

# What to Know When Layoffs Occur

Understanding the W.A.R.N. Act can help employees and employers in shutdowns and downsizings

By **Kathleen Nelson**, shareholder, Lane Powell PC

**I**N THE PAST FEW MONTHS, NUMEROUS mortgage lenders have closed their doors. Several others have announced substantial layoffs, resulting in a massive decrease in industry employment. Some analysts predict this will continue for the next several months, if not longer.

One result of this is that lawsuits have been filed against mortgage lenders based on violations of the Worker Adjustment and Retraining Notification (W.A.R.N.) Act, Chapter 29, Title 23 of the U.S. Code, §§ 2101-2109.

For brokers facing potential company downsizing — or for business-owners considering layoffs or closing their doors — it helps to know the ins and outs of the W.A.R.N. Act and when it applies.

## About the act

Congress enacted the W.A.R.N. Act in 1988 in response to a large number of layoffs in the 1970s and '80s that occurred because of an increased number of company mergers and closings. The act's purpose was to deter companies from avoiding various obligations to their employees by hiding pending mergers or pending or imminent bankruptcy proceedings.

The W.A.R.N. Act requires employers to provide employees, their families and their communities advance notice of a plant closing or a mass layoff. The act applies only to employers with more than 100 employees (excluding part-time employees) or to those with 100 or

more employees, including part-time employees, who collectively work 4,000 hours per week, overtime excluded. It covers hourly and salaried employees, including those in supervisory and managerial positions. Congress intended for this provision to help soon-to-be-terminated employees find alternate work and training in the event of a plant closing or mass layoff.

In this case, a plant closing is defined as a permanent or temporary shutdown of a single employment site or of one or more facilities or operating units within a single employment site. This

shutdown would result in the loss of 50 or more employees during any 30-day period.

The act defines a mass layoff as an employment loss of:

- 500 employees; or
- Between 50 and 499 employees who comprise more than 33 percent of the employer's total active workforce at a single site.

The legislation also requires employers that are planning a plant closing or mass layoff to notify workers or their representatives, the state's dislocated-worker unit and the chief elected official of their local government at least 60 days before the action.

If an employer is found to violate the W.A.R.N. Act, its employees can sue to seek back-pay and benefits — e.g., medical expenses that health insurance would have covered — for the period of the violation, for as long as 60 days. The period can be no more than half the number of days the employer employed the worker.

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The employer also can be penalized by as much as \$500 a day if it violates any statutory-notice requirement that may pertain to a local government unit. The act also allows the prevailing party to recover attorneys' fees.

## Recent litigation

In recent months, lenders have faced a significant onslaught of pending litigation related to the W.A.R.N. Act.

Former employees of a large nonprime lender recently filed a class-action lawsuit in the U.S.

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**Kathleen Nelson** is a shareholder at Lane Powell PC and is an active member of the firm's mortgage-and-consumer-finance, class-action and insurance-industry teams. She has extensive experience in complex commercial litigation in state and federal court. Nelson also represents mortgage brokers and lenders in a variety of civil disputes, including claims under the Real Estate Settlement Procedures Act, Truth in Lending Act, state consumer-protection statutes and more. Reach her at (206) 223-7268 or [nelsonk@lanepowell.com](mailto:nelsonk@lanepowell.com).

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## When Layoffs Occur

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Bankruptcy Court for the District of Delaware. Plaintiffs considered the company and its subsidiaries to be a “single employer” under the act, alleging that they laid off hundreds of employees without giving adequate notice. The employer defendant was partially controlled by a large hedge fund.

Plaintiffs also claimed that the defendant had violated their rights under the W.A.R.N. Act by ordering a mass layoff or plant closing without providing them the requisite 60 days’ advance notice. The complaint alleges that the defendant laid off about 400 employees before filing for Chapter 11 bankruptcy protection with the same court.

The plaintiffs seek back-pay and fringe benefits for the full 60 days.

A similar lawsuit was filed in August against a large mortgage lender that laid off more than 900 employees just before filing Chapter 11. The class representatives argued that the layoff violated their rights under the W.A.R.N. Act because the employer failed to provide 60 days’ advance notice. The plaintiffs say they are owed 60 days’ worth of wages, bonuses, holiday and vacation pay, among other benefits.

Another comparable lawsuit against a large lender also was filed in August, three days after that lender had filed for Chapter 11. The plaintiff employees allege the defendant violated the W.A.R.N. Act because it had only provided one day’s notice before firing more than 6,000 employees across more than 500 offices nationwide.

### When the act applies

With some mortgage companies facing bankruptcy and/or layoffs, the question is how the W.A.R.N. Act applies to them and their employees. There are two scenarios where the act may apply to an employer that declares bankruptcy:

1. **If the employer knew about the closing or mass layoff before filing bankruptcy** and should have provided notice — but sought to use bankruptcy to avoid giving notice.
2. **If an employer continues to run the business in bankruptcy as a “debtor in possession.”** Keep in mind that the W.A.R.N. Act does not apply, however, to a trustee in bankruptcy whose only purpose is to shut down a business.

Further, an employer cannot require its employees to waive their notification rights through the act. When an employer closes a facility or conducts a layoff, however, it can ask its employees to waive their rights to make

a claim against the employer. The employer may have to provide additional severance pay or extended health benefits to employees in exchange for the waiver.

Mortgage lenders that are considering closing their facilities, laying off a large number of employees or both should carefully evaluate whether the W.A.R.N. Act governs their actions. They also should be aware, however, that the act contains some exceptions to the advance-notice obligation. These apply when:

- **A plant closing is a temporary facility, or a layoff is the result of the completion of a particular project or undertaking.** The employees also must understand that the length of their employment was limited to the duration of the facility, project or undertaking;

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- **The closing or layoff is a strike or a lockout, when these events have the same results as a plant closing or mass layoff.** Employers do not need to provide notice to strikers who are involved in labor negotiations that lead to a strike or lockout. But they still should provide notice to nonstriking employees and employees who are not part of the bargaining unit involved in the labor negotiations and who lose jobs as a direct or indirect result of a strike or lockout; or

- **An employer is permanently replacing a person who is defined as an “economic striker” under the National Labor Relations Act.** An economic striker is someone whose object of a strike is to obtain an economic concession, such as higher wages, shorter hours or better working conditions.

In addition, under the following circumstances, an employer is not required to give the 60 days’ notice under the act.


- **Faltering company:** This exception covers situations in which a company has sought new capital or business to stay open and in which giving notice would deter opportunities to obtain new capital or business. This exception applies only to plant closings and is narrowly construed.

- **Unforeseeable business circumstances:** This covers closings and layoffs caused by circumstances that are not reasonably anticipated at the time notice would otherwise have been required — which arguably could be the case in mass layoffs that have occurred in the past few months; and

- **Natural disaster:** This exception covers closings and layoffs that directly result from a natural disaster, such as a flood, earthquake, drought or storm.

An employer must bear the burden of proof if it relies on one or more of the above exceptions for not giving the required advance notice. In any event, an employer must give as much notice as is possible under all the circumstances. It must provide a written statement that satisfactorily explains the reason behind the reduced notice period given to its employees.

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With lenders already shutting down and making large-scale layoffs, a significant amount of litigation has stemmed from employees’ claims that their employers did not provide proper notice under the W.A.R.N. Act. Given the projection that such layoffs will continue, at least in the near future, employers should pay strict attention as to whether 60 days’ notice is required under the act. 

### On the Web

**Worker Adjustment and Retraining Notification Act Fact Sheet:**  
[www.doleta.gov/programs/factsht/warn.htm](http://www.doleta.gov/programs/factsht/warn.htm)