



Workforce Realignment and Reductions in Force

Part 3: WARN Act Issues

September 27, 2023

Seyfarth Shaw LLP

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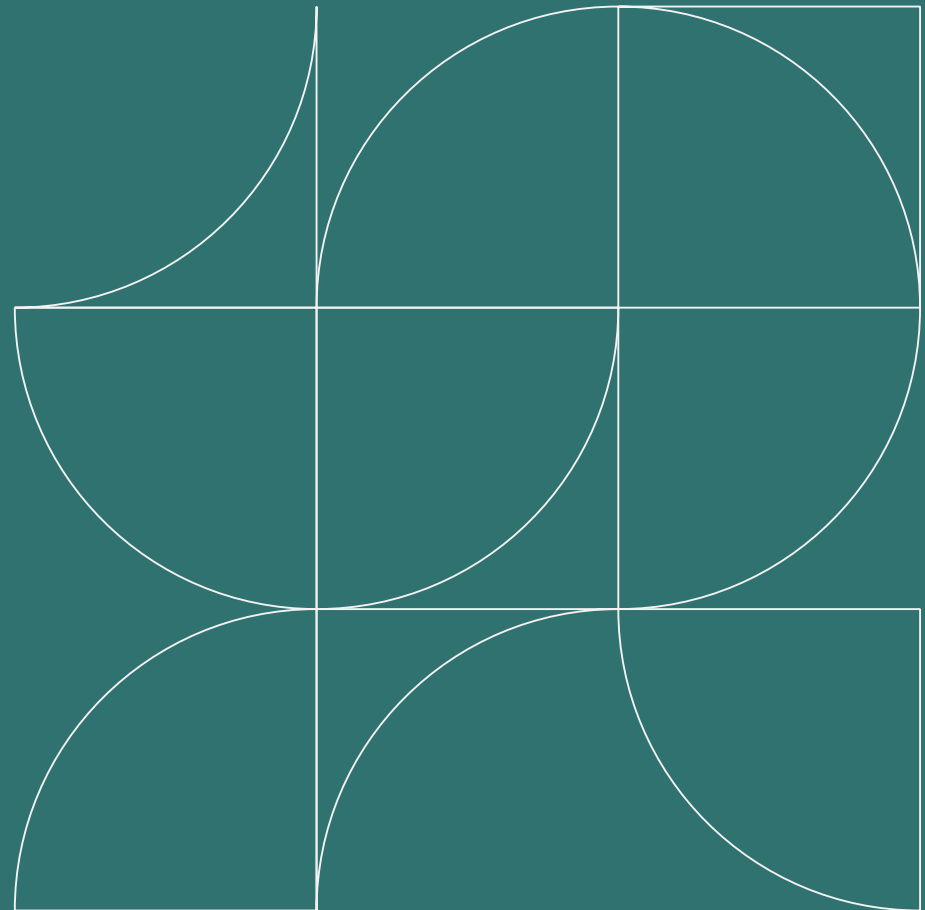
Agenda

- 01** The WARN Act and Its Triggers
- 02** What the WARN Act Requires – Notice!
- 03** WARN Act Exceptions & Additional Considerations
- 04** State-Specific WARN Acts

Introduction to WARN Act

- Worker Adjustment and Retraining Notification Act (Eff. May 22, 1989)
- *“WARN provides that, with certain exceptions, employers of 100 or more workers must give at least 60 days' advance notice of a plant closing or mass layoff to affected workers or their representatives, to the State dislocated worker unit, and to the appropriate local government.”*

WARN Act Triggering Events



Employer and Employee Coverage

Employer Coverage:

- 100 employee threshold
- Applies to most employers considering mass layoffs, mass employment separations, furloughs, and facility closures.
- Federal, State, and local government entities providing public services are not covered.

Employee Coverage:

- Hourly and salaried workers, as well as managerial and supervisory employees.

What triggers a duty under WARN?

Mass Layoff:

- laid off for at least 6 months or discharged;
- 50 FTE with at least 6 months tenure;
- with employment losses comprising at least 1/3 of full-time workforce at location; OR
- 500 employment losses within rolling 30-days.

Plant Closing:

- 50 FTEs at a site;
- experience employment loss within any rolling 30-day window;
- and losses are the result of closure or substantial closure of a part of the business.

(Beware of Hours Reduction)

“Employment Loss” and “Single Site of Employment”

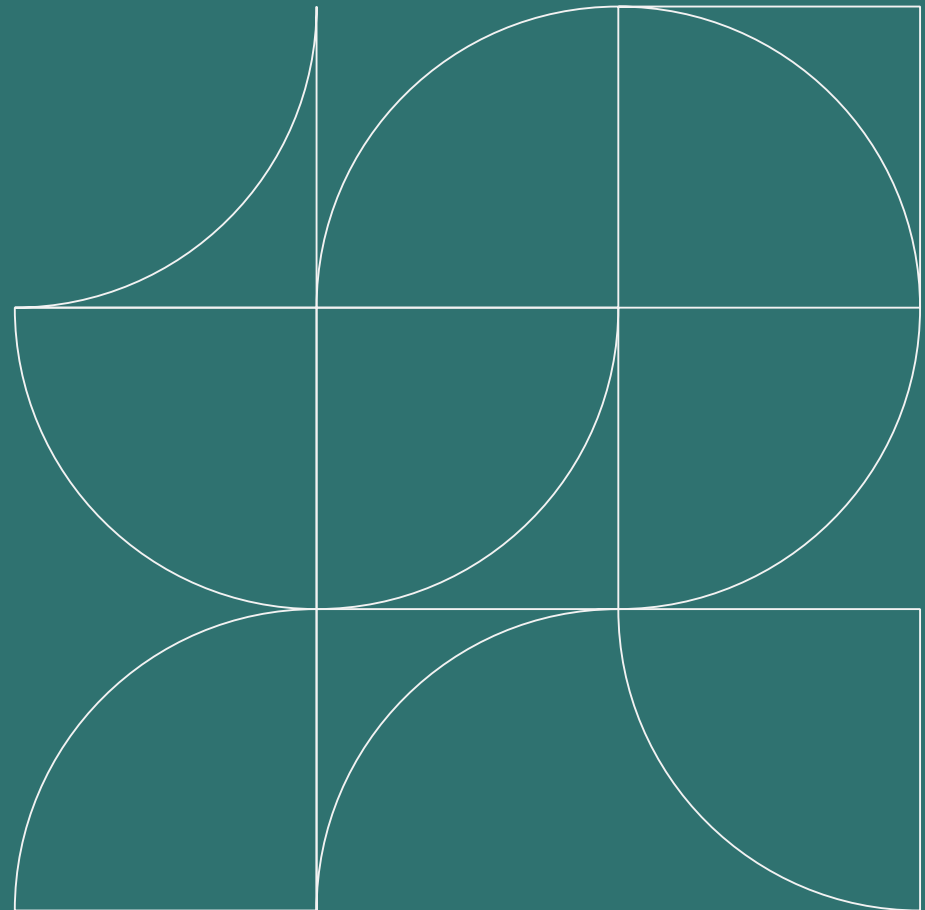
Employment Loss

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 an employee’s hours of work of more than 50% in each month of any 6-month period.

Single Site of Employment

1. Single location or group of contiguous locations.
2. Rolling period (typically 30-90 days)

What the WARN Act Requires – Notice!



What the WARN Act Requires – Notice!

Notice:

- At least 60 days in advance
- Written
- To various people, entities, and officials

Why bother? Liability.

- Back pay
- Benefits
- Civil fine
- ...and attorney's fees for prevailing employees

Who Needs Notice?

- All affected non-union employees
- Union representatives of affected employees
- The “dislocated workers unit” of the state in which the affected employment site is located
- The chief elected official of the municipality in which the affected employment site is located; and/or
- The chief elected official of the county in which the affected employment site is located

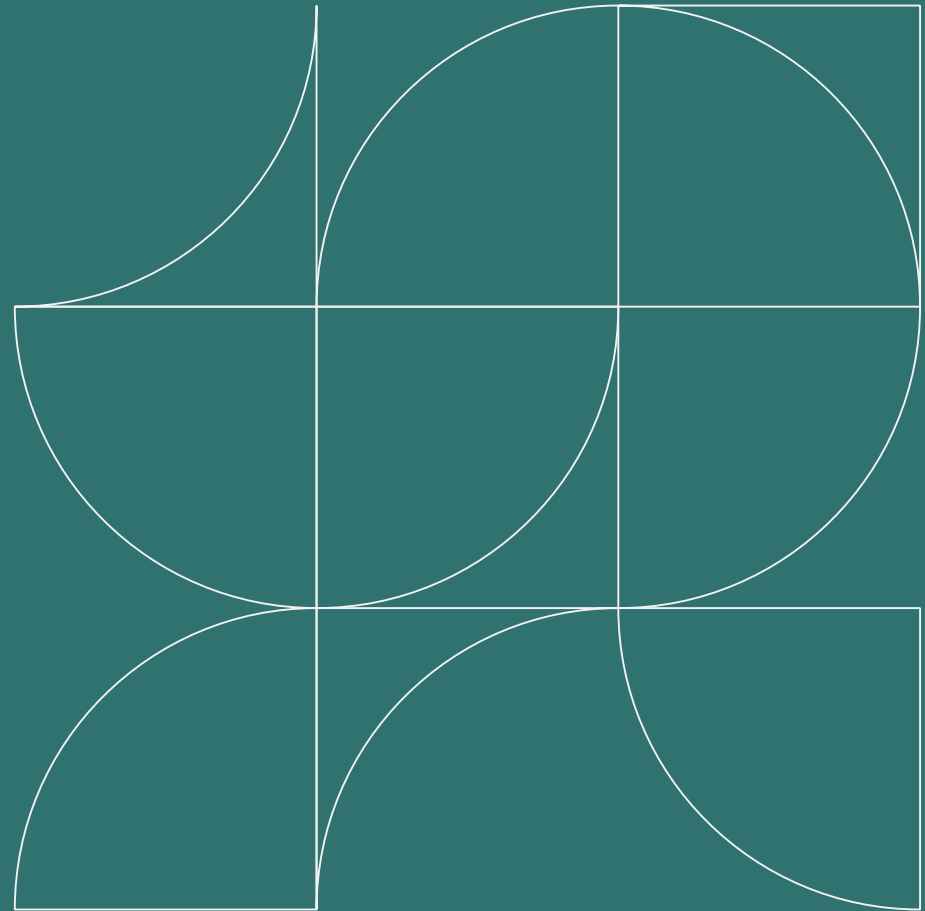
Form and Content of Employee Notice

Required content differs depending on the recipient of the notice. For impacted individuals, must contain:

- A statement as to whether the planned action is expected to be permanent or temporary and, if the entire plant is to be closed, a statement to that effect;
- The expected date when the plant closing or mass layoff will commence and the expected date when the individual employee will be separated;
- An indication whether or not bumping rights exist;
- The name and telephone number of a company official to contact for further information.

All notices **must be in writing.**

WARN Exceptions & Additional Considerations



Exceptions

Two types of exceptions:

- Exceptions that completely eliminate the need for notice
- Exceptions that allow for notice of less than 60 days

Exemptions from the Notice Requirement

When WARN Notice is Not Required

- If a plant closing is the closing of a **temporary** facility, or if the closing or mass layoff is the result of the completion of a particular project or undertaking.
- **Strikes and lockouts** – or workers who are part of the bargaining unit which are involved in the labor negotiations that led to a lockout, when the lockout is equivalent to a plant closing / mass layoff.
- Transfer offers in **relocation/consolidations** cases (no “employment loss” for refusals to transfer)
 - Site closing but reopening at a different site is within reasonable commuting distance and
 - the employee accepts the transfer offer within 30 days of the offer, or of the closing or layoff, whichever is later

Exceptions to the 60 Day Notice Requirement

Three Circumstances Under Which an Employer is Exempt from the 60 Day Notice

- **Faltering company.** This exception, to be narrowly construed, covers situations where a company has sought new capital or business to stay open and where giving notice would ruin the opportunity to get the new capital or business, and applies only to plant closings.
- **Unforeseeable business circumstances.** This exception applies to closings and layoffs that are caused by business circumstances that were not reasonably foreseeable at the time notice would otherwise have been required.
- **Natural disaster.** This applies where a closing or layoff is the direct result of a natural disaster, such as a flood, earthquake, drought or storm.

Additional Considerations

What if I don't know how long the layoff will last?

- Notice needs to be given if, exercising commercially reasonable judge, you believe the layoff will last more than six months.
 - Based on the best information available. Fact intensive, but still risk
- If, based upon circumstances reasonably unforeseeable at the time of the beginning of the layoff, the layoff is to be extended beyond 6 months, the employer then must give WARN notice as soon as possible, while presumably invoking the “unforeseeable business circumstances” notice reduction provision.

Additional Considerations

What if I announced WARN employment separations, but need to postpone them?

Supplemental notices may be required under WARN

- The postponement is for less than 60 days, the additional notice should be given as soon as possible and should include reference to the earlier notice, the date (or 14-day period) to which the planned action is postponed, and the reasons for the postponement
- The postponement is for 60 days or more, the additional notice should be treated as new notice

Penalties for Violations

For employer who orders plant closing or mass layoff without providing appropriate notice:

- Back pay **and benefits** to each aggrieved employee for the period of violation, up to 60 days

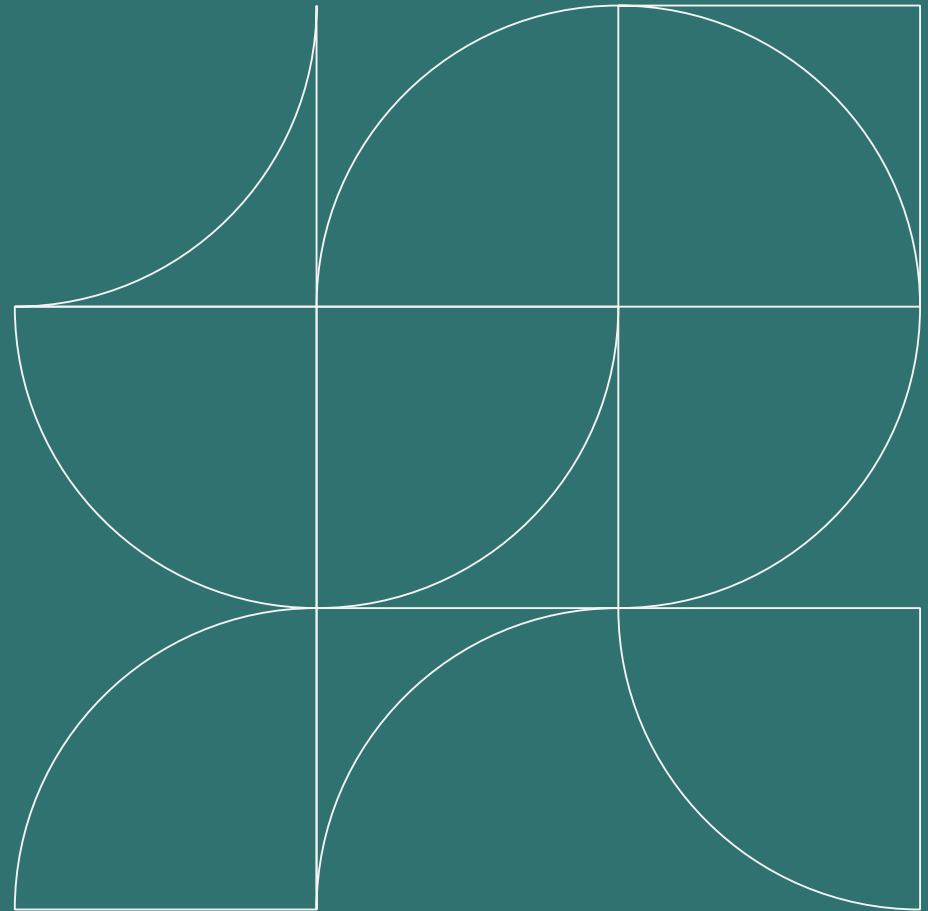
For employer who fails to provide notice to local government:

- Civil penalty up to \$500 for each day of violation. Avoidable if promptly pay impacted employees.

Cause of Action

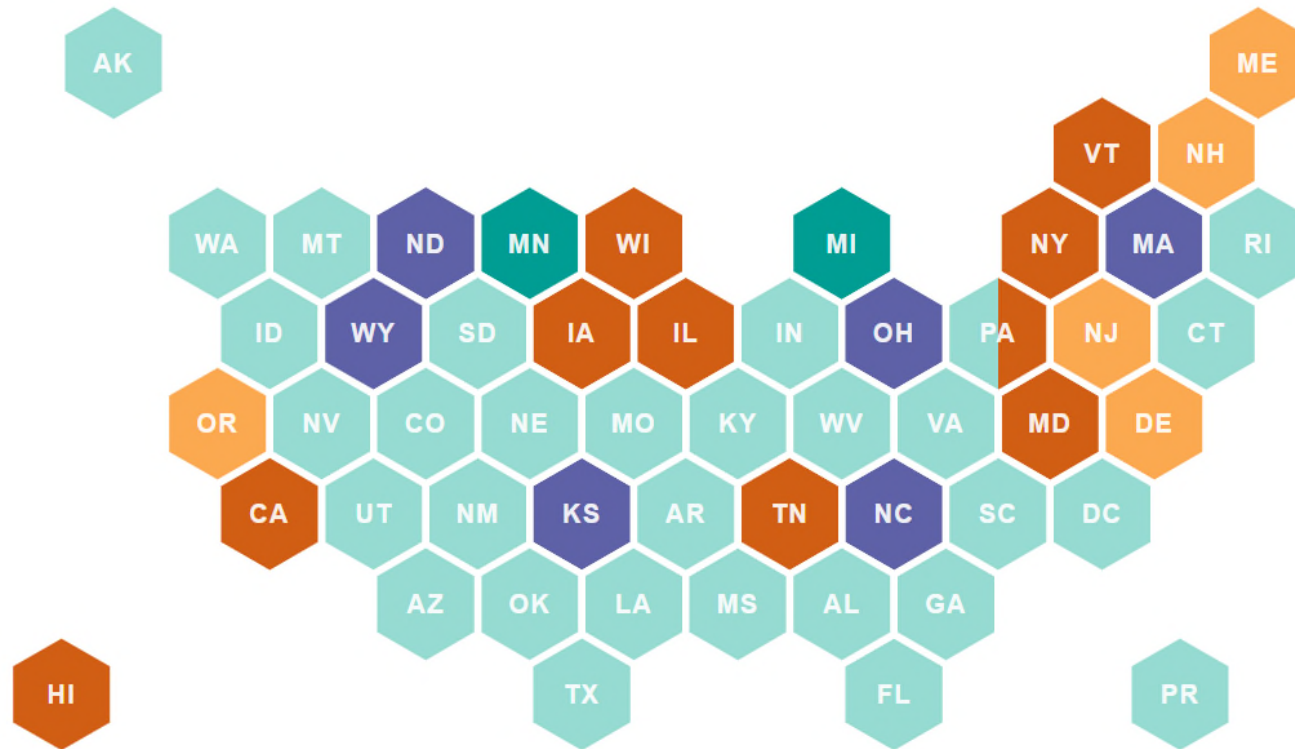
- Workers, representatives of employees, and units of local government have standing to bring enforcement action on individual or class basis.
- Attorney's fees are not automatic but may be awarded by the Court

State-Specific WARN Acts



States with WARN Acts or Equivalents

● Yes, 100 employee threshold ● Yes, less than 100 employee threshold ● Limited Circumstances ● Voluntary ● No



Key Differences for New England State

Two New England States with WARN Acts:

- New Hampshire
 - Different triggering threshold (25+ employee loss)
- Maine
 - 90 days' notice and certain mandatory severance requirements
- Massachusetts
 - Does not have a WARN Act but has plant closing laws.
 - Not heavily enforced
 - <https://www.mass.gov/info-details/submit-a-worker-adjustment-and-retraining-notification-warn>

Upcoming Webinar In Series

Part 4: Using AI/Technology in RIFs

Wednesday, October 18, 2023

1:00 p.m. to 1:30 p.m. Eastern

12:00 p.m. to 12:30 p.m. Central

11:00 a.m. to 11:30 a.m. Mountain

10:00 a.m. to 10:30 a.m. Pacific

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Thank You

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