A Practical Guide to Workforce Reductions

Even before the tragic events of September 11, many employers contemplated significant corporate restructuring and downsizing in response to unfavorable economic conditions. Workforce reductions, facility closings, business consolidations, and comparable actions frequently give rise to a host of legal issues, including liability under plant closing and mass layoff statutes, and the potential for discrimination claims.

This article is intended to provide a practical guide to areas of particular concern in corporate restructuring and downsizing situations, including the federal Worker Adjustment and Retraining Notification (WARN) Act and state plant closing/mass layoff laws, and anti-discrimination laws.

The WARN Act

The WARN Act requires employers to provide all affected non-union employees, representatives of unionized employees, and designated state and local government officials with at least 60 calendar days written notice prior to any covered "plant closing" or "mass layoff" occurring at a "single site of employment." The basic formula triggering an obligation to provide WARN notice involves four elements built into WARN's definitions of "plant closing" and "mass layoff." In essence, advance notification must be provided whenever:

- There are "employment losses" (i.e., terminations, layoffs exceeding 6 months, or more than a 50% reduction in hours of work during each month of a 6-month period);
- Which affect the requisite number of full-time employees;
- Over a rolling 90-day (or, in some cases, a 30-day) period;
- Which occur at or within a "single site of employment."

**Plant Closing:** A "plant closing" occurs when there are 50 or more "employment losses" for full-time employees and these employment losses are the result of 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.

**Mass Layoff:** A "mass layoff" occurs if there are "employment losses" for a minimum of 50 full-time employees and at least 33% of the full-time employees at a "single site of employment," or if 500 or more full-time employees experience employment losses within the applicable time period.

**Damages and Penalties for Failure to Comply With WARN:** An employer that violates WARN is liable to each affected employee who suffers an "employment loss" as a result of the plant closing or mass layoff for back pay for each day of the violation (e.g., up to 60 days, although many courts have held that the liability is for the number of work days in the 60-day period), and for benefits due under an employee benefit plan, including the cost of medical expenses incurred during the employment loss which would have been covered under an employee benefit plan if the employment loss had not occurred. Any employer who violates WARN by not providing adequate notice to a unit of local government is subject to a civil penalty of not more than $500 for each such day of the violation (i.e., up to $30,000 over 60 days). WARN may be enforced by private litigants (e.g., through a class action), and in addition to back pay and benefits, courts may provide to prevailing parties reasonable attorneys’ fees as part of the cost of any litigation under WARN.
"Issue Spotting" Checklist

The following checklist is intended to highlight issues to consider in determining whether WARN notice is required:

1. WARN generally applies only to private employers. A public employer that operates a commercial enterprise also may be covered. To be potentially subject to WARN, an employer must have 100 or more full-time employees, or 100 or more employees who in the aggregate work at least 4,000 hours per week excluding overtime - counting all employment sites.

2. Analyze workforce reductions under both the "plant closing" and "mass layoff" formulas. If an employer has suffered a covered plant closing, it should not "double count" the affected employees when considering whether other employment losses constitute a mass layoff.

3. To determine if enough employees will be affected by a "plant closing" or "mass layoff" to trigger WARN, count all "employment losses"(involving full-time employees) at the "single site of employment" over the next 90 days. If the employer can establish that the employment losses within the 90-day period will be the result of separate and distinct causes, then a 30-day aggregation period is appropriate. Alternatively, if there are enough employment losses within any 30-day period to trigger WARN, a 30-day aggregation period should be used.

4. "Part-time employees" are not counted in determining whether WARN has been triggered. However, if an employer has a WARN-covered event at an employment site, part-time employees are entitled WARN notice on the same basis as full-time employees. "Part-time employees" are employees employed for an average of fewer than 20 hours per week (over the 90 days prior to when WARN notice would be due) or employees employed for less than 6 of the 12 months preceding the date that WARN notice would be required.

5. The entire "plant" does not have to close to give rise to a covered "plant closing." A "plant closing" can involve the shutdown of a discrete "operating unit" (e.g., department, product line, function) if 50 or more full-time employees are affected.

6. Keeping a "skeleton crew" at a plant (e.g., for windup or maintenance activities) will not avoid an otherwise covered "plant closing."

7. A short-term holiday plant shutdown will not be a WARN event.

8. In calculating whether WARN is triggered, contiguous facilities (e.g., part of a campus or office park) typically are counted together as a "single site of employment." Facilities which are within a "reasonable geographic proximity" of each other may be counted together when they undertake the same functions, share employees and equipment, and have common management and administration.

9. Employees who, prior to a job loss, are offered transfers within a "reasonable commuting distance" (with a break in employment of less than 6 months) as part of a corporate relocation or consolidation are not counted as suffering an "employment loss" - even if the employee declines the offer. Similarly, there is no "employment loss" when the employer offers to transfer the employee to any other site (with a break in employment of less than 6 months), regardless of distance, and the employee accepts the offer.
10. Traveling or "outstationed" employees are counted as part of their home office for WARN purposes.

11. Employees who suffer a "technical termination" as part of a sale of the business (i.e., are terminated by the seller but are rehired by the buyer shortly after the sale) do not suffer an "employment loss."

12. Employees participating in a strike or a (lawful) lockout do not need to be provided WARN notice.

13. Temporary employees who were hired with the understanding that their employment would be limited to a particular project or undertaking do not need to be provided WARN notice. However, "permatemps" (i.e., temporary employees hired for an indefinite duration) likely are due WARN notice.

14. An employer who suffers a "natural disaster" (e.g., tornado, flood, fire) resulting in a covered "plant closing" or "mass layoff" still must give as much WARN notice "as is practicable" - which may be less than a full 60 days' notice - along with a "brief statement of the basis for reducing the notification period."

15. In "plant closing" (not "mass layoff") situations where WARN notice would have been required, the employer (a "faltering company") was actively seeking capital to avoid or postpone a shutdown, and the employer reasonably believed that giving WARN notice would have precluded it from obtaining the needed capital, the employer still must give as much WARN notice "as is practicable" - which may be less than a full 60 days' notice - along with a "brief statement of the basis for reducing the notification period."

16. WARN expressly encourages employers to give voluntary WARN notice in situations where notice is not required. Therefore, in "close situations," an employer should try to give WARN notice if possible; it is not conceding liability if it does so.

17. Even if an employer has orally told affected employees of "plant closing" or "mass layoff" - indeed, even if it is otherwise clear that such employees know that they will lose their jobs - formal written WARN notice is still required.

18. The fact that affected employees will be receiving severance pay does not obviate the need to provide notice of a WARN-covered event. Moreover, pre-existing severance obligations cannot be used to offset liability for a failure to give WARN notice. (However, in certain circumstances discussed below, WARN liability can be counted against the amount of severance to be paid).

19. If otherwise entitled to a WARN notice, even the Chief Executive Officer of the employer (and other members of senior management) must be given notice.

**WARN's "Unforeseeable Business Circumstances" Exception**

Given the uncertain economic climate, WARN's "unforeseeable business circumstances" exception deserves particular attention.
It is important to recognize that while WARN terms certain "unforeseeable business circumstances" as an "exception" to WARN, this is a misnomer. It does not mean that an employer able to invoke the exception is relieved from all WARN liability or obligation to provide notice. Rather, it means that such an employer may give as much notice "as is practicable" - which may be less than a full 60 days' notice. The employer's WARN notice also must include "a brief statement of the basis for reducing the notification period."

The Department of Labor's WARN regulations indicate that the essence of "unforeseeable business circumstances" involves sudden, dramatic (and, of course, unforeseeable) events. Examples may include the unexpected termination of a major contract, a strike at a major supplier of the employer, loss of financing, a government-forced closure (e.g., due to public health and safety), a major change in business conditions such as price, cost, or declines in orders, or force majeure.

The Department of Labor's test of "unforeseeability" focuses on the employer's business judgment. An employer must exercise commercially reasonable business judgment as would a similarly situated employer in predicting the demands of its particular market. However, the employer is not required to accurately predict general economic conditions that also may affect demand for its products or services.

There is little doubt that the force majeure situation immediately resulting from September 11 constituted "unforeseeable business circumstances." In many sectors of the economy, the full impact of those events may still not have been felt. However, the further in time since the occurrence of a force majeure event, the more likely it is that a judge or jury will conclude that an employer has had time to "react" to the event and to plan accordingly.

Moreover, because the appropriateness of the "unforeseeable business circumstances" exception (including whether the employer indeed gave as much WARN notice as was "practicable") is a fact-intensive, case-by-case inquiry, in a litigation situation it can be difficult to obtain summary judgment. Accordingly, rather than invoking the exception, an employer should consider whether it can comply with WARN by providing a full 60-day notice.

**Elements of WARN Notice**

The Department of Labor has developed regulations specifying the content of WARN notice to affected non-union employees, union representatives of affected unionized employees, and the appropriate state and local government officials (i.e., the chief elected municipal or county official - depending upon which governmental unit receives the most taxes from the employer - and the state dislocated workers' unit). The information that must be provided includes:

- The name and address of the site where the WARN event will occur;
- The name, address, title, and telephone number of the company official to contact for further information;
- A statement as to whether the planned action is expected to be permanent or temporary and, if the entire facility is to be closed, a statement to that effect;
- An indication of whether "bumping rights" (i.e., the right to displace other workers) exist;
- The expected date when the plant closing or mass layoff will commence;
- Information regarding which employees will be affected and when (i.e., the schedule for employment losses); and
- Identification of any union representatives of affected employees.
Individual WARN notice does not have to be provided to those employees represented by a union. Rather, notice must be given to the chief elected officer of the local union and, if the international union (or some other union entity) is a party to the collective bargaining agreement, to the chief elected officer of that entity, as well. The union is then responsible for notifying its affected members. The Department of Labor's WARN regulations describe the information which must be provided to the union for it to be able to effectively notify those employees it represents.

WARN notice is effective upon receipt, not mailing. Consequently, an employer must use a reliable delivery method (e.g., hand delivery, inclusion in pay envelope, U.S. mail, overnight delivery) which ensures that affected employees receive notice at least 60 days in advance of their employment separation.

Because of the possibility of litigation surrounding the workforce reduction, an employer should use a delivery method that can be documented and used in court (e.g., an acknowledgment signed by the employee).

It is possible to send WARN notice by electronic mail. However, employers should consider the potential litigation downside of e-mail. The employer will have to establish that affected employees actually received the WARN notice (e.g., that the employee had a computer, the employee was computer literate, the employee - and not someone else - opened the e-mail instead of deleting it without opening it, the employee understood that he/she would be suffering an employment loss). Additionally, employers should recognize that some judges or juries might consider a WARN mass e-mail to be insensitive.

WARN notice must be given as the result of a genuine event. In contrast, purely preventative "rolling" or "periodic" notice (e.g., an employer routinely including a WARN notice with every paycheck) does not comply with WARN.

As soon as an employer becomes aware that an affected employee's employment loss will actually occur after the date announced in a prior WARN notice, it must provide "supplemental" notice (as described in the Department of Labor's regulations) if the new separation date is within 60 days after the original date. A "supplemental" WARN notice does not have to be for an additional 60 days. However, if the affected employee's new separation date will be more than 60 days after the original date, the employer must give a new, full WARN notice of at least 60 days.

**Common Business Situations Involving WARN**

- We need to reduce our workforce next week (or tomorrow) so we don't have time to give WARN notice.

Assuming that the workforce reduction is a covered WARN event, the employer should still give as much notice as possible. Any advance notice serves to reduce the WARN liability period. Additionally, the employer should determine whether any of the notice-reduction "exceptions" (e.g., "unforeseeable business circumstances," "faltering company," "natural disaster") is appropriate and should invoke it (or, indeed, more than one).

- We need to reduce our workforce in 2-3 months but have no idea now who will be selected.

The safest course is to provide WARN notices to all employees who might be affected by the
WARN event. However, because many courts (and the Department of Labor) strongly disfavor "blanket" notices, the employer should undertake a good-faith effort to narrow the group of potentially affected employees as much as possible. In this regard, the employer should consider the impact upon the business of telling most or all of the workforce that it is anticipated that they will be losing their jobs. (As the employer determines that certain employees will not, in fact, be suffering an employment loss, it can - and probably should - notify them of the changed circumstances.)

- We have flexibility regarding the timing of employment losses.

In most instances, it does not violate WARN for an employer to structure the timing of employment losses to avoid a WARN event (e.g., staggering employment losses over longer than a 90-day period). However, some courts have held that if an employer knows that a facility will be closed, it cannot avoid WARN's notice obligations in this manner.

- Are there ways to reduce our workforce without causing a WARN event?

Other than structuring the timing of employment losses, an employer might consider reducing employees' hours instead of implementing a layoff. A reduction in hours of less than 50% in each month of a 6-month period does not constitute an "employment loss." Likewise, an employer could layoff employees for less than 6 continuous months to avoid an "employment loss."

- What is the best way to satisfy WARN liability?

If an employer has to get employees out of the workplace (e.g., because there is no work for them) but does not have time to provide WARN notice prior to doing so and is unable to invoke any of the notice-reducing "exceptions" (e.g., "unforeseeable business circumstances"), it can put employees on leave with pay and benefits until an employment separation date at least 60 days in the future. (Although the issue is not free from doubt, WARN should not prevent the employer from reducing compensation during the leave period if it so chooses, as long as the reduction does not give rise to a constructive discharge.) Under this scenario, the employer would give the employees WARN notice and essentially "assign" them not to come to work for the notice period (unless the employer needs to utilize them). With respect to compensation and seniority accrual, the employees would be treated as if they were still actively at work. This allows the employer to comply with WARN. To the extent that the employer can give any WARN notice, it should do so in order to reduce the paid leave period as much as possible. Further, if any employees on "notice" or "administrative leave" voluntarily resign, the employer is relieved of any further obligation to them under WARN.

Alternatively, consistent with WARN, an employer can terminate employees and "payoff" its WARN liability by providing the pay and benefits the employees would have received if they had been working during the period for which notice was not given (e.g., up to 60 days). Most courts hold that have held that the liability is for the number of work days during that period. Under WARN, this payment is to be made within 3 weeks of the employees' employment losses.

In order to satisfy WARN, such payments must be "voluntary and unconditional [and] ... not required by any legal obligation[.]") In other words, an employer cannot offset WARN liability with pre-existing severance obligations. However, if it is able to do so, an employer can amend its severance plan prior to the employees' job losses so that the amount of any severance is reduced by WARN payments.
(or "notice leave" compensation). The employer must keep WARN and severance payments administratively separate (e.g., through separate checks and employee acknowledgments). Further, if the employer is seeking a release from the employee, there must be consideration for the release that is separate from the "voluntary and unconditional" WARN payment.

**State Plant Closing/Mass Layoff Laws**

Alabama, California, Colorado, Connecticut, Hawaii, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, New York, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Wisconsin, and Wyoming have some form of a plant closing/mass layoff statute. Some municipalities such as Philadelphia also have plant closing/mass layoff laws. Many of these laws do not require any different obligations than WARN. However, some of these laws do contain different requirements. For example, Wisconsin's plant closing/mass layoff statute can be triggered by 25 (not 50) full-time employees or at least 25% (not 33%) of the full-time workforce suffering employment losses, whichever is greater. Therefore, an employer contemplating a workforce reduction in these states should examine the pertinent state law(s).

**Avoiding Discriminatory Workforce Reductions**

Workforce reductions, facility closings, and comparable actions frequently give rise to discrimination claims, particularly where only part of a facility is affected (or where some but not all employees are retained, offered transfer, etc.).

**Discrimination Laws**

Title VII of Civil Rights Act of 1964: prohibits discrimination on the basis of race, color, religion, sex, and national origin.

- Age Discrimination in Employment Act (ADEA): prohibits discrimination on the basis of age.
- National Labor Relations Act (NLRA): prohibits discrimination on the basis of union activities.
- Americans with Disabilities Act (ADA): prohibits discrimination on the basis of disability.
- State Laws: many states have statutes or constitutional provisions prohibiting discrimination on the basis of other classifications, e.g., sexual orientation.

**Discrimination "Issue Spotting" Checklist**

The following guidelines may improve an employer's ability to defend its actions in discrimination litigation resulting from a fundamental business change.

1. Review company bulletins and other documents to ensure there are no inadvertent references to age or another "protected" classification.

2. Develop non-discriminatory criteria to be used in determining which employees are to be affected by the workforce reduction. Criteria may include non-discriminatory criteria used in prior layoffs, seniority, and performance factors. Draft internal memoranda discussing criteria.

3. Workforce reduction goals should be stated in numbers of employees to be reduced, rather than specific dollar amounts to be saved.
4. Review any "performance rating" systems or other facially neutral criteria for possible "adverse impact" discrimination.

5. Recent college graduates or other categories of mostly younger employees should not be insulated from reduction decisions.

6. Do not disfavor higher paid employees, since higher salaries can be associated with older employees.

7. Ensure that the reduction in force in consistent with any company affirmative action program.

8. Two or more management officials should be involved at every level of decision-making during a workforce reduction and during every meeting with affected employees. If possible, the employer should include persons in "protected" classifications, e.g., persons over 40, minorities, and females as part of the decision-making process. This "oversight committee" should keep notes of its deliberations and results and conduct a legal audit of its decisions before they become final.

9. Ensure that voluntary "early out" programs or early retirement incentives are in fact "voluntary" and nondiscriminatory.

10. After reduction decisions are made, document individual decisions based upon selection criteria, and develop an EEO profile of likely affected employees (for disparate impact analysis). Decision-makers should not have access to the EEO profile during selection process. Monitor statistical effects of the reduction in force and be able to provide an explanation for disparities.

11. Employees selected for termination should, to the extent possible, be considered for transfer, relocation or even demotion based on uniformly applied objective criteria (or documented subjective criteria).

12. Develop scripts for exit interviews and written communications, e.g., general reason for downsizing and statement of criteria.

13. Be sensitive to potential claims based on an informal or oral "contract" of continued employment. Review all company benefit programs, employee handbooks, and employment applications, to ensure that a reduction in force will not breach any promises, representations, or commitments.


15. Know the answer to "why me?" In every case, an adversely affected employee's supervisor and other decision-makers should be prepared to accurately explain why every employee was selected for inclusion in the reduction, who made the relevant decisions, what benefits are available, etc.

16. Communicate. Identify a "communications czar" to coordinate communications with employees, union officials, and elected officials.
17. Consider effects on remaining employees. Give employees the "big picture." Try to have a single workforce reduction so that employees will regain a sense of security.

**Conclusion**

Workforce reductions, if handled improperly, have the potential to violate plant closing/mass layoff, anti-discrimination, and other laws. Accordingly, employers should educate themselves regarding their legal obligations, and be sensitive to the impact of a reduction in force on those employees who are let go, and on those who remain.

*By Joshua L. Ditelberg, SHRM Legal Report, March-April 2002*