

# BEYOND THE WARN NOTICE: GETTING TO THE TIPPING POINT AND BEYOND

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In addition to the technical requirements of closing work facilities, such closings are often fraught with significant emotional tolls. Most turnaround experts and bankruptcy professionals are experts at unwinding the operation and closing the doors. They perform these tasks with a seemingly strong stomach so that they can go beyond the emotional issues facing employees and focus on the tasks at hand. Others, unfortunately, view the task of closing the plant in its raw, simplified form: give the notice, terminate the employees, and shut the doors. While certain business considerations may necessitate this chopping block approach to

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downsizing, for the sake of the employees and ultimately for the good of the organization, there are a myriad of technical considerations, legal issues, and human issues, all within the context of an extremely difficult environment, that any employer should consider when closing a facility.

Particularly where there is a remaining ongoing entity in some form, management has a significant opportunity when planning and carrying out a plant closing. This includes building or retaining the good will necessary among employees to move the organization forward, thereby helping it to meet its strategic objectives with minimal disruption and waste of resources.

## **BASIC WARN REQUIREMENTS**

The Worker Adjustment and Retraining Notification Act (WARN) generally requires certain employers to provide notice to workers 60 days in advance of a plant closing or mass layoff.<sup>1</sup> Covered employers include those with 100 or more employees.<sup>2</sup> A plant closing refers to 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.<sup>3</sup> Alternatively, a mass layoff refers to a workforce reduction, not the closing of a plant, which results (during any 30 day period) in the loss of employment for: (1) at least 33% of the active employees (excluding part time employees), and (2) 50 employees. This 33% requirement does not apply where 500 employees or more are reduced.<sup>4</sup> Notably, "...plant closings involve employment loss which results from the shutdown of one or more distinct units within a single site or the entire site, [whereas] a mass layoff involves employment loss, regardless of whether one of more units are shut down at the site."<sup>5</sup>

The employer is required to provide notice to affected employees or their representatives, the particular state dislocated worker unit, and the chief elected official of the local government.<sup>6</sup> In the context of the sale of the business (or part thereof), it is generally the seller who is responsible for providing the notice.<sup>7</sup> Should the buyer intend to

conduct a plant closing or mass layoff it is obviously prudent for the buyer and seller to work together to determine who will provide the required notices.

Generally, the notices must be provided 60 days prior to any plant closing or mass layoff, and a worker's last day is considered the date of his/her layoff.<sup>8</sup> Anyone who is terminated beyond the issuance of the first layoff is still entitled to the full 60-day notice period.

WARN provides three exceptions to the requirement that the notice be provided 60 days in advance. Notwithstanding these exceptions, the notices to employees and other required parties must still be issued. The exception relates to the timeliness of the notice. The first, the "faltering company" exception, applies only to plant closings, not mass layoffs and is intended to be narrowly construed. It applies in instances where the employer is actively seeking to obtain capital or business at the time the notice should have otherwise been given. There must have been a realistic possibility of obtaining the financing or business. The financing or business sought by the employer must have been sufficient to enable it to avoid or postpone the plant closing. Lastly, the employer must have believed that providing the required notice would have prevented it from obtaining the capital or business sought.<sup>9</sup>

The second exception refers to "unforeseeable business circumstances" and applies to both mass layoffs and plant closings. It refers to situations that were not reasonably foreseeable at the time the notice would have been otherwise required.<sup>10</sup> An example of this might be the sudden cancellation of a major contract by a client or some other sudden event out of the employer's control.

The last exception, the "natural disaster" exception, applies to both mass layoffs and plant closings which occur as a result of any natural disaster. These include, among others, floods, earthquakes, and storms and the employer must be able to show that there is a direct relationship between the disaster and the plant closing or mass layoff.<sup>11</sup>

### BEYOND THE NOTICE

The WARN 60-day notice is often considered the pivotal moment in time in a plant closing or mass layoff. This issuance of the notice is often the beginning of the implementation of a sophisticated and detailed transition plan, which has hopefully been undertaken as far as possible in advance of the notice. Operationally, however, there is another point—the tipping point—which can be more pivotal to the success or failure of the plant closing or layoff.

The tipping point refers to the moment in time during the notice period to which the employer must keep employees or a group of employees in order to meet its business demands. An employer's inability to keep certain employees up until the tipping point could be detrimental to its operations. Employers obviously struggle with this issue once the notice is given. Employees likely begin looking for employment opportunities elsewhere and they often become disengaged. This results in a loss of productivity and the potential for costly errors.

Ideally, the employer wants the employees to stay up until their respective tipping points and no longer. If an employee is no longer required, the employer may let the employee go and continue to provide salary for the remainder of the notice period. Ideally, the employ-

er would like to see the employee resign for another position thereby relieving the employer of future salary or severance obligations.

### COMMUNICATION, COMMUNICATION, COMMUNICATION

Communication is often touted as the answer to most employee problems. However, communicating can either be done in a productive and positive manner that helps retain employees and enables them to transition with dignity or it can be done in a manner that fosters ill will not only among those affected, but also among remaining employees, outside constituents and the community at large. A communications plan must be carefully orchestrated with specific roles and responsibilities assigned.

An effective communication plan must go well beyond the notice and include the following elements:

1. **A Review of Notice Documents:** This will ensure that they reflect not only the legal and technical requirements of compliance but that they reflect the culture and management style of the organization. Indeed, at times the boiler plate notice can be most effective. However, when considering future relationships with the affected employees, those employees that remain, business relationships, and the impact on other stakeholders, this simple notice can take on far more meaning than initially thought.
2. **Preparation of Speeches to Various Stakeholders:** This includes employees, business relationships, and other relevant stakeholders. Who will deliver the news?

Will it be done in person? Will there be smaller meetings? Will there be one large meeting? Will it be conducted offsite? What written materials will be provided to employees beyond the required notice? How will questions be handled?

3. **Creation of Talking Points and Answers:**

When conducting a plant closing, mass layoff or other strategic event with significant employee impact, it is always recommended that the organization prepare a list of talking points with the appropriate answers. Ideally, this list will anticipate many of the questions that will be posed by employees during the meeting *and* will provide approved answers. This will clearly demonstrate to employees that the employer has not only complied with minimal requirements but has given thought to the impact of the transition on employees. Some of the topics addressed in the talking points range from the reason for the closure or layoff, preliminary timelines, the effects on benefits and pay, how day-to-day job duties may be affected, and how layoff decisions were made.

4. **The Day of the Announcement:** The employer should be prepared to communicate quickly and effectively both internally and externally. Included in this phase of the communications plan is the need to ensure that appropriate personnel are assigned to receive and answer questions from

their appropriate constituents. All stakeholders, particularly employees, must be made aware of whom these “go to” people are. And those charged with answering questions and communicating must have the appropriate training and information to ensure that the message is delivered clearly, consistently, and as intended. Ideally, the organization will recognize those questions that it cannot answer as of the date of the announcement and be prepared with appropriate responses.

5. **After the Announcement:**

Once the employer is in the midst of the commotion associated with the announcement, it must quickly act to meet with individual employees to discuss the individual effect of the plant closing or mass layoff. Another speech needs to be written, a series of talking points and answers prepared and documents and other materials need to be compiled and distributed—all of which must be evaluated for legal compliance and to ensure they reflect the appropriate tone and style desired.

**MANAGEMENT EDUCATION AND SUPPORT**

The organization should plan to discuss the plant closing or mass layoff with appropriate management personnel just prior to announcing it to the general employee population. While some may disagree with this philosophy, it will help to alleviate the “sandwich effect.” This occurs when a general meeting is held with employees and management together. A care-

fully scripted speech is delivered, everyone goes back to work and the employees go immediately to their manager to ask questions. The manager, having no more or less information and no direction from senior management about how to handle such inquiries, can do greater damage than initially imagined. Where should a manager go with his/her own questions or those posed by employees?

The meeting with management should take place on the same day as the general meeting. At times, organizations wish to conduct a meeting a day or two prior. Be forewarned that the farther away in time the two communications are the greater likelihood of word getting out and rumors spreading like wildfire. Topics to be addressed with management should include the same general items described above. In addition, however, managers must be made aware of how they are to respond to questions. This is the time to address the talking points, who is responsible for certain questions that will be posed, what authority they will have to make promises, or to provide guidance to employees. One of the worst things that can happen is for an employer to demoralize the very managers it needs to keep employees engaged during the transition.

Further, the organization needs to address what changes in roles and responsibilities will occur upon the announcement. Is an outsider being brought in? How will this influence existing management authority? How will it influence individual employee job duties and responsibilities? Even if the answers to some of these questions are not known at the outset, they must be considered, anticipated and a response crafted.

## POLICY ISSUES OFTEN OVERLOOKED

While every organization has certain policies in place, they may have fallen to the wayside over time, may be minimally enforced or not be adequate to address a plant closing or mass layoff. Therefore, employers should review and revise, where appropriate, the following policies.

1. **Security:** The organization will need to address security concerns in order to be prepared for the transition and throughout the notice period. Ideally, the employer should consider security concerns beyond the location in question. A detailed review of financial, capital, information technology, and other areas is required. Failure to address these issues and prepare well in advance of the announcement can result in events as simple yet catastrophic as an employee tossing a wrench into a multi-million dollar machine, theft of trade secrets and loss of competitive advantage, and other sabotage. Again, the security implemented must be consistent with the spirit of the organization yet balanced against the risks of loss.
2. **Company Property:** Company property appears to have a way of disappearing at a much more accelerated rate during a plant closing or mass layoff. A solid inventory at the outset is vital for preventing and/or tracking the loss of materials, equipment, office supplies, computers, customer information/lists, etc. Related to this is the establishment of a process to recover property in the pos-

session of employees, including intellectual property.

3. **Ongoing Communications with the Media, Government Officials, and Various Stakeholders:** The contemplated transition may require that employers change the contact persons or approved persons who can communicate on behalf of the organization not only to the media but to government officials. Giving thought to these well in advance will help to minimize uncertainty and the communication of misinformation.
4. **Paid Absence Time:** The closing of a facility or mass layoff may be the first time that an organization must deal with the decision about how to handle paid absence time upon separation. Regardless of existing policies, employers must review WARN requirements and state laws for guidance on dealing with all forms of paid absence time.
5. **Bumping Rights and Other Polices Relating to Job Posting, etc.:** Where there is a collective bargaining agreement in place, it is typical for the union and management to discuss the method of bumping if not clearly laid out in the agreement and to negotiate over the effects of the plant closing or mass layoff. The mere significance and magnitude of such a transition may push the envelope of the most predictable union-management relationship.
6. **Job Elimination, Return to Work:** These policies, sometimes considered sepa-

rate policies and sometimes buried within other major policies, require review in the context of the transition. Employees may assert rights contained in a specific policy buried in an outdated handbook that the employer failed to consider.

## GETTING TO THE TIPPING POINT

Wise employers will carefully review their workforces and determine the tipping point for each employee or groups of employees. In doing so, calculate the potential damage or risk to the organization if the employee(s) depart earlier. Focus on those employees where the impact is most significant (such as when their skills are unique and not transferable to others) and put a plan into place to keep them until they are no longer needed. Such a plan may include individual communication with employees regarding their job searches in order to remain abreast of how close their departure may be to the desired time. Employers may also wish to plan the implementation of any job search assistance initiatives at a time when it is closer or farther from the tipping point, depending upon the circumstances. In other words, evaluate when, during the 60-day notice period, the tipping point is. If the risk of loss of a group of employees is significant and the tipping point is at the end of the notice period, provide these employees with enhanced job search support later in the notice period rather than earlier. Included in this assessment is the likelihood of employees finding other employment in light of their skills and market conditions.

In addition, discuss with employees any notice they might give upon resigning. These are often negotiable and employees may be willing to

agree to provide more or less than the standard two-week notice.

Be sure to determine where cross training can be done. As fewer and fewer staff members are required, cross training can allow critical employees who may have time on their hands to be retained to their tipping point.

Enhanced severance is often a technique that employers use to motivate employees to stay until the tipping point. For example, employees may be eligible for severance based upon a standard formula. The employer may offer enhanced severance if an employee stays to achieve some milestone or reach some particular date in the future. This dissuades employees from finding employment elsewhere and leaving while the employer still needs their skills. While enhanced severance is often an effective solution, there are many instances in the case of plant closings or mass layoffs where the employer does not have the resources to provide it.

### BEYOND THE TIPPING POINT

Once the tipping point is reached for an employee or group of employees, all bets are off. The employer no longer needs them, and there is often opportunity for idle time and mischief in the workplace as both the employer and the employees wait for the 60 days to expire. Some employers may consider letting some of these employees go early. However, this must be balanced with the notion that the employer may be giving a free "vacation" to those employees who figure out how to play their cards correctly.

The effective employer will want to again evaluate each employee or group of employees against the risk of them remaining in the workplace as the notice period winds down. What will be the effect on other employees who are still vitally needed? Will there be a

decline in morale? What will be the effect on operations? Will idle time result in abuse of policies? Will there be sabotage of equipment? These questions are particularly important when some form of the entity will remain after the mass layoff or plant closing. Ultimately, the employer wants to remove those employees as soon as possible after the tipping point. Hopefully, this is done at the employee's volition as he/she moves proudly on to a new job.

### AS EMPLOYEES DEPART

The following are just a few areas that should be addressed well in advance in order to help employees and the organization adequately transition.

1. **Unemployment Issues:** A variety of logistical issues will need to be addressed. While notices will be given to local authorities and the requisite state unemployment service, many of these offer sophisticated services beyond simply processing unemployment claims. Resume writing, providing job leads, interview preparation, and the like can be conducted onsite at the facility. These services are often quite robust and free of charge. For an organization in distress, they provide the difference between a layoff that is cold and inhumane and one that is perceived as empathetic and professional. Remember, however, that these services should be timed in conjunction with the appropriate tipping point described above.
2. **Community Outreach:** The breadth of support available in local communities is often an enormous untapped resource. Charitable institutions, religious groups, business groups and the like can often provide a multitude of services to the departing employee.
3. **Outplacement:** while many firms rely on local state employment services to provide job service assistance to employees, many others consider outplacement services provided by a professional services firm. These can be quite costly and are offered at different levels of service depending upon the level of employee. Often these are included as part of any severance given to employees and are, therefore, often subject to a waiver and release.
4. **Benefits Continuation:** Health benefits continuation issues, including COBRA, will be of particular concern to employees especially in the case of a plant closing. Will the plan exist after the plant is closed? Will employees be eligible for benefits continuation under the existing plan or will they be eligible under the plan of a related entity? Will continuation rights not exist at all? Sadly, these questions are often not addressed until the first employee leaves and the organization is forced to determine the appropriate course of action. Always remember that the nature of the underlying transaction, if any, can influence benefits continuation rights.
5. **Retirement Plans:** Also high on the employees' list of concerns is their retirement plan. Again, the nature

of the underlying transaction will affect pension and retirement issues. Who will be responsible for distributions? Will any plans need to be amended to be brought into compliance in order to avoid disqualification issues or to address the contemplated transaction?

6. **Relocation:** Will employees be offered relocation to another facility? How will tax implications be communicated to employees? What level of assistance will be provided? What information will be provided about the new location to employees to review and consider when deciding whether to relocate?
7. **Employees on Disability or Medical Leave of Absence:** All too often an employer fails to provide notice to employees who are on an approved leave of absence. Typically, employees who are on family or medical leave will be forgotten when the notices are issued. At some point long after the notice was required the employer must deal with the fact that it has not provided the required 60 days of notice. The employer must also give consideration to and educate employees as to how disability issues, including workers' compensation claims, will be handled going forward after the party responsible for administration is gone or duties reassigned elsewhere.
8. **Categorization of Pay as Severance or Wages and Other PTO Issues:** Careful thought must be given to the

tax and benefit consequences of pay given to employees after they depart. Are these wages for time worked or severance? Are they to be included as wages for the purpose of calculating unemployment benefits? Will these payments affect retirement calculations or benefits? Will these payments be considered wages or salary for the purposes of calculating future workers' compensation premiums? These issues are just a sampling of those that must be addressed with legal and tax guidance.

### AFTER EVERYONE IS GONE

The closing of a facility poses logistical considerations with regard to how necessary activities will take place once the doors have been closed. Assuming there is no trustee in bankruptcy to take care of the affairs of the closed organization, someone else in the organization, typically in another location, must assume responsibility for taking care of many details. Changes in staff and a lack of knowledge of local practices may make these tasks even more difficult. The tip of the iceberg when it comes to these issues includes, but is certainly not limited to:

1. **Paying Out of Benefits:** Retirement plans, COBRA Notices, final paychecks, W-2s, and the winding down of other benefit plans must be taken care of. The simple act of obtaining forwarding addresses or reminding employees to keep a responsible person apprised of their addresses will make the job of winding things down that much easier

2. **Proper Reporting to the State:** Each state has its own requirements with regard to notification that must be made, tax filings and other reporting.
3. **Record Retention Issues:** What happens to the box of employee files? What about all of the records that were retained for specific periods time in order to comply with regulations? The information that was treated as confidential and locked in a secure location? Lastly, what will happen to information relevant to the distribution of benefits sometime in the future, perhaps decades away?

### CONCLUSION

As one can see, the planning for an effective plant closing or mass layoff requires the organization to go well beyond the creation of the required notice. In reality, the notice is just a small piece of a highly sophisticated plan to retain and secure organizational resources, minimize risk, and ensure the continuation or proper closing down of a business or facility. This plan must be balanced with the need to ensure that employees are treated fairly and equitably, that they remain engaged with the employer until they are no longer needed and that their affairs are addressed in a thoughtful and professional manner.

### NOTES

1. 20 CFR §639.1 (a).
2. 20 CFR §639.3(a).
3. 20 CFR §639.3(b).
4. 20 CFR §639.3(c).
5. 20 CFR §639.3(c).
6. 20 CFR §639.4.
7. 20 CFR §639.4(c).
8. 20 CFR §639.5(a)(1).
9. 20 CFR §639.9(a).
10. 20 CFR §639.9(b).
11. 20 CFR §639.9(c).