

Memo: Review of the Worker Adjustment and Retraining Notification (WARN) Act

March 17, 2020

What is the WARN Act? A federal act which offers protection to workers, their families and communities by requiring employers to provide notification 60 calendar days in advance of “plant closings” and “mass layoffs.” 20 C.F.R. § 639.1

Does North Carolina have a separate state specific “mini-WARN” law? No.

Who must comply with this Act? Any restaurant, hotel or other employer that employs:

- 100 or more employees (excluding part-time employees) or
- 100 or more employees, including part-time employees, who in the aggregate work at least 4,000 hours per week, exclusive of overtime.
- **If your restaurant or hotel does not employ this many people, the WARN Act does not apply to you.**

Who is entitled to receive notice under the WARN Act? All affected workers or their representatives (union), the North Carolina Division of Workforce Solutions (a unit of the N.C. Department of Commerce), and the chief elected official of the unit of local government where the site is located (Mayor in a city or town/Chair of County Commissioners in a county).

What triggers notice? Either a “Plant closing” or a “mass layoff.”

- Plant Closing is defined as the *permanent or temporary shutdown* of a “single site of employment,” or one or more “facilities or operating units” within a single site of employment, if the shutdown results in an “employment loss” during any 30-day period at the single site of employment for 50 or more employees, excluding any part-time employees. A “temporary shutdown” triggers the notice requirement only if there are a sufficient number of terminations, layoffs exceeding 6 months, or reductions in hours of work as specified under the definition of “employment loss.” 20 C.F.R. § 639.3

“Employment loss” is defined as (1) termination, (2) a layoff exceeding 6 months, or (3) a reduction in hours of work of individual employees of more than 50% during each month of any 6-month period.

- Mass Layoff is defined as at least 500 employees, or a layoff impacting between 50-499 employees during any 30-day period when that number represents at least one-third of the employer’s workforce. 20 C.F.R. § 639.3

Are there exemptions for notice? Yes, if the plant closing is one of a temporary facility or if the closing or mass layoff is the result of the completion of a particular project or undertaking then no notice is required under the WARN act. Similarly, employers do not need to provide notice to employees on strike or during a lockout.

What is the notification period? With three exceptions, notice must be timed to reach those entitled to notice at least 60 days before a closing or layoff.

What are the exceptions to the 60-day notice period?

- Faltering company exception: This covers situations where a company sought new capital or business in order to stay open and in good faith the employer believed that giving such notice would take away the opportunity to get such new capital or business. This only applies to plant closings.
- Unforeseeable business circumstances: the circumstance (plant closing or mass layoff) is caused by “some sudden, dramatic, and unexpected action or condition outside the employer's control.”
- Natural disaster exception: includes “floods, earthquakes, droughts, storms, tidal waves or tsunamis and *similar effects of nature*.” The employers must however be able to demonstrate that the plant closing, or mass layoff is a direct result of the natural disaster.

Even if an exception applies, the employer must still give “as much notice as is practicable” to the affected employees and provide a reason for reducing the notice period as well as the elements of a regular notice.

What must a WARN notice contain?

- It must be specific (but language understandable to employees who do not have a representative);
 - include the date of which separations are expected to occur;
 - name and address of the site that is closing or where the layoff will occur;
 - the name and telephone number of a company official to contact for more information;
 - statement as to whether the planned action is expected to be permanent or temporary;
 - job titles of positions being affected.
- See sample WARN letter from the N.C. Department of Commerce:
<https://files.nc.gov/nccommerce/documents/files/Sample-WARN-Letter.docx>

Are there penalties for non-compliance? Yes, the Act provides stiff penalties for non-compliance, including up to 60 days of back pay and benefits, along with a civil penalty of up to \$500 per day. It also provides for a private cause of action in federal court.

Current situation with Covid-19 virus. With Governor Cooper’s March 17 Executive Order closing all restaurants and bars, it appears that the current situation would fall within the exception for unforeseeable business circumstances. Even so, “as much notice as practicable” is still required if you are covered by the WARN Act. Hotels and restaurants should consult with their own legal counsel for advice specific to your business.