

A Warning for Employers in the Energy Sector

Article

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The US energy sector is experiencing ongoing consolidation, with \$250 billion worth of deals in 2023 alone. This trend often leads to workforce restructuring, making it crucial for employers to understand potential triggers for the Worker Adjustment and Retraining Notification Act requirements.

This article aims to provide guidance on these complex issues, helping employers navigate the legal requirements within the WARN Act during periods of corporate restructuring and workforce reduction.

Basic Concepts

What is the WARN Act?

The WARN Act is a federal labor law that requires employers to provide advance notification of plant closings and mass layoffs to employees, their representatives and local government officials.

To which employers does the WARN Act apply?

The WARN Act generally applies to employers with 100 or more full-time employees or 100 or more employees who work at least a combined 4,000 hours per week.

Which events trigger WARN Act requirements?

WARN Act requirements are triggered by:

1. Plant closings affecting 50 or more employees; and
2. Mass layoffs affecting at least 50 employees and one-third of the workforce at a single site or 500 or more employees at a single site.

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What constitutes a single site of employment?

A single site of employment generally refers to a single location or a group of contiguous locations. Separate buildings or areas within reasonable geographic proximity and used for the same purpose may be considered a single site. Noncontiguous sites in the same geographic area may be considered separate sites if they are separately managed. For mobile workers, the single site is typically the location they report to or receive assignments from.

How is single site of employment determined for field workers, such as those on oil rigs?

For employees working in the field or at remote locations, such as oil rigs, determining the single site of employment can be complex. Here are key points to consider:

- **Separate locations:** Generally, each oil rig or drilling site is considered a separate site of employment.
- **Factors for aggregation:** Courts consider three main factors when determining whether multiple sites can be aggregated as a single site of employment: a) the sites must be in “reasonable geographic proximity” to each other; b) they must be “used for the same purpose;” and c) they must “share the same staff and equipment.” Notably, all three factors need to be met for separate sites to be treated as a single site of employment.
- **Geographic proximity:** Recent court decisions have emphasized that rigs located hundreds of miles apart typically do not meet the “reasonable geographic proximity” requirement.
- **Share the same staff and equipment:** This element requires more than the occasional intermingling of various employees and equipment. Instead, it requires the regular exchange of employees and equipment.
- **Mobile workforce:** For truly mobile workers who do not report to any fixed location regularly, the single site of employment might be determined to be the site to which they are assigned as their home base, from which their work is assigned or to which they report.
- **Case-by-case basis:** Given the complexity of these situations, the determination often needs to be made on a case-by-case basis, considering the specific facts of the employment situation.

Notice Requirements

How much notice must be given?

At least 60 calendar days advance written notice.

Who must receive the WARN notice?

The notice must be provided to:

1. Affected employees or their union representatives;
2. The state dislocated worker unit; and
3. The chief elected official of the local government where the closing or layoff will occur.

What information must be included in the WARN notice?

The notice should include:

1. Whether the planned action is permanent or temporary;
2. The expected date of the first separation;
3. The job titles of positions to be affected and the number of employees in each job classification;
4. An explanation of bumping rights, if they exist; and
5. The name and contact information of a company official to contact for further information.

Exceptions and Special Circumstances

Are there any exceptions to the 60-day notice requirement?

Yes, there are three exceptions:

1. **Faltering company:** For plant closings only, when a company is actively seeking capital that would allow it to avoid or postpone a shutdown and believes that advance notice would preclude its ability to obtain the needed capital;
2. **Unforeseeable business circumstances:** When the closing or mass layoff is caused by business circumstances that were not reasonably foreseeable 60 days in advance; and
3. **Natural disaster:** Which can be a major concern for companies in the Texas Gulf Coast region.

How difficult is it to establish the unforeseeable business circumstances exception?

It can be challenging. Key factors include:

- Whether the circumstance was reasonably foreseeable at the time notice would have been required; and
- Whether the circumstance was outside the employer's control.

Courts generally interpret this exception narrowly. The employer must demonstrate that the circumstances leading to a layoff or closure were caused

by some sudden, dramatic and unexpected action or condition outside the employer's control.

What is the 90-day look-back period?

The WARN Act includes a 90-day look-back period to prevent employers from avoiding WARN Act obligations by conducting a series of smaller layoffs. If multiple smaller layoffs within 90 days collectively meet WARN Act thresholds, the Act applies unless the employer can prove they resulted from separate and distinct actions and causes.

Can a voluntary retirement plan be offered to avoid triggering WARN?

Yes, if truly voluntary. If coercive or if employees are told they'll be laid off if they don't accept, WARN Act obligations could still apply.

Compliance and Penalties

What are the penalties for violating the WARN Act?

- Back pay and benefits: Employers are liable to each affected employee for an amount equal to back pay and benefits for the period of the violation, up to 60 days;
- Civil penalties: Up to \$500 per day of violation; and
- Attorney's fees: In successful lawsuits.

Can employers provide pay in lieu of notice?

Yes, employers can provide pay in lieu of notice, often called "WARN pay." However:

- Pay in lieu of notice doesn't eliminate the requirement to provide written notice;
- The pay cannot be conditioned on a release of claims; and
- The pay must include the value of all benefits the employee would have received through the notice period.

WARN Act in M&A Transactions

How does the WARN Act apply in M&A transactions?

In M&A transactions, WARN Act obligations can become complex, especially when layoffs occur before, during or after the closing of the deal. Both buyers and sellers need to be aware of potential WARN Act liabilities and address them in the purchase agreement.

Who is responsible for WARN Act compliance in an asset purchase?

In an asset purchase, the seller typically remains responsible for WARN Act compliance for pre-closing layoffs, while the buyer is responsible for post-closing layoffs. However, the specific allocation of liability should be addressed in the purchase agreement.

What about WARN Act liability in an equity purchase?

In an equity purchase, where the corporate structure remains intact and only ownership changes, the company (now under new ownership) remains responsible for any WARN Act violations, including those that may have been set in motion before the transaction.

What if layoffs occur both before and after the closing?

This situation can be particularly complex. If the seller conducts layoffs prior to closing that do not meet the WARN Act threshold, but post-closing layoffs by the buyer then trigger WARN Act obligations, determining liability can be challenging. It is crucial to address this scenario explicitly in the purchase agreement.

How can parties mitigate WARN Act risks in M&A transactions?

To mitigate risks, the purchase agreement should include provisions that:

1. Clearly allocate WARN Act responsibilities and liabilities between the seller and buyer;
2. Require the seller to disclose all involuntary terminations that occurred in the 90-day period prior to closing;
3. Include representations and warranties from the seller regarding compliance with the WARN Act and disclosure of any WARN Act-related notices or events; and
4. Provide for indemnification in case of WARN Act violations resulting from undisclosed pre-closing terminations.

What due diligence should be conducted regarding the WARN Act in M&A transactions?

Both parties should conduct thorough due diligence regarding employment matters, including:

- Recent and planned workforce reductions;
- Any WARN Act notices issued in the past three years;
- Compliance with state “mini-WARN” acts; and
- Review of employee handbooks and policies related to layoffs.

Are there any special considerations for post-closing layoffs?

Buyers should be cautious about implementing significant layoffs immediately after closing, as these could potentially be aggregated with pre-closing

terminations for WARN Act purposes. It is advisable to wait at least 90 days after closing before conducting major layoffs, unless appropriate provisions have been made in the purchase agreement.

Additional Resources

Where can employers get more information about the WARN Act?

Employers can find more detailed information and guidance on the U.S. Department of Labor's [website](#).

Remember to consult with legal counsel for specific situations, as this article provides general information and does not constitute legal advice.

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