



Bryan Benard

Partner
801.799.5833
Salt Lake City
bbenard@hollandhart.com

COVID-19: Mass Layoffs/WARN Act Application

Insight — March 20, 2020

Does an employer have to give 60-days' notice if they undertake a mass layoff as a result of the Coronavirus pandemic?

Answer: Probably not, based on the unforeseeable business circumstances exception under the Worker Adjustment and Retraining Notification Act of 1988 ("WARN"). However, if WARN is triggered, notice would be required "as soon as practicable," even under the exceptions to the 60-day notice requirement.

Things to Consider

The WARN Act is a federal labor law that requires most employers with 100 or more employees to provide 60 calendar-day advance notification of plant closings and mass layoffs of "employees," as defined in the Act. See general information in this DOL Guidance.

WARN REQUIREMENTS

A WARN notice is required when:

a business with 100 or more full-time workers (not counting workers who have less than 6 months on the job and workers who work fewer than 20 hours per week) is laying off at least 50 people at a single site of employment, OR

the business employs 100 or more workers who work at least a combined 4,000 hours per week, and is a private for-profit business, private non-profit organization, or quasi-public entity separately organized from regular government.

CIRCUMSTANCES WHEN WARN IS NOT TRIGGERED

WARN is not triggered when the following various thresholds for coverage are not met:

- If a plant closing or mass layoff results in fewer than 50 people losing their jobs at a single site of employment; or
- If 50-499 workers lose their jobs and that number is less than 33% of the employer's total active workforce at a single site; or
- If a layoff is for 6 months or less; or
- If work hours are not reduced 50% in each month of any 6-month period.

EXCEPTIONS TO THE 60-DAY NOTICE

There are three exceptions to the full 60-day notice requirement. However, notice must be provided as soon as is practicable even when an exceptions applies. And, the employer must provide a statement of the reason for reducing the notice requirement in addition to fulfilling other notice information requirements.

- 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;
- Unforeseeable business circumstances: When the closing or mass layoff is caused by business circumstances that were not reasonably foreseeable at the time that 60-day notice would have been required (i.e., a business circumstance that is caused by some sudden, dramatic, and unexpected action or conditions outside the employer's control, like the unexpected cancellation of a major order); or
- Natural disaster: When a plant closing or mass layoff is the direct result of a natural disaster such as a flood, earthquake, drought, storm, tidal wave, or similar effects of nature. In this case, notice may be given after the event.

CORONAVIRUS PANDEMIC ISSUES

Even where WARN would otherwise apply to an employer's mass layoff or plant closing, the current Coronavirus pandemic is likely to create one of two exceptions to the WARN notice requirements. Certainly, a strong argument could be made that the pandemic created unforeseeable business circumstances. The Department of Labor ("DOL") indicates that if "an employer believes their situation is the result of an economic crisis, it may apply the unforeseen business circumstances exception" but will have the burden to prove why it was unforeseen. It seems reasonable that this pandemic was unforeseen.

The DOL defines natural disaster as: "When a plant closure or a mass layoff is the direct result of a natural disaster such as a hurricane, flood, earthquake, drought, storm, tidal wave, or similar events caused by nature, employers are obligated to give as much notice as possible, even if the notice comes after a disaster. To comply with the law, the employer may send notice to the employee's last known address, even if their homes are destroyed. This would indicate good faith." It seems reasonable as well that a pandemic may be considered a "similar event caused by nature."

OTHER CONSIDERATIONS

Some states have mini-WARN Act provisions which must be consulted based on the state where your business is located.

Employee terminations also can impact 401(k) and other retirement plans.

Generally, if there is a reduction of 20% or more in one or a series of terminations, that can be a "partial termination" that would trigger 100% vesting in the plan. Please see other Retirement Plan information in the Employee Benefits section of the Resource Site.

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