

**MELTZER, LIPPE, GOLDSTEIN & BREITSTONE, LLP**

**Client Alert – Federal WARN Act and NY WARN Act**

February 1, 2009

In our initial client alert, we shared with you our concern about the prospect that 2009 would result in a perfect storm for employers due to the convergence of political, legislative and economic events. To assist you in understanding the challenges that your business may face in 2009 and beyond, we promised to provide a series of reports on specific issues in changing areas of labor and employment law. This client alert, which focuses on the federal Worker Adjustment and Retraining Notification Act ("WARN") and its New York State equivalent, the New York State Worker Adjustment and Retraining Notification Act ("NYS WARN"), is the first in our series of monthly reports.

The purpose of this report is to provide a general understanding of the circumstances which trigger an employer's obligation to provide notice, the limited exceptions to providing full notice, and the severe consequences of non-compliance. It is not intended to be a comprehensive and exhaustive discussion of these statutes, nor is it intended to constitute legal advice in connection with WARN issues in specific circumstances.

**Overview**

Federal WARN and state law equivalents require covered employers to provide advance notice of plant closings or mass layoffs to employees, unions (if applicable), and local government agencies, units, and/or officials. As the failure to provide requisite notice may result in substantial monetary sanctions and as many businesses today face the prospect of downsizing, WARN familiarity and compliance are critical.

New York State's WARN Act is effective February 1, 2009. California, Connecticut, Hawaii, Illinois, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, Ohio, Oregon, Rhode Island, South Carolina, Tennessee and Wisconsin also have WARN Acts.

**What Employers Are Covered?**

Federal WARN covers employers with 100 or more employees, including part-time employees,<sup>[1](#)</sup> who collectively work at least 4,000 hours per week exclusive of overtime. By contrast, NYS WARN, is applicable to employers with 50 or more employees who collectively work at least 2,000 hours per week.

**What Events Trigger the WARN Notice Requirements for Covered Employers?**

The two common events which trigger federal WARN and NYS WARN notice obligations are: (1) plant closings and (2) mass layoffs. With respect to a plant closing, a covered employer must provide the requisite advance notice if a single site of employment, or one or more operating units within the site, is temporarily or permanently shutdown resulting in an employment loss of 50 or more employees during a 30 day period under federal WARN (25 or more employees

within a 30 day period under NYS WARN).

With respect to a mass layoff, a covered employer must provide the requisite advance notice if there is a reduction in force (not the result of a plant closing), resulting in an employment loss at the single site of employment during any 30 day period for: (1) 50 or more full-time employees under federal WARN (25 or more employees under NYS WARN) provided they constitute at least 33% of the full-time workforce at the site; or (2) at least 500 full-time employees under federal WARN (at least 250 fulltime employees under NYS WARN).

NYS WARN also requires notice when a covered employer relocates or moves all or substantially all of its industrial or commercial operations more than 50 miles from its original location.

To prevent covered employers from evading their WARN obligations by scheduling and/or structuring downsizing so that the number of employment losses within a 30 day period are below the minimum threshold amounts required to constitute a plant closing or mass layoff, federal and NYS WARN apply the principle of aggregation. That is, a covered employer may be required to total employment losses over a rolling 90 day period within a single site of employment. If the sum total of employment losses within said 90 day period meets or exceeds the minimum threshold amount to constitute a plant closing or mass layoff, the employer will be required to provide the requisite notice under the applicable statutes. Layoffs or closings made prior to February 1, 2009 are not subject to NYS WARN or its aggregating process.

#### **How Much Advance Notice is Required For A Covered Event?**

Federal WARN requires 60 days notice prior to any plant closing or mass layoff, while NYS WARN requires 90 days advance notice prior to any plant closing, mass layoff, or relocation.

#### **An Otherwise Covered Employer May Enjoy A Complete Or Partial Exemption From WARN Obligations**

Federal and NYS WARN allow a covered employer to provide less than the requisite amount of advance notice under the following three circumstances:<sup>[2]</sup> (1) the employer constitutes a faltering company; (2) unforeseen business circumstances cause the downsizing; or (3) a natural disaster. Notwithstanding the existence of these circumstances, an employer is still required to provide as much notice as practicable and provide a brief statement setting forth the facts explaining why the shortened notice period was necessary.

The faltering company exception only applies to plant closings and not mass layoffs under federal WARN. By contrast, the faltering company exception applies to both plant closings and mass layoffs under NYS WARN. To qualify for this exception, an employer must show: (1) it was actively seeking capital or business at the time the 60 day notice would have been required; (2) there was a realistic opportunity to obtain the financing or business sought;<sup>[3]</sup> (3) the financing or business sought, if obtained, would have enabled the employer to avoid or postpone the shutdown for a reasonable amount of time; and (4) the employer reasonably and in good faith believed that giving the required notice would have precluded it from obtaining the needed capital or business.

To qualify for the "unforeseen business circumstances" exception, the employer must show that business circumstances leading to the downsizing or closing were not reasonably foreseeable at the time that the notice would have been required.

Courts have been extremely reluctant to find that the conditions for either the faltering company or unforeseen business circumstance exceptions will have been met.

To qualify for the "natural disaster" exception, the employer must show the plant closing or mass layoff was due to a natural disaster (e.g. flood, earthquake, drought).

Under federal WARN, a covered employer is not required to provide any advance notice for a plant closing or mass layoff that is the result of: (1) the completion of a particular project or undertaking that was temporary in nature, if the affected employees were hired with the understanding that their employment was limited to the duration of the facility, or project or undertaking; or (2) an economic strike or lockout not intended to evade statutory requirements. By contrast, NYS WARN only relieves a covered employee from providing advance notice if the mass layoff, relocation, employment loss, or plant closing is necessitated by a physical calamity or an act of terrorism or war.

### **What Are the Consequences for Violating the Federal WARN and NYS WARN Acts?**

Generally, any employer that violates federal WARN or NYS WARN may be liable for: (1) back pay and benefits (e.g., contributions to employees pension plans, medical expenses incurred during the employment loss which would have been covered under the employee benefit plan but for the employment loss) for each affected employee for every day of the violation up to a maximum of 60 days;<sup>[4]</sup> (2) civil penalty of \$500 for each day the employer fails to provide notice to a local government unit, unless the employer pays each affected employee the amount for which the employer is liable within 3 weeks from the date the employer ordered the plant closing or mass layoff); and (3) attorneys' fees.<sup>[5]</sup>

Violations of federal WARN may only be enforced through civil lawsuits commenced by aggrieved employees, representatives of the employees, or an aggrieved local unit of government (as individuals or on behalf of a class). Conversely, violations of NYS WARN may be enforced by the New York State Department of Labor through an administrative investigation and hearing process or by a civil lawsuit by the aggrieved employees, representatives of the employees, or local government as individuals or on behalf of a class.

### **Conclusion**

The many WARN issues potentially affecting business today are far too complex and detailed to describe in this update alone. Should you have any questions or concerns regarding WARN or any other labor and employment issue, please do not hesitate to contact me or any one of my colleagues.

**Comparison of Federal WARN AND NYS WARN Acts**

	<b>FEDERAL</b>	<b>NYS (effective 2/1/2009)</b>
Required Advance Notice	60 days	90 days
Covered Employer	100 or more employees	50 or more employees
Affected Employees	For Plant Closing: 50 or more full-time employees  For Mass Layoff: 50 or more employees who constitute at least 33% of the workforce losing their positions at the worksite	For Plant Closing: 25 or more full-time employees  For Mass Layoff and Relocation: 25 of more employees who constitute at least 33% of the workforce losing their positions at the worksite
Triggering Events	Plant Closing, Mass Layoff	Plant Closing, Mass Layoff, Relocation
Partial Exemption	Faltering Company, Unforeseen Business Circumstances, Natural Disaster	Faltering Company, Unforeseen Business Circumstances, Natural Disaster, Temporary Employment, Strike or Lockout
Complete Exemption	Temporary Employment, Strike or Lockouts	Physical Calamity, Act of Terrorism or War
Enforcement	Private Civil Action Only	Private Civil Action and Administrative Investigation/Hearing by NYSDOL
Remedies	Back Pay and Benefits of all affected employees for each day of violation up to 60 days; Civil Penalties; Attorneys' Fees	Back Pay and Benefits of all affected employees for each day of violation up to 60 days; Civil Penalties; Attorneys' Fees

<sup>[1]</sup> Part-time employees are defined as employees who work an average of fewer than 20 hours per week or who have been employed for fewer than 6 of the 12 months preceding the WARN notice date. 29 U.S.C. § 2101(a)(8)

<sup>[2]</sup> The NYS WARN Act additionally provides that a covered employer can provide less than the required advance notice when the plant closing or mass layoff is the result of: (1) the completion of a particular project or undertaking that was temporary in nature, and the affected employees were hired with the understanding that their employment was limited to the duration of the facility, or project or undertaking; or (2) a strike or lockout not intended to evade statutory requirements.

<sup>[3]</sup> Under NYS WARN, an employer is generally not required to demonstrate that there was a realistic opportunity to obtain the financing or business to qualify for the faltering company exception.

<sup>[4]</sup> We note that courts in different jurisdictions have offered conflicting interpretations concerning the scope of back pay and benefits due. Indeed, some courts have held that employers can be liable for a maximum of 60 *calendar* days worth of back pay and benefits for each aggrieved employee. Conversely, other courts have held that the maximum amount of back pay and benefits an employer can be liable for is the amount of back pay and benefits the aggrieved employees would have been due in a 60 day period based on the hours or days such employees would have worked but for the violation.

<sup>[5]</sup> Liability may be reduced by establishing violation(s) were committed in good faith and the employer had reasonable grounds for believing the act or omission was not a violation the statutes. Some of the factors potentially examined in determining whether an employer's liability should be reduced include: (1) the hardships posed on employees by the violation(s), and (2) any efforts by the employer to mitigate the violation(s).