



New York Plant Closing Law Covers More Employers and Smaller Employment Losses Than Federal WARN

New York recently enacted a law requiring employers to provide 90 days' advance notice to employees and others of expected employment losses due to a plant closing or mass layoff. Although similar to the federal Worker Adjustment and Retraining Notification Act (WARN), the New York law covers a larger cross-section of employers and smaller layoffs. Any employer considering a reduction in force in New York on or after February 1, 2009 must be prepared to comply with federal and more expansive state requirements.

Background

On August 5, 2008, Governor David Paterson signed the [New York State Worker Adjustment And Retraining Notification Act](#) (NY WARN) into law, joining New Jersey (see our April 2, 2008 [For Your Information](#)) and more than a dozen other states with plant closing laws. The law takes effect on February 1, 2009.

Like federal WARN, the New York law basically requires private sector employers to provide advance notice to employees, their collective bargaining representatives, and the state and local governments of certain reductions in force, shutdowns or transfers of operations. However, the New York law applies to substantially more employers than the federal law, and requires greater advance notice of covered plant closings or layoffs.

New York WARN

NY WARN generally applies to private sector employers with 50 or more employees (excluding part-time employees) or 50 or more employees (including part-time employees) that in the aggregate work at least 2,000 hours per week, and requires 90 days' advance written notice of mass layoffs, plant closings or relocations. For this purpose, part-time employees are those who work less than 20 hours per week on average or who have been employed for less than six of the 12 months immediately preceding the date notice must be given. By contrast, federal WARN requires employers with 100 or more full-time employees to provide at least 60 days' advance notice of a mass layoff or plant closing. Both Federal and NY WARN cap the maximum liability for back pay and benefits at 60 days.

Mass Layoffs. Substantially smaller employment losses than those required under federal law will trigger coverage under NY WARN. Under the New York law, a mass layoff occurs when either 250 employees or at

least 33% of the workforce totaling 25 or more employees lose their employment at a single site during any 30-day period but not as a result of a plant closing. For purposes of determining whether each of these thresholds is met, part-time employees are excluded.

Plant Closings and Relocations. A plant closing occurs under NY WARN when a permanent or temporary shutdown of a single employment site (or one or more facilities or operating units within a single site) results in an employment loss for 25 or more employees (other than part-time employees) – this is half the employment loss required to trigger coverage under federal law.

A relocation is the removal of all or substantially all of the employer's industrial or commercial operations to another location at least 50 miles away. Unlike federal WARN, the New York law requires a covered employer to provide notice of a relocation, whether or not there are any associated employment losses.

Determining Employment Loss. Under NY WARN, an employment loss is a termination or permanent job elimination, layoff exceeding six months, or a reduction in hours of more than 50% in each month of a six-month period. However, voluntary resignations, retirements, discharges for cause and certain transfer offers do not qualify as employment losses.

Who Receives Notice and When. When the New York law is triggered, affected employees, their union representatives, the New York State Department of Labor and the "local workforce investment board" must receive advance written notice of a mass layoff, plant closing or relocation that results in the specified employment losses at a single worksite during any 30-day period. These notices, which must generally contain all information required by federal law, must be provided at least 90 days before an employment loss occurs in connection with a triggering event. Generally, employment losses which occur during any 90-day period are aggregated for purposes of the notice requirements – unless the employer can demonstrate that the losses result from separate and distinct causes.

Significant Exceptions to Notice Requirements. The New York law contains exceptions to the notice requirements similar to many of the key federal exceptions for a facility closing or mass layoff – e.g., for employment losses caused by a natural disaster, the sale of a business, a strike/lockout, the closing of a temporary facility or the completion of a particular project. New York also excepts from its notice requirements employment losses due to a physical calamity or an act of terrorism or war.

As drafted, New York WARN expressly exempts a plant closing from the 90-day notice requirement in certain other circumstances. An employer could give less than 90 days' prior notice in the case of a faltering business (e.g., where the employer's capital seeking efforts to prevent closing would be jeopardized by providing notice) or where the need for a notice was not reasonably foreseeable at the time notice was required. A shorter notice period would be allowed when a layoff that was originally intended to be shorter than six months is extended due to business circumstances (including changes in price or cost) that were not foreseeable at the time of the initial layoff, as long as the employer gives notice as soon as it anticipates the layoff will exceed six months.

BUCK COMMENT. *Because there is some ambiguity in the statute, it is unclear whether certain New York exceptions are available only in the case of a plant closing, or would also be available in mass layoff and relocation situations. Hopefully, these issues will soon be clarified through technical amendments or guidance from the New York State Department of Labor.*

Penalties for Noncompliance. The New York law provides essentially the same penalties for noncompliance as federal law. Thus, it generally permits recovery of one day of lost wages and benefits for each day the employer fails to give the required notice (up to a maximum of 60 days). In addition, the employer may be subject to a civil penalty of \$500 per day if it fails to pay employees required amounts within three weeks from the date the employer orders the mass layoff, relocation or employment loss. In contrast to federal law, there is no provision to excuse minor or inadvertent errors in the notice or that occur as a result of changed circumstances during the notice period. However, an employer's liability may be reduced if it acted in good faith and had reasonable grounds to believe that it had complied with state requirements.

BUCK COMMENT. *Last year, legislation to strengthen the federal law (i.e., the [Federal Oversight Reform and Enforcement of the WARN Act](#)) was introduced in Congress by Senators Sherrod Brown (D-OH), Barack Obama (D-III) and Hillary Clinton (D-NY). This legislation would lower the federal coverage threshold for employers to 50 employees, reduce employment losses to 25 for a covered mass layoff, increase the notice period to 90 days, and double the back pay liability for WARN violations.*

Effective Date. The New York law will take effect on February 1, 2009.

Conclusion

Any employer considering a reduction in force in New York on or after February 1, 2009 must be prepared to comply with federal and more expansive state requirements. Careful advance planning of a reduction in force and the complex benefit issues that surround it is essential. Buck's consultants can assist you in dealing with these and any other issues relating to the downsizing of your workforce.

This FYI is intended to provide general information. It does not offer legal advice or purport to treat all the issues surrounding any one topic.