

# Handling layoffs: Can waivers cut your WARN Act liability?

The recession has forced companies to downsize, resulting in an epidemic of layoffs. Many mass layoffs trigger employer obligations under the Worker Adjustment and Retraining Notification (WARN) Act, which requires some employers to provide advance written notice of a “plant closing” or “mass layoff” to their employees.

But sometimes, those obligations can be waived. A recent 7th Circuit case—*Ellis v. DHL Express, Inc.*, No. 09-3596, 2011—held that employees who voluntarily entered into a severance agreement released their employer from liability under the WARN Act.

## DHL offers severance

In November 2008, DHL Express announced it would stop offering domestic shipping. As a result, five DHL facilities in Chicago would be closed. In December 2008, the union at these facilities negotiated severance agreements for various bargaining units covering drivers and office workers.

Workers who accepted the severance package—506 in all—were required to sign a “General Waiver and Release.” The document contained a provision in which workers waived, released and discharged DHL from any and all actions arising out of their employment or the termination, including claims under the WARN Act.

Workers who didn’t sign retained their seniority status, recall rights and their right to sue DHL.

## Was the waiver voluntary?

Two of the workers who signed, John Ellis and Timothy Price, sued DHL for failing to comply with the WARN Act. The district court granted summary judgment for DHL, holding that the WARN Act did not apply for several reasons, including that the layoffs were not a “plant closing” or a “mass layoff” under the WARN Act.

Under the WARN Act, an employer does not count workers who resign when determining whether a plant closing or layoff falls within the law’s requirements. If the 506 workers who agreed to the union-negotiated severance agreements are counted in the total number of affected employees, DHL may have violated the WARN Act. At issue, then, was whether the workers voluntarily accepted the severance agreements.

The WARN Act specifically excludes “voluntary departure” from its definition of “employment loss” that trigger the notification requirements but it does not define “voluntary.” However, the Secretary of Labor has clarified that incentive retirement programs and voluntary layoffs should typically be considered voluntary departures if the circumstances surrounding them comport with traditional legal notions of voluntariness. A worker who decides to participate in an incentive program is generally considered voluntary unless the employer improperly induced the worker to leave the job by creating a hostile or intolerable work environment or applying other forms of undue pressure or coercion.

## A ruling for the employer

The 7th Circuit has previously found that voluntariness may be determined by factors such as whether the person received information about what would happen in response to the choice, whether the choice was free from fraud or other misconduct, whether the person had an opportunity to say no and whether there was enough time to make a complex choice.

In this case, the plaintiffs argued that the resignations couldn't be considered voluntary because the employees resigned amid extreme economic uncertainty and pressure from DHL. They said they didn't have enough time to make their decisions.

The court rejected the plaintiffs' arguments. It found no evidence that the workers were given incomplete information or that DHL forced them to accept the severance packages and sign the waiver. The court pointed out that the union had negotiated the severance agreements and waiver with the workers' interests in mind and they were clearly written. The waiver also expressly advised workers to consult an attorney before signing.

The court acknowledged that the workers had to make a difficult decision quickly. But there was no evidence that DHL denied the workers the opportunity to learn about their options or to discuss them with anyone.

As a result, the court held that the separations were voluntary and should not be counted as "employment losses" in determining whether the WARN Act's notification requirement was triggered.

## WARN Act employer cautions

The DHL Express case is a good reminder that employers considering layoffs must be vigilant about complying with notification requirements under the WARN Act.

Employers that fail to provide notice to employees may be liable for back pay and benefits for each day that the WARN Act was violated.

**Note:** Illinois employers must comply with the Illinois WARN Act in addition to the federal WARN Act. While the Illinois WARN Act is similar to the federal WARN Act, it has several differences that provide greater employee protections and employer obligations.

**Advice:** Consult your attorney to develop practices that will ensure compliance with both the Illinois and federal WARN acts.