

CLIENT ALERT: NEW YORK WARN ACT GOES INTO EFFECT ON FEBRUARY 1, 2009

Beginning on February 1, 2009, New York employers will not only have to make sure that they are in compliance with the Federal Worker Adjustment and Retraining Notification Act (“Federal WARN Act”), but they will also have to make sure that they are in compliance with New York’s Worker Adjustment and Retraining Notification Act (“NY WARN Act”).

The Federal WARN Act, which has been in effect since 1989, seeks to protect workers by requiring employers to provide such workers with advance written notice of covered plant closings and mass layoffs. Specifically, the Federal WARN Act requires employers with 100 or more employees, excluding part-time employees, to give 60 days notice to all employees who will suffer an employment loss as a result of a “Mass Layoff” or a “Plant Closing.”

Although the NY WARN Act is modeled after the Federal WARN Act, it is important to note that the NY WARN Act is significantly more extensive than the Federal WARN Act in many respects. Accordingly, it is important for New York employers to become familiar with the NY WARN Act and how it differs from the Federal WARN Act. Set forth below is a summary of some of the relevant portions of the NY WARN Act as well as a discussion of some of the key distinctions between the NY WARN Act and the Federal WARN Act.

The NY WARN Act Applies To More Employers

The Federal WARN Act applies to employers that have 100 or more full-time employees. The NY WARN Act applies to employers that have 50 or more full-time employees.

The NY WARN Act Requires Employers To Provide Additional Advanced Notice

The Federal WARN Act requires employers to provide affected employees with a minimum of 60 days’ advanced written notice. The NY WARN Act requires employers to provide affected employees with a minimum of 90 days’ advanced written notice.

The NY WARN Act Is More Easily Invoked

The Federal WARN Act requires employers to provide employees with advanced written notice in the event of a “Mass Layoff” or a “Plant Closing.” The NY WARN Act requires employers to provide employees with advanced written notice in the event of a “Mass Layoff,” “Plant Closing” or a “Relocation.”

The NY WARN Act’s definitions of “Mass Layoff” and “Plant Closing” are also more expansive than the Federal WARN Act’s definitions.

- The NY WARN Act defines a Mass Layoff as a reduction in force resulting in an employment loss at a single employment site during any 30-day period for at least 33% of the workforce and at least 25 full-time employees, or at least 250 full-time employees notwithstanding the percentage of the workforce affected. By contrast, the Federal WARN Act defines a Mass Layoff as an employment loss at a single employment site within a 30-day period for at least 33% of the workforce and at least 50 full-time employees, or at least 500 full-time employees notwithstanding the percentage of the workforce affected.
- The NY WARN Act defines a Plant Closing as the permanent or temporary shutdown of a single employment site, or one or more facilities or operating units within a single employment site, if the shutdown results in an employment loss within a 30-day period for at least 25 full-time employees. The Federal WARN Act defines a Plant Closing as the permanent or temporary shutdown of a single employment site, or one or more facilities or operating units within a single employment site, if the shutdown results in an employment loss within a 30-day period for at least 50 full-time employees.

- Further, unlike the Federal WARN Act, the NY WARN Act also covers a Relocation. The NY WARN Act defines a Relocation as the removal of all or substantially all of the industrial or commercial operations of an employer to a location that is at least 50 miles away.

Other Aspects of The NY WARN Act

Similar to the Federal WARN Act, the NY WARN Act will use a 90-day aggregation period to discern whether a Mass Layoff or Plant Closing has occurred in situations where there are insufficient employment losses within the 30-day period to invoke the NY WARN Act and the total employment losses within the 90-day aggregation period are not the result of separate and distinct actions and causes.

The NY WARN Act also contains exceptions to the notice requirement that are similar, but not identical, to those set forth in the Federal WARN Act. Pursuant to the NY WARN Act, the employer does not have to comply with the notice requirements if:

- The Mass Layoff, Plant Closing or Relocation resulted from a physical calamity or an act of terrorism or war;
- At the time that the notice would have been required: (1) the employer was actively seeking capital or business; (2) the capital or business sought, if obtained, would have enabled the employer to avoid or postpone the relocation or termination; and (3) the employer reasonably and in good faith believed that giving the required notice would have precluded the employer from obtaining the needed capital or business;
- The need for notice was not reasonably foreseeable at the time the notice would have been required;
- If the Plant Closing is of a temporary facility or the Plant Closing or Mass Layoff is the result of the completion of a particular project or undertaking, and the affected employees were hired with the understanding that their employment was limited to the duration of the facility or project or undertaking;
- The Plant Closing or Mass Layoff is due to any form of natural disaster, such as a flood, earthquake or drought; or
- The Plant Closing or Mass Layoff is due to a strike or lockout.

Both the NY WARN Act and the Federal WARN Act provide for a private right of action. However, the NY WARN Act also provides for administrative enforcement by the New York State Department of Labor.

Like the Federal WARN Act, employers who violate the NY WARN Act may be liable for 60-days of back pay and employee benefits. In addition, the New York State Department of Labor can penalize employers who violate the NY WARN Act up to \$500 per day for each day of the employer's violation.

In light of the expansive coverage of the NY WARN Act as compared to the Federal WARN Act, it is important for New York employers to familiarize themselves with this new law and to contact legal counsel when contemplating a reduction in force, plant closure or relocation.

If you would like to further discuss the details of the NY WARN Act, or to discuss other labor and employment matters facing your organization, please contact:

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