

# A Bit of Fore-WARning Before Engaging in Mass Layoffs

By  
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*At some point every company is forced* to make the difficult decision to lay off an employee and an unlucky few are tasked with undergoing mass layoffs. Before doing so, you'll want to make sure that you're complying with the Federal Worker Adjustment and Retraining Notification Act ("WARN"), as well as California's WARN Act ("Cal-WARN").

		Federal WARN	Cal-WARN
Covered Employees	Total Number of Employees <sup>1</sup>	100 or more (excluding part-time employees) OR 100 or more (including part-time employees) working at least 4,000+ hours (non-overtime) per week	75 or more at a "covered establishment" <sup>2</sup>
	Part-Time Employees	No – employees who work fewer than 20 hours per week are not counted	Yes
	Temps Hired Through Staffing Agency	Not included	Probably included if otherwise meet the definition of employee
	Independent Contractors	No (unless misclassified)	No (unless misclassified)
	Former Employees	No	No
Triggering Event	Plant Closing v. Termination	Plant Closing: Permanent or temporary shutdown of a single site of employment or facility (or operating unit within a single site of employment) that involves 50 or more employees during a 30-day period	Termination: a cessation or substantial cessation of industrial or commercial operations in a covered establishment. There is no numerical threshold of affected employees.

<sup>1</sup> Only includes those who have been employed for at least 6 of the 12 months preceding the date of required notice.

<sup>2</sup> Under the Cal-WARN statute, a "covered establishment" is "any industrial or commercial facility" that employs, or within the past 12-months has employed, at least 75 persons, and specifically includes the parent corporation of a covered subsidiary. In determining whether the company employs 75 people, all employees employed for at least six months during the previous 12-month period are counted, including both full- and part-time employees.

		Federal WARN	Cal-WARN
Triggering Event	Mass Layoff	Employment loss at the single site of employment during any 30-day period involving: (a) at least 50 employees (excluding part-timers) <i>and</i> if the number affected is at least 3% of the workforce; <i>or</i> (b) at least 500 employees (excluding part-timers)	Layoff of 50 or more employees during any 30-day period regardless of percentage of work force
	Relocation / Consolidation	A relocation or consolidation of part or all of the employers' business and prior to the closing or layoff: (a) the employer offers to transfer the employee to a different site of employment within a reasonable commuting distance with no more than a 6-month break in employment; <i>or</i> (b) the employer offers to transfer the employee to any other site of employment regardless of distance with no more than a 6-month break in employment, and the employee accepts within 30 days of the offer of the closing or layoff, whichever is later	Removal of all or substantially all of industrial or commercial operations to a different location 100 miles away or more. There is no numerical threshold of affected employees.
	Aggregate Employment Losses Within 90 days	Yes – employment losses within 90 days will be aggregated to meet the definition of a triggering event unless the employer can show that the losses resulted from distinct causes and were not an attempt to evade the statute's requirements	This is an uncertain area and employers should consult counsel about aggregation

		Federal WARN	Cal-WARN
Notice Requirements	Who Must Receive Notice	(1) The affected employee (or the employee's union representative) <sup>3</sup> (2) The State dislocated worker unit (e.g. the EDD in California) (3) The chief elected official of the local government within which such closing or layoff is to occur	(1) The affected employee (2) EDD – Workforce Services Division (3) The local Workforce Investment Board (4) The chief elected official of each city and county government within which the termination, relocation, or mass layoff occurs.
	Timing of Notice	At least 60 calendar days in advance unless qualify under an exception below	At least 60 calendar days in advance unless qualify under an exception below
	Pay in Lieu of Notice	Yes	Yes
Exceptions to Notice Requirements	Exception for Faltering Company Exception	Only applicable to plant closing (not applicable to mass layoff).  Employer may provide less than 60 days' notice if it was taking specific action to procure financing or business that would have enabled it to avoid or postpone the shutdown, relocation, or termination and the employer reasonably believed in good faith that giving notice would have precluded the employer from obtaining the necessary capital or business. The employer must provide notice as soon as practicable.	Only applicable to termination or relocation (not applicable to mass layoff).  Same standard as under federal WARN, but Cal WARN also requires employers to provide documentation to the Department of Industrial Relations (DIR) and DIR must conclude that the employer was actively seeking capital or business, and a WARN notice would have precluded the employer from obtaining the capital or business.
	Exception for Unforeseen Business Circumstances	Yes	N/A
	Exception for Natural Disaster	Yes – notice is not required if plant closing or mass layoff is directly caused by a natural disaster, such as flood, earthquake, or drought	Yes – notice not required if mass layoff, relocation, or termination is caused by a physical calamity or act of war

<sup>3</sup> While part-time employees are not counted in determining whether plant closing or mass layoff thresholds are reached, affected part-time employees must receive notice once WARN is triggered.

		Federal WARN	Cal-WARN
Exceptions to Notice Requirements	Exception for Relocation / Consolidation Combined with Offer of Transfer	A relocation or consolidation of part or all of the employers' business and prior to the closing or layoff: (a) the employer offers to transfer the employee to a different site of employment within a reasonable commuting distance with no more than a 6-month break in employment; or (b) the employer offers to transfer the employee to any other site of employment regardless of distance with no more than a 6-month break in employment, and the employee accepts within 30 days of the offer of the closing or layoff, whichever is later	N/A
Employer Liability	Civil Penalty	A possible penalty of \$500 per day for each day of violation	A possible penalty of \$500 per day for each day of violation
	Back Pay	Back pay for each day of violation	Back pay for each day of violation
	Benefits	Only ERISA benefits and actual medical costs	All benefits
	Caps on Back Pay and Benefits	Yes – back pay and benefits capped at lower of 60 days or half the number of days the individual was employed	Yes – back pay and benefits capped at lower of 60 days or half the number of days the individual was employed
	Attorneys' Fees	Yes	Yes
	Individual Officer and Director Liability	No	Probably yes

**EDD:** [www.edd.ca.gov/jobs\\_and\\_training/layoff\\_services\\_warn.htm#HowDoIFileaWARNNotice](http://www.edd.ca.gov/jobs_and_training/layoff_services_warn.htm#HowDoIFileaWARNNotice)

**Workforce Development Boards:**

[cwdb.ca.gov/local\\_boards/local\\_workforce\\_investment\\_associations/](http://cwdb.ca.gov/local_boards/local_workforce_investment_associations/)

**General Federal WARN Information:**

[www.doleta.gov/programs/factsht/WARN\\_Fact\\_Sheet\\_updated\\_03.06.2019.pdf](http://www.doleta.gov/programs/factsht/WARN_Fact_Sheet_updated_03.06.2019.pdf)

At O'Hagan Meyer we specialize in assisting employers of all sizes ensure they understand and are complying with federal and state laws dealing with layoffs subject to WARN and Cal-WARN. Feel free to reach out to us at [msgnilek@ohaganmeyer.com](mailto:msgnilek@ohaganmeyer.com) or [arosenkranz@ohaganmeyer.com](mailto:arosenkranz@ohaganmeyer.com).