



**EMPLOYERS: BE PREPARED FOR THE  
NEW YORK STATE WARN ACT**

A new law will require New York State employers to provide advance written notice to employees and other entities in the event of mass layoffs, plant closings, and relocations. The New York State Worker Adjustment and Retraining Notification Act ("WARN") is scheduled to take effect on February 1, 2009. This new state law imposes requirements that are more expansive than those established by the federal WARN Act, which took effect on February 4, 1989. Among the most significant differences from the federal law, the state law will: (i) apply to more employers, (ii) require notice further in advance, (iii) require notice where fewer employees suffer employment losses, (v) introduce a new notice requirement for business relocations, and (vi) allow the New York State Department of Labor to enforce the law's requirements. The Table below summarizes these differences.

	<b>Federal WARN Act</b>	<b>NY State WARN Act</b>
<b>Employers Covered</b> <i>(excluding most units of federal, state, and local government)</i>	(a) 100 or more employees, excluding part-time employees; or  (b) 100 or more employees who in the aggregate work at least 4,000 hours per week (exclusive of hours of overtime)	(a) 50 or more employees, excluding part-time employees; or  (b) 50 or more employees who in the aggregate work at least 2,000 hours per week
<b>Notice Period</b>	60 days	90 days
<b>Plant Closing</b>	50 or more employees in any 30-day period	25 or more employees in any 30-day period
<b>Mass Layoff</b>	(a) 500 or more employees in any 30-day period; or  (b) 50-499 employees, in any 30-day period, if at least 33% of active workforce	(a) 250 or more employees in any 30-day period; or  (b) 25-249 employees, in any 30-day period, if at least 33% of active workforce
<b>Relocation</b>	Not addressed	Removal of all or substantially all of the industrial or commercial operations of an employer to a different location 50 miles or more away
<b>Enforcement</b>	Private lawsuits	(a) New York State Department of Labor, or (b) Private lawsuits

## **WHICH EMPLOYERS ARE COVERED?**

While the federal WARN Act covers employers with 100 or more employees, the New York State WARN Act applies to New York private sector employers who employ 50 or more employees. Both laws exclude part-time employees in determining whether an employer is covered by the WARN Acts, and define "part-time employee" as an employee who (i) is employed for an average of fewer than 20 hours per week or (ii) who has been employed for fewer than 6 of the 12 months preceding the date on which notice is required. Because notice may be required further in advance under the New York State WARN Act than under the federal WARN Act (as discussed below), it is possible that an event that might give rise to notice will be covered by one of the laws, but not the other, depending on when certain employees began working.

*The New York State WARN Act does not apply to the federal or state governments or any of their political subdivisions, including any unit of local government or any school district. (The federal WARN Act also does not cover most government employers.)*

## **WHEN IS NOTICE REQUIRED?**

The New York State law will require covered employers to give up to 90 days' advance written notice in anticipation of certain notice triggering events, as opposed to up to 60 days' notice as required by the federal WARN Act. It appears that the New York State Legislature intended to require notice with respect to "plant closings," "mass layoffs," and perhaps "relocations." However, the current language of the law excludes "plant closings" from the list of notice triggering events, and includes "employment losses." In addition, the New York State Department of Labor has expressed its position that no notice is required with respect to a relocation unless the relocation is related to a plant closing or mass layoff. The Department of Labor has also indicated that employers will not be required under the New York State WARN Act to provide notice before its February 1, 2009 effective date with respect to notice triggering events that are anticipated to occur within 90 days following that date.

**Under the NY State WARN Act, the above-quoted terms are defined as follows:**

- **“Plant closing”:** occurs when a single site of employment, or one or more facilities or operating units within a single site of employment, is shutdown, if the shutdown results in an employment loss at the site for 25 or more employees (excluding part-time employees) during any 30-day period. (The federal WARN Act has a 50 employee threshold.)
  - **“Mass Layoff”:** occurs when a reduction in force (not the result of a plant closing) results in employment loss at a single site of employment during a 30-day period for (i) 250 or more employees (excluding part-time employees) or (ii) between 25 and 249 employees (excluding part-time employees) and at least 33% of the workforce. (The federal WARN Act has respective 500 and 50-500 employee thresholds.)
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- **“Relocation”**: occurs upon the removal of "all or substantially all of the industrial or commercial operations of an employer to a different location that is 50 miles or more away," apparently regardless of whether any employment losses occur. ("Relocation" is not a defined notice triggering event under the federal WARN Act.)
- **“Employment Loss”**: occurs in the event of (i) an employment termination, other than a discharge for cause, voluntary departure, or retirement; (ii) a mass layoff exceeding six months; or (iii) a reduction in hours of work of more than fifty percent during each month of any consecutive six-month period. ("Employment loss" is not a defined notice triggering event under the federal WARN Act.)

The New York State WARN Act provides narrow exceptions to the 90-day notice requirement in certain circumstances. These include situations where (i) the need for notice was not reasonably foreseeable; (ii) the employer was actively seeking capital or business, which, if it had been obtained, would have prevented a notice triggering event, and the employer reasonably believed that giving notice would have precluded the employer from obtaining the necessary capital or business; (iii) the notice triggering event was necessitated by "a physical calamity or an act of terrorism or war" or was due to a natural disaster; or (iv) the notice triggering event constituted a strike or lockout that is not intended to evade the WARN notice requirement. As drafted, the New York State WARN Act is somewhat ambiguous as to which types of notice triggering events are potentially subject to each of these various exceptions.

### **WHAT FORM OF NOTICE MUST BE PROVIDED?**

When notice is required by the New York State WARN Act, it must be provided, in writing, to:

- "Affected employees," which is defined to mean "employees who may reasonably be expected to experience an employment loss as a consequence of a proposed plant closing or mass layoff by their employer";
- the exclusive bargaining representative of any affected employee (if any);
- the New York State Department of Labor; and
- the state dislocated worker unit.

By comparison, the federal WARN Act requires notice to:

- The exclusive bargaining representative of any affected employees, or individually to the affected employees if they are not represented;
- the state dislocated worker unit; and
- the chief elected official of the unit of local government within which the plant closing or layoff is to occur.

The contents of the notice required by the New York State WARN Act must comply with the federal WARN Act



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**ADMISSIONS INFORMATION**  
by state, follows respective attorney name

Join us for a Seminar on  
The **NYS WARN Act** and  
**Workforce Reductions.**

**9.23.08**  
Westwood Country Club  
8:00 a.m. - 10:00 a.m.

RSVP to Donna Blaufuss at  
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and its regulations, which currently require, among other things: (i) the name and address of the employment site; (ii) the expected date of the first employment loss; (iii) the number of affected workers; and (iv) the name and number of a company official to contact for further information. It may be necessary or desirable to include additional elements in some cases.

## **WHAT ARE THE CONSEQUENCES OF NON-COMPLIANCE?**

The New York State WARN Act is subject to enforcement by the New York State Department of Labor, but also allows employees to bring private lawsuits. Despite the New York State law's longer 90-day notice period, the New York State WARN Act mirrors the federal WARN Act by limiting the period for which an employer can be liable for back pay and benefits to the lesser of 60 days or one-half the number of days the employee was employed by the employer. Attorney fees may also be recoverable. Moreover, employers who fail to give required notice may also be subject to a civil penalty of not more than \$500 per day of violation, unless all back pay and benefits owed have been paid within three weeks after the employer ordered the event that triggered a WARN notice requirement under New York State law.

## **CONCLUSION**

Because of its more expansive terms, the New York State WARN Act will, in some situations, necessitate notice that would not be required under the federal law. Some New York employers will be subject to WARN obligations for the first time beginning in February 2009. Others will be required to give notice earlier and in circumstances that would not have required notice before.

A number of other states have similar laws, which may vary from both the federal and New York State WARN laws in some jurisdictions. Thus, it is critical to consider such other potential requirements in the event that your company will be altering the employment status of a number of employees at job sites outside of New York State.

Employers contemplating mass layoffs, plant closings, or relocations (or any other group employment actions) are encouraged to seek legal advice as soon as possible to ensure compliance with these notice requirements and other obligations imposed by law. For more information about the NYS WARN Act, contact Thomas E. Brydges at 716.843.3812 / tbrydges@jaeckle.com or Scott P. Horton at 716.843.3949 / shorton@jaeckle.com.

**Note:** The new law, as signed by Governor Paterson on August 8, 2008, seems to contain inadvertent drafting errors. Some of the errors are transposed from a similar Illinois law, which apparently served as the basis for the New York law. For example, if the New York State WARN Act were applied as written, it would facially require any covered employer to give up to 90 days' advance notice anytime the company terminated an employee involuntarily and without cause (subject to limited exceptions). This seems to be well beyond the Legislature's intent. For example, it is our understanding that the New York State Department of Labor, which was involved in drafting the new law, has taken the position that the law as enacted should not be interpreted to require notice unless at least 25 employees would be affected by a plant closing or mass layoff. This Alert describes the parameters that the New York State WARN Act is reasonably expected to proscribe when it takes effect. Given the potentially crippling impact of its current language, this law appears ripe for amendment before then.

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