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WORKER ADJUSTMENT RETRAINING AND NOTIFICATION ACT (“WARN”) CHECKLIST

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The Worker Adjustment and Retraining Notification Act (“WARN”) was enacted in 1988 and requires that certain employers give sixty days advance notice of a “plant closing” or “mass layoff” to affected employees, bargaining representatives, and local government officials. The purpose of the WARN Act is to provide workers and their families some transition time to adjust to the prospective loss of employment, to seek and obtain alternative employment and to gain the skills necessary to successfully compete in the job market. Employers who fail to comply with the WARN notice requirements may be liable for pay and benefits for the period during which notice should have been given, up to sixty days.

The following is a checklist of key WARN Act definitions and requirements designed to be used when preparing for a WARN Act event or the possibility of a WARN Act event.¹

CHECKLIST

I. WHO IS AN EMPLOYER?

A. Small Employer Exemption.

The WARN Act only applies to those business which employ:

- ‘ 100 or more employees, excluding part-time employees; OR
- ‘ 100 or more employees, including part-time employees, who in the aggregate work at least 4,000 hours per week, exclusive of hours of overtime.

B. Subsidiaries/Independent Contractors.

Independent contractors and subsidiaries which are wholly or partially owned by a parent company are treated as separate employers or as part of the parent or contracting company depending on the degree of their independence from the parent. Consider the following factors:

- ‘ Common ownership;
- ‘ Common directors and/or officers;
- ‘ *De facto* exercise of control;

- ‘ Unity of personnel policies emanating from a common source;
- ‘ Dependency of operation.

II. TO WHOM MUST THE EMPLOYER GIVE NOTICE?

A. Employees Who Must Be Given Notice:

- ‘ Managerial and supervisory employees;
- ‘ Part-time employees;
- ‘ Employees on temporary layoff who have a reasonable expectation of recall prior to notice of the plant closing or mass layoff;
- ‘ Permanent employees working at temporary facilities or on temporary projects;
- ‘ Employees who are likely to be bumped;
- ‘ Any 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.

B. Employees Who Do Not Require Notice:

- ‘ Temporary project employees;
- ‘ Business partners;
- ‘ Consultants;
- ‘ Contract employees of another employer who are paid by that employer;
- ‘ Self-employed individuals.

C. Other Individuals Who Require Notice:

- ‘ Bargaining (union) representatives of affected employees;
- ‘ State dislocated worker unit;
- ‘ Chief elected official of the unit of local government within which a closing or layoff is to occur.

¹ For a more extensive discussion of the WARN Act, see Ethan Lipsig and Keith R. Fentonmiller, *A WARN Act Road Map*, The Labor Lawyer 273 (1995) and the Department of Labor’s WARN Act regulations, 20 C.F.R. § 639.1 *et. seq.*

III. WHAT IS A “PLANT CLOSING”?

A Plant Closing Is:

- ‘ A permanent or temporary shutdown of a single site of employment; OR
- ‘ A permanent or temporary shutdown of one or more facilities or operating units within a single site of employment; AND
- ‘ Which exceeds the 50 employee threshold, during a thirty (30) day period, excluding part-time employees.²

IV. WHAT IS A “MASS LAYOFF”?

Mass Layoff Means A Reduction In Force Which:

- ‘ Is not the result of a plant closing; AND
- ‘ Results in an **employment loss** at a single site of employment during any 30-day period for:
 - ‘ 33 % or more of the active employees, excluding part-time employees, but at least 50 OR
 - ‘ 500 employees, excluding part time employees.³

V. WHAT IS AN “EMPLOYMENT LOSS”?

An Employment Loss Is:

- ‘ An employment termination other than a discharge for cause, voluntary departure, or retirement;
- ‘ A layoff exceeding six months; OR
- ‘ A reduction in hours of work of individual employees of more than 50% during each month of any six month period.

VI. WHEN MUST NOTICE BE GIVEN?

- ‘ As a general rule, notice must be given sixty (60) calendar days prior to any planned plant closing or mass layoff.
- ‘ When all employees are not terminated on the same date, the date of the first individual termination within the 30-day or 90-day period (discussed below) triggers the sixty (60) day notice

² Workers other than part time workers (temporary project, seasonal, and employees employed outside the U.S.), who are exempt from the WARN Act’s notice requirements are nonetheless counted as employees for purposes of determining coverage as a plant closing or mass layoff.

³ See fn.2 above.

requirement. The first and each subsequent group of terminatees are entitled to a full sixty (60) days notice.

- ‘ In order to determine whether a WARN notice is required an employer should look ahead thirty (30) days and behind thirty (30) days to determine whether employment actions will in the aggregate reach the minimum numbers for a plant closing or mass layoff. If so, notice must be given.
- ‘ Additionally, if two or more employee groups suffer employment losses at a single site of employment during a ninety (90) day period, which separately are not of sufficient size to trigger the WARN Act, the groups will be aggregated, unless an employer can prove that the losses resulted from reasons not related from an attempt to evade its WARN Act commitments. If the employment actions, in the aggregate, reach the minimum numbers for a plant closing or mass layoff, notice must be given.

VII. WHAT MUST A WARN NOTICE CONTAIN?

A. Notices To Employees Must:

- ‘ State the name and telephone number of a company official from whom further information may be obtained;
- ‘ State whether the planned action is permanent or temporary. If a plant is being closed, the notice must so state;
- ‘ Set forth the expected date of the first termination and the expected date of the recipient’s termination, or set forth a two-week window in which the terminations are to occur;
- ‘ Indicate whether bumping rights exist.

B. Notices To Bargaining Representatives Must:

- ‘ Set forth the name and address of the employment site where the plant closing or mass layoff will occur and give the name and telephone number of a company official from whom further information may be obtained;
- ‘ State whether the planned action is permanent or temporary. If a plant is being closed, the notice must so state;
- ‘ Set forth the job titles of affected positions and the names of the workers currently holding affected jobs.

C. Notices to Government Officials Must:

- ' Set forth the name and address of the employment site where the plant closing or mass layoff will occur and give the name and telephone number of a company official from whom further information may be obtained;
- ' Set forth the expected date of the first termination and the anticipated schedule for termination, or set forth a two-week window in which they are to occur;
- ' Set forth the job titles of positions to be affected and the number of affected employees in each job classification;
- ' State whether the planned action is permanent or temporary. If a plant is being closed, a notice must so state;
- ' Indicate whether bumping rights exist;
- ' Set forth the name of each union representing affected employees and the name and address of the chief elected official of each such union.

VIII. WHAT ARE THE EXCEPTIONS TO THE NOTICE REQUIREMENT?

A. Complete Waiver of the Notice Requirement:

- ' Closing of temporary facility employing temporary employees that has completed its project or undertaking;
- ' Strike or Lockout that is not an attempt to evade WARN Act obligations.

B. Partial Waiver of the Notice Requirement:⁴

- ' Unforeseeable business circumstances;
- ' Failure to secure capital or business in situation that employer reasonably believed that providing WARN Act notices would have prevented obtaining the capital or business;
- ' Natural disasters;
- ' Sale-of-business exceptions (providing for allocation of notice obligations as between seller and buyer);
- ' Recalls within six months precluding a plant closing or mass layoff;
- ' Payment-in-lieu of notice.

⁴ In these situations, an employer is still obligated to supply as much notice as possible. Some of these exceptions are provided for by statute and others have been crafted by the courts. The criteria for many of the exceptions are complex and fact specific.