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New York Adopts New WARN Act

By: Louis P. DiLorenzo¹

On August 5, 2008, the New York Labor Law was amended by a new section requiring private employers to give an advance written notice to employees in certain, impending layoffs, plant closures and relocations. This Worker Adjustment and Retraining Notification Act (NY WARN) becomes effective February 1, 2009 and imposes requirements on employees in addition to those imposed by the Federal WARN Act.

Employers covered by this act are defined as "any business enterprise that employs fifty or more employees, excluding part-time employees, or fifty or more employees that work in the aggregate at least two thousand hours per week." The Act requires such employers to provide written notice at least 90 days in advance of: (1) a mass layoff resulting in employment losses during a 30-day period affecting at least 25 full-time employees representing at least 33% of the workforce, or 250 or more full-time employees; (2) a plant closing in which there is a loss of 25 or more full-time employees during a 30-day period at a single site; or (3) a relocation involving the removal of all or substantially all of the industrial or commercial operation to another location at least 50 miles away. The 90-day notice must be sent to affected employees, their collective bargaining representatives (where applicable), the New York State Dept. of Labor and local workforce partners.

The New York WARN Act is more restrictive than its federal counterpart:

- It applies to smaller employers [The New York WARN Act requires employers with 50 rather than 100 under the Federal law or more full-time employee to provide written notice of any "plant closing," "mass layoff" or "relocation;"]
- It provides more notice [Under the New York law the employer must provide at least 90 (rather than 60) days advance written notice;]
- It requires notice when less employees are affected [The New York law applies to covered employment loss due to planned plant closing or mass layoff of at least 25-full-time employees (rather than 50) or a total of 250 employees (rather than 500);]
- It offers administrative enforcement [New York law allows for a private right of action, as does the Federal statute, but it also provides for administrative enforcement by the Commissioner of Labor.]

The statute is poorly drafted. For example, a literal reading of the statute indicates a notice is not required under

NY WARN for a plant closing but a notice must be given for even a layoff of one employee. In response to a request for technical clarification, the Legislative Counsel to the New York State Department of Labor has issued a letter glossing over the drafting errors and explaining that "All parts of a statute must be harmonized with one another, as well as the general intent of the statute as a whole." The letter goes on to explain that the terms "employment loss" and "relocation" for which a WARN notice is required must be read in conjunction with the subdivision which requires the existence of "affected employees" upon whom to serve the notice. The term "affected employees" is defined as employees who may reasonably be expected to experience an employment loss as a consequence of a proposed plant closing or mass layoff impacting at least 25 employees. According to the letter, "employment loss" is not meant, despite what the statute says, to apply to a single instance of lost employment but to instances affecting at least 25 employees.

Since the statute prohibits the ordering of a covered event without notice, employers contemplating a triggering event occurring on or after February 1, 2009, may wish to consider providing the requisite notice before then.

Penalties for violating the Act are substantial. Affected employees have six years to bring a suit to recover back pay, the value of lost benefits and possible attorneys' fees. Back pay is capped at 60 days of pay. Alternatively, an employee may file a complaint with the New York State Department of Labor and receive the same awards excluding attorneys' fees. Additionally, the employer may also be required to pay an award to the New York State Department of Labor of a civil penalty of \$500 for each day of violation. There are limited exceptions to the notification requirements, among them: at the time the notice was required the employer was actively seeking capital or business which would have enabled the employer to avoid the closing; the need for a notice was not reasonably foreseeable; the plant closing or mass layoff is the result of the completion of a particular project or undertaking and the employees were hired understanding the limited duration of the project; the action constituted a strike or lockout, the mass layoff; relocation or employment loss "is necessitated by a physical calamity or an act of terrorism or war."

Be careful out there!

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