

“New York Employers, Be Fore-WARNed”

We are now in a full-blown recession, with many employers considering layoffs and downsizings. If you do business in New York, you need to be aware that New York will have its own new state Worker Adjustment and Retraining Notification Act (“NY WARN Act”), which will become effective February 1, 2009.

The federal WARN act requires employers with over 100 employees to provide 60 days advance written notice to affected employees and designated state and local officials prior to implementing a “mass layoff” or “plant closing.” Failure to do so may result in liability for back wages and benefits, as well as civil fines.

The NY WARN Act is different. In comparison to the Federal WARN, the New York Act provides significantly broader employer coverage and a greater notice period (90 versus 60 days). The triggers for WARN notice are also different. The following is a brief summary of the major differences between the state and federal WARN statutes:

COVERAGE

- The federal WARN only covers employers with more than **100** employees.
- NY WARN will cover employers with more than **50** employees.

TRIGGERS

Mass Layoff

- Under Federal WARN, a “**mass layoff**” occurs if there are employment losses at a single site within a 30-day period of (1) at least **33% of the workforce**

and at least **50** full-time employees, or (2) at least **500** employees, regardless of percentage.

- NY WARN defines “**mass layoff**” as a RIF resulting in employment losses at a “single employment site” within a 30-day period of (1) at least **33% of the workforce** and at least **25** full-time employees, or (2) at least **250** full-time employees, regardless of the percentage of workforce.

Plant Closing

- A “**plant closing**” under Federal WARN is the shut-down of a single site of employment, resulting in a employment loss of at least **50** full-time employees.
- NY WARN defines “**plant closing**” as a shutdown of a single employment site, resulting in the termination of **25** full-time employees within a 30-day period.

Relocations

- NY WARN is triggered by “**relocations**,” which are defined as “the removal of all or substantially all of the commercial or industrial operations of an employer to a different location” at least 50 miles away. Federal WARN does not separately cover relocations.

NOTICE PERIOD

- Federal WARN requires **60 days’** advance written notice to employees.
- NY WARN requires **90 days’** advance written notice before a layoff.
- NY WARN calculates time for notice and the imposition of penalties based on **calendar days**. Most courts calculate time under Federal WARN based on work days.
- NY WARN also requires notice to employees who are unionized. Federal WARN does not require separate notices to union workers.

ENFORCEMENT

- NY WARN empowers the **New York State Department of Labor to enforce the statute administratively**, in addition to private lawsuits by affected employees. Federal WARN provides for only a private right of action.
- Employees in NY will have up to 6 years to file a claim for lost wages and cost of benefits. Employers may also be fined up to \$500 per day.

THE EFFECTIVE DATE

The NY WARN Act becomes effective on February 1, 2009. However, be careful. The State Department of Labor has advised that the state Act will apply to all layoffs occurring on or after that date. Hence, if you are a New York employer covered by the state WARN Act, and you are now planning a layoff that will occur in February – you are “caught”. If your layoff falls within one of the “triggers”, you are now obligated to comply with the New York law, and give 90 days notice, or pay in lieu of notice, to the affected employees. In effect, you must follow the New York WARN law, even before its effective date.

CONCLUSION

The foregoing is only a brief summary of the major differences between the NY “WARN” Act and the federal WARN act. The NY WARN Act has detailed

regulations and enumerates a number of exceptions, which are not covered here.

Employers are also reminded that, as with many other employment statutes, when federal and state versions of the same statute conflict, employers **must comply with the more “generous” statute** — in this case, that will be the NY WARN. Employers should take heed that both the federal and state versions of WARN are complex statutes with potentially costly legal implications, and should therefore proceed with caution.

If you are considering a RIF, layoff, plant closing, or the shutdown of a site – anything that might trigger the obligations of the federal or state WARN statutes – we encourage you to seek legal advice before proceeding.

If you have questions about compliance with the New York “WARN” Act please contact:

BARBARA E. HOEY
Kelley Dye & Warren LLP
(212) 808-7836
bhoey@kelleydrye.com