

Client Bulletin

January 2009

Employer Duty to WARN Under Recent New York Legislation

Employers are probably familiar with the federal Worker Adjustment and Retraining Notification Act (“WARN Act”) which requires that employers of 100 or more full-time employees provide sixty (60) days notice of a mass layoff to affected employees. On May 6, 2008, Governor David Patterson signed into law the New York State Worker Adjustment and Retraining Notification Act (“NY WARN Act”). The new legislation is effective February 1, 2009 and is more burdensome for employers than the Federal WARN Act. The NY WARN Act requires employers with at least 50 employees to provide 90 days written notice of “a mass layoff, relocation or employment loss” to: (1) affected employees, (2) the Department of Labor, and (3) local workforce investment boards. New York joins the growing number of states to have enacted “baby WARN Acts.”

Under the new legislation, a “mass layoff” is a reduction-in-force that is not the result of a plant closing and results in an employment loss during a 30-day period affecting at least twenty-five (25) full-time employees representing 33% of the workforce or at least 250 full-time employees. An “employment loss” includes a mass layoff of more than six months or a reduction of more than 50% of work hours for six consecutive months.

Employers are exempt from the notice requirement if (1) the employment loss is a result of a plant closing; (2) at the time the notice would have been required, the employer was actively seeking business which, if obtained, would have prevented the closing; and (3) giving the notice would have precluded the employer from obtaining such business. Other exemptions to the NY WARN Act are where:

- the need for a notice was not reasonably foreseeable at the time it was due;
- the terminations were due to a natural disaster;
- the operation being closed was a temporary facility or project closed upon completion of the project; or
- the termination constitutes a strike or lockout.

The NY WARN Act provides an employee with a right of action against an employer who violates the Act and entitles the employee to back-pay and back-benefits. The Act also provides for civil penalties in the amount of \$500 for each day of an employer’s violation.

Several ambiguities in the legislation will make complying with the new Act difficult for employers. For example, “relocation,” an event that does not trigger notice under the federal WARN Act, is defined as the “removal of all or substantially all of the industrial or commercial operations of an employer to a different location fifty miles or more away.” The Act, however, does not provide guidance as to what “substantially all” of an employer’s operations include. It is unclear whether operations is to be measured by number of employees affected or some other criteria; whether only New York operations are to be considered; or whether the provision would apply to the relocation of a single employee if a particular New York office employed only that single employee.

Further, employers must give “affected employees” notice of relocation. But, “affected employees” are defined as those who can be reasonably expected to “experience an employment loss as a consequence of a proposed plant closing or mass layoff.” Thus, the NY WARN Act apparently requires notice only for a relocation which is also a plant closing or mass

layoff. Because this literal reading would render the addition of relocation as a triggering event meaningless, this was presumably not the intention of the legislature.

Additionally, the Act gives little guidance as to the obligations of employers who are conducting a mass layoff or relocation after February 1st, but before May 1, 2009. If the Act applies retroactively, then such an employer must have provided notice before the Act even went into effect. The NY Department of Labor has issued an opinion on its website which states: “For employers planning layoffs shortly after the new law takes effect, notice would have to be provided prior to the law’s effective date to meet the 90-day requirement.” It remains to be seen whether courts would agree with the Department of Labor and enforce civil and administrative penalties.

The New York Commissioner of Labor has the authority to issue regulations under the NY WARN Act and hopefully will do so to clarify what kind of “relocation” triggers notice, as well as other ambiguities in the statute. In the interim, employers should act with an abundance of caution when instituting a reduction-in-force, plant closing or relocation in New York to comply with the State’s WARN Act.



If you would like more information regarding the NY WARN Act or the topics discussed in this Newsletter, please contact:

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