



BALCH & BINGHAM LLP  
EMPLOYMENT LAW UPDATE

---

LABOR & EMPLOYMENT SECTION MEMBERS

Edward S. Allen  
Leslie M. Allen  
Annette E. Ball  
David B. Block  
David R. Boyd  
William P. Cobb II  
Jonathan P. Dyal

Rhonda Garman  
Monica Graveline  
Alicia M. Harrison  
Leigh Anne Hodge  
Douglas B. Kauffman  
Teresa G. Minor

Charles B. Paterson  
N. DeWayne Pope  
Jerry D. Redmond, Jr.  
Lisa J. Sharp  
T. Dwight Sloan  
M. Jefferson Starling, III  
Dorman Walker

---

LAYING OFF EMPLOYEES?  
WHAT YOU NEED TO KNOW BEFORE PASSING OUT THE PINK SLIPS...

---

Unfortunately, recent events and the economy have forced many employers to consider or implement mass layoffs. The Worker Adjustment and Retraining Notification Act (“the WARN Act”) and the Older Workers Benefits Protection Act (“the OWBPA”) are two of the statutes that should be examined before employers implement a reduction in force.

**The WARN Act:** The WARN Act generally requires that employers provide 60 days notice of a “plant closing” or “mass layoff” to affected employees, bargaining representatives, and local government officials. In general, a “plant closing” is a permanent or temporary shutdown of an employment site, facility or operating unit that results in an employment loss to 50 or more employees in any 30-day period. A “mass layoff” is any reduction in force other than a plant closing which, within any 30-day period, results in an employment loss at a single site of employment of either one-third or more of the site’s active employees, but at least 50 employees, or at least 500 employees. Employers that do not employ 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), are exempted from the WARN Act’s notice provisions.

The WARN Act contains complicated methods of counting employees for determining if an employer is covered by the Act, and for determining if a plant closing or mass layoff has occurred. The WARN Act specifies that certain information be contained in the notices provided to affected employees or their bargaining representatives, and local government officials.

If an employer fails to provide the applicable WARN Act notice, employees will be able to recover wages and benefits for the period for which notice was not given. Some employers decide to pay wages and benefits in lieu of providing notice due to productivity and potential workplace violence issues that may arise if employees are provided with 60 days notice of their impending layoff. A civil penalty

---

[www.balch.com](http://www.balch.com)

1710 Sixth Avenue North  
Birmingham, Alabama 35203

1 901 Sixth Avenue North  
Birmingham, Alabama 35203

2 Dexter Avenue  
Montgomery, Alabama 36104

655 Gallatin Street  
Huntsville, Alabama 35801

1275 Pennsylvania Avenue  
Washington, D.C. 20004

1310 Twenty Fifth Avenue  
Gulfport, Mississippi 39501

226 North President Street  
Jackson, Mississippi 39201

119 Hardy Street  
Hattiesburg, Mississippi 39403

841 Highway 90  
Bay St. Louis, Mississippi 39520



## BALCH & BINGHAM LLP

PAGE 2

of not more than \$500 for each day of violation may be imposed for failure to provide the proper notice to the applicable unit of local government. Attorney's fees also may be awarded to a prevailing party in a WARN Act suit.

**The OWBPA:** Often employers offer severance benefits to employees whose jobs are being eliminated through a reduction in force. In exchange for severance benefits, employers should obtain a general release of claims from affected employees in order to avoid future lawsuits. In order to waive an age discrimination claim under the Age Discrimination in Employment Act ("ADEA"), however, a waiver or release of such claim must be "knowing and voluntary."

A waiver is "knowing and voluntary" only if (1) the waiver is part of an agreement between the employee and the employer that is written in an understandable manner; (2) the waiver refers to the ADEA; (3) the employee does not waive rights or claims that may arise after the date the waiver is executed; (4) the employee receives some additional consideration above what the employee already is entitled to receive; (5) the employee is advised in writing to consult with an attorney prior to executing the waiver; (6) the employee is given a period of at least 21 days to consider the waiver, or if the waiver is requested in connection with an employment termination program offered to a group of employees, the individual is given a period of at least 45 days to consider the waiver or agreement; and (7) the agreement contains a 7-day revocation period.

In addition, if a waiver is requested in connection with an employment termination program offered to a group of employees, the employer must inform the employee in writing as to (1) any group of employees covered by the program, any eligibility factors for such program, and any time limits applicable to such program; and (2) the job titles and ages of all employees eligible or selected for the program, and the ages of all employees in the same job classification or organizational unit who are not eligible for the program.

In addition to complying with the WARN Act and the OWBPA, employers should perform a disparate-impact analysis using statistics to ensure that there is no disparate impact on a facility- or company-wide basis as a result of the reduction in force. Statistics should be computed for each protected category, including age, race and sex.

For further information regarding the laws applicable to layoffs, please contact Leslie M. Allen or Douglas B. Kauffman at (205) 251-8100.

If you no longer wish to receive this update or have an address change, please contact Nora Yardley at [nyardley@balch.com](mailto:nyardley@balch.com) or (205) 226-3476.

---

[www.balch.com](http://www.balch.com)

1710 Sixth Avenue North  
Birmingham, Alabama 35203

1 901 Sixth Avenue North  
Birmingham, Alabama 35203

2 Dexter Avenue  
Montgomery, Alabama 36104

655 Gallatin Street  
Huntsville, Alabama 35801

1275 Pennsylvania Avenue  
Washington, D.C. 20004

1310 Twenty Fifth Avenue  
Gulfport, Mississippi 39501

226 North President Street  
Jackson, Mississippi 39201

119 Hardy Street  
Hattiesburg, Mississippi 39403

841 Highway 90  
Bay St. Louis, Mississippi 39520