



AUTO DEALERS AND THE WARN ACT

Dealerships impacted by the COVID-19 Pandemic because of government recommendations and possible mandates may face the economic reality of having to terminate or lay off employees (even if temporarily) or even close departments or the dealership. Dealerships in this predicament should know the implications of a federal law known as the Worker Adjustment and Retraining Notification ("WARN") Act. While some states have their own versions of the WARN Act, Virginia does not.

What businesses are subject to the WARN Act?

Like any legal requirement, the details can be technical. To simplify the explanation of how the law applies to auto dealerships: the WARN Act covers businesses with 100 or more full-time employees whose combined work hours regularly total 4,000 hours a week, excluding overtime. Part-time employees are those who work less than 20 hours a week or have been employed fewer than 6 of the 12 months preceding the date the WARN Act notice is required. A dealer operating multiple dealerships, even when owned by separate corporations or LLCs, where the total combined full-time employee count is 100 or more, should consider itself a covered employer under the WARN Act.

What does the WARN Act require as notice?

The WARN Act requires covered employers to give at least 60 days' notice of a 1) plant closing, or 2) large-scale mass layoff. Any temporary or permanent shutdown of one or more facilities at a single employment site that causes a loss of employment for 50 or more employees (excluding part-time employees) that lasts over a 30-day period, is considered a plant closing. A reduction in force not otherwise the result of a plant closing, that lasts over a 30-day period, for at least 33 percent of the workforce (excluding part-time employees) but at a minimum 50 employees at a single employment site, is considered a mass layoff. The WARN Act notice requirements may be triggered by a dealer shutting down one or more of its stores, or laying off employees at one or multiple stores, if doing so affects 50 or more full-time employees at a single employment site.

Is a 60 days notice always required?

Certain exceptions allow a covered employer to give less than 60 days' notice. For example, if at the time a dealer should have given the 60 days' notice, the dealer experiences (a) unforeseeable business circumstances, or is (b) actively seeking new business or capital, which the dealer reasonably believes in good faith that giving such notice would have prevented the dealer from obtaining the new business or capital, then the dealer may give less than the required 60 days' notice. However, the dealer must still give notice and include an explanation of the circumstances (i.e. explanation of unforeseeable business circumstances or faltering company) causing the shortened notice period. If the shutdown or mass layoff results from a natural disaster (i.e. flood, earthquake, tsunami, hurricane, tornado), then a dealer need not give any notice. Though the current Pandemic may seem analogous to a natural disaster, there has been no legal interpretation of this exception to cover pandemics, meaning that if the notice requirements of the law are triggered notice should be given. This Pandemic, particularly with

government regulations and mandates impacting operations, is clearly an unforeseeable business circumstance that justifies less than 60 days' notice.

What should the notice contain?

The notice required under the WARN Act must be made in writing and delivered to all full-time and part-time employees by mail or hand-delivery. The required contents in the notice must include:

- Name and address of the employment site being shut down or where the mass layoff will occur;
- If the entire plant is being closed, the notice must state that, otherwise the notice must state whether the shut down or mass layoff is permanent or temporary;
- If terminations or layoffs are to be done in waves, the notice must set forth the expected date of the first separation and the expected schedule for making separations;
- The job titles of positions to be affected and the names of the employees holding those affected jobs;
- The name and telephone number of a company official to contact for further information; AND
- A statement of the basis behind the reduced notification period, if applicable (unforeseeable business circumstances or faltering company).

Given certain obstacles created by this Pandemic, and the increasing limitations affecting everyday operations, it is foreseeable that regular mail may be delayed. It is advisable to deliver the required notice by email, in addition to mail. Minor or inadvertent defects in the notice are not considered fatal under the WARN Act.

If I am a covered employer because I own multiple stores, and I am laying off employees at all stores but no store is laying off 50 or more employees, must I give a WARN Act notice?

It depends. The notice is only required when 50 or more employees are affected at a single employment site. If each dealership is at a separate site, and no dealership will lay off 50 or more employees, notice is unnecessary. However, if commonly-owned dealerships are in an auto park, that may be considered a single employment site, and a layoff affecting 50 or more employees at the dealerships within that auto park may trigger WARN Act notice requirements.

To err on the side of caution, and because the WARN Act is a complicated law, a covered dealer under the WARN Act considering a shutdown of one or more of its stores, or laying off or terminating 50 or more employees in one or more of its stores, because of the Pandemic, should consult with experienced auto dealer counsel to determine if a notice is necessary and to ensure that the proper notice is given, even if it is given with less than 60 days' notice.