

A WARning – Business Closings and Mass Layoffs: The Unfortunate Reality In Light of COVID-19 (US)

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In light of COVID-19's global economic impact, employers continue to face the harsh reality that significant and even perhaps permanent changes to their business, including their workforce, will be necessary. As employers consider their options, unfortunately, closings and mass layoffs are amongst them.

In the US, employers must consider the federal Worker Adjustment and Retraining Notification (WARN) Act and various state versions of the WARN Act. There are so-called "mini-WARN" acts in the following jurisdictions: California, Connecticut, DC, Georgia, Hawaii, Illinois, Iowa, Maine, New Hampshire, New Jersey, New York, Tennessee, Vermont, and Wisconsin. The City of Philadelphia also has its own WARN act. Some states – Georgia, Maryland, North Dakota, and Ohio – require notice to state agencies but not to employees, and Michigan and Minnesota encourage, but don't require, notice to employees prior to closings or mass layoffs.

If the federal WARN or state mini-WARN Acts apply, it puts employers in the difficult position of having to provide advance notice (typically 30-90 days), depending on size of the employer, the number of employees affected, and the jurisdiction.

Although during these challenging times, employers may take solace in the "unforeseeable business circumstances" exception within the federal WARN Act regulations – for which COVID-19 likely qualifies – not every state has the same exception.

Federal WARN Act

First, some background regarding the federal WARN Act.

Employers who are typically subject to the federal WARN Act (*i.e.*, those with 100 or more full-time employees, subject to certain caveats) must provide 60 days' notice of an "employment loss" if there is a "plant closing" or a "mass layoff" impacting 50 or more employees over a 90-day lookback period. For "mass layoffs," it must impact at least 50 full time employees and at least 33% of the active full-time employees at a "single site of employment," unless the layoff impacts 500 or more employees, in which case the one-third requirement does not apply.

Under the federal WARN Act, an “employment loss” is: (1) an employment termination, other than a discharge for cause, voluntary departure, or retirement; (2) a layoff exceeding six consecutive months; or (3) a reduction in hours of more than 50% during each month of any six-month period.

The last thing any employer – or frankly, anyone – knows right now is what the world will look like in 60 days in light of COVID-19. That is where the “unforeseeable business circumstances” exception comes in, which only requires the employer to provide “as much notice as is practicable...,” rather than 60 days. Under the applicable regulations, “[t]he employer must, at the time notice actually is given, provide a brief statement of the reason for reducing the notice period, in addition to the other elements....” Notably, for purposes of the current COVID-19 pandemic, the federal WARN Act expressly recognizes that “an unanticipated and dramatic major economic downturn might be considered a business circumstance that is not reasonably foreseeable.”

California WARN

California, which has its own state-law mini-WARN Act, does not have the same “unforeseeable business circumstances” exception. (Hawaii and New Jersey are also states that do not have the “unforeseeable business circumstances” exception.) California’s WARN Act also is broader than the federal WARN Act:

- California WARN is triggered when an employer has 75 or more employees. (Federal WARN Act is 100 employees.)
- Its definition of “mass layoff” applies when 50 or more employees suffer from “employment loss” during any 30-day period regardless of the percentage of the work force impacted. (Federal WARN Act requires that the 50 employees comprise at least 33% of the workforce at the impacted location.)
- The lookback period in California is a 30-day period rather than a 90-day period under the federal statute.
- California WARN applies to a relocation of an employee more than 100 miles away. There is no requirement under the federal WARN Act for relocations.
- There is a \$500 civil penalty per day for violations under California’s WARN Act.

The only potential exception to the notice requirement that applies for purposes of COVID-19 under the more expansive California WARN Act is if a mass layoff is caused by “physical calamity or act of war.” What qualifies as a “physical calamity” is unknown, which is why Governor Newsom’s Executive Order issued on March 17, 2020 provides the clarity many employers have been seeking during these uncertain times.

Executive Order N-31-20

California Governor Newsom’s Executive Order N-31-20 (the “Order”) suspends the 60-day notice requirement for plant closings or mass layoffs otherwise required under the California WARN Act. The Order acknowledges that “[b]ecause of the need to prevent or mitigate the spread of COVID-19, employers have had to close rapidly without providing their employees the advance notice required under California law.” The Order states that the following provisions of the California WARN Act and the relevant employer obligations are SUSPENDED:

- Lab. Code §1401(a) – an employer’s 60-day notice requirement for a mass layoff, relocation, or termination at a covered establishment;
- Lab. Code §1402 – any liabilities or penalties associated with failure to provide notice (e.g.,

back wages, value of cost of benefits); and

- Lab. Code §1403 – civil penalties associated with failure to provide notice.

Instead, citing to the federal WARN Act, the Executive Order requires that employers give “as much notice as is practicable and, at the time notice is given, provide[] a brief statement of the basis for reducing the notification period.”

For all written notices after March 17, 2020 related to mass layoffs, relocations, or terminations caused by COVID-19, California employers must also include the following statement:

- “If you have lost your job or been laid off temporarily, you may be eligible for Unemployment Insurance (UI). More information on UI and other resources available for workers is available at labor.ca.gov/coronavirus2019.”

The California WARN Act notice requirements and related liabilities/penalties for failure to provide notice do not apply to any employment losses due to COVID-19 from March 4, 2020 to through the end of this emergency.

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