

Legal matters

BUSINESS CLOSINGS AND LAYOFFS: LEGAL ISSUES AND NOTICES FOR EMPLOYERS

by: Catherine J. (Cate) Furay and Christopher G. Rendall

Every layoff or reduction-in-force creates potential obligations for employers. The Worker Adjustment and Retraining Notification Act (the WARN Act) or its Wisconsin counterpart – the Wisconsin Plant Closing Law – require advance notice to employees and the community (under certain circumstances) of an intended layoff or plant closing.

Failure to give the required notice can result in devastating consequences to both the employee and the employer. It is essential that these laws are understood by an employer.

What is the purpose of these laws?

The WARN Act and the Plant Closing Law are intended to provide workers with time to prepare for the transition between the jobs they currently hold and new jobs. Another purpose includes permitting federal, state or local governments to provide assistance through labor market information, job search and placement, and training.

What is a “business closing” or “mass layoff”?

A “business closing” is either the permanent or temporary shutdown of a facility or operating unit at an employment site.

A “mass layoff” is a reduction in an employer’s workforce that is not the

result of a business closing but affects an employment site.

When do the requirements of the WARN Act or Plant Closing Law apply to employers?

In general, the **WARN Act** applies to an employer with 100 or more employees, excluding employees who average less than 20 hours per week and not

counting employees who have worked less than six of the last 12 months.

The **Plant Closing Law** is designed to apply to smaller employers who might not be covered by the WARN Act. It applies to companies with 50 or more employees in Wisconsin.

{continued on next page}

BEFORE ANY PLANT CLOSING OR LAYOFF

✓ Consult with an attorney experienced in WARN Act and Plant Closing matters. An attorney can assist you in the following:

- To determine whether you are subject to notice requirements and how to calculate the various back pay and benefits due to each employee
- To assess when a notice should be given and to whom the notice must be provided
- To explore whether there are alternatives to the layoffs or closings or if the employer’s issues can be addressed in a different manner
- To assist in adjusting the timing of possible layoffs or plant closings to minimize liability
- To assist you in addressing questions and issues such as whether accrued vacation plays into the calculation of wages or benefits

Because plant closing claims could affect the rights of a secured lender, a lawyer can help you anticipate and address your business’s secured lender’s questions or concerns.

✓ **Gather your facts.** Whether you are covered depends on many facts. What is the total number of your employees by job location? How many employees are part-time and average less than 20 hours per week? How many employees are “new”? How many employees have been laid off in the past 90 days? How many are likely to be laid off in the subsequent 90 days?

✓ **Review your health benefits.** Know the complete array of health benefits that are provided. Knowing the status and timing of health benefit claims is important in any planning.

BUSINESS CLOSINGS AND LAYOFFS: LEGAL ISSUES AND NOTICES FOR EMPLOYERS *(continued)*

If a closing or layoff affects at least 25 percent of the employer's workforce or 25 employees in the same municipality, whichever is greater, the Plant Closing Law may come into play.

Again, employees averaging less than 20 hours per week or employees who have worked for less than 6 months in the last 12 months are not included in the calculations to determine whether obligations under the statute have been triggered.

The calculation may also vary depending on the number of employees that may have been laid off in the past, whether some of the employees who are leaving have actually been laid off, or whether the affected employees are retiring. The application of these statutes is very technical. Advice should be sought from qualified legal counsel to assist with determination of applicability.

If either of these laws applies, what notice is the employer required to give?

The employer must give written notice to the affected individual workers, to the chief elected local official and to the bargaining agent/chief elected officer of any affected union.

In addition, a notice under the WARN Act must be given to the State Rapid Response Dislocated Worker Unit. Notice under the Plant Closing Law must be given to the Wisconsin Department of Workforce Development.

Are there any circumstances when notice is not required?

Employers are exempt from providing notice in the following situations:

- If, at the time notice would have been required, the employer is actively seeking capital or business to enable the employer to avoid or postpone a business closing or layoff and the employer reasonably believes that notice would impair those efforts.
- The employer has sold its business and the buyer agreed to hire substantially all of the affected employees with no more than a 6-month break in service.
- The closing or layoff is the direct result of a natural disaster.
- When unforeseen business circumstances cause a closing or layoff and the circumstances were not reasonably foreseen at the time the 60-day notice would have been required.
- The cessation is temporary and employees are or will return to work within 60 days.

These exemptions are extremely technical and should not be relied upon without seeking the advice of counsel.

What does the notice contain?

Although these laws do not specify a particular form for the notice, there are some particular requirements:

- It must be in writing.
- It must state whether it is anticipated that the closing or layoff will be permanent or temporary.
- It must include the expected date when the closing or layoff will commence.
- It must include a date when the employee will be separated.
- If there are "bumping rights," that fact must be included. Bumping rights traditionally result in the displacement of

a junior employee's position by a senior employee and are normally found in the union setting.

- It must provide the name and telephone number for a company official to be contacted for further information.

Depending on the facts and projections concerning the layoff or closing, there may be additional information that should be included. This sometimes varies depending on the person who is receiving the notice.

What are the consequences of failing to provide notice?

If notice is required and none of the exemptions apply, the failure to provide timely notice results in penalties. First, the employer who fails to provide timely notice may be liable to each affected employee for an amount equal to back pay and benefits for the period of the violation, up to 60 days.

Second, there may be civil penalties of \$500 per day imposed. This penalty is calculated beginning with the date on which the notice should have been given and ending on the earlier of the date the employer actually gives notice or the date of the closure or layoff.

There may also be liability for costs and attorneys' fees.

Under the Plant Closing Law, there can be significant adverse consequences to existing lenders due to state laws granting liens to employees for unpaid wages. Legal counsel should be consulted to determine the extent of the employer's and the lender's exposure.

{continued on next page}

BUSINESS CLOSINGS AND LAYOFFS: LEGAL ISSUES AND NOTICES FOR EMPLOYERS *(continued)***Are there concerns or issues if the timing or extent of any closing or layoff changes?**

The WARN Act has specific guidelines for the timing of the notice and for extension of the notice.

For example, if the projected layoff or closing is postponed for less than 60 days, a “supplemental” notice of the new date can be provided without requiring a full new notice.

If the postponement is for 60 days or more, a new notice is required under the WARN Act.

No similar guidance exists under the Plant Closing Law. The assistance of an attorney to address the issue under the state law and avoid any unintended problems is advisable.

Are there other things I need to know as a Wisconsin Employer?

Yes. In addition to the WARN Act or Plant Closing law obligations, a Wisconsin Employer also has obligations related to advance notice if the employer ceases health care benefits. If the employer has at least 50 employees in Wisconsin, a 60-day advance notice is required prior to the cessation of health benefits.

Like the Plant Closing Law, if the required notice is not provided, the employer may be liable for paying the value of the health care benefits the

employee would have received for up to 60 days after the cessation of benefits occurred. This includes the cost of any medical treatment that would have been covered under the employee’s health care benefits.

Do these laws still apply in bankruptcy situations?

Yes, in some circumstances. If the employer knew about the layoff or plant closing before filing bankruptcy, there may still be liability under either the WARN Act or the Plant Closing Law

If the employer continues to operate that business after filing a Chapter 11 reorganization and later closes a plant or lays off employees, the employer may also be required to give notice as stated under the WARN Act and Plant Closing Law.

The filing of a bankruptcy does change the court in which any WARN or Plant Closing claim must be filed.

When should I contact an attorney?

If your business is considering a closing or layoff, contact an attorney at Murphy Desmond S.C. to help reduce your liabilities and to ensure you are meeting all of the legal requirements.

CONTACT MURPHY DESMOND FOR ALL YOUR LEGAL NEEDS

- Administrative / Regulatory Law & Government Relations
- Alternative Dispute Resolution – Mediation & Arbitration
- Business Law
- Creditors’ Rights, Business Bankruptcy & Commercial Litigation
- Employment & Labor Law
- Estate Planning & Probate
- Family Law & Divorce
- Health Law
- Intellectual Property
- Litigation
- Municipal Law
- Real Estate, Land Use & Construction Law
- Sports & Entertainment Law

This information sheet provides general guidance about the titled subject, is not to be regarded as legal advice, and does not create an attorney-client relationship between Murphy Desmond S.C. and the reader. Because the information herein may become outdated or may not apply to your specific circumstance, it should not be relied upon or used in place of a detailed consultation with a professional advisor. If you need legal advice, Murphy Desmond can help.



Consider all possibilities.® Plan to succeed.