On Notice: Understanding Federal WARN Act Compliance

Whether due to funding cuts, government shutdowns, recompetition, or other operational reasons, at some point a Community Action Agency (CAA) may need to consider restructuring or downsizing its workforce. Terminating employees, shuttering locations, or implementing cost-saving measures trigger significant obligations for employers. When such an occurrence becomes a CAA's reality, it should consider whether it has responsibilities under the federal Worker Adjustment and Retraining Notification Act (WARN Act or "Act").[1]

The WARN Act generally requires certain employers to provide at least 60 calendar days' notice prior to closing a work site or conducting a mass layoff. However, the Act only applies to certain employers who conduct specific types and sizes of employment actions. If the Act applies, an employer must comply with requirements regarding the information included in the notice and the employees to whom the notice is provided.[2] A CAA should work with an employment law attorney in its state to obtain guidance when grappling with some of the trickier aspects of the law and to ensure compliance with similar state or local laws.

A WARN Act analysis should address the following questions:

- *Does the WARN Act Apply to My CAA?* The size and composition of a CAA's workforce dictates whether the Act applies to it at the outset. CAAs with less than 100 employees are not subject to the WARN Act. A CAA must determine how many employees it has, and in some instances, differentiate between full-time and part-time employees as well as calculate the total number of hours employees work per week.

- *Even If It Applies to my CAA, Does the WARN Act Apply to My Situation?* Even if a CAA is subject to the Act, it only applies to certain types of employer actions that affect at least a specific number of employees. A CAA must determine if its proposed actions will amount to a qualifying loss of employment for its workforce, which includes analyzing the likelihood of the action actually occurring and the aggregate impact on employees within certain time periods.

- *What Else Should I Consider?* A CAA must consider whether one of the Act's exceptions applies to its circumstances and weigh the potential cost of penalties for noncompliance when it is unclear if the Act applies, as well as determine whether its state has any similar laws it must comply with.

Does the WARN Act Apply to My CAA?

A CAA must first evaluate the size and composition of its workforce to determine if it will qualify as an employer required to comply with the federal WARN Act. The WARN Act does not apply to local government employers but does apply to nonprofit organizations as well as "quasi-public entities" who have their own governing bodies and independent authority to manage their personnel and assets.[3]

An "employer" under the Act is an organization that employs either: (a) 100 or more employees, excluding part-time employees, or (b) 100 or more employees, including part-time employees, who in the aggregate work at least 4,000 hours per week, excluding overtime hours.[4] The Act's definition of part-time employees includes both individuals that work 20 hours or less per week and individuals that work full-time but have been with an employer for 6 months or less in the preceding 12-month period.[5] Workers who are on leave and have a "reasonable expectation of recall" are counted as employees for the purposes of determining if an employer must comply with the Act.[6]

What is an EMPLOYER?

An organization with 100 or more full-time employees

OR

An organization with 100 or more part- and full-time employees who work a total of at least 4,000 non-overtime hours per week

Who's an Employer?

A CAA's workforce consists of:

- 80 full-time employees that work 40 hours per week and have been with the CAA for longer than 6 months;
- 5 full-time employees that work 40 hours per week and have been with the CAA for less than 6 months in the preceding 12-month period; and
- 30 part-time employees that work 20 hours per week.

To determine if it is an employer under the Act, a CAA must first establish how many part-time and full-time employees it employs. Because full-time employees who have worked for an employer for less than 6 months are classified as part-time under the WARN Act, the CAA's 5 full-time employees who have been with the CAA for less than 6 months would be considered part-time. The CAA's workforce is thus comprised of 80 full-time employees and 35 part-time employees under the Act.

Next, the CAA must determine whether it falls under the first or the second prong of the Act's employer definition. Under the first prong, a CAA must employ at least 100 employees, excluding part-time employees. Since the CAA employs only 80 full-time employees, it does not meet the first prong's threshold.

Under the second prong, a CAA must employ 100 or more employees, regardless of full-time or part-time status, who in the aggregate work at least 4,000 non-overtime hours per week. The CAA has a total workforce of 115 full-time and part-time employees. Since it has at least 100 total employees, it must determine if its employees work, in the aggregate, at least 4,000 hours per week. For this determination, the full-time or part-time status of an employee is irrelevant. The calculation for this CAA is as follows:

- 80 employees that work 40 hours per week, for a total of 3,200 hours per week;
- 5 employees that work 40 hours per week, for a total of 200 hours per week; and
- 30 employees that work 20 hours per week, for a total of 600 hours per week.

The sum of the aggregate non-overtime hours worked per week equals 4,000 hours. The CAA has met both requirements of the second prong because it employs 100 or more employees who together work at least 4,000 hours per week. Therefore, this CAA is an "employer" under the WARN Act.

Even If it Applies to My CAA, Does the WARN Act Apply to My Situation?

For a specific situation to trigger WARN Act notice, it must meet two criteria: (1) an employer action that results in a loss of employment (i.e., "employment loss") and (2) a certain number of employees are affected by that action within a certain time period (i.e., a "mass layoff" or site closing). Both criteria must be met for the WARN Act notice requirement to apply to a qualified employer.

What Action(s) am I Taking?

For an employment action to trigger an employer's WARN Act obligations, the action must result in an employment loss. The Act defines "employment loss" as any one of the following three actions: (a) an employment termination (other than a discharge for cause, voluntary departure, or retirement); (b) a layoff exceeding 6 months; or (c) a reduction in an employee's hours of work of more than 50% in each month of any 6-month period.[7] However, if these actions are the result of the relocation or consolidation[8] of an employer's business, they will not qualify as an employment loss if the employer gives an employee certain alternative options. To meet this exclusion, an employer must offer an employee a transfer, with a less than 6-month break in employment: (a) to a different employment site within reasonable commuting distance, even if the employee does not accept the offer or (b) to any other employment site, regardless of distance, if the employee accepts within 30 days of the later of the offer or qualifying employment action.[9]

Certain employment actions may not fit neatly within the definition of an "employment loss" which can make the applicability of the WARN Act unclear. Colloquially, a CAA may use the term "layoff" to describe either a termination of employment or a furlough, which is a period of required unpaid leave. Generally, termination is intended to be a permanent severing of ties, while furloughs are intended to be a temporary reduction in pay and hours. While a termination without cause clearly falls under the first prong of the "employment loss" definition, unpaid leave or furlough is not as straightforward. Furlough may also require WARN Act compliance if certain circumstances occur. A 5-month furlough would not meet any prong of the "employment loss" definition in the Act. However, sometimes employers must extend furloughs longer than initially expected in response to changing circumstances. If that furlough were extended by 2 months, it could meet both the second and third prongs of the definition unless an exception to the Act applies.[10] A so-called partial furlough, where some employees work sporadically during the furlough period, could also require compliance with the Act, if it results in a more than 50% reduction in enough employees' hours over a 6-month period. For further discussion about furloughs and related topics, see CAPLAW's article Evaluating Cost-Saving Workforce Options in Leaner Times.

What's an Employment Loss?

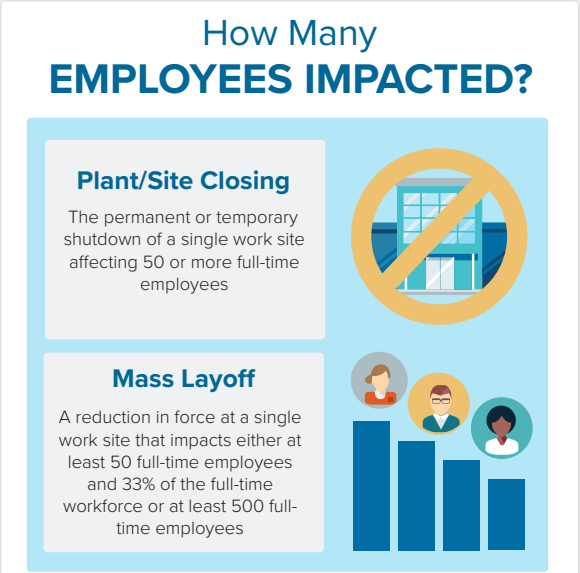
The federal government shut down on January 1 and it is unclear when it will resume operations or what federal budget cuts may result from negotiations. A CAA's weatherization program is up for renewal February 1. If the federal government does not reopen by February 1, the CAA will be unable to pay its weatherization employees.

The CAA is considering putting its weatherization employees "on layoff" until the funds begin to flow again, which it expects will be 1-2 months total. The CAA intends for these employees to continue to receive health insurance benefits during this time (pursuant to its policies and state law) and for all of them to return to work after the shutdown ends.

Because the CAA will not be ending anyone's employment, this "layoff" can be considered a furlough or required unpaid leave rather than a termination that meets the first prong of an "employment loss" under the WARN Act. In addition, since the furlough is only expected to last a maximum of 2 months, it does not meet the second or third prongs either, which both require the employment action to persist over at least 6 months.

However, the shutdown unfortunately lasted much longer than the CAA anticipated, and it was forced to push the furlough to 3, then 4, and eventually 7 total months before its weatherization employees returned to work. During this extended period, some employees found other work and left the CAA—those voluntary departures are not employment losses under the WARN Act. For all other weatherization employees, under both the second and third prongs of the definition in the Act, the extended furlough would be considered an "employment loss" from the date it began 7 months ago.[11]

How Many Employees Were Affected by My Action(s)? The WARN Act prohibits employers from ordering a "plant closing or mass layoff" until 60 days after they provide proper notice.[12] Both plant closings and mass layoffs must result in a certain number of employment losses to trigger WARN Act compliance.[13] The Act defines a "plant closing", also called a site closing, as the permanent or temporary shutdown of a single work site if 50 or more full-time employees experience an employment loss.[14] A "mass layoff" consists of a reduction in force at a single work site that impacts (a) at least 50 full-time employees and 33% of the full-time workforce or (b) at least 500 full-time employees.[15]



To determine if a site closing or mass layoff has occurred, a CAA must look at not only the number of employees that experienced an employment loss but also the time period within which the losses occurred.[16] The timing requirements of the Act are intended to prevent employers from avoiding the Act's notice requirements by structuring reductions in force or furloughs in a way that gets around the Act. The WARN Act requires employers to aggregate affected employees over any 30- and 90-day period (i.e., 30 and 90 days before and after the employment action occurred). The criteria for determining when affected employees are included in the count over a 30-day versus a 90-day period is different. If, looking ahead and behind 30 days, all employment losses that were conducted or planned would together meet the threshold for a site closing or mass layoff, WARN Act notice is required. Similar aggregation must occur by looking ahead and behind 90 days, unless an employer can show that the employment losses are due to "separate and distinct actions and causes", rather than an attempt to evade the Act's requirements.

Employers must give WARN Act-compliant notice 60 days prior to the date of the *first* event in the aggregation period. If an initial notice is provided, but it does not address subsequent events in the 30- or 90-day applicable period, then employers must provide additional notice 60 days prior to each subsequent event.

What's a Mass Layoff?

A CAA is a qualified employer under the WARN Act with 150 full-time employees (all of which have been employed for more than 6 months) and 20 part-time employees. The following events occur during the CAA's calendar year:

- On April 20, due to federal budget cuts, the CAA is forced to permanently terminate 15 full-time employees at its senior citizen center.
- On June 1, due to multiple, serious compliance issues arising from a monitoring of the CAA's affordable housing units and subsequent uncertainty as to the continuation of the

grant funding the units, the CAA permanently terminates 20 full-time employees from its low-income housing assistance program.

- On August 1, as a result of the negative monitoring report, the grant funding the affordable housing units is cut in half which forces the CAA to permanently terminate 30 full-time employees.

The CAA knows that each of these events on their own do not meet the first prong of the Act's "mass layoff" definition because none of the events resulted in 50 full-time employees and at least 33% of the CAA's workforce (i.e., 50 full-time employees) suffering an employment loss. Moreover, none of the events meet the second prong threshold since fewer than 500 full-time employees suffered an employment loss.

The CAA must also consider if any set of terminations, when aggregated across 30 or 90 days around the date they occurred, meet the WARN Act thresholds. For example, 30 days prior to April 20 would be March 21 and 30 days after would be May 21. Since no other terminations occurred during the 30-day look forward and back periods surrounding the April 20 event, a mass layoff requiring notice under the Act has not occurred as of April 20. The other events, when analyzed in the same way, also do not meet the mass layoff thresholds (i.e., they fall outside of the 30-day period).

However, the CAA must also aggregate any terminations across a 90-day period—but unlike the 30-day analysis, the 90-day analysis only requires an aggregation if the terminations are due to a similar or connected action or cause. For example, looking back 90 days from April 20 to January 21, no other employment loss events occurred, but looking forward 90 days from April 20 to July 19, further terminations occurred on June 1. Because the April 20 terminations were triggered by federal budget cuts whereas the June 1 event was triggered by a negative monitoring report, the CAA could argue that the terminations arose from separate and distinct actions and causes. Even if the terminations were for the exact same reason, since only 35 total employees (less than 50 employees and 33% of the workforce) were terminated during those 90 days, the number of employees affected fails to meet the mass layoff thresholds.

When the 90-day window is applied to the June 1 event, a different outcome occurs because it captures the August 1 event—and both sets of terminations were due to the same negative monitoring report and subsequent funding issues. The aggregation of these two dates results in a total employment loss of 50 full-time employees, which meets the mass layoff threshold of 50 full-time employees and 33% of the CAA's 150-employee workforce. Therefore, this CAA would be required to provide the 20 employees impacted by the June 1 event with notice 60 days prior to that event, i.e., no later than April 1, and the 30 employees affected by the August 1 event with notice 60 days prior to that event, i.e., no later than May 2.

What Else Should I Consider?

State Laws

The WARN Act is a federal law that applies in all 50 states and is generally enforced by affected employees filing suit in federal court against their employer. A number of states have enacted laws, known as "mini-WARNs", that require additional or more stringent notification procedures in similar situations. When both the WARN Act and a mini-WARN apply, a general rule of thumb is that the law more favorable to *employees* will govern an employer's actions—this is typically the mini-WARN. A mini-WARN may apply to smaller employers, smaller employment actions, or require employers to follow additional procedures prior to closing a work site or conducting mass layoffs. States may also have employment laws that require employers to follow particular processes other than notice when terminating employment, such as specific forms or timelines for delivery of final pay.

Exceptions

There are three exceptions to the WARN Act's 60-day notice requirement: a faltering company, unforeseeable business circumstances, or a natural disaster.[17] If one of these exceptions apply, an employer must still give "as much notice as is practicable" but will not be penalized for the tardiness of the notice.

The exception most likely to apply to CAAs is unforeseeable business circumstances, which applies to site closings and mass layoffs that are caused by "business circumstances that were not reasonably foreseeable at the time that 60-day notice would have been required."[18] For this exception to apply, a "sudden, dramatic, and unexpected" incident outside of the CAA's control must occur and prevent it from complying with the Act. Determining whether a particular set of circumstances fits this exception is a fact-based analysis and requires the assistance of an attorney familiar with WARN Act case law to appropriately assess. The WARN Act regulations provide the following examples of situations that may constitute unforeseeable business circumstances:

- A principal client suddenly and unexpectedly terminates a major contract with the employer.
- A government ordered closing of an employment site happens without prior notice.
- An unanticipated and dramatic major economic downturn occurs.

If a CAA intends to rely on a WARN Act exception, the notice it provides employees must include "a brief statement of the basis for reducing the notification period." The burden is on the CAA to show that the exception applies to it.

Does an Exception Apply?

A CAA employs 250 full-time employees, all of which have been employed for over 6 months. The CAA runs a program dedicated to providing housekeeping services to low-income families, which is funded by a grant from a private foundation and employs 85 of the CAA's 250 employees. The CAA has run this program for several years and renews the grant on an annual basis.

One day, the CAA receives an email from their contact at the foundation stating that it will likely need to terminate the grant in 6 months—3 months before the end of their grant year. The foundation informs the CAA that a foundation employee has been embezzling funds and the foundation is not sure if its insurance will cover the loss. Without the grant, the CAA will be forced to shut down its program and terminate all 85 employees.

The CAA determines that it must comply with the federal WARN Act if it shuts down the program. The CAA is a qualified employer because it employs 250 full-time employees, well over the 100 full-time employee threshold. Without the foundation grant, the CAA would have to terminate 85 employees, which would be an employment loss for at least 50 employees and 33% of its workforce (i.e., at least 83 of this CAA's employees).

However, a difficult issue for this CAA is determining the likelihood that the WARN Act-triggering event will actually occur. This analysis will likely require the CAA to work with an employment law attorney knowledgeable about federal WARN Act compliance. If the CAA feels confident that it could find another grant to cover the program or the foundation will be made whole by its insurance coverage, issuing WARN notices soon after receiving the foundation's email could be premature.

The CAA could also analyze whether the unforeseeable business circumstances exception applies to its situation with the help of an attorney. The foundation's email was certainly sudden, dramatic, and unexpected given that the CAA had been running the program smoothly for years without incident. The loss of funding is also outside of the CAA's control because it has no power over the foundation's employees or its insurance. The facts here are similar to an example from the WARN Act regulations: a principal funder has suddenly and unexpectedly terminated a major grant agreement. Here, though, the foundation has provided the CAA with 6 months of notice before ceasing the funding—the email from the foundation may have been sudden, but the grant termination itself is not.

One possible solution is that the CAA and its attorney can work together to craft notices to its employees that not only meet federal WARN Act requirements but also outline the CAA's efforts to save the program.

Penalties

Failure to comply with the WARN Act can result in significant penalties, including back pay and employee benefit plan costs to aggrieved employees.[19] Back pay penalties accrue for *each* day an employer is in violation of the Act at the highest wage an employee received during the last 3 years of their employment. Additional penalties may also apply pursuant to a state's mini-WARN statute or other applicable law.

Conclusion

CAAs may find it difficult to determine in a timely manner if federal WARN Act compliance is required. Key factors such as whether funding will be renewed or lost or how long a federal shutdown will last can be unpredictable. Many times, a CAA may determine it is a qualified employer, but the circumstances will make it difficult to accurately assess whether its actions will amount to a site closing or mass layoff. A CAA should work with an employment attorney in its state to carefully weigh its options when considering cost-saving measures such as terminations, furloughs, or restructuring. With a lawyer's assistance, a CAA can consider the cost of potential litigation and penalties for noncompliance versus providing employees with a premature WARN Act notice that may prove disruptive and damaging to its operations and particularly to employee morale. Whenever a CAA is faced with a difficult WARN Act scenario, it should consider educating its staff on the CAA's WARN Act obligations while regularly meeting with them to clarify the organization's financial outlook, set realistic expectations, and address employee concerns.

END NOTES

[1] 29 U.S.C. § 2101 et seq.
[2] 20 C.F.R. 639.7
[3] 20 C.F.R. 639.3(a)
[4] 29 U.S.C. § 2101(a)(1)
[5] 29 U.S.C. § 2101(a)(8); 20 C.F.R. 639.3(h)
[6] 20 C.F.R. 639.3(a): "An employee has a "reasonable expectation of recall" when he/she understands, through notification or through industry practice, that his/her employment with the employer has been temporarily interrupted and that he/she will be recalled to the same or to a similar job."
[7] 29 U.S.C. § 2101(a)(6)
[8] 20 C.F.R. 639.3(f)(4): "A 'relocation or consolidation' . . . means that some definable business, whether customer orders, product lines, or operations, is transferred to a different site of employment and that transfer results in a plant closing or mass layoff."
[9] 29 U.S.C. § 2101(b)
[10] 20 C.F.R. 639.4(b)
[11] 20 C.F.R. 639.4(b)
[12] 29 U.S.C. § 2102(a)
[13] 20 C.F.R. § 639.3(b) & (c)
[14] 29 U.S.C. § 2101(a)(2)
[15] 29 U.S.C. § 2101(a)(3)
[16] 29 U.S.C. § 2102(d); 20 C.F.R. 639.5(a)(1)
[17] 29 U.S.C. § 2102(b)
[18] 20 C.F.R. 639.9(b)
[19] 29 U.S.C. § 2104(a)

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