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in this issue:

AUGUST 2008

Effective February 1, 2009, New York will join the growing number of states that have supplemented federal notification requirements for large layoffs. However, unless technical corrections to the new statute are made, complying with the requirements of NY WARN will be confusing and difficult especially when the requirements of Fed WARN are taken into account.

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East Coast Edition

A Littler Mendelson East Coast-specific Newsletter

New York WARN: Applies to Employers with as Few as 50 Employees, Covers Layoffs Involving as Few as 25 Employees at a Single Site, and Requires 90 Days' Notice

By Gerald T. Hathaway

Effective February 1, 2009, New York will join the growing number of states that have supplemented federal notification requirements for large layoffs.

The federal mass layoff and plant closing law, the Worker Adjustment and Retraining Notification Act[1] ("Fed WARN") comes into play where an employer has at least 100 employees, and it requires 60 days' notice when at least 50 are to experience an employment loss at a single site of employment. The New York Worker Adjustment and Retraining Notification Act[2] ("NY WARN") applies to employers with as few as 50 employees, and it requires 90 days' notice when as few as 25 are to experience an employment loss at a single site of employment. NY WARN is drafted in such a way, however, that technical compliance with its requirements will be difficult unless it is amended before it takes effect.

Fed WARN has been criticized by courts and the Government Accounting Office as being difficult to apply because of its peculiarly worded definitions and standards.[3] NY WARN was drafted by the New York Department of Labor ("NY DOL"), and it is quite clear that the drafters based much of the statute on Fed WARN. Unfortunately, the drafters introduce new concepts that will certainly cause a great deal of confusion and litigation over the requirements of NY WARN. Littler Mendelson is in communication with NY DOL urging some technical corrections to the law before its effective date.

Which Employers are Covered

NY WARN applies to employers having as few as 50 employees. Section 860-a.3 defines an employer as "any business enterprise that employs fifty or more employees, excluding part-time employees, or, fifty or more employees that work in the aggregate at least two thousand hours per week." Except for the numbers involved, this language tracks Fed WARN, but when there are fewer than 50 full-time employees, and there is to be a count of all hours work by all employees, including part-time employees, where Fed WARN would exclude overtime hours from its count of hours worked, NY WARN includes overtime hours toward its 2,000-hour minimum.[4] Like Fed WARN, the NY WARN definition does not say when it is that an employer takes the measurement to determine if it has the requisite number of employees. The Fed WARN regulations indicate that the measurement should be taken as of the date that notice would be required, except that if that time is not a representative period of the employer's employment level, a different "more representative" time should be used.[5] The expected New York regulations should give guidance on this point, and they will likely take a similar position.

Like Fed WARN, the New York law excludes *part-time employees* from the first part of the count, and it has a similar definition of part-time employees: One who on average works fewer than 20 hours per week (so an employee who works on average as few as 20 hours

per week would be regarded as a full-time employee - a result that would surprise most employers), or one who has worked fewer than six of the 12 months preceding the date on which notice is required. The notice date would be 90 days before the layoff (under Fed WARN, it would be 60). Thus, anyone first employed within six months of the notice date (which works out to be about nine months before a stand-alone layoff) would be excluded from the count as a part-time employee, regardless of the number of hours that person works (so a recent hire who works 60 hours per week would be excluded because such a person is only a part-time employee - another surprising result for employers). Because of the differing measurement periods (the period ending 90 days before a layoff event under NY WARN, and the period ending 60 days before a layoff event under Fed WARN), a recently hired individual may be a part-time employee for purposes of NY WARN, but a full-time employee for purposes of Fed WARN.

Even by excluding part-time employees the employer does not employ 50 employees, the analysis is not yet done - for if 50 or more employees, including part-time employees, work in the aggregate 2000 hours or more in a week, the employer is covered. As noted above, NY WARN would have the employer include in that count all overtime hours. An employer counting hours will have some difficulty with counting the number of exempt employees' hours worked, since those hours are not usually recorded, nor does any state or federal law require an employer to record hours worked by exempt employees. It can be expected that the counting of hours would occur no later than the work week preceding the date on which notice would be required. The Fed WARN regulations would allow an earlier counting period if the time around the date a WARN notice would be required is not "representative" of the size of the workforce. The NY regulations will likely have a similar provision.

Mass Layoff, Plant Closing and Relocation

Mass Layoff

The concept of mass layoff is relatively easy to grasp because it is similar to the mass layoff concept under Fed WARN. Under NY WARN, however, it is triggered when fewer persons are terminated: 250 employees at a single site of employment (this is half the number referenced in Fed WARN), other than part-time employees, or if fewer than 250 are being terminated, 33% of the employees at the site of employment (other than part-time employees), and at least 25 (other than part-time employees) (this is also half the number referenced in Fed WARN). As noted above, because differing notice dates are involved with NY WARN and Fed WARN (90 days versus 60 days), the dates on which an employer determines whether an employee is part time or not are different. The result of this is that an employee may be regarded as part-time for purposes of one statute, but not the other. The single-site concept is the same under NY WARN as it is under Fed WARN.

Plant Closing

The NY WARN definition of *plant closing* is very similar to the Fed WARN definition, except it applies if 25 or more employees (other than part-time employees) suffer an employment loss, which is half the number in the Fed WARN definition.

For purposes of counting employment losses to see if the threshold number requiring notice is met, both Fed WARN and NY WARN aggregate employment losses that occur over any 30-day period, and if the threshold is not met, they will combine employment losses over a period of 90 days.[6]

Relocation

Fed WARN does not have a concept of a *relocation* that in itself triggers a notice requirement. NY WARN section 860-a.8 defines a *relocation* as "a removal of all or substantially all of the industrial or commercial operations of an employer to a different location fifty miles or more away." Note that according to section 860-b.8 the term relocation does not have any requirement for any employment losses, and so a site with as few as one employee could come within the definition of a relocation, if it is moved to a new location 50 or more miles away.

What Triggers the 90-Day Notice Requirement: "Mass Layoff, Relocation or Employment Loss" -- but not a Plant Closing?

The operative section prohibiting a mass layoff or *plant closing* without giving advance notice in Fed WARN is contained in 29 U.S.C. section 2102(a). The comparable section in NY WARN is section 860-b.1, which tracks some, but not all of Fed WARN, and does not prohibit an employer from ordering a plant closing without first giving notice. Instead, it states, "[a]n employer may not order a mass layoff, relocation, or *employment loss*, unless [notice is given]." Note that NY WARN does not reference a "plant closing" in section 860-b.1, but in its place requires notices for an "employment loss." Here is where the New York statute not only departs from Fed WARN, but derails within itself. This may be a drafting mistake, and it is likely that "plant closing" was intended where "employment loss" appears in section 860-b. As written, 90-days' advance notice will be required before an employer implements an employment loss, which is defined by NY WARN to include a number of concepts, including the *termination of a single employee*: "an employment termination, other than a discharge for cause, voluntary departure, or retirement."[7] But as drafted, notice would not be required to be given to the single employees being terminated without cause, because the notice requirement references "affected employees," which is limited to employment losses associated with mass layoffs and plant closings (but oddly not employment losses associated with relocations).[8] As written, however, the statute requires an employer to notify governmental agencies before it terminates *anyone* without cause, or risk a civil penalty of $500 for every day notice is not given (subject to a cap). Surely this was not intended. There may be time for a technical correction.

Because of the omission of the term "plant closing" from its central section 860-d, NY WARN does not directly obligate an employer to give notice before ordering a plant closing. While section 860-d does not require that any notice be given for a plant closing, the current drafting of the enacted statute requires notices for "employment losses," and so if a plant closing occurs, there will be some employ-

ment losses, and as a consequence, there will be at least an obligation to give governmental notices. If there are a sufficient number of "employment losses" when a facility is closed such that a plant closing has occurred (i.e., 25 full-time employees), then those losing their jobs would be "affected employees," and they too would be required to receive notice. But this results from an unnecessarily complex analysis of the statute, which instead should clearly state that a notice must be issued prior to a plant closing.

What Is in the Notice, and Which Governmental Entities Should Receive It?

NY WARN notices go to affected employees (i.e., employees who may lose their jobs as a consequence of a mass layoff or plant closing - but not apparently relocations), unions who represent them, and governmental offices stated in the statute. These governmental offices are in addition to the offices that would receive notice for a Fed WARN mass layoff or plant closing. Unlike Fed WARN, notices to unionized employees go to both the employees and their union (a Fed WARN notice for a unionized employee goes only to the union, not to the employee).

The content of the notice is identical to the content of the notice required by Fed WARN because NY WARN simply incorporates by reference the elements of Fed WARN's notice requirements.[9]

Reductions in the Timing of the Notice

Fed WARN allows certain exceptions to its 60-day requirement, and NY WARN attempts to make similar exceptions to its 90-day requirement, but the curious drafting for mass layoff exceptions has clouded the extent to which exceptions are available under NY WARN.

Faltering Company (Plant Closing)

Fed WARN has a *faltering company* exception at 29 U.S.C. section 2102(b)(1), where a company may order a plant closing (but not a mass layoff) with less than 60 days' notice where it was seeking capital or business, and the giving of a notice would jeopardize the company's ability to obtain the required capital or business. NY WARN has the same concept, stated at section 860-c.1(a), which would allow a shortening of the 90-day notice period.

Unforeseeable Business Circumstances

Fed WARN has an *unforeseeable business circumstances* exception that may reduce the notice period for both a plant closing or mass layoff if the events giving rise to the need for the plant closing or mass layoff were "not reasonably foreseeable as of the time that notice would have been required."[10]

NY WARN applies the unforeseeable business exception only to plant closings, not mass layoffs, because the introductory part of the section that provides it, section 860-c.1, references only a plant closing.

Other Exceptions: Temporary Projects, Natural Disasters, Strikes and Lockouts

Fed WARN has additional exceptions to the notice periods for both plant closings and mass layoffs where the closing or layoff is caused by a natural disaster.[11] There is a separate section that excludes temporary projects and strikes and lockouts.[12] All of these concepts are blended into section 860-c.1, and while each exception references "mass layoff," the availability of a reduction in the notice period due to a "mass layoff" is called into doubt because the introductory part of section 860-c.1 appears to limit that section to plant closings. This is likely another drafting error, but the wording of the statute, as written, invites litigation. This section could be made clearer by technical corrections to its wording.

Sale of a Business

Like Fed WARN, NY WARN provides an exception in the case of a sale of a business, and this provision tracks the federal law, with a minor exception relating to the status of part-time employees upon the closing date of the sale.[13]

Damages

The damages available under NY WARN section 860-g.2 include a civil penalty of $500 per day and backpay for the period of time that notice should have been given to an affected employee, which would appear on its face to be a maximum of backpay (including benefits) for a 90-day period, except that one section expressly limits backpay and other penalties up to a maximum of 60 days. Section 860-h.2 also limits civil penalties to the amount "for which the employer may be liable under federal law for the same violation." The statute also makes it clear that the damage period is based on calendar days.[14] It appears that an employer giving only a 60-day notice pursuant to Fed WARN, and not the full 90-day period required by NY WARN, would be liable for backpay under NY WARN for a 30-day period.

Damages may be sought by the NY Commissioner of Labor in an agency proceeding, or by a private lawsuit, in court.

Miscellaneous Issues

There are other drafting problems with the statute, such as circular definitions of various terms, and the use of a defined term ("relocation") in one section when the ordinary meaning, not the statutory definition, is clearly intended. As noted above, Littler Mendelson is in communication with the Department of Labor regarding the drafting of the statute. If the NY DOL does not seek technical amendments to NY WARN, the agency may issue regulations that clarify the meaning of the statute, though litigants in private actions may likely challenge regulations that are in apparent conflict with the plain wording of the new statute as it was drafted.

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1 29 U.S.C. §§ 2101 et seq.
2 NY Senate Bill S8212, to be codified at N.Y. Labor Law §§ 860 et seq.
3 See The Worker Adjustment and Retraining Notification Act: Revising the Act and Educational Materials Could Clarify Employer Responsibilities and Employee Rights GAO-03-1003, (United States Government Accounting Office, September 19, 2003), available at http://www.gao.gov/docdblite/details.php?rptno=GAO-03-1003.
4 Compare NY WARN § 860-a.3 with 29 U.S.C. § 2101(a)(1).
5 20 C.F.R. § 639.5(a)(2).
6 Compare 29 U.S.C. § 2102(d) with NY WARN § 860-e.
7 NY WARN § 860-a.2(a).
8 See NY WARN §860-a.1.
9 NY WARN § 860-b.2.
10 29 U.S.C. § 2102(b)(2)(A).
11 29 U.S.C. § 2102(b)(2)(B).
12 29 U.S.C. § 2103.
13 Compare 29 U.S.C. § 2101(b) with NY WARN § 860-b.5.
14 NY WARN § 860-b.8.