



Guidance for Restaurants: Federal WARN Act and COVID-19 Issues* September 25, 2020

1. What is the Workers Adjustment and Retraining Notification (WARN) Act?

A: The WARN Act is a federal law requiring employers to provide written notice to various state and local government officials, affected employees, and any union representatives. If the WARN Act is triggered, generally, the notice must be provided at least 60 days before the separations. Certain states have different requirements and exceptions, for more information on the states, please look at our guidance on "[‘Mini-WARN’ Acts and COVID-19 Issues.](#)"

2. Which employers are covered by the WARN Act?

A: The WARN Act applies to employers that either have:

- 100 or more full-time employees anywhere in the U.S.; OR
- 100 or more full-time or part-time employees whose weekly work hours (excluding overtime hours) equal or exceed 4,000 hours per week in the aggregate.

For purposes of the WARN Act, independent contractors and subsidiaries which are wholly or partially owned by a parent company are treated as separate employers or as a part of the parent or contracting company depending upon the degree of their independence. In addition, the WARN Act defines "part-time employee" as someone 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 notice is required.

3. When does the WARN Act require 60-days' advance written notice?

A: The WARN Act requirements are triggered by:

- **Plant closings:** 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 a single site of employment for at least 50 full-time employees during any 30-day period.
- **Mass layoffs:** a reduction in the workforce, not due to a "plant closing," resulting in employment loss at a single site during any 30-day period: 1) for at least 50 full-time employees, if those employees comprise at least 33% of the active full-time workforce at the site; or 2) for at least 500 full-time employees regardless of the percentage of the workforce they comprise. However, note that layoffs at a facility generally will be aggregated during a 90-day period, unless the employer can show the layoffs were implemented for separate and distinct reasons.

An employment loss is generally either a termination, a layoff exceeding 6 months in duration, or a reduction in hours by more than 50% for each month of a 6 consecutive month period.

4. What are the contents of WARN notices?

A: The contents of WARN notices vary by recipient but generally must include:

- The name and address of the employment site where the triggering event will occur.
- A statement as to whether the action is anticipated to be either temporary or permanent.
- The name and telephone number of a company official to contact for further information.
- A statement as to whether bumping rights exist, even where there are no unions.
- The expected date of the first separation and information regarding unions.



5. Are there “exceptions” to federal WARN Act notice requirements?

A: There are “quasi-exceptions,” which permit employers to provide less than 60-days’ notice in certain circumstances:

- Unforeseeable Business Circumstances Exception (plant closings and mass layoffs).
- Faltering Company Exception (plant closings only).
- Natural Disaster (plant closings and mass layoffs).
- Notice must still be provided to rely upon an exception and the notice must set forth, with specificity, why an employer believes an exception applies. Also, the notice must generally be provided as soon as possible after the event triggering reliance on an exception.

6. Does COVID-19 qualify under the “Unforeseeable Business Circumstances Exception”?

A: The unforeseeable business circumstance exception may apply to COVID-19 related employment losses. However, this exception is fact specific; a restaurant must evaluate the specific situation and whether it could have provided notice at an earlier time. For the Unforeseeable Business Circumstances Exception to apply you need:

- A triggering event caused by business circumstances that were not reasonably foreseeable at the time the 60-day notices would have been required;
- The circumstances must have been caused by a sudden, dramatic, unexpected action or condition beyond the employer’s control; and,
- Employers must use “commercially reasonable business judgment” in determining whether a business circumstance is reasonably foreseeable.

7. What if a Temporary Furlough extends beyond six months, i.e., the COVID-19 Quandary?

A: A temporary layoff or furlough which lasts less than six months will not constitute an “employment loss” for the purposes of the federal WARN Act. However, the problem arises when circumstances such as a continued downturn in business or COVID-19 state and local mandatory closures and restrictions create a climate whereby the temporary layoffs initially planned for less than six months must now be extended beyond the six months mark. An employer that is faced with a circumstance whereby it must extend initially short-term furloughs beyond 6 months must provide WARN notice as soon as it becomes apparent that the employees will not be able to return to work. Whether the employer can rely upon an exception at this juncture will be fact specific. Ideally, there would have been recent occurrences beyond the employers’ control that caused the employer to determine that it must now extend the furloughs beyond 6 months. General reliance on the continued issues related to COVID-19 could be problematic if the reasons for the extension were reasonably foreseeable at the time of the initial temporary layoff.

For questions regarding this document, please contact [Angelo Amador](#), Executive Director of the Restaurant Law Center, at 202-331-5913 or via email at aamador@restaurant.org.



We would also like to thank [Michael Jakowsky](#) and [Isaac Burker](#) with the firm of [Jackson Lewis P.C.](#) for their assistance in drafting this document.

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