

Updated New York WARN Act Regulations Address Post-Pandemic Environment, Add Employer Obligations

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The New York State Department of Labor (NYSDOL) has released amended New York State Worker Adjustment and Retraining Act (NYS WARN) Regulations that, in large part, respond to the unique issues presented during the COVID-19 pandemic relating to employers' provision of fewer than 90 days of notice, temporary layoffs, and rise of remote and hybrid work arrangements.

The updated Regulations also align the existing regulations with the 2020 amendments to the NYS WARN Act, include gender-neutral references, and clarify and expand certain NYS WARN notice contents.

“Employer” Status Under NYS WARN

An “employer” under NYS WARN is a business enterprise that employs at least 50 employees in New York.

The NYS WARN amendments add specific treatment of remote workers, providing that remote employees (other than part-time employees) who are “based at the employment site” must be counted in determining whether the business is covered as an “employer” under NYS WARN. The amendments do not require that the remote employee’s remote worksite (*e.g.*, their home) be located in New York.

The amendments also distinguish between a “temporary layoff” and a “permanent layoff.” A “temporary layoff” is a mass layoff with a duration of less than a consecutive six-month period and a planned return of employees after the layoff period ends. A temporary layoff is not deemed to be subject to NYS WARN notice requirements. On the other hand, a “permanent layoff” is a mass layoff that extends beyond a consecutive six-month period and for which the employer must comply with notice requirements “from the time of the employment loss.”

Additional WARN Notice Recipients

In addition to notices to the commissioner of labor, affected employees and their union representatives, and the local workforce investment board, tracking 2020 WARN Act amendments, an employer must provide NYS WARN notices to the following individuals and entities where the employment site is located:

- The chief elected official of the unit or units of local government.
- The school district or districts.
- The locality that provided police, firefighting, emergency medical or ambulance services, or other emergency services, to the locale where the site of employment is located. Where two or more villages, towns, cities, counties, or a combination therefore provide these services, each locality that provides the services must

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receive WARN notice.

The updated Regulations also set forth the contents of each of these additional notices.

Changes to Contents, Transmission of NYS WARN Notices

The amendments require the notice to the commissioner of labor to include far more information than previously required. Among other new requirements, these notices also must include:

- The employer's complete legal business name, and any business names used in the operation of the business.
- The total number of full-time and part-time employees the employer employs throughout New York State and at each affected employment site, as well as the number of affected full-time and part-time employees at each affected site.
- The personal telephone number(s), home address, and email address (if known) of each affected employee, as well as their work locations, part-time or full-time status, method of payment (hourly, salary, or commission), expected separation date, and the employee's affiliation to an employee representative (union).

Further, instead of requiring an original signature on the commissioner of labor notice and that the notices be sent by mail or fax, an employer must provide the notice to the commissioner of labor electronically in the manner prescribed by the commissioner of labor and identified on the Department's website, or through an alternative method approved by the commissioner. The NYS DOL has a new employer online WARN portal and is urging employers to provide information through the portal. To access the portal, an employer must create an account on the NY.GOV website and, before it enters data into the portal, have accessible all information the NYS DOL requires.

The WARN notices for affected employees, representatives of employees and other government entities also require additional information regarding the employer, including the business address and e-mail address of the agent of the employer to contact for further information, its complete legal business name, and any business names used for the employment site.

Notices to affected employees also should include "any additional information known at the time of the notice and relevant to the separation, including but not limited information on severance packages or financial incentives if the employee remains and works until the effective date of the mass layoff, relocation or employment loss, available dislocated worker assistance, and, if the planned action is expected to be temporary, the estimated duration."

NYS WARN Exceptions

Perhaps the most significant change to the updated NYS WARN Regulations is the new requirement that an employer seeking a reduction or excusal from the NYS WARN notice requirements obtain a determination from the commissioner of labor that the employer established all of the requirements of the claimed exception.

In addition to providing the required NYS WARN notice to the commissioner of labor, within 10 business days of provision of WARN notices, the employer must submit to the commissioner of labor a request for a determination that the employer meets the

exception's requirements. The request must include an affidavit and a statement and documentation supporting the bases for invoking the exception. Thereafter, the commissioner will conduct an investigation and determine whether the employer meets the exception's requirements. If the commissioner finds the employer does not satisfy all of the exception's requirements, the commissioner will commence an enforcement action against the employer for determining the employer's liability for violation of NYS WARN. An employer that fails to submit a request for a commissioner determination may not rely on an exception to avoid liability.

The new Regulations also clearly state that the "faltering company exception" applies only to a "plant closing" and expand on the showing an employer must make in order to satisfy the requirements of this exception.

Clearly in response to the pandemic and the current world situation, the amended Regulations include as examples of unforeseeable business circumstances, "a public health emergency, including but not limited to a pandemic, that results in a sudden and unexpected closure" and "a terrorist attack directly affecting operations."

Sales of Businesses

The amendments seek to clarify the earlier confusing treatment of NYS WARN notice obligations in the context of a sale of business. If there is a sale and the seller terminates employees prior to the closing of the sale transaction, the seller has the obligation to provide any required WARN notices. Under the prior version of the Regulations, a promise of employment by the purchaser to an employee does not relieve the seller of its WARN notice obligations.

The amendments added a qualification: If, as a condition of the "purchase agreement," the purchaser agrees to extend employment offers to the seller's employees, the seller may rely on that promise and, should the purchaser fail to comply with its promise, the purchaser, not the seller, is obligated to provide WARN notices and the seller is relieved of such obligation. Neither the federal WARN Act (29 U.S.C. § 2101 *et seq.*) nor the federal WARN regulations (20 C.F.R. § 639 *et seq.*) expressly provide for similar treatment in a sale situation where federal WARN notices are required.

Payments in Lieu of Notice of Separation, Layoff

Any payments in lieu of a WARN notice, except for payments related to an employer's violation of the NYS WARN Act, will be treated as wages with respect to the WARN notice period, provided the following conditions are met:

- There must be an employment agreement or a uniformly applied company policy that requires the employing unit give the employee a definite period of notice before a layoff or separation; and
- The employee must be laid off or separated without the required notice; and
- The employing unit must pay the employee a sum equal to the employee's regular wages and the value of the costs of any benefits, or an amount computed in accordance with a formula based on the employee's past earnings and benefits costs, for the required period of the notice.

If the payment does not satisfy all of these conditions, the payment will be viewed as severance pay, rather than payment due for the WARN notice period, except for payments that qualify as vacation pay in connection with the layoff and are not relate

to an employer's liability for violation of NYS WARN. Again, employers should be mindful of different treatment under the federal WARN Act.

Takeaway

The amended NYS WARN Regulations present additional challenges and requirements for employers than the already complex and often confusing federal and state requirements relating to plant closings, mass layoffs and relocations. Employers contemplating layoffs or plant closings should contact a member of our reductions-in-force and WARN team or the Jackson Lewis attorney with whom they work for guidance.

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