

## Comprehensive WARN Act FAQ for Employers in the Energy Sector

Update

October 18, 2024 | 8 minute read

### Preamble

The US energy sector's ongoing consolidation wave, which saw \$250 billion worth of deals in 2023 and continues into the current year, is reshaping the industry landscape. As companies seek to deploy cash reserves and enhance their oil and gas portfolios, mergers and acquisitions (M&A) have become increasingly common. This trend, however, often leads to workforce restructuring. Consequently, energy companies involved in these transactions are frequently confronted with the need to reduce their workforce. In this climate of change, it's imperative for employers to be cognizant of potential triggers for the Worker Adjustment and Retraining Notification (WARN) Act requirements. Compliance with WARN Act provisions is crucial as companies navigate the complex terrain of consolidation-driven layoffs.

Additionally, given the demographic makeup of many energy sector workforces, employers must be particularly cognizant of the interplay between the WARN Act and the Older Workers Benefit Protection Act (OWBPA). The OWBPA provides additional protections for workers aged 40 and over, and its requirements often come into play during large-scale layoffs or early retirement offerings that are common in consolidation scenarios.

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

### Basic Concepts

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## **1. What is the WARN Act?**

The Worker Adjustment and Retraining Notification (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.

## **2. Which employers does the WARN Act apply to?**

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 (excluding overtime).

## **3. What events trigger WARN Act requirements?**

WARN Act requirements are triggered by:

1. Plant closings affecting 50 or more employees.
2. Mass layoffs affecting at least 50 employees and 1/3 of the workforce at a single site, or 500 or more employees at a single site.

## **4. 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. Non-contiguous sites in the same geographic area may be considered separate sites if they are managed separately. For mobile workers, the single site is typically the location they report to or receive assignments from.

## **5. 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:

1. Separate Locations: Generally, each oil rig or drilling site is considered a separate site of employment.
2. 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.
3. Geographic Proximity: Recent court decisions have emphasized that rigs located hundreds of miles apart typically do not meet the "reasonable geographic proximity" requirement.

4. **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.
5. **Mobile Workforce:** For truly mobile workers who don't 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.
6. **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.

Employers should consult with legal counsel when making determinations about WARN Act applicability, especially in situations involving geographically dispersed workforces. For further guidance, see *Meadows v. Latshaw Drilling Co., LLC*, No. 3:15-CV-1174-D, 2016 WL 3057657, at \*1 (N.D. Tex. May 31, 2016), *aff'd sub nom. Meadows v. Latshaw Drilling Co., L.L.C.*, 866 F.3d 307 (5th Cir. 2017).

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## Notice Requirements

### 6. How much notice must be given?

Employers must provide at least 60 calendar days' advance written notice.

### 7. 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.
3. The chief elected official of the local government where the closing or layoff will occur.

### 8. 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.
5. The name and contact information of a company official to contact for further information.

## Exceptions and Special Circumstances

### 9. 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 which 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.
3. **Natural disaster:** When a natural disaster, such as a flood, earthquake, or drought, causes the closing or layoff.

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

Establishing the unforeseeable business circumstances exception can be challenging. Key factors include:

1. Whether the circumstance was reasonably foreseeable at the time notice would have been required.
2. Whether the circumstance was outside the employer's control.

Courts generally interpret this exception narrowly. The employer must demonstrate that the circumstances leading to the layoff or closure were caused by some sudden, dramatic, and unexpected action or condition outside the employer's control.

Even if the exception applies, the employer is still required to give as much notice as is practicable once the need for mass layoffs or plant closing becomes known. It's advisable to consult with legal counsel before invoking this exception.

### 11. 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 two or more groups of employees are laid off within 90 days and each group is below the threshold but the total meets or exceeds it, the WARN Act applies unless the employer can demonstrate that the layoffs resulted from separate and distinct actions and causes.

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

Yes, offering a voluntary retirement or resignation plan can potentially help avoid triggering WARN Act requirements, provided it's truly voluntary. If enough

employees accept the voluntary package, it might reduce the number of involuntary layoffs below the WARN Act threshold. However, if the “voluntary” program is coercive or if employees are told they’ll be laid off if they don’t accept, it may not be considered truly voluntary, and WARN Act obligations could still apply.

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## Compliance and Penalties

### 13. What are the penalties for violating the WARN Act?

The penalties for failing to provide required notice under the WARN Act can be significant:

1. **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.
2. **Civil Penalties:** Employers may be subject to a civil penalty of up to \$500 for each day of violation. This penalty may be avoided if the employer pays each affected employee within three weeks after the closing or layoff.
3. **Attorney’s Fees:** If employees or their representatives sue successfully to enforce the WARN Act, the court may allow reasonable attorney’s fees as part of the costs.

### 14. Can employers provide pay in lieu of notice?

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

1. Pay in lieu of notice doesn’t eliminate the requirement to provide written notice.
2. The pay cannot be conditioned on a release of claims.
3. Pay in lieu of notice should cover the full notice period (up to 60 days) and include the value of all benefits the employee would have received during that time and cover the cost of medical expenses incurred during the period which would have otherwise been covered under an employee benefit plan if the employment loss had not occurred.

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## WARN Act in M&A Transactions

### 15. 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.

## **16. 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.

## **17. 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. This liability persists unless it is specifically addressed in the purchase agreement. Therefore, buyers in equity transactions should be particularly diligent in assessing potential WARN Act liabilities and negotiating appropriate protections in the agreement.

## **18. 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 threshold, but post-closing layoffs by the buyer then trigger WARN obligations, determining liability can be challenging. It's crucial to address this scenario explicitly in the purchase agreement.

## **19. 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-related notices or events.
4. Provide for indemnification in case of WARN Act violations resulting from undisclosed pre-closing terminations.

## **20. 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 notices issued in the past three years.

- Compliance with state “mini-WARN” acts.
- Review of employee handbooks and policies related to layoffs.

## **21. 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's advisable to wait at least 90 days after closing before conducting major layoffs, unless appropriate provisions have been made in the purchase agreement.

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## **Interaction with Other Laws**

### **22. What considerations are there under the OWBPA with respect to WARN?**

The Older Workers Benefit Protection Act (OWBPA) interacts with the WARN Act when a layoff or termination involves employees aged 40 or older. Key considerations include:

1. If offering severance in exchange for a release of age discrimination claims, the release must meet OWBPA requirements to be valid.
2. Employees must be given at least 45 days to consider the agreement (for group terminations).
3. Employees must be provided information about the “decisional unit” and the eligibility factors used to determine who was selected for layoff.
4. The OWBPA requires a seven-day revocation period after signing the agreement.

### **23. How is the decisional unit determined with respect to the OWBPA?**

The decisional unit is the class, unit, or group of employees from which the employer chose the individuals who would be offered the severance agreement. Factors to consider when determining the decisional unit include:

1. The organizational structure of the company.
2. The chain of command or reporting relationships.
3. The functions or responsibilities of various departments or units.
4. How layoff decisions were actually made.

### **24. Can you provide examples of decisional units and how they might be determined?**

Here are some examples of how decisional units might be determined:

1. Single Department: If layoffs are limited to a specific department, such as “Marketing” or “IT,” that department could be the decisional unit.
2. Job Classification: If cuts are made to a particular job role across the organization, such as “Junior Analysts” or “Administrative Assistants,” all employees in that classification could form the decisional unit.
3. Reporting Structure: If layoffs affect all employees reporting to a particular manager or executive, that group could be the decisional unit.
4. Geographic Location: For a company with multiple locations, if layoffs are limited to a specific office or region, that could be the decisional unit.
5. Entire Organization: In some cases, particularly for smaller companies or when cuts are made across the board, the entire organization might be the decisional unit.

Employers should be aware that defining the decisional unit too narrowly when the actual decision-making process involved a broader group could lead to legal challenges. It’s important that the defined decisional unit accurately reflects how layoff decisions were truly made.

## **25. Are there state laws similar to the WARN Act?**

Yes, many states have their own WARN Acts or similar laws, often called “mini-WARN” laws. These state laws may have different thresholds, longer notice periods, or additional requirements. Employers should check the laws in their state(s) of operation.

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## **Additional Resources**

### **26. 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: <https://www.dol.gov/agencies/eta/layoffs/warn>.

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