

HR Tip of the Week
P•A•S ASSOCIATES
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Short-Term Layoff Triggers
WARN Act Obligations

It's well known that California is an at-will employment state, which means that employers may generally terminate individual or small groups of employees without notice. But that does not apply when an employer undergoes a mass layoff — in such cases, the Worker Adjustment and Retraining Notification Act (WARN Act) requires that employers give affected employees advance notice of the layoff. And recently, a California Court of Appeal clarified that employers also must follow the WARN Act's notice provisions when the layoffs will be for a short period of time (*The International Brotherhood of Boilermakers, et al. v. NASSCO Holdings, Inc.* 17 Cal.App.5th 1105 (2017)).

WARN Act Requirements and Penalties

Both the state and federal legislatures have passed WARN Acts, with California's Act primarily expanding on the protections offered at the federal level and covering more employers.

California's WARN Act requires employers with more than 75 employees to provide affected workers and state officials with at least 60 days' notice of a mass layoff, relocation or termination.

California WARN Act definitions:

lay·off	mass lay·off
/'lā,ôf/	/mas/ /'lā,ôf/
The WARN Act defines a "layoff" as "a separation from a position for lack of funds or lack of work."	The WARN Act defines "mass layoff" as a layoff during any 30-day period of 50 or more employees.

The Act does not specify how long a layoff must last to qualify for protections. Employers that violate the WARN Act's notice provisions can be liable for back pay to affected workers, as well as civil penalties of up to \$500 for each day of the violation. The penalties may be reduced if the employer believed in good faith that providing notice was not required.

Temporary vs. Permanent Layoff

In 2014, shipbuilding and repairing business NASSCO Holdings, which employs thousands of workers, determined it would need to temporarily lay off some employees due to a business slowdown. Without notice, NASSCO informed about 90 employees that, effective immediately, they weren't needed at work for three to five weeks. The slowdown ended up lasting about four to five weeks, after which the employees returned to work in their original positions.

The employees' union complained to NASSCO that the mass layoff of more than 50 employees triggered notice protections under the WARN Act. NASSCO responded that it did not "lay off" any workers; it temporarily furloughed them. NASSCO also pointed out that California's law is silent on the duration of qualifying layoffs — and the federal WARN Act only requires notice to workers when a layoff will be for more than six months.

The union sued NASSCO for violating the California WARN Act, seeking back pay and millions of dollars in penalties. Both parties agreed on the basic facts of the case: 90 workers were temporarily laid off due to lack of work, and NASSCO did not provide advance notice of the temporary layoff. The only question was a legal interpretation of the California WARN Act's requirements — whether a temporary layoff of less than five weeks triggers an employer's California WARN Act notice obligations.

Short-Term Layoffs Protected

The court held that temporary layoffs are covered by the California WARN Act for several reasons:

- The plain definition of "layoff" in the California WARN Act doesn't require that the layoff be a permanent termination versus a temporary layoff or furlough. The Act defines layoff as a "separation from a *position*" not a "separation from *employment*."
- The legislative history and public policy show that the California WARN Act's intent was to strengthen protection for California workers. Covering temporary layoffs is consistent with these objectives.
- Federal law doesn't even mandate that notice is required only if layoff is permanent — it requires notice if the layoff is more than six months. So for California to require that layoffs be permanent when the federal government does not wouldn't make sense.

How Short is Too Short?

NASSCO then argued that the California WARN Act should only apply to layoffs lasting more than six months — just like federal law. Otherwise, NASSCO contended, a completely open-ended period of time could trigger notice requirements for long holiday weekends or one-week closures between Christmas and New Year's.

The court declined to specify how long a layoff must be to meet the definition of "mass layoff," stating that it's not the court's job to rewrite a California law to include language that the legislature did not. It also pointed out that the hypothetical situations NASSCO presented weren't under consideration — the only issue for the court to decide was whether NASSCO violated the WARN Act by laying off 90 workers for about a month without giving them any notice.

The court held that NASSCO did violate the California WARN Act and that it was liable for back pay and pension benefits because:

- NASSCO knew it needed to institute layoffs;
- NASSCO didn't tell the workers until the day they showed up for work that they would be laid off, effective immediately;
- The employees performed no work during the temporary layoff, received no wages, earned no vacation and accrued no pension service credits; and
- There was no showing that NASSCO couldn't have reasonably provided the notice or that a notice requirement was "absurd" or "unworkable" in this situation.

Because NASSCO believed in good faith that WARN had not been triggered, however, the court decided NASSCO was not liable for civil penalties.

The court recommended that California businesses direct concerns about the California WARN Act's language to their legislators.

Best Practices

- Check to see if you are covered by California or Federal WARN Act requirements.
- Never presume that a court will read an ambiguous WARN Act statute narrowly when doing so would lead to a lack of coverage. The California WARN Act will be interpreted liberally to favor employee protections whenever possible.
- Never provide "preemptive" WARN Act notices to cover a remote chance that a layoff may occur at some time in the future. Employers may not "cry wolf" by putting pre-printed WARN Act notices into employee pay envelopes every week.
- Consult with legal counsel prior to implementing a mass layoff of any duration, as the court did not specify a minimum time frame for layoffs that will trigger California WARN Act notice requirements. The court noted that the California WARN Act is meant to shift the risk of surprise unemployment from the employee to the employer, so it's possible that in the future, even layoffs of less than the four to five weeks in NASSCO could trigger California WARN Act notice obligations.

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