SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2023-2024 Regular Session

AB 1356 (Haney)
Version: April 26, 2023
Hearing Date: July 11, 2023
Fiscal: Yes
Urgency: No
ME

SUBJECT

Relocations, terminations, and mass layoffs

DIGEST

This bill strengthens California's Worker Adjustment and Retraining Notification Act (CalWARN) by creating an obligation on employers to give workers 90 day notice of the closure of a covered establishment instead of the 60 day notice already required by statute and expands the universe of workers who are required to be provided CalWARN Act notice, among other things.

EXECUTIVE SUMMARY

This bill would increase the universe of workers that are entitled to CalWARN notification to include specified contract workers and workers who work remotely. The bill also requires employers to give workers 90 day notice of the closure of a covered establishment instead of the 60 day notice currently required by statute.

There is evidence that California's workforce, especially in the tech industry, is changing. Companies have been allowing for more remote workers and at the same time have been utilizing workers who are not directly employed by them but instead are provided to the business by contractor companies. The author also points to how Twitter has had employees, who were subject to CalWARN, sign agreements such as nondisclosure agreements in exchange only for what they are statutorily entitled to under CalWARN. The author and sponsors also argue that workers can better prepare for their future when they are given 90 day notice instead of just 60 days as required under the current CalWARN Act.

This bill is sponsored by TechEquity Collaborative, the California Labor Federation, Alphabet Workers Union-CWA, Temp worker Justice, California Employment Lawyers Association, National Employment Law Project and the National Legal Advocacy Network, and supported by numerous organizations who advocate for worker rights. The bill is opposed by a coalition of 21 organizations led by the California Chamber of

Commerce. This bill passed out of the Senate Labor, Public Employment and Retirement Committee on a vote of 4 to 0.

PROPOSED CHANGES TO THE LAW

Existing law:

1) Establishes the federal Worker Adjustment and Retraining Notification (CalWARN) Act, under federal law, which prohibits an employer of 100 or more full-time employees from ordering a mass layoff, relocation, or termination at a covered establishment, as defined, unless, 60 days before the order takes effect, the employer gives written notice of the order to the employees. This applies to businesses that have 100 or more full-time employees that have been employed more than 6 out of the preceding 12 months and businesses that have 100 or more employees, including part-time employees who work more than 4,000 regular hours per week, collectively. (29 U.S.C. §§2101.)

2) Establishes within the Department of Industrial Relations (DIR) and under the direction of the Labor Commissioner, the Division of Labor Standards Enforcement (DLSE) tasked with administering and enforcing labor code provisions concerning wages, hours and working conditions. (Labor Code § 56.)

3) Under the Worker Adjustment and Retraining Notification Act (CalWARN), prohibits an employer from ordering a mass layoff, relocation, or termination at a covered establishment, as defined, unless, 60 days before the order takes effect, the employer gives written notice of the order to the employees, the Employment Development Department, the local workforce investment board, and the chief elected official of each city and county government within which the termination, relocation, or mass layoff occurs. CalWARN applies to employers with 75 or more full and part-time employees when there is going to be a termination or relocation or a mass layoff of 50 or more employees. (Labor Code §§ 1400-1413.)

4) Exempts, from the provisions of CalWARN, seasonal employees and employees that are laid off as a result of the completion of a project in specified industries, where the employers are subject to specified wage orders, and the employees were hired with the understanding that their employment was seasonal and temporary. (Labor Code §1400.5.)

5) States that an employer that fails to give the required notice, as required by CalWARN, before ordering a mass layoff, relocation, or termination, is liable to each employee entitled to notice, for specified compensation and benefits, calculated for the period of the employer's violation, up to a maximum of 60 days, or half the number of days that the employee was employed by the employer, whichever period is shorter. (Labor Code §1402.)

6) States that an employer who fails to give the notice, as required by CalWARN, is subject to a civil penalty of not more than five hundred dollars ($500) for each day of the employer's violation. Exempts an employer from this civil penalty if the employer pays all applicable employees within three weeks from the date the employer ordered the mass layoff, relocation, or termination. (Labor Code §1403.)

7) Permits a person, including a local government, or an employee representative, seeking to establish liability against an employer for violation of CalWARN to bring a civil action on behalf of the person other persons similarly situated, or both, in any court of competent jurisdiction. Also permits a court to award reasonable attorney's fees as part of the costs to any plaintiff who prevails in a civil action. (Labor Code §1404.)

8) Provides up to $450 per week for up to 26 weeks for laid off employees, not including independent contractors, self-employed individuals, informal workers, and undocumented workers. (Unemployment Ins. Code §2655)

This bill:

1) Defines "labor contractor" as an individual or entity that supplies, either with or without a contract, a client employer with workers to perform labor within the client employer's usual course of business.

2) Clarifies that a "covered establishment" may be a single location or a group of locations, including any facilities located in this state.

3) Revises the definition of "mass layoff" to mean a layoff during any 30-day period of 50 or more employees at, or reporting to, a covered establishment.

4) Adds to the definition of "employee" a person employed by a labor contractor and performing labor with the client employer for at least six months of the 12 months preceding the date on which the CalWARN notice is required.

5) Revises the seasonal employee exemption under CalWARN to instead require that the season must be complete for the exemption to apply.

6) Prohibits an employer from utilizing compliance with the provisions of CalWARN in connection with a severance agreement and waiver of an employee's right to claims.

7) Increases, from 60 to 90 days, the period of an employer's liability for specified back pay and benefits owed to affected employees for an employer's violation of the CalWARN notice requirement.

8) Requires a labor contractor to remit the payment provided by a client employer, to affected employees, in the full amount calculated, as specified, for a violation of the CalWARN notice requirement.

9) States that an employer that includes a general release, waiver of claims, nondisparagement agreement, or nondisclosure agreement, as a condition of payment owed to an employee under CalWARN, is subject to a civil penalty of up to $500 for each violation.

10) States that any general release, waiver of claims, or nondisparagement or nondisclosure agreement that is made a condition of the payment of amounts for which the employer is liable under CalWARN, as specified, is void as a matter of law and against public policy.

11) Prohibits an employer that is required to give notice, pursuant to CalWARN, from offering an employee a separate agreement that includes a general release, waiver of claims, or nondisparagement or nondisclosure agreement, unless the agreement is offered in exchange for reasonable consideration that is in addition to anything of value to which the individual already is entitled to.

COMMENTS

1. Impetus for the bill

The Senate Labor, Public Employment and Retirement Committee analysis explains the following[1]:

> Home to some of the largest companies in the world, California has established itself as a tech capitol. As of 2020, California's workforce consisted of approximately 1.38 million tech workers, representing about 10 percent of the overall workforce in California.[2] The state is home to some of the largest and most profitable companies in the world. The tech industry, in particular, has grown significantly over the last decade.
>
> The tech industry has shifted to using contract workers to fulfill critical parts of their business. In 2019, the New York Times reported on the tech industry's reliance on contracted workers, or workers who are primarily employed by a temp agency and contracted out to "client employers." During this time, Google's overall workforce consisted of 121,000 temp workers as compared to 102,000 full-time employees.[3] Contract workers fulfill roles like software

[1] California State Senate Labor, Public Employment and Retirement Committee Analysis of AB 1356 (Haney, 2023) prepared for the June 22, 2023 hearing.
[2] CompTIA Cyberstates 2021 vFinal [available as of 7/7/23]
[3] Google's Shadow Work Force: Temps Who Outnumber Full-Time Employees - The New York Times (nytimes.com) [available as of 7/7/23]

> engineers, content moderators, data scientists, quality assurance, cafeteria workers, janitors, warehouse workers, and administrative specialists. This is a growing practice both in tech and other industries. In many cases, contract workers perform similar roles as directly hired employees. Due to the changing economy, since the Spring of 2022, tech companies have laid off about 187,000 people; however, those numbers don't capture contract workers, who are directly affected by mass layoffs, but are largely ineligible for the same protections under CalWARN.

According to the author:

> Innovative industries like tech are a critical part of our state's economy, and we know that tech companies start here and grow here because of our highly skilled workforce. This bill is about protecting that workforce, from the engineers to the janitors, and making sure they're treated fairly during a job transition. To be pro tech, we have to be pro tech-worker. Our workers are why these companies are in California. If we don't take care of our tech workers then we'll lose one of California's greatest resources to states like Texas, Washington, or New York. We respect that downsizing is sometimes an unavoidable part of business. But discarding employees that have done nothing wrong, with little to no notice, isn't right and it hurts the competitiveness of our state's tech industry. If our workers are given notice and have enough time to look for other work, they're more likely to stay here in California. AB 1356 closes the gaping loopholes in critical layoff protection laws and gives contract workers the basic protections that all workers at these large companies deserve.

In support, the sponsors of the bill write:

> California has expanded on the federal [WARN] Act through state protections, but thousands of workers are still falling through the cracks. Recent layoffs in the tech industry have captured headlines, with 187,000 workers laid off since the beginning of 2022. Since July of 2022, nearly 64,000 workers in California alone have been affected by a mass layoff. Twitter, the poster child of recent downsizing, laid off 3,700 workers in November of the same year—a move that drew headlines and widespread concern. Largely missing from the coverage, however, was that 4,400 contract workers were also laid off, and sent home with nothing because the WARN Act currently does not cover many of them.
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> WARN has left behind thousands of workers, with the potential to leave millions in the lurch. California's contract and temporary workforce comprises approximately 1.9 million employees. In 2018, contract workers at Google outnumbered direct-hire employees, 150,000 to 144,000. The recent layoffs at Meta—noted at the time for their generous layoff packages — did not include contract workers such as campus cafeteria workers, who now must urge the company to provide severance.

> Research shows that contract and temporary workers are more likely to be from diverse and underrepresented backgrounds. In Illinois, which has tracked temporary and contract worker demographics since 2018, 85% of the temporary workforce are people of color, despite the fact that people of color comprise just 35% of the overall state workforce. The temporary workforce of California-based tech companies was similarly found to be disproportionately people of color, women, and nonbinary [people] than the directly-employed workforce. A recent survey conducted by Alphabet Workers Union found that Google often did not enforce its own minimum employment standard for 'temps, vendors, and contractors,' and that there was disparate pay based on race, sexual orientation, and ability.
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> Employment of third-party contract workers is not isolated to the tech industry. Since the Great Recession, temporary employment in all sectors has increased by 75% compared to 19% in total employment. This large and disproportionately diverse workforce often does not have the same protections as the rest of the workforce. This bill changes that by explicitly extending the WARN Act to millions of contract and temporary workers in California. [. . .]
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> The bill also ensures that employers cannot use the WARN Act notice pay to create the false impression that employees are receiving a "severance benefit." People recently laid off from tech companies are reporting that companies are providing some or all of the 60 days of pay in lieu of their WARN-mandated notice along with a separation agreement that waives their legal rights. By offering payments that are already guaranteed under the law in the guise of a separation negotiation, employers induce employees to sign agreements with general releases, waivers of claims, nondisparagement, and nondisclosure provisions. WARN Act rights are already guaranteed to workers impacted by mass downsizing, and AB 1356 makes that clear by requiring any severance agreement to include something of additional value in exchange for signing any waiver of claims or waiver of rights agreement.

2. <u>Obligation to give workers 90 day notice of relocation, termination, or mass layoff at a covered establishment instead of the 60 day notice already required by statute</u>

CalWARN prohibits specified employers from ordering a mass layoff, relocation, or termination at a covered establishment unless, 60 days before the order takes effect, the employer gives written notice of the order to the employees of the covered establishment affected by the order and to the Employment Development Department, the local workforce investment board, and the chief elected official of each city and county government within which the termination, relocation, or mass layoff occurs. An employer is not required to provide notice if a mass layoff, relocation, or termination is necessitated by a physical calamity or act of war. Additionally an employer is not required to comply with the notice requirement if the employer was actively seeking capital or business, at the time the notice would have been required.

The Cal-WARN Act protects and supports workers during company closures and layoffs. Advance notice provides workers time to prepare for unemployment, look for a job, seek training, and prepare financially. The notice also prepares communities and local and state government for the loss of jobs and economic activity in the area. This bill would extend the required notice period from a 60 day notice to 90 days before the closure takes effect. Proponents assert that more time is necessary. The Lawyers Committee for Civil Rights of the San Francisco Bay Area writes the following in support of this provision:

> AB 1356 would strengthen the economic safety net for over 7 million workers by increasing the notice period to 90 days. This change is critical as more than 33% of Californians do not have 3 months of savings to cover basic necessities in the event of an unexpected job loss. Layoffs have lasting negative impacts on workers' health, well-being, and finances.

Employers who fail to appropriately notice their employees or the required agencies are subject to penalties including back pay for each employee, and the value of benefits that the employee would have been entitled to. A failure to sufficiently notice the appropriate agency exposes the employer to a civil penalty of $500 per day of the violation.

In opposition, a coalition of business and employer trade associations led by the California Chamber of Commerce writes:

> [. . .] Increasing the number of days is actually likely to disadvantage workers. If notices must be issued 90 days in advance, this means employers must know well before the 90 day mark who is subject to the closure or layoff at issue. The further that date moves up, the more the employer is in a position where it is guessing with less certainty exactly how many workers this could impact. Out of fear of violating the statute, the employer has no choice but to be over-inclusive in who is receiving notices, leading to layoffs that may not actually be necessary or having to tell workers they are being laid off and then walking that back later, which is poor for worker morale and may lead workers to finding other jobs unnecessarily.

The author has agreed to amend the bill to provide that the notice period is 75 days instead of 90.

Amendment

> 1401. (a) An employer shall not order a mass layoff, relocation, or termination at a covered establishment unless, 75 ~~90~~ days before the order takes effect, the employer gives written notice of the order to the following.
>
> (1) [. . .]

3. Strengthens the Cal-WARN Act in other ways

a. Modifies the definition of "covered establishment" to cover any business that employs 75 or more employees at all of their locations instead of applying to a single location with 75 or more employees

The author, sponsors, and supporters highlight how the California workforce has changed in such a way to justify a change in CalWARN. The California Chamber of Commerce and the members of the opposition coalition write:

> [. . .] [R]ecent amendments change the definition of "covered establishment" so that instead of applying to single locations with 75 or more employees, it now covers any business that employs 75 or more employees between all of their locations. That affects the definitions of mass layoff, relocation, and termination. For example, if a company lays off a few employees at different locations that altogether total 50 workers, the WARN Act is now triggered. This is a significant expansion of the law, imposing new burdensome requirements on small locations that were previously never subject to the WARN Act. It would also mean that if 100 layoffs were happening at a facility and one layoff was happening at a second facility across the state, that second facility is now also required to issue a WARN Act notice.

In response the author proposes to amend the provision regarding local notices. The amendment would specify that the employer must give written notice of the order of mass layoff, relocation, or termination to the workforce investment board, and the chief elected official of each city and county government within which the termination, relocation, or mass layoff occurs for any layoff that impacts 50 or more employees at a single location. In other words, unless there are 50 employees impacted in a single location, the employer would not have to give notice to the workforce investment board and chief elected official of the city or county.

Amendment

1401. (a) [. . .]

(2) The Employment Development Department, ~~the local workforce investment board, and the chief elected official of each city and county government within which the termination, relocation, or mass layoff occurs.~~

(3) The local workforce investment board, and the chief elected official of each city and county government within which the termination, relocation, or mass layoff occurs for any layoff that impacts 50 or more employees at a single location.

(b) [. . .]

b. Includes contracted workers if the workers perform labor within the client employer's usual course of business

Currently, the CalWARN Act does not require employers to give notice to contract workers, regardless of the type of work they perform or whether they are full-time workers. The author has provided the Committee with examples of workers who were doing similar jobs at the same company but one group, the employees, received CalWARN Act notification while the other group, the contracted workers, did not receive the CalWARN Act notice. Workers need advance notice of layoff, closures, and relocations so they can make decisions based on the reality of what is happening with their employment. It makes no policy sense to provide notice to one set of workers and not the other simply because one set is contracted and the other set was hired as employees. The expansion of warnings to contracted workers and temporary workers seems appropriate. Opponents of this bill contend that the definition of contract workers is too broad and therefore captures too many workers. Pursuant to the bill, a contracted worker who is employed by a labor contractor and performing labor with the client employer for at least 6 months of the 12 months preceding the date on which notice is required would be covered under the CalWARN Act.

The opponents of this bill write the following regarding the provisions of the bill that bring contracted workers into CalWARN:

> The new group of workers that would fall under the WARN Act requirements is far too broad. "Labor contractor" is defined as "an individual or entity that supplies, either with or without a contract, a client employer with workers to perform labor within the client employer's usual course of business." That definition has been interpreted broadly in other statutes…Further, "employee" for purposes of those employed by labor contractors should be narrowed. Presently, the bill only requires that the worker has performed labor with the client employer for at least 6 of the 12 months. There is no requirement as to how much work or how frequently. A worker could have worked on a worksite once or twice and now fall under the purview of the bill. It is unlikely the employer even has the most current contact information for that worker.

In response the author has agreed to an hour requirement to qualify a labor contractor to be covered by this bill.

Amendment

1400.5.

(h) (1) [. . .]
(2) This chapter does not apply to employees who are employed in seasonal employment when the season is complete and the employees were hired with the understanding that their employment was seasonal and temporary.

> (i) "Employee" means a person employed by an employer for at least 6 months of the 12 months preceding the date on which notice is required. "Employee" includes a person employed by a labor contractor and performing labor with the client employer for at least 6 months of the 12 months and for at least 60 hours preceding the date on which notice is required.
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> [. . .]
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> *c. Prohibits an employer from utilizing compliance with the CalWARN Act in connection with a severance agreement and waiver of an employee's right to claims*

According to the California Labor Federation, a sponsor of this bill, "CEO Elon Musk promised 60 days of pay to laid-off Twitter workers to meet WARN Act requirements, but asked that employees sign a severance agreement. The agreement required employees to waive their rights to future litigation, sign non-disparagement agreements, and more to receive their legally required compensation through the provisions of the CalWARN Act. Workers were forced to choose between receiving severance pay as they were laid-off or signing away their legal rights, an unfair choice in any situation, doubly so as workers face a loss of a job."

In response, this bill prohibits an employer from utilizing compliance with the CalWARN Act in connection with a severance agreement and waiver of an employee's right to claims. An employer who includes a general release, waiver of claims, or nondisparagement or nondisclosure agreement that is made a condition of payment of amounts for which the employer is liable under CalWARN is subject to a civil penalty not to exceed $500 for each violation. Additionally, any general release, waiver of claims, or nondisparagement or nondisclosure agreement that is made a condition of the payment of amounts for which the employer is liable under CalWARN is void as a matter of law and against public policy. The bill also prohibits an employer who is required to give the notice pursuant to CalWARN to offer an employee a separate agreement that includes a general release, waiver of claims, or nondisparagement or nondisclosure agreement, unless the agreement is offered in exchange for reasonable consideration that is in addition to anything of value to which the individual already is entitled to under CalWARN and states in unequivocal language that the consideration being offered to the employee is in addition to anything of value to which the individual already is entitled under CalWARN. Any agreement in violation of this requirement is void as a matter of law and against public policy.

SUPPORT

Alphabet Workers Union – Communication Workers of America (Sponsor)
California Employment Lawyers Association (Sponsor)
California Labor Federation (Sponsor)
National Employment Law Project (Sponsor)
National Legal Advocacy Network (Sponsor)

TechEquity Collaborative (Sponsor)
Temp Worker Justice (Sponsor)
Alliance of Californians for Community Empowerment (ACCE) Action
Alphabet Workers Union - Communication Workers of America
American Sustainable Business Council
California Commission on The Status of Women and Girls
California Employment Lawyers Association
California Environmental Voters
California Faculty Association
California Labor Federation
California Labor Federation, AFL-CIO
California School Employees Association
Center for Responsible Lending
Communications Workers of America, District 9
Courage California
Economic Policy Institute
End Poverty in California (EPIC)
Equal Rights Advocates
Freelancers Union
Grace Institute - End Child Poverty in Ca
Indivisible CA Statestrong
Lawyers' Committee for Civil Rights of The San Francisco Bay Area
Legal Aid At Work
National Council of Jewish Women Los Angeles
National Employment Law Project
National Legal Advocacy Network
People's Collective for Environmental Justice
Santa Clara County Wage Theft Coalition
State Building and Construction Trades Council of Ca
Techequity Collaborative
Temp Worker Justice
UFCW - Western States Council
Warehouse Worker Resource Center
Western Center on Law and Poverty
Worksafe

OPPOSITION

Acclamation Insurance Management Services
Allied Managed Care
California Association for Health Services At Home
California Association of Winegrape Growers
California Attractions and Parks Association
California Building Industry Association
California Business Properties Association

California Business Roundtable
California Chamber of Commerce
California League of Food Producers
California Lodging Industry Association
California Restaurant Association
California Retailers Association
Coalition of Small and Disabled Veteran Businesses
Family Business Association of California
Flasher Barricade Association
Hollywood Chamber of Commerce
Independent Lodging Industry Association.
Official Police Garage Association of Los Angeles
Technet
Valley Industry and Commerce Association

RELATED LEGISLATION

Pending Legislation: SB 627 (Smallwood-Cuevas, 2023) prohibits an employer from closing a chain establishment, as defined, unless the employer gives a displacement notice to workers 60 days before the closure takes effect. SB 627 is pending before the Assembly Judiciary Committee.

Prior Legislation: SB 1162 (Limon, Ch. 559, Stats. 2022) required employers of 100 or more workers hired through labor contractors to provide the Department of Fair Employment and Housing with specified information, including pay data, about their workers. This bill also required employers to provide the pay scale for a position to an applicant for employment and include it in job postings.

PRIOR VOTES:

Senate Labor, Public Employment and Retirement Committee (Ayes 4, Noes 0)
Assembly Floor (Ayes 60, Noes 14)
Assembly Appropriations Committee (Ayes 11, Noes 4)
Assembly Judiciary Committee (Ayes 8, Noes 2)
Assembly Labor and Employment Committee (Ayes 5, Noes 0)
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