

DEPARTMENT OF LABOR
DIVISION OF EMPLOYMENT AND TRAINING

Statutory Authority: 19 Delaware Code, Section 1908(a) (19 **Del.C.** §1908(a))

PROPOSED

PUBLIC NOTICE

1103 Worker Adjustment and Retraining Notification (WARN) Regulations

In compliance with the State of Delaware's Administrative Procedures Act (Title 29, Chapter 101 of the Delaware Code) and under the authority of 19 **Del.C.** §1908(a), the Delaware Department of Labor, through its Division of Employment and Training (the "Division"), proposes new regulations at 19 **DE Admin. Code** 1103 to carry out the Delaware Worker Adjustment and Retraining Notification Act, 19 **Del.C.** §§1901-11 (the "WARN Act").

The proposed regulations are not substantially likely to impose additional costs or burdens upon individuals (i.e., natural persons not in their capacities as officers, directors, or employees of an organization other than a small business) or small businesses (i.e., certain enterprises or workshops that employ fewer than 50 people, have gross receipts less than \$10,000,000, and are not owned, operated, or controlled by another business enterprise) because the WARN Act applies to employers who employ 100 or more employees. See 19 **Del.C.** §1903(a)(4).

In accordance with 29 **Del.C.** §10116, any person who wants to submit written suggestions, compilations of data, briefs, or other written materials concerning the proposed regulations should direct them to the following address:

Delaware Department of Labor
Division of Employment and Training
ATTN: Kiran Wiker
4425 N. Market St., 3rd Fl.
Wilmington, DE 19802

Comments may also be submitted via email to kiran.wiker@delaware.gov. Any written submission in response to this notice and relevant to the proposed rules must be received by the above contact at the Delaware Department of Labor no later than 4:00 p.m. EDT on September 3, 2024.

The action concerning determination of whether to adopt the proposed regulations will be based upon the Division's consideration of the written comments and any other written materials filed by the public.

Statutory Authority: 19 **Del.C.** §1908(a)

Title 19, §1908(a) of the Delaware Code empowers the Delaware Department of Labor to prescribe rules and regulations necessary to carry out the WARN Act.

1103 Worker Adjustment and Retraining Notification (WARN) Regulations

1.0 Purpose and Scope

- 1.1 The Delaware Worker Adjustment and Retraining Act, 19 **Del.C.** Ch. 19, protects workers by requiring employers to provide notification of mass layoffs, plant closings, or relocations at least 60 calendar days in advance. Advance notice allows workers time to adjust, to seek and obtain new employment, and to take advantage of services and benefits offered by the Department of Labor and other service providers, if necessary. These regulations are prescribed pursuant 19 **Del.C.** §1908(a) to carry out the State WARN Act.
- 1.2 These regulations establish basic definitions and standards for giving notice under the State WARN Act, as well as the administrative procedures for the Department to enforce it. The Department's objective is to establish clear principles, broad guidelines, and simple but robust procedures for hearing alleged violations.

2.0 Definitions

Words and terms defined in 19 **Del.C.** Ch. 19 shall have the same meaning provided therein. The following words and terms, when used in this regulation, have the following meanings unless the context clearly indicates otherwise:

"Code" means the Delaware Code.

"State WARN Act" means the Delaware Worker Adjustment and Retraining Notification Act, set forth in 19 Del.C. Ch. 19. When used in reference to whether a violation occurred, the term includes this regulation.

3.0 Provision and Contents of Notice

3.1 Determining Whether and When Notice Is Required

- 3.1.1 In determining whether notice is required, the employer shall look ahead 30 days and behind 30 days from the date of an employment loss to determine whether any employment actions both taken and planned will, in the aggregate for any 30-day period, reach the minimum numbers to trigger the notice requirement.
- 3.1.2 For purpose of this section, the term "date" refers to a specific date or to the first day of a 14-day period during which a planned employment loss is expected to occur.
 - 3.1.2.1 If employment losses are planned according to a schedule, the schedule shall indicate the specific employment-loss date or the first day of each 14-day period during which any employment losses are expected to occur.
 - 3.1.2.2 Where a 14-day period is used, notice must be given at least 60 days in advance of the first day of the period.
- 3.1.3 In the case of the sale of part or all of a business, the employer (seller or buyer) who orders the mass layoff, plant closing, or relocation is responsible for giving the notice. Thus, if the employment loss will occur less than 60 days after the sale closes, the buyer may be responsible for ensuring proper notice is timely given, even though the sale has not yet been completed by the time notice is required.
- 3.1.4 Employers are encouraged to voluntarily provide notice of employment losses and relocations to employees, the Delaware Department of Labor, and the Delaware Workforce Development Board even if such notice is not required under the State WARN Act. The fact that an employer gives voluntary notice does not relieve the employer of its obligations under the State WARN Act should it become applicable. A voluntary notice that does not meet all the requirements of the State WARN Act and these regulations cannot substitute for notices required under them.
- 3.1.5 Notice may be given conditional upon the occurrence or non-occurrence of an event only when the event is definite and the consequences of its occurrence or non-occurrence will necessarily, in the normal course of business, lead to a plant closing, mass layoff, or relocation that will cause an employment loss. For example, if the non-renewal of a major contract will lead to the closing of a plant that produces the articles supplied under the contract 30 days after the contract expires, the employer may give notice at least 60 days in advance of the projected plant closing date, which states that if the contract is not renewed, the plant closing will occur on the projected date.

3.2 Service of Notice

- 3.2.1 If first class or certified mail is used, notice must be postmarked at least 60 days before the employment loss.
- 3.2.2 All notices must be sent on official letterhead of the employer and must be signed by an individual with authority to represent the employer in this regard. Notice provided to the Department of Labor must contain the original or digital signature of the employer representative. The employer representative must have the authority to bind the employer and must attest to the truthfulness of all information provided in the notice.
- 3.2.3 Notice to the Delaware Department of Labor, Division of Employment and Training, WARN Act Administrator should be mailed to:
 - Delaware Department of Labor
 - Division of Employment and Training, WARN Act Administrator
 - 4425 N. Market St., 3rd Fl.
 - Wilmington, DE 19802
- 3.2.4 Notice to the Delaware Workforce Development Board should be mailed to:
 - Delaware Department of Labor
 - Delaware Workforce Development Board
 - 4425 N. Market St., 3rd Fl.
 - Wilmington, DE 19802

3.3 Contents of Notice

- 3.3.1 Notice must be specific and based on the best information available to the employer at the time the notice is served.
- 3.3.2 Notice to affected employees and the representatives of affected employees must include:

- 3.3.2.1 The name and address of the employment site where the mass layoff, plant closing, or relocation will occur;
- 3.3.2.2 The name and telephone number of a company official to contact for further information regarding the mass layoff, plant closing, or relocation;
- 3.3.2.3 A statement as to whether the mass layoff, plant closing, or relocation is expected to be permanent or temporary, whether the planned action will affect identifiable units of employees differently, and if an entire plant is to be closed, a statement to that effect;
- 3.3.2.4 The expected date of the first separation or when the mass layoff, plant closing, or relocation will commence, and the anticipated schedule for making separations;
- 3.3.2.5 The expected date when the individual employee will be separated;
- 3.3.2.6 The name, job title, home address, telephone number, and email address of each planned dislocated worker;
- 3.3.2.7 An indication whether or not bumping rights exist;
- 3.3.2.8 General information regarding any payouts, severance packages, job relocation opportunities, and retirement options that will be offered to the dislocated workers;
- 3.3.2.9 A statement as to whether the employer is self-insured for workers' compensation insurance under 19 **Del.C.** Ch. 23; and
- 3.3.2.10 Information concerning unemployment insurance, job training, and re-employment services for which affected employees may be eligible. Such information shall, at a minimum, include the following notice:
You are also hereby notified that, as a result of your employment loss, you may be eligible to receive job retraining, re-employment services, or other assistance with obtaining new employment from the State of Delaware Department of Labor or its workforce partners upon your termination. You may also be eligible for unemployment insurance benefits after your last day of employment. Whenever possible, the State of Delaware Department of Labor will contact your employer to arrange to provide additional information regarding these benefits and services to you through workshops, interviews, and other activities that will be scheduled prior to the time your employment ends. If your job has already ended, you can also access reemployment information and apply for unemployment insurance benefits on the Department's website, or you may use the contact information provided on the website or visit one of the Department's local offices for further information and assistance.
- 3.3.3 The notice may include additional information useful to the employees; for example, if the planned action is expected to be temporary, the estimated duration, if known.

4.0 **Exceptions**

- 4.1 The State WARN Act establishes 5 exceptions to the 60-day notice requirement:
 - 4.1.1 The "seeking-capital-or-business exception" under 19 **Del.C.** §1905(a)(1);
 - 4.1.2 The "unforeseen-business-circumstances exception" under 19 **Del.C.** §1905(a)(2);
 - 4.1.3 The "temporary-employment exception" under 19 **Del.C.** §1905(a)(3);
 - 4.1.4 The "natural-disaster exception" under 19 **Del.C.** §1905(a)(4); and
 - 4.1.5 The "strike-or-lockout exception" under 19 **Del.C.** §1905(a)(5).
- 4.2 In all cases, an employer invoking an exception bears the burden of proof to show that the requirements for an exception have been met.
- 4.3 For the seeking-capital-or-business exception, the Code requires an employer to have had a reasonable and good faith belief that giving the required notice would have precluded the employer from obtaining the needed capital or business.
 - 4.3.1 To make this showing, the employer must:
 - 4.3.1.1 Identify the specific actions taken to obtain such capital or business;
 - 4.3.1.2 Show there was a realistic opportunity to obtain the capital or business sought;
 - 4.3.1.3 Show the capital or business sought would have been sufficient to enable the employer to avoid or postpone the plant closing, mass layoff, or relocation; and
 - 4.3.1.4 Show that a potential customer or financing source would have been unwilling to provide the new business or capital if notice were given.

4.3.2 The employer's actions will be viewed in a company-wide context. An employer with access to capital markets or with cash reserves may not avail itself of this exception by looking solely at the financial condition of the single site of employment to be closed.

4.4 For the temporary-employment exception:

4.4.1 The employer must demonstrate that it informed each affected employee at the time of hire that the job was temporary. For purposes of this regulation, "at-will" employment is not temporary employment. Providing notification to at-will employees, at the time of hire or otherwise, that their employment is subject to termination at any time shall not constitute notice that employment is of limited duration.

4.4.2 Employment in an industry that traditionally hires temporary employees does not, in and of itself, render a particular employee's employment temporary.

4.4.3 Employers may not attempt to avoid notice requirements by purporting to convert permanent employment into temporary work.

4.5 For the natural-disaster exception, the Code requires that the mass layoff or plant closing be "due to any form of natural disaster."

4.5.1 The term "due to" means that the mass layoff or plant closing would not have occurred but for the natural disaster, and the natural disaster was a substantial factor in bringing about the mass layoff or plant closing.

4.5.2 The term "natural disaster" includes floods, earthquakes, droughts, wildfires, storms, tidal waves, tsunamis, any form of a pandemic declared by the Centers for Disease Control and Prevention, and similar effects of nature.

5.0 Extensions and Other Changes in Plans

5.1 For purposes of 19 Del.C. §1906, the date a mass layoff originally commenced shall be the date on which the first affected employee was laid off.

5.2 If a mass layoff, plant closing, or relocation is postponed beyond the date of separation or end of the 14-day period stated in the initial notice, additional notice is required.

5.2.1 If the postponement is for less than 60 days, the additional notice shall be given as soon as possible. The additional notice shall include reference to the earlier notice, the date or 14-day period to which the planned action is being postponed, and the reasons for the postponement. The additional notice shall otherwise meet all the requirements of the original notice as to form, delivery, and parties entitled to notice.

5.2.2 If the postponement is for 60 days or more, the additional notice should be treated as a new notice subject to all requirements of 19 Del.C. Ch. 19 and these regulations.

5.3 If, after notice has been given, an employer determines that it will continue operations and the announced plant closing, mass layoff, or relocation will not occur, the employer shall give a notice of rescission to the Department as soon as possible after the decision is made. The notice of rescission shall include reference to the earlier notice and the reason why such action is no longer required.

6.0 Transfers

For purposes of determining whether an offer to transfer in connection with a relocation or consolidation constitutes an "employment loss" under 19 Del.C. §1903(a)(5)b., a "reasonable commuting distance" will be determined under the totality of the circumstances, including consideration of geographic accessibility of the place of work, the quality of the roads, customarily available transportation, and the usual travel time.

7.0 Enforcement by the Secretary of Labor

7.1 Investigations

7.1.1 The Department may investigate a suspected violation of the State WARN Act when a complaint is filed or on its own motion, regardless of whether a complaint has been filed.

7.1.2 Consistent with the authority granted under 19 Del.C. Chs. 1 and 19, the Department may exercise the following powers when conducting investigations:

7.1.2.1 Inspect records, including any information of an employer necessary for determining whether a violation of the State WARN Act occurred or the validity of any defense;

7.1.2.2 Collect facts or statistics, through interviews, requests for information, or similar means;

7.1.2.3 Issue and enforce subpoenas to compel the appearance of witnesses or the production of papers, books, accounts, payrolls, documents, records, or testimony;

7.1.2.4 Administer oaths;

7.1.2.5 Certify to official acts; and

7.1.2.6 Depose witnesses.

7.1.3 In general, subpoenas shall be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome. More specifically, subpoenas shall:

7.1.3.1 Be issued in the name of the Department;

7.1.3.2 Direct the person designated to personally appear and give testimony or to produce the items sought;

7.1.3.3 State the time when and place where the person designated must appear or the items sought must be delivered; and

7.1.3.4 Be served either by personal service by any person 18 or more years of age by delivery of a copy thereof to the person named therein, by overnight delivery by commercial courier, or by registered or certified mail, return receipt requested.

7.1.4 The Department shall complete its investigations as promptly as reasonably possible.

7.1.5 If an employer fails or refuses to cooperate with any portion of the Department's investigation, reasonable inferences will be made against the employer on relevant issues. The Department WARN Administrator may rely on those inferences in reaching the preliminary determination, and unless the employer satisfactorily rebuts the inferences by presenting contrary evidence at a hearing, the Secretary also may rely on those inferences in the final order.

7.2 Commencing an Action

7.2.1 Either an affected employee or the Department may commence an action by filing with the Department WARN Administrator a complaint that alleges a violation of the State WARN Act.

7.2.2 A complaint shall be in writing on the form prescribed by the Department.

7.3 Notice of Action or Investigation. The Department shall notify the employer by certified and First-Class mail when a complaint has been filed or an investigation has been initiated.

7.4 Preliminary Determination

7.4.1 After the Department conducts its investigation, the Department WARN Administrator shall issue a preliminary determination as to whether or not the employer violated the State WARN Act. The preliminary determination shall set forth the supporting facts and any recommended penalties.

7.4.1.1 If the Department WARN Administrator determines that no violation occurred, the Secretary shall issue an order dismissing the complaint.

7.4.1.2 If the Department WARN Administrator determines that one or more violations occurred, the employer may request within 20 days of receiving the preliminary determination that the Department schedule an administrative hearing on the violations. The Department shall include a notice of the right to request a hearing and the 20-day deadline in the same mailing as the preliminary determination. If the employer fails to timely request an administrative hearing, the Secretary shall issue a final order finding the employer violated the State WARN Act and awarding appropriate relief, including any civil penalties.

7.4.2 The Department shall provide a copy of the preliminary determination to the employer by certified and First-Class mail as soon as reasonably possible after the conclusion of the investigation.

7.5 Hearings

7.5.1 The Department will promptly schedule requested hearings and shall provide at least 20 days' notice of the hearing. The notice must:

7.5.1.1 Describe the subject matter of the proceedings;

7.5.1.2 Give the date, time, and place of the hearing;

7.5.1.3 Cite 19 **Del.C.** Ch. 19 and this regulation as the Department's authority to enforce the alleged violations and conduct the proceedings;

7.5.1.4 Inform the employer of the rights to present evidence, to be represented by counsel, and to appear personally or by other representative at the hearing; and

7.5.1.5 Inform the employer of the Department's obligation to reach its final decision based upon the evidence received.

7.5.2 The Secretary may serve as the hearing officer or appoint a designee within the Division of Employment and Training to serve as the hearing officer. The hearing officer will rule upon all motions and questions relating to the administrative hearing. The hearing officer shall not be bound by rules of evidence or procedure. The hearing officer is empowered to:

- 7.5.2.1 Issue subpoenas for witnesses and other evidence, either on the agency's initiative or at the request of any party;
- 7.5.2.2 Administer oaths to witnesses;
- 7.5.2.3. Exclude plainly irrelevant, immaterial, insubstantial, cumulative, and privileged evidence;
- 7.5.2.4 Limit unduly repetitive proof, rebuttal, and cross-examination;
- 7.5.2.5 Cause interrogatories to issue and depositions to be taken; and
- 7.5.2.6 Hold prehearing conferences for the settlement or simplification of issues by consent, for the disposal of procedural requests or disputes, and to regulate and expedite the course of the hearing.
- 7.5.3 Before the hearing, or at any time directed by the hearing officer, the Department and the employer will exchange documents, records, and other evidence relevant to the matters at issue during the hearing. If a party fails to make the respective items available to the other party, then upon application of the other party, the hearing officer may dismiss the complaint, exclude consideration of the withheld items, make factual inferences against the withholding party on issues relevant to the withheld items, or order other appropriate relief within hearing officer's powers.
- 7.5.5 Either the Department or the employer may request a continuance or other changes to the timing, manner, or location of the hearing. A request must be made to the hearing officer within a reasonable time prior to the hearing, and the other party may oppose it. When ruling on the request, the hearing officer may consider the sufficiency of the grounds for the request, the length of time appropriate for a continuance, and the degree of prejudice, if any, to the other party.
- 7.5.6 At the hearing, the parties shall have the opportunity to express all pertinent facts and circumstances; to introduce evidence; to examine and cross-examine witnesses; to advance any arguments without undue interference; and to question or refute any testimony or evidence.
- 7.5.7 The Department shall have the burden of proving each alleged violation of the State WARN Act by a preponderance of the evidence. The employer shall have the burden of proving that any exceptions apply by a preponderance of the evidence. Likewise, for the purpose of empowering the Secretary with the discretion to reduce the amount of the employer's liabilities or penalties owed for a violation, the employer shall have the burden of proving, by a preponderance of the evidence, that the employer's act or omission constituting the violation was in good faith and that the employer had reasonable grounds for believing the act or omission was not a violation.
- 7.5.8 The Department shall keep a record of the hearing from which a verbatim transcript can be made. Transcripts will be made at the request and expense of a party.
- 7.5.9 The Department shall keep a record of each case that includes all notices; correspondence between the Department and the employer; all exhibits, documents, and testimony admitted into evidence; all motions, responses, exceptions, and other similar writings submitted by the parties; and all preliminary determinations, summaries, interlocutory orders, and proposed and final orders.
- 7.6 Final Orders
 - 7.6.1 If the Secretary's designee served as the hearing officer, the designee shall prepare a proposed order that briefly summarizes the evidence and recommends factual findings based upon the evidence, conclusions of law, and a decision. The Department shall promptly send the proposed order to the employer. Both parties shall have 20 days from the date of the proposed order to submit to the Secretary, in writing, exceptions to, comments on, and arguments respecting the proposed order.
 - 7.6.2 The Secretary shall issue a final order after receiving a preliminary determination where no hearing is requested, after personally conducting a hearing, or after a designee conducts a hearing and the Secretary receives the parties' responses to the designee's proposed order, if any. The final order must be based upon the entire record of the case and, when applicable, the summaries and recommendations provided to the Secretary. The Secretary may rely on hearsay evidence admitted so long as it does not constitute the sole basis for the Secretary's determination. The final order must include:
 - 7.6.2.1 A brief summary of the evidence;
 - 7.6.2.2 Factual findings based upon the evidence;
 - 7.6.2.3 Conclusions of law;
 - 7.6.2.4 A determination as to whether the employer violated the State WARN Act;
 - 7.6.2.5 If asserted by the employer, a determination as to whether any exception applied;
 - 7.6.2.6 If asserted by the employer, a determination as to whether the employer acted or failed to act in good faith and with reasonable grounds to believe the act or omission was not a violation;
 - 7.6.2.7 Awards of any back pay or the value of other liabilities owed to affected employees; and

7.6.2.8 Penalties assessed.

7.6.3 The Secretary shall sign the final order and immediately mail or deliver a copy to each party and each other person requesting it.

7.6.4 The right of a party aggrieved by a final order to seek judicial review is established by statute, 29 Del.C. §10142. Parties should consult the Code and the Superior Court rules for appeal procedures.

28 DE Reg. 92 (08/01/24) (Prop.)