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New York Passes WARN Act Providing Greater Protection For Employees

By Bennett Pine

Against the backdrop of large scale layoffs in the financial services industry and elsewhere, employees in New York soon will have another weapon at their disposal.

New York Governor David A. Paterson recently signed into law the New York State Worker Adjustment and Retraining Notification ("WARN") Act, which requires private employers with 50 or more full-time employees to provide at least 90 days' notice before a mass layoff, plant closing or relocation.

The New York law is modeled after the federal WARN Act, which was passed in 1988, but is stricter and supplemental in a number of ways, providing significantly greater employee protections. It becomes effective in February 2009, 180 days after its August 5, 2008 enactment. According to the New York State Department of Labor, New York becomes the fourth state to enact a state statute with requirements that are more stringent than the federal WARN Act (California, New Jersey and Illinois being the others).

Enhanced Coverage and Notice Requirements

The New York WARN Act requires private employers with 50 or more employees to provide at least 90 days' advance notice before a mass layoff, plant closing or relocation. This casts a much broader net than the federal WARN Act which, by contrast, applies only to employers with 100 or more employees, and which mandates only 60 days' advance notice. Thus, the New York WARN statute covers smaller employers and increases by 50% the advance notice required!

Lower Thresholds for Triggering Events

Like the federal WARN Act, the New York law requires notice in the event of a "plant closing" or "mass layoff." However, the New York WARN Act requires advance notice when the "plant closing" results in an employment loss of 25 employees, compared with 50 employees under the federal law. Similarly, the New York WARN Act defines a "mass layoff" as a reduction in force resulting in an employment loss for either (i) 33% of the work force, provided there are at least 25 affected employees—as compared to 50 under the federal WARN Act—or (ii) a total of 250 employees—as compared to a total of 500 employees under the

Wage Hour Updates

New York's Highest Court Extends 'Employee' Wage-Hour Protections to 'Executives'; Allows Deductions from Commissions By Parties' Agreement

James Serritella and Bennett Pine

In *Pachter v. Bernard Hodes Group, Inc.*, the New York Court of Appeals, the highest court in New York, addressed whether executives are entitled to protections afforded to "employees" under Article 6 of the New York Labor Law and when, in the absence of a written agreement, commissions are earned and therefore considered wages under the Labor Law.

The case arose when Pachter sued her former employer, Bernard Hodes Group, Inc., alleging that the deductions from her commissions were unlawful under Section 193 of the Labor Law. Pachter's commissions were subject to deductions for costs associated with nonpayment or late payment by clients, costs associated with Pachter's personal assistant and miscellaneous business costs.

In holding that executives are employees within the meaning of the Labor Law, the Court of Appeals put to rest a disagreement among New York state courts and federal courts in New York as to whether executives were employees under the Labor Law. The

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federal law. Additionally, the New York WARN Act, unlike the federal law, requires a covered employer to provide the required advance notice in the event of a "relocation" of all or substantially all of its industrial or commercial activities to a different location at least 50 miles away.

Notice to Whom?

The New York WARN Act requires that written notice be provided to affected employees as well as their union representatives, if applicable. By contrast, under the federal WARN Act, if the bargaining representative receives notice, affected employees need not receive individual notices. Notice also must be provided to the New York State Department of Labor and a body referred to as the "local workforce investment board." Unlike the federal WARN Act, notice evidently need not be provided to the chief elected official of the applicable local government entity.

Enforcement and Penalties

Like the federal law, the New York WARN Act gives affected employees the right to sue their employers for violations. However, unlike the federal law, the New York WARN Act also grants the New York State Department of Labor enforcement authority.

In the event of a violation, New York employees may be entitled to receive back pay and the cost of lost benefits or medical expenses for the period of the violation up to a maximum of 60 days. Employers also may be required to pay attorneys' fees to prevailing plaintiffs and civil penalties of up to $500 per day of violation.

Exceptions

Similar to the federal WARN Act, the New York law recites three circumstances under which the advance notification period may permissibly be reduced to fewer than 90 days.

First, an employer may provide reduced notice of a plant closing (but not mass layoff) if: (1) the employer was actively seeking capital or business at the time that notice would have been required; (2) the capital or business sought, if obtained, would have enabled the employer to avoid or postpone the termination of employees; and (3) the employer reasonably and in good faith believed that giving the required notice would have precluded the employer from obtaining the needed capital or business.

Second, an employer may provide reduced notice of a plant closing (but not mass layoff) if the need for notice was not reasonably foreseeable at the time the notice would have been required.

Third, an employer may provide reduced notice of a plant closing or mass layoff due to any natural disaster (e.g., flood, earthquake or drought).

The EFCA: A Proposed Overhaul of Union Organizing Law

Private sector union membership rates are at historic lows. The Employee Free Choice Act ("EFCA"), which is proposed federal legislation that would fundamentally change the way unions organize and negotiate, seeks to reverse that and remains a hot button issue leading up to elections this November. The EFCA was co-sponsored in its latest form by Senators Obama and Biden and opposed by Senator McCain.

Currently, an employer has the option of (1) voluntarily recognizing a union as the result of a majority signature card drive, or (2) requiring a secret ballot NLRB election. If the EFCA becomes law, an employer would lose the ability to require an election if a majority of employees have signed cards stating that they want to be part of a union. Critics of the EFCA argue that card check organizing takes away the right of workers to vote for or against the union in a secret ballot election, while permitting union coercion and intimidation.

Additionally, the EFCA provides for increased fines and penalties for employers found to have discriminated against union employees or interfered with the formation of unions. For instance, employers who are found to have terminated pro-union employees would be subject to liquidated damages in the amount of three times back pay, tripling the amount of damages allowed under current law.

Further, the EFCA would change the way unions and employers negotiate terms of the first collective bargaining agreement, allowing for federal mediation if the parties cannot reach an agreement within 90 days, and providing for binding arbitration if an agreement is not reached 30 days after that.

The outcome of this year's elections will do much to determine whether some form of the EFCA becomes law when the 111th Congress convenes in January 2009.

—Meghan Finnerty

It is important to note that an employer relying on one of these "exceptions" still has the burden of providing as much notice as practicable and must provide a brief statement explaining the basis for falling within the exception and reducing the notice period.

The New York WARN Act also exempts an employer from providing advance notice of a mass layoff, relocation or employment loss necessitated by a "physical calamity or act of terrorism or war." This language is not contained in the federal WARN Act.

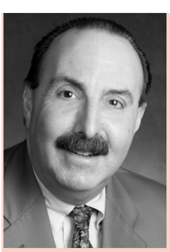
Proposed Changes to Federal Law

Employers also should be aware that bills have been introduced in Congress to amend the federal WARN Act to (i) lengthen the notice period to 90 days, (ii) allow for civil actions by the Secretary of Labor, and (iii) provide double back-pay for employer violations.

Conclusion

According to a statement from the New York Department of Labor, "the need for a stringent law at the state level comes on the heels of a number of companies, including some located in western New York, which closed their doors in recent years and gave their workers little or no prior notification." New York-based employers and out-of-state employers with operations in New York should realize that the New York WARN Act significantly enhances the employee protections granted by federal law by lowering the threshold for employer coverage, reducing the magnitude of triggering events and providing for longer advance notice to employees.

As a result, any employer anticipating a reduction in force, facility closing or relocation in New York would be prudent to consult employment counsel to ensure compliance with the requirements of both the federal and New York State WARN Acts.



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Court of Appeals noted that Labor Law Section 190 has a broad definition of employee. The Court also pointed out that several subcategories under the Labor Law specifically exclude executives from receiving certain benefits for employees, reasoning that if executives were not employees in the first place, it would have been superfluous for the legislature to exclude them in these subcategories.

Next, the Court of Appeals addressed when a commission becomes "earned" in the absence of a written agreement. Labor Law Section 193 prohibits employers from making deductions from employee wages unless permitted by law or authorized in writing by the employee for certain employee benefits, charitable donations, payments or union dues. Commissions are considered wages, under Section 190(1). Section 193, however, does not prohibit employers from making deductions before employees "earn" their commissions. Therefore, the Court had to determine when commissions are earned and thus become wages.

The Court determined that commissions become earned when the employee produces a ready, willing and able buyer. This means that an employee's commissions are typically earned when his or her efforts result in a client's commitment to buy goods or services. The Court expressed that in the absence of a written agreement, evidence of the 11 year course of dealings between Bernard Hodes and Pachter could establish an implied agreement between the parties under which the computation of commissions could depend on making adjustments based on certain factors, such as nonpayment by customers, cost of a personal assistant and work related expenses. Consequently, the Court of Appeals held that employers and employees are not prohibited by Section 193 from entering into agreements to structure compensation formulas so that commissions are earned only after specific deductions are taken from gross sales. Only in the absence of an agreement, whether express or implied, should courts apply the ready, willing and able buyer test to determine when commissions become earned.

The result of the *Pachter* decision is twofold. The ruling that executives are "employees" under the Labor Law affords executives greater protections

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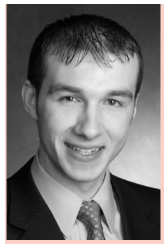
against deductions from wages. On the other hand, employers still can lawfully agree to commission formulas with their commissioned employees providing for adjustments or deductions for business related expenses. In light of this decision, employers should be pleased that they can create their own commission computation formulas without violating Section 193, but, at the same time, employers should be wary that their wage-deduction practices may create liability with regard to executive employees. Employers are well-advised to consult employment counsel before making deductions from executives' commissions or other compensation.



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