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WARN Act Basics and FAQs: COVID-19 Edition
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Hawaii employers with **100 or more employees** who lay off or furlough (even temporarily):

- at least 50 or more employees, or
- who through layoffs/furloughs reduce the total workhours of at least 50 employees by 50%

should consider the potential impact of the federal WARN Act, which requires advance notice of terminations, layoffs, or reductions in hours to affected employees and government officials.

Although WARN notices are generally required 60 days in advance of the termination/layoff/reduction in hours which trigger the Act’s requirements, WARN notices can and should be given even if 60 days advance notice is impossible. Under WARN, less than 60 days’ notice may be given if the termination/layoff/reduction in hours is due to “unforeseeable business circumstances.” The COVID-19 pandemic should qualify as an “unforeseeable business circumstance.” This exception does not absolve employers of having to give WARN notices, however – it simply allows employers to give whatever advance notice is feasible.

Prior to the COVID-19 pandemic, employers often avoided providing WARN notices because of concerns that employees would leave the business and seek permanent employment elsewhere. Given the widespread unemployment caused by the COVID-19 pandemic, however, it is unlikely that employees will easily be able to find other employment. Moreover, WARN violations provide substantial penalties for employers, and lawsuits may become attractive to terminated employees during an economic recession. Businesses laying off employees should consider the potential application of the WARN statute.

**Do I Really Need to Comply With the WARN Act?**

**Q.1.** I have heard that WARN only applies to layoffs or reduction in hours lasting 6 months or more. Since I intend to return my laid off employees to work in less than 6 months, do I still need to give WARN notices?

**A.** Unless an employer can be **reasonably certain** that a plant closing, layoff, or reduction in hours triggering WARN will last less than 6 months, it is recommended that the employer comply with WARN notice requirements. If a temporary layoff which an employer expects to last less than 6 months subsequently extends beyond 6 months, the employer would be liable for failing to give a WARN notice 60 days before the layoff (or if an exception applies, within a reasonable time before the layoff), unless it can prove that the business circumstance causing the extension beyond 6 months was not reasonably foreseeable at the time of the initial layoff. 20 CFR 639.4(b).

Because Hawaii’s unemployment rate has already risen above 20% as of April 3, 2020, and because many economists and business leaders are predicting a sustained recession because of the COVID-19 pandemic, it could be difficult for an employer to argue that it could not...
reasonably contemplate that a layoff caused by the COVID-19 pandemic would extend beyond 6 months.

**Q.2. Right now, I only plan to lay off 25 of my employees. Because WARN only applies to plant closing or mass layoffs affecting 50 or more employees, why would I give WARN Notices to those 25 employees?**

A. You should consider giving WARN Notices to the 25 employees if there is any possibility, within the 90-day period following their layoff, that you will lay off another 25 or more employees, or if a total of 50 or more employees (during any 90 day period) will either (a) be laid off for more than 6 months, or (b) suffer a reduction in work hours of 50% or more for more than 6 months.

Normally, when counting the number of employees affected by a plant closing or mass layoff, the WARN Act looks at employment losses within a 30-day period. However, to prevent employers from staggering terminations and layoffs in order to avoid WARN requirements, WARN has a 90-day aggregation rule. This rule requires employers to look forward 90 days and backward 90 days to determine whether separate smaller employment actions, each of which is not sufficient to trigger the Act, can be combined to reach the minimum numbers (i.e. 50 affected employees) triggering WARN.

For example, assume that because of business conditions relating to the COVID-19 pandemic, you laid off 25 employees on April 1, 2020, hoping that conditions will improve after April 30. However, because business conditions continue to deteriorate due to the pandemic, you lay off another 10 employees on May 29, 2020, then another 5 employees on June 29th. Under the WARN aggregation rules, the layoff of a total of 50 employees within 89 days is a “mass layoff,” and you will be liable for failing to give each group of affected employees separate WARN notices, unless you can prove that each layoff was “the result of separate and distinct actions and causes.” 20 CFR 639.5(a)(ii). So even if you may not lay off enough employees to trigger WARN now, you should consider whether future layoffs may trigger WARN.

**Employer Coverage Issues**

**Q.3. Which employers are subject to WARN Requirements?**

A. The WARN Act generally applies to all private employers. There are two tests for determining whether an employer is covered by the ACT. If an employer meets either test, it is covered.

1. Applies to employers having **100 or more “full-time” and “temporary” employees** at the point in time the WARN notice is required. Generally, governmental employers are not covered – however, municipal corporations or quasi-public agencies that engage in business activities (such as city housing authorities) may be subject to WARN.
• “Full-time” employees for WARN purposes are employees who averaged at least 20 hrs./week during the shorter of (a) 90 days prior to the date of the required notice, or (b) the actual period the employee has worked for the employer.

• “Temporary” employees under WARN are employees who (a) are assigned to a specific project and whose employment will end at the end of the project, (b) average at least 20 hrs./week, and (c) have worked at least 6 of the 12 months prior to the required notice date. One confusing aspect of WARN is that although temporary employees are counted to determine whether a “plant closing” or “mass layoff” triggering WARN notices has occurred, an employer is NOT required to give WARN notices to temporary employees.

2. Applies to employers who employ **100 or more “full-time” and “part-time” employees**, if in the aggregate the employees together work at least **4000 hours per week** (not including overtime hours) at the point in time the WARN notice is required.

A “part-time” employee is defined as a worker who either averages less than 20 hrs./week during the shorter of (a) the 90 day period prior to the required notice date, or (b) their period of employment with the company. “Full-time” workers are as defined above in paragraph 1.

**Plant Closings and Mass Layoffs Triggering WARN**

Q.4. **What is a “plant closing” triggering WARN requirements?**

A. A “plant closing” involves the temporary or permanent shutting down of a “single site of employment,” or of one or more facilities or operating units (such as departments, divisions, or even production shifts) within a single site of employment, that causes 50 or more full-time or temporary employees to suffer an “employment loss.” 29 USC 2101(a)(2); 20 CFR 639.3(b). The terms “single site of employment” and “employment loss” are discussed more fully below.

Note that a temporary or permanent shutdown may be deemed to be a “plant closing” affecting a single site of employment even if a few employees continue to work, if the shutdown results in the general cessation of operations at the site.

Q.5. **What is a “single site” of employment? I have a retail store in Kaneohe and a retail store in Kakaako, and an operations office in Aiea. Do I treat them as separate “single sites” of employment?**

A. Generally, a single site of employment is either a single physical location, or a group of structures in reasonable geographic proximity to each other which have the same purpose, and who may share the same staff or equipment. 20 CFR 693.3(i)(3) Courts also consider whether there is centralized management and supervision for the close geographic sites. For example, if an employer has 2 warehouses that share the same staff within a 2-acre industrial park, the 2 warehouses would be treated as a “single site.”

In your case, unless there is frequent staff rotation or interchange between them, your stores in Kaneohe and Kakaako will probably be treated as separate sites of employment. Similarly, your
operations office in Aiea is a separate site. For purposes of determining whether a “plant closing” has occurred, you would treat each site separately. However, some courts have found that geographic proximity, when combined with interchange of staff and centralized management, can result in separate sites being considered a “single site.” In 1199 SEIU United Healthcare Workers v. South Bronx Mental Health Council (S.D.N.Y. 2013), the court found that 4 separate mental health clinics which were within approximately 2.5 miles of each other, had staff interchange, and which were subject to centralized supervision, constituted a “single site of employment” for WARN purposes. Thus layoffs at all 4 of the clinics were counted to reach the 50 affected employees requirement.

Note that even where a “plant closing” has not occurred, you should determine whether a layoff or reduction in hours affecting 50 or more employees constitutes a “mass layoff.”

Q.6. I have outside sales staff and other employees who work remotely. What is their single site of employment for purposes of WARN?

A. If an employer has workers who work remotely, or whose work generally requires them to work outside of the employer’s premises (such as delivery drivers or repairmen), the single site which they are assigned as their home base, or from which their work is assigned, or to which they regularly report, will be their single site of employment. 20 CFR 639.3(i)(6).

Q.7. For purposes of WARN, what is an “employment loss” that triggers WARN requirements?

A. An “employment loss” under WARN means either:

- a termination of employment, other than a discharge for cause, voluntary quit, or retirement, or
- a layoff exceeding 6 months, or
- a reduction in work hours of more than 50% for each month of any 6 month period.

29 USC 2101 (a)(6); 20 CFR 639.3(f)(1). Employees who are placed on paid leave but are not working have not suffered an employment loss. In addition, if an employer offers to transfer an employee subject to a layoff/termination/reduction in hours to a different site of employment within a reasonable commuting distance, and the employee would suffer no more than a 6-month break in employment, the employee has not suffered an employment loss.

Q.8. What is a “mass layoff” triggering WARN requirements?

A. A “mass layoff” is a reduction in force which is not a “plant closing,” and results in an “employment loss” at a “single site” of employment that affects either:

- 33% or more of the employer’s full-time and temporary employees, which must include at least 50 full-time or temporary employees (but not part-time, OR
- At least 500 employees, including full-time and temporary employees (but not part-time)
The major difference between a mass layoff and a plant closing is that in a plant closing, the employer has effectively ceased (on a temporary or permanent basis) the operations of a geographic site, or of a department, division, or operational unit. In contrast, a “mass layoff” often occurs when the employer pares down the number of workers in different departments, divisions, or operational units, but does not effectively shut them down.

For example, if at an employer’s headquarters on Bishop Street, the employer lays off 10 managers, 20 administrative staff, and 20 sales staff, but has not shut down any divisions or operational units, a “mass layoff” rather than a “plant closing” has occurred.

Employers should not get bogged down with the fine details of whether a “plant closing” or “mass layoff” has occurred. Instead, they should focus on whether one could reasonably anticipate an employment loss affecting 50 or more employees within a 90 day period.

Q.9. How much advance notice is required by WARN?

A. The WARN Act generally requires that affected employees be given at least 60 days advance notice of a plant closing or mass layoff. However, there are 3 exceptions in which less than 60 days advance notice may be given. It is important to note that the 3 exceptions still require the employer to provide WARN notices, but the notices are allowed to be given less than 60 days before the terminations, layoffs, or reduction in hours. 20 CFR 639.9. In fact, the WARN regulations state that where an exception applies, the WARN notices may be given after the plant closing or mass layoff has occurred.

Q.10. What are the 3 exceptions to the 60 day advance notice requirement, and which one(s) apply to the COVID-19 pandemic?

A. The 3 exceptions are: (1) the “unforeseeable business circumstances” exception, (2) the “faltering company” exception, and (3) the “natural disaster” exception.

Employers who, because of the COVID-19 pandemic, terminate/layoff/reduce work hours of employees may rely on the “unforeseeable business circumstances” exception. The exception applies where the circumstance is caused by some “sudden, dramatic, and unexpected action or condition outside the employer’s control.” 20 CFR 639.9(b). Almost all attorneys and legal commentators agree that the sudden and disastrous effects of the COVID-19 pandemic were an unforeseeable business circumstance.

However, employers affected by the COVID-19 pandemic cannot rely on the “unforeseeable business circumstances” exception indefinitely. The longer Hawaii business conditions continue to remain poor, the more difficult it will be to rely on the unforeseeable business circumstances exception in the future. In other words, while layoffs occurring in late March or through April 2020 clearly fall under the exception, it may be more difficult to rely on the exception for layoffs occurring in May or June 2020.
This is an example of the adage that “no good deed goes unpunished.” For example, assume an employer on March 31, 2020 (9 days after Mayor Caldwell’s stay-at-home order) knows that a layoff of 50 or more employees is reasonably likely to happen within the next 60 days because of deteriorating financial conditions due to COVID-19, but clings to the hope that things will get better. It finally gives a WARN notice on May 23, 2020 of an impending layoff of 50 employees that will occur on May 30, 2020. An employee could reasonably argue that the employer should have known a layoff was likely 60 days earlier, on March 31, 2020, and should have given the WARN Notice then.

The “faltering company” exception may also apply, but it is more likely to apply to terminations or layoffs occurring later than April 2020. The “faltering company” exception applies only to “plant closings,” and not to mass layoffs. Under the “faltering company” exception, an employer must meet the following requirements:

1. It must have actively been seeking capital or business at the time the 60 day advance notice would have been required (including seeking loans, refinancing, investment, or additional credit or business).
2. There must have been a realistic opportunity to obtain the financing or business sought.
3. The financing or business sought must have been sufficient, if obtained, to enable the employer to avoid or postpone the shutdown.
4. The employer reasonably and in good faith must have believed that giving the 60 day WARN notice would have prevented the employer from obtaining the necessary financing or business. For example, the employer can show that a lender would not have provided loans to a troubled company, or that an acquiring company would not have wanted a workforce that was looking for other employment.

See 20 CFR 639.9(a). For example, employers who seek Paycheck Protection Program (“PPP) loans may be able to claim the “faltering company” exception if they are denied the loan, but held off on giving WARN notices in expectation of receiving a PPP loan.

The 3rd and final exception applies to “natural disasters.” It is unclear (and perhaps doubtful) that the natural disaster exception will apply to the COVID-19 pandemic, because the examples given in the regulations are “floods, earthquakes, droughts, storms, tidal waves or tsunamis and similar effects of nature.” 20 CFR 639.9(c).

Q.11. Since I am relying on the “unforeseeable business circumstances” exception, do I have to give a WARN notice at all?

A. Yes, you still have to give WARN notices to affected employees or, if the employees are represented by a union, a notice to their collective bargaining representative, and to government officials. Under the regulations, the exceptions only allow an employer to give less than 60 days’ notice, and do NOT absolve the employer of all responsibility to provide WARN notices. 20 CFR 639.9: see also United Paperworkers Int’l Union v. Alden Corrugated Container Corp., 901 F.Supp. 426, 440 (D. Mass. 1995) (employer could not rely on a WARN exception where it failed to provide any WARN notice).
Q.12. I will be giving a WARN notice just a few days before laying off my employees. What must I include in my WARN notices if I want to rely on the “unforeseeable business circumstances” exception?

A. When an employer relies on a WARN exception and gives less than 60 days’ notice, the employer’s notice must “provide a brief statement of the reason for reducing the notice period.” 20 CFR 639.9. Although the regulations only call for a “brief statement of the reason,” the Ninth Circuit (which includes Hawaii) has held that it is not sufficient for an employer to merely refer to one of the WARN exceptions. Alarcon v. Keller Industries, 27 F.3d 386, 390 (9th Cir. 1994) (“it is not enough for an employer simply to cite a statutory exception, stating, for example, ‘the notice is short because we are a faltering company.’”)

Under Alarcon, an employer must not only state that it could not give prior notice because of an unforeseeable business circumstance, but must also “give some indication of the factual circumstances” that make the exception applicable. It may be enough to state that greater advance notice was not feasible due to the rapidly deteriorating business or economic conditions caused by the COVID-19 pandemic.

Q.13. Who must receive WARN notices, and what must the notices contain?

A. In Hawaii, notices must be given to: (1) each affected full-time or part-time employee not represented by a union; (2) if employees are represented by a union, notice to the chief elected officer of the Union, and if this individual is not a local union official, additional notice to a local union official; (3) the Director of the Department of Labor and Industrial Relations and (4) Mayors of the counties in which a site of employment will experience a plant closing or mass layoff.

One confusing aspect of WARN is that part-time employees (who average less than 20 hours per week) must be provided with WARN notices if they will be terminated, laid off, or have their hours reduced. However, part-time employees are not counted when determining whether 50 or more employees will be affected. Make sure WARN notices are given to all affected part-time employees.

A. Contents of Notice to Affected Employees

1. A statement as to whether the planned action is expected to be permanent or temporary, and if the entire plant is closed, a statement to that effect.

2. The expected date of when the closing or layoff will begin, and the expected date the affected employee will be separated.

3. An indication whether or not bumping rights exist.

4. The name and telephone number of a company official to contact for further information (email address is not sufficient).
5. If less than 60 days’ notice is given, a brief statement as to why the employer could not provide 60 days advance notice. It should note, at minimum, that more advance notice could not be given because the COVID-19 pandemic had a sudden and disastrous effect on operations, revenues, etc.

B. Contents of Notice to Chief Elected Union Official.

If affected employees are represented by a union, the notice should be sent to the chief elected union official. If the chief elected official is not a local official (is on the mainland, for example), an additional notice should be sent to the highest local union official.

1. Name and address of the employment site where the closing or layoff will occur, and the name and phone number of a company official to contact for further information.

2. A statement as to whether the planned action is to be temporary or permanent, and if the entire plant is closing, a statement to that effect.

3. The expected date of the first separation and the anticipated schedule for making separations.

4. The job titles of positions to be affected and the names of the workers currently holding affected jobs.

5. If less than 60 days’ notice is given, a brief statement as to why the employer could not provide 60 days advance notice. It should note, at minimum, that more advance notice could not be given because the COVID-19 pandemic had a sudden and disastrous effect on operations, revenues, etc.

C. Contents of Notice to Director of DLIR and Mayors of Counties

1. Name and address of the employment site where the closing or layoff will occur, and the name and phone number of a company official to contact for further information.

2. A statement as to whether the planned action is to be temporary or permanent, and if the entire plant is closing, a statement to that effect.

3. The expected date of the first separation and the anticipated schedule for making separations.

4. The job titles of positions to be affected and the number of affected employees in each job titles (don’t have to provide names).

5. An indication as to whether or not bumping rights exist.
6. The name of each union representing affected employees, and the name and address of the chief elected officer of each union.

7. If less than 60 days’ notice is given, a brief statement as to why the employer could not provide 60 days advance notice. It should note, at minimum, that more advance notice could not be given because the COVID-19 pandemic had a sudden and disastrous effect on operations, revenues, etc.

Q.14. How do I provide WARN Notices to my employees? Can I just send them an email?

A. The regulations, at 20 CFR 639.8, state that “any reasonable method of delivery. . . which is designed to ensure receipt of notice” can be used, and lists first-class mail, personal delivery, and insertion of notice into mailed or hand-delivered pay notices as acceptable methods.

As of the present date, it does not appear that any court has determined that email notice, by itself, is acceptable notice. Accordingly, employers should either mail the WARN notices via first class mail, or should hand-deliver the notices with an accompanying acknowledgment of receipt. Some employers use registered mail to provide WARN notices.

Q.15. I know there is a separate Hawaii law called the Dislocated Workers Act (“DWA”), which also requires written notices from the employer. Does the DWA apply to plant closings or mass layoffs caused by the COVID-19 pandemic?

A. No, in the vast majority of cases, the Hawaii Dislocated Workers Act (“DWA”) will not apply to layoffs or terminations caused by the COVID-19 pandemic. The DWA requires that 60 days’ notice be provided to employees of a “closing, divestiture, partial closing, or relocation.” HRS § 394B-9.

In turn, a covered closing or partial closing involves the full or partial “shutting down of operations within a covered establishment due to the sale, transfer, merger, other business takeover or transaction of business interests, bankruptcy, or other close of business transaction that results in or may result in the layoff or termination of employees of a covered establishment.” HRS § 394B-2. A “divestiture” means the transfer of an establishment from one employer to another. A “relocation” is the removal of all or substantially all of the industrial, commercial, or business operations of a covered establishment to a location outside the state of Hawaii.

Business conditions such as a severe drop in revenue, drop in customers, increase in costs, inability to pay rent, or government orders prohibiting working at or traveling to non-essential businesses are not covered closings, partial closings, divestitures, or relocations that trigger the Hawaii DWA. Note, however, that a bankruptcy caused by COVID-19 is a “close of business transaction” that triggers DWA notice requirements.
Employer Penalties Under WARN

Q.16. What are the penalties for failing to comply with WARN?

A. An employer who provides less than 60 days’ notice is generally liable to affected employees for backpay and benefits (including but not limited to vacation pay, death benefits, health insurance, and retirement benefits) lost between the date that the WARN notice was legally required to be given, and the date that the WARN notice was actually given. 29 USC 2104(a)(1). A majority of courts use work days, rather than calendar days, when making the calculation.

Employers who fail to provide required WARN notices to government officials also face a fine of up to $500 per day. Employers may also be liable for interest on damages and attorneys’ fees.