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Worker Adjustment and Retraining Notification (WARN) Act: A Primer

Updated January 2, 2013

Congressional Research Service

<https://crsreports.congress.gov>

R42693

Summary

Enacted by the 100th Congress, the Worker Adjustment and Retraining Notification (WARN) Act requires qualified employers that intend to carry out plant closings or mass layoffs to provide 60 days' notice to affected employees, states, and localities. The purpose of the notice to workers is to allow them to seek alternative employment, arrange for retraining, and otherwise adjust to employment loss. The purpose of notifying states and localities is to allow them to promptly provide services to the dislocated workers and otherwise prepare for changes in the local labor market.

The WARN Act applies to employers with at least 100 or more employees (excluding part-time employees). Federal, state, and local government employers are not subject to the act.

Broadly speaking, there are three types of events that require notification under the WARN Act. Each of these events is limited to a single site of employment; employment losses by a single employer across multiple sites are not aggregated. Events that trigger the requirements of the WARN Act are

- a *plant closing* resulting in employment losses of at least 50 employees;
- a *mass layoff* of at least 50 employees where the employment loss consists of at least 33% of employment at the site; or
- a *mass layoff* with an employment loss of 500 or more at a single site of employment, regardless of its proportion of total employment at the site or if the employment loss is part of a plant closing.

For the purposes of the WARN Act, an *employment loss* is defined as an involuntary termination, layoff exceeding six months, or a reduction in hours worked exceeding 50% for each of six consecutive months. In addition to the three events described above, an employer may also be subject to the WARN Act if it engages in several layoffs during a 90-day period that, in aggregate, meet the criteria of an applicable event. Short-term layoffs that are later extended to six months or more may also trigger WARN Act requirements.

The act and accompanying regulations also specify situations in which an otherwise covered employer may be exempt from WARN Act requirements. Generally, these exceptions relate to layoffs that are triggered by unanticipated situations such as unforeseeable business circumstances or natural disasters.

The WARN Act is enforced through the federal court system. While the Department of Labor is permitted to establish regulations related to the act and offer non-binding guidance to employers and workers, all penalties and settlements are administered through the courts.

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Background and Purpose

The Worker Adjustment and Retraining Notification (WARN) Act requires qualified employers that intend to carry out plant closings or mass layoffs to provide 60 days' advance notice to affected employees, states, and localities. There are several purposes to the WARN Act. Notices provide workers with time to seek alternative employment, arrange for retraining, and otherwise adjust to the prospect of employment loss. The act also provides notice to state dislocated worker units so that services can be provided promptly to the affected employees and to local governments so they can adjust to upcoming changes in their local labor market.

Although “retraining” appears in its title, the WARN Act does not authorize or fund training activities. Workers affected by layoffs covered by the WARN Act may be eligible for training services under the dislocated worker provisions of the Workforce Investment Act (WIA) or, if their job loss is attributable to foreign competition, Trade Adjustment Assistance for Workers (TAA).¹

Legislative History

Legislation related to the notification of workers prior to mass layoffs and plant closings was first introduced at the federal level in 1973.² The issue proved to be contentious and more than a decade elapsed before Congress enacted the WARN Act (P.L. 100-379) in 1988 without President Ronald Reagan's signature.³ The law became effective in February 1989. Except for some small changes to align the WARN Act with terminology changes elsewhere in law, the WARN Act has not been amended.

Most recent proposals related to the WARN Act have proposed expanding the law's breadth or otherwise increasing employer responsibilities. The most recent amendment to the act to come up for a vote was in the 110th Congress, when the House passed H.R. 3920, the Trade and Globalization Assistance Act of 2007.⁴ Among other labor provisions, the bill would have increased the notice period under the WARN Act from 60 to 90 days and required employers to inform the Secretary of Labor of their intended layoffs.

Provisions of the WARN Act

The WARN Act requires covered employers to provide 60 calendar days' notice prior to qualified employment losses affecting 50 or more employees.⁵ The act is at Title 29, Chapter 23 of the U.S. Code (29 U.S.C. 2101-2109).

¹ For more information on WIA, see CRS Report R41135, *The Workforce Investment Act and the One-Stop Delivery System*, by David H. Bradley. For more information on TAA, see CRS Report R42012, *Trade Adjustment Assistance for Workers*, by Benjamin Collins.

² The Trade Act of 1974 (Title II, Section 283 of P.L. 93-618) *asked* firms that planned to move operations outside the United States to provide at least 60 days advance notice to employees likely to be adversely affected by their actions as well as to the Secretaries of Labor and Commerce.

³ For more information, see U.S. House of Representatives, Committee on Education and Labor, *Legislative History of S. 2527, 100th Congress, Worker Adjustment and Retraining Notification Act, P.L. 100-379, 100th Cong., 2nd sess., serial no. 101-K* (Washington, DC: GPO, 1990).

⁴ After passing the House, the bill was referred to the Senate Committee on Finance, where no action was taken.

⁵ Some states have developed standards that are stricter than the federal WARN Act. These standards may increase the

Covered Employers

To be subject to the WARN Act, employers must have at least 100 employees (excluding part-time employees)⁶ or 100 or more employees who work for at least a total of 4,000 hours per week (exclusive of overtime). Persons who are temporarily laid off or are on leave but have a reasonable expectation of being recalled are also covered and counted toward the employer-size threshold. The statute and regulations offer guidance on defining employers and determining if subsidiaries and independent contractors are separate from a parent company.⁷

Federal, state, local, and federally recognized tribal governments are not subject to the WARN Act. However, public and quasi-public entities that engage in business and that function independently of those governments are covered if they meet the employer-size threshold.

Covered Events

Broadly speaking, there are three types of events that require notification under the WARN Act. Each of these events is limited to a single site of employment; employment losses by a single employer across multiple sites are not aggregated. Events that trigger the requirements of the WARN Act are

- a *plant closing* resulting in employment losses that affect at least 50 employees;⁸
- a *mass layoff* that affects at least 50 employees where the employment loss consists of at least 33% of employment at the site; or
- a *mass layoff* with an employment loss of 500 or more at a single site of employment, regardless of its proportion of total employment at the site or if the employment loss is part of a plant closing.

For the purposes of the WARN Act, *employment loss* is defined as the involuntary separation of a worker exceeding six months or a reduction in hours worked of at least 50% during each month for a six-month period.⁹ Any employment losses during a 30-day period are considered a single event for the purposes of the WARN Act. Employment losses affecting part-time workers are not counted when determining if an event meets WARN Act thresholds.

period of notice, cover smaller employers, or cover layoffs of fewer than 50 workers.

⁶ Seasonal employees and recent hires may be considered part-time employees under the WARN Act even if they are working full-time hours prior to employment loss. Full details are in the “Part-Time Employees” section of this report.

⁷ For complete details on covered employers, see 29 U.S.C. §2101(a)(1) and 20 C.F.R. §639.3. For information on the treatment of subsidiaries and independent contractors, see 20 C.F.R. §639.3(a)(2).

⁸ A *plant closing* is defined as the shutdown of a single site of employment or one or more facilities or operating units within a single site of employment. See 29 U.S.C. §2101(a)(2).

⁹ See 20 C.F.R. §639.3(f).

There are also circumstances in which the WARN Act can be applied retroactively:

- If an employer announces layoffs that are for less than six months but otherwise meet the WARN Act criteria and then subsequently extends the layoffs past six months, the employer may be subject to WARN Act notification responsibilities. Unless the employer can establish that the layoff extension was due to circumstances that were unforeseeable at the time of the original layoff, the case is treated as if notice was required for the original layoff.¹⁰
- If an employer engages in a series of layoffs that are below WARN Act levels, they may be aggregated for up to 90 days unless the employer can establish that each layoff was due to distinct, unrelated events. In the case of smaller layoffs adding up to a WARN-required level, each employee must receive notice 60 days prior to his or her date of termination.¹¹

Covered Employees

Employees covered by the statute include hourly and salaried employees, managers, and supervisors on the employer's payroll. The law does not apply to an employer's business partners, contract employees who have an employment relationship with and are paid by another employer, and self-employed individuals.

Part-Time Employees

Part-time employees are defined as employees who work, on average, fewer than 20 hours per week or who have been employed fewer than 6 of the 12 months preceding the date on which notice is required. Part-time employees under the WARN Act thus include recently hired employees working full-time hours as well as seasonal (part-year) workers. Although part-time employees are not counted toward the threshold for determining employer coverage under the law, they nonetheless are due advance notice from covered employers.

Temporary Employees

Temporary employees and other employees associated with projects of limited duration are not entitled to notice under the WARN Act so long as the employees were hired with the understanding that their employment was limited in duration.¹² Regulations state that an understanding of temporary employment can be established by "reference to employment contracts, collective bargaining agreements, or employment practices of an industry or locality, but the burden of proof will lie with the employer."¹³

¹⁰ See 29 U.S.C. §2102(c).

¹¹ See 29 U.S.C. §2102(d).

¹² See 29 U.S.C. §2103(1).

¹³ See 20 C.F.R. §639.5(c) for additional details on establishing temporary employment.

Notification Requirements

Written notice of WARN events must be provided to each affected employee 60 calendar days prior to layoff.¹⁴ If the affected employees are covered by a collective bargaining agreement, notification can instead be issued through the employees' bargaining representative.

In addition to the affected employees or their representative, an employer must notify the state entity responsible for carrying out rapid response activities¹⁵ and the chief elected official of the local government within which the layoffs are to occur.¹⁶

The required content of the notifications varies somewhat depending on whether they are being issued to employees, union representatives, or government entities.¹⁷ All notifications must include (1) a description of the planned action and a statement as to whether the planned action is expected to be permanent or temporary, (2) the expected date or dates when the layoffs will commence,¹⁸ and (3) the name and telephone number of a company official to contact for more information.

Bumping Rights

In some cases, company policy or a collective bargaining agreement may permit *bumping rights*. Typically, bumping rights allow a more senior employee whose job is eliminated to replace (bump) a less senior worker whose job was not eliminated. Under bumping rights, it is possible that the worker who is ultimately laid off is not the worker whose job was eliminated.

In cases where a workplace has bumping rights but workers are not covered by a collective bargaining agreement, the employer must attempt to identify the worker who will ultimately be terminated subsequent to bumping and provide him or her with notice. If the employer is not able to reasonably identify the worker who will ultimately be laid off, notice can be issued to the incumbent worker whose job is being eliminated.

In cases where bumping rights exist, the affected employees are covered by a collective bargaining agreement, and notice is issued to an employee representative rather than the employees themselves, it is not necessary for the employer to identify the ultimate bumpees. Instead, the employer's notice to the employee representative must identify the specific positions that will be eliminated. In these cases, the workers' representative is responsible for identifying and notifying the ultimate bumpee.

Enforcement and Penalties

The U.S. Department of Labor does not have any investigative or enforcement authority under the law. It is authorized to write regulations and provide assistance in understanding them.

¹⁴ The act defines *affected employees* as "employees who may reasonably be expected to experience an employment loss as a consequence of a proposed plant closing or mass layoff[.]" See 29 U.S.C. §2101(a)(5).

¹⁵ Rapid response activities are state-administered services to dislocated workers following a mass layoff. Services include, but are not limited to, career counseling, job search assistance, education and training services, and access to unemployment insurance.

¹⁶ See 29 U.S.C. §2102(a).

¹⁷ Complete requirements for each notice are at 20 C.F.R. §639.7.

¹⁸ The date may be a specific day, a schedule of layoffs, or a 14-day period in which separations are expected to occur. In cases where an employer provides a 14-day period in which layoffs are expected to occur, notice must be issued 60 days prior to the beginning of the 14-day period. See 20 C.F.R. §639.7(b) for further details.

The WARN Act is enforced through the federal court system. Employees, their representatives, or units of local government can bring civil actions in district court against employers thought to have violated the WARN Act. A court does not have the authority to stop a plant closing or mass layoff.

Employers who violate the WARN Act are liable for back pay and benefits (e.g., the cost of medical expenses that would have been covered had the employment loss not occurred) to each aggrieved employee. The penalty is calculated for each working day that notice was not provided up to a maximum of 60 days. In other words, the 60-day liability is reduced for each day that notice was provided. Maximum liability may be less than 60 days for those employees who had worked for the employer for fewer than 120 days.

In addition to payments to workers, employers found to be in violation of the WARN Act may also be subject to a \$500 civil fine for each day fewer than 60 that they provided notice to affected employees. An employer can avoid the civil penalty entirely if each aggrieved employee is paid the full amount for which the employer is liable within three weeks from the date of the plant closing or mass layoff.¹⁹

Exceptions that Allow for a Notice Period of Less Than 60 Days

The statutory language of the WARN Act specifies three exceptions in which employers may provide less than 60 days' notice to employees and jurisdictions affected by an employment loss.²⁰

- *The faltering company exception:* Employers can provide reduced notice for plant closings, but not for mass layoffs, if they had been seeking financing or business for their faltering enterprises, thought they had a realistic chance of obtaining funds or new business sufficient to allow the facilities to remain open, and believed in good faith that giving notice would have prevented them from getting the capital or business necessary to continue their operations.
- *The unforeseeable business circumstances exception:* Employers can provide reduced notice if they could not reasonably foresee the business circumstances that caused the plant closings or mass layoffs. Circumstances that occurred without warning and that were outside the employer's control could include (1) a major client terminating a large contract with the employer, (2) a strike at a supplier of key parts to the employer, or (3) the swift onset of a deep economic downturn or a non-natural disaster (e.g., a terrorist attack).
- *The natural disaster exception:* Employers may also provide reduced notice if the layoff is due to a natural disaster such as a flood, earthquake, drought, or storm. If a plant closing or mass layoff is indirectly due to natural disasters, the exception would not apply; however, the unforeseen business circumstances exception might.

Other Special Circumstances

The WARN Act also addresses several special circumstances and the responsibilities of the affected parties in each circumstance.

¹⁹ See 29 U.S.C. §2104(a)(3).

²⁰ See 29 U.S.C. §2102(b).

Transfers or Reassignments

If a closing or layoff takes place due to the relocation or consolidation of all or part of an employer's business, the plant closing or mass layoff is not considered an employment loss if before the action,²¹

- the employer offers to transfer an employee to another site within reasonable commuting distance and no more than a six-month break in employment occurs (regardless of whether the employee accepts or rejects the offer); or
- the employee accepts a transfer to another site—regardless of distance—with no more than a six-month break in employment, within 30 days of the employer's offer or of the closing/layoff, whichever is later.

Strikes and Lockouts

Plant closings or mass layoffs that are the result of a strike or lockout are exempt from the notice requirement unless employers lock out employees to evade compliance with the act.²² “Economic strikers” whom employers permanently replace do not count toward the employee-size thresholds necessary to trigger the notice requirement.²³ Non-striking employees who experience an employment loss directly or indirectly associated with a strike and employees who are not members of the bargaining unit involved in the contract negotiations that prompted a lockout are entitled to advance notice.²⁴

Sale of a Business

The sale of all or part of a business does not in itself produce an employment loss because individuals who were employees of the seller through the sale's effective date are thereafter considered employees of the buyer. If a covered plant closing or mass layoff takes place up to and including the effective date of the sale, it is the responsibility of the seller to provide notice. If the seller knows the buyer has definite plans to initiate a covered plant closing or mass layoff within 60 days of the purchase, the seller may give notice to affected employees as an agent of the buyer if so empowered by the buyer. If not, the buyer becomes responsible for providing the requisite advance notice.²⁵

Notification of Layoffs in Cases Where Notice is Not Required by the WARN Act

In addition to establishing criteria and notification procedures for applicable layoffs and plant closures, the WARN Act also encourages procedures for layoffs that may not require formal notification:

²¹ See 29 U.S.C. §2101(b)(2).

²² See 29 U.S.C. §2103(2).

²³ Economic strikers are those employees who go on strike over wages, hours, or other working conditions during contract negotiations.

²⁴ See 20 C.F.R. §639(d).

²⁵ See 29 U.S.C. §2101(b)(1).

It is the sense of Congress that an employer who is not required to comply with the notice requirements of section 2102 of this title should, to the extent possible, provide notice to its employees about a proposal to close a plant or permanently reduce its workforce.²⁶

Regulations have reiterated and expanded upon this sentiment:

Notice in ambiguous situations. It is civically desirable and it would appear to be good business practice for an employer to provide advance notice to its workers or unions, local government and the State when terminating a significant number of employees. In practical terms, there are some questions and ambiguities of interpretation inherent in the application of WARN to business practices in the market economy that cannot be addressed in these regulations. It is therefore prudent for employers to weigh the desirability of advance notice against the possibility of expensive and time-consuming litigation to resolve disputes where notice has not been given. The Department encourages employers to give notice in all circumstances.²⁷

Neither statute nor regulations discourage or state a penalty associated with notices that are not followed by an applicable mass layoff or plant closure. Regulations, however, prohibit employers from regularly issuing WARN Act notices so as to perpetually be in compliance with the law in the event of a mass layoff or plant closure.²⁸

Data on WARN Act Notifications and Compliance

Since the WARN Act does not require firms to notify the federal government prior to layoffs or plant closings, there is no central data source for information on WARN Act notifications. As such, it is not possible to easily identify how many WARN Act notifications were issued in a particular timeframe, nor is there a simple procedure for identifying how many notifications were followed by an applicable mass layoff or plant closing.

In 2003, the Government Accountability Office (GAO; then the General Accounting Office) released a report in which it obtained information on WARN notices from state dislocated worker units and then matched them to mass layoff and plant closure data from the Bureau of Labor Statistics. The report found that of the 5,349 WARN notices issued, only 717 (13%) could be matched to a specific mass layoff or plant closing. The report also identified 1,257 additional events that appeared to require notification under the WARN Act in which it could not find a corresponding layoff notice filed with the state.²⁹

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²⁶ See 29 U.S.C. §2106.

²⁷ See 20 C.F.R. §639.1(e).

²⁸ Regular issuance of notice is also known as “rolling notice.” See 20 C.F.R. §639.10(b).

²⁹ See Government Accountability Office (GAO), *The Worker Adjustment and Retraining Notification Act: Revising the Act and Educational Materials Could Clarify Employer Responsibilities and Employee Rights*, GAO-03-1003, September 19, 2003, <http://www.gao.gov/products/GAO-03-1003>.

Acknowledgments

Linda Levine authored a previous version of this report.

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