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New York State Emergency Regulations Modify NY Employers' WARN Responsibilities

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With very little fanfare, the New York State Department of Labor (the "Department") recently filed a Notice of Emergency Adoption and Proposed Rule Making (the "Emergency Regulations") that significantly amends the existing regulations to the New York State Worker Adjustment and Retraining Notification Act (the "NYS WARN Act" or the "Act"). The Emergency Regulations became effective on February 12, 2010. For additional information about the Emergency Regulations, visit the Department's Web site at http://www.labor.ny.gov/workforcenypartners/warn/warnportal.shtm.

The NYS WARN Act has been effective since February 2009. Under the Act, companies with at least 50 employees within New York State (as compared to the federal WARN Act's 100 employee threshold) must provide at least 90 days' notice to affected employees and their representatives, the Department, and the local Workforce Investment Board(s) ("LWIB") when the employer experiences a "plant closing" or "relocation" affecting 25 or more full-time employees, or a "mass layoff" or "covered reduction in work hours" (as those terms are defined in the Act and Emergency Regulations) affecting at least 25 full-time employees (who represent at least 33 percent of the workforce) or at least 250 full-time employees.

Each of the eight sections of the NYS WARN Act's original regulations have been amended, and a final ninth section, entitled "Preservation of Other Rights and Remedies," has been added. We have summarized below the most significant aspects of the Emergency Regulations.

I. DEFINITIONS

A. Employer

The definition of "employer" remains the same: a business, whether for-profit or not-for-profit, that employs 50 or more employees within New York State, excluding part-time employees, or 50 or more employees, including part-time employees, who work, in aggregate, at least 2,000 hours per week, including "overtime hours earned on a regular basis," as that term is defined in the Emergency Regulations.

The Emergency Regulations provide additional guidance, in that they specify that the following entities are considered employers:

- A receiver, trustee, debtor-in-possession, or other fiduciary (under the provisions of the U.S. Bankruptcy Code) or other parties responsible for continuing operations of the business entity.

- A client-employer of a professional employer organization ("PEO"), under certain circumstances.

B. Employment Loss

An "employment loss" still includes (i) an employment termination, other than a discharge for cause, voluntary departure, or retirement; (ii) a mass layoff exceeding six months and affecting at least 25 full-time employees (50 under the federal WARN Act) who represent at least 33 percent of the workforce or at least 250 full-time employees (500 under the federal WARN Act); or (iii) a reduction in hours of work of more than 50 percent during each month of any consecutive six-month period. The Emergency Regulations add the following fourth and fifth categories: (iv) plant closings affecting 25 or more full-time employees (50 under the federal WARN Act) and (v) certain relocations affecting 25 or more full-time employees. In addition, any of the above enumerated actions that are the result of a bankruptcy filing or the sale of a business are now considered an "employment loss."

The Emergency Regulations further clarify that a reduction in hours of work only qualifies as an "employment loss" if it affects (i) at least 25 or more full-time employees (who make up at least 33 percent of the workforce) or (ii) at least 250 full-time employees.

C. Single Site of Employment

Determining whether an employment loss affects a "single site of employment" has always been a difficult component of compliance with the federal and NYS WARN Acts. The Emergency Regulations provide additional examples of what the Department may or may not consider to be a "single site of employment."

For example, "[w]here an employer has two separate locations in the same geographic area and the purpose of one location is to support the operations of the other location, and this support requires travel between the two locations, the two locations will be considered a single site." However, "[n]on-contiguous sites in the same geographic area that have separate management, produce different products or provide different services, and have separate workforces do not constitute a single site of employment."

D. Date of Layoff

The Emergency Regulations define a new term, "date of layoff," as the last day an employee is eligible or permitted to work for his/her employer. With respect to this term, the Emergency Regulations also now provide that payments to an employee subsequent to the date of layoff, whether in the form of continued payment of wages, severance payments, vacation pay, personal leave, or other similar benefits, do not extend the employee's date of layoff. The addition of this definition is significant, especially in light of the clarified rules with respect to "pay in lieu of notice," which are discussed in greater detail below.

II. NOTICE

A. Scope

Several provisions have been added to the Emergency Regulations so as to make them more consistent with the federal WARN Act's regulations. For example, the Emergency Regulations clarify obligations under the NYS WARN Act in connection with the sale of a business or a merger (*i.e.,* although a seller has NYS WARN Act obligations up to the point of the sale, and then those obligations shift to the buyer, a promise of employment by the buyer to an employee does not relieve the seller of the obligation to provide notice). The Emergency Regulations also conform to the federal WARN Act's requirements regarding the 30-day and 90-day look-ahead and look-back periods.

B. Providing Notice

The Emergency Regulations clarify that if notice is made by first class mail, such notice must be post-marked by the 90th day prior to the date of layoff. Further, the Emergency Regulations provide that notice to employees may be made via company e-mail, so long as every employee has regular access to a personal computer in the workplace, and such e-mail is able to be received and viewed by employees during work hours. Any such e-mail must be addressed to each employee at the e-mail address provided to the employee by the employer, and the employer must be able to confirm that the e-mail was "received" by each employee. Further, the e-mail notice must be designated as "urgent." Finally, where an e-mail is identified as "undeliverable," the employer must provide notice in an expeditious manner to the employee (*e.g.,* by overnight mail, hand delivery,

or inter-office mail). If such delivery takes more than five days, then the notice period must be extended accordingly.

The Emergency Regulations provide that notice must be made by a person who has authority to bind the company (and who must attest to the truthfulness of the information contained in the notice), and must either be made by e-mail or on company letterhead.

C. Content

Although the New York and the federal WARN Acts require different content in their notices, employers may wish to utilize the same notice to meet both state and federal notice requirements. Employers may do so, as long as all information required under the federal and state laws are included in such notices.

As with the NYS WARN Act's original regulations, the Emergency Regulations state that notice must be provided to the following: (i) affected employees; (ii) their representatives (if unionized); (iii) the Department; and (iv) the LWIB where each applicable site of employment is located. The Emergency Regulations make clear that this last requirement is satisfied by providing notice to the local chief elected official only if, in that location, the LWIB is the same person as the chief elected official. The copy of the notice to the Department may be either mailed or faxed (with a hard copy sent by mail). As noted above, the NYS WARN Act's notice requirements are more stringent than those provided under the federal WARN Act, which, for example, do not require employers to provide details such as lists of affected employees and/or specific positions affected, so long as the information is maintained and available at the employer's place of business. Further, certain notices under the NYS WARN Act must be sent to different recipients than under the federal WARN Act.

The specific requirements of each of the notices have been modified in the Emergency Regulations. For example, the notice to the Department must now include the name of the employer representative as well as his/her telephone number. As another example, with respect to the list of the affected employees, the notice to the Department must now include not only a list of affected job titles and a list of the names of the affected employees, but also the addresses of the affected employees. Additionally, the notice to the Department must also include a confirmation that the other notices required by the NYS WARN Act were made, the method the employer used to distribute notice to affected employees, and a sample notice to affected employees.

The contents of the notices to affected employees have been modified in the Emergency Regulations. For example, affected employees must be notified of both the expected date of the employee's own separation and the date of the first expected separation. Further, the required statement to affected employees

provided in the NYS WARN Act's original regulations has been modified to clarify that the employee may be eligible for unemployment insurance after his/her last day of employment.

Finally, similar changes as those described above have been added to the notices to each of the LWIB's and the employees' representatives.

III. PAY IN LIEU OF NOTICE

The Emergency Regulations clarify that employers will not be subject to civil penalty if they pay affected employees the total amount for which the employer is liable (including back pay and all fringe benefits), within three weeks from the affected employees' "date of layoff" (as defined in Section I.D. above). Further, the Emergency Regulations provide that "[p]ayments to an employee subsequent to the date of layoff, whether continuing to pay an employee's normal weekly wage, or for severance pay, vacation pay, personal leave, or other similar benefits, shall not extend the employee's date of layoff." Therefore, for those employees who are not permitted to work during the notice period, employers, if they wish to avoid penalties, should ensure that they make any payments in lieu of notice within three weeks of the last day the employee is permitted to work.

Additionally, the Emergency Regulations provide a revised statement that must be included in any notice provided to employees being paid in lieu of notice.

IV. OTHER AMENDMENTS

Among other less significant amendments, the Emergency Regulations address seasonal employment (*e.g.,* under certain circumstances, notice is not required if the closing or layoff results from the completion of a particular seasonal project) and additional factors the Department may consider to reduce the amount of penalty for non-compliance (*e.g.*, the employer's good faith cooperation and truthfulness).

V. CONCLUSION: IMPACT OF THE NYS WARN ACT AND EMERGENCY REGULATIONS

Unlike the federal WARN Act, which requires employees to bring private lawsuits to seek redress for violations, the NYS WARN Act empowers the Department to recover back wage and benefits on behalf of employees, in addition to imposing civil penalties (up to $500 for each day of violation) against employers that fail to provide the required NYS WARN notice. Since the NYS WARN Act took effect in early 2009, the Department has issued four Notices of Violation and collected $7,500 in penalties. Currently, the Department is conducting approximately 20 NYS WARN Act investigations. In light of the Emergency Regulations and the Department's increased enforcement efforts, it is imperative that employers properly and carefully navigate the stringent notice requirements of both the state and federal laws.

Although the Emergency Regulations clarify several aspects of the NYS WARN Act, they do not address all situations that may arise. Employers should still consult with counsel to navigate this complex law.

If you have questions related to the NYS or federal WARN Act, please contact any of the attorneys listed below.

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