Meeting WARN Act Obligations Amid Mass Layoffs and Closures

Analysis by Pamela L. Wolf, J.D.
CCH Writer Analyst

Introduction

The evidence is unmistakable – the U.S. economy is in serious trouble. In 2008, the total number of extended mass layoff events reached a program high of 7,818 and the 1,383,553 associated worker separations were at their highest level since 2001, according to the Bureau of Labor Statistics. (Extended mass layoffs are layoff events of at least 31 days' duration that involve 50 or more individuals from a single employer filing initial claims for unemployment insurance during a consecutive five-week period.)

Four major industry sectors reported program highs in terms of events and separations in 2008: construction; finance and insurance; educational services; and accommodation and food services (with annual data available back to 1996). Eight states reached program highs as to numbers of separations – Alaska, California, Hawaii, Idaho, Indiana, Missouri, New Jersey and Wyoming.[1]

The trend continues – the latest available data show that in February 2009, employers took 2,769 mass layoff actions that resulted in the separation of 295,477 workers, seasonally adjusted. The number of mass layoff events in February increased by 542 from the prior month.[2]

Federal WARN Act

Many companies have been forced to downsize or close operations altogether amid the deepening U.S. economic downturn. Employers considering such action should keep in mind that the Worker Adjustment and Retraining Notification Act (WARN Act) places notice requirements on certain employers prior to implementing a plant closing or mass layoff. Generally, it prohibits a covered employer from ordering a plant closing or mass layoff before the end of a 60-day period beginning when written notice is provided to employees of the plant closing or layoff. Several provisions of the WARN Act limit its coverage, arising in the form of exemptions, exclusions, reductions, and in the definitions used in the Act.

Not much litigation – yet. "Despite the 20-year history of the WARN Act, there have been surprisingly few lawsuits filed under the statute, and not because there have not been workforce reductions covered by the Act," according to Catherine S. Weil**,** Director of Labor Relations and Employment Law for Albertson's, LLC, a food and drug retailer. "Even though many employers are simply not aware of their obligations under the WARN Act and therefore do not comply, the plaintiffs' bar seems more interested in litigating over other protected rights."

But a spate of recently filed class actions against employers, including one filed in US District Court for the Northern District of California against the law firm Thelen LLC,[3] may signal an ominous shift in the sentiments of the plaintiffs' bar. Given the economic climate and rise in mass layoffs, one might expect law firms on both sides of the bar to focus increasingly on WARN Act issues.

Moreover, as Weil points out: "With the advent of "Mini" WARN statutes in some states that provide for stricter requirements and greater penalties than the federal statute, such as the California, New Jersey and the brand-new New York WARN Act, I think we can expect to see more litigation under these "Mini" WARN statutes, as a declining economy forces more employers into reducing their workforces."

Employers' WARN Act obligations

The WARN Act requires employers to provide at least 60 days' advance notice of plant closings and mass layoffs. Notice must be given in writing to:

> (1) the employees' representative or, if there is no representative, to each affected employee;
> (2) the state dislocated worker unit; and
> (3) the local government where the plant is located.[4]

Key definitions. Understanding the meaning of key terms used in the WARN Act is essential to identifying WARN Act coverage and ensuring compliance.

An ***"employer"*** is a business enterprise that meets either part of the following two-part definition:

> (1) any business enterprise that employs 100 or more employees, excluding part-time employees; or
> (2) a business enterprise that employs 100 or more employees, including part-time employees, who, in the aggregate, work at least 4,000 hours per week exclusive of overtime.

A ***"part-time employee"*** is an employee who is employed for an average of fewer than 20 hours per week, or one who has been employed for fewer than six of the 12 months preceding the date notice is required. For example, a new full-time employee who regularly works more than 20 hours per week but who has not been employed for at least six months would be counted as a "part-time" employee. The period used to calculate whether an employee has worked an average of less than 20 hours per week is the amount of time the employee has been employed or the most recent 90 days, whichever is shorter.

Counting employees. In other words, employees with greater than six months' employment who work more than 20 hours per week are counted in determining whether an employer must comply with the Act. Also, an employer with 100 or more employees, some of whom work fewer than 20 hours per week but all of whom aggregated together work at least 4,000 hours per week (not counting overtime) is also covered. Thus, an employer with 92 employees who work 40 hours per week and 18 employees who work an average of 19 hours per week would also be covered (92 x 40 = 3,680) + (18 x 19 = 342) because the employees together work at least 4,000 hours (4,022 hours, in this example).

For purposes of determining whether an employer has 100 employees, workers on temporary layoff or workers on leave who have a reasonable expectation of recall are also counted.
The Department of Labor, Employment and Training Administration notes that part-time employees do not count for purposes of determining whether a plant closing or mass layoff has occurred, but they nonetheless are entitled to receive WARN notice if either of these events do occur. [5]

A ***"plant closing"*** is any 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.

"Mass layoffs" are reductions in force that are not the result of a "plant closing" and result in an employment loss at a single site of employment during any 30-day period for one of two calculations of employees:

1. The number of affected employees must be at least 33 percent of the employees at a single site of employment, excluding part-time employees, and that number must total at least 50 employees, excluding part-time employees; or
2. The number of affected employees must total at least 500, excluding part-time employees. Whether an employer's multiple facilities constitute a "single site of employment" depends on how each facility employs and controls its workers.

Thus, a layoff of 50 full-time employees at a single site at which 150 full-time employees worked would be covered (a third of the full-time workforce was affected and at least 50 full-time employees were laid off). A layoff would also be covered if 500 full-time employees at a single site were laid off regardless of what percentage of the workforce they comprised. In either case, the reduction in force could not be due to a “plant closing” and the definition of “employment loss” must be met.

Plant closing compared to mass layoff. What is the difference between a plant closing and a mass layoff? The Department of Labor (DOL) regulations distinguish the two in this way: “Plant closings involve employment loss which results from the shutdown of one or more distinct units within a single site or the entire site. A mass layoff involves employment loss, regardless of whether one or more units are shut down at the site.”[6]

A ***“representative”*** is the employee’s exclusive bargaining representative when the work force is unionized.

“Affected employees” are employees who may reasonably be expected to experience an employment loss as a consequence of a proposed plant closing or mass layoff by their employer.

“Employment loss” does not include discharges for cause, voluntary departures, or retirements, but any other employment termination, layoff exceeding six months, or reduction in hours of work of more than 50 percent during each month of any six-month period is considered an “employment loss.”

However, if the closing or layoff is the result of a relocation or a consolidation by an employer, an employee is not considered to have experienced an employment loss if, prior to the closing or layoff, the employee is offered a transfer to the new site of employment within six months and the new site is within reasonable commuting distance. The same is true if the employer offers to transfer the employee to a new site of employment and the employee accepts within 30 days of the offer, closing or layoff, whichever is later, regardless of the commuting distance.

Consider the following examples:

- **Receipt of wages and benefits.** Employees who lose their jobs in a plant closing do not suffer an “employment loss” while receiving full wages and benefits, according to at least one court. Thus, where an employer fails to give employees 60 days’ advance notice of a plant shutdown, but continues to pay full wages and benefits to workers for 60 days after the shutdown, the WARN Act is not violated. The Act defines employment loss as employment termination, and an employee is not terminated if he continues to receive full wages and benefits, according to the court.[7]

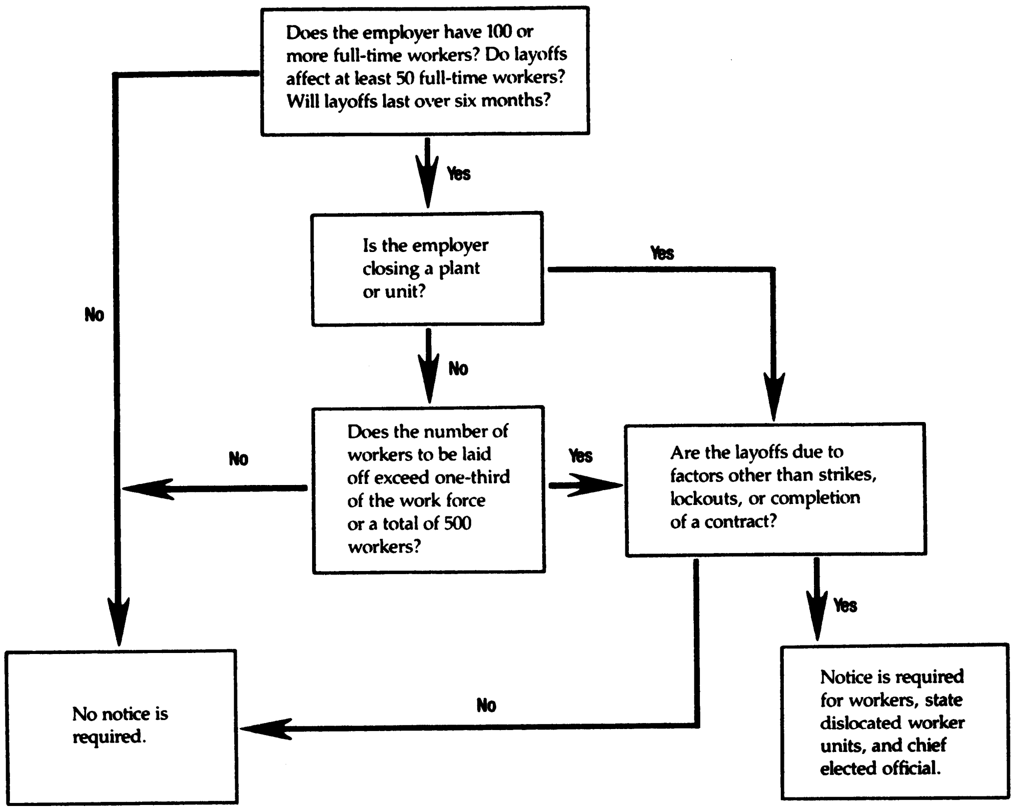
- **Rehired employees.** The definition of “employment loss” under WARN includes a layoff exceeding six months. But, workers who are laid off and then rehired before six months transpire are not considered to have suffered an employment loss for WARN Act purposes, according one federal appellate court. This is true even if the layoffs were expected to be permanent. The purpose of the Act, stressed the court, is to ensure that employees who lose their jobs have adequate opportunities for retraining and reemployment. Employees who are rehired do not need this protection.[8]

- **Temporary recalls.** A brief recall may stop the clock for purposes of calculating the length of the layoff, according to a federal district court in Minnesota. Laid-off workers who were recalled briefly (for six-to-seven days) did not suffer a qualifying "employment loss" under the WARN Act because they were ultimately rehired within six months of the date their recall ended. The brief recall stopped the clock for purposes of calculating the duration of their layoff, only to restart a new six-month layoff period upon the end of the recall. Notably, there was no allegation the employer lacked a legitimate business reason for the recalls or otherwise acted in bad faith. The court acknowledged that there may be situations in which a recall should be disregarded due to its brevity and implementation for the purpose of evading the WARN Act.[9]

- **Seasonal employees.** Losing the expectation of recall cannot be considered an immediate employment loss, according to the Ninth Circuit Court of Appeals. Employment loss for seasonal workers occurs at the earliest time they reasonably could have expected to be recalled to work. Thus, seasonal lettuce harvesters, normally laid off from November until April, did not suffer an employment loss in November when they received a letter advising them of the discontinuation of lettuce harvesting operations. Rather, the employment loss occurred in April, the earliest time they reasonably could have expected to be recalled to work. Up until the point when the workers reasonably could have expected to be recalled to work, they had not lost anything in connection with their employment, except their expectation of returning to work in April. Losing the expectation of recall was a factor the court found not to be sufficient to cause an immediate employment loss.[10]

- **Early retirement.** An employer can reduce the number of employees who have suffered an employment loss (for the purposes of calculating whether a mass layoff has occurred) by offering early retirement in lieu of layoff, the Eight Circuit Court of Appeals has ruled. The plain wording of WARN indicates that retirement is not an "employment loss." The purpose of WARN is to provide time for retraining and reemployment, the court noted. Employees who choose early retirement do not need WARN protections.[11]

What are the steps in the WARN Act coverage analysis?



Aggregation. In some cases, employment losses for two or more groups of employees that occur at a single site of employment may be added together to determine whether a mass layoff or plant closing has occurred. This will occur when:

> (1) each of the groups contains fewer than the minimum number of affected employees;
> (2) the employment loss for each group will occur within any 90-day period; and
> (3) the total number added together exceeds the minimum number considered to be a plant closing or mass layoff as discussed above.

This determination does not apply where an employer is able to demonstrate that the losses of employment for the different groups are the result of separate and distinct actions and causes rather than an attempt to evade the requirements of the WARN Act.

Weil points out that worksites may be aggregated together under certain circumstances, such as when there is sharing of employees, common human resources/labor relations functions and overlapping management between worksites. Moreover, in a union environment, multiple worksites may need to be considered if “bumping rights” exist between locations.

Union bargaining. An employer may have additional obligations when the workplace is unionized. "Under certain circumstances if labor costs are the primary reason for the reduction in force, the employer may be required to bargain over the decision to reduce its workforce," Weil points out. "In any event, a unionized employer is required to bargain with the union over the effects of the reduction in force."

What are the WARN Act notice requirements? Employers are required to give notice of a plant closing or mass layoff:

- 60 days before a plant closing
- 60 days before a mass layoff

The notice must be sent to:

- The union if the workforce is unionized
- If not unionized, to all affected employees, including part-time employees
- In all cases, to the state dislocated workers' unit
- In all cases, to the chief elected official of the city or county where the plant is located

The notice may be given by:

- First class mail (return receipt optional)
- Notice addressed to named employees included in paychecks

Notice is not required if:

- The employer is actively seeking capital or business to avoid shutdown and giving notice would preclude the employer's obtaining the capital or business
- The closing or layoff is due to business circumstances that were not reasonably foreseen or to natural disaster (requirement is then to give as much notice as possible)
- A temporary facility is closed
- The closing or layoff results from completing a project and employees were hired knowing employment was limited to the duration of the project
- The loss of employment is due to a strike or lockout

Exceeding WARN Act requirements

The WARN Act regulations cannot cover every fact situation where the statute would require notice. But even if it is uncertain whether notice is required, the DOL advises that it is still "civically desirable and would appear to be good business practice" to provide advance notice. The DOL also notes that it is "prudent for employers to weigh the desirability of advance notice against the possibility of expensive and time-consuming litigation to resolve disputes where notice has not been given." Thus, the regulations encourage employers to give notice in all situations.

Weil suggests that even if the WARN Act does not apply to a plant closing or mass layoff, an employer should consider providing a courtesy notice to the state dislocated worker unit and the chief elected official. Why? "Such notice will trigger the support of the state's rapid response team, which can provide onsite assistance to displaced employees with unemployment claims filing, retraining, and outplacement services, all free of charge to the employer," she notes.

Similarly, the state workforce commission in some states has a "mass claims" process for handling unemployment claims. "The mass claims process allows the employer to submit a roster of information to the state for expedited processing of unemployment claims – a benefit both to employees and to the employer, who will avoid the need to respond to a large volume of individual claims," Weil advises.

While not required for unionized workforces, Weil also recommends that employers give employees individual written notice in addition to the required notice to the union representative. Why? "If folks work for you and you are laying them off, it's the right thing to do to give them individual notice, along with notice to the union," Weil urges. "Also, it helps ensure there is not miscommunication by the union."

Justifiable noncompliance

What are some of the scenarios under which employers might legitimately be unable to comply with the WARN Act's 60-day notice requirement?

Statutory exemptions. There are two statutory exemptions set forth in the Act.[12] The first excludes closings of temporary facilities as well as closings or layoffs that result from the completion of a particular project or undertaking. This exemption applies *only* when the affected employees were hired with the understanding that their employment was limited to the duration of the facility, project or undertaking.

The second exemption is for a closing or layoff that constitutes a strike layoff provided that such actions are not attempts to evade the requirements of the WARN Act. An employer has no duty to serve the required notice when permanently replacing a person who is deemed to be an economic striker under the National Labor Relations Act.

Reduced notice period. As Weil points out, less than 60 days' advance notice may be given in very limited circumstances[13] for:

- Plant closings falling under the **faltering business exception** that applies when the business was actively seeking capital or business as of the time WARN notice was required, which would have permitted the employer to avoid or postpone the layoff, and the employer in good faith believed notice would have precluded it from receiving the capital or business;

- The **unforeseeable circumstances exception** applicable to plant closings or mass layoffs that were caused by business circumstances not reasonably foreseeable at the time notice would have been required; and
- Plant closings or mass layoffs caused by a **natural disaster**.

"These defenses are difficult to establish and warrant a detailed review of existing case law before asserting," Weil cautions. Even if one of these defenses to providing the full 60-day WARN notice applies, WARN-compliant notice must still be provided "as soon as practicable" and must explain the reasons for the reduction in the notice period, she notes.

When does the faltering business exception apply? According to the DOL regulations, the exception applies to plant closings but not to mass layoffs. To qualify for reduced notice[14]:

1. An employer must have been actively seeking capital or business at the time that 60-day notice would have been required. That is, the employer must have been seeking financing or refinancing through the arrangement of loans, the issuance of stocks, bonds, or other methods of internally generated financing; or the employer must have been seeking additional money, credit, or business through any other commercially reasonable method. The employer must be able to identify specific actions taken to obtain capital or business.
2. There must have been a realistic opportunity to obtain the financing or business sought.
3. The financing or business sought would have been sufficient, if obtained, to have enabled the employer to avoid or postpone the shutdown. The employer must be able to objectively demonstrate that the amount of capital or the volume of new business sought would have enabled the employer to keep the facility, operating unit, or site open for a reasonable period of time.
4. The employer must have reasonably and in good faith believed that giving the required notice would have prevented the employer from obtaining the needed capital or business. The employer must be able to objectively demonstrate that it reasonably thought that a potential customer or source of financing would have been unwilling to provide the new business or capital if notice were given–that is, if the employees, customers or the public were aware that the facility, operating unit, or site might have to close. This condition may be satisfied if the employer can show that the financing or business source would not choose to do business with a troubled company or with a company whose workforce would be looking for other jobs.

Actively seeking capital. The faltering business exception applies when employers are actively seeking capital that would avoid or delay a shutdown, but the criteria can be difficult to meet. For example, an appellate court found that an employer that had been waiting for a financial institution to offer additional financial assistance, rather than actively seeking needed revenue, failed to prove all elements of the faltering company defense. Further, the trial court erred in finding the employer did not have to set forth specific proof of steps taken toward that goal at the time its layoff notice was to have issued.[15]

Different companies involved. Moreover, the faltering business exception might not apply where the company seeking capital to stay in business is not the same company that planned the layoffs and store closures. To illustrate, in one case, the decision to lay off employees and to close stores was made by another company with which the company seeking capital merged. In addition, the decision to lay off employees and to close stores was dependent on the *merger*, not on the acquisition of capital. Thus, contrary to a requirement of the faltering company exception, the acquisition of capital would not have prevented or delayed the layoffs and store closures at issue and in fact did not do so.[16]

Company-wide context. Importantly, the actions of an employer relying on the faltering company exception are viewed in a company-wide context. Therefore, a company with access to capital markets or with cash reserves may not avail itself of this exception by looking solely at the financial condition of the facility, operating unit, or site to be closed.

What is an unforeseeable business circumstance? The DOL regulations state:

> An important indicator of a business circumstance that is not reasonably foreseeable is that the circumstance is caused by some sudden, dramatic, and unexpected action or condition outside the employer's control. A principal client's sudden and unexpected termination of a major contract with the employer, a strike at a major supplier of the employer, and an unanticipated and dramatic major economic downturn might each be considered a business circumstance that is not reasonably foreseeable. A government-ordered closing of an employment site that occurs without prior notice also may be an unforeseeable business circumstance.[17]

Case-by-case determination. There is no *per se* rule as to what constitutes unforeseen business circumstances – the application of the exception depends on a case-by-case examination of the facts. For example, the business circumstances exception did not apply where a lumber company's downturn was reasonably foreseeable and was not caused by its loss of credit. The employer's financial crisis resulted from a general downturn in the lumber industry, a trend that was steadily growing for several years. There was no sudden contract cancellation, no unanticipated event, or other pertinent circumstances that would have excused the employer from providing notice. The employer's contention that the sudden trigger was its loss of credit from its bank failed since the bank closed its line of credit more than a month after the layoff event.[18]

By contrast, the exception did apply to a wholesale grocery warehouse and distribution center that laid off workers after its largest customer, whose orders it had struggled to fulfill for several months, finally informed the warehouse that it was going to use another primary supplier. The customer's withdrawal was not reasonably foreseeable despite its ongoing dissatisfaction since the two companies had suffered through similar difficulties in the past but their business relationship survived intact. Moreover, the distributor established that the customer's withdrawal was the cause of the layoff, even though there was no change in the actual volume of business, where the shutdown decision was made in the immediate wake of the withdrawal. At that point, "hope was vitiated," as the distributor lost 40 percent of its potential business.[19]

Business judgment. The test for determining when business circumstances are not reasonably foreseeable focuses on an employer's business judgment. The employer must exercise such commercially reasonable business judgment as would a similarly situated employer in predicting the demands of its particular market. Courts may consider many factors in determining whether an employer's business judgment is reasonable. One factor considered by a federal court was the longstanding business relationship between an employer and its major client. The court noted that a lengthy relationship builds a sense of security upon which it may not be unreasonable for an employer to rely.[20]

WARN Act administration and enforcement

An employee who suffers an employment loss and does not receive timely notice of a plant closing or mass layoff in violation of the WARN Act may maintain a civil cause of action against an employer. The amount that an employer is liable for includes back pay for each day of violation at a rate of compensation not less than the higher of: (1) the average regular rate received by the employee during the last three years; or (2) the final regular rate received by the employee. In addition, the employer is liable for benefits under an employee benefits plan as described in Section 3(3) of the Employee Retirement Income Security Act, including medical expenses that would have been covered by the benefit plan had the employment loss not occurred. The court may award the prevailing party reasonable attorneys' fees.

Calculating damages. The exact calculation of damages due to affected employees because of a notice requirement violation can make a big difference in an employer's liability. There is disagreement among the circuit courts as to whether the violation period should be calculated based on *working* days or *calendar* days. The majority of circuit courts considering the issue have concluded the violation period should be calculated based on working days.[21]

Courts that have calculated the violation period based on *working* days have focused on the term "back pay." Back pay, those courts argue, means the amount of money that an employee would normally have earned had the violation not occurred. Calculating damages based on *calendar* days would not be consistent with the definition of back pay because the back pay for a day the worker would not have worked had there been no violation would be zero.

Maximum liability. An employer's liability to an aggrieved employee is limited to 60 days, but can never be more than one-half of the number of days the employee was employed by the employer. An employer's liability for violating the WARN Act's notice provisions with respect to a unit of local government is limited to $500 per day for days of violation up to a maximum of 60 days.

The Fifth Circuit has held that the violation period is based on working days, can extend up to a maximum of 60 individual workdays, and is not limited to the number of workweeks contained within a 60-day period.[22]

Rate of pay. The proper way to convert an annual salary rate into a daily rate is simply to divide the annual salary by the number of days in a year, according to the Third Circuit Court of Appeals.[23]

Liability for benefits. If an employer was providing medical benefits to employees before the closing, it is liable for the *value of the medical benefits*, in addition to reimbursement for any medical expenses incurred that would have been covered. This means the employer must pay to former employees the premiums it otherwise would have paid to an insurance company or, if self-insured, the actuarial cost that the employer would have incurred in insuring the employees.[24]

Voluntary payments. Back pay liability is reduced by any *voluntary severance or extra vacation pay* given to employees. If the employer was not contractually obligated to provide the severance or vacation pay, it is entitled to a credit for payments that it voluntarily made.[25] An employer may be able to avoid WARN liability by offering covered employees severance benefits in exchange for their agreement to waive their rights under the WARN Act. However, such waivers will be ineffective if the employer was contractually obligated to pay severance benefits regardless of whether employees agreed to waive their rights.[26]

Reducing damages. Although not a defense for noncompliance with WARN notice, Weil points out that an employer may be able to reduce damages by establishing, to the satisfaction of the court, that it was acting in good faith with reasonable grounds to believe its actions or omissions were not in violation of the WARN Act.[27]

Limiting WARN Act liability

In order to avoid or limit WARN Act liability, Weil suggests a few steps that employers should consider taking when the possibility of a mass layoff or facility closure arises.

Plan for reductions. First, planning is key with workforce reductions, according Weil. “For example, if an employer expects a decline in business and anticipates the potential need to reduce its workforce three to six months out, then it can begin not only planning for WARN purposes, but may be able to avoid WARN obligations entirely by such legitimate actions as reducing its workforce through attrition or qualifying transfers, and by offering early exit incentives for groups of employees, which should include a waiver of WARN obligations in the release,” she advises.

Use waivers. Some courts have recognized the validity of a WARN Act waiver that is part of a general release and meets the other general requirements for validity of a waiver, Weil notes.

Since most employers require a release agreement as part of their severance plan, Weil recommends that employers ensure that the release agreement covers WARN Act claims. “In any event, an employer may provide in its release agreement an offset from severance for any WARN ‘pay in lieu of notice’ payments, to minimize its outlay of costs associated with a layoff,” she suggests.

Give conditional notice when uncertain. Employers should also be aware that conditional WARN notice is permitted when an employer is unsure as to whether layoffs will be necessary, so long as the notice spells out the conditional event and the occurrence or non-occurrence of the event is made clear, Weil instructs.[28] And, the WARN notice can provide for a 14-day layoff window in the event that it is difficult to ascertain a date certain for a layoff or closure,[29] she explains.

Extend notice if necessary. Moreover, Weil points out that WARN notice periods of up to 60 additional days may be extended by written notice to employees and other entities entitled to receive notice. “The extension notice need only explain the reasons for the extension and refer to the original WARN notice,” Weil advises. “The regulations provide that the notice must be given in a manner that will provide the information to all affected employees, which in most cases could be satisfied by a time clock posting or e-mail, depending on the work environment.” However, if the extension is for more than 60 days, a new written WARN-compliant notice must be provided, she cautions.

Consider less notice with compensation. Finally, employers have the option of providing less than the required 60-day WARN Act notice and paying employees’ wages and benefits for the remainder of the notice period, Weil proposes. “While the statute does make provision for a fine for noncompliance with the notice requirements of $500 for each day of violation, because there is no private right of recovery of the fine, this rarely becomes an issue,” she advises.[30]

Avoid questionable strategies. There are some tactics that employers should be wary of when attempting to avoid or minimize WARN Act liability, such as creating related or “alter ego” companies. According to Weil, creating an alter ego or related company may not minimize or eliminate WARN liability. The relevant regulation[31] outlines the five factors considered by the DOL in determining whether a related or alter ego company is part of its holding or parent company and shares “employer” status under WARN. “This can be a particularly significant evaluation, since to utilize the faltering company defense to the 60-day WARN notice requirement, the court will look to the resources of the entire company, not just the facility, and the entire company could include a parent company’s resources if the five-factor analysis warrants consideration of both employers as a single employer under the WARN Act,” she explains.

Factors to consider in planning

What factors should employers consider when planning for a mass layoff or plant closure? **"**It is critically important that human resources and labor relations professionals in the planning phase are involved at an early stage, for WARN planning and possibly WARN avoidance reasons," Weil instructs.

Demographics. In light of the Supreme Court's 2005 decision in *Smith v City of Jackson*, 544 US 228,[32] Weil advises that employers also evaluate the demographics of those who may be laid off to determine if the selection criteria for the layoff creates a disparate impact on older workers – those over age 40. Under *Smith*, older workers may bring disparate impact claims under the Age Discrimination in Employment Act. "This consideration is in addition to the other potential legal challenges to the workforce reduction under disparate treatment and Title VII and related employment discrimination theories," she notes.

Statistical analysis. Weil suggests that outside counsel are particularly useful in identifying a statistician or utilizing their own personnel to determine whether a set of selection criteria create a disparate impact. The analysis performed may support reexamination of selection criteria if there is a statistical anomaly, she points out.

"To the extent that an employer uses criteria other than reverse tenure and job qualifications, if there is a statistical anomaly in the reduction-in-force demographics, the employer should carefully examine the selection criteria," Weil warns. "For example, if an employer uses performance evaluations as its layoff selection criteria, it may want to review prior years' performance reviews to determine if the anticipated layoff may have influenced the performance review process, and consider also whether objective data, such as sales and profitability figures support the performance review rating, rather than simply subjective criteria, such as ratings on leadership skills, teamwork, etc," she explains. Similar scrutiny should be given to forced rankings prior to the layoff.

After further evaluation, the employer may want to consider other selection criteria and analyze the statistical impact based on using alternative criteria, Weil suggests.

Release of age bias claims. Finally, an employer that wants to ensure the release of age discrimination claims as part of its severance process should carefully review the Older Worker Benefit Protection Act (OWBPA) provisions to ensure that any release agreements meet OWBPA's requirements, Weil urges. When a group of employees are offered exit incentives, employees must be permitted 45 days to consider the release document and seven days to revoke their signatures to the agreement before the agreement is considered valid. Detailed information about the age and job classes of individuals eligible and ineligible for the incentive must accompany the release agreement. "The Courts have historically been extremely critical of OWBPA information provided to employees and have invalidated releases found to be deficient," Weil advises.[33]

Unionized workforce. In addition to a unionized employer's potential obligation to bargain over its decision to reduce its workforce and the effects of the reduction, employers should be aware that union contract provisions may dictate the order and sequence of layoffs, Weil stresses. "This may decrease the likelihood of WARN liability because union contracts typically require layoff in order of reverse seniority, which in some instances will require layoff of employees who do not count for WARN because they are not full-time employees under the Act," she points out. Some union contracts may also provide for more advance notice than the WARN Act requires.

Sales and bankruptcy

Given the current harsh economic climate, many employers are selling their businesses or facing the prospect of bankruptcy. What are the WARN Act implications for a business that is being sold, and what are the steps that employers can take to avoid or minimize Warn Act liability resulting from the sale?

There is a special provision under the WARN Act for a sale of all or part of an employer's business. Any notice required by the Act is the responsibility of the seller up to and including the date (time) of the sale. After the date (time) of the sale, the purchaser is responsible for providing notice of any plant closing or mass layoff. A person other than a part-time employee, who is an employee of the seller as of the effective date of the sale will be considered an employee of the purchaser immediately after the sale.[34]

"The parties can and should contractually allocate the burden of WARN notice, if WARN obligations are expected by either the buyer or the seller," Weil advises.[35] "Also, the parties can eliminate WARN liability by contractually agreeing that the buyer will hire and retain a requisite number of employees to eliminate WARN notice liability," she points out. "In many instances, the purchaser will agree to hire all employees who meet their hiring criteria, such as a background check and drug test."

What are the WARN Act implications that employers contemplating bankruptcy should take into consideration? Employers facing bankruptcy are frequently surprised to learn that WARN Act claims may survive and even have priority claim status in bankruptcy, according to Weil. "The timing of the bankruptcy filing, the dates during which the back pay obligation was incurred, and the date of the termination of employment may determine priority claim status," she explains. "Claims granted priority status may be capped at $10,000 each for benefits and wages."[36]

State WARN laws

Employers should be aware that state laws may come into play when a workforce is reduced or a worksite is closed. "While many states have laws that mirror the federal WARN Act, a handful of states have more restrictive provisions," Weil cautions.

New York. Effective February 1, 2009, New York's "Mini" WARN Act expands coverage to employers of only 50 or more full-time employees, as compared with 100 full-time employees under the federal statute, Weil points out. The state statute also requires that an employer provide 90 days' advance notice of a plant closing or mass layoff – 30 days more than required under federal law. Under the New York law, noncompliant employers owe employees 60 calendar days of back pay and benefits, as compared to 60 working days. "The federal circuits are divided as to whether under the federal WARN statute, 60 calendar days or 60 working days should apply," Weil instructed. "The significance of this distinction is that typically an employee might work only 42 days during a 60-day period (working days), whereas 60 calendar days of back pay would add an additional 18 days of back pay," she advises.

New Jersey. Weil notes that under the New Jersey WARN Act, employers are required to provide 60 days' advance notice of: (1) termination of employment; (2) termination of operations; (3) transfer of operations; or (4) mass layoffs. "The remedy under New Jersey law for missing even one day of a required 60-day notice period provides that the employer pay each employee severance equal to one week of pay for each full year of service," she points out.

California. The California WARN Act "expands coverage to employers of 75 or more employees, and extends to both a traditional employer and one which 'indirectly' owns and operates a covered establishment," according to Weil. The California law also does not require that a layoff be for more than six months or that it impact one third of the workforce to be covered. Moreover, some of the defenses available under the federal WARN Act do not apply, such as the unforeseen business circumstance exception, Weil cautions.

More litigation under state laws. If Weil is correct, employers can expect increasing litigation under state WARN laws. As of April 9, 2009, 20 states and the Commonwealth of Puerto Rico have laws applicable to layoffs, closures or relocations by public and/or private employers. Notice requirements are included in the laws of nineteen states. The coverage criteria, notice requirements and penalties for noncompliance among state laws vary considerably. Comparative information pertaining to state laws is detailed in *CCH's State and Federal Employment Law Compare Complete*.

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[1] USDL 09-0151.
[2] USDL 09-0272.
[3] Bergman v Thelen, NDCal, No CV 08 5322.
[4] 20 CFR §639.7.
[5] *WARN Employer's Guide to Advance Notice of Closings and Layoffs*, p. 3, http://www.doleta.gov/layoff/pdf/EmployerWARN09_2003.pdf.
[6] 20 CFR §639.3 (c).
[7] Long v Dunlop Sports Group Ams, Inc, 155 LC ¶10,926 (4thCir 2007).
[8] Rifkin v McDonnell Douglas Corp, 131 LC ¶11,510 (8thCir 1996).
[9] United Steel v Ainsworth Eng'g, 156 LC ¶11,124 (DMinn 2008).

[10] Marques v Telles Ranch, Inc, 131 F3d 1331 (9thCir 1997).
[11] Rifkin, *supra* note 8.
[12] 29 USC §2103.
[13] 29 USC §2102(b).
[14] 20 CFR §639.9 (a)-(c), *When May Notice Be Given Less Than 60 Days In Advance?*
[15] APA Transport Corp v Teamsters Local 560, 156 LC ¶11,093 (3rdCir 2008).
[16] Carpenters Dist Council of New Orleans & Vicinity v Dillard Dep't Stores, Inc, 127 LC ¶11,024 (5thCir 1994).
[17] 20 CFR 639.9.
[18] Childress v Darby Lumber, Inc, 149 LC ¶10,304 (9thCir 2004).
[19] Gross v Hale-Halsell Co, 157 LC ¶11,154 (10thCir 2009).
[20] Local Union 7107, UMW v Clinchfield Coal Co, 134 LC ¶10,055 (4thCir 1997).
[21] **Fifth Circuit:** Carpenters Dist Council, *supra* note 16. **Sixth Circuit:** Saxion v Titan-C Mfg, Inc, 131 LC ¶11,589 (6thCir 1996); **Eighth Circuit:** Breedlove v Earthgrains Baking Co, 135 LC ¶10,139 (8thCir 1998); **Ninth Circuit:** Burns v Stone Forest Indust, Inc, 135 LC ¶10,198 (9thCir 1998); **Tenth Circuit:** Frymire v Ampex Corp, 130 LC ¶11,413 (10thCir 1995).
[22] Carpenters Dist Council of New Orleans & Vicinity, *supra* note 16.
[23] Ciarlante v Brown & Williamson Tobacco Co, 135 LC ¶10,150 (3dCir 1998).
[24] Jones v Kayser-Roth Hosiery, Inc, 118 LC ¶10,560 (EDTenn 1990).
[25] *Id.*
[26] *See* International Bhd of Elec Workers, Local Union No 1992 v The Okonite Co, 139 LC ¶10,510 (3dCir 1999).
[27] 29 USC §2104(a)(4).
[28] 20 CFR §639.7(3).
[29] 20 CFR §639.7(4)(b).
[30] 29 USC §2104 (a)(3).
[31] 20 CFR §639.3(a)(2).
[32] 86 EPD ¶41,882.
[33] *See* 29 USC §626(f).
[34] *See* 29 USC §2101(b)(1).
[35] *See* 20 CFR § 639.4(b).
[36] *See* Bankruptcy Code §§ 507(a)(4) and (5).