

New York Department of Labor Issues Emergency/ Proposed State WARN Act Regulations

On February 18, 2009, the New York Department of Labor (the "N.Y.D.O.L.") published emergency/proposed regulations¹ interpreting New York's Worker Adjustment and Retraining Notification Act ("N.Y. WARN" or "N.Y. Act"),² which went into effect earlier this month. The regulations are important, particularly because the N.Y. Act is unclear, in part due to what appears to be a number of drafting errors. Although the N.Y.D.O.L. is seeking comments on the regulations for a 45-day period, the regulations went into effect immediately on an emergency, interim basis.

Like the federal WARN Act (the "federal statute"),³ N.Y. WARN requires employers to give affected employees and other parties notice of a planned business closure or significant reduction in force. While similar in many respects to the federal statute, N.Y. WARN imposes greater obligations on employers by covering smaller employers, expanding the types of events for which notice must be given, and requiring longer advance notice of covered events. N.Y. WARN empowers the New York State Commissioner of Labor to enforce the statute administratively, in addition to providing a private right of action, similar to that of the federal statute, for failure to provide adequate notice.⁴

The following are (a) a summary of key provisions of N.Y. WARN and the new regulations; and (b) a chart comparing the key provisions of N.Y. WARN with those of the federal statute.

Covered Employers

N.Y. WARN applies to employers that have either: (a) 50 or more employees within New York State (excluding part-time employees); or (b) 50 or more employees within New York State (including part-time employees) who work in the aggregate at least 2,000 hours per week.⁵ (By contrast, the federal statute covers employers with 100 employees (excluding part-time employees) and those with 100 or more employees (including part-time employees) working a total of 4,000 hours per week.)⁶ Also, unlike the federal statute, which does not count overtime hours in measuring whether an employer falls under its coverage, under N.Y. WARN "overtime hours that are earned on a regular basis" are counted in measuring whether the 2,000 hour threshold is met.⁷ Overtime hours are those "earned on a regular basis" by an employee if the employee has earned overtime in at least seven of the twelve weeks immediately preceding the date notice must be given.⁸

Events that Trigger Notice

Although the language of N.Y. WARN requires employers to give 90 calendar days' notice only in the event of a "mass layoff, relocation or employment loss,"⁹ the regulations attempt to correct an apparent drafting error in the statute by also requiring notice of a plant closing.¹⁰

Mass Layoff

A "mass layoff" occurs under N.Y. WARN when over a 30-day period either 25 or more employees, amounting to 33 percent of the workforce at a single site, or a total of 250 employees at a single site suffer an employment loss.¹¹ In each case, part-time employees are not counted for this purpose. An employment loss includes an employment termination (other than a discharge for

cause, a voluntary departure or a retirement), a mass layoff exceeding six months, and a reduction in hours of work of more than 50 percent during each month of any consecutive six-month period.¹² Part-time employees are not counted for the purpose of these calculations. Requiring notice of a "mass layoff" is consistent with the federal statute, which requires **60** days' notice of such an event. However, the latter law's requirement only covers terminations over a 30-day period of **50** employees, who comprise 33 percent of the workforce at a single site, or **500** employees at a single site.¹³

Plant Closing

Under N.Y. WARN, a "plant closing" is the permanent or temporary shut down of a single site of employment, or one or more facilities or operating units within a single site of employment, if the shutdown results in an employment loss during a 30-day period at such site for 25 or more employees, excluding part-time employees.¹⁴ A "plant closing" occurs even if a few employees remain in place in a production unit if the production or the work performed by that particular unit ceases.¹⁵ Under the federal statute, the concept is similar, but the threshold level of employment loss is 50 or more employees.¹⁶

Relocation

In addition to requiring notice for plant closings and mass layoffs, the N.Y. Act requires employers to give 90 calendar days' notice of a planned "relocation" of employees.¹⁷ A "relocation" is the removal of "substantially all of the [employer's] industrial or commercial operations" to a different location at least 50 miles away from the original site of business.¹⁸ The regulations state that a removal of an "entire unit, product line, division, or other segment of the employer's operation" constitutes a removal of substantially all of the employer's industrial or commercial operations.¹⁹ The federal statute does not recognize the concept of a "relocation" or provide for notice when one occurs.

Neither N.Y. WARN nor the new regulations specify how many employees must be relocated to warrant notice. Prior to the publication of the regulations, a representative of the N.Y.D.O.L. stated in a letter response to an attorney inquiry (which the agency subsequently disseminated to numerous other persons) that in "harmonizing" the separate sections of the N.Y. Act, "an employer is only required to provide a WARN notice under the relocation provision where at least 25 of its employees would suffer an employment loss or relocation as the result of a planned plant closing or mass layoff."²⁰ The letter states that "[t]he relocation intended by the Act is a relocation of the employer's business that is necessitated by the plant closing or mass layoff Neither the intent of the Act nor any of its provisions would extend the WARN requirement to relocations unrelated to a plant closing or mass layoff" ²¹ It remains to be seen whether the term "relocation" will be interpreted by the N.Y.D.O.L. and, more importantly, by the courts, so as not to include relocation of 25 or more employees when neither a mass layoff nor a plant closing is involved.

Notice Requirements

Under the New York regulations, employers calculate whether notice is due by "look[ing] ahead ninety (90) days and behind ninety (90) days to determine whether actions constituting employment losses . . . both taken and planned, will, in the aggregate for any ninety (90)-day period, reach the minimum standards to trigger the notice requirement."²² By contrast, the federal statute requires an employer to evaluate notice obligations based on the number of employees as of "the date the first notice is required to be given."²³

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When an employer plans to take action that will trigger the N.Y. Act's notice obligations, it must provide 90 calendar days' notice of the action. This notice period is 30 days longer than that required by federal statute. The 90-day period is measured backwards from the date the first individual employment loss will occur,²⁴ which means that each employee who may reasonably be expected to experience a loss of employment must receive 90 days' notice. The applicable government entities must receive 90 days' notice before the beginning of the event. The regulations caution that the time during which an employee is receiving severance, vacation or personal leave pay does not extend the period of employment for purposes of triggering notice.²⁵

Notice must be served on the New York State Commissioner of Labor, affected employees, their unions, and the local Workforce Investment Board.²⁶ Notice to each party is required to contain very specific information set forth in detail within the regulations²⁷ and must be based on the "best information available" to the employer at the time notice is served.²⁸ While most methods of delivery designed to ensure receipt are acceptable under the N.Y. Act, the regulations state that notice must be sent on the "official letterhead" of the employer, signed by an "individual with authority to represent the employer," and may not be sent by e-mail.²⁹

Exceptions to Notice Requirements

Importantly, N.Y. WARN recognizes exceptions to the 90-day notice requirement that are similar to, and somewhat broader than, those under federal law. The exceptions apply for a "faltering company,"³⁰ "unforeseeable business circumstances," and "natural disaster," and for the employer permanently replacing a person who is deemed to be an economic striker under the National Labor Relations Act.³¹ However, even when an employer is excused from providing 90 days' notice, it still must provide "as much notice as is practicable," as well as a "statement of the basis for reducing the notice period."³² Significantly, although the text of the N.Y. Act appears to limit the availability of these exceptions to a "mass layoff,"³³ the regulations state that all of the exceptions apply to a "plant closing, mass layoff, relocation, or covered reduction in work hours."³⁴

In limited circumstances, employers are excused from providing notice entirely. As under the federal statute, notice is not required if an employer closes a temporary facility or an employee completes a particular project (so long as the employee understood employment was temporary).³⁵ Employers also need not provide notice if there is a "physical calamity" or an "act of terrorism or war,"³⁶ or if a triggering event will take place following the effective date of a sale of all or part of the employer's business.³⁷ These exceptions do not appear in the federal statute.³⁸

Remedies

The N.Y. Act is enforceable by the State Commissioner of Labor (in an agency proceeding or in court) as well as by employees or unions through a private right of action. Employers who fail to give adequate notice are liable to each employee entitled to receive notice for back pay for the period for which notice was not given and for the "value of the cost of benefits" to which the employee would have been entitled, including the cost of any medical expenses incurred that would otherwise have been covered.³⁹ The regulations state that the lost benefits for which the employee must be compensated include, but are not limited to: life insurance, private disability coverage, employer-paid retirement contributions, health benefits and vacation leave. Significantly, back pay and other liabilities are capped at 60 days. Employers are also subject to a civil penalty of up to \$500 per day for each day of violation (in the aggregate, not per employee), unless the employer pays all affected employees the total amount for which it is liable within three weeks from the date the employer orders the event triggering notice.⁴⁰

The New York Commissioner of Labor is empowered to reduce the amount of penalty it would otherwise impose if it determines after investigation that an employer conducted a reasonable investigation in good faith, and had reasonable grounds to believe that its conduct was not a violation of the N.Y. Act.⁴¹

Notice Requirements for Actions Taken Within 90 Days of Statute's Enactment

An important question that the regulations do not answer is whether employers who implement workforce actions otherwise covered by N.Y. WARN within the first three months after the statute's effective date (February 1, 2009) will be found to have violated the notice provisions if they have not given notice in compliance with the statute, i.e., whether (given the fact that the statute was enacted several months before its effective date) employers were required to give the notice provided for by the statute prior to the statute's effective date. Persons who have sought advice from the N.Y.D.O.L. concerning this issue are reported to have received conflicting opinions from the agency.

Conclusion

Although the regulations provide clarification of the N.Y.D.O.L.'s interpretation of the N.Y. Act in numerous respects, uncertainty continues to surround this new law. It is possible that the final regulations will provide further clarification. Even if that is the case, however, one cannot rest assured that a court will follow the regulations where they are at odds with the language of the statute. Requests have been made to state legislators to amend the statute to address the areas in which employers and employment lawyers have been left with uncertainty due to poor draftsmanship. It remains to be seen whether any legislative action will be taken in response to these requests.

Comparison of State and Federal WARN Acts

The following table compares the key provisions of the N.Y. WARN Act, as clarified by the N.Y.D.O.L. regulations, to those of the federal WARN Act:

	N.Y. WARN Act	U.S. WARN Act
Covered Employers	Employers with (a) 50 or more employees within New York State, excluding part-time employees, or (b) 50 or more employees, including part-time employees, who work in aggregate at least 2,000 hours per week, including overtime hours that are earned on a regular basis.	Employers with (a) 100 or more employees, excluding part-time employees, or (b) 100 or more employees, including part-time employees, who work in aggregate at least 4,000 hours per week, exclusive of hours of overtime.
Covered Events	Layoff, Plant Closing, Relocation, Covered Reduction in Work Hours	Mass Layoff (which includes a Covered Reduction in Work Hours), Plant Closing
"Mass Layoff" Triggering Notification	Loss of employment by (a) 25 or more employees, excluding part-time employees, who represent 33% of the workforce at a single site over a 30-day period or (b) 250 or more employees (part-time excluded)	Loss of employment by (a) 50 or more employees, excluding part-time employees, who represent 33% of the workforce at a single site over a 30-day period or (b) 500 or more employees (part-time excluded)
"Plant Closing" Triggering Notification	Site closure involving 25 or more employees, excluding part-time employees	Site closure 50 or more employees, excluding part-time employees

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	N.Y. WARN Act	U.S. WARN Act
"Relocation" Triggering Notice	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 (unclear whether 25 employees must be affected and whether relocation only triggers notice when there is a mass layoff or plant closing).	N/A
Parties Who Must Receive Notice	"Affected employees" (see definition below), their unions, and the Commissioner of Labor and the local Workforce Investment Board(s)	Each representative of the "affected employees" (or, if none, each affected employee), the state, or state-designated rapid response entity (e.g., State Dislocated Worker Unit), and the chief elected official of the unit of the local government within which the closing or layoff is to occur.
Definition of Affected Employees	Employees "who may reasonably be expected to experience an employment loss as the result of a proposed plant closing, mass layoff, relocation , or covered reduction in hours by the employer."	Employees "who may reasonably be expected to experience an employment loss as a consequence of a proposed plant closing or mass layoff by their employer."
Manner of Delivery of Notice	"reasonable and timely method of delivery designed to ensure its receipt"; first class mail, personal delivery and inclusion of notice with paycheck are acceptable; e-mail is unacceptable.	"Any reasonable method of delivery . . . which is designed to ensure receipt of notice of least 60 days before separation"; first class mail, personal delivery, and inclusion of notice with paycheck are specifically acceptable.
Number of Days' Notice	90 (calendar)	60 (calendar)
Enforcement	Private action and administrative enforcement by State Commissioner of Labor	Private action
Remedies	<p>Back pay and the value of the cost of benefits under employee benefit plans (including, but not limited to, health benefits, private disability, life insurance, employer paid retirement contributions, and vacation leave); and the cost of any medical expenses incurred by the employee that would have been covered under an employee benefit plan.</p> <p>Back pay and other liabilities are capped at 60 days.</p> <p>Civil penalty of \$500 per day of violation for failure to give notice, unless employer pays all affected employees the total amount of back pay and benefits owed within three weeks from the date the employer orders the covered event.</p>	<p>Back pay and benefits under ERISA-covered benefit plans; and the cost of any medical expenses incurred by the employee that would have been covered under an employee benefit plan. Liability is calculated for the period of violation up to a maximum of 60 days.</p> <p>Civil penalty of \$500.00 per day for failing to provide notice if payment to the employees is not completed within three weeks of the covered event.</p>

Endnotes

- ¹ New York State Worker Adjustment and Retraining Notification Act Requirements, Emergency/Proposed Rule, to be codified at 12 N.Y.C.R.R. Part 921. The regulations can presently be found at <http://www.labor.state.ny.us/workforcenypartners/warn/pdfs/text.pdf>.
 - ² N.Y. Lab. L., Art.25-A, §§ 860a-i.
 - ³ 29 U.S.C. §§ 2101 *et seq.*
 - ⁴ N.Y. Lab. L. § 860-g(7).
 - ⁵ A "part-time employee" is one employed for an average of fewer than 20 hours per week or who has been employed for fewer than six of the twelve months preceding the date on which notice is required. The average work hours per week is calculated based on the shorter of the actual period the employee has been employed or the 90 days prior to the date notice is due. Part 921-1.1(i). The regulations specify that a covered employer may be either for-profit or not-for-profit. *Id.* Part 921-1.1(d).
 - ⁶ 29 U.S.C. § 2101(a).
 - ⁷ Part 921-1.1(i).
 - ⁸ *Id.* Part 921-1.1(d)(1).
 - ⁹ N.Y. Lab. L. § 860-b.
 - ¹⁰ Part 921-2.1(a). "Plant closing" is not included among the categories of events triggering notice in section 860-b of the N.Y. Act. Section 860-b is inconsistent with section 860-a, which defines "affected employees" to whom notice must be delivered to include employees who may reasonably be expected to lose their jobs as a result of a "proposed *plant closing* or mass layoff." (emphasis added). By providing that employers may not order a "mass layoff, *plant closing*, relocation, or a covered reduction in work hours" without prior notice (Part 921-2.1(a) (emphasis added)), the regulations convey the N.Y.D.O.L.'s view that the statutory intent was to include plant closings in the notice provision. It remains to be seen whether courts will follow the language of the regulations as to language that is not in the statute. In this particular case, one could conclude that the N.Y.D.O.L.'s interpretation is consistent with the statute as a whole.
- The regulations also attempt to correct another notable inconsistency within section 860-b, namely its inclusion of an "employment loss" (which is defined to cover the termination of one individual's employment) in the list of events triggering notice. Thus, interpreted literally, the N.Y. Act requires employers to serve notice for even a single job loss. Rectifying what appears to have been another drafting error, the regulations exclude "employment loss" from the categories of events triggering notice. Part 921-2.1(a).
- ¹¹ N.Y. Lab. L. § 860-a; Part 921-1.1(g).
 - ¹² N.Y. Lab. L. § 860-a(c). *See also* Part 921-1.1(e), defining an "employment loss" as "(i) An employment termination, other than a discharge for cause, voluntary departure, or retirement; (ii) A mass layoff exceeding six months; or (iii) A reduction in hours of work of more than fifty percent (50%) during each month of any consecutive six-month period"
 - ¹³ 29 U.S.C. § 2101(a)(3). While under both the federal statute and N.Y. WARN, part-time employees are not counted for the purpose of determining whether notice is due, they are owed notice if it is otherwise required.
 - ¹⁴ N.Y. Lab. L. § 860-a(6); Part 921-1.1(j).
 - ¹⁵ Part 921-1.1(k).
 - ¹⁶ 29 U.S.C. § 2101(a)(2).
 - ¹⁷ N.Y. Lab. L. § 860-b.
 - ¹⁸ *Id.* §§ 860-a(8), 860-b; Part 921-1.1(k). Another inconsistency within the N.Y. Act arises in connection with relocations. Although section 860-b requires notice of a "relocation," the statute does not include relocated employees in the definition of "affected employees" under section 860-a to whom notice must be delivered. Thus, the statute requires employers to notify only government entities (the local Workforce Investment Board) of a planned "relocation" of employees. The regulations expand the definition of "affected employees" to include those suffering employment loss as a result of a relocation. Part 921-1.1(a).
 - ¹⁹ Part 921-1.1(k).
 - ²⁰ *See* August 25, 2008 letter from Maria Colavito, Esq. of the New York Department of Labor to Gerald T. Hathaway, Esq. of Littler Mendelson at 2.
 - ²¹ *Id.* at 2-3.
 - ²² Part 921-2.1(b)(1).
 - ²³ 20 C.F.R. § 639.5(a)(2).
 - ²⁴ *Id.* Part 921-2.1(a).
 - ²⁵ *Id.* Part 921-1.1(g)(3).
 - ²⁶ N.Y. Lab. L. § 860-b.
 - ²⁷ Part 921-2.3.
 - ²⁸ *Id.* Part 921-2.1(c).
 - ²⁹ *Id.* Part 921-2.2. The federal statute contains no specific prohibition against e-mail delivery.
 - ³⁰ Under federal law, this exception is only applicable to plant closings. *See* 29 U.S.C. § 2102(b)(1).

³¹ Part 921-6.
³² *Id.*
³³ N.Y. Lab. L. § 860-c.
³⁴ Part 921-6.1.
³⁵ *Id.* Part 921-5.1.
³⁶ N.Y. Lab. L. § 860-b(3).
³⁷ *Id.* § 860-b(5).
³⁸ See 29 U.S.C. § 2101(b).
³⁹ Part 921-7.3.
⁴⁰ *Id.*
⁴¹ N.Y. Lab. L. § 860-g(7).

If you wish to discuss or have questions concerning the Department of Labor issues, please contact Ellen Martin at 212.336.2860, Lisa Cleary at 212.336.2159, or Sarah Goodstine at 212.336.2476.

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