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The New York WARN Act

BY ALLAN S. BLOOM, STEPHEN H. HARRIS, ETHAN LIPSIG AND GLENN S. GRINDLINGER

On August 5, 2008, Governor David Patterson signed legislation enacting the New York State Worker Adjustment and Retraining Notification Act ("**NY WARN Act**"), to become effective on February 1, 2009.

Although it is based on the Federal Worker Adjustment and Retraining Notification Act ("**US WARN Act**"), the NY WARN Act is more expansive than the US WARN Act in three significant ways: (1) it protects more employees; (2) it is more easily triggered; and (3) it requires more advance notice of plant closings and mass layoffs. By enacting the NY WARN Act, New York joins a growing number of states that have enacted more expansive protections than those provided by the US WARN Act. Regrettably, the New York law is inartfully drafted in places, as is the case with many of these state laws, making it difficult if not impossible to determine how to comply with it in certain contexts. For example, the New York law generally requires employers subject to the law to provide advance notice to various governmental agencies of all layoffs no matter how small. That this was almost certainly unintentional is of no comfort.

The NY WARN Act Protects More Employees Than the US WARN Act

The US WARN Act generally requires employers with 100 or more employees to provide at least 60 days' advance written notice of "plant closings" and "mass layoffs."

The US WARN Act defines a "plant closing" as "the permanent or temporary shutdown of a single site employment [resulting] in an employment loss at the single site of employment during any 30-day¹ period for 50 or more employees excluding part-time employees"² and defines "mass layoff" as a non-plant-closing reduction in force at a site of employment if within a 30-day period at least the number of full-time employees shown on the following table³ suffer employment losses at that site:

NUMBER OF EMPLOYEES EMPLOYED AT SITE	MINIMUM NUMBER OF EMPLOYMENT LOSSES
154 or fewer	50
155-1514	33% of employees at site
1515 or more	500

In contrast, the NY WARN Act generally requires, or appears intended to require, employers with 50 (rather than 100) or more full-time employees to provide at least 90 (rather than 60) days' advance written notice of any "plant closing," "mass layoff," or "relocation" as those terms are defined under

the act. The NY WARN Act defines “plant closings” and “mass layoffs” in the same manner as the US WARN Act, except that the plant closing employment loss threshold is 25 employees, not 50 employees, and the mass layoff thresholds are as follows:

NUMBER OF EMPLOYEES EMPLOYED AT SITE	MINIMUM NUMBER OF EMPLOYMENT LOSSES
75 or fewer	25
76-757	33% of employees at site
758 or more	250

A “relocation” under the NY WARN Act is “the removal of all or substantially all of the industrial or commercial operations of an employer to a different location” at least 50 miles away. It is unclear what the Legislature intended by “substantially all of the...operations of an employer.” For example, must substantially every facility throughout the country be moved to another location more than 50 miles from its existing location?⁴ Because the New York Commissioner of Labor has the authority to issue regulations under the NY WARN Act, she will have (and hopefully take advantage of) the opportunity to clarify the definition of “relocation” as well as a number of other statutory ambiguities.

NY WARN Act Notice Requirements

Once the NY WARN Act is triggered (e.g., there will be a mass layoff), the employer is required to provide at least 90 days’ advance written notice to (1) employees who will lose their jobs as a result of the event (the “affected employees”); (2) the affected employees’ collective bargaining representative, if applicable; (3) the New York State Department

of Labor; and (4) the local workforce investment boards established pursuant to the Federal Workplace Investment Act for the locality in which the employment loss will occur. The substance of the written notice is identical to the notice required under the US WARN Act.

NY WARN ACT Issues

The NY WARN Act, by design or inattentive drafting, differs from the US WARN Act in a number of very material ways.

First, although the act obviously was intended to require that employers provide notice of plant closings, the statute inexplicably omits any mention of plant closings from the litany of events for which notice must be given.

Second, although the NY WARN Act presumably was not intended to require any advance notice of employment losses unconnected with plant closings, mass layoffs, or relocations, the act literally requires employers to provide advance notice of each such employment loss. This notice must be given to the government, but it need only be given to “affected employees,” which the NY WARN Act defines as “employees who may reasonably be expected to experience an employment loss as a consequence of a proposed plant closing or mass layoff.” It appears, absent a more plausible explanation, that a legislative staffer accidentally substituted the term “employment loss” for “plant closing” in the notice provision of the law, creating the bizarre result described above.

Third, the US WARN Act does not require any notice with respect to relocations unless they are also plant closings or mass layoffs. In determining whether a relocation is a plant closing or mass layoff, employees who transfer to other facilities or who are offered transfers to other facilities within a reasonable commuting distance need not be counted as suffering employment losses (a rule that the

NY WARN Act might limit to a “relocations,” as defined in that act). Unlike the US WARN Act, the NY WARN Act requires notice of all 50-mile or greater “relocations,” as defined in the act, e.g., without reference to the number of employment losses that occur. That notice must be given to the government, but it need only be given to “affected employees,” which the NY WARN Act defines as “employees who may reasonably be expected to experience an employment loss as a consequence of a proposed plant closing or mass layoff.” Thus, NY WARN Act literally does not require employees to be notified of relocations unless they also are plant closings or mass layoffs. Because it is not clear that this was intended (since there then would have been little or no need to include relocation provisions), whenever the government must be notified of a relocation, employers should consider also giving NY WARN Act notice to all employees who may suffer employment losses in connection with it.

Penalties for Violations

If an employer violates the NY WARN Act, affected employees have six years to sue to recover back pay, the value of benefits lost during the notice shortfall period, and, at the discretion of the court, attorneys’ fees. Back pay is capped at 60 days of pay. The New York State Department of Labor can be awarded a civil penalty of \$500 for each day that the employer violated the statute. It is unclear whether a court can reduce both penalty and back pay liability, or only penalty liability if it finds that the employer acted in good faith.

As an alternative to a civil lawsuit, the NY WARN Act permits an employee to file a complaint with the New York State Department of Labor. In the event an administrative law judge finds that the employer violated the statute, the agency may award the damages and penalties described above, excluding attorneys fees. If the administrative law judge finds that the employer’s violation was in good

faith, he or she may reduce the penalty and back pay. Neither the Department of Labor nor any court has the authority to enjoin a plant closing, mass layoff, or relocation (or, presumably, an employment loss).

NY WARN Act Exceptions

An employer need not comply with the NY WARN Act’s notice requirements under five circumstances, which are similar but not identical to the US WARN Act’s exceptions:

- If the mass layoff, plant closing, or relocation resulted from a natural disaster or an act of terrorism or war;
- If, at the time the notice would have been required: (1) the employer was actively seeking capital or business; (2) that capital or business would have enabled the employer to avoid the mass layoff, plant closing, or relocation; and (3) the employer reasonably and in good faith believed that had it provided the required notice, it would have been precluded from obtaining the capital or business;
- If the need for notice was not reasonably foreseeable at the time notice would have been required;
- If the plant closing is of a temporary facility or the mass layoff or plant closing is due to the completion of a particular project, *and* the affected employees were hired with the understanding that their employment would be limited to the duration of the project; or
- The plant closing or mass layoff is the result of an industrial action, such as a strike or lockout.

The fourth and fifth exceptions listed above do not apply to relocations – only to (certain) plant closings and mass layoffs. As with any

affirmative defense, the employer carries the burden to prove that an exception is applicable.

What Should Employers Do?

In light of this new statute, employers should take at least four steps to ensure they are in compliance with applicable law. First, before engaging in a reduction in force, plant closing, or relocation that will affect New York employees, an employer should determine whether the NY WARN Act will apply.

Second, employers subject to the law generally should give WARN Act notice to all employees affected by a relocation until the act's vagaries are resolved.

Third, because the NY WARN Act's statute of limitations is six years, employers should maintain accurate records of all decisions concerning plant closings, mass layoffs, and

relocations affecting New York employees, so as to be in the best position to defend future claims relating to such employment actions.

Fourth, employers subject to the law should either provide governmental notice as to all employment losses or determine that the risk of not doing so is offset by the likelihood that the notice requirement as to employment losses is unintentional and will not be enforced.

Other State Analogs

Multi-state employers must consider not only the US WARN Act but a variety of differing state analogs. If you would like us to send you our 50-state survey on these analogs or if you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers listed below.



Allan S. Bloom
212-318-6377
allanbloom@paulhastings.com

Ethan Lipsig
213-683-6304
ethanlipsig@paulhastings.com

Stephen P. Sonnenberg
212-318-6414
stephensonneberg@paulhastings.com

Stephen H. Harris
213-683-6217
stephenharris@paulhastings.com

Patrick Shea
212-318-6405
patrickshea@paulhastings.com

Glenn S. Grindlinger
212-318-6364
glenngrindlinger@paulhastings.com

¹ For both plant closings and mass layoffs, the 30-day period often is expanded to 90 days.

² 29 U.S.C. § 2102(a)(2).

³ Neither the US nor NY WARN Acts state mass layoff thresholds in the manner set forth in the following two charts, but they more clearly show what those thresholds really are.

⁴ Other state analogs, such as California's, base a "relocation" on the removal of industrial or commercial operations at a "covered establishment," rather than an "employer."

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