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WARN Notice – One More Burden for Employers Recovering from Sandy?

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Businesses in the tri-state area disrupted or closed by Hurricane Sandy may have an additional burden that may have been overlooked: whether the company must provide notice of closing or mass layoff under federal or state WARN Acts.

New Jersey and New York both have mini-WARN Acts. While Connecticut does not have a mini-WARN Act requiring notice to employees of layoff or termination, Connecticut employers may have notice requirements under federal WARN. (Connecticut law also requires employers, in some closing situations, to continue to pay for health care coverage for employees and their dependents for up to 120 days.)

Federal, New York, and New Jersey WARN Acts

In brief, federal and New Jersey WARN require 60 days' prior notice to employees when a business of 100 or more employees has a plant closing or mass layoff covered by the laws. New York WARN requires employers with 50 or more employees within New York State to give 90 days' notice.

To oversimplify complex statutes that are all somewhat different, a *plant closing* occurs when a facility is permanently or temporarily closed and 50 or more full-time employees (25 in New York) suffer a job loss.[1] A *mass layoff* occurs when either of the following suffer a job loss: (a) 500 or more full-time employees at a facility (250 in New York); or (b) 50 or more full-time employees at a facility (25 in New York) constituting at least 33% of the workforce. A "facility" includes an operating unit within a facility.

A job loss under federal and New York WARN includes a layoff of six months or more. Under the language of New Jersey's law, however, even a short-term layoff may be a covered job loss unless there is a commitment to reinstate the employee to his or her previous employment within six months.

1 In general, an employee who works as few as 20 hours a week may be "full time," but an employee who works 40 hours per week is not full time if he or she has not worked for six months prior to the time notice should have been given.

Natural Disasters and Notices of Plant Closings or Mass Layoffs

One might think that the laws provide exceptions in the case of natural disasters. They do, but such exceptions are very limited. Under federal and New York WARN, employers may give shortened (or retroactive) notice if the disaster was a direct cause of the job losses, and may be able to rely on the "unforeseeable business circumstances" exception if the disaster was an indirect cause. However, employers are not relieved completely of their WARN notice obligations. They must give "as much notice as is practicable" (even if that is retroactive notice), and they must state why they were unable to give notice earlier.

New Jersey WARN provides an exception only in the case of a termination of operations, not for a mass layoff. The natural disaster must be a "direct cause" of the closing, and New Jersey does not have an express "unforeseeable business circumstances" exception. New Jersey WARN does not explicitly require a notice as soon as is practicable in the event of a termination of operations due to a natural disaster. However, both the legislative history and at least one appellate case indicate that the law should be interpreted consistently with federal WARN.[2] Thus, a cautious employer would provide shortened New Jersey WARN notices even in the event of a termination of operations caused by a natural disaster, although the law does not seem to require it.

In short, employers who permanently close a facility or operating unit, or who anticipate that the facility or unit will remain closed for more than six months, are well advised to give notice under federal and state WARN. Employers who have not closed a facility or operating unit entirely, but have experienced significant layoffs that they know will last six months or more, should also strongly consider giving notice if they meet the threshold numbers, despite the fact that Hurricane Sandy was the direct or indirect cause of the layoffs.

What Should an Employer Whose Business Has Been Interrupted and Cannot Anticipate Whether It Will Be Able to Reopen Within Six Months Do?

In the event of a short-term layoff, announced as such at the time it occurs, which later turns out will last more than six months, federal WARN permits what we might simply call an "extension notice." The extension must be due to unforeseeable circumstances and the notice must be given as soon as this becomes apparent. However, if the layoff is not initially announced to be a short-term layoff, or these other conditions are not met, an extension notice may not be considered valid. Further, a natural disaster-related shortened WARN notice given later – at the time it becomes apparent that the layoff will last more than six months – may be considered untimely, because the job loss is considered to have occurred at the time the layoff commenced.

While the "natural disaster" exception provides for shortened notice, it does not cross reference the "extension" provision of federal law. Thus, if notice should have been given at the time of the initial layoff, then the natural disaster provision of federal WARN allows shortened, or even retroactive notice. But an extension notice may not be permitted where a temporary layoff that has already begun later extends beyond six months.

New York WARN also has a provision for extension of a layoff. It is virtually identical to the federal extension provision. However, the New York WARN statute refers to extension of a "mass layoff," not a "layoff." And a "mass layoff," by definition, excludes a "plant closing," which is the permanent or temporary shutdown of a single site of employment. Under this close reading of the New York statute, it is possible that an extension notice cannot be used to extend a temporary plant closing – only a temporary mass layoff. This probably was an error in drafting. And, indeed, the New York State Department of Labor (NYSDOL) regulation concerning extension notice uses the broader term "layoff" rather than "mass layoff." However, it is not clear that the NYSDOL can modify the explicit language of the statute, and an employer takes a risk if it relies on the broader language of the NYSDOL regulation to give an extension notice of a closing at a later time.

Thus, if a New York employer has closed a facility due to Hurricane Sandy at which 25 or more full-time employees were working, and that employer is uncertain whether it will be able to reopen and reemploy its employees within six months, the safest course is to provide a New York WARN notice as soon as possible.

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2 "Because the New Jersey Act was modeled after its federal counterpart, and the two statutes share the same purpose of protecting workers and communities by requiring employers to provide notice of plant closings and mass layoffs [citations omitted], in the absence of case law interpreting the Act, we look to federal WARN Act regulations and case law for guidance in interpreting the New Jersey WARN Act." DeRosa v. Accredited Home Lenders, Inc., 22 A.3d 27, 36 (N.J. Super. Ct. App. Div. 2011).

New Jersey WARN has language concerning extensions of short-term layoffs that is identical to federal WARN – but there is the wrinkle, noted above, that reading the language strictly, a covered termination may already have occurred if the employer did not initially make a commitment to reinstate the employee within six months of the layoff.

The natural disaster exception under New Jersey WARN is limited to "termination of operations," and applies only if the shutdown was "made necessary because" of the natural disaster. Unlike New York or federal WARN, which require notice as soon as possible, New Jersey WARN requires no notice at all if there is a termination of operations caused by Hurricane Sandy. However, if there is a mass layoff, rather than a termination of operations, notice may be required; and if the operations are transferred, notice may be required. Also, New Jersey employers must comply with federal WARN which, as indicated, may require that notice be given as soon as possible, even if no notice is required under New Jersey law.

What if Operations Were or Will Be Transferred Due to Hurricane Sandy?

If there is a brief interruption of operations at one location, and operations resume at another location close by, notice would not be required under federal or New York WARN. Since the employees were not terminated, and did not suffer a layoff exceeding six months, they did not suffer employment losses in the first place and the notice requirement was not triggered. (Relocation to a distant location, however, might be considered a job loss on the theory that it constitutes a constructive discharge.)

Federal and New York WARN also have employee transfer provisions, but they do not come into play here. Under federal and New York WARN, if a closing or layoff is *the result of a relocation*, and, *prior* to the closing or layoff, the employer offers to transfer the employee to a different site of employment with a reasonable commuting distance with no more than a six-month break in service, then that employee does not count as experiencing an "employment loss." The provision is inapplicable for two reasons. First, we have posited that the closing or layoff is not the result of a relocation, but is the result (directly or indirectly) of the hurricane; the relocation is a *consequence* of the closing, not the cause of it. Second, in all but the rarest of cases, the employer would not have given employees an offer to transfer *prior* to the closing or layoff resulting from Hurricane Sandy. Thus, this exception to the definition of employment loss does not apply. Fortunately, it is generally not necessary for employers to rely on these transfer provisions, due to the lack of job loss noted in the prior paragraph.

Unfortunately, the picture is less clear under New Jersey WARN. A New Jersey employer might be required to rely on the narrow New Jersey employee transfer provision. Under New Jersey WARN, an employee does not experience a "termination of employment" if he or she is offered a position *within the state* that is not more than 50 miles from the previous place of employment, and is the same employment or "a position with equivalent status, benefits, pay and other terms and conditions of employment." Helpfully, however, the New Jersey law, unlike federal or New York WARN, does not seem to require that the offer of transfer occur *prior* to the closing, or that the transfer be triggered by a decision to relocate or consolidate.

This suggests that a post-Hurricane Sandy relocation of New Jersey operations, in which all employees are transferred within the state consistent with the standards stated above, would not require notice under New Jersey WARN. However, a court could interpret the law consistently with federal WARN regulations and infer a requirement that notice be provided prior to the closing or layoff. Then again, if the New Jersey law as a whole were to be interpreted consistently with federal WARN, notice would not be required in these circumstances because the transfer would not be considered a job loss.

Employers in New York and New Jersey that have experienced a facility closing or layoffs due to Hurricane Sandy should consult with experienced employment counsel to determine whether notice is required under federal and state WARN Acts, including shortened, retroactive, or extension notices.

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