

# Worker Adjustment and Retraining Notification Act (WARN) Criteria

## Employer Coverage

In general, employers are covered by WARN if they have 100 or more employees, not counting employees who have worked less than 6 months in the last 12 months and not counting employees who work an average of less than 20 hours a week. Private, for-profit employers and private, nonprofit employers are covered, as are public and quasi-public entities which operate in a commercial context and are separately organized from the regular government. Regular Federal, State, and local government entities which provide public services are not covered.

## Employee Coverage

Employees entitled to notice under WARN include hourly and salaried workers, as well as managerial and supervisory employees. Business partners are not entitled to notice.

## What Triggers A Notice?

*Facility Closing:* A covered employer must give notice if an employment site (or one or more facilities or operating units within an employment site) will be shut down, and the shutdown will result in an employment loss (as defined later) for 50 or more employees during any 30-day period. This does not count employees who have worked less than 6 months in the last 12 months or employees who work an average of less than 20 hours a week for that employer. These latter groups, however, are entitled to notice (discussed later).

*Mass Layoff:* A covered employer must give notice if there is to be a mass layoff which does not result from a plant closing, but which will result in an employment loss at the employment site during any 30 day period for 500 or more employees, or for 50- 499 employees if they make up at least 33% of the employer's active workforce. Again, this does not count employees who have worked less than 6 months in the last 12 months or employees who work an average of less than 20 hours a week for that employer. These latter groups, however, are entitled to notice (discussed later).

An employer also must give notice if the number of employment losses which occur during a 30-day period fails to meet the threshold requirements of a plant closing or mass layoff, but the number of employment losses for 2 or more groups of workers, each of which is less than the minimum number needed to trigger notice, reaches the threshold level, during any 90-day period, of either a plant closing or mass layoff. Job losses within any 90-day period will count together toward WARN threshold levels, unless the employer demonstrates that the employment losses during the 90-day period are the result of separate and distinct actions and causes.

## Sale of Businesses

In a situation involving the sale of part or all of a business, the following requirements apply.

1. In each situation, there is always an employer responsible for giving notice.
2. If the sale by a covered employer results in a covered plant closing or mass layoff, the required parties (discussed later) must receive at least 60 days notice.
3. The seller is responsible for providing notice of any covered plant closing or mass layoff which occurs up to and including the date/time of the sale.
4. The buyer is responsible for providing notice of any covered plant closing or mass layoff which occurs after the date/time of the sale.
5. No notice is required if the sale does not result in a covered plant closing or mass layoff.
6. Employees of the seller (other than employees who have worked less than 6 months in the last 12 months or employees who work an average of less than 20 hours a week) on the date/time of the sale become, for purposes of WARN, employees of the buyer immediately following the sale. This provision preserves the notice rights of the employees of a business that has been sold.

## Employment Loss

The term "employment loss" means:

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

Exceptions: An employee who refuses a transfer to a different employment site within reasonable commuting distance does not experience an employment loss. An employee who accepts a transfer outside this distance within 30 days after it is offered or within 30 days after the plant closing or mass layoff, whichever is later, does not experience an employment loss. In both cases, the transfer offer must be made before the closing or layoff, there must be no more than a 6 month break in employment, and the new job must not be deemed a constructive discharge. These transfer exceptions from the "employment loss" definition apply only if the closing or layoff results from the relocation or consolidation of part or all of the employer's business.

## Exemptions

An employer does not need to give notice if a plant closing is the closing of a temporary facility, or if the closing or mass layoff is the result of the completion of a particular project or undertaking. This exemption applies only if the workers were hired with the understanding that their employment was limited to the duration of the facility, project or undertaking. An employer cannot label an ongoing project "temporary" in order to evade its obligations under WARN.

An employer does not need to provide notice to strikers or to workers who are part of the bargaining unit(s) which are involved in the labor negotiations that led to a lockout when the strike or lockout is equivalent to a plant closing or mass layoff. Non-striking employees who experience an employment loss as a direct or indirect result of a strike and workers who are not part of the bargaining unit(s) which are involved in the labor negotiations that led to a lockout are still entitled to notice.

An employer does not need to give notice when permanently replacing a person who is an "economic striker" as defined under the National Labor Relations Act.

## Who Must Receive Notice?

The employer must give written notice to the chief elected officer of the exclusive representative(s) or bargaining agency(s) of affected employees and to unrepresented individual workers who may reasonably be expected to experience an employment loss. This includes employees who may lose their employment due to "bumping," or displacement by other workers, to the extent that the employer can identify those employees when notice is given. If an employer cannot identify employees who may lose their jobs through bumping procedures, the employer must provide notice to the incumbents in the jobs which are being eliminated. Employees who have worked less than 6 months in the last 12 months and employees who work an average of less than 20 hours a week are due notice, even though they are not counted when determining the trigger levels.

The employer must also provide notice to the State of Michigan's Department of Labor and Economic Opportunity – Workforce Development and to the chief elected official of the unit of local government in which the employment site is located.

## Notification Period

With three exceptions, notice must be timed to reach the required parties at least 60 days before a closing or layoff. When the individual employment separations for a closing or layoff occur on more than one day, the notices are due to the representative(s), State dislocated worker unit and local government at least 60 days before each separation. If the workers are not represented, each worker's notice is due at least 60 days before that worker's separation.

The exceptions to 60-day notice are:

- Faltering company. This exception, to be narrowly construed, covers situations where a company has sought new capital or business in order to stay open and where giving notice would ruin the opportunity to get the new capital or business, and applies only to plant closings;
- Unforeseeable business circumstances. This exception applies to both closings and layoffs that are caused by business circumstances that were not reasonably foreseeable at the time notice would otherwise have been required. These are circumstances that are typically caused by some sudden, dramatic, and unexpected action or condition outside the employer's control, such as the outbreak of the coronavirus.; and
- Natural disaster. This applies where a closing or layoff is the direct result of a natural disaster, such as a flood, earthquake, drought or storm. If an employer provides less than 60 days advance notice of a closing or layoff and relies on one of these three exceptions, the employer bears the burden of proof that the conditions for the exception have been met. The employer also must give as much notice as is practicable. When the notices are given, they must include a brief statement of the reason for reducing the notice period in addition to the items required in notices.

## Form and Consent of Notice

No particular form of notice is required. However, all notices must be in writing. Any reasonable method of delivery designed to ensure receipt 60 days before a closing or layoff is acceptable.

Notice must be specific. Notice may be given conditionally upon the occurrence or non-occurrence of an event only when the event is definite, and its occurrence or nonoccurrence will result in a covered employment action less than 60 days after the event.

The content of the notices to the required parties is listed in section 639.7 of the WARN final regulations. Additional notice is required when the date(s) or 14-day period(s) for a planned plant closing or mass layoff are extended beyond the date(s) or 14-day period(s) announced in the original notice.

## Record

No particular form of record is required. The information employers will use to determine whether, to whom, and when they must give notice is information that employers usually keep in ordinary business practices and in complying with other laws and regulations.

## Penalties

An employer who violates the WARN provisions by ordering a plant closing or mass layoff without providing appropriate notice is liable to each aggrieved employee for an amount including back pay and benefits for the period of violation, up to 60 days. The employer's liability may be reduced by such items as wages paid by the employer to the employee during the period of the violation and voluntary and unconditional payments made by the employer to the employee.

An employer who fails to provide notice as required to a unit of local government is subject to a civil penalty not to exceed \$500 for each day of violation. This penalty may be avoided if the employer satisfies the liability to each aggrieved employee within 3 weeks after the closing or layoff is ordered by the employer.

## Enforcement

Enforcement of WARN requirements is through the United States district courts. Workers, representatives of employees and units of local government may bring individual or class action suits. In any suit, the court, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs.

## Information

Specific requirements of the Worker Adjustment and Retraining Notification Act may be found in the Act itself, Public Law 100-379 (29 U.S.C. 210l, et seq.) The Department of Labor published final regulations on April 20, 1989 in the Federal Register (Vol. 54, No. 75). The regulations appear at 20 CFR Part 639.

## Questions

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