



Dissecting Federal WARN Act Compliance

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Funding cuts, government shutdowns and Head Start recompetition are on the radar for Community Action Agencies (CAAs). When these occurrences become a CAA's reality, it should consider whether the federal Worker Adjustment and Retraining Notification Act (WARN Act) applies to it. A CAA must analyze multiple factors when determining if federal WARN Act compliance is required. This article will examine those factors and provide examples of the analysis a CAA may engage in to assess its WARN Act obligations. It is important to note that most states have enacted their own version of the WARN Act which may differ from the federal WARN Act. This article only addresses a CAA's compliance with the federal WARN act. A CAA should work with an employment law attorney in its state to not only ensure compliance with state WARN Act requirements but also to obtain guidance when grappling with some of the trickier aspects of the federal WARN Act.

The federal WARN Act generally requires certain employers provide at least 60 days notice when they plan to close a work site or conduct a mass layoff that will result in an employment loss. In determining if the Act applies to a CAA, the following factors must be considered:

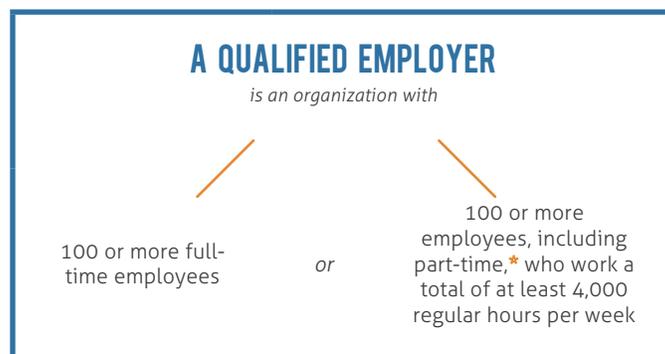
- **Size and makeup of workforce.** The CAA must determine how many employees it has, and in some instances, differentiate between full-time and part-time employees as well as calculate the total number of hours worked per week for all employees.
- **Site closing or a mass layoff.** The CAA must determine whether it is expecting or likely to close a work site or conduct a mass layoff. In analyzing a mass layoff, the CAA will also need to consider the number of employees affected within specified 30- and 90-day periods.
- **Employment loss.** If the CAA is planning to close a work site or conduct a mass layoff, it must consider the length of time employees will be affected; e.g., permanently terminated or laid off for two months, etc.

- **Exceptions.** The CAA will need to consider whether one of the exceptions to providing the full 60-day WARN Act notice applies to its particular set of circumstances.
- **Penalties.** The CAA will need to consider the potential cost of noncompliance in circumstances where it is unclear if the Act applies.

An in-depth examination of each of these factors is necessary for a CAA to properly assess its federal WARN Act obligations.

Size and Make-up of Workforce

A CAA must first consider the size and makeup of its workforce to determine if it will be classified as a "qualified employer" subject to the federal WARN Act. A qualified employer 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.¹ The definition of part-time employees includes both individuals who work 20 hours or fewer per week and individuals who work full-time but have been with an employer for 6 months or less in the preceding 12 month period.²

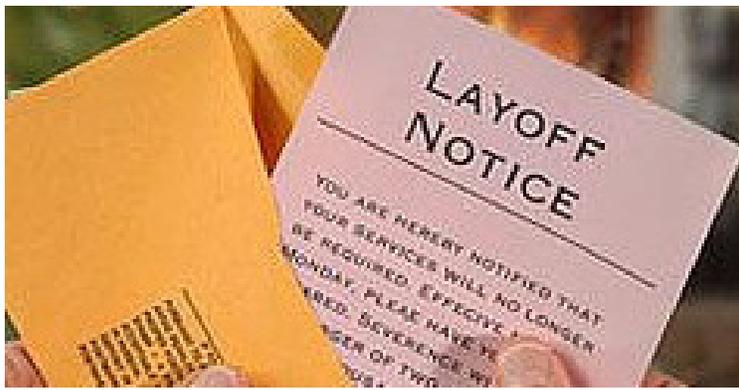


Part-time = individuals who work 20 hours or fewer per week **AND** individuals who work full-time, but have been with the employer for 6 months or less in the preceding 12 months

The following is an example of the analysis a CAA may undergo to determine if it is a qualified employer subject to the federal WARN Act:

CAA's workforce consists of the following:

- 80 full-time employees who work 40 hours per week and have been with the CAA for longer than 6 months;
- 5 full-time employees who 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 who work 20 hours per week.



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To determine if it is a qualified employer, a CAA must first establish how many part-time vs. 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, 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.

Next, the CAA must determine whether it falls under the first or the second prong of the qualified employer definition. Under the first prong, a CAA must employ at least 100 employees, excluding part-time employees. As previously explained, the CAA employs only 80 full-time employees, and thus, does not meet the first prong threshold.

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

- 80 employees (EEs) who work 40 hours per week (Hrs Per Wk), or a total of 3,200 Hrs Per Wk (80 EEs X 40 Hrs Per Wk);
- 5 EEs who work 40 Hrs Per Wk, or a total of 200 Hrs Per Wk (5 EEs X 40 Hrs Per Wk); and
- 30 EEs who work 20 Hrs Per Wk, or a total of 600 Hrs Per Wk (30 EEs X 20 Hrs Per Wk).

The sum of the hours worked per week equals 4,000 hours. The CAA has met both requirements of the second prong because it employs over 100 employees who work at least 4,000 hours per week. Therefore, this CAA is a qualified employer under the Act.

Site Closing or a Mass Layoff

If a CAA is a qualified employer, it must consider whether its planned action(s) will result in either a site closing or a mass layoff. The Act defines a site closing as the shutdown of a work site for a period that is longer than 6 months if 50 or more employees (excluding part-time employees) experience an employment loss.³

To determine if a mass layoff has occurred, a CAA must look at not only the number of employees that have been laid off but also the time period within which the layoff(s) occurred. A mass layoff consists of either an employment loss that impacts at least 50 employees and 33% of the workforce (excluding part-time employees, in both counts) or that impacts at least 500 employees (excluding part-time employees).⁴ Additionally, when calculating the number of employees affected, the employer must consider layoffs resulting in an employment loss that have occurred during any 30- and 90-day periods (i.e., 30 and 90 days before and after a layoff resulting in an employment loss has occurred).

During any 30-day period, an employer is required to aggregate all employees that have suffered an employment loss, *regardless of whether their loss was a result of a similar action or cause*.⁵ However, unlike the 30-day period, the 90-day period only requires the aggregation of employees impacted by a *similar action or cause*.⁶

Additionally, if a federal WARN notice is triggered, an initial notice must be provided at least 60 days prior to the date of the first event. Notice must also be provided 60 days before each related event. A CAA must, therefore, timely plan its workforce needs and anticipate future employment losses.





Number of employees affected includes those that have suffered an employment loss during 30 and 90 day periods before and after each event.

30 day periods: must aggregate all impacted employees

90 day periods: must aggregate only employees impacted by similar action or cause

If WARN notice is triggered, an initial notice must be provided at least 60 days prior to the date of the first event. Notice also must be provided 60 days before each related event.

The following example illustrates how a CAA may determine if a mass layoff has occurred within a requisite time period:

A CAA has 150 full-time employees (all of whom have been employed for more than 6 months) and 20 part-time employees. The following events occur during the calendar year:

- On April 20, 2013, due to sequestration, the CAA is forced to permanently lay off 15 full-time employees that work at its senior citizen center.
- On June 1, 2013, due to multiple, serious compliance issues from a monitoring of the CAA's weatherization assistance program (WAP) and subsequent suspension of WAP funding, the CAA lays off 20 full-time employees from WAP for an indefinite time period.
- On August 1, 2013, as a result of the negative monitoring report, WAP funding is terminated which forces the CAA to permanently lay off 30 full-time employees.

The CAA must initially consider if it meets the first factor (size and makeup of workforce). Because the CAA employs 150 full-time employees, well over the 100 full-time employee threshold, the CAA is a qualified employer potentially subject to WARN Act obligations. The CAA must then determine if any of the above events fall within the definition of a mass layoff under the Act. Each event on its own does not meet the first prong of the mass layoff definition. None of the events resulted in 50 full-time employees and at least 33% of this CAA's workforce (again, 50 full-time employees) suffering an employment loss. Moreover, none of the events meets the second prong threshold since fewer than 500 full-time employees suffered an employment loss.

The CAA must then consider if any layoffs resulting in an employment loss occurred 30 days before or after the date of an event that, when aggregated, meet the thresholds in the mass layoff definition. For example, 30 days prior to April 20 would be March 21st and 30 days after would be May 21st. Since no other layoffs resulting in an employment loss occurred during the 30-day look-forward and back periods surrounding the April 20 event, a mass layoff has not occurred. The other events, when analyzed in the same way, also do not meet the mass layoff thresholds.

Lastly, the CAA must consider if any layoffs resulting in an employment loss occurred 90 days before or after the date of an event due to a similar cause or action, that when aggregated with other events during that time period, meet the thresholds in the mass layoff definition. Looking back 90 days from April 20th to January 21st, no other employment loss events occurred. Looking forward 90 days from April 20th to July 19th, an employment loss event occurred on June 1st. Because the April 20th event was triggered by sequestration whereas the June 1st event was triggered by a negative monitoring report resulting in a suspension of funds, these events would **not** be aggregated as they resulted from distinct actions or causes. Moreover, it is important to note that since the aggregate of both events equals 35 employees (fewer than 50 employees and less than 33% of the workforce (also 50 employees)), even if the events resulted from similar actions or causes, the number of employees affected fails to meet the mass layoff thresholds.

When the 90-day look-back and forward window is applied to the June 1st event a different outcome occurs. The 90-day look-back period from June 1st to March 2nd also captures the April 20th employment loss event. As discussed above, the aggregation of the April 20th and June 1st events fails to meet the mass layoff thresholds. However, the August 1st employment loss event captured by the 90 day look-forward period from June 1st to August 30th would be aggregated with the June 1st event. Both the June 1st and August 1st events were triggered by similar actions or causes – a negative monitoring report resulting in first suspension then reduction of funds. The aggregation of these two events also results in a total employment loss of 50 full-time employees which meets the mass layoff thresholds of 50 full-time employees and 33% of the CAA's workforce (also 50 employees). Therefore, this CAA would be required to provide the 20 employees impacted by the June 1st event with a WARN notice 60 days prior to that event no later than April 1st and the 30 employees potentially affected by the August 1st event with a WARN notice 60 days prior to that event no later than May 2nd.

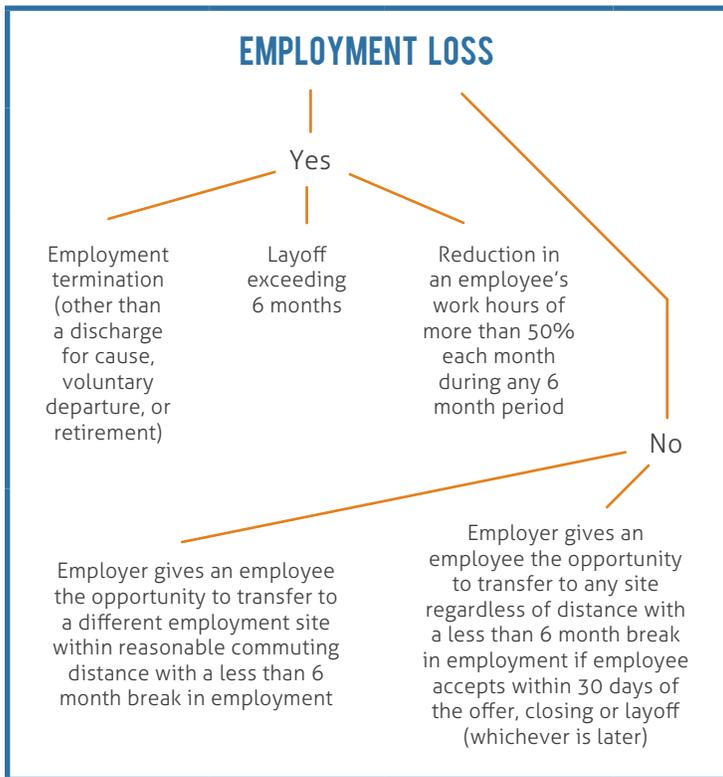
Employment Loss

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 work hours of more than 50% each month during any 6-month period. On the other hand, an employee has not suffered an employment loss if the employer gives an employee the opportunity to either: (1) transfer to a different employment site within reasonable commuting distance with a less than 6-month break in employment or (2) to transfer to any site regardless of distance with a less than 6-month break in employment if the employee accepts within 30 days of the offer, closing or layoff (whichever is later).⁷

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WARN Act Compliance

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The following is an example of the analysis a CAA may undergo to determine if an employment loss has occurred:

A CAA employs 110 full-time employees (all of whom have been employed for more than 6 months) and 20 part-time employees and operates a Head Start program at two sites located 10 miles apart. At the beginning of the calendar year the CAA realizes the following:

- It will lose state funding for its homeless shelter as of August 31st and must permanently lay off 25 employees as of that date.
- It will lose 1/3 of its state childcare services grant as of August 31st and must permanently lay off 15 employees as of that date.
- As a result of losing 1/3 of its state childcare services grant, it must reduce the hours of 10 Head Start employees currently working 28 hours a week to 12 hours a week as of August 31st until at least May 1st of the following year.

The CAA meets the first factor (size and make-up of workforce) of a federal WARN Act analysis because it employs 110 full-time employees. Whether the CAA meets the second factor (site closing or mass layoff) will depend on an employment loss having occurred that impacts at least 50 employees and 33% of the workforce (excluding part-time employees in both counts) in any 30- and 90-day periods. All of the employment actions above will be aggregated as they will occur within a 30-day period.

The permanent lay off of 25 homeless shelter employees and 15 childcare service employees results in an employment loss affecting 40 total employees. Additionally, reducing 10 employees' hours per week from 28 to 12 starting August 31st until at least May 1st results in an employment loss since the employees' hours per week are reduced by more than 50% in each month of a 6-month period (reduction projected to last approximately 7 months, August 31st to May 1st). Thus, the CAA would meet the mass layoff (50 employees and 33% of workforce) and employment loss thresholds and would be required to issue WARN notices 60 days prior to each event.

However, the analysis changes if the CAA offers at least one of the employees an opportunity to transfer to another site within reasonable commuting distance where the employee can continue performing his/her job. For example, rather than reduce their hours, if the CAA offers to transfer two of the Head Start employees to its other Head Start site and the site is within reasonable community distance, the total number of employees suffering an employment loss drops from 50 to 48. In this instance, the CAA would not be required to provide a WARN notice but should keep in mind that if additional events occur, the CAA's obligations under the federal WARN Act may be triggered.

Exceptions

Several exceptions exist to compliance with the federal WARN Act's 60-day notice requirement. The one most likely to apply to CAAs is the unforeseeable business circumstances exception. This exception applies to work site closings and mass layoffs that are caused by business circumstances that were not reasonably foreseeable at the time that the 60-day notice would have been required. For the exception to apply, a *sudden, dramatic, and unexpected* incident must occur that prevents an employer from complying with the Act. When such an incident occurs, the employer is still required to provide a WARN notice; however, it will not be penalized for the tardiness of the notice. The following are some of the examples of unforeseeable business circumstances provided by the federal WARN Act regulations:

"...a sudden, dramatic, and unexpected incident must occur that prevents an employer from complying with the Act."

- A major client suddenly and unexpectedly terminates a major contract with the employer;
- A government ordered closing of an employment site happens without prior notice; and
- An unanticipated and dramatic major economic downturn occurs.⁸

NOTE: The burden is on the employer to show that the unforeseeable business circumstances exception applies to it based on the particular circumstances at issue.

If an exception does not apply and the factors previously discussed are met, then a CAA must provide a WARN notice. Specific requirements exist regarding the information to be included in the notice and the employees to whom the notice must be provided. The Department of Labor offers the following guidance on WARN notice requirements, http://www.doleta.gov/layoff/pdf/EmployerWARN09_2003.pdf.

Penalties

Failure to comply with the Act may result in penalties totaling the wages of each employee for each day that a WARN notice should have been provided but was not.⁹ As noted, many states also have their own mass lay off notice laws and additional penalties may exist pursuant to a CAA's state WARN Act.

WARN Act Scenarios

Various scenarios that CAAs face may make it difficult to determine in a timely manner if federal WARN Act compliance is required. Often, the key unknown factors are whether the scenario will actually occur, such as with funding potentially not being renewed or lost, or how long a scenario will last, such as with a government shutdown when political motivations are at play. Many times with these scenarios, a CAA will meet factor one (the size and make-up of workforce) but the facts and circumstances will make it difficult to accurately assess factor two (whether a mass layoff has occurred) and/or factor three (whether an employment loss will extend beyond six months). With these scenarios, a CAA will most likely need to work with an employment law attorney to carefully weigh its options including determining if it is covered by any of the WARN Act exceptions. Generally, a CAA will need to consider the cost of litigation and penalty for noncompliance versus providing employees with a pre-mature WARN Notice that may prove disruptive and damaging 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.

(See endnotes on page 23)

**STAY
TUNED**

for an in depth analysis
of the OMB Super
Circular in our Spring
2014 Newsletter!

SAVE THE DATE



Join us for this webinar series encouraging a CAA's executive management team and board to proactively tackle legal issues that impact the health and sustainability of its organization.

When the Going Gets Tough, Who Gets Going?: Employment Laws Affecting Staffing Options

March 12, 2014 at 2 p.m. EST

Rick Pins, Esq., Leonard Street and Deinard

Learn about the applicable employment laws affecting different staffing choices and ways to reduce your employment law liability relating to those choices.

Just Added! Ins and Outs of the OMB Super Circular, Part I

April 16, 2014 at 2 p.m. EST

CAPLAW Attorney

In this webinar and the one on April 23rd, we will walk through the significant changes to the OMB Super Circular and discuss how these changes impact CAAs and what steps a CAA will need to take to prepare for compliance.

Just Added! Ins and Outs of the OMB Super Circular, Part II

April 23, 2014 at 2 p.m. EST

CAPLAW Attorney

We will continue to walk through the significant changes to the OMB Super Circular.

Changing Needs and Expectations for Chief Financial Officers in Community Action

May 14, 2014 at 2 p.m. EST

Kay Sohl, Kay Sohl Consulting

We will discuss what it take to be truly effective as a CFO in Community Action.

Significant CSBG Issues to Examine when Planning for the Future

June 11, 2014 at 2 p.m. EST

Anita Lichtblau, Esq., Casner & Edwards, LLP

We will discuss practical ways to comply with new and existing CSBG requirements.

Head Start Risk Management

July 16, 2014 at 2 p.m. EST

CAPLAW Attorney

Learn from the mistakes of others and explore actions a CAA that may take to strengthen its organization and avoid Head Start recompetition.

Article End Notes

Part 74.

3. Cost Principles For Non-Profit Organizations, OMB Circular A-122 codified at 2 C.F.R. Part 230.
4. 2 C.F.R. § 230, App. A ¶ A.2.a.
5. See 2 C.F.R. § 230, App. ¶ A.2.a, A.2.g.
6. 45 C.F.R. § 74.21(b)(2), (7).
7. See Touch of Love Ministries, Inc., DAB No. 2393 (2011); Northstar Youth Servs., Inc., DAB No. 1884 (2003).

Disecting Federal WARN Act Compliance

1. 29 U.S.C.S. § 2101(a)(1).
2. 29 U.S.C.S. § 2101(a)(8).
3. 29 U.S.C.S. § 2101(a)(2).
4. 29 U.S.C.S. § 2101(a)(3).
5. 29 U.S.C.S. §§ 2101(a)(2) and 2101(a)(3)(B).
6. 29 U.S.C.S. § 2102(d).
7. 29 U.S.C.S. § 2101(a)(6).
8. 20 C.F.R. § 639.9(b).
9. 29 U.S.C.S. § 2104(a).