

### Significant Potential Changes to Cal/WARN Requirements

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Among the changes that likely will affect California employers beginning in 2024 are new rules for giving advance notice to employees and government officials when a group of workers will lose their jobs because of a “mass layoff, relocation, or termination.” A bill amending the California Worker Adjustment and Retraining Act (Cal/WARN, Labor Code Section 1400 *et seq.*) would expand its coverage and require covered employers to give at least 75 days’ notice before a qualifying event. Other amendments would resolve ambiguity about the definition of a “covered establishment,” affirm that remote workers must be counted for purposes of a “mass layoff,” and make clear which local officials must be notified of a qualifying event. The changes also would prohibit employers from offering employees a payment in exchange for the employee’s general release of claims (or entering into a non-disparagement or non-disclosure agreement) unless the payment includes an amount “in addition to anything of value to which the individual is already entitled” under Cal/WARN. The bill has been presented to the Governor for approval and is expected to be signed shortly.

#### Overview of Cal/WARN

Like its federal counterpart, Cal/WARN requires covered employers to notify workers well in advance of certain events that will result in job losses. WARN laws are designed to prepare workers for anticipatory job loss by giving them time to obtain other positions or acquire marketable skills. The Act also requires employers to notify the state’s Employment Development Department (EDD), the applicable Local Workforce Development Board, and city and county officials. In theory, those notices facilitate the provision of job loss benefits to the affected workers.

Cal/WARN applies to a larger group of employers than are covered by federal WARN. The federal version covers most employers having 100+ full-time employees; currently, Cal/WARN applies to events affecting a “covered establishment,” which is defined as “any industrial or commercial facility or part thereof that employs, or has employed within the preceding 12 months,” 75+ employees. Although the federal version counts only “full-time” employees towards the minimum number to be considered a covered employer, Cal/WARN is not explicitly limited to full-time workers.

Events that require Cal/WARN notices include a “mass layoff, relocation, or termination at a covered establishment.” The current definitions under Cal/WARN (which differ from the federal WARN law) are:

- “Mass layoff” – “a layoff during any 30-day period of 50 or more employees at a covered establishment”
- “Relocation” – “the removal of all or substantially all of the industrial or commercial operations in a covered establishment to a different location 100 miles or more away”
- “Termination” – “the cessation or substantial cessation of industrial or commercial operations in a covered establishment”

Cal/WARN excepts from its requirements job losses that are “the result of the completion of a particular project or undertaking of an employer” in specific industries (including motion pictures and broadcasting) where “employees were hired with the understanding that their employment was limited to the duration of that project or undertaking.” Similarly, Cal/WARN does not apply to employees who were hired as seasonal workers “with the understanding that their employment was seasonal and temporary.”

Under both the federal WARN and the currently applicable Cal/WARN, California employers must give notice at least 60 days before a qualifying event. When notice is required under Cal/WARN, the notice must include the information required

by the federal WARN Act (29 U.S.C. Section 2101 *et seq.*), as set forth in Section 639.7 of the Code of Federal Regulations. Generally, notices must include: 1) the name and address of the location affected; 2) contact information for a company representative; 3) an indication of whether the action is expected to be permanent or temporary; 4) the expected schedule for the job losses; and 5) the names of those affected and their job titles.

Employers who violate Cal/WARN are liable to the affected employees for backpay and lost benefits for “the period of the employer’s violation, up to a maximum of 60 days, or one-half the number of days that the employee was employed by the employer,” whichever is less. Additionally, employers may be liable for civil penalties of up to \$500/day unless the employer pays all damages owed to employees within three weeks of the triggering event. Cal/WARN may be enforced in a private action by an employee (on behalf of the employee or a class). Violations of Cal/WARN also may be pursued by an “aggrieved employee” as a representative of the state, pursuant to California’s Private Attorneys General Act. In either case, attorneys’ fees may be recovered by a prevailing plaintiff.

### Expansion of Cal/WARN’s Coverage if AB 1356 Becomes Law

If approved by the Governor, Assembly Bill 1356 (AB 1356) will significantly expand the coverage of Cal/WARN, among other things because of a change to the definition of “employee” for purposes of the Act. Employers need to know who to count as an “employee” to determine whether compliance with Cal/WARN is required in specific situations. Previously, an “employee” was “a person employed by an employer for at least 6 months of the 12 months preceding the date on which notice was required.” The amended definition of “employee” would include workers who perform work for a client through a “labor contractor,” if the worker has performed services for the client for at least 6 months and at least 60 hours before the date that notice is required. A “labor contractor” is “an individual or entity that supplies, either with or without a contract, a client employer with workers to perform labor within the client employer’s usual course of business.” But AB 1356 includes an exception for employees who provide services through a labor contractor “to fulfill the needs of a temporary project with a defined end date”; Cal/WARN notice would not be required when such workers lose their positions at the defined end date unless the employer has a history of renewing or extending their engagement.

### Multiple Facilities *Together* May be a “Covered Establishment” for a Mass Layoff

Cal/WARN’s coverage also would apply more broadly because of a revision to the definition of a “covered establishment.” Each of the events that triggers an obligation to comply with Cal/WARN – a “mass layoff,” “relocation,” or “termination” – refers to an event at “a covered establishment.” Although a “mass layoff” is defined as being an event that affects 50+ employees, the definitions of a “relocation” or a “termination” do not include any minimum number of affected employees.

Under current law, a “covered establishment” is “any industrial or commercial facility or part thereof that employs, or has employed within the preceding 12 months, 75 or more persons.” Employers could interpret this language as meaning that Cal/WARN did not apply to a business unless it had 75+ workers who all were employed at a single “facility.” But AB 1356 would add this sentence to the definition: “‘Covered establishment’ may be a single location or a group of locations, including any facilities located in this state.” The effect of this change is that a large employer collectively having a total of 75+ employees at its California facilities would need to comply with Cal/WARN if a total of 50+ employees will lose their jobs (a “mass layoff”), even if only a handful of workers at specific locations are being let go. In other words, employers must aggregate layoffs occurring at all locations statewide to determine if a layoff will affect 50+ workers.

AB 1356 also would expand Cal/WARN’s coverage because of a change in the definition of “mass layoff.” Instead of counting those employees who work “at” a covered establishment to determine whether 50+ people are affected, employers also would need to include those employees “reporting to” a covered establishment – this suggests that remote workers associated with a physical location in California must be counted if they will be part of a mass layoff, regardless where the remote workers are physically located (potentially, even out-of-state remote workers).

### Note That A Parent Corporation Is an “Employer” as to Its Subsidiary’s Covered Establishments

AB 1356 would not change the definition of an “employer” for purposes of Cal/WARN, but employers that have corporate affiliates should be mindful that even under existing law, a parent corporation may be obligated to comply with Cal/WARN based on job losses at its corporate affiliates. Under the Act, an “employer” is “any person ... who directly or indirectly

owns and operates a covered establishment.” But the definition also says that “[a] parent corporation is an employer as to any covered establishment directly owned and operated by its corporate subsidiary.”

Arguably, Cal/WARN treats the parent entity of a corporate subsidiary as a single employer with respect to employees of the parent entity *as well as* its subsidiaries. Parent companies therefore should consider planned reductions in force by all of their affiliates collectively to determine whether and when job losses for all of the affiliates, taken together, trigger the obligation to provide compliant Cal/WARN notices long before such layoffs are implemented. Given that a “mass layoff” depends on the number of employees let go “during any 30-day period,” large companies also will need look forward and back, 30 days in each direction, to determine whether the cumulative number of job losses at all affiliates reaches the magic number of 50 or more. No doubt, that will be easier said than done.

### Changes to Cal/WARN’s Notice Requirements

AB 1356 also would change the requirements for the timing and manner of giving notice of a covered event. Key differences from current law include that:

- Notice of a mass layoff, relocation, or termination would be required sooner. AB 1356 would require covered employers to give notice 75 days before the triggering event (an increase of 15 days).
- Required notices would still need to be provided to the state Employment Development Department for all covered events, but notice to local workforce boards and local government officials would be required only if 50+ employees “at a single location” within their jurisdiction are affected by a termination, relocation, or mass layoff.

### Steeper Penalties for Violations of Cal/WARN

Damages owed to employees for violations of Cal/WARN would be more costly going forward. Liability for backpay and benefits would continue for a maximum of 75 days, rather than 60 (or one-half the number of days the employee was employed, if that period is smaller than 75).

### Limitations on Employers’ Ability to “Contract Around” a Violation of Cal/WARN

AB 1356 also would amend Labor Code Section 1403 by adding a subsection prohibiting employers from entering into agreements with employees that would release or waive employees’ claims for violations of Cal/WARN without adequate consideration. Employers would not be able to “comply” with Cal/WARN, for example, by:

- Conditioning the payment to an employee of amounts owed for a violation of Cal/WARN on the employee’s agreement to enter into a general release/waiver of claims, or acceptance of a non-disparagement or non-disclosure agreement. Employers who violate this provision would be subject to civil penalties of up to \$500/violation, and agreements violating this provision would be void.
- Offering to an employee an agreement including a general release/waiver of claims (or a non-disparagement or non-disclosure agreement) unless: a) “the agreement is offered in exchange for reasonable consideration that is in addition to anything of value to which the individual already is entitled” for a violation of Cal/WARN; and b) the agreement “states in clear and unequivocal language that the consideration being offered to the employee is in addition to anything of value to which the individual already is entitled” for a violation of Cal/WARN. Agreements violating this provision would be void.

### Implications for Employers

If the Governor signs AB 1356, complying with Cal/WARN will be more difficult for employers because of the requirement to provide notice of a qualifying event much sooner. WARN notices also will be required more often because of the change to the definitions of “covered establishment,” “mass layoff,” and “employee.” Violating Cal/WARN will be more costly because of the increase in the maximum number of days for which backpay and benefits are owed.

Beginning in 2024, employers also would need to review severance and settlement agreements for compliance with amended Section 1403 to ensure that they provide adequate consideration and include the required language.



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