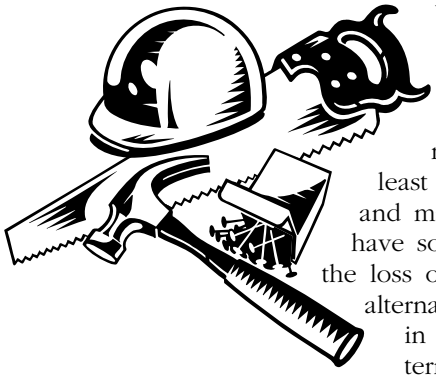
MICHAEL NEWMAN AND FAITH ISENHATH

The WARN Act 101

During these tough economic times, companies are being forced to eliminate positions and close operations, making knowledge of the Worker Adjustment and Retraining Notification Act important. The Worker Adjustment and Retraining Notification Act (WARN Act), enacted in 1988, requires employers of 100 or more employees to give written notice to affected employees, union bargaining representatives, and local government officials 60 days in advance of a "plant closing" or "mass layoff."[1] This column briefly outlines the requirements of the WARN Act so that attorneys can become familiar with this area of the law.

The Bureau of Labor Statistics reported a total of 21,137 mass layoffs in all of 2008—the highest annual level since 2001–2002.[2] In December 2008 alone, there were 2,275 mass layoffs, each action involving at least 50 employees.[3] Recently, numerous companies have eliminated jobs or plan to do so. A few of the major companies and their numbers are listed here:

- Cessna Aircraft cut a total of 4,600 jobs;
- Starbucks plans to close 200 U.S. stores and to cut 6,700 jobs;
- Sprint Nextel plans to eliminate 8,000 jobs;
- Target plans to eliminate 1,500 jobs;
- Saks plans to cut 1,100 positions;
- Walgreens plans to cut 1,000 jobs; and
- AT&T anticipates cutting 12,000 jobs in the United States.[4]



Therefore, the WARN Act is likely to come into play often.

The purpose of the WARN Act is to provide protection to workers and their families by requiring employers to give at least 60 days' notice of plant closings and mass layoffs so that the workers have some transition time to adjust to the loss of employment and to look for alternative employment.[5] The first step in following the WARN Act is determining whether the company is considered an "employer" that is required to give notice. The WARN Act defines an "employer" as any business enterprise that employs either 100 or more employees (excluding part-time employees), or 100 or more employees who, in the aggregate, work at least 4,000 hours per week.[6] Independent contractors and subsidiaries that are wholly or partially owned by a parent company are treated as separate employers—depending on the degree of their independence from the parent company and several other factors, such as common ownership, common directors/officers, de facto exercise of control, unity of personnel policies coming from a common source, and the dependency of operations.[7]

If the company is considered an "employer" under the WARN Act, the next determination is whether the employer's anticipated action constitutes either a "mass layoff" or a "plant closing." A "plant closing" is defined as "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 the single site of employment during any 30-day period for 50 or more employees excluding part-time employees."[8] A single site of employment refers to either a single location or a group of contiguous locations. Separate buildings or areas that are not immediately connected may be considered a single site "if they are in reasonable geographic proximity, used for the same purpose, and share the same staff and equipment."[9] Contiguous buildings that are owned by the same employer but have separate management, produce different products, and have separate workforces are considered separate single sites of employment.[10]

Under the WARN Act, the term "mass layoff" means a reduction in force that is not the result of a plant closing and results in an employment loss[11] at a single site of employment during any 30-day period for at least 33 percent of the employees (excluding part-time employees) *and* at least 50 employees (excluding part-time employees), or at least 500 employees (excluding part-time employees).[12] Mass layoffs involve loss of employment, regardless of whether one or more units are shut down at a site; plant closings involve loss of employment resulting from shutting down one or more distinct units within a single site of employment—both within a 30-day period.[13] If an employer is planning a plant closing or a mass layoff, affected employees must be provided at least 60 days' notice of such an action.[14]

Employers must also provide advance notice to the representatives of the affected employees, or if there is no representative, then to each affected employee, to the state or entity designated to carry out rapid response activities, and to the chief elected official of the unit of local government within which the plant closing or layoff is to occur.[15] The required content

of the notice depends on the recipient, and the applicable regulations detail what is required for notices to government officials, employees, and representatives.[16] An employer who fails to provide required notice as specified by the WARN Act is liable to each affected employee for wages and benefits incurred during the period that employment was lost.[17]

In addition, an employer who violates the act's provisions related to the local government is subject to a civil penalty of not more than $500 for each day of the violation, except if the employer pays each employee the requisite back pay within three weeks from the day the plant closing or layoff began.[18] These penalties do not apply if the employer can prove that the violation was in good faith and that the employer had reasonable grounds for believing that the omission did not violate the act.[19]

The WARN Act requirements regarding notice have a number of exceptions. The "faltering company" exception allows a reduced notice period in a plant-closing context if the employer was actively seeking capital or business that, if obtained, would have enabled the employer to avoid the shutdown.[20] Also, an employer may give less than 60 days' notice if a plant closing or mass layoff is caused by "sudden, dramatic, and unexpected" business circumstances that were not reasonably foreseeable and outside the employer's control. Examples of unforeseeable business circumstances include an unexpected termination of a major contract, a strike taking place at the employer's major supplier, an unanticipated economic downturn, and an unannounced government-ordered closing.[21] The WARN Act is waived entirely if a plant closing or mass layoff is caused by a natural disaster, but, in that case, the employer must give affected workers as much notice as possible.[22] Furthermore, the act provides an exception in the case of the sale of a business. This exception assigns the responsibility for giving the act notices to the seller if the mass layoffs or plant closings occur "up to and including the effective date of sale," but then the responsibility shifts to the purchaser after the date of sale. This exception also deems all the seller's employees the purchaser's employees immediately after the effective date of the sale.[23]

Employers can consider several alternative strategies in complying with the WARN Act. To avoid liability under the WARN Act, employers can voluntarily pay employees in lieu of giving them notice, as long as the correct pay and benefits are provided.[24] Another strategy is to provide employees with a paid leave of absence in lieu of advance notice with full pay and benefits.[25] Employers must always be sure to also comply with any notice provisions required by the state along with the WARN Act.

In an era in which company shutdowns and layoffs are likely options, it is imperative for attorneys to be familiar with the provisions of the WARN Act so that they can help advise either their company clients of their obligations under the act or their employee clients of their notice rights. **TFL**

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Endnotes

[1]29 U.S.C. §§ 2101–2109.

[2]Bureau of Labor Statistics, *Mass Layoffs Summary*, available at www.bls.gov/news.release/mmls.nr0.htm (Jan. 28, 2009).

[3]*Id.*

[4]Bureau of National Affairs, Daily Labor Report, *Workforce Reductions*, available at news.bna.com/dlln/display/alpha.adp?mode=topics&letter=W&item=B916EEBC6DC4ADE55C2F58894F543D09&act=exp&clear_exp=1 (last visited Feb. 2, 2009).

[5]20 C.F.R. § 639.1.

[6]29 U.S.C. § 2101. Workers who have been temporarily laid off or are on leave and have reasonable expectation of recall are counted as employees. 20 C.F.R. § 639.3.

[7]20 C.F.R. § 639.3(2).

[8]29 U.S.C. § 2101(2). A part-time employee means an employee who is employed for an average of fewer than 20 hours per week or who has been employed for fewer than six of the 12 months preceding the date on which notice is required. 29 C.F.R. § 639.3(h).

[9]29. C.F.R. § 639.3(h)(3). An example is an employer who manages numerous warehouses in an area but who regularly rotates the same employees from one building to another.

[10]*Id.*

[11]Employment loss means (1) termination of employment other than a discharge for cause, voluntary departure, or retirement; (2) a layoff exceeding six months; or (3) a reduction in hours of work of more than 50 percent during each month of any six-month period. 29 U.S.C. § 2101(a)(6).

[12]*Id.*, § 2101(a)(3).

[13]The WARN Act also looks at employment losses that occur over a 90-day period. An employer is required to give advance notice if it has a series of small layoffs that add up to the numbers that would require notice under the WARN Act. An employer is not required to give notice if it can show that the individual events occurred as a result of separate and distinct actions that are not an attempt to evade the requirements of the WARN Act. *Id.*, § 2102(d).

[14]20 C.F.R. § 639.2 . The term "affected employees"

LABOR *continued on page 22*

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system, allow use by academicians and government attorneys at no charge. Stanford's press release announcing the IPLC stated that "all three branches of government—judicial, executive, and legislative—may use the IPLC to track, manage, analyze, and debate IP litigation in real time."

Commercial uses—both direct and indirect—were initially prohibited, but Walker expects that a pay-for-use system for commercial users will be available in a few weeks (most likely by the publication date for this column or shortly thereafter). Such uses will be subject to different terms—including an up-front charge for each firm as well as hourly usage charges—which Walker says will be lower than those levied by other commercial services. As of this writing, the terms of use define commercial uses as those used by private attorneys defending, managing, or prosecuting litigation; by litigation consultants; by any for-profit legal entity; and by those who need to analyze the purchase, sale, licensing, commercialization, or valuation of any intellectual property. According to Walker, the charges are necessary to support the continued operation of the IPLC, which, like every other party, pays the federal government for access to PACER. However, Lemley says that he believes some commercial uses of the IPLC may be free in the future.

If the database works as well as expected, Lemley believes that it could lead to similar efforts in other fields, such as bankruptcy or antitrust law. **TFL**

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means employees who may reasonably be expected to experience an employment loss as a result of the plant closing or mass layoff. 29 U.S.C. § 2101(a)(5). It is important to note that, even though part-time employees are not included when considering whether the WARN Act will apply, they are entitled to notice if the act does apply.

[15]29 U.S.C. § 2102(a).
[16]20 C.F.R. § 639.7.
[17]29 U.S.C. § 2104.
[18]*Id.*
[19]*Id.*
[20]29 U.S.C. § 2102.
[21]*Id.*; 20 C.F.R. § 639.9.
[22]*Id.*
[23]29 U.S.C. § 2101.
[24]*See generally Association of Western Pulp and Paper Workers v. Grays Harbor Paper Co.*, No. C93-5226B, 1994 U.S. Dist. LEXIS 13094 (W.D. Wash. Mar. 14, 1994).
[25]*See* U.S. Department of Labor, *The WARN Act: Employers Guide*, available at www.doleta.gov/layoff/pdf/EmployerWARN09_2003.pdf (last visited Feb. 3, 2009).