



The Worker Adjustment and Retraining Notification Act (WARN)

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Summary

Congress has passed legislation to facilitate the reemployment of workers who through no fault of their own are let go by their employers. Among these laws is the Worker Adjustment and Retraining Notification (WARN) Act, P.L. 100-379, enacted in 1988. The WARN Act requires employers to provide written notice to displaced workers or their representatives, state dislocated worker units or entities designated by the state to carry out rapid response activities, and the chief elected official of a unit of local government at least 60 days before a plant closing or mass layoff is expected to occur. Shorter notice may be provided in three instances. Other exceptions to and exemptions from the notification requirement exist.

Relatively small businesses and small temporary layoffs are not subject to the WARN Act. Firms with 100 or more employees, excluding part-time employees, generally must provide advance notice if a mass layoff is expected to exceed six months. A mass layoff is an employment loss at a job site within any 30-day period affecting (1) 50-499 employees (excluding part-timers) if they make up at least one-third of an employer's workforce (excluding part-timers), *or* (2) at least 500 employees (excluding part-time employees). A plant closing is a shutdown of a work site that produces job losses for at least 50 employees (other than part-timers) within any 30-day period. Although part-time employees are not counted toward the act's size thresholds, they are entitled to advance notice.

Employees, their representatives, or units of local government can bring civil actions against employers thought to have violated the act. The Department of Labor (DOL) does not have any investigative or enforcement authority. The maximum liability of employers is back pay and benefits for each day that notice was not provided, although the amount of the penalty may be reduced.

Congressional interest in the WARN Act has renewed during the current decade due in part to growth in offshore outsourcing, perceived shortcomings of the statute, and the onset of a recession in December 2007. On June 25, 2009, the FOREWARN Act (H.R. 3042 and S. 1374) was introduced. The bills would require firms employing at least 75 employees to provide notice 90 days before a covered mass layoff or plant closing is to take place. As a result of lowering the size threshold for employer coverage under the act from 100 full-time employees and lowering the size threshold for covered employment losses from at least 50 full-time employees, H.R. 3042 and S. 1374 would expand the scope of the WARN Act. The bills also would authorize DOL to attempt to resolve administratively complaints of WARN Act violations and to bring civil actions on behalf of workers. Further, the Secretary of Labor and the governor of the state in which affected worksites are located would be added to those receiving notices. H.R. 3042 and S. 1374 would in turn require the Secretary to notify the appropriate Senators and House Members of impending layoffs and closings not later than 15 days after employers provided the notice to DOL. The bills would increase to two days the back pay penalty for violations of the notice requirement to which employers are subject as well.

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The Worker Adjustment and Retraining Notification (WARN) Act is one of the pieces of legislation that Congress has passed to facilitate the reemployment of workers who through no fault of their own lose their jobs. Other statutes include the Workforce Investment Act, which provides a variety of reemployment services to dislocated workers (e.g., training), and the Trade Adjustment Assistance program for workers, which provides reemployment services among other assistance to a subset of job losers (i.e., those harmed by trade).¹

Although “retraining” appears in its title, the WARN Act does not authorize training. It instead requires employers that intend to carry out plant closings or large-scale long-lasting layoffs to provide advance notice to enable affected workers to more quickly find new jobs.

Legislative Activity: Past and Present

Legislation was first introduced at the federal level in 1973 to require advance notice of plant closings and mass layoffs.² The issue proved to be contentious and more than a decade elapsed before Congress enacted the WARN Act (P.L. 100-379) in 1988 without President Reagan’s signature.³ The law became effective in February 1989. It generated fairly little interest during a period marked by a brief mild recession at the outset of the 1990s and then by the longest economic expansion in the nation’s history (120 months).

Interest has renewed in the WARN Act during the current decade. Initially, policymakers grappling with the issue of offshore outsourcing or offshoring of U.S. jobs to other countries introduced legislation to amend the statute.⁴ S. 2090, which was introduced in 2004, would have included under the law employer actions that had the effect of creating, shifting, or transferring positions or facilities outside the United States and in so doing cause a job loss for at least 15 employees during any 30-day period. In addition, the bill would have lengthened the notification period and lowered the firm-size threshold for mass layoffs. It also would have required the Secretary of Labor to issue statistical reports based on the written notices of plant closings, mass layoffs, and offshoring that covered employers would have had to provide the Secretary. (Under current law, employers do not provide notices to the federal government.)

Bills subsequently were introduced during the 110th Congress that appeared to take aim at perceived shortcomings of the statute that has not been substantively amended since its inception over 20 years ago.⁵

¹ For information on these statutes, see CRS Report RL33687, *The Workforce Investment Act (WIA): Program-by-Program Overview and Funding of Title I Training Programs*, by David H. Bradley, and CRS Report RL34383, *Trade Adjustment Assistance (TAA) for Workers: Current Issues and Legislation*, by John J. Topoleski.

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

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

⁴ For information on offshoring, see CRS Report RL32292, *Offshoring (a.k.a. Offshore Outsourcing) and Job Insecurity Among U.S. Workers*, by Linda Levine.

⁵ For information on the act’s perceived shortcomings, see U.S. Government Accountability Office, *The Worker Adjustment and Retraining Notification Act: Revising the Act and Educational Materials Could Clarify Employer* (continued...)

- On October 18, 2007, the House Committee on Education and Labor marked up and ordered to be reported H.R. 3796 (amended), the Early Warning and Health Care for Workers Affected by Globalization Act. It would have revised the WARN Act to require more firms to provide notice to more workers terminated en masse by retaining the firm-size threshold of 100 employees but including part-timers, and covering plant closings of at least 25 employees including part-timers.⁶ H.R. 3796 also would have lengthened the notice period to 90 days before the event, increased the back pay penalty for violation of the statute, and authorized the Secretary of Labor to bring civil action on behalf of workers. Further, the bill would have added to those who must receive notices the Secretary of Labor and appropriate U.S. Senators and House Members (i.e., those representing persons working at sites where covered mass layoffs and plant closings will take place).
- Shortly thereafter (October 31, 2007), the House passed H.R. 3920, which would have reauthorized the Trade Adjustment Assistance (TAA) programs for workers and firms and amended the WARN Act. Changes made by H.R. 3920 to the advance notice statute were similar to those proposed in H.R. 3796 as well as H.R. 3042 and S. 1374, the FOREWARN Act of 2007.

Interest in the WARN Act during the 111th Congress likely has been further fueled by the onset of the recession in December 2007. The FOREWARN Act (H.R. 3042 and S. 1374) was introduced on June 25, 2009. The bills would require firms employing at least 75 employees to provide notice 90 (rather than 60) days before a covered mass layoff or plant closing is to occur. As a result of lowering the size threshold for employer coverage under the act from 100 employees (excluding part-timers) and lowering the size threshold for employment losses from at least 50 employees (excluding part-timers),⁷ the bills would expand the scope of the WARN Act. H.R. 3042 and S. 1374 also would authorize the Secretary of Labor to receive, investigate, and attempt to resolve administratively complaints of WARN Act violations and to bring civil action on behalf of workers. Further, the Secretary of Labor and the governor of the state in which affected worksites are located would be added to those receiving notices. The Secretary would in turn be required to notify the appropriate Senators and House Members of the impending layoffs and closings not later than 15 days after employers provided the notice to DOL. The Secretary is also directed to maintain on the department's website a guide of benefits and services of which affected workers might avail themselves and immediately transmit the guide to employers who provide advance notice to the Secretary. For their part, employers are to immediately provide affected employees with the information contained in the guide. Additionally, H.R. 3042 and S. 1374 set forth the information employers must include in their notices and institute a penalty if employers fail to properly post in the workplace information about the WARN Act. The bills would increase the back pay penalty for violations of the notice requirement to which employers

(...continued)

Responsibilities and Employee Rights, GAO-03-1003, September 2003.

⁶ The act defines part-time employees as persons who on average work under 20 hours per week *or* who have been employed fewer than six months.

⁷ The bill defines mass layoff as a reduction in force at a single employment site that causes 25 or more employees at the site to lose their jobs during any 30-day period. Plant closing is defined as a shutdown of a single site of employment, or one or more facilities or operating units within a single site, that causes an employment loss at the site involving at least 25 employees during any 30-day period.

are subject as well. Firms would be excused from the advance notice requirement if the employment loss is directly due to a terrorist attack on the United States.

Summary of the WARN Act

The key provisions of the act are described below and at 29 USC Chapter 23.

Length and Intent of the Act's Advance Notice Requirement

Generally, the WARN Act requires employers to provide written notice to affected workers or their representatives at least 60 days before a plant closing or mass layoff is expected to occur. Workers affected by a mass layoff would include those who might be “bumped” from their jobs by more senior workers whose positions had been eliminated.

State dislocated worker units or entities designated by the state to carry out rapid response activities must be forewarned as well so they may provide assistance under the Workforce Investment Act for example. The chief elected official of a unit of local government also must receive notice 60 days before a plant closing or mass layoff is initiated. (See the box, “Three Reasons for a Notice Period of Less Than 60 Days,” for the three instances in which the advance notice period can be of shorter duration.)

The WARN Act does not supersede collective bargaining agreements or other laws whose terms concerning advance notice or related employee rights are superior to those of the statute (e.g., the provision of severance payments). If a state plant closing law requires employers to provide more than 60 days advance notice, the federal law's notice period runs concurrently with the state's requirement.

P.L. 100-379's advance notice period is intended to afford employees time to find other jobs, obtain retraining or otherwise adjust to their soon-to-be-changed employment situation. As opposed to the termination of a few employees, large numbers of workers released into a local labor market at approximately the same time would produce keen competition for job vacancies. The job-seeking efforts of displaced workers could be particularly difficult if they are released from a declining industry in which nearby firms producing similar goods or services can offer few employment opportunities. Similarly, a geographic area with a shrinking or stagnant job base could have much more trouble absorbing many workers laid off at once as opposed to a few employees let go from time to time.

Three Reasons for a Notice Period of Less Than 60 Days

The faltering company exception: Employers can provide reduced notice for plant closings but not for mass layoffs, if they had been seeking financing or business for their faltering enterprises, thought they had a realistic chance of obtaining funds or new business sufficient to allow the facilities to remain open, and believed in good faith that giving notice would have prevented them from getting the capital or business necessary to continue their operations.

The unforeseeable business circumstances exception: Employers can provide reduced notice if they could not reasonably foresee the business circumstances that provoked the plant closings or mass layoffs. Dire circumstances that occurred without warning and that were outside the employer's control could include (1) a major client terminating a large contract with the employer, (2) a strike at a supplier of key parts to the employer or (3) the swift onset of a deep economic downturn or a non-natural disaster (e.g., a terrorist attack).

The natural disaster exception: The occurrence of floods, earthquakes, droughts, storms, and similar effects of nature fulfill this exception to the 60-day advance notice requirement for plant closings or mass layoffs. If closings or layoffs are indirectly due to natural disasters, the exception would not apply; however, the unforeseen business circumstances exception might.

Whom Does the Act Cover?

Relatively small employers are not subject to the WARN Act. Private for-profit and non-profit employers with 100 or more employees (excluding part-time employees or the hourly equivalent⁸) must provide notice of impending plant closings or mass layoffs. Neither federal, state, nor local governments are covered by P.L. 100-379, but public and quasi-public entities that engage in business and that function independently of those governments are covered if they meet the employer-size threshold.

Workers covered by the statute include hourly and salaried employees, managers, and supervisors on the employer's payroll. Persons who are temporarily laid off or are on leave but have a reasonable expectation of being recalled also are covered and counted toward the employer-size threshold. The law does not apply to an employer's business partners, contract employees who have an employment relationship with and are paid by another employer, and self-employed individuals.

Part-Time Employees

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

Employees Not Entitled to Notice

Workers who are counted toward the firm-size threshold but are not entitled to advance notice include U.S. workers who are located at an employer's facility in a foreign country and

⁸ At least 100 full-time and part-time employees who in the aggregate work at least 4,000 hours per week exclusive of overtime hours (i.e., 4,000 hours/100 employees = 40 hours per week on average).

individuals who are clearly told upon being hired that their employment would be temporary (e.g., limited to the time it takes to complete a specific project). For information on other exemptions see the section in this report entitled “Exceptions to or Exemptions from P.L. 100-379.”

Closings and Layoffs to Which the Act Applies

A *plant closing* is defined as a permanent or temporary shutdown of one or more distinct sites of employment (e.g., an auto plant) or facilities or operating units within a single site (e.g., a photocopying department) that produces an “employment loss” for at least 50 employees, other than part-timers, at the site within any 30-day period. An action is considered a plant closing if it effectively stops the work of a unit within the site, although a few employees may remain in the facility.

A *mass layoff* is defined as an employment loss—regardless of whether any units are shut down—at a single site within any 30-day period for

- 50-499 employees (excluding part-timers) if they make up at least 33% of an employer’s active workforce (excluding part-timers),⁹ *or*
- at least 500 employees (excluding part-timers).

P.L. 100-379 thus does not cover small layoffs.

An employer may have to provide advance notice if multiple groups of workers are laid off over time but each group is smaller during any 30-day period than the employee-size thresholds. If taken together the number of terminated workers exceeds one of the thresholds during any 90-day period, the action is considered a plant closing or mass layoff unless the employer proves that the employment losses are due to “separate and distinct actions and causes and are not an attempt by the employer to evade the requirements of” the act.

In order for the above-described plant closings or mass layoffs to trigger the advance notice requirement, the employment loss must involve

- a termination other than a discharge for cause, voluntary departure, or retirement,
- a layoff exceeding six months, *or*
- a more than 50% reduction in the work hours (excluding overtime hours) of individual employees during each month of any six-month period.

If an employer calls a layoff that is not expected to meet the statute’s six-month threshold for providing advance notice and the employer subsequently extends the layoff beyond six months, an employment loss will have occurred unless the extension was due to “business circumstances not reasonably foreseeable at the time of the initial layoff.” The employer must give employees advance notice when it becomes foreseeable that an extension of a short-term layoff is necessary. As in the case of multiple layoffs of small groups of employees, this provision is intended to

⁹ Actively working employees are persons currently on the employer’s payroll and in pay status at the time of the mass layoff.

prevent employers from evading the act's notice requirement by prolonging a layoff that initially was too brief to meet the law's definition of employment loss.

Exceptions to or Exemptions from P.L. 100-379

The WARN Act contains several exceptions to or exemptions from its requirement that employers provide affected parties with 60 days notice of an impending mass layoff or plant closing. For example, the legislation specifies three instances in which a shorter period of notice is allowed (see box above). The exemption from the notice requirement of workers employed at temporary facilities or on temporary projects was mentioned previously in the discussion about who is counted toward the act's employer-size threshold. Three other cases are taken up below.

Transfers or Reassignments

The extent of employment loss can be reduced—and hence, the need to provide notice can be minimized—under certain circumstances. If a closing or layoff takes place due to the relocation or consolidation of all or part of an employer's business it is not considered an employment loss if before the action:

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

Sale of a Business

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

Strikes and Lockouts

Plant closings or mass layoffs that are the result of a strike or lockout are exempt from the notice requirement unless employers lockout employees to evade compliance with the act. "Economic strikers" whom employers permanently replace do not count toward the employee-size thresholds necessary to trigger the notice requirement.¹⁰ Non-striking employees who experience an

¹⁰ Economic strikers are those employees who go on strike over wages, hours, or other working conditions during contract negotiations.

employment loss directly or indirectly associated with a strike and employees who are not members of the bargaining unit involved in the contract negotiations that prompted a lockout are entitled to advance notice.

Enforcement and Penalties

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

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

Employers who violate P.L. 100-379 are liable for back pay and benefits (e.g., the cost of medical expenses that would have been covered had the employment loss not occurred) to each aggrieved employee. The penalty is calculated for each working day that notice was not provided up to a maximum of 60 days. In other words, the 60-day liability is reduced for each day that notice was provided. Maximum liability may be less than 60 days for those employees who had worked for the employer less than 120 days.

If any employer made “voluntary and unconditional payments” to terminated employees for failure to provide timely notice, the amount of the penalty may be reduced.¹¹ A court also may decrease the back pay liability if an employer’s failure to comply with the act was in “good faith” with “reasonable grounds for believing” that its closure or layoff action did not violate the law. In addition, a court may reduce the \$500-a-day civil penalty to which a unit of local government is entitled for an employer’s violation of the statute. An employer can avoid the civil penalty entirely if each aggrieved employee is paid the full amount for which the employer is liable within three weeks from the date of the plant closing or mass layoff.

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¹¹ In contrast, severance payments that the employer was legally obligated to make because of the employment loss do not diminish the employer’s liability. Similarly, payments made by third parties to terminated employees (e.g., unemployment insurance benefits) do not limit the size of the employer’s penalty.