

Chapter Ind 79

BUSINESS CLOSING AND MASS LAYOFF

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Ind 79.001 Purpose. The purpose of this chapter is to implement s. 109.07, Stats., which provides remedies for an employer's failure to provide notice of a business closing or mass layoff in certain cases. The chapter provides criteria for exceptions and is designed to aid the administration and enforcement of the law.

History: Cr. Register, March, 1991, No. 423, eff. 4-1-91.

Ind 79.002 Interpretation. Whenever possible, this chapter will be interpreted in a manner consistent with the Federal Worker Adjustment and Retraining Notification Act, 29USC ss. 2701, *et seq.*, the federal regulations and court decisions interpreting that Act to the extent that the provisions of federal and state law are the same.

History: Cr. Register, March, 1991, No. 423, eff. 4-1-91.

Ind 79.01 Definitions and scope. (1) When used in this chapter or in s. 109.07, Stats:

(a) "Affected employee" has the meaning specified in s. 109.07 (1) (a), Stats. An employee that suffers loss of employment is an affected employee if that loss is the result of an employment termination (other than a discharge for cause, voluntary departure or retirement), a layoff exceeding 6 months or a reduction in hours of work of more than 50% during each month of any 6-month period. An affected employee does not include an employee discharged for cause or employees who terminate their employment as a result of retirement or voluntary departure. Business partners as well as consultant or contract employees who are paid by another employer or are self employed are not affected employees of the business to which they are assigned.

(b) "Business closing" has the meaning specified in s. 109.07 (1)(b), Stats.

(c) "Department" means the department of industry, labor and human relations.

(d) "Employer" has the meaning specified in s. 109.07 (1) (d), Stats., but does not include the federal or state government or any of their political subdivisions. Charitable or tax-exempt institutions and organizations are also not included. Independent contractors and wholly or partially owned subsidiaries that are independent from the parent corporation are considered separate employers for the purposes of this section.

(e) "Employment site" as used in s. 109.07, Stats. means a single location or group of locations within the same municipality or reasonable

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geographic proximity that share the same or related staff or operational purpose. Employment sites that have separate workforces, separate management, or produce different products are separate employment sites.

(f) "Facilities" as used in s. 109.07 (1) (b), Stats., means a building or buildings.

(g) "Mass layoff" has the meaning specified in s. 109.07 (1) (f), Stats.

(h) "Municipality" means a city, town or village.

(i) "New or low hour employe" has the meaning specified in s. 109.07 (1) (h), Stats.

(j) "Operating units" as used in s. 109.07 (1) (b), Stats., means an organizationally or operationally distinct operation or specific work function within or across facilities at an employment site. Only distinct structural or operational entities within an employment site are intended to be included as "operating units."

(k) "Persons" as used in s. 109.07 (1) (d), Stats., does not include new or low-hour employes.

(l) "Substantially all" as used in s. 109.07 (6) (a) and (b), Stats., means that number of an employers affected employes who if hired or offered transfer, will make the total number of affected employes experiencing a loss of employment, as determined by the department on a case by case basis less than the thresholds for a "business closing" or "mass layoff" as defined in s.109.07 (1) (b) or (f), Stats.

History: Cr. Register, March, 1991, No. 423, eff. 4-1-91.

Ind 79.02 Employer notice. (1) An employer who has decided upon a business closing or mass layoff in this state shall provide written notice of the closing or mass layoff to the department, any affected employe, any collective bargaining representative of any affected employe and the highest official of any municipality in which the affected employment site is located.

Note: An employer shall notify the department of a business closing or mass layoff by providing written notice delivered to the Dislocated Workers Unit, Department of Industry, Labor and Human Relations, P.O. Box 7972, Madison, Wisconsin 53707.

(2) (a) In the case of the sale of part or all of a business the exception in s. 109.07 (6) (a), Stats., may apply. If that exception does not apply and if notice is required, the seller shall provide notice of any business closing or mass layoff that occurs up to the effective date of sale, and the buyer is responsible for providing notice of any business closing or mass layoff that takes place thereafter. If termination or layoff takes place on the sale's effective date, notice to affected employes not hired by the buyer in connection with the sale is the responsibility of the buyer.

(b) Notwithstanding the allocation of responsibility for notice in par. (a), a buyer and seller may issue notices jointly or as agents of one another. Buyers and sellers also may enter into private agreements which address their respective rights and notice obligations under this subsection.

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(c) If notice is not given as required by par. (a), the employer required to give notice shall be liable for penalties under s. 109.07 (3) and (4m), Stats.

History: Cr. Register, March, 1991, No. 423, eff. 4-1-91.

Ind 79.03 Who must receive notice. (1) An employer shall provide notice to all affected employes that may reasonably be expected to lose employment as a result of a business closing or mass layoff. If at the time the notice is given, the employer is unable to identify which employe will lose employment due to elimination of a particular position, notice shall be provided to the employe currently holding that position.

(2) An employer shall notify the collective bargaining representative of an affected employe by providing written notice to that employe's local bargaining agent or the chief elected officer of the employe's exclusive bargaining agent.

(3) An employer shall notify the affected municipality of the business closing or mass layoff by providing written notice to the mayor of a city, town board chairman or village president. In the case of cities organized under a city manager plan, notice shall be delivered to the president of the city council and city manager. For villages organized under a city manager plan, notice shall be delivered to the president of the village board of trustees and the village manager.

History: Cr. Register, March, 1991, No. 423, eff. 4-1-91.

Ind 79.04 When employer notice must be given. (1) An employer who has decided upon a business closing or mass layoff in this state shall provide written notice of such action no later than 60 calendar days prior to the date that the closing or layoff occurs. The department shall, upon complaint, determine whether notice is required or should have been provided.

(2) (a) An employer is not required to provide notice as required in this section unless affected employes lose employment in sufficient number on a particular date to meet the definition of business closing or mass layoff. However, subject to par. (c), 2 or more groups of employes who are affected during a 90-day period may be considered in the aggregate in order to determine whether the business closing or mass layoff thresholds have been met, unless the loss of employment in different groups are the result of separate and distinct actions and causes. In order to be considered in the aggregate, each group of employes affected by a reduction in the workforce on different dates must, by itself, be insufficient to trigger notice obligations.

(b) For the purpose of this subsection successive layoffs or terminations that result from different events are separate and distinct actions and causes. Successive layoffs or reductions in the workforce caused by ongoing unfavorable business conditions are separate and distinct if the employer had a reasonable basis for believing that the subsequent reduction would not necessarily follow from the earlier reduction or reductions.

(c) The department shall consider, subject to par. (a), a series of layoffs that are related and conducted by the employer with the intent to evade the notice requirements of s. 109.07, Stats. as failure to give timely notice.

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(d) The department shall consider permanent or routine notice given by an employer with the intent to evade the requirements of s. 109.07, Stats., as failure to give timely notice.

(3) For the purposes of this section, an affected employe's date of layoff or termination is the date active employment is first denied because of a business closing or mass layoff. The date of an employe's reduction in hours of work of 50% or more in a given month is the first business day in the month in which the employe experiences that reduction. Notice is required when it becomes evident that the reduction will extend beyond 6 months.

(4) (a) An employer may use any reasonable method of delivery designed to result in receipt of written notice at least 60 days before the business closing or mass layoff occurs. Employers must exercise reasonable diligence in issuing notices but do not have to take extraordinary or unreasonable measures to ensure notices are actually received by all parties.

(b) A reasonable method of delivery includes but is not limited to, first class mail, personal delivery with optional signed receipt or in the case of notification directly to affected employes, insertion of notice into pay envelopes. A ticketed notice, in other words, a preprinted notice regularly included in each employe's pay check or pay envelope, does not meet the requirements of this section.

(5) To determine whether a business enterprise is an employer subject to s. 109.07, Stats., or to determine the number of employes in an employer's workforce or at an employment site against which the 25% threshold for a mass layoff is to be calculated, the point in time at which that number is to be measured is the date the first notice is required to be given. If this "snapshot" of the amount of employes on the date is not representative of the employer's ordinary or average employment levels over the previous 90 days then the department shall use a more representative number.

History: Cr. Register, March, 1991, No. 423, eff. 4-1-91.

Ind 79.05 Extension of notice. Additional notice of a delayed business closing or mass layoff must be issued within a reasonable time after the employer learns there will be a postponement or delay beyond the date announced in the original notice. The additional notice shall be directed to the same recipients of the original notice. The additional notice shall include reference to the earlier notice, the date to which the planned action is postponed, and the reasons for the postponement or change.

History: Cr. Register, March, 1991, No. 423, eff. 4-1-91.

Ind 79.06 Content of employer notice. (1) Notice by the employer to each affected employe shall contain at least all of the following:

(a) The name and address of the employment site where the business closing or mass layoff will occur and the name and telephone number of a company official to contact for further information.

(b) A description of whether the planned action is expected to be permanent or temporary and, if the entire employment site is to be closed, a statement to that effect. If the planned action is expected to be temporary the notice should to the extent reasonable include the estimated duration of that action, if known.

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(c) The expected date when the business closing or mass layoff will commence and the expected date of the employee's layoff or separation.

(d) The name and address of the employee's collective bargaining representative, if applicable.

(2) Notice to the collective bargaining representative of an affected employe shall contain all of the following:

(a) The name and address of the employment site where the business closing or mass layoff will occur and whether the planned action is expected to be permanent or temporary, and if the entire employment site is to be closed a statement to that effect.

(b) The schedule of separation or layoff, a list including the job titles of the affected positions and the names of employes currently holding those jobs or expected to be affected by the business closing or mass layoff.

(c) The name and address of a company official for the bargaining representative to contact for further information.

(3) Notice to the department and to the highest official of the municipality in which the affected employment site is located shall contain all of the following:

(a) The name and address of the employment site where the business closing or mass layoff will occur.

(b) The name and telephone number of a company official to contact for further information.

(c) The expected date of the first separation or layoff.

(d) The number of employes affected by the business closing or mass layoff.

(e) A description of whether the planned action is expected to be permanent or temporary and, if the entire employment site is to be closed, a statement to that effect. If the planned action is expected to be temporary the notice should include to the extent reasonable the estimated duration of that action, if known.

(4) (a) Information provided in the notice shall be based on the best information available to the employer at the time the notice is served. Errors in information provided in a notice that occur because events subsequently change or that are minor inadvertent errors are not to be considered a violation of s. 109.07, Stats.

(b) Minor inadvertent errors includes but is not limited to factual errors that result because circumstances later changed, the omission or misstatement of position titles or number of employes in a given position, typographical errors or other minor inaccuracies that were unintended.

(5) Employers may use a form of notice that satisfies the notice requirements of the federal Worker Adjustment and Retraining Notification Act as specified in 20 CFR s. 639.7, as a substitute for the notice required in this section. In those instances when notice is required under s. 109.07, Stats., but not clearly required under federal law, employer notice shall comply with this section.

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(6) Conditional notice may be given upon the occurrence or nonoccurrence of an event, such as the renewal of a major contract, other than the renewal of a labor contract between the employer and any potentially affected employes as defined in s. 109.07 (1) (a), Stats., when the event is definite and the consequences of its occurrence will lead to a business closing or mass layoff less than 60 days after the event.

History: Cr. Register, March, 1991, No. 423, eff. 4-1-91.

Ind 79.07 Posting of notice. An employer shall permanently post in one or more conspicuous places where notices to employes are customarily posted a written notice of employes' rights, in a form approved by the department, as required by s. 109.07(7), Stats.

Note: A copy of the form may be obtained at no charge from the department's Equal Rights Division, P.O. Box 8928, Madison, Wisconsin 53708.

History: Cr. Register, March, 1991, No. 423, eff. 4-1-91.

Ind 79.08 Exceptions. An employer is not liable for failure to give notice if the department, upon complaint, determines the business closing or mass layoff is caused by any of the following:

(1) A strike or a lockout not intended to evade the requirements of s. 109.07, Stats., including but not limited to loss of employment for non-striking employes who lose work with an employer because of a strike.

(2) The sale of all or part of an employer's business, if the purchaser agrees, in writing, as part of the purchase agreement to hire substantially all of the affected employes with not more than a 6 month break in employment.

(3) (a) The relocation of all or part of an employer's business within a reasonable commuting distance, if the employer offers to transfer or hire substantially all of the affected employes with not more than a 6-month break in employment.

(b) Offers to transfer shall be considered a relocation under this subsection if the employe receives a bona fide transfer offer to an employment site owned and operated by a related enterprise. If the new employment site is within a reasonable commuting distance, the relocation exception will apply, regardless of whether the employer offers to compensate the affected employe for relocation costs. However, an employer's offer to pay relocation costs may make a more distant site equivalent to one within a reasonable commuting distance for purposes of this subsection.

(c) Under this subsection, a "reasonable commuting distance" shall be presumed to be a distance of less than 50 miles, unless an affected employe has already been commuting 50 miles or greater on a voluntary basis prior to the relocation or indicates in writing that he or she is willing to commute 50 miles or more under a relocation. On a case by case basis, the department may determine that a commuting distance of less than 50 miles is not reasonable if industry practice or local conditions, such as climate, geographic accessibility, the quality of roads, customary available transportation, including public transportation, and travel time, so warrant.

(4) (a) The completion of a particular project, activity or undertaking or work of a specific duration, including seasonal work if the affected em-
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ployees were hired with the understanding that their employment was limited to the duration of the work or project.

(b) For the purposes of this paragraph, an employer is not required to provide notice to agricultural, construction or other employees whose work is clearly identified as seasonal but not recurring, or who are hired for harvesting, processing, or for work limited to a particular project.

(c) The department shall consider usual and customary employment practices of the industry or locality, employment contracts or collective bargaining agreements in determining whether the exemption under this paragraph applies to a particular situation.

(d) A particular project, activity or undertaking or work will be considered to be of a specific duration where employees understand that, upon completion of a particular project, activity, undertaking or work, their employment will cease. There is no requirement that a specific termination date be known or communicated to employees.

(e) Whether affected employees understand at the time of hire that their employment was for a particular project, activity or undertaking, or work of a specific duration, shall be determined by reference to employment contracts, collective bargaining agreements or employment practices of an industry or a locality. The burden of proof will be the employer's to show that the temporary nature of the project or facility was clearly understood.

(5) Business circumstances that were not foreseeable when the notice would have been timely given.

(a) Factors that the department shall consider in determining whether the exemption under this paragraph applies include without limitation by enumeration a strike or lockout at a major supplier of the employer, a government ordered closing of an employment site without prior notice, the unexpected termination of a major contract the employer has with a principal client or customer, or an employer's sudden inability to obtain sufficient supplies to be used in production at a competitive cost.

(b) For purposes of this paragraph sudden, dramatic or unexpected events, are considered not foreseeable.

(6) A natural or man-made disaster beyond the control of the employer.

(a) For purposes of this paragraph an employer must be able to demonstrate that its business closing or mass layoff is a direct result of a natural or man-made disaster.

(b) Where a business closing or mass layoff is an indirect result of a natural or man-made disaster this exception does not apply, but the unforeseeable business circumstances exception in sub. (5) may apply.

(7) A temporary cessation of business operations, if the employer recalls the affected employees on or before the 60th day beginning after the cessation.

(8) (a) At the time the 60-day notice would have been required, the employer was actively seeking capital or business to prevent or postpone indefinitely the closing or layoff and the employer reasonably believed both that it had a realistic opportunity of obtaining the necessary capital

or business and that giving notice would prevent the employers' action from succeeding.

(b) Upon receipt of a complaint concerning an employers' failure to give notice under this subsection, the department shall request from and the employer shall provide a written chronological record of those steps taken at or shortly before the time notice would have been required, which shall include the following:

1. Written requests for loans of capital to individuals or lending institutions.

2. Written replies granting or denying requests for loans of capital from individuals or lending institutions. If an offer for a loan or credit is rejected by the employer, the employer must state to the department the reasons, in writing for refusing the offer.

3. Evidence that the employer sought financing or refinancing through the issuance of stocks, bonds or other methods of internally generated financing or sought additional money, credit or business through any other commercially reasonable method.

4. Evidence that the capital or business sought was sufficient, if obtained, to have enabled the employer to avoid or postpone the closing or mass layoff.

5. Evidence that an employer's business source would not do business with a troubled company or a company whose workforce would be looking for other jobs.

(c) All records, individual documents or other material submitted under this paragraph shall be notarized by the employer as required by the department.

(d) The employer shall provide to the department an affidavit verifying the content of the notarized documents.

History: Cr. Register, March, 1991, No. 423, eff. 4-1-91.

Ind 79.09 Applicability. (1) Voluntary notice by an employer is encouraged, even in situations which technically do not constitute a business closing or mass layoff. For that reason, whether particular actions by employers actually constitute a business closing or mass layoff within the meaning of s. 109.07, Stats., will depend on the actions themselves, and not on how characterized by an employer in any written notice.

(2) The amount for which an employer is liable for claims by affected employes shall be reduced by any wages paid by the employer for the period of the violation and any voluntary and unconditional payment by the employer to the employe that is not required by any legal or contractual obligation.

(3) An employe who has received notice of a business closing or mass layoff but who remains employed and is placed on paid leave or comparable program is not an affected employe for the purposes of this chapter even though the employe does not report to work or is transferred to another position or assigned different job duties.

History: Cr. Register, March, 1991, No. 423, eff. 4-1-91.

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Ind 79.10 Complaint. A complaint concerning an employer's failure to give timely notice of a business closing or mass layoff, may be filed by any affected employee, the highest official of any municipality in which the affected employment site is located, or the collective bargaining representative of any affected employee. The complaint must be in writing, signed by the complainant and filed with the department's Equal Rights Division, P.O. Box 8928, Madison Wisconsin 53708.

History: Cr. Register, March, 1991, No. 423, eff. 4-1-91.

Ind 79.11 Reviews. (1) After a department investigator has issued an initial determination on a claim, the claimant or the employer named in the claim may request an administrative review. If an investigator has issued a determination on whether notice should be given under s. 109.07 (1m), Stats., any person entitled to receive notice under s. 109.07 (1m), Stats., may request administrative review of that determination. All requests for administrative review of an initial determination must be in writing and must be mailed to the department within 10 days of the initial determination. A request for administrative review shall specify the reasons for contesting the initial determination. The department in its discretion may deny a request for administrative review if adequate issues for review are not presented.

(2) The administrative review shall be conducted by either the investigator's supervisor or a designated department employee other than the investigator that issued the initial determination. The administrative review is not a contested case proceeding. The person conducting the review may determine whether the review shall be limited to the existing file or may include new information or arguments. The administrative review shall conclude with a written determination that either affirms, reverses or modifies the initial determination.

History: Cr. Register, March, 1991, No. 423, eff. 4-1-91.

Ind 79.12 Referrals. The department shall refer each claim filed by an employe to the department of justice unless the claim is satisfied.

Note: The intent of this section is to provide for a prompt informal review of initial determinations. These decisions should not be subject to formal appeals because the determinations control only the contents of a case file referral to the department of justice. By providing that all unsatisfied claims are to be referred, this section preserves the right of any individual to take a claim to court under s. 109.07 (4) (c), Stats., if the department of justice does not proceed with the referral within 120 days. An employer that opposes the department's determination will have an opportunity to present its arguments to the department of justice. If the department of justice proceeds in court, that will be a "de novo" proceeding.

History: Cr. Register, March, 1991, No. 423, eff. 4-1-91.

Ind 79.13 Records and inspections. The employer shall maintain and have available for inspection by the department copies of all notices and correspondence delivered to affected employes, municipalities, collective bargaining representatives and the department, as well as any records used in connection with preparation and delivery of these notices.

History: Cr. Register, March, 1991, No. 423, eff. 4-1-91.