

# Temporary to Permanent: Layoffs Trigger WARN Act

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Two months ago, businesses were ordered to close their doors to battle the coronavirus pandemic, and many were forced to temporarily furlough or lay off employees to weather the uncertainty. As counties move from red to yellow to green phases of opening in Pennsylvania, businesses are reopening to a new reality that may not include demand for all of its employees. Operating at 50% capacity doesn't translate to recalling 100% of workers.

In the scramble following the governor's closure order in mid-March, businesses told furloughed employees the move was temporary, to be revisited when the order was lifted. These temporary layoffs were not intended to exceed six months, so they did not trigger the required WARN Act notice at the time.

But now, as businesses consider converting temporary furloughs to permanent layoffs, they need to revisit their obligations under the WARN Act. Aptly named the WARN Act, the federal Worker Adjustment Retraining and Notification Act, requires larger employers with 100 or more employees to provide 60 days' advance notice of a "mass layoff" or "plant closing." Written notice goes not only to affected employees, but to state agencies and local officials as well, thus becoming public. The purpose of the WARN Act is to give affected employees sufficient advance notice to adjust to and hopefully emerge from the impending job loss, and to marshal public resources to assist them.

## **When does a temporary layoff become a permanent layoff that triggers a 60-day WARN Act notice?**

First, the WARN Act applies to companies of 100 or more employees, excluding part-time employees working less than 20 hours per week (or short term employees of less than six months). It also applies to employers of 100 or more employees (including part-time workers) who in the aggregate work at least 4,000 hours per week.

Second, the WARN Act notice is triggered by a mass layoff - which is either:

- A reduction in force of at least one-third of the full-time employees, provided the number of full-time affected employees is at least 50, at a single facility during any 30-day period, or
- Employment loss of at least 500 full-time employees at a single facility during any 30-day period, regardless of the percentage affected.

It is important to note that temporary layoffs not expected to exceed six months will not trigger a WARN Act notice. But if a layoff is extended beyond six months due to business circumstances, notice is required when it becomes reasonably foreseeable that the extension is required. Where the layoffs occur in two or more phases and the aggregate number of affected employees exceeds these thresholds within any 90-day period, the employer must provide notice under the act.

Where a business fails to provide proper notice, affected employees are entitled to 60 days' pay and benefits. The

WARN Act is enforced by private legal action in any U.S. District Court. Employees can file a civil lawsuit under the WARN Act, often styled as a class action, for monetary damages and attorneys' fees. In addition, an employer that fails to notify the local taxing authority and fails to pay employees money due under the WARN Act within three weeks of the layoff may also be subject to a civil penalty of up to \$500 per day.

The act has an "unforeseeable business circumstances" exception that applies to mass layoffs caused by business circumstances that were not reasonably foreseeable at the time that 60-day notice would have been required. However, the exception's applicability to the current COVID-19 pandemic is not clear. The U.S. Department of Labor WARN Act FAQs indicate "[a] government-ordered closing of an employment site that occurs without prior notice . . . may be an unforeseeable business circumstance." However, given the hindsight of the past two months and the foresight of the coming months as COVID-19 statistics are reported daily and businesses plan for phased reopening, employers may be hard pressed to claim they didn't see this coming. Whether the COVID-19 pandemic presented a sudden, unforeseeable business circumstance, when the layoffs became reasonably foreseeable, and whether the company used commercially reasonable business judgment all will be determined on a case-by-case basis in federal court.

Note that even when invoking an exception to the WARN Act's 60-day notice requirement, a covered employer is still required to:

1. Give as much notice as is practical
2. Include a brief statement of the reason for giving less than 60-days' notice along with the other required elements of a WARN notice.

Given these risks, covered businesses that currently anticipate the need to extend a mass layoff beyond six months should consider providing affected employees with 60 days' advance written notice of the layoffs.

If your covered business is contemplating extending temporary layoffs beyond six months, or it needs assistance in crafting WARN Act notices to employees and state and local agencies, please [contact me](#) or any of the attorneys in the [Barley Snyder Employment Practice Group](#).

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