

New York State Amends Its WARN Act Regulations

August 3, 2023

At the end of June 2023, the New York Department of Labor (DOL) issued [final amended regulations](#) to the state's Worker Adjustment and Retraining Notification (NY WARN) Act. The amendments, which are now effective, impose significant new requirements on employers conducting mass layoffs.

Similar to, but more expansive than, its federal counterpart, NY WARN requires certain New York businesses to provide at least 90 days' notice of employment loss to affected employees (and other government entities) in the case of plant closings, mass layoffs, relocation, and certain reductions in work hours. [According to the DOL](#), the amendments "address the post-pandemic employment climate," and "simplif[y] language to ensure businesses better understand their obligations." We've outlined the key updates below.

Labor commissioner determination of eligibility for exceptions

The most significant change of the regulations is the new process by which employers seek an exception from the 90-day notice period requirement. Under this new process, an employer seeking an exception must submit certain required documentation demonstrating eligibility for the exception to the state's labor commissioner, who will then decide whether an exception is warranted. The required documentation – which must be submitted within 10 business days of the notice being provided to the commissioner – includes, among other things:

1. A statement describing the reason for the need to close the business, perform a layoff or reduce work hours.
2. A description for the basis of the reduced period of notice.
3. Relevant documents.
4. An affidavit attesting to the truth of the documents.

After completing an investigation, the commissioner may notify the employer of its determination or, if the investigation determines that the employer failed to establish the elements of any exception, the commissioner will "continue the enforcement action for determining the employer's liability for violation of the [a]ct." To gather additional information, the commissioner also can convene an "investigative conference" at which an employer may be accompanied by a lawyer or other representative.

Pandemic-related updates to employer coverage, 'unforeseeable business circumstances' exception

NY WARN applies to employers with 50 or more full-time employees "within New York State." In a nod to the post-pandemic workplace, the regulations now clarify that individuals "who work remotely but are based at the employment site" will be counted toward this threshold. However, the regulations do not elaborate on how to determine whether employees are "based at" a particular employment site in the state. Further, this expanded definition could cover employers with less than 50 employees working physically in the state, if the employer has remote workers outside the state who report into a New York office.

The regulations also amend the “unforeseeable business circumstances” exception to the notice requirement to include public health emergencies, such as a pandemic “that results in a sudden and unexpected closure” as an additional situation that may excuse full compliance with NY WARN.

Temporary and permanent layoff definitions

The regulations now distinguish between a temporary layoff (which is excluded from the notice requirements) and a permanent layoff that requires notice under NY WARN. A “temporary layoff” does not exceed six consecutive months with a planned return of employees, whereas a “permanent layoff” is a mass layoff extending beyond a consecutive six-month period.

Expansion of notice recipients

NY WARN requires notices to be served on affected employees, employee representatives, the labor commissioner and the local Workforce Investment Board where the site of employment is located. The regulations now require that notices also are sent to the following:

- The chief elected official of the unit(s) of local government where the employment site is located.
- The school district(s) where the employment site is located.
- The locality that provides police, firefighting, emergency medical or ambulance services, or other emergency services to the locale where the site of employment is located.

Expanded content of notices

The content required to be contained – and also now be provided electronically – in the notice to the labor commissioner must include:

- The complete legal business name and any other business names used in the operation of the business.
- The business address and email address of the employer’s representative, whom the state can contact for more information.
- The name, address, personal telephone number, personal email address, job title and work location(s) of each employee to be laid off, in addition to information on whether the employee is paid on an hourly, salary or commission basis, whether the employee is full time or part time, and if the employee has any union affiliation.
- The total number of full-time and part-time employees in the state and at each affected site, as well as the number of affected employees at each affected site.
- Any additional information required by the labor commissioner.

Notably, the regulations also greatly expand the content of the notice required for affected employees, which now broadly comprises “[a]ny additional information known at the time of the notice and relevant to the separation.” This includes “information on severance packages or financial incentives if the employee remains and works until the effective date of the mass layoff, relocation or employment loss, available dislocated worker assistance, and, if the planned action is expected to be temporary, the estimated duration.”

Payment in lieu of notice

Under the existing framework, employers can reduce their liability for failing to provide the required 90 days’ notice by making voluntary and unconditional payments that are not otherwise required pursuant to a contract or law, or by paying wages and benefits

for the violation period.

The regulations now provide that an employer also may make payments “in lieu of notice of separation or layoff” if all of the following conditions are met:

1. The employer maintains an “employment agreement or a uniformly applied company policy” that “requires that the employing unit give the employee a definite period of notice before a layoff or separation.”
2. The employee is laid off or separated without the required notice.
3. The employer pays the employee a sum equal to the employee’s regular wages and value of the costs of any benefits, for the required period of the notice.

As this new section does not materially alter the existing framework for employers to reduce their liability by paying wages and providing benefits for the violation period, it appears that this latest amendment was intended to provide an additional method for reducing an employer’s liability under NY WARN, such as in the case of a preexisting employment agreement providing for notice periods or payments in lieu of such notice periods.

Notification in sale of business situation

The regulations also amended the notice provisions with respect to a sale of all or part of a business. Notably, if the transfer of employees is a condition of the purchase agreement, and that condition is not upheld by the purchasing employer (i.e., the purchaser does not employ the seller’s employees), the purchasing employer is obligated to provide the required notice.

Next steps

Although it’s not part of the amended regulations, New York employers should note that in May 2023, the [DOL launched an updated WARN portal](#), which employers now may use to submit required notices and other documents under NY WARN, as described above. Employers considering layoffs should consult with counsel as soon as possible to ensure compliance with the additional onerous burdens imposed by the updated regulations.

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