

NEW YORK STATE WARN ACT

November 17, 2008

To Our Clients and Friends:

The financial conditions over the last few months have generated several mass layoffs of employees, and additional large-scale reductions in force are inevitable. These actions give rise to a host of legal obligations and potential pitfalls, including obligations to give advance notice to workers who may be affected under the federal Worker Adjustment and Retraining Notification Act (“Federal WARN Act”). Such workers who claim that they did not receive the legally mandated advance notice of a reduction can sue for lost wages, benefits and various penalties, as illustrated by a recent putative class action filed against Lehman Brothers under the Federal WARN Act. Under certain circumstances, lenders of entities in bankruptcy or reorganization proceedings may also assume liability for a debtor’s non-compliance with such notice requirements. Many large employers are already familiar with the notice requirements under the Federal WARN Act.

Early next year, however, employers in New York will have to comply not only with the Federal WARN Act but also with the recently enacted New York State Worker Adjustment and Retraining Notification Act (“NY WARN Act”). The NY WARN Act, which was signed into law by Governor Paterson on August 5, 2008, and which will become effective on February 1, 2009, as Article 25-A to the New York Labor Law, is broader than the Federal WARN Act in several important respects. It is therefore critical that New York employers become familiar with their expanded obligations under the new state law.

BROADER COVERAGE OF THE NY WARN ACT

The NY WARN Act is broader than the Federal WARN Act in several significant ways, summarized in the chart below. **First**, the NY WARN Act covers a larger group of employers. While the Federal WARN Act applies only to employers with 100 or more full-time employees, the NY WARN Act applies to employers with 50 or more full-time employees, or 50 or more employees (including part-time employees) whose aggregate hours total at least 2,000 hours per year. **Second**, greater advance notice is required under the NY WARN Act. The Federal WARN Act requires 60 days advance written notice to employees prior to a plant closing or mass layoff, while the NY WARN Act requires 90 days advance notice prior to a triggering event. **Third**, the threshold for reductions in force that trigger notice requirements is lower under the state law. Under the Federal WARN Act, employers must provide notice in the event of either (i) a “plant closing,” which is defined as a permanent or temporary shutdown of a single site of employment that creates a layoff of 50 or more full-time employees during any 30-day period; or (ii) a “mass layoff,” which is defined as a reduction in employment force at a single site during any 30-day period of at least 50

employees who constitute 33% or more of employees on site, or at least 500 employees in total. The NY WARN Act lowers these thresholds by defining a plant closing as a shutdown of a single site that creates a layoff of 25 or more employees in the course of 30 days and by defining a mass layoff as a reduction of 25 employees constituting 33% or more of all employees on a site or at least 250 employees in total. Additionally, while the Federal WARN Act does not require notice for a “relocation” that does not constitute a mass layoff or plant closing, the NY WARN Act mandates notice for any relocation involving the removal of all or substantially all of the industrial or commercial operations of an employer from one location to a different location 50 miles or more away.

	Minimum Number of Employees for Coverage Under the Act	Advance Notice Required Prior to Plant Closing or Mass Layoff	Minimum Number of Layoffs Triggering Notice for Plant Closing	Minimum Number of Layoffs Triggering Notice for Mass Layoff	Notice Required for Relocation that is not a Mass Layoff or Plant Closing?
Federal WARN Act	100	60 days	50 during any 30-day period	50 during any 30-day period (constituting 33% or more of total employed at a site) or at least 500 employees overall	No
NY WARN Act	50	90 days	25 during any 30-day period	25 during any 30-day period (constituting 33% or more of total employed at a site) or at least 250 employees overall	Yes—if relocation is a distance of 50 miles or more from present location

NY WARN ACT NOTICE REQUIREMENTS AND EXCEPTIONS

The substance of the notice requirements is also somewhat different. Under the NY WARN Act, employers must provide notice to affected employees, any union representatives, the New York State Department of Labor and the local Workforce Investment Board. In contrast, the Federal WARN Act does not require notice to affected employees represented by a union. It does, however, require notice to unrepresented individual workers, as well as the state dislocated worker unit and the chief elected official of the unit of local government in which the employment site is located. Requirements for the content of the notice are the same as those set forth in the Federal WARN Act.

Certain situations may qualify employers for a reduction of the 90-day notification period under the NY WARN Act. These circumstances largely reflect those exceptions listed in the Federal WARN Act and include the following:

- in the event of a plant closing, at the time that notice is required, an employer was actively seeking capital or business that would enable the employer to avoid or postpone the closing or relocation, and the employer reasonably believed that it would have been precluded from obtaining the capital or business if it had provided the requisite notice;
- the need for notice was not reasonably foreseeable at the time that notice was required;
- the plant closing was of a temporary facility, or the plant closing or mass layoff was the result of the completion of a project for which employees were hired with the understanding that their employment was limited to the duration of the project;
- the plant closing or mass layoff was due to a physical calamity, an act of terrorism or war or a natural disaster (the Federal WARN Act does not provide an exception for physical calamity or acts of terrorism or war); or
- the closing or mass layoff was due to a strike or lockout.

An employer unable to provide the required notice during the standard 90-day notification period must provide as much notice as is practicable, along with a brief statement explaining its reason(s) for reducing the notification period. Employers bear the burden of showing that an exception to the notification period applies.

EMPLOYER LIABILITY UNDER THE NY WARN ACT

While the Federal WARN Act allows only for a private right of action, the NY WARN Act allows for administrative enforcement by the New York State Department of Labor in addition to a private right of action. Terminated employees who claim they did not receive required notice have up to six years to file a claim to obtain back pay and the cost of benefits (such as medical fees for those employees who would have been covered under their employers' benefit plans) for up to a maximum of 60 days. Similar to the penalty provided in the Federal WARN Act, employers may also be assessed a civil penalty of \$500 for each day they have violated the NY WARN Act. The New York State Commissioner of Labor may exercise the discretion to reduce the penalties assessed if it finds that a violation was made in good faith.

MEETING THE CHALLENGE OF COMPLIANCE

Compliance with the requirements of the NY WARN Act and Federal WARN Act may be confusing in light of their different scopes, but employers can take many steps to ensure compliance and limit exposure:

- **Maintain Detailed and Accurate Records of Events.** Employers should keep clear records pertaining to plant closings, mass layoffs and relocations. In the event that a reduction in the notification period is needed, employers should maintain detailed documentation of the event(s) necessitating the reduction.
- **Maintain and Review Documentation of Employee Hours.** Application of the NY WARN Act notice requirements may be triggered when employee work hours, including part-time employee hours, total at least 2,000 hours per week. Maintenance and periodic review of accurate records of employee hours is, therefore, important.
- **Determine Application of Notice Requirements in Advance.** Most important, prior to a relocation, plant closing or mass layoff, employers should carefully assess whether notice is required under federal or state law and plan ahead to provide the requisite advance notice to the necessary parties.

Please feel free to contact us with any questions.

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