## 5. Plant and Facility Closings (WARN Act)

The federal Worker Adjustment and Retraining Notification Act requires employers of 100 or more employees that plan to terminate or lay off 50 or more employees at a single location for six months or more to notify those workers 60 days in advance (209 U.S.C. §§ 2101 et seq.). Part-time workers who work an average of 20 hours or less per week or who have worked less than six months are not counted in the 50-employee layoff threshold, but they are entitled to notice if the threshold is met.

A covered employer also must give notice if there is to be a mass lay-off that does not result from a plant closing but will result in an employment loss at the employment site during any 30-day period for 500 or more employees or for 50 to 499 employees if they make up at least 33% of the employer's active work force. Again, this does not count employees who have worked less than six months in the last 12 months or employees who work an average of less than 20 hours a week for that employer. These employees, however, are entitled to notice if the applicable threshold is met.

### *a. Staffing Industry Exemptions*

Staffing firms should be aware of two important exceptions to the notice requirements under the WARN Act.

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137. Maikish v. Pac. Gas & Electric Co., 2d. Civ. No. B098600 (Cal. App. 2d. Jun. 5, 1997) (unpublished decision); *see also* Hankins v. Adecco Servs. of Ohio, No. 17-01-13, 2001 WL 1475801 (Ohio Ct. App. Nov. 20, 2001) (the employee knew that assignments were temporary and nothing in the client's work program manual guaranteed a permanent job with the client).

Consultants or contract employees who have a separate employment relationship with another employer and who are paid by that employer or are self-employed are not entitled to WARN notice from the business to which they are assigned *(see* 20 C.F.R. § 639.3[e]). This exception means that a staffing firm client is not required to give notice to employees assigned by a staffing firm.

### *b. Temporary Projects*

Notice need not be given when temporary facilities are closed or employees are laid off because a particular project has been completed. This exemption applies, however, only when the employees were hired with the understanding that their employment was limited to the duration of the project.

Therefore, if a staffing firm has more than 50 employees working on assignments at a single location and the work is performed as part of a special project, the staffing firm will not be required to give notice if the employees were informed when they started work that their assignments would end when the project was completed *(see* 20 C.F.R. § 639.5[c]). The temporary employment exemption will relieve the staffing firm from having to provide notice if the workers understood that their assignments would end when the project was completed or the temporary facility closed. However, if the assignments were indefinite, or if the lay-off occurs before the expected completion of the project, the staffing firm must provide the required notice.

Even though temporary project employees are not entitled to notice, they are counted in determining whether the act applies and whether the 50-employee threshold for plant or facility closings has been met. For example, a staffing firm client that employs 90 regular full-time employees and 10 temporary project employees is covered by the act. If the employer closes the temporary project as planned and terminates the employment of the 10 temporary workers and 40 permanent employees, the 50-employee threshold will be met, but only the 40 permanent employees are entitled to notice *(see* 20 C.F.R. § 639.3(a)(3) and (c)(2).

### *c. Special Circumstances*

If no exemption applies and a staffing firm is required to gives its temporary employees notice, then less than 60 days' notice may be given in special circumstances that were not foreseeable at the time the notice would have been required.

For example, if a client does not give a staffing firm adequate notice of its intent to terminate the employment of 50 or more of the staffing firm's employees, and this action was not reasonably foreseeable by the staffing firm, then the staffing firm must give as much notice as possible. In some circumstances, this may be notice after the fact.

No notice is required, however, if the staffing firm offers at the time of lay-off or termination to transfer the employee to a different site of employment within a reasonable commuting distance and with no more than a six-month break in employment. Notice is also not required if the firm offers to transfer the employee to another site regardless of distance and with no more than a six-month break in employment if the employee accepts the offer within 30 days of the offer or of the lay-off, whichever is later.

## 6. Immigration and I-9 Verification

In 1986 Congress passed the Immigration Reform and Control Act, making it unlawful for an employer to hire any person not authorized to work in the U.S. To prove that only authorized persons have been hired, all employers must complete a Form I-9, attesting that they have verified each individual's right to work. Employees must establish their identity and work authorization by showing certain documents described in regulations.

Regulations issued under the act make clear that clients using contract services do not have any obligation to verify the employment status of the contractor's employees. The regulations provide that "in the case of an independent contractor or contract labor or services, the term 'employer' shall mean the independent contractor or contractor and not the person or entity using the contract labor."[138] Accordingly, clients have no obligation to verify the employment status of a staffing firm's employees.[139]

Because the staffing firm is responsible for performing the I-9 verification and for maintaining the records relating to this requirement, it is also the staffing firm's responsibility to ensure that the information obtained from a job applicant is not used in a discriminatory manner.

## 7. Privacy Protection

### *a. Health Information Privacy Rules Under HIPAA*

The Health Insurance Portability and Accountability Act of 1996 required the establishment of privacy rules that apply to organizations in the health care industry and that set a compliance date of April 14, 2003, for most covered entities.[140] On May 21, 2008, President Bush signed the Genetic Information Nondiscrimination Act of 2008 which, among other things, expanded HIPAA specifically to state that genetic information should be considered medical infor-

138. 8 C.F.R. § 274a.1(g).

139. *See* Handbook For Employers, Instructions For Completing Form I-9 (Employment Eligibility Verification Form) M-274 at 5 (U.S. Citizenship & Immigration Servs., U.S. Dep't of Justice, Rev. July 31, 2009).

140. 42 U.S.C. § 1320d–1320d-9.