

Newsday

Help Wanted: How WARN act applies to company closures

By Carrie Mason-Draffen

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DEAR CARRIE: I work for a company that is in Chapter 11 bankruptcy and will be going out of business in 60 days. My head is spinning with questions. What are our rights? Is our job secure for these 60 days, or can we be laid off at any time before that? Also, can the company reduce the salary of hourly workers? Can we collect for unused vacation time? Where can we get more information?

Bracing for the Worst

DEAR WORST: You are smack in the middle of the federal WARN act, or the Worker Adjustment and Retraining Notification Act, a law designed to give workers a big heads-up on their company's planned closing or mass layoff.

If a company planning such an action has at least 100 full-time employees, the WARN act requires it to give employees, unions, state and local governments, a 60-day notice of the plant closing or mass layoff. Failure to do so can result in fines and other penalties.

Private companies and nonprofit employers that meet the 100-employee threshold are covered, as are certain public and quasi-public entities, said Carmelo Grimaldi, an employment attorney at Meltzer, Lippe, Goldstein & Breistone in Mineola.

A plant closing triggers the WARN Act if the shutdown results in job losses for at least 50 employees. A personnel cutback qualifies as a mass layoff if at least 500 employees at a company are laid off or even 50 to 499 employees, if they make up at least 33 percent of a workforce.

As with any law, the WARN Act has exceptions, and it has three for employers.

If a faltering company is planning a mass layoff but at the same time is seeking new capital or business to stay open, it can be exempted from a WARN notice if giving such a notice would jeopardize the employer's opportunity to get the new capital or business, Grimaldi said; secondly, an unforeseen downturn in the business could also exempt a company from having to issue a WARN notice if it plans a mass layoff or closing, and finally, a natural disaster could also provide the basis for an exemption.

But the exceptions have a caveat. "When an employer provides less than 60 days advance notice of a closing or layoff and relies on one of these exceptions, the employer also must give as much notice as is practicable," Grimaldi said.

As to your question about whether your company can reduce your pay during the 60-day period, it can because that action doesn't fit the definition of employment loss, Grimaldi said.

"However, an extreme example may cause a court to rule otherwise," he said.

But if you are let go during the 60-day notification period, the company would have to pay you wages and benefits for any remaining days, or risk a violation, Grimaldi said.

As to your right to receive your accrued and unused vacation, under state law, a company's obligation to pay for unused time after employees lose their job depends on the employer's policy on paid time off, Grimaldi said.

"New York courts have held that an agreement to furnish benefits or wage supplements, such as vacation, can specify that employees forfeit accrued benefits under certain conditions, he said. "To be valid, the employer must have notified employees in writing of the conditions that nullify the benefit."

If the company has no written forfeit policy, then it must pay the employee for the accrued paid time off, he said.

Your company's bankruptcy filing adds a possible wrinkle to your situation. A bankruptcy judge may have ruled that your company's status exempts it from certain aspects of WARN.

"Absent that, an employer in Chapter 11 bankruptcy is not excused from compliance with the WARN act," Grimaldi said.

On Feb. 1, a state law will offer even more WARN protection to workers, Grimaldi said. It has a lower employee threshold than the federal law - companies with at least 50 employees are covered - and a longer notification period: 90 days.