Labor and Employment Law Information Memo

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NEW YORK WARN ACT TAKES EFFECT: EMPLOYERS THAT ARE PLANNING WORK FORCE REDUCTIONS FACE NEW CHALLENGES

On February 1, 2009, New York became the 18th state in the nation with its own version of a plant closing notification law when the New York State Worker Adjustment and Retraining Notification Act ("NY WARN") became effective. On January 30, 2009, the New York Department of Labor ("NY DOL") released emergency/proposed regulations concerning NY WARN, which are also effective on February 1, 2009.

In general, NY WARN requires employers, with 50 or more employees in New York, to provide 90 days' advance notice prior to ordering: (1) a mass layoff; (2) a plant closing; (3) a relocation of operations; or (4) a covered reduction in hours of work, as these terms are defined in NY WARN. Employers in New York have been required to comply with the federal WARN Act ("US WARN") notice requirements for almost twenty years. NY WARN, however, applies to more, smaller employers and requires a longer notice period than US WARN. Failure to comply with the state notice requirements may subject an employer to significant back pay liability and other civil penalties.

Who is Covered by NY WARN?

The definition of a covered employer has two elements. First, an employer is required to comply with NY WARN if it employs ***50 or more employees, excluding part-time employees.*** A "part-time employee" under NY WARN (like US WARN) is defined as an employee who is employed for an average of fewer than 20 hours per week or an employee who has been employed for fewer than 6 of the 12 months preceding the date on which notice is required.

Alternatively, an employer may be required to comply with NY WARN, if the employer employs 50 or more employees (including ***all*** employees regardless of status as part-time or full-time), who work in the aggregate 2,000 or more hours per week. This analysis is similar to the analysis under US WARN, except that US WARN requires 100 employees and 4,000 aggregate hours per week to trigger employer coverage. NY WARN also differs from US WARN in the counting of hours of work in this coverage assessment. Under NY WARN, overtime hours that are "earned on a regular basis" are included in aggregate hours worked per week, while under US WARN overtime hours are specifically excluded from the count. Under NY WARN, overtime hours are "earned on a regular basis" where they have been worked for 7 or more of the 12 weeks preceding the date upon which notice is required to be given under NY WARN.

What Triggers the Requirement for NY WARN Notice?

According to the statute and the proposed regulations, there are 4 events that trigger the notice requirement under NY WARN:

(1) Mass Layoff

The 90-day NY WARN notice for a mass layoff is triggered where there is a reduction in the work force that results in an employment loss at a single site of employment during any 30-day period for:

(1) 250 or more employees; or

(2) at least 33% of the employees at the single site and at least 25 employees. (For example, a layoff of 30 employees at a single site with a total of 90 employees would trigger a NY WARN notice).

The term "employment loss" is generally defined to include a termination (other than a discharge for cause, a voluntary separation or retirement), a layoff exceeding six months, or a reduction in hours of work of more than 50% during each month of a consecutive six-month period.

The foregoing definition of mass layoff largely tracks the US WARN definition, although the trigger is 500 employees or 33% and at least 50 employees for US WARN.

Significantly, the proposed regulations for NY WARN provide that an employee's layoff commences on the date he or she is no longer employed by the employer and may not be extended by the "payment of severance pay, vacation pay, personal pay or similar benefits" to the employee. In other words, an employer cannot utilize accrued paid time off to supplement less than full 90 days' notice to satisfy the NY WARN notice requirement.

(2) Plant Closing

The 90-day NY WARN notice is also required for the permanent or temporary shutdown of a single site of employment, or for the shutdown of one or more facilities or operating units within a single site of employment, if the shutdown results in an employment loss during any 30-day period for 25 or more employees, excluding part-time employees. The proposed NY regulations follow US WARN principles and define an "operating unit" as "an organizationally or operationally distinct product, operation, or specific work function within or across facilities at a single site of employment." A covered plant closing may occur, under NY WARN, where an employer closes a department or assembly line in a plant or facility, if it results in an employment loss for at least 25 employees.

(3) Relocation

NY WARN also requires notice for an employer's "relocation." This trigger for notice is not included in US WARN, so it is a new concept for New York employers. A "relocation" under NY WARN is defined as the "removal of all or substantially all of the industrial or commercial operations of an employer to a different location 50 miles or more away." The proposed regulations for NY WARN expand the statutory definition of relocation by asserting the position that a "relocation of substantially all of the industrial or commercial operations of an employer" includes the relocation of "an entire unit, product line, division, or other segment of an employer's operations."

Unlike the definitions of "mass layoff" and "plant closing," the term "relocation" does not refer to a specific minimum number of employees who must be affected by the employer's action. Under a literal reading of the statutory language, a "relocation" occurs if a site with only 1 employee is moved to a new site at least 50 miles away. Despite this oddity in the statutory language, NY DOL has informally advised that it interprets the relocation requirement to trigger notice only where at least 25 employees are affected by the employer's action and that the relocation intended by NY WARN is a relocation of the employer's business that is necessitated by a plant closing or mass layoff. In other words, there must first be a plant closing or mass layoff, as those terms are understood, for the relocation language to apply.

(4) Covered Reduction in Hours of Work

The proposed regulations for NY WARN also list a fourth trigger for notice: "a reduction in hours of work of more than 50% during each month of any consecutive six-month period." Like the term relocation, this term does not specify a minimum number of employees who must be affected, although it is likely that NY DOL would similarly require the hours reduction to affect at least 25 employees in order to trigger notice under the statute. Employers familiar with US WARN will recognize that a reduction in hours of work of more than 50% during each month of any six month period constitutes an employment loss for purposes of US WARN and advance notice must be provided, as long as the other requirements for a plant closing or mass layoff are met. NY WARN, however, establishes a "covered reduction in hours" as a stand-alone trigger for notice under the proposed regulations.

In the proposed regulations, NY DOL exempts from the definition of "employment loss" a covered reduction of hours where an employer is participating in NY DOL's "Shared Work Program." Among other requirements, the Shared Work Program permits an employer to reduce the hours of work of employees (up to a maximum of 60%) and the employees are able to supplement lost income with partial unemployment insurance benefits from NY DOL. Therefore, as long as an employer is validly participating in NY DOL's Shared Work Program, a reduction in hours of work that would otherwise trigger a NY WARN notice (i.e., is greater than 50%), would be exempt from the notice requirement under NY WARN.

Aggregation Issues

When determining whether notice is required for NY WARN, employers must aggregate employment losses over a 90-day period. Generally, an employer should look backward 90 days and forward 90 days to assess whether actions, taken and planned, will, in the aggregate, reach the minimum number of affected employees to trigger notice. The only exception to aggregating employment losses is where the employer can

demonstrate that the losses resulted from separate and distinct actions and causes.

The proposed NY WARN regulations also direct an employer to "measure the average number of individuals employed by the employer over the ninety (90) day look back period," unless this figure is clearly unrepresentative of employment levels. In other words, an employer on June 1 should review its employment records dating back to approximately March 1 and measure the average number of employees employed over the course of this 90-day period. This number should be the one used in the denominator for assessing whether the 33% threshold has been met when determining whether a mass layoff has occurred (*i.e.*, at least 25 employees and 33% of the work force suffer an employment loss at the single site of employment).

Transfer of Employees

Where the loss of employment is the result of the relocation or consolidation of part or all of the employer's business and the employer offers to transfer the employee to a different site of employment within a reasonable commuting distance, then the employee is not considered to have experienced an employment loss and, therefore, is not included in the threshold calculation. If the transfer is to another site of employment beyond a reasonable commuting distance, then the employee also may be excluded from the calculation if he or she accepts the offer.

Whether a transfer offer is to another site "within a reasonable commuting distance" will vary with local and industry conditions. However, the proposed regulations for NY WARN provide that in no event shall the distance exceed that which can reasonably be traveled in 1½ hours, when the site of employment is being moved to a location within New York City or Long Island, or 1 hour, anywhere else in the state.

How Should the Notice be Served and Who Must Receive it?

If an employer determines that notice is required under NY WARN, the notice must be served by first class mail, personal delivery with optional signed receipt, or by including it in an envelope that contains an employee's paycheck or receipt for direct deposit. Notice may not be provided by e-mail. The notice must be sent on the employer's official letterhead and signed by an individual who is authorized to represent the employer.

The notice must be provided to: (1) affected employees; (2) their union representatives, if any; (3) the New York Commissioner of Labor; and (4) the local Workforce Investment Board where the employment site is located.

An employee, whose job is unaffected, but who may nonetheless experience an employment loss (*e.g.*, as the result of a seniority-based bumping procedure) must also receive a notice, as long as the individual can be identified at the time notice is required to be given.

What Must the Notice Contain?

The proposed regulations provide a detailed list of information that must be included in each notice, depending on the recipient of the notice. Notice to the affected employees must be in a language that is understandable to the employees and must include: the expected date of the plant closing or other triggering event; the date the employee will be terminated; statements as to whether the action is temporary or permanent, and whether bumping rights exist; the identity of an employer contact person; and information concerning unemployment insurance, job training and available re-employment services. In addition, the notice to an affected employee must also include the paragraph set forth below:

> *You are also hereby notified that, as a result of your loss of employment, you may be eligible to receive unemployment insurance benefits, job retraining, re-employment services, or other assistance with obtaining new employment upon your termination. The New York State Department of Labor will contact your employer to arrange to provide additional information regarding these benefits and services to you through workshops, interviews, and other activities that will be scheduled prior to the time your employment ends. You can also access reemployment information and apply for unemployment insurance benefits on the Department's website, www.labor.state.ny.us, or you may use the contact information provided on the website to contact the Department for further information and assistance.*

The notices to the Commissioner of Labor, any union representative, and the local Workforce Investment Board, as described in the regulations, require certain additional information consistent with the purpose of the specific notice.

Exceptions to The Notice Requirements

NY WARN has several exceptions to the notice requirements for certain events.

(1) Temporary Facilities and Project Completions

No notice is required under NY WARN if the plant closing is of a temporary facility or if the plant closing or mass layoff results from 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, project, or undertaking. The proposed NY WARN regulations state that providing employees with notice at the time of hire that they are "at-will" and therefore subject to termination at any time does not suffice to serve as notice that employment was for a limited duration.

(2) Natural Disasters and Strikes/Lockouts

NY WARN includes an exception from the notice requirement for employment losses, due to "any form of natural disaster" including floods, earthquakes, droughts, storms, tidal waves, tsunamis or similar effects of nature. An employer also is not required to serve written notice where it is permanently replacing an economic striker, as defined under the National Labor Relations Act.

(3) Faltering Company

NY WARN contains a faltering company exception which eliminates the need for notice if: (1) at the time notice would have been required, the employer was actively seeking capital or business; (2) there was a realistic opportunity to obtain the capital or business; (3) the needed capital or business, if obtained, would enable the employer to avoid or postpone the employment action; and (4) the employer reasonably and in good faith believed that the giving of notice would have precluded the employer from obtaining the needed capital or business. The proposed regulations state that the faltering company exception will be viewed on a "company-wide" basis. A company with "access to capital markets or with cash reserves" cannot avail itself of this exception by looking solely at the financial condition of the single site of employment.

(4) Unforeseeable Circumstances

NY WARN dispenses with the notice requirement if the need for notice was not "reasonably foreseeable" at the time notice would have been required. A business circumstance is not reasonably foreseeable, according to the proposed regulations, upon the occurrence of some "sudden, dramatic, and unexpected action or condition outside the employer's control." Examples in the proposed regulations include: "a principal client's sudden and unexpected termination of a major contract with the employer, a strike at a major supplier of the employer, an unanticipated and dramatic major economic downturn, or a government-ordered closing of an employment site that occurs without notice."

If an employer is unable to provide the full NY WARN notice because of one of the exceptions described above (*i.e.*, faltering company, unforeseeable business circumstances or a natural disaster), it must nonetheless provide as much notice as is practicable under the circumstances along with a written explanation for the reduced notice period.

Enforcement of NY WARN and Possible Damages

Unlike US WARN, which may be enforced only by commencing an action in court, NY WARN may also be enforced by the NY DOL through its administrative procedures, in addition to a cause of action in state court. The NY DOL's authority includes its ability to examine "any information of an employer" that is necessary to assess whether a violation occurred or the applicability of any defense. An employer found to have violated NY WARN is subject to a civil penalty of not more than $500 for each day of the employer's violation. An employer also is liable, to each employee who did not receive proper notice, for backpay and benefits for the period of violation, up to a maximum of 60 days. An employer is not subject to a civil penalty under NY WARN if, in lieu of notice, it has paid the affected employees all of their wages and benefits for the notice period, within three weeks from the date the employer orders the plant closing or other triggering event, and the employer includes a short form notice to the employees at the time of their final wage payment or termination.

While NY WARN contains many provisions and requirements that mirror those found in US WARN, there are also significant differences in coverage, triggering events and the form of notice that will require particular attention from New York employers that are contemplating work force reductions.

For more information about NY WARN contact:

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