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## CLIENT ALERT

### NEW YORK ISSUES EMERGENCY PROPOSED REGULATIONS ON STATE WARN ACT

On January 30, 2009, the New York State Department of Labor issued emergency regulations on the New York Worker Adjustment and Retraining Act ("NY WARN"). The regulations became effective on February 1, 2009, the same date that the NY WARN Act itself became effective. The Department of Labor noted that the regulations are necessary due to the dramatic job losses currently being suffered within the state. The regulations attempt to clarify ambiguities in the NY WARN Act.

#### New York WARN Act

On August 5, 2008, the New York State Legislature enacted the NY WARN to supplement requirements of the Federal WARN Act. *See* New York Labor Law, Article 25-A. The NY WARN greatly expands the scope of employer obligations and applies to many New York employers that are not within the purview of the Federal WARN Act. Significant differences between the NY WARN and Federal WARN Acts include the following:

- Covered Employers – The NY WARN Act covers private sector employers with 50 or more full time employees. The Federal WARN Act covers employers of 100 or more full time employees.
- Length of Advance Notice – Eligible New York employers must now provide affected employees with 90-days advance notice of a covered event. The Federal WARN Act requires that employees provide 60-days advance notice.
- Covered Events – In addition to mass layoffs and plant closings, relocation is a covered event under the NY WARN Act. Relocation requires 90-days notice if, "all or substantially all of the industrial or commercial operations" of the employer are relocated 50 or more miles from their current location. The Federal WARN Act applies only to mass layoffs and plant closings.

- Loss of Employment (Mass Layoff/Relocation/Plant Closing) – Under the NY WARN Act, mass layoffs and relocations require an employer to issue WARN notices if one of these events results in loss of employment for 25 or more full-time employees who represent 33% of the workforce over any 30-day period. Under the Federal WARN Act a loss of employment for 50 employees constituting at least 33% of the workforce triggers the notice requirement. Similarly, under the NY WARN Act, a plant closing will trigger notice requirements when the closing results in the loss of employment for 25 employees over a 30 day period, in contrast to the Federal WARN Act’s limit of 50 or more employees.

### **New York WARN Act Regulations**

The Department of Labor issued the emergency regulations to “fill in gaps found in the law in order to more fully inform employees of their obligations and workers of their rights under the law.” The regulations are similar in many respects to the regulations implementing the Federal WARN Act, but there are also several significant differences:

- Employer Defined – As noted above, the NY WARN Act applies to employers with 50 or more full-time employees. The Regulations clarify that an “employer” is a business enterprise, for-profit or non-profit, that employs 50 or more employees within New York State who work at least 2,000 hours per week in the aggregate. An employer with over 50 total employees but whose New York workforce is less than 50 employees is not covered by the NY WARN Act.
- Date of Separation – The Regulations clarify that the date on which an employee is laid off is the date on which the employee is no longer employed and that the period of employment is not extended by the payment of severance pay, vacation pay, personal leave, or similar benefits to the employee.
- Notice – The regulations clarify that notice may not be sent by e-mail and must be provided on the official letterhead of the employer. Generally, the notice mirrors the requirements of the Federal WARN Act. However, the NY WARN Act requires that employers provide information in the notice concerning unemployment insurance, job training, and reemployment services for which affected employees may be eligible. The regulations (available on the New York Department of Labor’s website at <http://www.labor.ny.gov/workforcenypartners/warn/pdfs/text.pdf>) provide sample language that satisfies this requirement. The NY WARN Notice must be sent to the affected employees as well as any bargaining representatives of such employees, the Commissioner of the New York Department of Labor, and the local Workforce Investment Board where the site of employment is located. Notice to the Commissioner of Labor must include additional information such as the name of all affected employees and their job titles.

- Commuting Distance – Under the NY WARN Act, an employment loss does not qualify as a plant closing or mass layoff necessitating notice if the employer offers to transfer the employees to a different work site within reasonable commuting distance. The Regulations indicate that a reasonable commuting distance that which can be traveled in 1.5 hours for facilities which are relocated to a location in New York City or Long Island, or 1 hour for facilities which are relocated within the rest of the state.
- Exceptions – The NY WARN Act allows certain exceptions under which the 90 day notice period may be reduced, such as by demonstrating that giving notice would have precluded the acquisition of needed capital or business. The Regulations provide guidance on how an employer may meet the burden of proof to show that the requirements for an exception have been met.
- Damages – The Regulations clarify that an employer who fails to give notice is subject to a civil penalty of up to \$500 for each day of the employer’s violation, but that such a penalty is imposed in the aggregate and not for each affected employee. However, the Regulations detail that an employer who fails to give notice may be liable to each employee for back pay, the cost of any benefits to which the employee would have been entitled, as well as other types of payments related to the employee’s prior position.
- Enforcement – The Regulations provide for enforcement through a private cause of action or by administrative action of the Department of Labor. This is in contrast to the Federal WARN Act which only provides affected employees with the right to pursue a private cause of action.

### **Significance of the NY WARN Act and its Regulations**

New York State employers must now view changes in corporate personnel, structure and location with an increased level of scrutiny and should be sure to consult with counsel as soon as possible in the event of an anticipated relocation, layoff or plant closing. We can assist you in this regard.

If you have any questions, please feel free to contact us.

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