PRYOR CASHMAN LLP

LEGAL UPDATE

February 11, 2009 *By: Joshua Zuckerberg, Anna E. Hutchinson and Vanessa G. Lan*

THE NEW YORK STATE WARN ACT, RECENT AMENDMENTS TO THE AMERICANS WITH DISABILITIES ACT AND CHANGES TO THE FAMILY AND MEDICAL LEAVE ACT

NEW LAWS FOR THE NEW YEAR

The new year has brought with it a number of important changes to laws affecting the workplace. This client update addresses: (1) the recently enacted New York WARN Act, which affects New York employers contemplating lay-offs and/or closing or relocating their operations; (2) the recent amendments to the Americans with Disabilities Act (ADA) which broaden the act's coverage to a wider array of disabilities; and (3) changes to the Family and Medical Leave Act (FMLA) which provide the family members of military personnel increased leave rights in a variety of situations.

NEW YORK STATE WARN ACT TAKES EFFECT

At a time when many employers are faced with the possibility of workforce reductions, the New York State Workers Adjustment and Retraining Notification (WARN) Act became effective on February 1, 2009.

The law is similar to the federal WARN act, but requires more notice to employees (or payments in lieu of notice) and covers more employers/events. New York State employers planning restructuring should therefore be careful to comply with the more onerous requirements of the New York act. The following is a summary of the new requirements as of February 1, 2009, and a comparison with the federal WARN Act.

- **Coverage:** The New York WARN Act applies to employers with **50** or more full-time employees (who work an aggregate of 2,000 hours per week, *including* overtime), while the federal WARN Act applies to employers with **100** or more full-time employees (who work an aggregate of at least 4,000 hours per week, *excluding* overtime).
- **Notice:** While the federal WARN Act requires **60 days** advance written notice to employees, union representatives and certain state and local government officials, the New York act mandates **90 days** advance written notice to (1) employees, (2) union representatives, (3) the New York State Department of Labor and (4) local workforce partners.
- **Triggering Events:** Both the federal and New York WARN Acts are triggered in the event of a "mass layoff" or a "plant closing;" however, the New York act defines those terms to require only half as many affected employees as the federal act, and New York notice requirements are also required during a "relocation."
  - A "mass layoff" under federal law is an employment loss affecting at least **50** employees constituting at least 33% of the workforce, or **500** or more employees. Under the New York WARN Act, however, a "mass layoff" is at least **25** employees constituting at least 33% of the workforce, or **250** or more employees.
  - A "plant closing" under the federal statute is a shut-down of a single site of employment or one or more of its facilities or operating units, affect-

ing **50** or more employees. By contrast, the New York WARN Act defines a shut-down as a "plant closing" if only **25** or more employees suffer employment loss.

- New York's WARN Act is unlike the federal act in that it also imposes notice requirements in the event of a planned "relocation," which is defined as the removal of all or substantially all of the industrial or commercial operations of an employer to a different location 50 miles or more away.

- **Enforcement:** While both the New York and federal acts can be enforced in the courts, New York also allows the WARN Act to be enforced in an administrative proceeding by the New York State Department of Labor.

The New York WARN Act tracks its federal counterpart in terms of exceptions to the notice requirement (e.g., if the need for notice was not foreseeable, the employer was actively seeking capital that would have made the layoffs unnecessary, or the layoffs were caused by a natural disaster) and penalties for violation (back wages and benefits plus civil fines).

In sum, the New York WARN Act applies to employers that are half the size, laying off half the number of workers, and requires 30 days more notice, than the federal WARN Act.

THE BROADER AND MORE PROTECTIVE ADA

At the end of 2008, President Bush signed into law an amendment to the ADA, effective January 1, 2009, which broadens the act's definition of "disability." Prior to the ADA amendment, the Supreme Court had ruled that "mitigating measures" that ameliorate the effects of a disability (such as insulin for diabetes) should be considered and may in fact mean the individual is not "disabled" under the ADA. *See Sutton v. United Air Lines*, 527 U.S. 184 (1999). The amended ADA ("AADA") explicitly rejects the restrictive approach taken by the Supreme Court in *Sutton* and makes it very clear that "the determination of whether an impairment substantially limits a major life activity shall be made *without regard to the ameliorative effects of mitigating measures.*"

Additionally, the AADA rejects the Supreme Court's standard for determining disability as enunciated in *Toyota Motor Mfg. Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002). The AADA states that the *Toyota* case, which held that the definition of disability should be interpreted strictly to create a "demanding standard," imposed "an inappropriately high level of limitation necessary to obtain coverage." Under the AADA, Congress has instructed that a court's primary focus should be on whether the employer has complied with its obligations under the AADA, while the individual's impairment "should not demand extensive analysis."

The AADA defines "disability" as an impairment which substantially limits one (or more) major life activities. A major life activity can include "learning, reading, concentrating, thinking, communicating and working," and thus learning disabilities are protected under the AADA. Major bodily functions are also considered major life activities. The AADA specifically mandates that only one major life activity need be impaired, and that an impairment that is episodic or in remission is still a disability if it would substantially limit a major life activity when active.

The AADA is thus a major boon for individuals with disabilities, eliminating Supreme Court decisions that had limited the impact of the ADA on employers and shifted the focus onto the disabled individual rather than the alleged discriminator. In New York, though, the change may not be as profound. The New York Human Rights Law already had a broad definition of "disability," defining it as "a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological cond-

itions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques." N.Y. Exec. Law § 292(21)(a). This definition makes no reference to a "major life activity" and thus any medically diagnosable condition qualifies as a disability. Even broader is the New York City Human Rights Law, which defines "disability" even more simply as "any physical, medical, mental or psychological impairment, or a history or record of such impairment." N.Y.C. Admin. Code § 8-102(16).

Nevertheless, the AADA is an important bill for New York employers and employees, because it means that New York plaintiffs can now elect to pursue a discrimination claim either in a New York court or in a federal court under the new, broader definition of disability.

EXPANSION OF THE FMLA

The FMLA was recently amended and now provides two new types of FMLA leave for the family members of military personnel. An employee, who is otherwise entitled to FMLA leave, and is related to a covered service member (e.g., spouse, son, daughter, parent or next of kin) will now be entitled to 26 weeks of leave during one 12-month period to care for the service member. A covered service member under the law is a member of the Armed Services, including Reserves or National Guard, who is undergoing treatment for a serious injury or illness that was incurred in the line of duty while on active duty. The injury or illness must render the service member unfit to perform his/her military duties. An employee who takes advantage of this leave will be entitled to a combined total of 26 weeks of all types of FMLA leave (including, i.e., birth of a child), during any 12 month period.

In addition, the amended FMLA now provides that an eligible employee may take up to 12 weeks of leave in a single 12-month period for a "qualifying exigency" arising out of the fact that the employee's spouse, son, daughter or parent is on active duty, or has been notified of an impending call or order to active duty, in the Armed Forces. Under the new law, "qualifying exigencies" may include, among other things: attending certain military events and related activities, arranging for childcare and school activities, addressing certain financial and legal arrangements, attending certain counseling sessions, and attending post-deployment re-integration briefings.

***

About the Authors

Joshua Zuckerberg
Partner

Direct Tel: 212-326-0885
Direct Fax: 212-798-6379
jzuckerberg@pryorcashman.com

Joshua Zuckerberg has been with Pryor Cashman since 2000 and became a partner in January 2007. His practice covers the entire spectrum of labor and employment issues. He has extensive experience representing and counseling employers on all matters affecting the workplace, including discrimination, harassment, and disability claims, restrictive covenants, wage and hour issues, and termination and severance practices.

In addition, Mr. Zuckerberg represents employee associations whose membership includes physicians, professors, stage directors and fire officers. Mr. Zuckerberg has developed considerable expertise in arbitration, mediation, collective bargaining, and federal and state litigation.

Recently, Mr. Zuckerberg has:

- Represented high level executives in various termination and severance negotiations
- Prosecuted and defended collective action wage and hour cases in the restaurant industry
- Initiated and settled a sexual harassment litigation against a Fortune 500 Bank
- Defended a real estate company and its executive in a quid pro quo sexual harassment claim

Mr. Zuckerberg is a 1997 graduate of Brooklyn Law School, where he was a member of the Brooklyn Journal of International Law and the Moot Court Honors Society. He was awarded an Edward V. Sparer Public Interest Law Fellowship.

Anna E .Hutchinson
Associate

Direct Tel: 212-326-0474
Direct Fax: 212-798-6326
ahutchinson@pryorcashman.com

Anna E. Hutchinson is an associate in Pryor Cashman's Litigation Group. She represents clients in all areas of complex commercial litigation, including labor and employment disputes, ERISA claims, securities litigation, patent litigation, white collar defense, copyright disputes, immigration matters, and real estate litigation. She advises employers with regard to their wage and overtime obligations under state and federal labor law, and represents matrimonial clients in Pryor Cashman's Family Law Group. She has experience in both state and federal courts as well as in arbitration and mediation.

Anna has devoted time to many *pro bono* matters, including successfully representing two separate Legal Aid pro bono clients before U.S. Citizenship & Immigration Services in obtaining permanent residency under the Violence Against Women Act. Anna received the Legal Aid Pro Bono Award in November 2006 for outstanding pro bono service.

VANESSA G. LAN
Associate

Direct Tel: 212-326-0256
Direct Fax: 212-798-6356
vlan@pryorcashman.com

Vanessa is an associate in the Litigation Group, concentrating in intellectual property and entertainment litigation. Her practice also encompasses other areas of litigation, including complex contract and commercial matters. Vanessa joined Pryor Cashman in 2007 after working as a summer associate at the firm in 2006.

Vanessa is a 2007 graduate of Fordham University School of Law, where she was a Notes and Articles Editor of the Fordham International Law Journal and a Stein Scholar in Public Interest Law and Ethics.