

**New York Employers Must Comply With New Laws  
That Became Effective February 1, 2009**

**The New York Warn Act**

New York enacted the New York State Worker Adjustment and Retraining Notification Act (the "New York WARN Act"), which is more expansive than the Federal Worker Adjustment and Retraining Notification Act (the "Federal WARN Act"). Specifically, the NY WARN Act (1) covers more employers, (2) has more triggering events with lower thresholds, (3) requires more advance notice, and, most significantly, (4) can be enforced more easily in an administrative proceeding before the New York Commissioner of Labor. In today's economic climate, New York employers are likely to see a significant increase in enforcement actions for WARN Act violations at the state level. Although the New York WARN Act goes into effect in February 2009, New York employers should be aware that the law provides for a 90-day look back period when determining the threshold number of affected employees for coverage.

**Employers Covered.** The New York WARN Act covers employers with 50 or more full-time employees or 50 or more full-time and part-time employees whose total hours exceed 2000 per week, as compared to the Federal WARN Act which covers 100 or more full-time employees or 100 or more full-time employees and part-time employees whose total hours exceed 4000 per week. The definition of "part-time employee" under both laws is essentially the same and includes an employee who is employed for an average of fewer than 20 hours per week or who has been employed for fewer than 6 of the 12 months preceding the date on which notice is required.

|                                  | New York WARN Act  | Federal WARN Act   |
|----------------------------------|--|--|
| Number of Employees for Coverage | 50 or more full-time<br>OR 50 or more full time and part-time employees whose total hours exceed 2000 per week | 100 or more full-time<br>OR 100 or more full time and part-time employees whose total hours exceed 4000 per week |

**Triggering Events.** While the Federal WARN Act is triggered for a mass layoff or plant closing, the New York WARN Act triggers the notice requirement for these events as well as for a relocation. Under the New York WARN Act, "relocation" is defined as the "removal of all or substantially all of the industrial or commercial operations of an employer to a different location" at least 50 miles away from the employer's current location.

|   | New York WARN Act  | Federal WARN Act                        |
|---|--|---|
| Events that Trigger WARN Notice Obligations | (1) Mass Layoff,<br>(2) Plant Closing or<br>(3) Relocation | (1) Mass Layoff or<br>(2) Plant Closing |

In addition, the threshold number of employees affected that is required to meet the definition of "mass layoff" or "plant closing" under the New York WARN Act is half of what is required under the Federal WARN Act, and both statutes include a 90-day look back period.

**Required Notice/Damages/Penalties.** The required notice under the New York WARN Act (90 days) is longer than the notice required under the Federal WARN Act (60 days). However, the maximum damages available to employees is the same, i.e., 60 days of back pay and benefits, and therefore, the additional notice period does not give New York employees any greater recourse against employers for failing to provide the requisite notice. Employers can be penalized up to \$500 per day for each day in violation of WARN under both laws, and the courts have discretion to award attorneys' fees to prevailing plaintiffs. The written notice must be given to each employee who will suffer an employment loss, or to his or her union, and to certain state and local government agencies. There is a specific six (6) year statute of limitations under the New York WARN Act. While the Federal WARN Act does not set forth a specific limitations period, the Supreme Court has ruled that the most analogous state law statute of limitations will apply. Accordingly, employers in New York and several states (including Massachusetts) are advised to maintain accurate records regarding all plant closings, mass layoffs or relocations for six years.

|                 | New York WARN Act  | Federal WARN Act   |
|-----------------|--|--|
| Required Notice | 90 Days  | 60 Days  |
| Damages         | Up to 60 days of back pay and benefits, and, at the discretion of the Court, attorneys' fees | Up to 60 days of back pay and benefits, and, at the discretion of the Court, attorneys' fees |
| Penalties       | \$500 per day for each day in violation of the statute                                       | \$500 per day for each day in violation of the statute                                       |

**Enforcement.** Under both statutes, employees may bring a civil action in court against their employers. However, under the New York WARN Act, administrative enforcement actions may be brought before the Commissioner of the State Department of Labor, which many view will provide employees easier access to have their WARN claims adjudicated (as compared to the prohibitive costs and time associated with initiating a civil action in court).

|             | New York WARN Act   | Federal WARN Act                  |
|-------------|---|-----------------------------------|
| Enforcement | (1) Civil Action in State Court or<br>(2) Administrative Proceeding before the New York Department of Labor | (1) Civil Action in Federal Court |

Like the Federal WARN Act, the New York WARN Act also has limited exceptions to these notice requirements, including a closing because of a natural disaster or act of terrorism or war or a plant closing or mass layoff resulting from a union strike or lockout.

Due to the technical requirements under both WARN Acts as well as the significant consequences for employers who fail to comply with their strict notice requirements, employers considering a plant closing, mass layoff or relocation in New York, should consult with legal counsel. If you have any questions about the New York WARN Act, the Federal WARN Act, or any other state WARN Act, please contact our office.

### New York Correctional Law Article 23-A

New York passed new laws which impose notice requirements on employers relating to New York Correctional Law Article 23-A, a law that is aimed at improving employment opportunities for individuals with prior criminal convictions. Article 23-A is an existing law which requires employers to consider and balance a number of factors before taking action against an individual because of a prior criminal conviction. It should be noted that while Article 23-A bars employers from taking an “adverse employment action” against any applicant or employee based on a prior criminal conviction, it does not require employers to hire an individual with a criminal history if (1) there is a direct relationship between one or more of the previous criminal offenses and the specific employment sought or held by the individual or (2) the granting or continuation of employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.

In making a determination about a prior criminal conviction, employers are required to consider the following eight factors:

1. The public policy of New York, as expressed in the law, to encourage the licensure and employment of persons previously convicted of one or more criminal offenses;
2. The specific duties and responsibilities necessarily related to the license or employment sought or held by the person;
3. The bearing, if any, the criminal offense or offenses for which the person was previously convicted will have on his/her fitness or ability to perform one or more such duties or responsibilities;
4. The time which has elapsed since the occurrence of the criminal offense or offenses;
5. The age of the person at the time of occurrence of the criminal offense or offenses;
6. The seriousness of the offense or offenses;
7. Any information produced by the person, or produced on his behalf, in regard to his rehabilitation and good conduct; and
8. The legitimate interest of the public agency or private employer in protecting property, and the safety and welfare of specific individuals or the general public.

**New Employer Obligations.** Under the new laws, which became effective February 1, 2009, employers have three notice obligations. First, employers are required to post a copy of Article 23-A in a visually conspicuous manner in an accessible location at the workplace. Second, employers are mandated to provide a copy of Article 23-A to all job candidates who are subject to an “investigative consumer report” or a background check. Finally, if an employer receives a report that shows a criminal record for the applicant or employee, employers must provide the job applicant or employee with a copy of Article 23-A. A copy of Article 23-A can be obtained online at [here](#).

Employers with employees in New York should take immediate steps to fulfill their notice obligations, including the posting requirement. If you have any questions about your compliance obligation under Article 23-A or any of its notice requirements, please contact our office.