



LABOR & EMPLOYMENT DEPARTMENT

ALERT

WARNING: REVISED REGULATIONS ALTER EMPLOYERS' OBLIGATIONS UNDER THE NEW YORK WARN ACT

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Recent Publication of Revised Regulations

The New York Department of Labor (NY DOL) has revised the regulations under the New York Worker Adjustment and Retraining Notification Act (NY WARN Act). The revised regulations, published in the *New York State Register* on March 3, substantially change employers' obligations under the NY WARN Act and resolve a number of ambiguities in the law. The revised regulations, which became effective upon their filing date on February 12, 2010, replace regulations published in January 2009. Although currently in effect, the new rules are subject to a 45-day comment period, which commenced on March 4, 2010.

The New York WARN Act

The NY WARN Act became law in August 2008 and took effect on February 1, 2009. It requires employers to provide employees, their representatives, the NY DOL and the local Workforce Investment Board, with 90 days notice of plant closings, layoffs and other types of workforce transitions. Failure to provide timely and adequate notice may result in exposure to significant liability for employers, including back pay and the value of benefits lost during the notice period.

Generally, the NY WARN Act's notice requirements are more stringent than its federal counterpart, the Worker Adjustment and Retraining Notification Act (WARN Act). For example, the NY WARN Act requires 90 days notice while the federal WARN Act only requires 60 days

notice. In addition, unlike the federal WARN Act, the NY WARN Act covers smaller employers (employers with 50 or more employees, as compared to 100 or more employees under the federal WARN Act) and smaller job losses (notice requirements can be triggered when as few as 25 employees are affected, as opposed to 50 employees under the federal WARN Act).

Important Changes in the Revised Regulations

What follows is a brief summary of some of the revised regulations' more significant changes:

- **When Notice Is Required Under the NY WARN Act**

The revised regulations alter and/or clarify the rules for when the notice requirements under the NY WARN Act are triggered.

One example of this occurs in the definition of a "reduction in hours of work"—an occurrence that can trigger the statute's notice requirements. Prior to the revisions, in order for the law's notice requirements to be implicated by a reduction in hours, such a reduction would require a "reduction in hours of work of more than fifty percent (50 percent) during each month of any consecutive six month period."

This definition has been clarified and limited to instances where the above-referenced reduction in hours is imposed on: (1) at least 25 employees,

constituting at least 33 percent of the employees at the site (excluding part-time employees); or (2) at least 250 employees (excluding part-time employees), regardless of whether they constitute at least 33 percent of the employees at the site.

Similarly, definitions in the regulations were revised to be consistent with the terms of the statute. The revised regulations clarify that in order to trigger the notice requirements for a mass layoff based on the fact that 33 percent of the employees at a single site of employment are being laid off, the number of employees laid off must total at least 25 employees.

The new regulations also clarify the rules regarding the aggregation of laid off employees during the 30- and 90-day periods before and after employment decisions are made for purposes of determining whether the requisite number of employees have been laid off to trigger the statute's notice requirements.

• **New and Revised Definitions**

The revised regulations both modify and create new definitions for terms used in the NY WARN Act to help better guide employers in their compliance efforts under the statute. Significantly, the revised regulations now define the "date of layoff" as "the last day an employee is eligible or permitted to work for his/her employer." The regulations further specify that "the fact that an employer continues to pay an employee after the date of the layoff does not change the employee's employment status," and that payments that are made subsequent to the date of layoff, whether such payments constitute continued payments of the employee's "weekly wage" or "severance pay, vacation pay, personal leave, and other similar benefits, shall not extend the employee's date of layoff." In other words, an employer cannot extend the amount of time it has to provide notice, or otherwise avoid its notice obligations under the statute, by making payments, such as severance payments, to employees who are no longer working.

Another important definition modification was made with respect to the "single site of employment" definition, which now expressly includes two separation locations "in the same geographic area" where "the purpose of one location is to support the operations of the other location."

In addition, many of the other terms in the statute were implemented or revised, including those for: "affected employee," "consolidation of all or part of a business," "employer," "employment loss," "hours of work," "mass layoff," "relocation" and "merger."

• **Covered Employers**

One of the more significant revisions to the statute's terms occurs in the definition of "employer." The new regulations clarify which employees should be counted when determining if an employer meets the threshold of 50 employees to be covered under the law. Notably, the revisions clarify that individuals who are on "temporary layoff or on leave" and who have a "reasonable expectation of recall" must be included in the count.

• **Notice Responsibilities**

The regulations clarify which entities are required to provide the required notice in connection with the sale, consolidation or merger of any companies and the timing for when such notice is required (i.e., whether notice must be provided before or after the transaction).

• **Content of Notice**

The new regulations now require that the NY WARN notice, among other things, be provided "in a language understandable to the employee," that the notice provided to the Commissioner of Labor and employee representatives include the addresses of the employees to be laid off, and that the notice to the affected employees contain various advisory statements.

Some of the more significant clarifications, with regard to the content of such notices, include the following:

Separation Schedules: The revised regulations clarify that if separations are planned according to a schedule, "the schedule shall indicate the separation date or the beginning date of each fourteen (14)-day period during which any separations are expected to occur."

Advisory Statements: The revised regulations require that the notice provided to the Commissioner of Labor provide a statement as to whether other notices required under the statute have been provided, the date that such notices were sent and the means of delivery utilized. In

addition, the revised regulations also require that the notice to affected employees include a statement concerning employees' eligibility for unemployment insurance benefits.

• **Service of Notice**

The regulations now provide, for the first time, that the required notice may be provided via e-mail if, among other requirements, "all affected employees have regular access in the workplace to personal computers," the e-mail is marked "urgent" and the employer can "demonstrate that an e-mail notice was received by each affected employee."

• **Seasonal Employees**

The revised regulations clarify that seasonal employees, like temporary employees, are not required to be recipients of notice if the closing or layoff at issue results from the completion of a particular seasonal project or undertaking, and if the affected employees were hired "with the understanding that their employment was limited to the duration of the seasonal project or undertaking."

• **Penalties**

The revised regulations clarify that "severance packages or other payments required pursuant to

employee contracts, collective bargaining agreements, through other legal obligations, or under law" cannot be credited against liability. In addition, the regulations modify the deadline for the employer to either pay the amount owed because of a violation or request a hearing.

• **Confidentiality**

Under the terms of the revised regulations, the NY DOL has agreed to keep confidential the names and addresses of employees appearing on NY WARN notices.

• **Relationship to the Federal Law**

The revised regulations clarify the boundaries of the relationship between the NY WARN Act and the federal WARN Act in a new "rights and remedies" provision stating that the NY WARN Act does not exempt employers from complying with any other statute or legal obligation.

This Alert provides only a brief summary of some of the changes implemented by the revised regulations. For more information regarding this Alert, please contact Daniel N. Kuperstein at dkuperstein@foxrothschild.com, or a member of the New York office's [Labor & Employment Department](#) at 212.878.7983.



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