Recent Laws and Events Challenge New York Employers in the Areas of Plant Closings, Overtime and Workers' Compensation

October 7, 2008

New York State Enacts Expansive WARN Act

On August 5, 2008, New York State Gov. David Paterson signed into law the New York State Worker Adjustment and Retraining Notification Act ("NY WARN Act"), to become effective on February 1, 2009. The NY WARN Act is more expansive than its federal counterpart, the Worker Adjustment and Retraining Notification Act ("Federal WARN Act"), as it increases the number of employers and events that fall within the statute's mandates and requires covered employers to provide 90 days' written notice in advance of a plant closing, mass layoff or relocation, as those terms are defined in the statute.

The NY WARN Act is codified in Article 25-A of the New York Labor Law, and its broad scope is important for any New York employer contemplating a reduction in force, plant closing or relocation. As discussed below, certain of the statute's provisions are unclear and pending promulgation of interpretive rules by the commissioner of the New York Department of Labor, leaving open a number of questions for covered employers seeking to comply with the new statute's mandates.

Key Provisions of the NY WARN Act

Unlike the federal WARN Act, which applies to employers with 100 or more full-time employees, excluding part-time employees and employees who have worked less than six months during the previous 12 months, the NY WARN Act applies to all private sector employers with *50 or more* full-time employees or 50 or more employees (including part-time employees) whose hours total at least 2,000 hours per week.

The NY WARN Act significantly expands the federal statute's 60-day notice requirements and requires covered employers to provide *90* days' advance written notice of an upcoming plant closing, mass layoff or relocation to: (i) affected employees and their collective bargaining representatives; (ii) the New York State Department of Labor; and (iii) local workforce investment boards established pursuant to the federal Workforce Investment Act for the locality in which the mass layoff, relocation or employment loss will occur.

In addition to increasing the number of covered employers and requiring more advance notice, the NY WARN Act expands the scope of events that trigger the statute's notice requirements. Under the Federal WARN Act, a "plant closing" is the permanent or temporary shutdown of a single site of employment, or operating units within a single site of employment, resulting in an employment loss during any 30-day period of 50 or more full-time employees. A "mass layoff" under the federal law is a reduction in force that is not the result of a plant closing and results in an employment loss at a single site of employment during any 30-day period of 50 or more full-time employees, representing 33% of the workforce or at least 500 employees. The NY WARN Act significantly expands the definition of plant closings and mass layoffs by lowering the employee threshold in the context of plant closings to *25* employees (instead of 50) and, in the context of mass layoffs, decreasing the number of employment losses to 25 employees and 33% of the workforce or at least *250* employees (as opposed to 500). Finally, the NY WARN Act adds a "relocation" triggering event defined as the removal of all or substantially all of the industrial or commercial operations of an employer to a different location 50 miles or more away.

Interpretive Issues with the NY WARN Act

As drafted, the NY WARN Act presents a number of challenges for New York employers seeking to comply with its requirements. For example, the notice provisions fail to list plant closings as an event for which notice should be given, notwithstanding the fact that the law is premised on the requirement that notice be given to employees in the event of a plant closing. Instead, the plain language of the law requires notice when there has been an "employment loss" without any clarification as to how many or what percentage of terminated employees would trigger this event. Read broadly, employers implementing terminations unconnected to a plant closing, mass layoff or relocation would be required to provide 90 days' advance notice as set forth above. These anomalies will hopefully be clarified by a statutory amendment or Department of Labor regulation by the time the statute is to take effect.

NY WARN Act Penalties for Violations

The NY WARN Act provides for administrative enforcement by the New York State Department of Labor and a private right of action, as compared to the Federal WARN Act, which provides only for a private right of action. Employers that violate the NY WARN Act must provide back pay and the cost of benefits (including medical expenses incurred by the employee that would have been covered under the employer's benefit plan) to each terminated employee who did not receive the required notification for the period of the employer's violation, up to a maximum of 60 days. Employers are also liable for civil penalties of up to $500 per day and reasonable attorney's fees. The statute of limitations for such claims is six years.

NY WARN Act Exceptions

The NY WARN Act sets forth exceptions to the notice requirements under the following circumstances, which substantially mirror the exceptions set forth in the Federal WARN Act:

- If the mass layoff, relocation or employment loss resulted from a physical calamity, natural disaster or an act of terrorism or war;
- If, at the time the notice would have been required, (i) the employer was actively seeking capital or business; (ii) the capital or business sought, if obtained, would have enabled the employer to avoid or postpone the relocation or termination; and (iii) the employer reasonably and in good faith believed that providing the notice would have precluded the employer from obtaining such capital or business;
- If the need for notice was not reasonably foreseeable at the time the notice would have been required;
- If the plant closing is of a temporary facility or the plant closing or mass layoff is the result of the completion of a particular project or undertaking, and the affected employees were hired with the understanding that their employment was limited to the duration of the facility, project or undertaking; and
- If the plant closing or mass layoff is the result of a strike or lockout.

What This Means for Employers

New York has now joined an increasing number of states that have enacted state legislation to supplement protections afforded under the Federal WARN Act. The NY WARN Act covers more employers, is more easily triggered and requires more advance notice than the federal law. Furthermore, the statute's ambiguities will likely make compliance difficult pending promulgation of regulations by the New York Department of Labor. Employers are advised to consult with legal counsel in connection with an upcoming plant closing, reduction in force or relocation to determine whether they are subject to the law and to minimize their risk of liability.

New York Enacts Ban on Mandatory Overtime for Nurses

Effective July 1, 2009, public and private healthcare employers may not require registered nurses or licensed professional nurses to work mandatory overtime except in limited circumstances. In August 2008, New York Gov. David Paterson signed legislation prohibiting healthcare facilities from requiring nurses to work more than their "regularly scheduled hours of work," although the law does not explicitly set forth a cap on the number of hours a nurse may work each day or week.

This new legislation contains certain exceptions to the mandatory prohibition of overtime and does not prevent a nurse from voluntarily working overtime or preclude a healthcare employer from requiring overtime in the event of a healthcare disaster; federal, state or local emergency; or in connection with an ongoing medical or surgical procedure. An employer may also require a nurse to work overtime in the event of an "emergency," provided that the healthcare provider has made a good faith effort to obtain overtime coverage on a voluntary basis by, for example, seeking coverage from per diems, agency nurses and floating staff or by requesting an additional day of work from off-duty nurses.

What This Means for Employers

New York healthcare employers should examine their policies governing hours of work and overtime for nursing staff and review collective bargaining agreements for any provisions addressing mandatory overtime. Employers have less than a year to comply with the statute's new mandates and should make certain that they have sufficient procedures in place to maintain the requisite number of patient care employees to cover facility and patient needs without mandating overtime in violation of this new law.

Terminated Group Self-Insured Trusts Expose Employers to Joint and Several Liability

All New York employers are required to secure workers' compensation insurance for their employees. Employers have various options for workers' compensation coverage, including participation in a group self-insured trust pursuant to Sections 50(3-a) and 117 of the New York Workers' Compensation Law and the Regulations issued by the Workers' Compensation Board ("WCB") thereunder. Pursuant to the relevant statutory authority and as set forth in the trust agreements, each trust member is jointly and severally liable for all workers' compensation and employer liability obligations incurred by the trust for any contribution year in which the member was a participant. In recent months, over a thousand employers across New York State have been hit with enormous assessments - some in excess of a million dollars - imposed by the WCB to recover payments for the deficits of defunct group self-insured trusts. The collapse of the group self-insured trusts and levy of assessments has imposed a burden on many small- to medium-sized employers across all industries, including healthcare and manufacturing, who joined these trusts with the intent of providing workers' compensation benefits to their employees in an affordable and responsible manner.

The Worker's Compensation Law was modified in June 2008, followed by the WCB's amendment of the regulations thereunder in August 2008, all intended to provide the WCB with additional authority relative to self-insured trusts. Many employers are challenging the WCB's assessments as beyond the scope of its authority and/or as improper on other grounds. We will inform you how the courts rule relative to the same.

For Further Information

If you have questions about this Alert or would like more information, please contact any of the attorneys in our Employment & Immigration Practice Group or the attorney in the firm with whom you are regularly in contact.