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LABOR AND EMPLOYMENT ALERT

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Start Spreading the News: New York Enacts Plant Closing/Mass Layoff Notification Law

By Jennifer Vanse and Kimberly M. Talley

Following the lead of a handful of states such as California, New Jersey, and Illinois, New York State has enacted its own version of the federal Worker Adjustment and Retraining Notification Act ("federal WARN"), the federal law that requires employers, in certain circumstances, to provide employees with 60 days' notice prior to a mass layoff or plant closure.

The New York Worker Adjustment and Retraining Notification Act ("NY WARN"), which is primed to take effect February 1, 2009, is more expansive than federal WARN in a number of significant ways. For example, NY WARN covers more employers, requires more advance notice, requires notice when fewer employees suffer an employment loss, and allows for state enforcement. Employers should familiarize themselves with NY WARN's general provisions, along with its key differences from its federal counterpart.

Covered Employers

While federal law applies only to employers with 100 or more employees, NY WARN applies to employers with **50** or more full-time employees or **50** or more employees who, in the aggregate, work at least 2,000 hours per week. Thus, the New York law will not only cover most New York-based employers, but also out-of-state employers with New York workforces meeting this low threshold.

Triggering Event

NY WARN requires a covered employer to provide "affected employees" with at least 90 days' written notice prior to certain events. Although the law is poorly drafted and far from clear, it appears that the following circumstances trigger this notice requirement:

- A *mass layoff*, for six or more months, affecting either (1) **25 employees** who represent at least 33% of the active workforce or (2) **250 employees** without regard to the size of the workforce (half the number of layoffs needed to trigger federal WARN). A layoff also includes a reduction in hours of more than 50% for six consecutive months. As is true under federal law, NY WARN requires that the reduction in force occur at a single site during a 30-day period.

Q: GIVEN THE CURRENT ECONOMIC CRISIS, OUR COMPANY NEEDS TO REDUCE COSTS AND IS CONSIDERING CLOSING ITS NEW YORK OFFICE ON FRIDAY AFTERNOONS. DO WE NEED TO PROVIDE NY WARN NOTICE BEFORE WE DO SO?

A: NO. NY WARN IS ONLY TRIGGERED WHEN THE REQUISITE NUMBER OF EMPLOYEES HAS AN HOURS REDUCTION OF ***MORE THAN 50%*** FOR AT LEAST SIX CONSECUTIVE MONTHS. CLOSING AN OFFICE FOR A HALF DAY EARLY EVERY FRIDAY AFTERNOON WOULD EFFECTIVELY REDUCE HOURS BY APPROXIMATELY 10% AND WOULD NOT BE ENOUGH TO TRIGGER NY WARN. ON A SEPARATE NOTE, EMPLOYERS THAT REDUCE THE WORK HOURS OF EXEMPT EMPLOYEES SHOULD BE CAUTIOUS IF THEY ARE ALSO REDUCING THE SALARIES OF ***EXEMPT*** EMPLOYEES, AS A SALARY REDUCTION FOR A PARTIAL DAY ABSENCE OCCASIONED BY THE EMPLOYER WOULD

- A *plant closing* affecting **25 employees** during any 30-day period. Once again, this is half the number of layoffs required to trigger advance notice of a plant closing under federal WARN.

- A *relocation* of all or substantially all of an operation to a location 50 or more miles away. As drafted, it appears that any such relocation, regardless of the number of affected employees, would trigger the notice obligation. By contrast, federal WARN has no notice requirement in the event of a relocation

Requirements When NY WARN Is Triggered

If a triggering event occurs, an employer must provide written notice to affected employees and union representatives at least **90 days** in advance of the event. NY WARN's notice requirement not only extends the federal WARN requirement of 60 days' notice by a full month, but also obligates employers to provide notice to each affected employee **and** their union representatives. Federal law allows employers to provide notice to the individual employees **or** their union representatives, but not both.

As with federal law, employers also must provide written notice to the New York Department of Labor and local agencies.

Penalties

Although NY WARN extends the notice period to 90 days, back pay and other benefits recovery is limited to 60 days as under the federal statute. Importantly, however, under the NY WARN Act, back pay and benefits must be paid for up to 60 **calendar** days, whereas under federal WARN the maximum payment is for 60 **work** days (which is the equivalent of about 40 calendar days). Thus, if required notice is not provided, affected employees will receive about 50% more back pay and benefits as a penalty under the New York law. Further, the New York law also imposes additional penalties of $500 per day (subject to a safe harbor provision).

In yet another departure from federal requirements, NY WARN authorizes an additional enforcement mechanism beyond private lawsuits - administrative action by the New York State Department of Labor. Federal WARN has no such provision and enforcement is left to civil actions brought by employees.

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VIOLATE THE SALARY BASIS REQUIREMENT FOR EXEMPT STATUS.

Q: ARE THERE ANY EXCEPTIONS UNDER NY WARN THAT COULD APPLY, EVEN THOUGH MY COMPANY IS A COVERED EMPLOYER AND A TRIGGERING EVENT HAS OR WILL OCCUR?

A: YES. LIKE ITS FEDERAL COUNTERPART, NY WARN EXCUSES THE NOTICE REQUIREMENT (1) WHERE THE JOB LOSS IS THE RESULT OF TERRORISM, A NATURAL DISASTER, OR AN ACT OF WAR; (2) WHERE THE NEED FOR NOTICE WAS NOT REASONABLY FORESEEABLE; (3) WHERE A STRIKE OR LOCKOUT CAUSES THE PLANT CLOSING OR MASS LAYOFF; (4) WHERE, DURING WHAT WOULD HAVE BEEN THE NOTICE PERIOD, THE EMPLOYER WAS ACTIVELY SEEKING CAPITAL OR BUSINESS THAT WOULD HAVE ENABLED THE EMPLOYER TO AVOID THE EMPLOYMENT LOSS AND REASONABLY BELIEVED THAT PROVIDING NOTICE WOULD HAVE PREVENTED IT FROM OBTAINING THE CAPITAL OR BUSINESS; AND (5) WHERE THE PLANT CLOSING OR MASS LAYOFF RESULTS FROM THE COMPLETION OF A PROJECT AND THE AFFECTED EMPLOYEES KNEW WHEN THEY WERE HIRED THAT THE JOB WAS FOR A LIMITED TIME. AN EMPLOYER SHOULD ALWAYS CONSULT LEGAL COUNSEL WHEN IT IS UNSURE WHETHER IT

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MUST COMPLY WITH NY WARN AS THE PENALTIES FOR NONCOMPLIANCE COULD BE SUBSTANTIAL.

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