

[about Morgan Lewis Workforce Change](#) | [WARN concepts](#) | [archive](#) | [sign up](#) | [forward to a friend](#) | [contact](#)

Morgan Lewis provides Workforce Change Inside Business periodically to executives and in-house attorneys responsible for the employment, labor, benefits, and other legal issues arising from workforce reductions, corporate transactions, and other types of restructuring.

Top Four WARN Mistakes

Employers continue to struggle with the workforce reduction notice requirements imposed under the federal WARN law (the Worker Adjustment and Retraining Notification Act). This has become more complicated by a number of increasingly more onerous and confusing WARN-type state laws.

Here are four of the most important mistakes employers make involving WARN:

1. When Notice Is (and Isn't) Required. WARN notices are required 60 days before a "plant closing" or "mass layoff." But these terms are misleading. Keep in mind:

- Many WARN "plant closings" do not involve the closing of an entire plant.
- Many WARN "mass layoffs" involve employment terminations and not layoffs (and not all "layoffs" count under WARN – see point 4).
- Hours reductions can be considered a "plant closing" or a "mass layoff" triggering notice requirements.
- An entire plant shutdown can lawfully occur without notice if the shutdown will last six months or less.

See "[Important WARN Concepts](#)."

2. Severance Pay Confusion. Employers under WARN generally do NOT get credit for providing severance pay required under a preexisting severance plan.

- Giving employees post-termination severance pay is not the same as sending valid WARN notices (which, if required, must be received 60 days before the triggering employee separations occur).
- WARN liability can be reduced or eliminated by "voluntary and unconditional" payments that are "not required by any legal obligation." But this generally excludes severance conditioned on a release; this also excludes severance pay "required" under existing severance benefit plans.
- However, existing severance benefit plans – though not given credit under WARN – can themselves be crafted or amended in a manner that potentially reduces the amount of required severance pay by any advance written notice that is required or received by the employee. See "[Severance Pay: The Fundamentals](#)."

3. WARN Exceptions Are Not Exceptions. Most employers understand that WARN has three so-called "exceptions" that potentially apply if the full 60 days' notice is precluded by one of the following:

- unforeseeable business circumstances
- a natural disaster
- a company actively seeking capital or business to avoid a plant closing where timely notices would have precluded the employer from obtaining the needed capital or business.

However, the above exceptions will NOT apply UNLESS THE EMPLOYER ISSUES WRITTEN WARN NOTICES, even if these notices can only be issued after the fact. WARN states that any employer hoping to rely on these exceptions must still give "as much notice as is practicable" with a "brief statement of the basis for reducing the notification period" (italics added).

WARN also contains complex exemptions and exclusions dealing with certain types of sales, relocations and consolidations, strikes and lockouts, and temporary projects or undertakings. Employers should carefully evaluate WARN and applicable regulations and obtain experienced legal advice concerning WARN compliance.

4. Watch State/Local Notice Laws. An increasing number of states have enacted their own WARN-type laws.

- State notification laws exist, for example, in New York, New Jersey, Illinois, Wisconsin, California, and other states.
- Existing state notice laws in many respects differ dramatically from WARN, triggering notice obligations in circumstances when WARN notice is not required (e.g., in some cases imposing more than 60 days' notice), and with exceptions and other specialized provisions that are dissimilar to WARN.

Severance Pay: The Fundamentals

In spite of the prevalence of circumstances that trigger severance benefits, employers often overlook important compliance and administrative issues when contemplating workforce reductions and other major corporate transactions. Important issues to remember include:

1. ERISA Welfare Plan Compliance. Many formal and informal severance programs are “employee welfare benefit plans” that are subject to ERISA (the Employee Retirement Income and Security Act of 1974). Employers must consider the extent to which any severance program is subject to ERISA and, if so, how to comply with its requirements. Among other things, compliance with ERISA requires filing annual reports with the Department of Labor, distributing summary plan descriptions and other disclosures to plan participants, complying with ERISA’s fiduciary duties, and following ERISA’s claims and appeals procedures.

However, being subject to ERISA is not necessarily undesirable. If litigation arises in connection with severance benefits provided through an ERISA plan, state law claims may be pre-empted and (assuming claims and appeals procedures are followed) a decision to deny severance benefits may receive a deferential standard of review by a reviewing court. As such, an employer considering a workforce reduction should consider whether it is appropriate to establish an ERISA-covered severance plan or otherwise take steps to ensure that its existing plan complies with ERISA.

2. Amending/Terminating Severance Benefits. The case law generally is favorable concerning an employer’s right to amend or terminate a severance plan before (and even shortly before) the event that would otherwise cause employees to be eligible for severance benefits. While ERISA does not unduly limit an employer’s right to amend or terminate an ERISA-covered severance plan, care should be taken to ensure that any amendment is adopted appropriately. For example, the amendment should be adopted in accordance with plan procedures and by an entity (board of directors or committee) or individual with authority to amend the plan.

3. Potential Offset/Coordination with WARN. Although employers generally do NOT receive credit under WARN for severance pay that is required under a preexisting benefits plan (see “**Top Four WARN Mistakes**”), a severance plan can be created or amended so the amount of required severance pay is reduced or offset by the advance written notice that is required to be received by the employee in advance of a layoff or termination. Such careful drafting can help ensure that the employer both satisfies its WARN obligations and is not unintentionally or overly generous in providing severance pay at a time when it can least afford to do so.

4. Coordinate Multiple Severance Benefit Arrangements. Whether preparing for a workforce reduction, or establishing or updating current plans as a part of good business practices, employers should review all existing plans, policies, and individual agreements (employment, severance, retention agreements, etc.) to ensure that the various programs and agreements coordinate appropriately and there are no unintended consequences. As noted above, if identified in advance, it is often possible to amend a severance plan to avoid providing duplicate benefits or other unintended consequences. Of course, it may be more difficult to amend a bilateral agreement without the consent of the affected employee.

5. Restructuring and Severance Benefits. Employers should be especially careful about restructuring actions (e.g., sale of a subsidiary) that may involve employees terminating from a company and becoming eligible for severance benefits even though the employee continues to be employed in the same position with a new or different company. Imprecise language in severance plans or other agreements may provide a basis for a claim for severance benefits even though the employees continued in the same position (often with the same pay and benefits) after the transaction. Again, if identified in advance, these issues often can be avoided by amending the severance plan.

6. Compliance with 409A. Employers should be careful to ensure that severance arrangements (severance plans, employment agreements that provide severance pay, etc.) comply with the deferred compensation rules set forth in 409A of the Internal Revenue Code. In some instances, severance pay and benefits may constitute “deferred compensation” for purposes of 409A and need to satisfy 409A’s technical payment timing rules and other requirements (including the requirement that payments to key employees of a public company be delayed for six months following a separation from service). In other instances, it may be possible to structure a severance arrangement to fit within one of 409A’s exceptions and avoid the need to comply with 409A. There are potentially serious tax consequences for failing to comply with 409A (immediate inclusion of severance pay in income and the employee being subject to a 20% excise tax on the severance pay) so it is important to ensure that a severance arrangement either complies with 409A or fits within one of the exceptions.