

Understand New York's new WARN Act—it's tougher than federal law

New amendments to the New York Labor Law now mean New York employers face tougher layoff notification requirements under state law than they do under federal law. Both the New York Worker Adjustment and Retraining Notification (NYWARN) Act and the federal Worker Adjustment and Retraining Notification (WARN) Act require private employers to give employees advance, written notice of impending layoffs, plant closures and relocations.

But the NYWARN Act, which takes effect Feb. 1, 2009, imposes requirements in addition to those mandated by the federal WARN Act.

Who's covered

Employers covered by the NYWARN Act include "any business enterprise that employs fifty or more employees, excluding part-time employees, or fifty or more employees that work in the aggregate at least two thousand hours per week."

The act requires employers to provide written notice at least 90 days in advance of:

- A mass layoff resulting in employment losses during a 30-day period affecting at least 25 full-time employees representing at least 33% of the workforce, or 250 or more full-time employees
- A plant closing in which 25 or more full-time employees will lose their jobs during a 30-day period at a single site
- A relocation involving the removal of all or substantially all of an industrial or commercial operation to another location at least 50 miles away

The 90 days' notice must be sent to affected employees, their collective bargaining representatives (where applicable), the New York State Department of Labor (NYSDOL) and local workforce agencies or partners.

New York gets tough

The NYWARN Act is more restrictive than its federal counterpart:

- **It applies to smaller employers.** The NYWARN Act requires employers with 50 or more full-time employees to provide written notice of any plant closings, mass layoffs or relocations. The federal threshold is 100 employees.
- **It requires notice when fewer employees are affected.** The New York law applies to covered employment loss due to planned plant closings or mass layoffs affecting at least 25 full-time employees or a total of 250 employees. The federal limits are 50 full-time employees or a total of 500 employees of any kind.
- **It provides more notice.** The NYWARN Act requires employers to provide at least 90 days' notice. Federal law requires 60 days.

- **It offers administrative enforcement.** New York law allows for a private right of action, but it also provides for administrative enforcement by the state Commissioner of Labor.

Flawed law, problems ahead

This statute is poorly drafted. For example, a literal reading indicates that notice isn't necessarily required for a plant closing, but employers must give advance notice if they plan to layoff just one employee.

In response to a request for technical clarification, the legislative counsel to the NYSDOL issued a letter that glossed over the drafting errors while explaining that, "All parts of a statute must be harmonized with one another, as well as the general intent of the statute as a whole."

The letter goes on to explain that the terms "employment loss" and "relocation" for which a WARN notice is required must be read in conjunction with language that requires the existence of "affected employees" upon whom to serve the notice. The

term "affected employees" is defined as employees who may reasonably be expected to experience an employment loss as a consequence of a proposed plant closing or mass layoff affecting at least 25 employees. According to the letter, "employment loss" is not meant to apply to a single instance of lost employment.

Since the statute prohibits the ordering of a covered event without notice, employers contemplating a plant closing, layoff or relocation on or after Feb. 1, 2009, may wish to consider providing notice before then.

Violations of the NYWARN Act carry substantial penalties. Affected employees have six years to bring a suit to recover back pay, the value of lost benefits and possible attorneys' fees. The law caps back pay at 60 days of pay.

Employees may also file complaints with the NYSDOL and receive the same awards excluding attorneys' fees.

An employer who violates the law may also have to pay a civil penalty of \$500 for each day it is in violation.

Exceptions

There are limited exceptions to the notification requirements. Among them:

- At the time the notice was required, the employer was actively seeking capital or business that would have enabled the employer to avoid the closing.
- The need for a notice was not reasonably foreseeable.
- The plant closing or mass layoff resulted from the completion of a particular project and the employees were hired with the understanding that the work had a limited duration.
- The action constituted a strike or lockout.
- The employment loss "is necessitated by a physical calamity or an act of terrorism or war."