

## Employment Alert: New York State Adopts a More Stringent WARN Act

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Effective February 2009, more New York employers will need to plan ahead for layoffs and plant closings. The New York Worker Adjustment Retraining and Notification Act (the “New York WARN Act”), which largely tracks the federal act of the same name (the “Federal WARN Act”), expands coverage to include more employers in layoff situations involving fewer employees. And, in a significant expansion of coverage under the Federal WARN Act, the New York WARN Act also covers relocations. The chart below compares the two acts.

	New York WARN Act	Federal WARN Act
<b>Total Number of Employees to be Covered</b>	50 or more full-time employees  OR  50 or more full-time and part-time <sup>1</sup> employees whose total hours exceed 2000 per week	100 or more full-time employees  OR  100 or more full-time and part-time <sup>1</sup> employees whose total hours exceed 4000 per week
<b>Advance Notice Period</b>	90 days written notice	60 days written notice
<b>Triggering Events</b> (require advance notice to EE)	Mass layoff  Plant closing  Relocation <sup>2</sup>	Mass layoff  Plant closing
<b>Threshold Number of Affected Employees for Plant Closing or Mass Layoff</b>	Within a 30-day period <sup>3</sup> , an employment loss at a single site of:  25 or more full-time employees, which are at least 33% of the workforce, or  250 or more full-time employees, regardless of the percentage of the workforce	Within a 30-day period, an employment loss at a single site of:  50+ full-time employees, which are at least 33% of the workforce at a single site, or  500 or more full-time employees, regardless of the percentage of the workforce
<b>Enforcement</b>	Private right of action  Administrative enforcement by the New York State Department of Labor	Private right of action
<b>Damages</b>	Up to 60 days of back pay and benefits	Up to 60 days of back pay and benefits
<b>Penalties</b>	Up to \$500 per day of violation	Up to \$500 per day of violation

### Summary

The primary (effective) difference between the New York and Federal WARN Acts is that under the New York law, administrative proceedings before the Commissioner of Labor are available for enforcement and the Commissioner may order damages to the affected employees. The federal law only allows for a lawsuit to be brought in federal district court. This was seen as a significant obstacle to enforcement under the federal law because the burden was on employees to file a lawsuit. Legislative history indicates that New York lawmakers view this provision as closing a loophole in the federal law that likely will lead to increased enforcement and more frequent recovery of damages for affected employees.

The New York WARN Act also expands coverage to include more employers (fewer total employees) and lowers the thresholds that trigger coverage to mass employment losses involving fewer employees.

Although the notice period is longer under the state law (90 days instead of the 60 days under the federal law), because damages are only available for 60 days, this provision does not serve to give employees greater recourse where employers fail to comply. If an employer fails to comply with the notice period required under the New York WARN Act, employees will remain in the same position with respect to damages as they will under the Federal WARN Act.

There are limited exceptions to the New York WARN Act, which track those in the Federal WARN Act. Given the timing of notice these laws require, employers considering a plant closing, mass layoff, or relocation should consult with an Employment, Labor and Benefits attorney well in advance of those actions.

### Endnotes

<sup>1</sup> Definition of “part-time” employees includes those employed more than 6 months.

<sup>2</sup> “Relocation” is defined as “all or substantially all of the industrial operations” of the employer moved 50 miles or more from its current location.

<sup>3</sup> Both the New York and Federal WARN Acts include a 90-day “look back” provision for determining whether a plant closing or mass layoff has occurred. This provision essentially ignores the 30-day rule where the threshold number of affected employees is met within a 90-day period, unless the employer demonstrates that the employment losses are the result of separate and distinct actions and causes.

*For assistance in this area, please contact one of the attorneys listed below or any member of your Mintz Levin client service team.*

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