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The New York WARN Act Covers More Employers Than Its Federal Counterpart

With today's turbulent economic climate prompting an increasing number of layoffs, New York businesses will soon need to contemplate yet another legal hurdle prior to making workforce reductions. The New York State Worker Adjustment and Retraining Notification ("WARN") Act, which goes into effect February 1, 2009, requires advance notice to employees in the event of certain mass layoffs, plant closings, and plant relocations.

Following New Jersey, which passed similar legislation in 2007, New York Governor Paterson signed the state WARN Act into law on August 5, 2008, in response to a growing problem – a number of companies, including American Home Mortgage, closed-up shop, with little or no notice.

How The New York Law Differs From Federal Law

The New York WARN Act mirrors the federal WARN Act, enacted in 1989, in nature and purpose. However, the state law contrasts its federal predecessor in a few key, critical aspects, affecting more employers and casting a far larger net within the state. The following differences illustrate the extremely expansive character of this state law:

- The New York law applies to employers with at least 50 full-time employees, whereas the federal law applies only to employers with 100 full-time employees.
- The New York law lowers the threshold number for each triggering event, giving the definitions of "mass layoffs" and "plant closings" broader application.
- A "mass layoff" under the New York WARN Act means a reduction in force, which is not the result of a plant closing, during any 30 day period, of at least 25 full-time employees who comprise 33% of the employer's full-time workforce; or, alternately, the employer lays-off at least 250 full-time employees, regardless of the workforce percentage. The federal WARN Act, on the other hand, defines the term as requiring twice the amount of job terminations – 50 full-time job losses which constitute a 33% reduction in force, or 500 such employee layoffs, irrespective of percentage.
- With regard to "plant closings," state protection is triggered if the shutdown of an employment site (or facility or operating unit within said site) results in employment loss for 25 or more full-time employees during any 30 day period. Again, the federal law states that the change must affect twice that number – 50 full-time workers.
- A notable deviation is the New York law's provision for plant "relocation," defined as the "removal of all or substantially all" of the employer's operations to a location at least 50 miles away. There is no such provision in the New York WARN Act's federal counterpart.
- The New York law requires at least 90 days advance notice prior to any mass layoff, plant closing, or relocation covered by the Act, whereas the federal law demands only 60 days written notice of a covered plant closing or mass layoff only. The New York statute requires that an employer include in such notice the same elements required by the federal WARN Act. However, the New York law not only provides that notice be submitted to the affected employee and his or her representative, but also to the New York State Department of Labor and the local workforce investment boards for the locality in which the layoff will occur.
- Failure to comply with the New York WARN Act could result in similar repercussions to those provided for under the federal law, such as an employer's exposure to private lawsuits and back pay for affected individuals. The New York law also enables the state Department of Labor to enforce the statute administratively, subjecting employers to civil penalties, while the federal Act only allows for terminated employees to bring private lawsuits.

What The New Law Means For Employers

Despite the notably stringent nature of this legislation, which may encompass small or medium-sized employers not covered under federal law, the New York law is not without reprieve for companies undergoing radical changes. In fact, both the federal and state laws outline exemptions from WARN's purview.

For example, New York's law, similar to the federal statute, includes provisions covering unforeseen circumstances, plant closings due to strikes or lock-outs, natural disasters, and project completions where employees were hired with the understanding that the employment duration would be limited. In some circumstances, employers may avoid liability altogether by offering transfer opportunities to the employees at issue, subject to conditions set forth in the statute. In the case of staggered layoffs that seemingly give rise to WARN liability, the New York and federal laws alike both provide opportunity for an employer to prove that the layoffs in question were the result of separate and distinct causes and not an attempt to evade the law.

Further, in the case of an actual violation, the New York law provides employers with limited opportunities to off-set liability, such as wage payments during the period of the employer's violation, or any other voluntary and unconditional monetary remittance. Alternately, liability may be reduced if the employer can satisfactorily prove that the act or omission constituting a WARN violation was made in good faith, and the employer had reasonable grounds for believing there was no such violation.

The state Department of Labor has not yet released regulations explaining how it will interpret the law. With such divergence from the federal law, some confusion and ambiguity surround the New York statute and its potential application.

In the end, notifying employees of an impending layoff empowers them to seek future employment as well as search for the means to meet other needs, such as health care. However, this new law's expansive provisions may expose unaware or unprepared businesses, who are suffering from the recent economic downturn, to litigation and penalties. Such exposure might also cause new or relocating employers to reconsider using New York as an employment site.

Due to the potential implications under both federal and state laws, employers considering any number of layoffs should check with legal counsel to ascertain that their actions will comport with the law.

Venable's Labor and Employment Group Presents Successful Webinar on the Big Changes Coming to Labor and Employment Law

A broad cross-section of Venable's Labor and Employment and Employee Benefits lawyers from multiple offices joined together on December 16 to conduct a simultaneous live seminar and nationwide webinar on the Big Changes Coming to Labor and Employment Law. Topics included the transformational proposals to increase union organizing, recent expansion of the Americans With Disabilities Act, new regulations covering the Family and Medical Leave Act, the coming crackdown on independent contractor misclassification, and many other challenges confronting employers in 2009.

To access the recording of the webinar, click here.

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