COLLAZO FLORENTINO & KEIL LLP Client Advisory

For Clients And Friends Of The Firm

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New York WARN Act Regulations Amended

The New York State Department of Labor recently adopted a Notice of Emergency Adoption and Proposed Rule Making ("Emergency Regulations") amending the New York State Worker Adjustment and Retraining Notification (WARN) Act regulations. As you may recall, the New York State WARN Act requires employers to notify affected employees at least 90 days in advance of a "plant closing" or "relocation". In addition, the State WARN Act now requires employers to provide 90 days' advanced notice to affected employees in the event of a "mass layoff" or "covered reduction in work hours" that affects at least 25 employees (where 25 employees constitutes 33% of the workforce at that site of employment) or at least 250 employees (regardless of the percentage of workforce affected).

In addition to offering greater clarification of the State WARN Act generally, the Emergency Regulations expand upon important terms as they are defined in the Act and they impose additional notice obligations upon employers. The key provisions of the Emergency Regulations are summarized below.

Terms and Definitions

The Emergency Regulations have clarified the meaning of "employer" under the State WARN Act. The Act defines an "employer" as any business enterprise that employs 50 or more full-time employees within the State, or that employs 50 or more full and part-time employees within the State who work in aggregate at least 2,000 hours per week. The Emergency Regulations indicate that the calculation of total weekly hours shall include overtime hours earned on a regular basis where such employee has worked overtime in seven or more weeks out of the twelve weeks immediately prior to the date when State WARN notice is required.

Furthermore, the Emergency Regulations expand upon the categories of "employers". Under certain circumstances, a worksite employee of a client-employer of a Professional Employer Organization (PEO) may be considered an employee of the client-employer. In addition, a receiver, trustee, debtor-in-possession, or other fiduciary will constitute an employer where such party is responsible for continued business operations under certain bankruptcy proceedings.

The definition of "employment loss" has been expanded by the Emergency Regulations as well. The State WARN Act requires employers to provide 90 days' notice to affected employees of a covered event that causes "employment loss". Under the Act, an "employment loss" is: (1) an employment termination (other than discharge for cause, voluntary departure, or retirement); (2) a mass layoff exceeding six months in duration; (3) a covered reduction in work hours of more than 50% during each

747 Third Avenue
New York, N. Y. 10017
Tel: 212-758-7600
www.cfk-law.com

month of any consecutive six-month period affecting at least 25 full-time employees (where 25 employees constitutes 33% of the workforce) or at least 250 employees; (4) a plant closing affecting 25 or more full-time employees; or (5) a relocation affecting 25 or more full-time employees. The Emergency Regulations highlight that any plant closing, mass layoff, covered reduction in work hours, or relocation that is the result of a bankruptcy filing or sale of the business is now considered an "employment loss".

In addition, the Emergency Regulations shed some light on the meaning of "single site of employment" and the notice obligations of multi-site employers. Under the State WARN Act, employers must provide notice to affected employees of a plant closing or mass layoff where the employment loss occurs at a "single site of employment". A single site of employment may refer to a single location or a group of contiguous locations in proximity to one another. Furthermore, separate buildings or facilities, within reasonable geographic proximity to each other, may constitute a single site of employment if they are used by the employer for the same purpose and share the same staff or equipment. The Emergency Regulations further clarify that where an employer has two separate locations in the same geographic area and the purpose of one location is to support the other location, the two locations will be considered a single site of employment if the support requires travel between the two locations. On the other hand, non-contiguous sites in the same geographic area that have separate management, produce different products, provide different services, and that have separate workforces do not constitute a single site of employment.

Lastly, the Emergency Regulations offer some guidance with respect to calculating the notice date based on the "date of layoff". According to the Emergency Regulations, the "date of layoff" is defined as the last day an employee is eligible or permitted to work for the employer. If the employer chooses to provide payment to an employee subsequent to the date of layoff, whether in the form of wages, severance, vacation pay, personal leave, or other benefits, the date of layoff will not be extended.

Notice

The most significant changes imposed by the Emergency Regulations involve employer notification requirements. Employers should be mindful of these new obligations if they are contemplating an event that would trigger the 90 days' notice under the State WARN Act.

Form of Notice

The State WARN Act and the Emergency Regulations require employers to notify the following persons or organizations of a plant closing, mass layoff, covered reduction in work hours, or relocation: (a) all affected employees; (b) employee representatives, if any; (c) the Commissioner of Labor; and (d) the Local Workforce Investment Board ("LWIB") where each site of employment is located. The person who provides notice to affected employees must have the authority to bind the employer and must attest to the truthfulness of all information provided in the notice.

The Commissioner may be notified of the employment loss event via first class mail or by fax with a hard copy to follow in the mail. Notice to the LWIB may be sent to the local chief elected official only if, in that location, the LWIB is the same person as the chief elected official. In the event that the delivery of notice to an affected employee takes longer than five days, the employer must extend the period of notice by the number of days between the day notice was first attempted and the day notice was ultimately effectuated.

If the 90 days' notice is made by first class mail, the mail must be post-

marked on or before the 90th day preceding the employment loss event. All notice sent by first class mail must be on company letterhead. Notice may be provided via email so long as all employees eligible for notification have regular workplace access to personal computers at which email may be received and viewed during the work day. Email notification may only be sent to an email address that has been provided to be employee by the employer to be used in the conduct of business. The subject line of the email notice must be labeled "urgent". Any employer that elects to utilize email notification must be able to demonstrate that an email notice was received by each employee. If an email notice is returned to the employer sender as undeliverable, notice must be sent in an expeditious manner to that employee, i.e., hand delivery, interoffice mail, overnight delivery.

Contents of Notice

Under the Emergency Regulations, the content of the notice provided to the above-listed persons and organizations has expanded. The Commissioner of Labor and the LWIB must be notified of the following: (1) the name and address of the employment site affected; (2) name and telephone number of employer representative to contact for further information; (3) name and telephone number of employee representative to contact for further information; (4) name of employer's liaison with the Department of Labor; (5) the names, addresses, and job titles of the employees to be laid off; (6) expected date of first separation of employees and anticipated schedule of separations; (7) statement as to whether bumping rights exist; (8) statement as to whether planned action is temporary or permanent; (9) a statement as to whether the other notices required under the Act have been delivered, including the dates the notices were sent; (10) a statement as to the means by which notice was delivered to affected employees; and (11) a sample notice provided to employees and to the employee representatives.

Furthermore, the Emergency Regulations now require employers to notify affected employees and their representatives, if any, of the expected date of separation of employees (even if a particular recipient employee is not part of this group) as well as the date when particular recipient employee will be separated. Affected employees and their representatives must also be notified of certain information regarding the collection of unemployment insurance benefits, job training, and re-employment services. According to the Emergency Regulations, such information shall include, at a minimum, the following language:

> You are hereby notified that, as a result of your employment loss, you may be eligible to receive job retraining, re-employment services, or other assistance with obtaining new employment upon your termination. You may also be eligible for unemployment insurance benefits after your last day of employment. The NYSDOL will contact your employer to arrange to provide additional information regarding these benefits and services to you through workshops, interviews, and other activities that will be scheduled prior to the time your employment ends. You can also access reemployment information and apply for UI benefits on the DOL's website, or you may use the contact information provided on the website to contact the Department for further information and assistance.

Employee representatives must be provided with a statement as to whether the notices to the Commissioner of Labor and

the LWIB have been sent, including the dates the notices were sent and a statement as to the means of delivery utilized to notify affected employees.

The State WARN Act provides a list of circumstances that may relieve an employer of its 90 day notice requirement. Such circumstances may include an active search for capital with the expectation it will be obtained, a natural disaster, or certain unforeseeable circumstances. Under the Emergency Regulations, if an employer provides less than 90 days' notice for a qualifying reason, the employer must include with its notice a statement of the reason(s) for reducing the notice provided and a factual explanation of the basis for claiming entitlement to such reduced notice period.

While notice is not required if an employer transfers an employee to another site of employment, notice is required if an offer of reassignment in effect constitutes a constructive discharge. In addition, notice is not required if the position held by the employee is a seasonal project. However, the employer must demonstrate it informed each employee at the time of hire that the job was seasonal.

Consolidations

In the event a merger or consolidation of a business, the Emergency Regulations clarify that an employer that has sold all or part of a business is responsible for providing notice of any employment loss event that is connected to the sale or merger. After the effective date of the sale or merger, the purchasing/merged employer assumes all notice responsibilities. The purchasing/merged employer does not assume any notice responsibilities prior to the effective date of the sale even if it makes a promise of employment to the employees of the seller employer.

Conclusion

In light of these changes to the State WARN Act, employers are encouraged to plan layoffs and plant closings carefully. If an event will trigger notice under the WARN Act, it is increasingly important to be diligent in drafting and delivering notice to the appropriate parties. If you have any questions about the State WARN Act, please contact Adam Harris at (212) 758-7724 or any other attorney at the firm.