
# California "Suspends" Its WARN Act Under Certain Circumstances Amid COVID-19 Crisis

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Among other challenges in the last week, California employers have grappled with important issues relating to reducing their workforces: Are we subject to the state and federal laws requiring advance notice of layoffs? If so, what do we do, since it's not possible to give 60 days of notice? Are there exceptions? What are the consequences of not providing the required notice?

California Labor Code sections 1400 to 1408 – known as "Cal-WARN," the state version of the federal Worker Adjustment and Retraining Notification Act – provided little flexibility to help employers who have had to suddenly and quickly lay off and furlough much of their workforces during these fast-moving times. Late on March 17, however, Governor Gavin Newsom issued an Executive Order that provides some relief during the time that California is in a state of emergency due to the COVID-19 coronavirus outbreak. The Order clarifies employers' responsibilities, lifting some of the uncertainty about conducting layoffs legally.

This Order is the latest development in these fluid, ever-changing times of crisis. For employers who have already evaluated their circumstances and decided not to give notice, we recommend that they revisit the issue and re-evaluate their options and obligations.

**Background**

California law requires employers that operate a "covered establishment" (any industrial or commercial facility that employs, or has employed within the preceding 12 months, 75 or more persons) to give notice of a "mass layoff" (during any 30-day period,

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50 or more employees at a covered establishment are separated from their positions due to lack of funds or lack of work). Specifically, when ordering a mass layoff, the employer must, at least 60 days before the order takes effect, give notice of the layoff to affected employees (or their union, if union-represented), the California Employment Development Department, the local workforce investment board, and the chief elected official of each city and county government within which the mass layoff occurs. The requirement also applies when the business is terminating operations or relocating its operations 100 miles or more away. The employees to whom notice is given are those who have been employed by the employer for at least six months of the 12 months preceding the date on which notice is required.

Failure to provide the required notice subjects the employer to legal liability in a civil action for (1) a daily civil penalty of up to $500; (2) each employee's lost wages, lost value of benefits, and any medical expenses incurred due to the loss of medical insurance; and (3) the employee's attorneys' fees.

Cal-WARN has few exceptions. One that has been discussed as possibly applicable to employers downsizing because of the COVID-19 coronavirus pandemic is that WARN notice is not required if the layoff "is necessitated by a physical calamity or act of war." Whether the COVID-19 coronavirus pandemic might qualify as a "physical calamity" is unclear. The Executive Order makes that question less important.

**The Executive Order**

Some flexibility for employers is provided in the Governor's Executive Order N-31-20, which recognizes that strict compliance with certain laws would prevent, hinder, or delay appropriate actions to prevent and mitigate the pandemic's effects. Regarding Cal-WARN, the Order suspends portions of the law (60-day notice; liability for damages; liability for the civil penalty) on the condition that an employer does the all of following:

- Orders a mass layoff because of COVID-19-related business circumstances that were not reasonably foreseeable as of the time that 60-day notice would have been required;
- Gives as much notice as practicable of the layoffs, providing a brief statement of the basis for reducing the notification period along with the information required by the federal WARN Act for notices; and
- Includes the following statement in its notice: "If you have lost your job or been laid off temporarily, you may be eligible for Unemployment Insurance (UI). More information on UI and other resources available for workers is available at labor.ca.gov/coronavirus2019."

The Order directs the Labor & Workforce Development Agency (LWDA) to provide, by March 23, guidance to the public on how the Order's provisions are to be implemented.

**A Checklist For Giving Notice of Layoffs**

Although the Order does not suspend employers' obligation to provide notice of layoffs where such notice is required by Cal-WARN, it provides a path for California employers to conduct layoffs without exposure to WARN liability if they follow the steps laid out in the Order. Specifically, for layoffs where notice under Cal-WARN otherwise would be required, employers should do the following:

1. Prepare documentation that you are ordering the mass layoff because of COVID-19-related business circumstances that were not reasonably foreseeable as of the time that 60-day notice would have been required.
2. Give written notice of the mass layoff to:
    1. Affected employees who are not union-represented;
    2. All unions representing affected employees (if any);
    3. The California Employment Development Department;
    4. The local workforce investment board; and
    5. The chief elected official of each city and county government within which the mass layoff occurs.
3. Give the notice as soon as practicable. Neither state nor federal law defines "as soon as practicable." However, the federal regulations that interpret the federal law state that, in some circumstances, "notice as soon as practicable" might be notice after the fact – meaning after layoffs begin or occur.
4. Ensure that the written notice contains the elements required by the federal WARN Act (29 U.S.C. § 2101 et seq.). While the statute itself does not specify those elements, the regulations state that the notice must be written in language understandable to the employee and contain the following information:
    1. For employees who are not union-represented:
        1. A statement as to whether the planned action is expected to be permanent or temporary (and, if the entire plant/facility is to be closed, a statement to that effect);
        2. The expected date when the mass layoff (or facility closing) will commence and the expected date when the individual employee will be separated;
        3. An indication whether or not bumping rights exist; and

4. The name and telephone number of a company official to contact for further information.

2. For employees who are union-represented:
    1. The name and address of the employment site where the mass layoff (or plant/facility closing) will occur, and the name and telephone number of a company official to contact for further information;
    2. A statement as to whether the planned action is expected to be permanent or temporary (and, if the entire plant/facility is to be closed, a statement to that effect);
    3. The expected date of the first separation and the anticipated schedule for making separations; and
    4. The job titles of positions to be affected and the names of the workers currently holding affected jobs.

5. Consider including additional information suggested by the regulations, such as information on available dislocated worker assistance, and, if the planned action is expected to be temporary, the estimated duration, if known.
6. Ensure that the written notice includes a brief statement of the basis for reducing the notification period.
7. Include the following statement in the written notice: "If you have lost your job or been laid off temporarily, you may be eligible for Unemployment Insurance (UI). More information on UI and other resources available for workers is available at labor.ca.gov/coronavirus2019."

Employers with 100 or more full-time employees who have been employed for at least six months of the 12 months preceding the date of required notice must also comply with the federal WARN Act. Although overall more flexible than Cal-WARN, the federal law has some specific requirements that may apply. For example, like Cal-WARN, the federal WARN Act requires notice not only to the employee/representative, but also to local government officials and the applicable State Dislocated Worker Unit (SDWU) (which in California is the EDD). However, the content required by the federal act for notice to the SDWU and local government officials is different from what must be given to the employee/representative.

**Conclusion**

We will continue to monitor this rapidly developing situation and provide updates as appropriate. Make sure you are subscribed to Fisher Phillips' alert system to gather the most up-to-date information. For further information, contact your Fisher Phillips attorney or any of our attorneys in our California offices, or any member of our COVID-19 Taskforce. You can also review our Comprehensive and Updated FAQs.

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