



# Members Only

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## Notification of Plant Closings and Mass Layoffs Under Ohio and Federal Law\*

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### Overview

By the late 1960s, the United States, which had emerged to dominate the global economy as a result of World War II, began to experience serious and continuing economic dislocations due to challenges from the reviving economies of other nations. Buzzwords used by American business managers that since have become part of the popular lexicon, including “downsizing,” “rightsizing,” “restructuring,” and “retrenchment,” testify to the results of those challenges. American businesses, long accustomed to dominance in a particular industry, began to implement mass layoffs of workers, close inefficient or obsolete facilities, or relocate facilities, often to foreign countries, in search of cheaper labor and raw materials. However, even those steps could not be guaranteed to avoid a total business shutdown and its attendant devastating results to a community’s workforce and economy, particularly in communities where a business was a major employer.

One legislative response to the developing situation was so-called “plant closing” legislation. Throughout much of the 1970s and early 1980s, the issue was debated in both Congress and state legislatures, including Ohio’s.

Legislative proposals sought to require that employers give affected employees and local communities advance notification about an impending mass layoff or facility relocation or closing. The proposed time periods for advance notification ranged from as short as a couple of months to two years. Some proposals also included requirements that the notification be accompanied by severance payments to employees or to the local community or a requirement that the affected employer repay to the local community

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*“Plant closing” legislation is a legislative response to mass layoffs of workers. This legislation is intended to obviate some of the negative consequences that often result when businesses close or relocate by providing affected employees advance notice of the need to seek alternative employment and dislocated workers assistance.*

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\* This *Members Only* brief is an update of an earlier brief on this subject dated September 7, 1998 (Volume 122 Issue 7).



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*The federal “WARN Act” requires employers that employ more than 100 employees to provide advance notice to its employees of a mass layoff or plant closing. Ohio’s Unemployment Compensation Law requires an employer that separates 50 or more employees within a seven-day period to provide advance notice to the Director of Job and Family Services.*

the cost of any tax abatements or business incentives the local political subdivision previously had granted the employer.

Representatives of employees and communities argued that employers often were making decisions about facility relocation or closure without regard to the workers and their families and the communities, all of which were adversely affected by the decisions. Plant closing legislation was necessary, then, to enable employees and communities to adjust to the economic dislocation the mass layoff or plant closing would create.

Employers and other representatives of the business community opposed plant closing legislation as an unwarranted restriction on employers’ freedom to make necessary business decisions. The longer the required advance notification period, the more unlikely it was that the employer accurately could predict its economic future. Business representatives further questioned how a business already in a weakened economic position could be expected to fund the payments to workers and communities some legislative proposals mandated. Many opponents of such legislation believed the actual purpose of the legislation was to make it too difficult and expensive for a business to leave a community where it was located.

Ultimately, Congress and several states enacted some form of plant closing legislation. Ohio did not enact a specific plant closing law except to insert into its Unemploy-

ment Compensation Law a provision to facilitate the efficient distribution of unemployment benefits to eligible workers in mass layoff situations.

This *Members Only* brief discusses the provisions of the federal Worker Adjustment and Retraining Notification Act,<sup>1</sup> commonly referred to as the “WARN Act.” It also discusses Ohio’s Unemployment Compensation Law<sup>2</sup> relative to notification of plant closings and mass layoffs.

Generally, the WARN Act requires each private employer that employs more than 100 employees to notify its employees of a pending permanent layoff due to a plant closing. This advance notice is intended to provide employees some transition time to adjust to the prospective loss of employment and to seek and obtain alternative employment and dislocated workers assistance (such as unemployment benefits), and, if necessary, to enter retraining programs. Ohio law requires an employer that “separates” 50 or more employees within a seven-day period to notify the Director of Job and Family Services.

Ohio employers, since 1989, have filed over 1,700 federal WARN Act notices with the Director (who under federal law is the state official designated to receive such notices). Between September 1, 2007 and August 21, 2008, there were 134 such notices, the lion’s share issued by employers in two counties: Cuyahoga and Franklin.



## Coverage and application of the WARN Act

The WARN Act applies to plant closings and mass layoffs as these terms are statutorily defined. A “plant closing” is a permanent or temporary shutdown of a “single site of employment,” or one or more “facilities” or “operating units” within a single site of employment, that results in an “employment loss” of 50 or more employees during any 30-day period.<sup>3</sup> “Mass layoff” refers to any reduction in force other than a plant closing that, within any 30-day period, results in an “employment loss” at a “single site of employment” of either (1) a third or more of the site’s employees but at least 50 employees, excluding part-time employees, or (2) at least 500 employees, excluding part-time employees.<sup>4</sup>

Under the Act, if two or more groups of employees suffered employment losses at a single site of employment during a 90-day period because of a plant closing or mass layoff and each group is less than the minimum number required to trigger the Act’s notice requirement, the groups will be aggregated, unless the employer demonstrates that the losses resulted from separate and distinct causes and not from an attempt to evade the requirements of the WARN Act.<sup>5</sup> An understanding of the terms “plant closing” and “mass layoff” requires an understanding of additional terms whose definitions are set forth below.

## Important defined terms

**Employment loss.** An employee suffers an “employment loss” if (1) the individual’s employment ends for any reason other than a discharge for cause, voluntary departure, or retirement, (2) the individual is placed on a layoff exceeding six months, or (3) the individual’s hours of work are reduced by more than 50% during each month of any six-month period.<sup>6</sup> A laid-off employee who is offered a job transfer to a different employment site because of a relocation or consolidation of the business does not suffer an employment loss if the employee is out of work for no more than six months and (1) the new job is within a reasonable commuting distance or (2) regardless of distance, the employee accepts the transfer within 30 days of the offer.<sup>7</sup>

**Operating unit.** An “operating unit” is an organizationally or operationally distinct product, operation, or specific work function within or across facilities at a single site, such as workers on many assembly lines.<sup>8</sup>

**Part-time employees.** A “part-time employee” is an employee who averages less than 20 hours per week (during the 90 days preceding the date the WARN Act notice is required or, if shorter than that 90-day period, the employee’s entire period of employment) or who works in fewer than 6 of the 12 months preceding the date the WARN Act notice is required.<sup>9</sup>

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*Simply because an employee loses employment due to a plant closing or is laid off does not mean that the employee is covered by the WARN Act. On the contrary, the employee must meet specific statutory criteria to be entitled to receive advance notice of the plant closing or mass layoff.*



**Single site of employment.**

WARN Act regulations provide eight criteria for determining whether a site qualifies as a “single site of employment”:<sup>10</sup>

(1) A single site of employment can refer to either a single location or a group of contiguous locations. Groups of structures that form a campus or industrial park, or separate facilities across the street from one another, may be considered a single site of employment.

(2) There may be several single sites of employment within a single building, such as an office building, if separate employers conduct activities within the building. For example, an office building housing 50 different businesses will contain 50 single sites of employment. The offices of each employer will be its single site of employment.

(3) Separate buildings or areas that are not directly connected or in immediate proximity may be considered a single site of employment if they are in reasonable geographic proximity, used for the same purpose, and share the same staff and equipment. An example is an employer that manages a number of warehouses in an area but regularly shifts or rotates the same employees from one building to another.

(4) Non-contiguous sites in the same geographic area that do not share the same staff or operational purpose would not be considered a single site. For example, assembly

plants that are located on opposite sides of a town and are managed by a single employer are separate sites if different workers are employed at the sites.

(5) Contiguous buildings owned by the same employer that have separate management, produce different products, and have separate workforces are considered separate single sites of employment.

(6) For workers whose primary duties require travel from point to point, who are outstationed, or whose primary duties involve work outside the employer’s regular employment sites (e.g., railroad workers, bus drivers, salespersons), the single site of employment to which they are assigned as their home base, from which their work is assigned, or to which they report will be the single site in which they are covered for WARN purposes.

(7) Foreign sites of employment are not covered under WARN. However, U.S. workers at such sites are counted to determine whether an employer is covered as an employer under the Act.

(8) The term “single site of employment” may also apply to truly unusual organizational situations where the above criteria do not reasonably apply. The application of this definition with the intent to evade the purpose of the Act to provide notice is not considered “acceptable.”



## Notice requirements

For the most part, all employers, except government employers and employers that employ fewer than 100 employees, must provide 60 days' advance written notice of a domestic plant closing or mass layoff to (1) each affected nonbargaining unit employee or the bargaining representative of affected bargaining unit employees, (2) the chief elected official of the unit of local government where the closing or layoff is to occur, and (3) the state entity designated to carry out rapid response activities under the federal "Workforce Investment Act of 1998," which in Ohio is the Director of Job

## Persons to whom notice must be given

Usually, all affected employees are entitled to WARN Act notice, including managerial and supervisory employees, part-timers, employees on temporary layoff who have a reasonable expectation of recall prior to the notice of the plant closing or mass layoff (even though, paradoxically, such employees are not counted in determining if the employer's mass layoff or plant closing will trigger the WARN Act notice requirement), permanent employees working at temporary facilities or on temporary projects, and employees likely to

*In general, all employers, except public employers (who are not covered by the WARN Act) and employers of fewer than 100 employees, must provide 60 days' advance written notice of a plant closing or mass layoff to covered employees and the chief elected official of the local government where the closing or layoff will occur.*

**INCLUSION OF AND NOTICE TO PART-TIME, SEASONAL, TEMPORARY, AND FOREIGN EMPLOYEES**

<i>Category</i>	<i>Counted for Purposes of Determining Whether an Employer is Subject to the WARN Act</i>	<i>Must be Given WARN Act Notice</i>
Recent Hires	Yes, unless part-time	No, unless part-time
Part-time	No	Yes
Temporary Project	Yes	No
Seasonal	Depends on whether they are part-time, temporary project, or permanent	Depends on whether they are part-time, temporary project, or permanent
U.S. Employees Employed Outside the U.S.	Yes	No
Foreign Employees Employed Outside the U.S.	No	No

and Family Services.<sup>11</sup> Determining who the "employer" is for purposes of the notice requirement is a commonly contested issue that necessitates an analysis of the particular facts and circumstances in each contested case.<sup>12</sup>

be bumped.<sup>13</sup> However, business partners, consultants, contract employees of another employer who are paid by that employer, and self-employed individuals are not "affected employees" for the Act's purposes, and, consequently, they



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*The WARN Act provides special reduced notification periods for faltering companies and for employers facing unforeseeable business circumstances or natural disasters.*

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*WARN Act notice generally is not required when temporary facilities are closed.*

need not be given notice of a plant closing or mass layoff.<sup>14</sup> Part-time, seasonal, temporary, and foreign employees are treated differently under the WARN Act as shown in the following table.

### ***Information to be included in the notice***

In general, the notice must include the name and address of the employment site where the plant closing or mass layoff will occur, the name of the company official who can be contacted for further information, a statement indicating whether the action is permanent or temporary, the expected date of each employee's termination, the job titles of positions to be affected, and the names of the workers currently holding affected jobs.<sup>15</sup>

### ***Exceptions to the regular notice requirement***

#### ***Waiver***

Under the WARN Act, notices are not required if a temporary facility is closing or if a particular project or undertaking has been completed, but this waiver applies only to affected employees who were hired with the understanding that their employment was limited to the duration of the existence of the facility or project.<sup>16</sup> WARN Act notice also is waived if the plant closing or layoff results from a strike or lockout that is not a subterfuge for evading the Act's

requirements; the waiver applies only to striking workers.<sup>17</sup>

#### ***Partial waiver***

#### **Faltering company exception.**

The WARN Act notice period is reduced, but not eliminated, for "faltering companies," but only in the plant closing context. A "faltering company" is one that requires an influx of business or capital to avoid or postpone shutting down operations. An employer may order the shutdown of a single site of employment before the 60-day advance notification period has run its course if (1) the employer was actively seeking capital or business that, if obtained, would have enabled the employer to avoid or postpone the shutdown, and (2) the employer reasonably, and in good faith, believed that giving WARN Act notices would have prevented the employer from obtaining the needed capital or business.<sup>18</sup> However, the employer still must give employees as much notice as is practicable, and its notice must explain why the employer is giving less than the 60-days' notice.<sup>19</sup>

#### **Unforeseeable business circumstances and natural disaster exceptions.**

The WARN Act provides that less than 60-days' notice also may be given if a plant closing or mass layoff is caused by "sudden, dramatic, and unexpected" business circumstances not reasonably foreseeable and outside the employer's control or if there is a natural



disaster when WARN Act notice otherwise would have been required.<sup>20</sup> However, the employer still must give employees as much notice as is practicable and the employer's WARN Act notices must explain why the employer is giving less than the 60-days' notice.<sup>21</sup>

## **Enforcement**

### ***Civil procedure***

Federal courts have jurisdiction to hear WARN Act suits, and suit may be brought in any district court in whose district the violation is alleged to have occurred or in whose district the employer transacts business.<sup>22</sup> At least two courts have held that plaintiffs in a WARN Act suit have the right to a jury trial.<sup>23</sup> While the WARN Act does not contain an explicit statute of limitations for bringing suit, the United States Supreme Court held that the most analogous state law statute of limitations should be borrowed.<sup>24</sup>

### ***Remedies***

An employer that violates the WARN Act is liable to each aggrieved employee, who suffers an employment loss as a result of such closings, for back pay, civil penalties, and the award of reasonable attorneys fees. These remedies are the exclusive remedies for a WARN Act violation, and a federal court has no authority arising out of the WARN Act to enjoin a plant closing or mass layoff.<sup>25</sup>

However, a court may reduce the damages imposed on an employer for a WARN Act violation if the employer acted in good faith and had reasonable grounds for believing that its actions did not violate the Act.<sup>26</sup>

An employer that fails to provide the required WARN Act notice is liable to each affected employee for wages and benefits under all employee benefit plans covered by the federal Employee Retirement Income Security Act, including the cost of medical expenses incurred during the employment loss that would have been covered under such a plan if the employment loss had not occurred.<sup>27</sup> Back pay 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.<sup>28</sup> The back pay wages are based on the higher of the average regular rate received by the employee during the employee's last three years of employment or the employee's final regular rate.<sup>29</sup> Most of the federal courts considering the issue have held that the number of "days" for which an employer may be liable for back pay is equal to the number of regular employee work days during the 60-day notification period rather than a total of 60 calendar days.<sup>30</sup>

Moreover, an employer that fails to provide the required WARN Act notice to a unit of local government is liable for a civil penalty of not more than \$500 for each day of violation. The penalty is not assessed, however, if the employer pays to each affected

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*The award of back pay, civil penalties, and reasonable attorneys fees to the prevailing party are the exclusive remedies for a WARN Act violation.*

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*Under the WARN Act, a federal court cannot enjoin a plant closing or mass layoff.*



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Ohio law requires an employer that “separates” 50 or more employees within a seven-day period for lack of work to notify the Director of Job and Family Services.

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The employer must provide the affected employees information necessary to determine their unemployment compensation eligibility.

employee the amount for which the employer is liable under WARN within three weeks from the date the employer orders the plant shutdown or mass layoff.<sup>31</sup>

### **Notification under the Ohio Unemployment Compensation Law**

Ohio’s Unemployment Compensation Law requires an employer that “separates” within any seven-day period 50 or more individuals because of lack of work, if those individuals then will be unemployed for purposes of that Law, to notify the

Director of Job and Family Services of the dates of separation and the approximate number of individuals being separated. The notice must be furnished to the Director at least three working days before the first day of those separations. Additionally, at the time of the separation, the employer must furnish to the individual being separated or the Director, information necessary to determine the individual’s eligibility for unemployment compensation benefits.<sup>32</sup> An individual is “separated” from the individual’s most recent work if the separation occurred for any reason that terminates the individual’s employee-employer relationship.<sup>33</sup>

### **Citations**

<sup>1</sup> 29 United States Code (U.S.C.) §§ 2101 to 2109 (1988).

<sup>2</sup> R.C. § 4141.28(C).

<sup>3</sup> 29 U.S.C. § 2101(a)(2); 20 Code of Federal Regulations (C.F.R.) § 639.3(b).

<sup>4</sup> 29 U.S.C. § 2101(a)(3); 20 C.F.R. § 639.3(c)(1).

<sup>5</sup> 29 U.S.C. § 2102(d); 20 C.F.R. § 639.5(a).

<sup>6</sup> 29 U.S.C. § 2101(a)(6).

<sup>7</sup> 29 U.S.C. § 2101(b)(2); 20 C.F.R. § 639.5(b).

<sup>8</sup> 20 C.F.R. § 639.3(j). *See also* WARN Regulations Preamble, 54 Federal Register 16,050.

<sup>9</sup> 20 C.F.R. § 639.3(h).

<sup>10</sup> 20 C.F.R. § 639.3(i).

<sup>11</sup> 29 U.S.C. §§ 2102(a) and 2864(a); R.C. 6301.03.

<sup>12</sup> *See, for example, Carpenters Dist. Coun. v. Dilliard Dep’t. Store* (E.D. La. 1992), 790 F.Supp. 663 (parent company that participated in plant closing decision was the responsible employer for WARN Act purposes), *aff’d in relevant part*, 15 F.3d 1275 (1994), *cert. denied*, 115 S. Ct. 933; *UMW, Dist. 2 v. Florence Mining Co.* (W.D. Pa. 1994), 855 F.Supp. 1466 (utility company that purchased coal from mine was not employer of coal miners absent evidence that utility owned mined or that utility and mine shared management or personnel).





<sup>13</sup> 20 C.F.R. §§ 639.3(e) and 639.6(b). “Bumping” refers to the displacement of a junior employee in a position by a senior employee, which commonly occurs during periods of layoff. BLACK’S LAW DICTIONARY 196 (6th ed. 1991).

<sup>14</sup> 20 C.F.R. § 639.3(e).

<sup>15</sup> 20 C.F.R. § 639.7.

<sup>16</sup> 29 U.S.C. § 2103(1); 20 C.F.R. §§ 639.3(c)(2) and 639.5(c)(1)-(4).

<sup>17</sup> 29 U.S.C. § 2103(2).

<sup>18</sup> 29 U.S.C. § 2102(b)(1); 20 C.F.R. § 639.9.

<sup>19</sup> 29 U.S.C. § 2102(b)(3) and 20 C.F.R. § 639.9.

<sup>20</sup> 29 U.S.C. § 2102(b)(2)(B) and 20 C.F.R. § 639.9(b)(1) and (c)(1).

<sup>21</sup> 20 C.F.R. § 639.9(b)(1).

<sup>22</sup> 29 U.S.C. § 2104(a)(5).

<sup>23</sup> *Bentley v. Arless Home Fashions, Inc.* (E.D. Ark. 1994), 861 F. Supp. 65; *United Steelworkers of America v. Dietrich Indus.* (N.D. Ala. 1994), 9 IER Cas. (BNA) 993.

<sup>24</sup> *North Star Steel Co. v. Thomas* (1995), 515 U.S. 29.

<sup>25</sup> 29 U.S.C. § 2104(a) and (b).

<sup>26</sup> 29 U.S.C. § 2104(a)(4).

<sup>27</sup> 29 U.S.C. § 2104(a)(1); *see, for example, Local 218, Hotel and Restaurant Employees Union v. MHM, Inc.* (2d Cir. 1992), 976 F.2d 805, 808.

<sup>28</sup> 29 U.S.C. § 2104(a)(1)(B).

<sup>29</sup> 29 U.S.C. § 2104(a)(1)(A).

<sup>30</sup> *Breedlove v. Earthgrains Baking Co., Inc.* (8th Cir. 1998) (violation of the WARN Act’s notice provision is calculated based on working days, not calendar days), *Carpenters Dist. Coun. v. Dilliard Dept. Stores* (5th Cir. 1994), 15 F.3d 1275, 1282-86, *cert. denied* 513 U.S. 1126 (1995) (same); *Saxion v. Titan-C Manufacturing, Inc.* (6th Cir. 1996), 86 F.3d 553, 558-61 (same); *Frymire v. Ampex Corp.* (10th Cir. 1995), 61 F.3d 757, 771-72, *cert. dismissed*, 116 S. Ct. 1588 (1996) (same). *But see United Steelworkers of America v. North Star Steel Co.* (3d Cir. 1993), 5 F.3d 39, *cert. denied*, 510 U.S. 1114 (1994) (holding that compensation for violation of the notice provision is based on calendar days rather than working days).

<sup>31</sup> 29 U.S.C. § 2104(a)(3).

<sup>32</sup> R.C. 4141.28(C).

<sup>33</sup> *See* R.C. 4141.01(R).

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