

heed the WARNing in this economic environment

On December 1, 2008, the National Bureau of Economic Research (the NBER) ended months of speculation and anticipation with its official declaration that the United States is in a recession and, in fact, has been since December 2007. The NBER is a private nonpartisan group of leading economists tasked with examining cycles and trends in the economy.¹ Reportedly, one of the key reasons for dating the commencement of the recession to December 2007 is that employers have trimmed 1.2 million jobs nationally through the first 10 months of 2008, a number that has grown by some estimates to about 1.9 million through the end of November and is expected to grow by several hundred thousand more by year end.²

With layoffs on the rise, employers should be mindful of and careful about complying with the Worker Adjustment and Retraining Notification Act (the “WARN Act”) when necessary, a federal law intended to protect workers and their families from unexpected unemployment. The WARN Act requires **employers** to give **sixty (60) days** prior written notice to affected employees, bargaining representatives, and government officials before a “**plant closing**” or a “**mass layoff**.”³

Although the general requirement of the WARN Act might seem relatively straightforward, the “devil in the detail” of its provisions can make understanding and complying with the WARN Act quite confusing. Understanding the following key definitions is essential:

- An “employer” under the WARN Act is any business enterprise employing 100 or more employees, excluding part-time employees, or 100 or more employees who in the aggregate work at least 4,000 hours per week, exclusive of overtime hours.⁴
- 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 at the single site during any thirty (30) day period for fifty (50) or more employees.⁵
- A “mass layoff” is defined as a reduction in force which is not the result of a plant closing and results in an employment loss at a single site of employment during a thirty (30) day period for 1) at least 50 full time employees, provided those affected make up at least 33% of the total full time employees working at the site, or 2) at least 500 full time employees.⁶

¹ www.nber.org/info.html.

² Chris Isidore, *It's official: Recession since Dec. '07*, at <http://money.cnn.com/2008/12/01/news/economy/recession/?postversion=2008120112>; see also http://money.cnn.com/2008/12/05/news/economy/jobs_november/index.htm

³ See 29 U.S.C. §§ 2101-2109.

⁴ 29 U.S.C. § 2101(a)(1).

⁵ 29 U.S.C. § 2101(a)(2).

⁶ 29 U.S.C. § 2101(a)(3).

However, the wording of the general requirement and the definitions above raise a number of issues. For example, what is considered written notice? How and when does the measurement of 100 employees take place? What is an “employment loss” within the definitions of plant closing and mass layoff? What is considered a “single site of employment” within the definitions of plant closing and mass layoff? Is a re-assignment within the organization considered a layoff?

If you believe that you or your company may be an “employer,” as defined above, and you are contemplating a layoff of more than fifty (50) employees, please contact us for help in determining whether WARN Act compliance is required.