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## Forewarned is Forearmed - The WARN Act May Apply to Tech Company Layoffs

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With the changing economic climate, many "new economy" companies are facing new challenges as they struggle to cope with circumstances that differ drastically from those under which they began doing business. One of the most difficult is making the transition from a focus on recruiting and hiring employees to the increasing need to reduce a workforce – often substantially – and the legal ramifications of these actions. Of particular importance is the federal [Worker Adjustment and Retraining Notification Act](#), or WARN Act, which requires companies to provide advance written notice of certain workforce reductions.

The WARN Act, enacted in 1988, requires employers to provide 60 days' notice in advance of plant closings and mass layoffs. Perhaps because the law was enacted following a downturn in the "old" economy, or because terms like "plant closing" and "mass layoff" are not generally associated with high-tech businesses, even employers who have heard of the WARN Act may not imagine it could apply to them. In fact, the WARN Act is not limited to any particular type of industry, and its reach may be far broader than most employers expect.

In general, employers with at least 100 full time employees are covered by the WARN Act and subject to its requirements. Subject to specific exceptions, covered employers must provide at least 60 days' advance notice to affected employees in the event of a plant closing or mass layoff.

A "plant closing" is defined as 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, if the shutdown results in an "employment loss" during any 30 day period at the single site for at least 50 full time employees. A "mass layoff" is a reduction in force which results in an employment loss at the single site during any 30 day period for at least 50 full time employees who make up at least 33% of the active full time employees at the site, or for at least 500 employees at the site. The 30 day period is extended to a 90 day period in situations involving employment losses for two or more groups of employees unless the employer can

demonstrate that such losses are the result of separate and distinct actions and causes and not an attempt to avoid the WARN Act's obligations.

Notices under the WARN Act must be provided to the employees affected by the closings or layoffs, any unions representing the employees, the state dislocated worker unit and the chief elected local government official. The notices must contain, among other things, statements as to whether the planned action is expected to be permanent or temporary, the expected date[s] of the actions, and whether bumping rights (the right to retain a job by displacing an employee who was not part of the reduction) exist.

Beyond the general rule mandating notice, the WARN Act and its regulations set up extremely complicated tests for determining whether the law actually applies in any given circumstance, including highly specific yet often confusing and contradictory definitions of key terms used in the Act. In addition, certain exceptions, although they are always narrowly construed, may excuse the compliance of employers who otherwise would be covered, or reduce the notice period. There are also special rules regarding who has the obligation to provide notice in the context of the sale of a business.

Covered employers who ignore or fail to comply with the WARN Act do so at their peril. An employer who violates the statute is liable to each affected employee for back pay and benefits for each day of the violation. An employer is also subject to civil penalties of \$500 for each day of violation, unless it pays each employee the amount for which it is liable within three weeks from the date it orders the shutdown or layoff. Damages and penalties may be reduced if a court finds that the violation was "in good faith" and the employer had reasonable grounds to believe that it was not violating the law. An employer who provides pay and benefits in lieu of notice may avoid damages and penalties under the WARN Act.

Because the Warn Act is complicated and the consequences of violations serious, and because there are analogous state laws which may have different coverage and notice requirements, the best practice is for any employer to consult with employment counsel prior to any plant closing or layoff.

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