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New York Mini-WARN Act Effective Soon – How Does It Compare to Federal and California WARN Acts?

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The recent economic downturn has sent companies scrambling for ways to cut costs, with many contemplating layoffs. Companies that choose to go ahead with layoffs should be aware of the requirements of the Federal Worker Adjustment and Retraining Notification Act ("Federal WARN"), as well as its many state counterparts or "Mini-WARN Acts." Federal WARN was enacted in 1988 to provide protection to employees, their families and communities, by requiring employers to provide notice sixty days in advance of covered plant closings and mass layoffs. New York passed its own Mini-WARN Act in August 2008, which becomes effective on February 1, 2009. New York's law differs from Federal WARN and many other Mini-WARN Acts in some significant ways.

This alert provides an introduction to the New York WARN Act ("NY WARN") as well as a comparison of its requirements to the requirements of Federal WARN and one of the oldest state Mini-WARN Acts[1] – the California WARN Act.

SUMMARY OF THE LAW

Like its federal and other state counterparts, NY WARN attempts to provide some protection to employees and their communities by requiring that notice be given to employees, their representatives, and government agencies in advance of a significant loss of jobs. Unfortunately, as drafted, the provisions of the statute are sometimes circular, wholly inconsistent, and unclear about when notice is required. (Other than that, it is very well drafted.)

Basic Definitions

NY WARN defines its key terms as follows:

"Mass layoff" 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 for: (i) at least 33% of full-time employees and at least 25 full-time employees; or (ii) at least 250 full-time employees.

"Relocation" is the removal of all or substantially all of the industrial or commercial operations of an employer to a different location 50 or more miles away.

"Employment loss" is: (a) an employment termination (excluding termination

for cause, voluntary departure, or retirement); (b) a *mass layoff* of more than 6 months; or (c) a more than 50% reduction in work hours during each month of a consecutive 6-month period.

"Plant closing" is the permanent or temporary shutdown of a single site of employment, or one or more facilities or operating units within a single site of employment, if the shutdown results in an employment loss of at least 25 full-time employees within any 30-day period.

When Is Notice Required?

NY WARN[2] requires businesses[3] with at least 50 employees (excluding part-time employees[4]) or 50 or more employees who work in the aggregate at least 2,000 hours per week to provide written notice 90 calendar days (as opposed to 60 days under Federal or California WARN Acts) before taking any of the following actions: (1) a "mass layoff," (2) a "relocation," or (3) an "employment loss." By comparison, Federal WARN notice requirements are triggered by mass layoffs and plant closings, and California WARN notice requirements are triggered by mass layoff, relocation, or termination.[5]

Note that although NY WARN goes through great pains to define a "plant closing," unlike federal

New New York Laws: Hiring Employees With a Criminal Record

Starting February 1, 2009, three new laws will affect employer practices in New York, all relating to the employment of individuals with prior criminal convictions. The new laws require employers to:

1. post a copy of Article 23-A of the New York Corrections Law ("Article 23-A") and any regulations promulgated pursuant to Article 23-A in a conspicuous manner in a place accessible to employees (N.Y. Lab. Law § 201-f);

2. provide a copy of Article 23-A to all job applicants undergoing a background check that qualifies as an investigative consumer report when the individual is informed that the background check may be requested (N.Y. Gen. Bus. Law § 380-C(2)(b)); and

3. provide applicants with an additional copy of Article 23-A if a criminal record is found from the background check (N.Y. Gen. Bus. Law § 380-g(d)).

Section 380-C applies to the gathering of investigative consumer reports in particular. An investigative consumer report is defined as "a consumer report or portion thereof in which information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with neighbors, friends, or associates of the consumer reported on or with others with whom he is acquainted or who may have knowledge concerning any such items of information. However, such information shall not include specific factual information on a consumer's credit record obtained directly from a creditor of the consumer or from a consumer reporting agency when such information was obtained directly from a creditor of the consumer or from the consumer."

A summary of Article 23-A is below.

Article 23-A

Article 23-A applies to any applicant with a prior criminal conviction who applies for a license or employment with either public agencies or private employers. (For the purpose of Article 23-A, a private employer has 10 or more employees.) Article 23-A does not apply to situations where it is illegal to employ such an applicant.

Article 23-A prohibits public agencies and private employers from denying or taking adverse action upon any application for any license or employment based on (1) the existence of a prior criminal conviction or (2)

Continued on Page 3

law, it does not specifically list a "plant closing" as an event triggering the notice obligation. Nevertheless, the drafters most likely intended employers to provide notice in the event of a plant closing, especially since the statute contains specific exceptions, setting forth the circumstances under which notice is excused for a plant closing (see below).[6]

Further, NY WARN states that a mass layoff period of less than 6 months that is extended to more than 6 months is an "employment loss" unless caused by business circumstances not reasonably foreseeable. As drafted, this provision is confusing since although employment losses are defined in part as mass layoffs of more than 6 months, mass layoffs in turn are defined as employment losses which are defined as occurring within 30 days.[7] Federal WARN has a similar provision for *layoffs* (not mass layoffs) extended to more than six months. Both statutes require that notice be given when it becomes reasonably foreseeable that an extension is possible, and both specify that no "employment loss" has occurred where, before a plant closing or mass layoff due to relocation or consolidation of part or all of the employer's business,

New New York Law
Continued from Page 2

"a finding of lack of 'good moral character'" as a result of prior criminal conviction(s) unless one of the following exceptions applies:

- there is a direct relationship between the criminal offenses and the specific license or employment; or
- granting or continuing the license or employment would involve an unreasonable risk to property, safety, or welfare of specific individuals or the general public.

Public agencies and private employers making a decision about an applicant with a prior criminal conviction must weigh the following factors:

- New York state public policy to encourage the licensure and employment of persons with criminal convictions;
- the specific duties and responsibilities necessarily related to the license or employment;
- any bearing the criminal offense(s) will have on the applicant's fitness or ability to perform his duties or responsibilities;
- the time elapsed since the criminal offense(s) occurred;
- the applicant's age at the time the criminal offense(s) occurred;
- the seriousness of the offense(s);
- any information produced either regarding the applicant's rehabilitation and good conduct;
- the public agency's or private employer's legitimate interest in protecting the property, safety, and welfare of specific individuals or the general public; and
- any certificate of relief from disabilities or a certificate of good conduct issued to the applicant. Such certificates create a presumption of rehabilitation regarding the offense(s) specified on the certificate.

Further, if a public agency or private employer denies the application of an individual convicted of a criminal offense, it must provide, within 30 days of a request, a written statement of the reasons for denial.

Article 23-A is enforceable against public agencies pursuant to Article 78 of the New York Civil Practice Law and Rules and against private employers by the New York Division of Human Rights pursuant to Article 15 of the New York Executive Law. It may also be enforced concurrently against private employers by the New York City Commission on Human Rights. ■

the employer offers to transfer the employee to a different site within a reasonable commuting distance with no more than a 6-month break in employment. Once again, New York probably intended to mimic Federal WARN and provide that *layoffs* (not mass layoffs) of less than 6 months extended to more than 6 months are an employment loss. California takes a different approach. Rather than defining "employment loss" or what is *not* an employment loss, California WARN builds the definition into the definitions for "layoff" and "mass layoff"; and no exception is provided for unforeseeable circumstances.

As under Federal WARN, two or more employment losses occurring within a 90-day period will be counted as one event unless the employer can prove that they are the result of separate and distinct actions and causes and not an attempt to evade NY WARN requirements.[8] Therefore, an employer conducting a layoff that is not large enough to trigger NY WARN should nonetheless comply with the Act's notification requirement if the company contemplates enough additional layoffs will occur within the 90-day timeframe to bring the total within the scope of NY WARN.

The relocation concept in NY WARN is significant. Relocation is not a trigger under Federal WARN. California WARN requires notice for relocation, but the relocation must be to a location 100 or more miles from the site as opposed to 50 or more under NY WARN.

What Are the Exceptions to Notice Requirements?

Under NY WARN, notice is not required if a mass layoff, relocation, or employment loss is necessitated by a physical calamity or an act of terrorism or war. While there is no such exemption in the Federal WARN, California WARN provides a notice exemption for physical calamity and acts of war.[9]

If unable to provide 90 days of notice, the employer must give notice as soon as practicable, and the notice must include a brief statement of the basis for reducing the notification period.

Similar to the Federal WARN, NY WARN exempts employers from providing notice for plant closings[10] where: (1) when required, the employer was actively seeking capital or business which if obtained would have enabled the postponement or avoidance of the plant closing and the employer believed notice would have precluded it from obtaining the capital or business; (2) need for notice was not reasonably foreseeable when it was required; or (3) the closing is the result of a natural disaster.[11] Additionally, NY WARN provides exceptions where the plant was a temporary facility and the project was completed and the employees were hired with the understanding that their employment was limited to that project; or the closing or mass layoff constitutes a strike or lockout not intended to evade NY WARN requirements.[12] If unable to provide 90 days of notice, the employer must give notice as soon as practicable, and the notice must include a brief statement of the basis for reducing the notification period.

Who Must Receive Notice?

Unlike the Federal WARN notice requirement, which allows notification of the employees' representatives instead of affected employees, NY WARN requires that employers provide written notice both to affected employees *and* that their representatives as well as the New York State Department of Labor and the local workforce investment

boards. Federal WARN requirements on notice content are incorporated into both NY WARN and California WARN by reference. Employers may provide notice by mailing it to the employee's last known address by either first class mail or certified mail or including it in the employee's paycheck. Neither California WARN nor Federal WARN offers examples of sufficient methods of notice communication, although regulations issued pursuant to Federal WARN allow that first class mail, personal delivery with optional signed receipt, and notice inserted in pay envelopes (for affected employees) are all viable options.[13]

Penalties

Penalties imposed under NY WARN are similar to those available under Federal WARN and California WARN. If an employer fails to provide proper notice, affected employees may bring a civil suit for violation of NY WARN and may recover backpay and the value of benefits for the period for which notice was not given, up to a maximum of 60 days or half the number of days that the employee was employed by the employer, whichever period is smaller. Payments for violations under all three WARN Acts are not to be considered remuneration and may not result in denial or reduction of any unemployment benefit. A prevailing employee in a civil action may also be awarded reasonable attorneys' fees.

As under Federal WARN and California WARN, an employer also may be subject to a civil penalty under NY WARN of up to $500 for each day of a violation unless the employer pays the amounts for which it is liable within 3 weeks of the date the employer orders the mass layoff, relocation, or employment loss. Total penalties under NY WARN, however, are capped at the level federal penalties would reach for the same violation. The Commissioner can reduce the violation if the employer's action or omission was made in good faith, and is instructed to consider the employer's size; hardship imposed on employees by violations; the employer's efforts to mitigate; and the reasons the employer believed failure to give notice was not a violation.

Neither the Commissioner nor any court is authorized under NY WARN to enjoin a plant closing, relocation, or mass layoff.

NY WARN provides additional offsets to liability, not available in either Federal or California WARN. Employer liability can be reduced by the following:

- any wages, except vacation pay accrued before the employer's violation, paid to the employee during the period of violation;

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- any voluntary and unconditional payments not made to satisfy any legal obligation made by the employer;
- any payments by the employer to a third-party trustee, such as premiums to benefit or pension plans on behalf of the employee for the violation period;
- any liability paid by the employer under any applicable federal law governing notification of mass layoffs, plant closings, or relocations;
- in an administrative proceeding by the Commissioner, any liability paid by the employer as the result of a private action under this article prior to the Commissioner's decision; and
- in any private action under this article, any liability paid by the employer in an administrative proceeding by the Commissioner

prior to adjudication of the private action.

Employers concerned about having affected employees work during the 90-day notice period because of its effect on workplace morale or the potential for misconduct by disgruntled employees, may want to consider providing pay in lieu of notice.

SIDE-BY-SIDE COMPARISON

The chart below summarizes key aspects of the WARN Acts for a clearer picture of how NY WARN compares to its federal and California counterparts.

RECOMMENDATIONS

Clear as mud? We agree. NY WARN empowers the Commissioner of the New York Department of Labor to issue rules and determine whether a violation occurred in any investigation or proceeding under NY WARN. Any clarification that the Commissioner offers regarding NY WARN's confusing and seemingly contradictory provisions will be welcome. Until regulations are issued or amendments passed, we can expect lots of claims and litigation to result from this enactment, and we strongly advise clients to seek legal counsel if there is any possibility that reduction in force might require notice under the law.

In the meantime, the longer notification period mandated by NY WARN emphasizes the importance of planning workforce reductions. As with any reduction in force, management and human resources should work closely with legal counsel while in the planning stage to take into consideration these and other laws, including the Older Worker Benefit Protection Act ("OWBPA"), the Employee Retirement Income Security Act of 1974 ("ERISA"), the Consolidated

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	FEDERAL WARN	CALIFORNIA WARN	NY WARN
Required Notice Period	60 days	60 days	90 days
Minimum Number of Employees to Apply	100 full-time	75	50 full-time
Minimum Number of Employees for Mass Layoff Notice	50 full-time, if 33% of workforce at single site or 500	50 regardless of site size	25 full-time, if 33% of workforce at a single site, or 250
Minimum Number of Employees for Plant Closing Notice	50 during any 30-day period	No minimum number	25 during any 30-day period
Notification for Relocation	No	Yes, if the site is 100 or more miles away	Yes, if the site is 50 or more miles away
Parties to Notify	• employee representative or (if unrepresented) the affected	• affected employees • Employment Development	• affected employees and their representatives • New York

Omnibus Budget Reconciliation Act of 1985 ("COBRA"), and any other states' Mini-WARN Acts that may apply. See our October 2008 Weathering the Storm: Employment Issues in an Economic Downturn Employment Law Commentary, for more information on relevant issues for employers considering a workforce reduction.

What does this mean for companies already in the midst of reductions? Unofficial guidance from the New York State Department of Labor suggests the companies are not expected to comply with NY WARN notice requirements prior to February 1, 2009. However, employers planning further reductions in February and beyond should be prepared to comply with NY WARN's more stringent notice requirements on February 1. ■

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[1] Many other states have passed Mini-WARN Acts that may impact national employers, including but not limited to Hawaii, Illinois, New Jersey, and Wisconsin.

[2] N.Y. Lab. Law §§ 860 to 860-I.

[3] NY WARN does not apply to "Federal or state government or any of their political subdivisions, including any unit of local government or any school district." N.Y. Lab. Law § 860-a(3).

[4] A "part-time employee" is one who is employed for an average of less than 20 hours per week or one who has been employed for less than 6 of the 12 months preceding the date on which notice is required. N.Y. Lab. Law § 860-a.

[5] 29 U.S.C § 2102(a); Cal. Lab. Code § 1401. California defines "termination" for the purpose of California WARN as "the cessation of all or substantially all of the industrial or commercial operations in a covered establishment." Cal. Lab. Code § 1400(g).

[6] Moreover, given that the definition of an "employment loss" includes "an employment termination (excluding termination for cause, voluntary departure, or retirement)," a plant closing arguably constitutes an "employment loss." Of course, read literally, this definition of "employment loss" also includes the layoff of a single employee and results in the presumably unintended obligation of employers to give notice each and every time they eliminate a single job.

[7] The use of the term "mass layoff" in the "employment loss" definition is probably a drafting error. It is more likely that the drafters intended to mimic the definition found in federal regulations which includes a "layoff exceeding 6 months." 20 C.F.R. § 639.3(f).

[8] California again takes a different approach. California WARN makes no mention of a period for consideration, simply requiring notice to be provided in the following cases: (a) mass layoffs of 50 or more employees at an establishment with at least 75 employees or (b) a termination where all or substantially all of the commercial operations at the site are shut down. Cal. Lab. Code § 1400.

[9] Cal. Lab. Code § 1401(c).

[10] NY WARN only lists these as exceptions for plant closings, although at least one of the exceptions – the one for strikes and lockouts – is also intended to apply to mass layoffs. N.Y. Lab. Law § 860-c(1).

[11] N.Y. Lab. Law § 860-c. California WARN only provides the first of these exceptions. *See* Cal. Lab. Code § 1402.5(A). Exceptions 1 and 2 also apply under Federal WARN. *See* 29 U.S.C § 2102(b).

[12] N.Y. Lab. Law § 860-c.

[13] 29 C.F.R. § 639.8.

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