

Bond

Coronavirus: Update and Discussion on Legal and Practical Issues April 21, 2020



 **BOND** SCHOENECK
& KING ATTORNEYS

1

Introduction



Peter A. Jones
Deputy Chair, Labor & Employment
pjones@bsk.com
315.218.8337

 **BOND** SCHOENECK
& KING ATTORNEYS

2

Layoffs, Furloughs and WARN Act Issues



Mary E. Aldridge

Associate
maldrige@bsk.com
716.416.7032



3

WARN Act: Overview

- Notice statute for “plant closings” and “mass layoffs”
- Federal and State Versions
 - Federal Statute
29 U.S.C. § 2101 et seq.
 - New York “Mini WARN Act”
N.Y. Lab. Law § 860 et seq.
- Notice Period: 90 days in New York



4

Does WARN Apply to the Employer?

- Less than 50 employees, excluding part time employees
 - WARN does not apply
- 50-100 employees, excluding part time employees
 - New York WARN applies
- 100 or more employees, excluding part time employees
 - New York and Federal WARN apply



5

Is WARN Triggered?

- New York WARN
 - Plant closing – employment loss of at least 25 employees in a 30 day period
 - Mass Layoff – employment loss of at least 25 employees during 30 day period constituting 33% of workforce at site, OR at least 250 employees
- Federal WARN
 - Plant closing – employment loss of at least 50 employees in a 30 day period
 - Mass Layoff – employment loss of at least 50 employees in a 30 day period, constituting 33% of workforce at site, OR at least 500 employees

Part time employees excluded
Duration must exceed 6 months



6

Extension of a Short-Term Layoff

- Layoff shorter than 6 months = no triggering event, so notice is not required.
- However, when it is reasonably foreseeable that the layoff period will be extended, WARN is back in play.

12 NYCRR § 921-3.1 Extension of a mass layoff period.

"An employer that previously announced and carried out a short-term layoff of six (6) months or less which is being extended beyond six (6) months due to business circumstances (e.g., changes in price or cost) not reasonably foreseeable at the time of the initial layoff must give notice required under the Act and this Part as soon as it becomes reasonably foreseeable that an extension is required. A layoff extending beyond six (6) months from the date the layoff originally commenced for any other reason other than unforeseeable business circumstances shall be treated as an employment loss from the date it originally commenced. For purposes of this section, the date the layoff originally commenced shall be the date on which the first employee was laid off."



7

Executive Order 202.19

- "Subdivision one of Section 860-b of the Labor Law, to the extent necessary to allow a business that receives federal Paycheck Protection Program funding and subsequently rehires employees, to provide the notice required under this section as soon as practicable but not necessarily within ninety days, provided that a business that receives federal Paycheck Protection Program funding provided the notice required under this section when it initially laid off employees."



8

Update from Albany



Caitlin A. Anderson

Associate

canderson@bsk.com

518.533.3234



9

Executive Orders in the Past Week

- EO 202.17
- EO 202.18
- EO 202.19
- EO 202.20
- EO 202.21



10

Face Coverings: Department of Health Guidance

- **What constitutes a “face covering?”**
 - Face coverings include, but are not limited to, cloth (e.g., homemade sewn, quick cut, bandana), surgical masks, N-95 respirators and face shields. Based on the Guidance, face coverings are something worn by the employee. Fixtures and installations are not “face coverings.”
- **Who must pay for the face coverings?**
 - Employers must pay for face coverings for their employees. Employees, however, may use their own face coverings, but cannot be mandated to do so by their employer.



11

Face Coverings: Department of Health Guidance

- **What does it mean to be in direct contact with members of the public?**
 - Direct contact with the public is to be determined by each employer. At a minimum, direct contact with the public includes any employee who is routinely within close contact (i.e., six feet or less) with members of the public, including but not limited to customers or clients. Interaction between co-workers is not considered direct contact with the public.



12

Face Coverings: Department of Health Guidance

- **What if the employee refuses to wear the face covering?**
 - If an employee advises that he or she has a medical condition that prevents the employee from wearing a face covering, employers should remember that they may well have a duty to determine whether the employee's condition could be reasonably accommodated. In certain circumstances this might include reassigning the employee to duties that do not include contact with the public.



13

Face Coverings: Wear One in Public

- All individuals, **two years and older** and **medically able to tolerate a face covering**;
- To wear a cloth face covering or mask that covers their nose and mouth;
- When in a public place; and
- When **unable** or **not maintaining** social distance.



14

NY FORWARD

	“More-Essential” Industry	“Less-Essential” Industry
Low Infection Risk	Services/product <u>more essential</u> , low risk of workplace or customer infection spread	Services/product <u>less essential</u> , low risk of workplace or customer infection spread
Higher Infection Risk	Services/product <u>more essential</u> , <u>higher risk</u> of workplace or customer infection spread	Services/product <u>less essential</u> , <u>higher risk</u> of workplace or customer infection spread



15

Reopening Issues – Planning and Preparedness



Adam P. Mastroleo

Member

amastroleo@bsk.com

315.218.8139



16

NY FORWARD

	“More-Essential” Industry	“Less-Essential” Industry
Low Infection Risk	Services/product <u>more essential</u> , <u>low risk</u> of workplace or customer infection spread	Services/product <u>less essential</u> , <u>low risk</u> of workplace or customer infection spread
Higher Infection Risk	Services/product <u>more essential</u> , <u>higher risk</u> of workplace or customer infection spread	Services/product <u>less essential</u> , <u>higher risk</u> of workplace or customer infection spread



17

Guidelines for All Phases: Employers

Develop and implement appropriate policies, in accordance with Federal, State, and local regulations and guidance, and informed by industry best practices, regarding:

- ✓ Social distancing and protective equipment
- ✓ Temperature checks
- ✓ Testing, isolating, and contact tracing
- ✓ Sanitation
- ✓ Use and disinfection of common and high-traffic areas
- ✓ Business travel

Monitor workforce for indicative symptoms. Do not allow symptomatic people to physically return to work until cleared by a medical provider.

Develop and implement policies and procedures for workforce contact tracing following employee COVID+ test.



18

Negligence and Litigation Issues



Daniel J. Pautz

Member

dpautz@bsk.com

315.218.8153



19

Relief Programs The Old, The New and The Unknown



Jeffrey B. Scheer

Member

jscheer@bsk.com

315.218.8286



20

- Layoffs, Furloughs and WARN Act Issues
Mary Aldridge, maldridge@bsk.com, 716.416.7032
- Update from Albany
Caitlin Anderson, canderson@bsk.com, 518.533.3234
- Reopening Issues – Planning and Preparedness
Adam Mastroleo, amastroleo@bsk.com, 315.218.8139
- Negligence and Litigation Issues
Daniel Pautz, dpautz@bsk.com, 315.218.8153
- Relief Programs – The Old, The New and The Unknown
Jeffrey Scheer, jscheer@bsk.com, 315.218.8286

