

[THIS ARTICLE IS FOR EMPLOYERS WITH 50 OR MORE EMPLOYEES]

CONSTRUCTION INDUSTRY MASS LAYOFFS AND PLANT CLOSINGS

By Jim Pease

A federal law, known as WARN (29 U.S.C. 2101-2109) and a similar Wisconsin law, Section 109.07, Wis. Stats., require employers to not order a mass layoff or shutdown of the business until they have given 60 days advance notice. This notice requirement applies to plant shutdowns or closings, or layoffs exceeding six months or reductions in hours of more than 50% in each of six consecutive months. The notice must be given to the affected employees, the highest official in the unit of local government in which the employer is located, and the Wisconsin Department of Workforce Development.

Employers who fail to give required notices must pay employees their wages and fringe benefits for 60 days and, in addition, may be fined up to \$500 per day for each day they fail to give the notice. Because most seasonal layoffs in the construction industry do not exceed six months, many construction industry employers have ignored these laws. However, the impact of the economic crisis may result in employers experiencing layoffs or shutdowns that are covered by these laws.

Covered Employers

WARN covers employers with 100 or more employees, not counting employees who average less than 20 hours per week or who have not worked for the employer in fewer than six of the prior 12 months. Wisconsin's Section 109.07 covers employers with 50 or more employees with the same exclusions. Employees on leave or layoff who have a reasonable expectation of reemployment are counted. Employees who quit or are discharged for reasons other than lack of work, and employees of labor suppliers who are paid by the labor suppliers, are not counted.

Mass Layoffs

WARN covers layoffs of 50 or more employees or 33% of the workforce, whichever is greater. Wisconsin's Section 109.07 covers layoffs of 25 employees or 25% of the workforce, whichever is greater. Employees other than part-time employees who aren't counted for determining coverage of an employer are counted in determining whether the threshold is exceeded. Several small layoffs in any rolling 90 day period may be aggregated in determining whether the threshold has been met. Notice must be given at least 60 days prior to the beginning of the first of the aggregated threshold-exceeding layoffs.

No Construction Industry Exemption

Federal regulation 20 CFR 639.5(c)(3) recognizes that construction industry employers may be able to prove that employees were temporarily hired just for a particular project and that

those employees understood at the time of hire that their employment was temporary. For those temporary employees, the completion of that project would not trigger an obligation to give notice of plant closing or layoff.

There also appears to be a provision for employees of labor suppliers. 20 CFR 639.3(e) states that contract employees who have a separate employment relationship with another employer and are paid by that other employer are not considered employees affected by a layoff or shutdown.

However, employees of construction industry employers who are not just hired temporarily for a particular project, but who work on a variety of jobs and tasks throughout most of the year are not included in that exemption. The layoff of those non-temporary employees would be covered by WARN. Section 109.07 is generally interpreted to be consistent with federal law.

Extended Temporary Layoffs

If something unforeseen occurs that requires that layoffs, the number of which exceed the threshold and which were anticipated to be for less than six months, be extended beyond six months, the employer must give the WARN/109.07 notices as soon as the extension becomes reasonably foreseeable. If the layoffs had been foreseeable, the notice should have been given at least 60 days prior to the first day of the first layoff in the 90 day period during which layoffs that ended up being for in excess of six months exceeded the threshold. Usually, it will be necessary for the employer to prove that the circumstance that requires the extension of the layoff was caused by some sudden, dramatic and unexpected action or condition outside the employer's control. The late notice must contain a brief explanation of why it was not timely given, in addition to all the other information that must be included in the notice.

“Plant” Closings

Likewise, if unforeseen circumstances of the type described above cause an employer to shut down its business without giving the required 60 day notice, the employer must give as much notice of the shutdown as possible and must include in that notice why it couldn't have been given notice more than 60 days prior to the shutdown. “Plant” closings generally apply to any business closing.

Conclusion

The complexity of the Plant Closing/Mass Layoff laws is aggravated by the inconsistencies between the State and federal laws. Basically, if employers comply with the State law they will be in compliance with the federal law.

Because it is so easy to violate these laws and because the penalties for noncompliance are severe, employers should promptly consult experienced counsel if they believe they may have a situation covered by either of those laws.