

## **Congress Considering Expansion of Employer Layoff Notification Requirements**

*The FOREWARN Act (S. 1374/H.R. 3042) Would Increase WARN Notice Requirement to 90 Days, Lower Trigger to 25 Employees*

The Worker Adjustment Retraining and Notification Act (WARN) was passed in 1988 after a decade of numerous layoffs in industries affected by the increased globalization of the economy. In the current period of economic dislocations, Congress may consider The Federal Oversight, Reform, and Enforcement of the WARN Act (FOREWARN; S. 1374, H.R. 3042), introduced by Sen. Sherrod Brown (D-OH) and Rep. George Miller (D-CA). The bill imposes greater compliance burdens on employers under WARN by increasing both the notice period and the number of instances in which notice is required. Yet, such changes could pose a disincentive to employers hiring employees under circumstances where their long-term employment may not be assured.

**Required Notice Extended to 90 Days** The FOREWARN Act would increase the required WARN notice from 60 to 90 days. This simple increase in the notice period by one-half has myriad implications for employers already struggling to make predictions about workforce changes. Even under current law, this would create substantial compliance hurdles, but coupled with the other changes being considered, these would become insurmountable in many instances.

**Trigger Lowered to 25 Under All Circumstances** WARN was enacted to give advance notice to employees and communities of sudden, massive economic dislocations whose numbers complicate the ability of the affected individuals to become reemployed. Thus, the notice is triggered when an entire worksite is closed (or facility or operating unit therein) or when a layoff—termed a “mass layoff”—affects one-third or more of those at the site. (A layoff involving 500 or more triggers the notice requirement as well, regardless of the total workforce.) In addition, at least 50 employees (excluding part-time employees) must lose their jobs within a 30 day period (or, in many instances, a 90 day period) for the requirement to be triggered. The FOREWARN Act substantially increases WARN-covered actions by: 1) lowering the minimum to 25 employees; 2) eliminating the requirement that at least 1/3 of the workforce lose their jobs; and 3) including part-time employees in the count. By lowering the threshold to include such small numbers (which may accumulate over as much as a 90 day period), the law’s rationale for dealing with sudden, massive dislocations is undercut.

**DOL Enforcement** Currently, WARN is enforced exclusively through private rights of action brought in federal court by affected. The Department of Labor (DOL) only role has been the promulgation of interpretative regulations issued shortly after enactment. Under the legislation, DOL would be empowered to enforce WARN and parties would be able to file a private right of action in the courts, a complaint with DOL, or both. If DOL proceeds with an enforcement action, an employee may not initiate a court action, though the bill does not appear to bar further proceedings on actions brought before the DOL takes action.

**Increased Penalties and Restrictions on Settlements** WARN’s remedies are “make whole,” thus awarding employees back pay for each day they failed to receive notice, including benefits and any medical costs incurred through loss of insurance coverage. Most courts have calculated this based on actual workdays, thus ensuring that the employees receive

what they would have earned during the notice period. Some courts have calculated this based on the number of calendar days, thus including weekends or other days the employee would not have worked. FOREWARN increases the remedy for violations by providing double back pay for each calendar day of the violation. Meanwhile, any agreements between employers and employees settling WARN claims would be unenforceable unless negotiated by DOL, a state attorney general or a private attorney on behalf of the employee. Under current law, many employers who find themselves in a position where they are incapable of giving notice provide “payment in lieu of notice” which avoids costly litigation by both parties and quick relief for the employees. FOREWARN provides a disincentive for employers to provide lump sum payments, thus many employers would simply provide the notice and then tell employees not to come to work during the notice period, thus receiving their income through normal payroll procedures rather than as a lump sum.

**Changes in Notice Requirements** The WARN Act does not prescribe the content of employers’ notices, but DOL’s interpretative regulations indicate certain elements that must be included, including: the contact name and number of a company official to contact; whether the employment loss is temporary or permanent; whether the action is a plant closing; whether bumping rights exist; the expected date of the first termination and the recipient’s termination date (or a two-week window within which it will occur).

FOREWARN establishes the required contents of the notice within the statute, requiring:

- the number of affected employees;
- the reason for the plant closing or mass layoff;
- the availability of employment at the employer’s other establishments;
- the employee's rights to wages, severance and employee benefits;
- a statement of the available employment and training services provided by DOL; and
- in the case of notices to a union and government officials, the names, addresses and occupations of affected employees.

Under WARN, where the employees are represented by a union, the employer is only required to give notice to the union with a sufficient description of the positions being affected to enable the union to provide notice to the workers. This is because, in many if not most unionized settings, there are bumping procedures that determine on the basis of seniority those employees who will lose their jobs. The union is typically a part of this process and, until that process has taken place, the employer may not know who will be affected. Meanwhile, under WARN, there is no separate legal requirement that the union convey the notice to the employees. The FOREWARN Act requires that notice be given to the union and each affected employee.

**Greater Role of Government** In addition to DOL’s new enforcement role, FOREWARN includes several other provisions enhancing the role of government officials. Employers would be required to provide “reasonable on-site access” during working hours to federal, state or local rapid response teams formed under the federal job training laws (Workforce Investment Act). The bill does not appear to provide any time constraints on this. In addition, all employers would be required to post a notice of WARN rights prescribed by DOL.