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As the middle market reawakens, don't forget to "WARN"

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After 18 months of a deep freeze, middle-market companies have started to awaken from their long hibernation. Healthy companies are looking to expand and gain market share, often by purchasing less-fortunate competitors. When that happens, and to the extent that a target company's workforce has redundancies that result in plant closings, parties may have an obligation under the Worker Adjustment and Retraining Notification Act (WARN) to so inform the soon-to-be terminated employees.



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the workers to successfully compete in the job market." *Rifkin v. McDonnell Douglas Corp.*, 78 F.3d 1277, 1282 (8th Cir. 1996).

When does the WARN Act apply?

To determine whether a business enterprise is subject to the WARN Act for an upcoming plant closing or mass layoff, one must determine whether: (1) the business entity qualifies as an "employer" under the Act; (2) the action results in an "employment loss"; and (3) the amount of employment loss is sufficient to qualify as a "plant closing" or "mass layoff."



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The WARN Act arose in the late 1980s out of a concern by Congress that employees in a purchased or merged company would be put out of work literally without warning, leaving them no time to prepare for impending joblessness. Generally, the WARN Act is a federal statute that requires large employers to give at least 60 days advance notice of a qualifying plant closing or mass layoff to its employees.

An employer who violates the WARN Act is liable to each employee for back pay and benefits for the period of the violation, up to 60 days, plus civil penalties and attorneys fees. 29 USC §2104(a)(1). The Act is designed to give "workers and their families some transition time to adjust to the prospective loss of employment, to seek and obtain alternative jobs, and, if necessary, to enter skill training or retraining that will allow

The WARN Act defines an "employer" as a business enterprise that employs **100 or more employees**, excluding part-time employees, or which employs 100 or more employees who in the aggregate work at least 4,000 hours per week, exclusive of overtime. 29 USC §2101(a)(1). If the business does not meet the definition of "employer," then the Act does not apply to any plant closing or layoff occurring at the business. For the purposes of the Act, "Part-time employee" means an employee who is employed for an average of fewer than 20 hours per week or who has been employed for fewer than 6 of the 12 months preceding the date on which the 60 day notice is required. 29 USC §2101(a)(8).

An employer must next determine whether its action will result in an "employment loss," which is defined as an employment termination, other

than a discharge for cause, voluntary departure, or retirement, a layoff exceeding six months, or a reduction in hours of work of more than 50 percent during each month of any six-month period. 29 USC §2101(a)(6).

The Department of Labor defines termination as "the permanent cessation of the employment relationship." 54 Fed. Reg. 16,047 (1989). In *Rifkin v. McDonnell Douglas Corp.*, employees who were laid off and later recalled within six months and employees who opted for earlier retirement in lieu of layoff did not suffer an "employment loss" for the purposes of meeting the 500 employee threshold for a "mass layoff." 78 F.3d 1277, 1282-83 (8th Cir. 1996).

Thus, in addressing whether an employment loss has occurred under §2101(a)(6), most courts have applied a practical, effects-driven analysis of whether a break in employment actually occurred, and where the termination is at best technical, have found no WARN Act violation. *Wiltz v. M/G Transport Services, Inc.*, 128 F.3d 957, 964 (6th Cir. 1997).

The definition of "employment loss" is subject to several important exceptions. An employee is not considered to have experienced an employment loss if the employer's business is sold and the employee becomes an employee of the buyer, thus terminating the employment relationship between the seller and the employee. 29 USC §2101(b)(1).

In that situation, the Act provides that "any person who is an employee of the seller (other than a part-time employee) as of the effective date of the sale shall be considered an employee of the purchaser immediately after the effective date of the sale." In other words, the Department of Labor has explained, "Although a technical termination of the seller's employees may be deemed to have occurred when a sale becomes effective, WARN notice is only required where the employees, in fact, experience a covered employment loss." 20 C.F.R. §639.6.

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For example, in *Long v. Dunlop Sports Group Americas, Inc.*, the District Court of South Carolina held that the WARN Act did not support requiring notice to employees of the seller who were immediately rehired by the buyer, since the policy behind the Act is to provide notice so the employee has time to undergo retraining and search for an alternative job. 454 F.Supp.2d 520, 523 (Dist. Ct. S.C. 2006).

Similarly, in *Headrick v. Rockwell International Corp.*, no employment loss occurred where seller sold its rights in a government contract to the buyer under the condition that the facility operate with the former employees, and the buyer hired the former employees of seller at full pay just a “millisecond” after their termination by seller with no break in employment, noting that “Congress meant ‘employment loss’ to cover only employees truly idled or deprived of income.” 24 F.3d 1272, 1279-80 (10th Cir. 1994). See also *International Alliance v. Compact Video Services, Inc.*, 50 F.3d 1464, 1467-1469 (9th Cir. 1994) (where buyer hired nearly all of the employees the seller had terminated upon closing on the purchase of the company, employees did not suffer an employment loss that triggered the WARN Act even though union and other benefits accorded to employees were not retained under buyer’s employ).

To the extent that an employment loss does occur in connection with the sale of a business, the Act provides that the seller is responsible for providing notice for any plant closing or mass layoff in accordance with the WARN Act up to and including the effective date of the sale, and after the effective date of the sale of an employer’s business, the purchaser is responsible for providing such notice.

Additionally, an employment loss has not occurred if a closing or layoff is a result of the relocation or consolidation of the employer’s business and, prior to the closing or layoff, the employer offers to transfer the employee to a different site of employment within a reasonable commuting distance with no more than a six-month break in employment, or the employer

offers to transfer the employee to any other site of employment regardless of distance with no more than a six-month break in employment, and the employee accepts within 30 days of the offer or of the closing or layoff, whichever is later. 29 USC §2101(b)(2).

Finally, the employer must determine whether the employment loss meets the threshold to qualify as a “plant closing” or “mass layoff,” in which case the notice requirements of the WARN Act will apply. A “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 at the single site of employment during any 30-day period for **50 or more employees** (excluding any part-time employees). 29 USC §2101(a)(2).

The term “mass layoff” means a reduction in force which is not the result of a plant closing and results in an employment loss at the single site of employment during any 30-day period for: (a) at least 33 percent of the employees (excluding any part-time employees); and (b) at least 50 employees (excluding any part-time employees) or (c) at least 500 employees (excluding any part-time employees). 29 USC §2101(a)(3).

Content of Notice

If WARN notice is required, the actual notice must be written in a language understandable to the employees and contain: a statement about whether the planned action is expected to be permanent or temporary and, if applicable, notification of whether the entire plant is to be closed; the anticipated date the plant closing or mass layoff will begin, and the expected date when the individual employee will be laid off or terminated; an indication as to whether bumping rights exist; and the name and telephone number of a company official to contact for further information.

This notice may be sent to the employee’s last known address or it may be included in the employee’s paycheck. 29 USC §2107(b). If the employees have a representative, it is

also acceptable to give notice to that person or entity. 29 USC §2102(a)(2).

A word to the wise

Although WARN Act notice may not be required in connection with the termination of employees, it is probably good business practice to give the notice if you feel it may be a close call, or if the action will impact a significant number of your employees.

The cost of providing the notice will not be substantial, and it will strengthen your position considerably should a lawsuit arise in connection with the termination. Indeed, the Act specifically states that “It is the sense of Congress that an employer who is not required to comply with the notice requirements of section 3 should, to the extent possible, provide notice to its employees about a proposal to close a plant or permanently reduce its workforce.” 29 USC §2106.

In an economy that is starting to see the re-emergence of mergers and acquisitions, WARN Act analysis must be made. To the extent that it applies, a WARN notice must be sent to all effected employees.

Quick Facts

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Stahl Cowen Crowley Addis LLC is a Chicago-based law firm focused on serving the needs of business enterprises in today's dynamic marketplace. The firm provides sophisticated, yet cost effective legal counsel to organizations ranging from the entrepreneurial to large, publicly traded corporations and municipalities. Practice areas include bankruptcy & restructuring, corporate, mergers & acquisitions, litigation, local government, real estate and trusts & estates.