

WARN Issues Regarding COVID-19 Related Closures and Layoffs

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The COVID-19 pandemic has no doubt caused widespread economic upheaval. In particular, state and local governments across the country have ordered restaurants and bars and other non-essential businesses to close. With little or no warning, employers have had to unexpectedly lay off employees. The question remains whether these layoffs will remain temporary or turn permanent and the long-term effects on businesses. Under federal law, employers must provide at least 60-days advance written notice to employees and government/union officials of mass layoffs and certain plant or facility closings which is also essentially 60-days' wage insurance in some but not all situations. Not all mass layoffs or closings are subject to the 60-day notice rule. Here is what you need to know.

Federal WARN

Applies To: employers with 100 or more employees excluding part-time employees, or 100 or more employees including part-time employees, in the aggregate who work more than 4,000 hours each week (excluding overtime).

A part-time employee is an employee who works on average less than 20 hours per week or who has been employed for fewer than 6 of the previous 12 preceding the date the notice was required.

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Does Not Apply To: most federal or State governments or any of their political subdivisions, including units of local government or school districts and tax-exempt institutions and organizations. It would apply to quasi-governmental organizations that engage in business and are separately organized from the regular government.

Requirements: employers must provide least sixty (60) days' notice to employees, employee representatives (unions) (if applicable), and certain state and local government officials of an employment loss resulting from a plant closing or mass layoff.

- An **employment loss** means: (1) an employment termination, other than discharge for cause, voluntary resignation, or retirement; (2) a layoff exceeding 6 months; or (3) a 50% or more reduction in hours of work during each month of any 6-month period.
 - **Note:** Whether a termination is called a layoff, furlough, shutdown, etc., what matters under WARN is whether the employment action meets the definition "employment loss."
- A **plant closing** means 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 results in an **employment loss** at the single site of employment during any 30-day period for 50 or more employees excluding part-time employees.
- A **mass layoff** means a reduction in force which: (1) is not the result of a plant closing and (2) results in an **employment losses** at a single site of employment during any 30-day period for either (a) at least 33% of the employees (excluding part-time employees) and at least 50 employees (excluding part-time); or (b) at least 500 employees (excluding part-time).

Exceptions: employers do not violate WARN by giving less than 60-days' because:

- **Unforeseen business circumstances:** an unforeseeable business circumstance is caused by some sudden, dramatic, and unexpected action or condition outside the employer's control such as: a principal client's sudden and unexpected termination of a major contract with the employer, a strike at a major supplier of the employer, an unanticipated and dramatic major economic downturn, or a government ordered closing of an employment site that occurs without prior notice.
- **Faltering company:** when, before a plant closing, a company is actively seeking capital or business and reasonably in good faith believes that advance notice would preclude its ability to obtain such capital or business, and this new capital or business would allow the employer to avoid or postpone a shutdown for a reasonable period; or

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- **Natural disaster.**

What This Means:

- In some cases, WARN will not apply because layoffs will be less than six months. If a layoff will exceed six months, then employers are required to provide notice when they determine that the layoff will exceed six months.
- If a layoff will be longer than six months, or a company closes an entire facility or business, a strong argument can be made that the sudden economic downturn and government ordered closures caused by the COVID-19 pandemic are sudden, dramatic and unexpected conditions sufficient to relieve an employer from providing the 60-day advance notice under the unforeseen business circumstance exception.
- When WARN-covered layoffs exceed 6 months and/or are due to unexpected business circumstances, a faltering company, or a natural disaster, the employer should still provide the required written notices and explain why it could not give employees 60-days' notice.

Penalties: Failure to provide the required notice may result in penalties such as back pay to each employee for the number of days' notice that was not provided up to sixty (60) days, payment for lost benefits, including medical expenses, and civil penalties up to \$500 for each day the notice was not provided.

Illinois Mini-WARN

Illinois' mini-WARN law largely follows the requirements of federal WARN with some significant differences.

Different Thresholds:

- **Applies To:** Illinois WARN applies to employers of 75 employees or more, which is less than the threshold under federal law.
- **Mass Layoff:**
 - Illinois WARN has a lower threshold for mass layoff.
 - Under Illinois WARN, a **mass layoff** means a reduction in force which:
 - is not the result of a plant closing; and
 - results in an *employment loss* at a single site of employment during any 30-day period for either:

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- at least 33% of the employees (excluding part-time employees) and at least 25 employees (excluding part-time); *or*
- at least 250 employees (excluding part-time) (the thresholds under federal WARN are 33% and 50 employees or 250 employees).
- **Planting Closing:**
 - Illinois WARN has a lower threshold for a plant closing.
 - Under Illinois WARN, a plant closing means 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 results in an *employment loss* at the single site of employment during any 30-day period for 25 or more employees excluding part-time employees (the threshold under federal WARN is 50 or more employees).

Different Exceptions:

- Federal WARN's unforeseen business circumstance exception applies to both mass layoffs and closings, but this exception under Illinois WARN *only* applies to closings. For closings, the Illinois Department of Labor must determine that the need for notice was not reasonably foreseeable at the time the notice would have been required. For this exception to apply, the employer must provide the Illinois Department of Labor with written documentation of why the need for notice was not reasonably foreseeable as well as an affidavit verifying the contents of such documentation.
- Under Illinois WARN, an employer is not required to provide notice if the mass layoff was necessitated by a physical calamity or an act of terrorism or war.
- The regulations addressing the exceptions provide no guidance on the meaning of "physical calamity" in the case of mass layoffs or the circumstances that could be considered sufficient to not be reasonably foreseeable in the case of plant closures.

Takeaways:

- WARN does not apply to temporary layoffs of less than six months.
- An Illinois employer may use the unforeseeable business circumstance exception to providing advance notice when closing a facility, plant or business.
- Illinois WARN does not provide for a clear exception when a mass layoff results from the COVID-19 pandemic.

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Other Defenses: Whether an employer is or is not excused from the sixty (60) day notice requirement, an employer should provide as much notice of a closure, mass layoff, or hours reduction as is reasonably possible. If an employer is ultimately found to have violated federal or Illinois WARN, showing that the violation was made in good faith and that the employer had reasonable grounds to believe it was acting consistent with its obligations, especially in these unprecedented circumstances, could result in a reduction of the employer's liability or penalties for such violation.

Other States

- In addition to federal WARN, many states have their own "mini-WARN" providing for more generous notice requirements. States and territories with their own mini-WARN laws are California, Connecticut, Delaware, Georgia, Hawaii, Illinois, Iowa, Maine, Massachusetts, New Hampshire, New Jersey, New York, Tennessee, Vermont, Wisconsin and Washington, DC.
- These states require notice to state agencies, but not employees: Georgia, Maryland, North Dakota, and Ohio. Two states, Michigan and Minnesota, encourage giving employees advance notice, but do not require it.
- Employers with affected employees in any of these states experiencing closures, layoffs or significant reduction in hours should determine whether the state mini-WARN law applies.