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New York Department of Labor Regulations Implement the New York State Worker Adjustment and Retraining Notification Act

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As we reported in our previous LawFlash (see Morgan Lewis's August 22, 2008 LawFlash at http://www.morganlewis.com/pubs/LEPG_NYComplyStateWorkerAdjust_LF_22aug08.pdf), the New York State Worker Adjustment and Retraining Notification Act (New York WARN) is patterned in many ways after the federal Worker Adjustment and Retraining Act (WARN). The same can be said of New York WARN's February 1 implementing regulations (the New York Regulations). The New York Regulations make clear that New York WARN imposes certain requirements on New York employers that are not present under WARN. Although they are helpful in many respects, the New York Regulations do not fully clarify a number of ambiguous provisions in New York WARN.

The New York WARN Act

In brief, the most significant difference between New York WARN and WARN is that New York WARN requires employers with **50 or more** employees to give at least **90 days'** advance written notice of a qualifying event, while WARN only requires employers with **100 or more** employees to give at least **60 days'** advance written notice. It is unclear whether WARN and New York WARN are consistent in their definition of a qualifying event.

Other significant differences between WARN and New York WARN include New York's lower minimum thresholds for determining whether a "mass layoff" or "plant closing" may trigger mandatory notice requirements. Specifically, New York WARN defines a "mass layoff" as a reduction in force that results in an employment loss at a single site of (i) at least **33%** of the employees **and** at least **25** employees, excluding part-time employees (as opposed to WARN's 50-employee minimum threshold) **or** (ii) at least **250** employees, excluding part-time employees (as opposed to **500** employees under WARN).

Similarly, New York WARN defines a "plant closing" as the permanent or temporary "shutdown" of a single site of employment (or the shutdown of one or more facilities or operating units within a single site), if the shutdown results in an employment loss at the single site during a 30-day period of **25 or more** employees, excluding part-time employees (as opposed to **50 employees** under WARN).

The New York WARN Regulations

In many important ways, the New York Regulations mirror the language contained in the regulations implementing WARN (the Federal Regulations). There are, however, some significant differences that New York employers must carefully consider in planning workforce reductions or business changes involving employment losses.

For example:

- Under both WARN and New York WARN, an employment loss does not result if a plant closing or mass layoff is the result of the relocation of all or part of the employer's business, and the employer offers to transfer the employees to a different site of employment within a "reasonable commuting distance." While the New York Regulations and the Federal Regulations both reference local custom in determining what is a reasonable commuting distance, the New York Regulations provide additional guidance. Specifically, the New York Regulations state that a reasonable commuting distance cannot "exceed that which can be reasonably traveled in one and one-half hours when the site of employment is being moved to a location within the City of New York or on Long Island, or one hour when the site of employment is being moved to any other location in the state."

- The New York Regulations define "employer" to include any business enterprise that employs **50 or more** employees in New York who work, in aggregate, at least **2,000** hours per week (as opposed to the Federal Regulations' **100**-employee minimum who must work an aggregate of at least **4,000** hours per week).

- The New York Regulations allow an employer to assess whether WARN has been triggered by "measur[ing] the average number of individuals employed by the employer over the ninety day look back period." The Federal Regulations instead require an employer to evaluate notice obligations based on the number of employees as of "the date the first notice is required to be given."[1]

- The New York Regulations explicitly prohibit an employer from providing notice to employees by email. Moreover, notice must be sent on the employer's "official letterhead" and be signed by "an individual with authority to represent the employer." An original copy must be sent to the Department of Labor. The Federal Regulations are silent on these issues.

- WARN requires that notice be sent to the union representative(s) of affected employees, **or** to the affected employees themselves if there is no representative, the state dislocated worker unit, and the chief elected official of the unit of local government where the WARN event will occur. The New York Regulations require that notice be sent to the union representative(s) of affected employees ***and*** the affected employees themselves, as well as the New York Commissioner of Labor and the Local Workforce Investment Board where the employment site is located.

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[1] Under both statutes, if the result is "clearly unrepresentative of the ordinary or average employment level, then a more representative number can be used."

- Certain notices under New York WARN must be more detailed than those required by WARN. Specifically, the notice to the Commissioner of Labor and to the employee representative(s) must contain the names of affected employees and their job titles. Also, the New York Regulations dictate that affected employees and their union representative(s) be provided with information concerning unemployment insurance, job training, and re-employment services (sample language is included in the New York Regulations). Finally, as a general rule, notice to affected employees "must be provided in a language understandable to the employee." No comparable requirements exist under WARN.

While providing some helpful guidance, the New York Regulations fall short of clarifying the scope of two key provisions contained in New York WARN: (1) what events trigger notification requirements, and (2) the application of certain exceptions to notification requirements.

First, as we noted in our previous LawFlash, New York WARN ostensibly requires notice in advance of every "employment loss," "mass layoff" and "relocation." However, the "employment loss" reference makes little sense as that term is defined to be any **single** employment termination. Requiring notice in advance of every "employment loss" would negate the statute's "mass layoff' definition. In addition, the term "plant closing" is not identified as a triggering event for New York WARN, although it is mentioned in the statute's definition of "affected employees." The New York Regulations do little to bring clarity to these issues. Without explanation, the New York Regulations simply omit any reference to an "employment loss" as an event that requires notice, substituting instead a reference to a "plant closing."

Second, it is unclear under what circumstances certain exceptions to New York WARN's notification requirements apply. Both WARN and New York WARN excuse notification in the event of (1) a faltering company; (2) an unforeseeable business circumstances; (3) a natural disaster; (4) a strike or lockout, and/or (5) a closure of a temporary facility or project. New York WARN expressly states that these exceptions only apply in the event of a "plant closing"—but then inexplicably reference the term "mass layoff" in describing the natural disaster, strike or lockout, and temporary facility or project exceptions. The New York Regulations only further confuse this issue. They indicate that the faltering company, unforeseeable business circumstances, and natural disaster exceptions apply not only with respect to plant closings, but also in connection with a mass layoff, relocation, or covered reduction in work hours. The temporary facility or project exception applies not only in the case of a plant closing, but also in the context of a mass layoff. Finally, the New York Regulations are silent as to the circumstances in which the strike or lockout exception applies and seemingly applies in all circumstances.

New York employers have been left with conflicting guidance about what events trigger notification requirements, and when an exception might apply so as to excuse notification. New York employers planning workforce reductions or business changes should carefully consider their notice obligations under WARN and New York WARN before effecting employment reductions.

Our Morgan Lewis Workforce Change Practice addresses these and other legal issues that can arise from workforce reductions, layoffs, and other types of business restructuring.

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