



# Labor and Employment Law Information Memo

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## Bond, Schoeneck & King, PLLC

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## NEW WARN REGULATIONS APPLICABLE TO EMPLOYERS IN NEW YORK

The New York State Department of Labor (“NYS DOL”) recently issued revised, emergency regulations concerning the New York State Worker Adjustment and Retraining Notification Act (“NY WARN”), Section 860 of the New York Labor Law. The revised regulations, 12 NYCRR Part 921, are effective immediately and replace the regulations first published by the agency in January 2009. The following memo provides an overview of NY WARN and specifically addresses the major revisions contained in the revised regulations, including the use of e-mail to notify employees, expanded information now required in the notices, a requirement that an employer representative “attest to the truthfulness of all information” contained in the WARN notices, and a specification that WARN notice may be required even where the triggering event was caused by a bankruptcy.

### NY WARN Coverage

Generally, NY WARN requires 90 days advance notice to employees and other designated officials prior to a mass layoff, plant closing, relocation, or covered reduction in hours which, in general, affects 25 or more employees. Employers in New York have been required to comply with the federal WARN Act notice requirements for over 20 years. NY WARN however, applies to more employers and requires more notice than the federal WARN statute. Failure to comply with the advance notice requirements before laying off workers may subject an employer to significant back pay liability and other penalties.

### *Who is Covered by the NY WARN Act?*

Employers with 50 or more employees within New York State must comply with NY WARN. The regulations require an employer to count every employee, other than part-time employees, toward the 50-employee threshold. In addition, an employer must count all employees (other than part-time employees) on temporary layoff or on leave, if the individual has a reasonable expectation of recall. The NY WARN regulations, like the federal WARN Act, define a “part-time employee” 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.

An employer may also be required to comply with NY WARN even if it does not employ 50 or more full-time employees. Specifically, if the employer employs 50 or more employees (including all employees regardless of status as part-time or full-time), and those employees work in the aggregate 2,000 or more hours per week, the employer must comply with the NY WARN Act.

### *What Triggers the Requirement for NY WARN Notice?*

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

#### **Mass Layoff**

The notice requirements under NY WARN are 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:

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1. 25 employees, excluding part-time employees, constituting at least 33% of the employees at the site (For example, a layoff of 30 employees at a single site with a total of 90 employees); or
2. 250 or more employees, excluding part-time employees.

### ***Plant Closing***

The 90-day NY WARN notice is also required for the permanent or temporary shutdown of a single site of employment, or 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 NY regulations follow the federal WARN Act 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.” Under NY WARN, a covered plant closing may occur 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.

### ***Relocation***

A “relocation” is a unique triggering event under NY WARN and is not included in the federal WARN statute.

Under the regulations, a relocation 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 from the original site of operation, where 25 or more employees, excluding part-time employees, suffer an employment loss”

### ***Covered Reduction in Hours***

The NY WARN notice requirement is also triggered where there has been a 50% or more reduction in the hours of work during each month of any consecutive six-month period. The revised regulations specify that to be covered, the reduction of hours must affect:

1. at least 25 employees constituting at least 33% of the employees at the site; or
2. 250 or more employees.

Notably, the NY regulations specifically exclude from the definition of “employment loss” a covered reduction of hours where an employer participates in NYS DOL’s Shared Work Program. 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 NYS DOL. Therefore, as long as an employer validly participates in NYS DOL’s Shared Work Program, a reduction in hours of work that would otherwise trigger the NY WARN Act requirements, would be exempt from the notice requirement.

### ***Aggregation***

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 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.

### ***Transfer of Employees***

No notice is required if the employer offers to transfer employees to a different site of employment within a reasonable commuting distance, which is defined by the revised regulations to mean “the distance an individual could be reasonably expected to commute.” However, in no event shall that distance exceed that which can reasonably be traveled in one and one-half hours, when the site of employment is being moved to a location within New York City or Long Island, or one hour anywhere else in the state. The revised regulations add a provision that eliminates the transfer offer notice exception where the new job otherwise constitutes a constructive discharge.

### ***Notice Requirements***

#### ***How May Notice be Served?***

Notice must be served 90 days prior to layoff. It may be served by first class mail, personal delivery with optional signed receipt, or by e-mail. The notice must be sent on the employer’s official letterhead.

The new regulations require that the notice be signed by an individual who has “the authority to bind the employer.” Additionally, the signatory must attest to the truthfulness of all information provided in the notice. If the notice is sent by first class mail, it must be post-marked at least 90 days prior to the employment loss.

As noted, the revised regulations provide for the option of sending a NY WARN notice by e-mail. The regulations state that e-mail may be used where “all affected employees have regular access in the workplace to personal computers at which e-mail may be received and viewed during work hours.” The following additional requirements must also be satisfied:

1. The employer must be able to demonstrate that the e-mail notice was **received** by each affected employee;
2. The e-mail address used must be an employer provided e-mail address, used in the conduct of business;
3. The e-mail must be marked “urgent;”
4. If the e-mail is returned as “undeliverable,” notice must be given as expeditiously as possible (e.g. overnight delivery, hand delivery, inter-office mail, etc.);

5. If an attempt to deliver the notices exceeds five days, the employer must extend the notice period by the number of days between the time notice was first attempted and when it was finally effectuated; and
6. The e-mail notice must be sent via the employer's computer network.

### **Who Receives Notice?**

The following individuals must receive notice under the NY WARN Act: affected employees; representative(s) of affected employees; the Commissioner of Labor; and the Local Workforce Investment Board(s) ("LWIB"). An employee who may experience an employment loss due to seniority bumping rights, for example, must also receive a notice, as long as the individual can be identified at the time notice is required to be given.

Under the revised regulations, the DOL specifically states that service of notice upon the "chief elected official of the local unit of government" in accordance with the federal WARN statute, is not sufficient to meet the notice requirements to the LWIB under the NY WARN Act. Similarly, service of notice on the LWIB may not be sufficient for notice to the chief elected official under the federal WARN statute.

### **Contents of the Notice**

The 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. The notice must include, among other things: the expected date of the first separation of employees and the date the individual employee will be separated; a statement as to whether the action is temporary or permanent and whether any bumping rights exist; the identity and contact information of an employer representative; 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, with the underlined sentence added by the revised regulations:

*You are also hereby notified that, as a result of your employment loss, you may be eligible to receive job retraining, re-employment services, or other assistance with obtaining new employment upon your termination. You may also be eligible for unemployment insurance benefits after your last day of employment. 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, 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, union representative, and the local Workforce Investment Board, as described in the regulations, require certain additional information, including, for example, the date and method of delivery of the NY WARN notices, a sample of the NY WARN notice provided to the employees, and a statement as to whether other required NY WARN notices were delivered.

### **Exceptions to Notice**

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

#### **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 or project or undertaking. The revised regulations require that an employer be able to demonstrate that it informed each employee at time of hire that the job was temporary.

#### **Seasonal Employment**

The revised regulations also exempt seasonal employment from coverage under NY WARN. Thus, if a layoff or closing is the result of a particular seasonal project or the affected employees were hired with the understanding their employment was limited to the seasonal project, an employer need not provide notice to the affected employees under NY WARN. However, the employer must demonstrate that it informed each employee at the time of hire that the job was seasonal. Additionally, the revised regulations state that employment in an industry that is typically seasonal in nature does not necessarily make the employment seasonal for purposes of NY WARN.

#### **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.

#### **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 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. As noted, the revised regulations make explicit that employment losses caused by a bankruptcy may still trigger notice under NY WARN.

### ***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 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.”

### **Penalties and Enforcement**

Unlike the federal WARN Act, which may be enforced only by commencing an action in court, NY WARN may be enforced by NYS DOL through its administrative procedures, in addition to a cause of action in court. The agency’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. The revised regulations include a provision which allows the DOL to share a NY WARN Act violation with other public entities who are making fitness, responsible contractor or due diligence inquiries.

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 the proper notice for backpay and benefits for the period of violation, up to a maximum of 60 days. According to NYS DOL Counsel’s Office, backpay liability under NY WARN is calculated by determining the wages owed to an employee up to a maximum of 60 days’ wages. Under the federal WARN law, backpay liability is generally measured by counting the number of work days that would have been worked in a 60 day period and assessing liability equal to wages that would have been earned during that period. Thus, backpay liability under NY WARN is likely to be greater than under the federal WARN statute.

An employer is not subject to the civil penalty under NY WARN if, in lieu of notice, it pays 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.

An employer’s liability may also be reduced by any voluntary payments made by the employer to the affected employees, which were not required to satisfy any legal obligations. Therefore, severance or other payments that may be required under a collective bargaining agreement or pursuant to a separation agreement will not be credited against an employer’s liability.

Finally, the revised regulations added that where an employer fails to give notice, the period of violation is 90 days. However, the regulations do not reconcile this violation period provision with the 60-day maximum penalty provision. At this point, it remains somewhat unclear what the effect is of this new provision in the revised regulations and how to reconcile it within the 60-day maximum backpay liability under NY WARN.

### **Conclusion**

While NY WARN contains many provisions and requirements that mirror those found in the federal WARN statute, there are also significant differences in coverage, triggering events, and the form of notice. Further, some of the revised emergency regulations significantly affect an employer’s obligations under NY WARN and will require particular attention from New York employers that are contemplating work force reductions. For more information about the NY WARN Act please contact:

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