WARN

Worker Adjustment and Retraining Notification (WARN) Act

Employer Tool Kit —
Advance Notice of Closings and Layoffs

Workforce Solutions

WARN

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This guide is intended to present a brief overview describing the principal provisions of the Worker Adjustment and Retraining Notification (WARN) Act, Public Law 100-379 (29 U.S.C. § 2101 et seq.). In addition, it provides answers to frequently asked questions (FAQs) about employer requirements and employee rights under WARN, Web site links to the U.S. Department of Labor's Employment and Training Administration (ETA) Dislocated Worker Web Site, the Department's Employment Laws Assistance for Workers and Small Businesses, and the Employee Retirement Income Security Act relative to termination benefits. The guide also includes contact information for the State Rapid Response Dislocated Worker Unit and a National Toll-Free Help Line to assist individuals in locating the nearest One-Stop Career Center.

This guide is not an official statement of interpretation of WARN or of the regulations adopted by ETA. The regulations appear at 20 CFR Part 639.

For questions regarding the WARN Act and assistance when downsizing, closing a facility or planning a layoff, employers in the Houston-Galveston region should contact:

Chrystal Broussard
Outplacement Liaison
chrystal.broussard@wrksolutions.com
713.499.6657

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INTRODUCTION

In our dynamic economy, many companies are streamlining their operations to maintain a competitive position in the marketplace. Although such actions can help your company become more efficient, this may result in the elimination of existing jobs and facilities.

In 1988, Congress passed the Worker Adjustment and Retraining Notification (WARN) Act to provide workers with sufficient time to prepare for the transition between the jobs they currently hold and new jobs. This transition may involve the provision of information about where new jobs may be found, or it may involve providing workers with other employment or retraining opportunities before they lose their jobs. In order to assist in maintaining the stability of the economy, the U.S. Department of Labor is committed to providing adjustment services to workers and employers and their affected communities.

As an employer, understanding your obligations under WARN is important. Your filing of an official WARN notice is typically the impetus for starting the Rapid Response process to assist the employees who might be affected.

This guide provides information on how employers can achieve their business objectives while also protecting their employees. This guide constitutes a general overview of the law and does not replace the advice of counsel.

HOW WARN PROVIDES ASSISTANCE

The WARN Act requires employers to provide written notice at least 60 calendar days in advance of covered **plant closings** and **mass layoffs** (see glossary). An employer's notice assures that assistance can be provided to affected workers, their families, and the appropriate communities through the **State Rapid Response Dislocated Worker** Unit (see glossary). The advance notice allows workers and their families transition time to seek alternative jobs or enter skills training programs.

Upon receipt of a WARN notice, the State Rapid Response Dislocated Worker Unit coordinates with the employer to provide on-site information to the workers and employers about employment and retraining services that are designed to help participants find new jobs. These services may include:

- Labor market information (occupational information and economic trends)
- Job search and placement assistance
- On-the-job training
- Classroom training
- Entrepreneurial training
- Referral to basic and remedial education

EMPLOYERS REQUIRED TO PROVIDE WARN NOTIFICATION

A WARN notice is required when a business with 100 or more full-time workers (not counting workers who have less than six 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** (see glossary and FAQs), or 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.

EMPLOYEES PROTECTED BY WARN

Affected employees are those who may be expected to experience an employment loss (see glossary). They may be hourly and salaried workers, including managerial and supervisory employees and non-strikers. Affected employees (see glossary) include:

- Employees who are terminated or laid off for more than six months or who have their hours reduced 50% or more in any six-month period as a result of the plant closing or mass layoff;
- Employees who may reasonably be expected to experience an employment loss as a result of a proposed plant closing or mass layoff. If the employer has a seniority system that involves bumping rights (see glossary and FAQs), the employer should use its best efforts to give notice to the workers who will actually lose their jobs as a result of the system. If that is not possible, then an employer must give notice to the incumbent in the position being eliminated;

- Workers who are on temporary layoff but have a reasonable expectation of recall; this includes workers on workers' compensation, medical, maternity, or other leave; and
- **Part-time workers** (see glossary). (These workers do not count when determining whether there has been a plant closing or mass layoff but they are entitled to receive WARN notice if there is one.)

EMPLOYEES NOT PROTECTED BY WARN

The following employees are not protected under WARN:

- Strikers, or workers who have been locked out in a labor dispute;
- Workers working on temporary projects or facilities of the business who clearly understand the temporary nature of the work when hired;
- Business partners, consultants, or contract employees assigned to the business but who have a separate employment relationship with another employer and are paid by that other employer, or who are self-employed; and
- Regular federal, state, and local government employees.

EMPLOYEES NOT COUNTED UNDER WARN

When determining whether or not your company's layoff or plant closing falls within the WARN requirements, the following employees are not counted:

- Part-time workers;
- Workers who retire, resign, or are terminated for cause;
- Workers who are offered a transfer to another site of employment within a reasonable commuting distance (see FAQs) if:
  - The closing or layoff is a result of a relocation or consolidation of all or part of the employer's business; and
  - The transfer involves no more than a 6-month break in employment.
- Workers who are offered a transfer to another site of employment outside of a reasonable commuting distance if:
  - The closing or layoff is a result of a relocation or consolidation of all or part of the employer's business;
  - The transfer involves no more than a 6-month break in employment; and
  - The worker accepts the offer within 30 days of the offer or the closing or layoff, whichever is later.

CIRCUMSTANCES THAT TRIGGER WARN

WARN is triggered when a covered employer:

- Loses a facility or discontinues an operating unit (see glossary) permanently or temporarily, affecting at least 50 employees, not counting part-time workers, at a single site of employment. A plant closing also occurs when an employer closes an operating unit that has fewer than 50 workers but that closing also involves the layoff of enough other workers to make the total number of layoffs 50 or more;
- Lays off 500 or more workers (not counting part-time workers) at a single site of employment during a 30-day period; or lays off 50-499 workers (not counting part-time workers), and these layoffs constitute 33% of the employer's total active workforce (not counting part-time workers) at the single site of employment;
- Announces a temporary layoff of less than six months that meets either of the two criteria above and then decides to extend the layoff for more than six months. If the extension occurs for reasons that were not reasonably foreseeable at the time the layoff was originally announced, notice need only be given when the need for the extension becomes known. Any other case is treated as if notice was required for the original layoff; or
- Reduces the hours of work for 50 or more workers by 50% or more for each month in any 6-month period. Thus, a plant closing or mass layoff need not be permanent to trigger WARN.

CIRCUMSTANCES THAT DO NOT TRIGGER WARN

WARN is not triggered when a covered employer:

- Closes a temporary facility or completes a temporary project, and the employees were hired with the clear understanding that their employment would end with the closing of the facility or the completion of the project; or
- Closes a facility or operating unit due to a strike or lockout and the closing is not intended to evade the purposes of the WARN Act.

WARN is also 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;
- 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;
- If a layoff is for six months or less; or
- If work hours are not reduced 50% in each month of any six-month period.

CALCULATING THE TIMEFRAME TO DETERMINE WHEN WARN NOTICE IS REQUIRED

WARN looks at the employment losses that occur over a 30-day period. For example, if an employer closes a plant which employs 50 workers and lays off 40 workers immediately, and then lays off the remaining 10 workers 25 days later, that is a covered plant closing.

WARN also looks at the employment losses that occur over a 90-day period. An employer is required to give advance notice if it has a series of small terminations or layoffs, none of which individually would be covered under WARN but which add up to numbers that would require WARN notice. An employer is not required to give notice if it can show that the individual events occurred as a result of separate and distinct actions and causes and are not an attempt to evade WARN.

The Preamble to the WARN Act regulations gives an example of 90-day aggregation. It suggests that an employer should look ahead and behind 90 days to determine whether separate but related events would trigger coverage. Below is a specific example of a situation in which 90-day aggregation might apply under WARN.

- DAY 1 Company has 180 employees
- DAY 2 Company terminates 30 employees
  (150 is now the number for WARN computations)
- DAY 31 Company terminates 29 employees (now 121 remaining employees)
- DAY 60 Company terminates 6 employees (115 remaining employees)
- DAY 90 Company terminates 5 employees (110 remain)

Assuming no notice was given, the company is liable to all 70 employees who were terminated because the mass layoff threshold has been reached through separate actions that did not occur for separate and distinct causes within this 90-day period. All employees terminated within the 90 days have suffered a mass layoff and are entitled to 60 days' notice before the date of termination. For this purpose, the date on which the company size is measured is Day One. (Note that aggregation periods are rolling and the second layoff starts a second 90-day period where the applicable workforce is 121 workers.)

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 these exceptions apply, and the employer must provide a statement of the reason for reducing the notice requirement in addition to fulfilling other notice information requirements. The exceptions are as follows:

- **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.

CONTENTS OF THE NOTICE TO EMPLOYEES WHEN NOT REPRESENTED

Notice to individual employees must be written in clear and specific language that employees can easily understand and must contain at a minimum the following requirements:

- A statement as to whether the planned action is expected to be permanent or temporary and, if the entire plant is to be closed, a statement to that effect;
- The expected date when the plant closing or mass layoff will commence and the expected date when the individual employee will be separated;
- An indication as to whether or not bumping rights (see FAQs) exist; and
- The name and telephone number of a company official to contact for further information.

The notice may include additional information useful to the employees such as available dislocated worker assistance, and, if the planned action is expected to be temporary, the estimated duration, if known.

CONTENTS OF NOTICE TO THE DISLOCATED WORKER UNIT AND THE LOCAL CHIEF ELECTED OFFICIAL

Advance notice should be given to the State Rapid Response Dislocated Worker Unit as well as to the chief elected official of the local government where the closing or mass layoff is to occur. If there is more than one such unit, the "tiebreaker" is the local government to which the employer paid the most taxes in the preceding year. However, if many affected employees live in nearby local government jurisdictions, it is also helpful to provide notice to those additional local governments so that coordinated planning of services for those employees to be laid off may begin quickly.

Notice to the State Rapid Response Dislocated Worker Unit and the local chief elected official must contain at a minimum:

- The name and address where the mass layoff or plant closing is to occur, along with the name and telephone number of a company contact person who can provide additional information;
- An explanation of whether the employment loss will be temporary or permanent, and whether the entire plant is being closed;
- The expected date of the first job losses, along with a schedule of any further employment reductions;
- The job titles of positions that will be affected and the number of affected employees in each job category;
- A statement of bumping rights, if any exist; and
- The name of each union/employee representative and the name and address of the chief elected officer of each union.

The WARN regulations also allow employers to provide alternative notice to the State Rapid Response Dislocated Worker Unit and the chief local elected official. The alternative form must be a written notice that provides the following information:

- The name and address of the employment site where the plant closing or mass layoff will occur;
- The name and telephone number of a company official to contact for further information;
- The expected date of separation; and
- The number of affected employees.

Employers who choose to provide the alternative form of notice must keep accessible all other information outlined above and provide it to the State Rapid Response Dislocated Worker Unit and local government upon request. Any failure to provide this additional information will be deemed a failure to give required WARN notice.

WHAT THE NOTICE TO THE UNION REPRESENATIVE MAY CONTAIN

Notice to the bargaining agent/chief elected officer of each affected union or local union official must contain at a minimum the following information:

- The name and address where the mass layoff or plant closing is to occur, along with the name and telephone number of a company contact person who can provide additional information;
- A statement as to whether the planned action is expected to be permanent or temporary and, if the entire plant is to be closed, a statement to that effect;
- The expected date of the first separation and the anticipated schedule for making separations; and
- The job titles of positions to be affected and the number of affected employees in each job classification.

The notice may include additional information useful to the employees such as available dislocated worker assistance, and, if the planned action is expected to be temporary, the estimated duration, if known.

DATES OF TERMINATION/LAYOFF

The WARN regulations recognize that it may not always be possible to identify, 60 days in advance, the exact date a termination or layoff will occur. WARN notice may identify a two-week (14-day) period during which terminations/ layoffs will take place.

ERRORS IN THE NOTICE

Notices should be as accurate as possible since employees rely on them for their own planning. However, minor or inadvertent errors in the notice or errors that occur because circumstances change during the 60-day notice period do not violate WARN.

EXTENSION OF NOTICE

Additional notice is required when the date or schedule of dates of a planned plant closing or mass layoff is extended beyond the date or the ending date of any 14-day period announced in the original notice as follows:

- If the employment action is postponed for less than 60 days, additional notice should be given as soon as possible and should include reference to the earlier notice, the new action date, and the reason for the postponement. The notice need not be formal but should be given in a manner that will provide the information to all affected employees; or
- If the postponement is for 60 days or more, a new notice is required. Routine periodic notice, given whether or not a plant closing or mass layoff is impending and with the intent to evade specific notice as required by WARN, is not acceptable.

SERVING NOTICE

An employer may use any reasonable method of delivery designed to ensure receipt of the written notice at least 60 days before separation. However, preprinted notices regularly included in each employee's paycheck or pay envelope and verbal notices do not meet the WARN Act requirements.

SALE OF A BUSINESS

When all or part of a business is sold, even if it is an asset sale, WARN applies. If a covered plant closing or mass layoff occurs, the employer–the seller or buyer–responsible for giving notice depends on when the event occurs. The seller must give notice for a covered plant closing or mass layoff that occurs before the sale becomes effective. The buyer must give notice for a covered plant closing or mass layoff that occurs after the sale becomes effective (see FAQs).

Employees of the seller automatically become employees of the buyer for purposes of WARN. That means that even though there is a technical termination of employment when employees stop working for the seller and start working for the buyer, the technical termination does not trigger WARN.

PENALTIES FOR VIOLATING WARN

An employer who violates WARN is liable to each affected employee for an amount equal to back pay and benefits for the period of violation, up to 60 days. This liability may be reduced by any wages the employer pays over the notice period. WARN liability may also be reduced by any voluntary and unconditional payment not required by a legal obligation. 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. The penalty may be avoided if the employer satisfies its liability to each affected employee within three weeks after the closing. In any suit, the court, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs.

WARN ENFORCEMENT

WARN is enforced through the U.S. District Courts, as provided in section 5 of the Act. Workers, their representatives, and units of local government may bring individual or class action suits against employers believed to be in violation of the Act. The U.S. Department of Labor has no authority or legal standing in any enforcement action and cannot provide specific binding or authoritative advice or guidance about individual situations. The Department provides assistance in understanding the law and regulations to individuals, firms, and communities.

HOW TO OBTAIN A COPY OF THE WARN ACT AND REGULATIONS

The specific requirements of WARN may be found in the Act itself, Public Law 100-379 (29 U.S.C § 2101, et seq.). The U.S. Department of Labor published final regulations on April 20, 1989, in Volume 54 of the Federal Register, pages 16042 to 16070 (54 FR 16042). The regulations appear at 20 CFR Part 639. The text of this brochure can be seen at the following Web site:

www.doleta.gov/programs/factsht/warn.asp

For more detailed information on WARN, please visit the U.S. Department of Labor's Employment Laws Assistance for Workers and Small Businesses (elaws) Web site at **www.dol.gov/elaws/**.

General questions about the WARN law and regulations may be addressed to:

U.S. DEPARTMENT OF LABOR
Employment and Training Administration
Division of Adults and Dislocated Workers, Room C5325
200 Constitution Avenue, N.W.
Washington, DC 20210
(202) 693-3580

For information regarding how to contact your State Rapid Response Dislocated Worker Unit, call the National Toll-Free Help Line: **1-877-US-2JOBS** or visit **www.doleta.gov/layoff** and go to the Employers page.

FREQUENTLY ASKED QUESTIONS (FAQS) ABOUT WARN

The following responses represent the U.S. Department of Labor's best reading of the WARN Act and regulations. Employers should be aware that the U.S. Federal Court solely enforces the Act and these answers are not binding on the courts.

OTHER LAWS AND CONTRACTS

Does WARN replace other notice laws or contracts?

The provisions of WARN do not supersede any laws or collective bargaining agreements that provide for additional notice or additional rights and remedies. If another law or agreement provides for a longer notice period, WARN notice runs concurrently with that additional notice period. Collective bargaining agreements may be used to clarify or amplify the terms and conditions of WARN but may not reduce WARN rights. For example, if a collective bargaining agreement provides for an employer to issue written notice to the union 75 days in advance of anticipated layoffs, the provision will satisfy the WARN requirement for 60-day advance notice. On the other hand, if a collective bargaining agreement provides a 45-day notice period, the WARN requirement for 60 days' notice supersedes that provision.

EMPLOYER PROHIBITED FROM ORDERING A PLANT CLOSING

Can an employer be forced to keep a plant open or retain employees?

No. Employers cannot be required by the WARN Act to refrain from closing a plant, relocating operations, or implementing layoffs. An employer can only be required to give a 60-day advance notice or provide back pay and benefits to the affected employees for each day that the employer failed to give notice, up to the required 60 days. The law at section 5(b) specifically states, "a Federal court shall not have authority to enjoin a plant closing or mass layoff." There is no injunctive relief available under the Act.

LABOR DISPUTES, STRIKES, AND LOCKOUTS

Is a labor dispute—a strike by a union or a lockout by management—considered a mass layoff under WARN?

No. An employer does not need to provide notice to strikers or to workers who are part of the bargaining unit(s) and 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) that are involved in the labor negotiations that led to a lockout are still entitled to advance notice.

The Act specifically states that WARN does not affect employers' or employees' rights and responsibilities under the National Labor Relations Act. An employer does not need to give notice when permanently replacing a person who is an "economic striker."

TIMING

When do I need to determine if WARN applies to my business?

You need to decide whether WARN applies to a particular employment action about 65-70 days before that action is to occur. If WARN does apply, this gives you the lead time to do what is necessary to give timely notice. You also need to rely on the facts as you know them at the time you have to make your decision. Assuming too much can lead to a significant risk. An example of a question often asked is, "If I close a plant with 53 workers but offer five of them early retirement and they take it, am I liable under WARN?" The legal answer to that question is that there is no liability since only 48 workers will suffer an employment loss, but the practical answer about whether or not to give notice may depend on what you know 65-70 days in advance. If you are absolutely sure that five workers will take the early retirement offer, then there is no requirement that you give notice. If you are not sure that the five workers will take the offer, then you run the risk of liability. If you choose not to give notice and all five accept the offer, there is no requirement that you give notice. However, if two workers do not accept the offer and you have not given notice, you may be liable to 50 workers for pay and benefits. For that reason, it is recommended that employers err on the side of caution and give notice in situations that pose these kinds of risks.

EMPLOYEES—PART-TIME AND FULL-TIME

What timeframe is to be used in calculating whether an employee works an average of fewer than 20 hours per week and is therefore a part-time employee?

The period to be used for calculating whether a worker has worked an average of fewer than 20 hours per week is the shorter of the actual time the worker has been employed or the most recent 90 days.

To determine the average number of hours worked in a week, see the following example:

WEEK NUMBER	EXAMPLE 1 Hours Worked	EXAMPLE 2 Hours Worked
1	15	24
2	20	25
3	11	17
4	10	20
5	20	15
6	20	19
7	22	24
8	16	18
9	15	17
10	12	15
11	24	26
12	18	23
13	20	22
90 Days Worked	223 Hours	265 Hours

The calculation to determine whether an employee may be eligible for WARN notice:

TOTAL HOURS WORKED / 13 WEEKS = AVERAGE HOURS WORKED PER WEEK

Example 1

223 TOTAL HOURS WORKED / 13 WEEKS = 17.2 HOURS AVERAGE HOURS WORKED PER WEEK

The worker in Example 1 is a part-time worker because the average hours worked per week was less than 20 hours.

Example 2

265 TOTAL HOURS WORKED / 13 WEEKS = 20.4 HOURS AVERAGE HOURS WORKED PER WEEK

The worker in Example 2 is a full-time worker because the average hours worked per week was over 20 hours.

If a plant closing or mass layoff occurs, part-time workers are also entitled to receive a WARN notice. In a mass layoff of fewer than 500 workers, do you exclude part-time workers from the total workforce, the group of workers laid off, or both?

Both. In determining whether the 33% threshold for a mass layoff involving fewer than 500 workers has been reached, you divide the total number of fulltime workers laid off by the total number of full-time workers. The term "fulltime workers" means workers at the single site, excluding part-time workers.

EMPLOYEE TRANSFERS

How do I determine if the transfer I am offering employees is of a reasonable commuting distance? Is it based on time, mileage, local custom, or some combination?

There is no set "rule of thumb." However, one would look at the circumstances of the individual case. Consideration should be given to the following factors: geographic accessibility of the place of work, quality of the roads, commonly available transportation, and the usual travel time. In addition, collective bargaining agreements may have to be taken into consideration if they are applicable. Travel time is measured from an employee's home, not the former work site.

WHEN AFFECTED EMPLOYEES CANNOT BE IDENTIFIED

Should I give notice to everyone when affected employees cannot be identified?

No. The Preamble to the WARN regulations provides that "where it is not possible at the time notice is required to be given to determine who may reasonably be expected to experience an employment loss, it may be advisable for an employer to give notice to other workers who may lose their jobs as a result of the seniority system, both to forewarn them and to avoid liability. However, it is not appropriate for an employer to provide blanket notice to workers."

BUMPING

What obligations do I have to give notice when there is an established bumping rights system?

Where there is no union, the employer must attempt to identify the individuals who will finally lose their jobs as a result of the bumping system. If the employer cannot reasonably identify these workers, it must give notice to the incumbent workers in the jobs being eliminated.

When providing notice to a union representative, it is not necessary for the employer to identify bumpees. The employer must, however, identify the positions affected by the closing or mass layoff.

INCREASED WORKERS' COMPENSATION CLAIMS AND POTENTIAL SABOTAGE

Should I be concerned about increased workers' compensation claims when notice is given?

Generally, when employees are given adequate notice of a layoff, workers' compensation claims do not increase. One major company found that when it gave notice and had planned on receiving more claims (and in fact set aside significant funds to cover these expected costs), they actually spent none of that money. As with concerns of sabotage, providing notice shows goodwill on the part of the employer, and employees are more likely to feel that they have been treated fairly despite the situation in which they find themselves.

Is sabotage a concern when notice is given?

Employers have occasionally expressed concern that providing workers with advance notice of layoffs and closings may result in an incident of sabotage by an affected worker. Experience of the state Rapid Response specialists, however, indicates that the opposite is generally true. Providing advance notice, along with early intervention services that boost morale, limit bitterness and apathy, and enable workers to plan their future before they lose their jobs, minimizes the occurrence of sabotage. This action of goodwill on the part of the employer also helps to maintain productivity, lower unemployment insurance costs, and present a more positive image of the company to the communities affected by the layoff or closing.

SALE OF A BUSINESS

In a hostile takeover situation, if the seller refuses to give notice, should the buyer give notice before actually buying the company?

Yes. The buyer is responsible for providing notice for any covered plant closing or mass layoff that occurs after the sale. The practical problem is that the buyer is not the employer at the time notice must be given. If the seller does not cooperate, the buyer may not know the names and addresses of everyone who will be affected so that it can give individual notice. However, written notice is still required.

When an employee is offered employment with the buyer but refuses, is this considered an employment termination or a voluntary departure?

This situation is considered a voluntary departure, unless the offer constitutes a **constructive discharge** (see glossary), which could include situations where significant changes are made in employee's wages, benefits, working conditions or job description.

If employees are terminated without notice at the instant the sale becomes effective, which party is liable—the seller or the buyer?

The seller. In the case of the sale of part or all of a business, the seller is responsible for providing affected employees with notice of any plant closing or mass layoff that takes place up to and including the effective date (time) of the sale, and the buyer is responsible for providing notice of any plant closing or mass layoff that takes place thereafter.

If the buyer retains the employees for a brief period after the sale but then terminates them within 60 days after the sale, is the buyer liable for the full 60-day notice or is liability allocated between the seller and the buyer based upon time of employment with each during the 60-day period preceding the termination?

The buyer is liable for the full 60 days. If the seller is made aware of any definite plans on the part of the buyer to carry out a plant closing or mass layoff within 60 days of purchase, the seller may give notice to affected employees as an agent of the buyer, if so empowered. If the seller does not give notice, the buyer is nevertheless responsible to give notice. If the seller gives notice as the buyer's agent, the responsibility for notice still remains with the buyer.

When a buyer chooses to continue the seller's employees in their previous jobs but at a substantial reduction in wages and fringe benefits, has the buyer constructively discharged the employees, and what would constitute a constructive discharge/involuntary departure?

If a drastic change in wages or working conditions causes a person to believe he or she was being fired or would be unable to continue working for that employer, this could constitute a constructive discharge. The test is usually a matter of state law and the test is often a strict one.

BANKRUPTCY

How is WARN applicable to bankruptcy situations?

WARN remains applicable to an employer that declares bankruptcy in some circumstances. If an employer declares bankruptcy and then orders a plant closing or mass layoff, it may still be liable under WARN. There are two situations in which WARN may apply in a bankruptcy. The first is when the employer knew about the closing or mass layoff before filing bankruptcy and should have given notice but seeks to use bankruptcy to avoid giving notice. The second is when the employer continues

to run the business in bankruptcy, usually as a "debtor in possession." WARN does not, however, apply to a trustee in bankruptcy whose sole function is to wind up the business. The exceptions to the notice requirement, known as the faltering company and unforeseeable business circumstances exceptions, often come up in bankruptcy cases. The bankruptcy proceeding does change the court in which any WARN claim must be filed, from the District Court to the Bankruptcy Court.

WAIVING THE RIGHT TO WARN NOTICE

Can I ask my employees to waive their rights to notice under WARN?

Employees cannot be required to waive their rights to advance notice under WARN. WARN requires notice, making no provision for any alternative. However, when you close a facility or have a layoff, you may ask employees to sign a document waiving their rights to make claims against your company. (Waiving the right to make claims against the company means the employee agrees not to sue the company for additional financial compensation or any other benefit because of the employee's job loss, or in some cases, from anything else that may have occurred during the worker's employment.) Requesting that employees voluntarily and knowingly waive any claims under WARN, or other employment-related laws, may involve offering some additional severance pay or extended health benefits. If something of value such as additional pay or benefits is received by the employees for signing the waivers, they may have waived any claims that they have under WARN or other employment-related laws.

PAY IN LIEU OF WARN NOTICE

Can I pay my workers their salary and benefits for 60 days in lieu of notice?

Neither the Act nor the regulations recognize the concept of pay in lieu of notice. WARN requires notice, making no provision for any alternative. Failure to give notice does a significant disservice to workers and undermines other services that are part of the purpose of the WARN Act. However, since WARN provides that the maximum employer liability for damages, including back pay and benefits, is for the period of violation up to 60 days, providing your employees with full pay and benefits for the 60-day period effectively precludes any relief.

What if I pay my workers for 60 days in lieu of notice and then an employee gets another job within what would have been the notice period, am I required to continue making payments to the employee through the notice period?

No. If an employee gets another job within the 60-day period, this is viewed as a voluntary termination that makes the employee ineligible to collect damages. Can severance pay offset WARN damages? WARN allows "voluntary and unconditional" payments that are not "required by any legal obligation" to be offset against an employer's back pay liability. In many cases, however, severance pay is required by contract, including an employer's personnel policies and handbooks. These payments do not offset WARN damages and thus would not serve as pay in lieu of notice.

EMPLOYEE ACCESS TO ACCRUED VACATION TIME

Can I decide not to give employees paid vacation in a closing or layoff situation?

Vacation pay may be considered wages or a fringe benefit in some situations. If an employee has "earned" the vacation pay, that is, if he/she has a legal right to it by contract or otherwise, then an employer must pay it as part of WARN damages. These obligations are generally governed by contract and sometimes by the Employee Retirement and Income Security Act. Call 1-800- 998-7542 or visit **www.dol.gov/ebsa** for more information.

SINGLE SITE OF EMPLOYMENT

Where is the "single site" of an office whose employees travel widely within large geographic regions—for example, salespersons?

For workers whose primary duties require travel from point to point, who are outstationed, or whose primary duties involve work outside any of the employer's regular employment sites (for example, railroad workers, bus drivers, or 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.

NOTICE MAILING REQUIREMENT

When notice is mailed, at what point does the 60-day timeframe commence— from the date of mailing, the date of receipt, or a reasonable time after the mailing?

From the date of receipt. Workers must receive notice at least 60 days before separation. This does not mean that if one or two notices are not delivered through no fault of the employer, there is a violation.It is prudent, however, to make sure that the workers who were sent notices actually got them.

ATTORNEY FEES IN WARN CASES

Are attorney's fees available in WARN cases?

Employers may be liable for actual attorney fees and costs incurred if a Federal District Court so rules in the event that the workers prevail in a WARN lawsuit.

GLOSSARY OF WARN TERMS

Affected Employees: The term "affected employees" means employees who may reasonably be expected to experience an employment loss as a consequence of a proposed plant closing or mass layoff by their employer. They include individually identifiable employees who will likely lose their jobs because of bumping rights or other factors, to the extent that such individual workers reasonably can be identified at the time notice is required to be given. The category of affected employees includes managerial and supervisory employees but does not include business partners. Consultant or contract employees who have a separate employment relationship with another employer and are paid by that other employer, or who are self-employed, are not "affected employees" of the business to which they are assigned.

Bumping Rights: Bumping rights are those rights of an employee to displace another employee due to a layoff or other employment action as defined in a collective bargaining agreement, employer policy, or other binding agreement. These rights are often created through a seniority system.

Constructive Discharge: In general, a constructive discharge is when a worker's resignation or retirement may be found to be involuntary because the employer has created a hostile or intolerable work environment or has applied other forms of pressure or coercion that forced the employee to quit or resign.

Employer: The employer is any business enterprise that employs 100 or more full-time workers or 100 or more full- and part-time workers who work at least a combined 4,000 hours a week. Business enterprises include private for-profit and not-for-profit entities as well as governmental or quasi-governmental organizations that engage in business and are separately organized from the regular government.

Employment Loss: The term "employment loss" means:

1. An employment termination, other than a discharge for cause, voluntary departure, or retirement;
2. A layoff exceeding 6 months; or
3. A reduction in hours of work of individual employees of more than 50 percent during each month of any six-month period.

An exception to this definition of employment loss is a case where a worker is reassigned or transferred to employer-sponsored programs, such as retraining or job search activities, and the reassignment does not constitute an involuntary termination or a constructive discharge, and the employee continues to be paid.

Facility and Operating Unit: A facility refers to a separate building or buildings. An operating unit refers to an organizationally or operationally distinct product, operation, or specific work function within or across facilities at the single site. Whether a specific unit within an employer's organization is an operating unit depends on such factors as collective bargaining agreements, the employer's organizational structure, and industry understandings about what constitutes separate work functions.

Mass Layoff: The term "mass layoff" means a reduction in force that:

1. Does not result from a plant closing; and
2. Results in an employment loss at the single site of employment during any 30-day period for:
    a. At least 50-499 employees if they represent at least 33% of the total active work-force, excluding any part-time employees; or
    b. 500 or more employees (excluding any part-time employees). (In this case, the 33% rule does not apply.)

Part-Time Worker: A part-time worker is an employee who:

- Averages less than 20 hours per week; or
- Has been employed for fewer than six of the last 12 months before the notice is due.

Plant Closing: A plant closing is 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 at the single site of employment during any 30-day period for 50 or more employees, excluding part-time employees. All of the employment losses do not have to occur within the unit that is shut down. For example, if the 45-person accounting department in a firm is eliminated and, as a result of the accounting department's closing, five positions in the clerical support staff are eliminated, a covered plant closing has occurred.

Single Site of Employment: The term "single site of employment" may refer to:

1. 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. Also, several single sites of employment may exist within a single building if separate employers conduct activities within the building;
2. Separate buildings or areas within reasonable geographic proximity and share staff and equipment; or
3. For workers who primarily travel:
    - a home base from which work is assigned; or
    - a home base to which workers report when:
        - a worker's primary duties require travel from point to point;
        - the worker's duties are outstationed; and
        - the worker's primary duties are outside any of the employer's regular employment sites.

State Rapid Response Dislocated Worker Unit: The term "State Rapid Response Dislocated Worker Unit" means a unit designated in each state by the governor under the Workforce Investment Act.

DIRECTORY OF INFORMATION AND CONTACTS

The following links connect you to detailed explanations about the WARN Act and other relevant information:

WARN Act Regulations: www.dol.gov/dol/compliance/comp-warn.htm

WARN elaws Advisor: www.dol.gov/elaws/

WARN Act Fact Sheet: www.doleta.gov/programs/factsht/warn.htm

Workforce Investment Act Facts: www.doleta.gov/usworkforce

Dislocated Worker Services: www.doleta.gov/layoff

Employee Benefits Security Administration: www.dol.gov/ebsa

Employee Retirement and Income Security Act (ERISA): www.dol.gov/ebsa/regs

America's Job Bank (AJB)®: www.careeronestop.org

The following links connect you to contact information in your state and local area:

State Rapid Response Dislocated Worker Units: www.doleta.gov/layoff/e_sdwuc.asp

State Workforce Investment Act Liaisons: www.doleta.gov/us/statecon.htm

One-Stop Career Centers in Your Area: www.servicelocator.org

If you do not have Internet access, please call the National Toll-Free Help Line at 1-877-US-2JOBS (TTY 1-877-889-5627) to receive state and local contact information. You may also visit your local One-Stop Career Center to use the Internet to find information and services to help you.

1-888-469-JOBS (5627)

713-688-6890 Employer Services

YOU CAN ALSO VISIT US ON THE INTERNET

@ **www.wrksolutions.com**

Workforce Solutions

226-WARN-E
WARN Act Booklet