

# KICKEM & TELLUS

## MEMORANDUM

**TO:** Harry Hardnose  
**FROM:** Kickem & Tellus  
**DATE:** February 18, 2006  
**RE:** Summary of WARN Act

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Below is a summary of relevant provisions of the federal Worker Adjustment and Retraining Notification Act of 1988, better known as the “WARN Act.”

### Summary of the WARN Act

The WARN Act imposes upon “covered employers” the obligation of providing notice to its employees or their union representatives, as well as certain state and local government agencies,<sup>1</sup> of a “plant closing” or “mass layoff” at a single site of employment, at least 60 calendar days in advance of such event. “Covered employers” are those “business enterprises” with at least 100 full-time employees, counting all of the employer’s business (not just employees working at the affected site). A “plant closing” is 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 of at least six months’ duration at the single site of employment of at least 50 or more employees (excluding part-time employees). A “mass layoff” is a reduction in the workforce which results in an employment loss of at least six months’ duration at a single site of employment of (i) at least 50 employees (excluding part-timers) constituting at least 33 percent of the workforce at that site, or (ii) at least 500 employees (excluding part-timers).<sup>2</sup> “Part-time employees,” whose layoffs do not count towards the applicable thresholds but who are owed notice if the thresholds are triggered anyway, are those who work an average of fewer than 20 hours per week in the previous 90 days, or who have worked for the employer fewer than 6 of the previous 12 months.

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<sup>1</sup> Notice must be given to a “state dislocated worker unit” established pursuant to WARN by each State, as well as to the chief elected official of the unit of local government to which the employer pays the highest taxes for the year preceding the year in which the layoff/plant closing occurs. If there is a union, notice goes to the union and not each individual member of the bargaining unit.

<sup>2</sup> To illustrate, where there are 200 employees at a single facility, a 60-person layoff would *not* trigger WARN, since 60 is less than 33% of 200; however, a 70-person layoff at this same facility *would* trigger WARN.

Employers assessing whether they have any WARN obligations must consider whether separate layoffs should be aggregated in order to determine whether applicable thresholds have been met. Under the Act, all layoffs within a 30-day period (looking forward and backward) generally must be aggregated. In addition, however, all layoffs within a 90-day period should be analyzed to determine whether they are “related” to one another, i.e., implemented for the same basic reason (such as an eventual plant closing). Unless the employer can prove that separate layoffs during that 90-day window were implemented for different reasons, then those layoffs also must be aggregated. In other words, there is a rebuttable presumption that all layoffs within a 90-day period (looking forward and backward) are related, and thus aggregable.

“Notice” provided under the WARN Act must be specific, containing certain elements the absence of which can result in a technical violation and imposition of all applicable remedies and penalties. Under U.S. Department Labor regulations, notice to employees must include (i) a statement whether the planned action is to be permanent or temporary, and if the entire plant is to be closed; (ii) the expected date when the plant closing or mass layoff will commence and the expected date when the individual employee will be separated; (iii) an indication whether or not “bumping” rights exist;<sup>3</sup> and (iv) the name and telephone number of a company official to contact for further information. Notice to the applicable state and local government agencies must contain essentially the same information, as well as the address of the affected facility and the number of affected employees.

An employer may give less than 60 days’ notice in only a few exceptional circumstances. Even then, however, as much notice as is “practicable” must be given. The exceptions:

- “Unforeseen circumstances,” including both unforeseen business events (*e.g.*, cancellation of a business contract, loss of a key customer without notice to the employer) and natural disasters. (The test of “foreseeability” is difficult to meet, though.)
- “Faltering company” exception, where the employer can prove that (i) a capital infusion or new business was being actively sought, (ii) that the infusion or new business would have prevented the closing/layoff, and (iii) the employer reasonably believed that the giving of notice would have precluded the employer from obtaining the needed capital or business. (Again, this is the employer’s burden, and can be difficult to develop objective evidence sufficient to prove these elements. Self-serving after the fact testimony by management officials of their subjective beliefs at the time decisions were made to withhold notice may be met with skepticism by a decision-maker.)

The remedies for violating the WARN Act are as follows:

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<sup>3</sup> “Bumping” refers to the practice, routine in unionized settings, of permitting more-senior employees to “bump” less senior employees out of their jobs.

- To employees: 60 days of back wages and employee benefits.

If the employer gives reduced notice, the employer owes wages and benefits for the period of the deficiency (*e.g.*, give 30 days' notice, owe 30 days of wages and benefits), unless reduced notice is excused by one of the Act's exceptions or (at the court's discretion) if the employer demonstrates a good-faith effort to comply with its WARN obligations, and subject to complete elimination if the employer pays the WARN severance within three weeks of the plant closing or mass layoff. Remedial Note: Failure to continue health insurance benefits throughout the 60-day period on the same terms and condition that existed prior to the layoff (for instance, with employer/employee co-payment of premiums) can result in the employer self-insuring employees for catastrophic illnesses and injuries.

- To the government: Up to \$500 per day for each violation, subject to the same court-permitted reductions described in the preceding bullet point.