

## 23. Worker Adjustment & Retraining Notification Act (WARN)

### 1. BACKGROUND

---

Congress enacted the Worker Adjustment and Retraining Notification Act (“WARN”) in 1988 to provide certain protections to employees involved in plant closures and mass layoffs. WARN requires employers to provide at least 60 days advance written notice of covered layoffs and plant closures to affected employees, their representatives, and appropriate local government officials. If the required notice is not given, the employer may be held liable to affected employees for back pay and benefits for the 60-calendar day notice period, as well as civil penalties for failing to notify the local government unit. The U.S. Department of Labor (“DOL”) is authorized to issue interpretive regulations under WARN, and the DOL published regulations in April 1989. However, the DOL is not authorized to investigate complaints or bring suits to enforce WARN. Instead, the Act entitles aggrieved employees to file civil actions for damages incurred by noncompliance with WARN.

### 2. HOW THE LAW WORKS

---

#### 1. COVERAGE

WARN applies to any employer that employs:

1. 100 or more employees, excluding part-time employees, or
2. 100 or more employees, including part-time employees who, in the aggregate, work at least a combined 4,000 hours per week, excluding overtime.

“Part-time employees” are defined as employees who are employed for an average of fewer than 20 hours per week or who have been employed for fewer than 6 of the 12 months before the date on which WARN notice is required.

Workers on temporary layoff or on leave who have a reasonable expectation of recall are counted as employees.

For purposes of determining coverage under WARN (but not whether a particular employment action triggers the notice requirements of WARN), all the facilities of an employer are combined. Coverage also extends to private for-profit and non-profit employers, as well as public and quasi-public entities which operate in a commercial context and are separately organized from the regular government. Regular federal, state, and local government entities that provide public services are not covered.

Individuals entitled to notice include those that are hourly and salaried, as well as managerial and supervisory workers. Business partners, consultants, contract

employees of another employer that are paid by that other employer, and self-employed individuals are excluded.

## 2. WHAT TRIGGERS NOTICE?

A covered employer who anticipates a “plant closing” or “mass layoff,” as defined by the Act, must provide the required 60 days’ advance notice.

1. **Plant Closing** - The term plant closing means 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 for 50 or more employees, excluding part-time employees.
  1. The DOL has interpreted “single site of employment” to include either a single location or a group of contiguous locations. The regulations indicate that the functional relationship between the separate buildings or areas is a determining factor in whether they will be considered a single site. For workers who travel, look to the home base from which work is assigned or to where they report when the worker’s duties are outside any of the employer’s regular employment sites.
  2. A single site of employment may contain a number of distinct operating units. The term “operating unit” refers to an organizationally or operationally distinct product, operation, or specific work function within the single site of employment. Under the plant closing definition, shutdown of an operating unit creating an employment loss for 50 or more employees will require compliance with WARN.
2. **Mass Layoff** - A mass layoff is a reduction in force which is not a plant closing as defined above and which results in an employment loss at a single site of employment during any 30-day period for:
  1. at least 33 percent of the active employees, excluding part-time employees, and
  2. at least 50 employees, excluding part-time employees.

If 500 or more employees (excluding part-time employees) are affected, the 33% requirement does not apply.
3. **Employment Loss** - Both plant closings and mass layoffs require, at a minimum, an employment loss for 50 or more employees before notice must be given. An employment loss under the Act is:
  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% during each month of any 6-month period.

An employment loss does not occur if an employee who is terminated or laid off as a result of a relocation or consolidation of all or a part of the employer's business is offered a transfer to a job within a reasonable commuting distance.

The DOL has adopted the constructive discharge theory from NLRB and Title VII law for determining if an employee's departure is voluntary for purposes of (1) above. Where an employee is pressured to resign or the employer has created a hostile or intolerable work environment, the employee's departure will not be considered voluntary, and the employee will have suffered an employment loss.

4. **The 90 Day Rule** - Generally, employment actions taken within a 30-day period are considered in determining whether a statutory plant closing or mass layoff has occurred. However, under section 3(d) of the Act, employment losses for two or more groups of employees at a single site of employment, each of which individually does not meet the 50 employee or 33 percent minimum, but which in the aggregate exceed the minimum numbers, are considered a single plant closing or mass layoff if they occur within a 90-day period. This section is designed to discourage employers from spacing out layoffs to avoid WARN coverage. The section does not apply if the employer can demonstrate that the employment losses are the result of separate and distinct actions and causes.

### 3. ACTION REQUIRED BY EMPLOYERS

---

#### 1. WHO MUST RECEIVE NOTICE?

WARN requires employers to provide the required notice to each employee representative or collective bargaining agent at the appropriate time. If there is no representative, each affected employee must receive notice. Notice must also be served on the state dislocated worker unit and the chief elected official of the unit of local government in which the layoff or closing occurs. Part-time employees are due notice, even though they are not counted when determining the trigger levels.

#### 2. REQUIREMENTS OF NOTICE

WARN sets forth the specific information that must be included in the mandatory notice. The requirements vary slightly between the notice that must be provided to affected employees, their representative, and local government officials. However, all notices must be in writing. The notice to affected employees must state the date of the separations, whether the separations will be temporary or permanent, whether employees have bumping rights, and the identity of the company official to contact for more information. The notice to the employee representative must have this same information, plus the location

of the plant, the job titles and positions affected, and the individuals holding these positions. The information required in the notice to the local government unit resembles that provided to the union, except the identity of the affected employees is not revealed.

#### 4. ACTION REQUIRED BY EMPLOYERS

---

##### 1. WHO MUST RECEIVE NOTICE?

WARN requires employers to provide the required notice to each employee representative or collective bargaining agent at the appropriate time. If there is no representative, each affected employee must receive notice. Notice must also be served on the state dislocated worker unit and the chief elected official of the unit of local government in which the layoff or closing occurs. Part-time employees are due notice, even though they are not counted when determining the trigger levels.

##### 2. REQUIREMENTS OF NOTICE?

WARN sets forth the specific information that must be included in the mandatory notice. The requirements vary slightly between the notice that must be provided to affected employees, their representative, and local government officials. However, all notices must be in writing. The notice to affected employees must state the date of the separations, whether the separations will be temporary or permanent, whether employees have bumping rights, and the identity of the company official to contact for more information. The notice to the employee representative must have this same information, plus the location of the plant, the job titles and positions affected, and the individuals holding these positions. The information required in the notice to the local government unit resembles that provided to the union, except the identity of the affected employees is not revealed.

##### 3. TIME OF NOTICE?

The mandatory notice under WARN must be given at least 60 calendar days prior to a plant closing or mass layoff. If all employees are not terminated on the same date, the date of the first termination within the applicable 30-day or 90-day period triggers the 60-day notice requirement.

#### 5. TIPS FOR EMPLOYERS

---

##### 1. DETERMINE IF WARN APPLIES

**If layoffs or terminations are planned, employers should analyze the number of employees involved to determine if WARN's notice requirements are applicable. WARN contains a number of exceptions and technical requirements. Consequently, legal counsel should be consulted in assessing the impact of WARN on an employment decision.**

##### 2. PLANT CLOSING V. MASS LAYOFF

In analyzing employment decisions for WARN coverage, employers should determine if a layoff effectively shuts down an operating unit, making the layoff a “plant closing” under WARN. The distinction between plant closings and mass layoffs is significant, since the definition of plant closing is met if 50 employees suffer an employment loss, while the mass layoff definition has the additional requirement that at least 33 percent of the employees at the employment site be affected, unless 500 employees are laid off.

### **3. SUPERVISORS**

Unlike the National Labor Relations Act, supervisors are included as employees under WARN. Therefore, supervisors should be counted when computing whether WARN applies, and they should receive the required notice if they are laid off in a plant closing or mass layoff covered by WARN.

### **4. PART-TIME EMPLOYEES**

WARN regulations define “part-time employees” as employees who are employed for an average of fewer than 20 hours per week or who have been employed for fewer than 6 of the 12 months preceding the date on which notice is required. Part-time employees are included in calculating the 100-employee coverage threshold but are not counted in determining whether a plant closing or mass layoff will occur. If a plant closing or mass layoff occurs, part-time employees are entitled to the required notice.

### **5. SAMPLE NOTICES**

Sample WARN notices to the collective bargaining agent, individual employees, and state and local government officials are found following this chapter.

Mayor and/or Highest Elected Official of the unit of local government where the site is located

Re: Announcement of Planned Action

Dear [Mayor/Chair \_\_\_\_\_]:

We are writing to give you notice that there will be a total closure of the [Name of Facility] facility located at [Street Address, City, State] on [Date]. The entire facility will be closed and all employees at the facility will be impacted. This closure is expected to be [permanent/temporary]. The expected date of the first separation will be [Date]. OR We are writing to give you notice that there will be a mass layoff at the [Name of Facility] facility located at [Street Address, City, State] on [Date]. This mass layoff is expected to be [permanent/temporary]. The expected date of the first separation will be [Date].

All affected employees have been notified of their separation dates and that their separation from employment will be [permanent/temporary]. Those employees are expected to be separated from employment beginning on [Date], with all separations accomplished by [Date].

The [following/attached] is a list of the job positions and number of individuals who will be affected by the [mass layoff/closure] along with the anticipated schedule for job losses:

Job Title	Number of Employees Affected	Date of Separation
-----------	------------------------------	--------------------

[Employer] [is/is not] part of a union [state name of local union, chief elected officer of union, and address of chief elected officer, if union affiliated]. There [will/will not] be any bumping rights for the affected employees, that is, employees [will/will not] be able to displace more junior employees out of their job positions as a result of this [closure/mass layoff].

If you have any questions or want additional information concerning this matter, please contact [Name of Person and Title] at [telephone number] or [e-mail address].

Sincerely,

---

[Name of Company Representative]

Name and Address of Employee

Re: Announcement of Planned Action

Dear [Employee Name]:

We are writing to inform you that [the Name and Address of Facility] will close on [Date]. The entire facility will be closed and all employees at the facility will be impacted. This closure is expected to be [permanent/temporary]. The expected date of the first separation will be [Date]. OR We are writing to inform you that there will be a mass layoff at the [Name and Address of Facility] on [Date]. This mass layoff is expected to be [permanent/temporary]. The expected date of the first separation will be [Date].

We regret to inform you that your position will be eliminated [on the separation date above OR on another specific date that is at least 60 days from the notice date OR between Start Date and End Date {must span a 14-day period}].

As you know, [Employer Name] [does/does not] have a job bumping system, that is, employees [will/will not] be able to displace more junior employees out of their job positions as a result of this [closure/mass layoff].

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

If you have any questions or want additional information concerning this matter, please contact [Name, Title] at [telephone number] or [e-mail address].

Sincerely,

---

[Name of Company Representative]

North Carolina Department of Commerce  
 Division of Workforce Solutions  
 Attention: Rapid Response Team  
 4316 Mail Service Center  
 Raleigh, NC 27699-4316

Re: Announcement of Planned Action

Dear Rapid Response Team:

We are writing to give you notice that there will be a total closure of the [Name of Facility] facility located at [Street Address, City, State] on [Date]. The entire facility will be closed and all employees at the facility will be impacted. This closure is expected to be [permanent/temporary]. The expected date of the first separation will be [Date]. OR We are writing to give you notice that there will be a mass layoff at the [Name of Facility] facility located at [Street Address, City, State] on [Date]. This mass layoff is expected to be [permanent/temporary]. The expected date of the first separation will be [Date].

All affected employees have been notified of their separation dates and that their separation from employment will be [permanent/temporary]. Those employees are expected to be separated from employment beginning on [Date], with all separations accomplished by [Date].

The [following/attached] is a list of the job positions and number of individuals who will be affected by the [mass layoff/closure] along with the anticipated schedule for job losses:

Job Title	Number of Employees Affected	Date of Separation
-----------	------------------------------	--------------------

[Employer] [is/is not] part of a union [state name of local union, chief elected officer of union, and address of chief elected officer, if union affiliated]. There [will/will not] be any bumping rights for the affected employees, that is, employees [will/will not] be able to displace more junior employees out of their job positions as a result of this [closure/mass layoff].

If you have any questions or want additional information concerning this matter, please contact [Name of Person and Title] at [telephone number] or [e-mail address].

Sincerely,

---

[Name of Company Representative]



[Name and Address of Union Chief Official]

Re: Announcement of Planned Action

Dear [Union Chief]:

We are writing to give you notice that there will be a total closure of the [Name of Facility] facility located at [Street Address, City, State] on [Date]. The entire facility will be closed and all employees at the facility will be impacted. This closure is expected to be [permanent/temporary]. The expected date of the first separation will be [Date]. OR We are writing to give you notice that there will be a mass layoff at the [Name of Facility] facility located at [Street Address, City, State] on [Date]. This mass layoff is expected to be [permanent/temporary].] The expected date of the first separation will be [Date].

Employees are expected to be separated from employment beginning on [Date], with all separations accomplished by [Date].

The anticipated schedule for job losses is as follows:

{Specify date(s) of separation from employment and, if all separations are not occurring at once, names of employees being separated on each date.}. Attached is a list of the job titles and names of the workers currently holding those affected jobs who will be separated according to the above schedule.

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

If you have any questions or want additional information concerning this matter, please contact [Name and Title], at [telephone number] or [e-mail address].

Sincerely,

---

[Name Of Company Representative]