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Labor & Employment Law

The New York WARN Act

What Every NY Employer Needs to Know

During the campaign season leading up to the November presidential election, the issue of job-creation took center stage. In the latest employment data from the United States Department of Labor, modest improvement in job-creation was evident across several sectors of the economy, including health care, transportation and warehousing and financial services businesses. Despite this apparent statistical jump in employment in September, however, economic demand stemming from the 2008 housing crash and financial meltdown persists. As a result, employers continue to face the prospect of having to discharge valued employees to survive. A lawsuit by affected employees claiming a lack of proper notice and seeking attendant back pay and benefits under state and federal law is the last thing a beleaguered employer wants to face. For these employers, the New York State Worker Adjustment and Retraining Notification Act ("NY WARN Act")[1] is of primary concern.

Steven N. Davi

The NY WARN Act requires covered employers to give affected employees (their representatives, the New York State Department of Labor and local workforce partners) 90 days' notice in the event of a mass layoff, plant closing or relocation.[2] This article will discuss the main aspects of the NY WARN Act and compare its key features with those contained in its federal analog, the Worker Adjustment and Retraining Notification Act ("US WARN Act").[3]

Covered Employers

The NY WARN Act generally applies to any business that employs at least 50 people within New York State. This 50-employee threshold can be met in two ways.

First, employers with at least 50 full-time employees within New York State are covered employers under the NY WARN Act. Specifically, NY WARN applies to "any business enterprise … that employs fifty (50) or more employees … within New York State, excluding part-time employees."[4] "Part-time employee" under the NY WARN Act means "an employee who is employed for an average of fewer than twenty (20) hours per week or who has been employed for fewer than six (6) of the twelve (12) months preceding the date on which notice is required."[5] Thus, employees who have worked less than 6 of the last 12 months or who work an average of fewer than 20 hours per week[6] are "part-time;" they are not counted toward the employer coverage threshold under the NY WARN Act.

Second, the 50-employee threshold can be met by having 50 or more full- and part-time employees within New York State who work at least 2,000 hours per week in the aggregate, inclusive of overtime hours "earned on a regular basis."[7] Under the NY WARN Act, overtime hours are considered "earned on a regular basis" when such employee has worked overtime in "seven or more weeks out of the twelve weeks immediately prior to the date upon which notice was required.[8]

The number of employees for purposes of establishing employer coverage under the NY WARN Act is typically measured as of the date notice of the mass layoff, plant closing, or relocation is due.[9] Where all employees are not terminated on the same date, however, the date of the first individual termination will trigger the notice requirement; "[t]he first and each subsequent group of employees earmarked for termination are entitled to a full 90 days' notice."[10]

The standards for employer coverage under the NY WARN Act are a departure from the higher employee thresholds for employer coverage under federal law.

The US WARN Act generally applies to private employers with 100 or more employees.[11] Like the NY WARN Act, employees who have worked less than 6 of the last 12 months or who work an average of fewer than 20 hours per week are not counted toward the employer coverage threshold under federal law.[12] Unlike the NY WARN Act, however, the 100-employee threshold under US WARN can be met by employers with at least 100 full-time employees, or with 100 or more full- and part-time employees who work at least 4,000 hours per week in the aggregate, exclusive of overtime hours.[13]

Triggering Events

The NY WARN Act modifies and extends the triggering events requiring notice under federal law. The US WARN Act generally requires covered employers to provide written notice to affected employees (their representatives and certain designated state and local government officials) at least 60 days in advance of a mass layoff or plant closing.[14] The NY WARN Act notice provisions are more stringent both in terms of the amount of required notice – 90 days, not 60 – and the circumstances under which the notice requirements can be triggered.

The NY WARN Act requires covered employers to provide 90-days written notice in the event of a mass layoff, plant closing, or relocation resulting in an "employment loss"[15] for affected employees.

Under the NY WARN Act, a mass layoff is a reduction in force which (1) is not the result of a plant closing and (2) results in an employment loss at a single site of employment during any 30-day period (i) for a third or more of the employees, but at least 25 employees (excluding part-time employees); or (2) at least 250 employees (excluding part-time employees).[16]

A plant closing under the NY WARN Act is a permanent or temporary shutdown of either an entire site of employment, or one or more "facilities or operating units" within a single site, causing an employment loss for at least 25 employees during any 30-day period (excluding part-time employees).[17]

Finally, unlike federal law, the NY WARN Act also requires notice in the event of a relocation, which means "the removal of all or substantially all of the industrial and commercial operations of an employer to a different location 50 miles or more away from the original site of operation where 25 or more employees, excluding part-time employees, suffer an employment loss."[18]

Counting Employees: Rolling 30- and 90-day Periods

A covered employer has to count the num-

ber of employees experiencing an employment loss to determine whether a plant closing, mass layoff, or relocation has occurred that would trigger an obligation to provide NY WARN notice.

A covered employer first must look at the number of employment losses occurring in any rolling 30-day period. Specifically, in deciding whether notice is required, the employer first should "[l]ook ahead 30 days and behind 30 days to determine whether employment actions both taken and planned will, in the aggregate, for any 30-day period, reach the minimum numbers for a plant closing or mass layoff and thus trigger the notice requirement."[19] Thus, for example, if an employer with 50 employees discharged 25 employees one day and then, 20 days later, discharged another 10 employees, WARN notice would be required for all of these employees.

A covered employer also must look forward and backward 90 days from each employment loss to determine whether WARN obligations arise. Specifically, where two or more groups suffer employment losses within 90 days, and neither group alone is "of sufficient size to trigger the notice requirement," the groups will be aggregated together.[20] If the "aggregate, for any 90-day period, reach[es] the minimum standards to trigger the notice requirement," then all of the aggregated employees will be entitled to receive notice, "unless the employer demonstrates that that the employment losses are the result of separate and distinct actions and causes and are not an attempt to evade … the requirements" under NY WARN.[21]

In short, each individual layoff triggers another rolling 90-day window, with the important caveat that "[e]mployees previously given notice pursuant to the 30-day look ahead/look behind period, shall not be aggregated with other employees suffering employment losses during a given 90-day period."[22] What this means is that the 90-day aggregation period applies only to employment losses that do not, on their own, constitute covered employment losses. As an example, where a covered employer employs 75 employees, lays off 15 employees on Day 1, 35 employees on Day 45, and 15 employees on Day 90, the employee layoff occurring on Day 45 would constitute an employment loss on its own, and thus, would not be aggregated with the uncovered employee lay-offs on Days 1 and 90. However, the employee layoffs occurring on Day 1 and Day 90 would be aggregated together for WARN purposes since each event, standing alone, is not large enough to trigger the notice obligation, but would in the aggregate, for the 90-day period, reach the minimum standard to trigger the notice requirement.[23]

Notice: Content and Recipients

The NY WARN Act requires employers to give notice to affected employees, their representatives, the New York State Department of Labor, and local workforce partners.[24] Notice to each party is required to contain specific information under the regulations[25] and must be based on the "best information available" to the employer at the time notice is served.[26] Notice recipients are slightly different under federal law in that State worker displacement agencies and the chief elected official of the unit of local government where the mass layoff or plant closing will occur must also receive WARN notice.[27]

Exceptions

There are circumstances under which covered employers are relieved of the notice requirement under the NY WARN Act; these exceptions are similar to those contained in federal law.

There is the "faltering company" exception, which applies to employers actively seeking new capital or business where providing notice of the shutdown would "preclude the ability to obtain the needed capital or business;"[28] the "unforeseeable business circumstances" exception, caused by business circumstances that "were not reasonably foreseeable when the 90-day notice period would have been required;"[29] and "natural disaster."[30]

However, even where the employer is able to prove that an exception applies, its notice obligation is reduced, not extinguished.[31] Thus, even where an otherwise covered employer proves that the requirements for an exception have been met, "the employer must [still] provide as much notice as possible in advance of the plant closing … to all required parties."[32] Indeed, "[a]n employer is encouraged to voluntarily provide notice of employment losses to employees and to the Commissioner of Labor even if such notice is not required under the Act."[33]

Enforcement/Penalties

The New York State Commissioner of Labor is authorized to enforce the NY WARN Act through administrative rules and regulations and by conducting administrative hearings and imposing penalties against any offending employers; employees or unions can also pursue their remedies through a private right of action.[34] Federal law provides only for a private right of action.[35]

Employers who fail to provide the notice required under NY WARN are liable to each affected employee for back pay and for the value of the cost of employee benefits for the period of the violation, up to a maximum of 60 days.[36] Employers are also subject to civil penalties of up to $500 per day for each day of violation, unless the employer pays all affected employees the total amount for which it is liable within three weeks from the date of the employment loss.[37] Back pay liability may be offset by any wages or benefits paid to employees during the period of violation, and by any "voluntary and unconditional payments" to the employee over and above what would be required under law.[38]

Practical Implications

As the above overview makes clear, the NY WARN Act and its implementing regulations entail substantial complexity. An employer contemplating a reduction in force would be prudent to examine its potential obligations under the NY WARN Act as early as possible to avoid any unintended and undesirable outcomes arising from a failure to meet its notice obligations to affected employees, their representatives, the New York State Department of Labor, and local workforce partners.

Steven N. Davi, as counsel in the labor and employment law group of Farrell Fritz, PC, represents and advises management clients on a wide array of issues affecting the workplace, including compliance with the NY WARN Act. He is based in the firm's Uniondale office.

1. N.Y. Lab. L., Art 25-A, §§ 860-860-i.
2. 12 N.Y.C.R.R. Part 921.
3. 29 U.S.C. § 2101, et seq.
4. Part 921-1.1(e)(1).
5. Part 921-1.1(l).
6. In determining whether an employee worked an average of fewer than twenty (20) hours per week, the NY WARN Act tells employers to use "the shorter of the actual period he or she was employed or the ninety (90) day period immediately prior to the date on which notice is required." *Id.*
7. Part 921-1.1(e)(1)(ii). While the regulations and statute are silent as to the date from which the aggregate 2,000 hours are to be computed, the New York State Department of Labor advises that aggregate hours worked for the purpose of determining employer coverage in this regard should be calculated for the 90-day period immediately prior to the date on which notice to affected employees would be required.
8. Part 921-1.1(e)(1)(ii).
9. Part 921-1.1(e)(7)(iii).
10. Part 921-2.1(a).
11. 29 U.S.C. § 2101(a)(1).
12. 29 U.S.C. § 2101(a)(8).
13. 29 U.S.C. § 2101(a)(1)(B).
14. 29 U.S.C. § 2102(a). Under federal law, a mass layoff is a reduction in force affecting a third or more of the employees, but at least 50 employees (excluding part-time employees), or (ii) at least 500 employees (excluding part-time employees) during any 30-day period, while a plant closing results in an employment loss for at least 50 or more employees (excluding part-time employees) during any 30-day period. 29 U.S.C. § 2101(a)(2) and (3).
15. Part 921-1.1(f). "Employment loss" under the NY WARN Act is not limited solely to actual separation from employment, but also includes a reduction in hours of work of more than fifty (50%) percent during each month of any consecutive six-month period for a third or more of the employees, but at least 25 employees (excluding part-time employees); or (2) at least 250 employees (excluding part-time employees). *See* Part 921-1.1(f)(1)(iii).
16. Part 921-1.1(i).
17. Part 921-1.1(m).
18. Part 921-1.1(n).
19. Part 921-2.1(e)(1).
20. Part 921-2.1(e)(2).
21. Part 921-2.1(e)(2); N.Y. Lab. L., Art 25-A, § 860-e.
22. Part 921-2.1(e)(2)(i).
23. *See* NYSDOL Opinion Letter, dated Feb. 24, 2010, File No. RO-10-0023.
24. Part 921-2.2(d).
25. Part 921-2.3.
26. Part 921-2.1(f)(1).
27. 29 U.S.C. § 2102(a).
28. Part 921-6.2. Under federal law, this exception is only applicable to plant closings. *See* 29 U.S.C. § 2102(b)(1).
29. Part 921-6.3.
30. Part 921-6.4.
31. Part 921-6.1.
32. Part 921-6.1.
33. Part 921-2.1(g). Nonetheless, in limited circumstances, employers are excused from providing notice entirely. For instance, a covered employer is excused from the NY WARN notice requirement where the employer seeks to permanently replace an employee who is deemed to be an economic striker under the National Labor Relations Act. *See* Part 921-6.5. Moreover, as under federal law, notice is not required under NY WARN when a temporary or seasonal project or undertaking is completed, provided the employee understood the temporary or seasonal nature of the employment. *See* Parts 921-5.1 and 5.2; 29 U.S.C. § 2103.
34. Part 921-7.
35. 29 U.S.C. § 2104.
36. Part 921-7.3.
37. Part 921-7.2.
38. Part 921-7.3(c)(2).