worksite closings occur due to faltering companies, unforeseen business circumstances, and natural disasters. In such instances, the WARN Act requires employers to provide as much notice to their employees as possible.

If I am considering a temporary layoff or furlough, do I need to provide workers with a notice under the WARN Act?

A WARN Act notice must be given when there is an employment loss, as defined under the Act. A temporary layoff or furlough that lasts longer than 6 months is considered an employment loss. A temporary layoff or furlough without notice that is initially expected to last six months or less but later is extended beyond 6 months may violate the Act unless:

1. The extension is due to business circumstances (including unforeseeable changes in price or cost) not reasonably foreseeable at the time of the initial layoff; and
2. Notice is given when it becomes reasonably foreseeable that the extension is required.

This means that an employer who previously announced and carried out a short-term layoff (6 months or less) and later extends the layoff or furlough beyond 6 months due to business circumstances not reasonably foreseeable at the time of the initial layoff is required to give notice at the time it becomes reasonably foreseeable that the extension is required. A layoff extending beyond 6 months for any other reason is treated as an employment loss from the date the layoff or furlough starts. The WARN Act is enforced by private legal action in the U.S. District Court for any district in which the violation is alleged to have occurred or in which the employer transacts business. Thus an employer may need to prove that it could not foresee the circumstances if a WARN Act action is brought. Any dispute regarding the interpretation of the WARN Act including its foreseeability will be determined on a case-by-case basis in such a court proceeding. The role of the U.S. Department of Labor is limited to providing guidance and information about the WARN Act; such guidance is not binding on courts and does not replace the advice of an attorney.

For permanent layoffs, may I claim an exception to the WARN Act because of COVID-19? If I do, what are my responsibilities?

The Department recommends that employers review the "unforeseeable business circumstances" exception to the 60-day notice requirement (contained in the WARN Act at § 3(b)(2)(A), and the WARN regulations at 20 CFR 639.9) set out below:

> The "unforeseeable business circumstances" exception… applies to plant closings and mass layoffs caused by business circumstances that were not reasonably foreseeable at the time that 60-day notice would have been required.
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> > (1) An important indicator of a business circumstance that is not reasonably foreseeable is that the circumstance is caused by some sudden, dramatic, and unexpected action or condition outside the employer's control. A principal client's sudden and unexpected termination of a major contract with the employer… and an unanticipated and dramatic major economic downturn might each be considered a business circumstance that is not reasonably foreseeable. A government ordered closing of an employment site that occurs without prior notice also may be an unforeseeable business circumstance.
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> > (2) The test for determining when business circumstances are not reasonably foreseeable focuses on an employer's business judgment. The employer must exercise such commercially reasonable business judgment as would a similarly situated employer in predicting the demands of its particular market. The employer is not required, however, to accurately predict general economic conditions that also may affect demand for its products or services.

When invoking an exception to the WARN Act's 60-day notice requirement, a covered employer is still required to:

1. Give as much notice as is practicable; and

2. Include a brief statement of the reason for giving less than 60-days' notice along with the other required elements of a WARN notice.

Applicability of the "unforeseeable business circumstances" exception rests on an employer's particular business circumstances. The WARN Act is enforced by private legal action in the U.S. District Court for any district in which the violation is alleged to have occurred or in which the employer transacts business. Thus an employer may need to prove that it could not foresee the circumstances 60 days in advance if a WARN Act action is brought. Any dispute regarding the interpretation of the WARN Act including its exceptions will be determined on a case-by-case basis in such a court proceeding. The role of the U.S. Department of Labor is limited to providing guidance and information about the WARN Act; such guidance is not binding on courts and does not replace the advice of an attorney.

Will the Department of Labor provide me with a letter that I have complied with the WARN Act?

No; the WARN Act is enforced by private legal action in the U.S. District Court for any district in which the violation is alleged to have occurred or in which the employer transacts business. Any dispute regarding the interpretation of the Act including its exceptions is determined on a case-by-case basis in such a court proceeding. The role of the U.S. Department of Labor is limited to providing guidance and information about the WARN Act; such guidance is not binding on courts and does not replace the advice of an attorney. While the Department can provide guidance and information about the WARN Act, it has neither investigative nor enforcement authority under the WARN Act; therefore, it cannot issue advisory opinions on specific cases.

Can the U.S. Department of Labor provide copies of WARN Notices or statistics on the number of WARN Notices that have been filed? Do States receive WARN Notice information?

No; the U.S. Department of Labor neither maintains a database of WARN notices, nor requires employers to provide WARN notices to the Department. But employers are required to provide WARN notices to the state dislocated worker unit. Some States publish WARN notice listings on their websites but this is voluntary for States, so the frequency of listings and amount of information varies from State to State. The Department recommends reaching out to each State for information or contacting the State Rapid Response Coordinators if you are having trouble locating this information online.

WARN FAQ for Workers on COVID-19 (also known as the coronavirus)

My employer has temporarily closed due to COVID-19. Was I supposed to receive notice under the WARN Act?

Employee protections under the WARN Act apply to those who suffer "an employment loss"; a layoff (or furlough) that is "temporary" may not be an employment loss for WARN Act

purposes. Under the Act, an employee who is laid off does not suffer an employment loss unless the layoff extends beyond 6 months. Therefore, a temporary layoff of 6 months or less does not trigger the need for the employer to issue a WARN Act notice. However, if the layoff lasts for more than 6 months, employees would be considered to have experienced an employment loss and would have been entitled to notice before the layoff unless it was not reasonably foreseeable at the time of the initial layoff that the layoff would extend beyond 6 months. If a layoff is extended beyond 6 months due to business circumstances, notice is required when it becomes reasonably foreseeable that the extension is required. The WARN Act is enforced by private legal action in any U.S. District Court for any district in which the violation is alleged to have occurred or in which the employer transacts business. In such an action an employer may have to prove that it could not foresee the circumstances necessitating an extension of the layoff. Disputes regarding the WARN Act will be determined on a case-by-case basis in such a court proceeding. The role of the U.S. Department of Labor is limited to providing guidance and information about the WARN Act; such guidance is not binding on courts and does not replace the advice of an attorney.

My employer has permanently closed due to COVID-19 but did not provide a 60-day notice stating that the loss of business from the virus was an unforeseen business circumstance. Does this violate my rights under the WARN Act?

Under the WARN Act, employers can claim an exception to the 60-day notice requirement for unforeseeable business circumstances. The exception to the advance notice requirement applies to worksite closings and mass layoffs caused by business circumstances that are not reasonably foreseeable at the time that 60-day notice would have been required. An important indicator of a business circumstance that is not reasonably foreseeable is that the circumstance is caused by a sudden, dramatic, and unexpected action or condition outside the employer's control. This can include an unanticipated and dramatic major economic downturn. A government ordered closing of an employment site that occurs without prior notice also may be an unforeseeable business circumstance. Similarly sudden, dramatic, and unexpected action outside the employer's control, announced and implemented swiftly, such that the employer is unable to provide 60 days' notice may also fall within this exception to the 60-day notice requirement.

When invoking an exception to the WARN Act's 60-day notice requirement, a covered employer is still required to:

1. Give as much notice to employees (or the employees' representative(s)) and State and local government officials as is practicable (which may, in some circumstances, be notice after the fact); and
2. Include a brief statement of the reason for giving less than 60-days' notice along with the other required elements of a WARN notice.

The WARN Act is enforced by private legal action in any U.S. District Court for any district in which the violation is alleged to have occurred or in which the employer transacts business. Thus an employer may need to prove that it could not foresee the circumstances necessitating the worksite closing or mass layoff if such enforcement action is brought. Any dispute regarding the

interpretation of the WARN Act will be determined on a case-by-case basis in such a court proceeding. The role of the U.S. Department of Labor is limited to providing guidance and information about the WARN Act; such guidance is not binding on courts and does not replace the advice of an attorney.

My employer sent WARN Notices by email because the business is currently closed. Is that allowed?

The regulations implementing the WARN Act state that: "Any reasonable method of delivery… which is designed to ensure receipt of notice" is an acceptable form of notice. *See* 20 CFR 639.8. A WARN notice sent via email must still be specific to the individual employee, and comply with all requirements of the WARN Act statute and regulations regarding written notifications.

My employer is talking about temporarily closing the office. Will we get a WARN notice if there are only 30 employees? Will I get a WARN Act notice if my employer is a nonprofit association?

Generally, WARN Act notice requirements apply to employers of 100 or more workers. A WARN Act covered employer is one that employs:

(a) 100 or more employees (not counting workers who are part time – *see below for more information on who is considered part time); or

(b) 100 or more employees (including part-time workers) who, in the aggregate, work at least 4,000 hours per week (excluding overtime hours).

A "part-time" employee for WARN Act coverage is someone who has worked an average of less than 20 hours per week or less than 6 of the last 12 months.

The WARN Act notice requirements apply to private for-profit businesses, nonprofit organizations, and quasi-public entities (when the entity is organized separately from regular government).

I believe my rights under the WARN Act were violated by my employer. Can the U.S. Department of Labor force my employer to comply or otherwise enforce the provisions of the WARN Act?

While the U.S. Department of Labor can provide general guidance and information about the provisions of the WARN Act and implementing regulations, employee rights under the Act, and employer responsibilities under the Act, the Department has neither investigative nor enforcement authority under the WARN Act. Therefore, any employee concerned about a WARN Act violation should seek legal counsel and consider whether to file suit in the applicable U.S. District Court. An employer who violates the provisions of the WARN Act may be found liable for an amount equal to the amount of wages and benefits for each day of the period of violation, up to 60 days. In any such suit, the court, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs. The role of the U.S. Department of Labor is

limited to providing guidance and information about the WARN Act; such guidance is not binding on courts and does not replace the advice of an attorney

I lost my job or am temporarily laid off due to COVID-19. What do I do now?

The U.S. Department of Labor-supported CareerOneStop.org website can direct workers and employers to resources and help answer questions about job loss, layoffs, business closures, unemployment benefits, and job training. Workers and employers can also call the U.S. Department of Labor's toll-free help line at 1-877-US-2JOBS (TTY: 1-877-889-5627).

Workers eligible for regular unemployment insurance benefits, as well as expanded benefits under the CARES Act, should file an unemployment benefits claim with the State where you worked. You can find the contact information for your State at www.dol.gov/uicontacts.

State Agency Questions for COVID-19

Are employers allowed to issue WARN notices by email to employees, State Rapid Response Coordinators, and Chief Elected Local Officials?

Yes, employers may issue WARN notices via email, although the same requirements for the content of the notices remain in place (found at 20 CFR 639.7). Given the COVID-19 pandemic-related guidelines and orders issued by many States, email may be a preferred method of notifying State and local government personnel, since many State officials are working from home. Employers are encouraged to reach out to these offices for more information on the preferred method of delivery. States should carefully review their policies and procedures to ensure that they can receive electronic notices.

What are the expectations for States managing the receipt of WARN notices and the provision of assistance to workers under the WARN Act?

States are expected to follow existing policies and procedures, as well as any further guidance provided by the State related to the COVID-19 pandemic.

When a State learns of a major dislocation (a worksite closing or mass layoff) resulting from the COVID-19 pandemic, should States add them to WARN logs before receiving WARN notices from the employers?

While the COVID-19 pandemic does not excuse employers from issuing WARN notices to employees, States, and Chief Local Elected Officials, the fast-moving nature of the pandemic may require certain worksite closings and mass layoffs to be implemented before completion of the 60-day notice requirement. Such closings and mass layoffs may fall under one of the exceptions to the 60-day notice requirement. Whether to add such actions to State WARN logs before receiving notice from employers is a State-level decision; States should continue to follow their policies and procedures for logging WARN notices. States may wish to track layoffs due to COVID-19, as well as whether notices are received concerning such layoffs.