



Members Brief

An informational brief prepared by the LSC staff for members and staff of the Ohio General Assembly

Author: Paul Luzzi, Attorney

Reviewer: Julie A. Rishel, Division Chief

Volume 133 Issue 27

September 24, 2020

Plant Closure and Layoff Notices

The federal Worker Adjustment and Retraining Notification Act generally requires a private sector employer with 100 or more employees to notify an employee of a pending employment loss due to a plant closing or mass layoff. Ohio’s Unemployment Compensation Law requires an employer that intends to separate 50 or more employees within a seven-day period to notify the Director of Job and Family Services.

This information brief provides an overview of the federal and state notice requirements, how they are triggered, and the consequences for failing to comply.

Contents

Introduction	1
WARN Act.....	2
Which employers are covered?.....	2
What triggers the WARN Act’s notice requirement?.....	2
Who receives WARN Act notice?	3
What information must a WARN Act notice contain?	4
Can an employer provide less than 60-days’ notice?	5
Remedies and penalties for WARN Act violations	5
Ohio’s Unemployment Compensation Law	6

Introduction

In an always changing economy, it is sometimes necessary for a company to close facilities and reduce the size of its workforce to stay competitive. Although workforce reductions can improve efficiency and keep companies profitable, they also can cause strain on both workers and the surrounding community. To lessen the negative effects of plant closings and mass layoffs, Congress enacted the Worker Adjustment and Retraining Notification¹ (WARN) Act. The purpose of the WARN Act is twofold. First, it provides workers and their families with advance notice of a potential employment loss so they can adjust to the prospective job loss, find alternative employment, and, if necessary, enter a retraining program. Second, it gives state agencies that assist dislocated workers time to provide workers information about job services before the

¹ 29 United States Code (U.S.C.) 2101 *et seq.*

workers are laid off.² The notice requirement in Ohio's Unemployment Compensation Law serves a similar purpose in that it provides the Department of Job and Family Services, the Ohio agency that assists dislocated workers, with advance notice of a mass layoff.³

WARN Act

The WARN Act requires a covered employer to provide specified individuals with written notice 60 days before a mass layoff or plant closing. If the employer fails to provide the required notice, the employer may be liable for damages, civil penalties, and attorney's fees.⁴

Which employers are covered?

The WARN Act's notice requirement applies to any private sector employer and any public or quasi-public employer that engages in business, such as taking part in a commercial enterprise, if the employer:

- Employs 100 or more employees, excluding part-time employees (an employee who works less than 20 hours per week or who has worked for fewer than six months in the 12 months preceding the date of the notice); or
- Employs 100 or more employees who work at least a combined 4,000 hours a week.⁵

What triggers the WARN Act's notice requirement?

A covered employer must provide WARN Act notice when the employer proposes a plant closing or mass layoff that will cause an employment loss for a minimum number of employees. Under the Act, an employment loss means any of the following:

- A termination of the employer-employee relationship, other than a discharge for cause, voluntary departure, or retirement;
- A layoff exceeding six months; or
- A reduction in an employee's hours of work of more than 50% in each month of any six-month period.⁶

Plant closings

Under the WARN Act, a plant closing occurs when an employment site (or one or more facilities or operating units within an employment site) is to be shut down, and the shutdown will

² U.S. General Accounting Office, *The Worker Adjustment and Retraining Notification Act – Revising the Act and Educational Materials Could Clarify Employer Responsibilities and Employee Rights*, p. 5 (2003), available [here](#).

³ R.C. 4141.28(C).

⁴ 29 U.S.C. 2102 and 2104.

⁵ 29 U.S.C. 2101(a)(1) and (8) and 20 Code of Federal Regulations (C.F.R.) 639.3. The public or quasi-public employer must have a separate governing body from the regular government and independent authority to manage the employer's personnel and assets.

⁶ 29 U.S.C. 2101(a)(6).

result in an employment loss for 50 or more full-time employees during any 30-day period. Although not included when determining whether the threshold is met, part-time employees are entitled to notice if the threshold number is reached.⁷

Mass layoffs

A mass layoff is any reduction in a workforce other than a plant closing that, within any 30-day period, results in either:

- 500 or more full-time employees at a single site losing employment; or
- Between 50 and 499 full-time employees at a single site losing employment, if that number is 33% or more of the number of full-time employees at that single site.

As with plant closings, part-time employees are not included in the count but are entitled to notice if the threshold number for a mass layoff is reached.⁸

Who receives WARN Act notice?

Affected employees

The WARN Act requires affected employees to receive notice. An affected employee is any employee, including a manager or supervisor, who can reasonably be expected to experience an employment loss as a consequence of a plant closing or mass layoff. However, none of the following are entitled to notice:

- Strikers or employees who have been locked out in a bona fide labor dispute that was not initiated to evade the WARN Act's notice requirement;
- Employees working on temporary projects or facilities who clearly understood the temporary nature of the work when hired; and
- Business partners, consultants, or contract employees who are self-employed or who have a separate employment relationship with another employer and are paid by the other employer.⁹

There are two situations in which an affected employee is not entitled to notice under the Act. The first is when the employee is represented (typically, by a union). In that case, the employer must provide the notice to the employee's representative.¹⁰

The second situation is when there is a system of bumping rights. Bumping rights allow a senior employee to displace (or "bump") a junior employee when an employer eliminates the senior position as part of a restructuring. Bumping rights are often created through a collective bargaining agreement, in which case the employee's representative receives the notice. If there are bumping rights but no employee representative, the employer must notify any affected

⁷ 29 U.S.C. 2101(a)(2) and 20 C.F.R. 639.6(b).

⁸ 29 U.S.C. 2101(a)(3) and 20 C.F.R. 639.6(b).

⁹ 29 U.S.C. 2101(a)(5) and 2103 and 20 C.F.R. 639.3(e).

¹⁰ 29 U.S.C. 2102(a)(1) and 20 C.F.R. 639.6(a).

employee who can be identified at the time the notice is required. If the employer cannot identify the employee who may reasonably be expected to lose employment due to a position being eliminated, the employer must notify the employee in that position. An employer is not required to predict exactly who will lose employment as a result of bumping rights.¹¹

Government entities

An employer also must provide notice to the state agency that carries out rapid response activities under the Workforce Innovation and Opportunity Act¹² (WIOA) and the chief elected official of local government where the employment site is located.¹³ In Ohio, the Director of Job and Family Services carries out rapid response activities under WIOA and is, therefore, entitled to receive notice of a plant closing or mass layoff.¹⁴ The chief elected official entitled to notice varies depending on the local government structure. In the case of an elected board or commission, the employer must notify its chairperson. If more than one unit of local government is involved (for example, a city and a county), the employer must notify the unit to which the employer paid the highest taxes during the preceding year.¹⁵

What information must a WARN Act notice contain?

WARN Act notices sent to employee representatives and unrepresented employees must contain the following information:

- A statement indicating whether the action is expected to be permanent or temporary, and if the entire plant is to be closed, a statement to that effect;
- The expected date of the first separation and the anticipated schedule for making separations;
- The name and phone number of the company official who can be contacted for further information.

In addition, a notice sent to an employee representative must include the name and address of the site where the plant closing or mass layoff will occur, the job titles of the affected positions, and the names of the employees holding the affected jobs. A notice sent to an unrepresented employee must state whether bumping rights exist.

¹¹ 20 C.F.R. 639.6(b). See, e.g., *Drake v. United States Enrichment Corp.*, 63 F. Supp.3d 721 (6th Cir. 2014) (holding that an employer complied with the Act when it notified the union president of a plant closing that would likely trigger collectively bargained bumping rights).

¹² 29 U.S.C. 3101 *et seq.*

¹³ 29 U.S.C. 2102(a).

¹⁴ R.C. 6301.02. See also Department of Job and Family Services, *Rapid Response and Layoff Aversion*, available [here](#).

¹⁵ 29 U.S.C. 2102(a) and 20 C.F.R. 639.6(d).

An employer may satisfy the notice requirement for government entities by providing an abbreviated written notice and providing additional details on request.¹⁶

Can an employer provide less than 60-days' notice?

There are three situations in which an employer does not have to provide the full 60-day notice. Regardless of which situation applies, an employer must provide the notice as soon as practicable. When an employer gives less than 60-days' notice, the employer must briefly state the reason why the time period was reduced.¹⁷

Faltering company

An employer is not required to give the full notice of a plant closing when, before the closing, it is actively seeking capital or business, which if obtained would avoid or postpone the closing. Known as the "faltering company" exception, it only applies if the employer reasonably believes that advance notice would hurt its ability to find the necessary capital or business. It does not apply to mass layoffs.¹⁸

Unforeseeable circumstances

An employer is not required to give the full notice when, in the employer's business judgment, it could not reasonably foresee business circumstances that would lead to a plant closing or mass layoff at the time the 60-day notice would have been required. For example, the unexpected cancellation of a major contract may allow an employer to initiate a plant closing or mass layoff without providing the full notice.¹⁹

Natural disaster

An employer is not required to give notice if a plant closing or mass layoff is the direct result of a natural disaster. The employer must provide a notice containing as much of the required information that is available under the circumstances after the employment loss caused by the disaster when practicable.²⁰

Remedies and penalties for WARN Act violations

An employer that violates the WARN Act may be liable for damages, civil penalties, and reasonable attorney's fees. The WARN Act does not, however, allow a court to enjoin a plant closing or mass layoff. A court may reduce the damages if the employer acted in good faith and had reasonable grounds for believing that its actions did not violate the Act.²¹

¹⁶ 20 C.F.R. 639.7(c) through (f).

¹⁷ 29 U.S.C. 2102(b).

¹⁸ 20 C.F.R. 639.9(a).

¹⁹ 20 C.F.R. 639.9(b).

²⁰ 20 C.F.R. 639.9(c).

²¹ 29 U.S.C. 2104.

Damages

An employer that fails to provide the required notice is liable to each affected employee for back pay and benefits under any employee benefit plan covered by the federal Employee Retirement Income Security Act. This includes medical expenses incurred by the employee during the employment loss that would have been covered under the plan if the employment loss had not occurred. Back pay and benefits must be provided for the period of the violation, up to a maximum of 60 days but not more than half the number of days the employee was employed by the employer.²²

Civil penalty

An employer that fails to provide the required notice to a local government unit is liable for a civil penalty of up to \$500 for each day of violation. The penalty does not apply, however, if the employer pays each affected employee the amount for which the employer is liable to the employee under the Act within three weeks after ordering the plant closing or mass layoff.²³

Attorney's fees

The WARN Act's attorney fee provision is virtually identical to the fee-shifting language in other federal civil rights statutes. As a result, one appellate court has held that the prevailing party in a WARN Act case should recover attorney's fees unless special circumstances would render recovery unjust.²⁴

Ohio's Unemployment Compensation Law

Ohio's Unemployment Compensation Law requires an employer to provide the Director of Job and Family Services with at least a three-day notice before laying off or separating 50 or more individuals within a seven-day period because of lack of work. The notice must include the layoff or separation dates and the approximate number of individuals being laid off or separated. The Law also requires the employer, at the time of the layoffs or separations, to furnish the individuals and the Director with any information necessary to determine the individuals' eligibility for unemployment benefits. An employer that fails to provide the notice or information within the required time period may be fined \$500 for a first offense and between \$25 and \$1,000 for each subsequent offense.²⁵

²² 29 U.S.C. 2104(a)(1).

²³ 29 U.S.C. 2104(a)(3).

²⁴ 29 U.S.C. 2104(a)(6) and *North Star Steel Co.* at 44.

²⁵ R.C. 4141.28(C), 4141.40, and 4141.99(D).