



EMPLOYMENT UPDATE

JANUARY 2009

New York WARN Act

The New York Workers Adjustment and Retraining Notification Act will go into effect on February 1, 2009, requiring certain employers to notify their employees in advance in the event of a mass lay-off or office/plant closure.

The NY WARN Act is based on the Federal WARN Act, with a few notable differences. Read on for a summary of the NY WARN Act's requirements and how they differ from those of the US WARN Act.

Does either Act affect my company?

The US WARN Act covers employers with 100 or more employees. The NY WARN Act is more expansive, covering employers with only 50 or more employees. So, if you are a New York employer with 50 or more employees then the new law applies to your company.

What do I have to do?

The US WARN Act requires covered employers to provide at least 60 days advance notice of "plant closing" or "mass layoff" that would result in loss of employment by at least 50 full-time employees during any 30-day period. Employment losses for two or more groups of employees at a single site within a 90 day period may be aggregated unless the Employer can demonstrate the employment losses were the result of separate and distinct actions. Under the US WARN Act:

A "plant closing" is a permanent or temporary shutdown of (1) a single employment site; or (2) one or more facilities or operating units within a single employment site provided that the shutdown results in an employment loss at the site for at least 50 full-time employees during a 30-day period.

A "mass layoff" is a reduction in force that does not result from a plant closing and that causes, during any 30-day period, employment loss for either: (1) 33% of full time employees and at least 50 employees; or (2) 500 full-time employees.

But employers covered by the new NY WARN Act must meet much more stringent requirements. Covered employers must provide 90 days advanced notice of plant closing or mass layoff that would result in loss of employment by merely 25 full-time employees during any 30-day period. As in the US WARN Act, the 90-day rule for aggregation applies. Under the NY WARN Act:

A "plant closing" is a permanent or temporary shutdown of (1) a single employment site; or (2) one or more facilities or operating units within a



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single employment site provided that the shutdown results in an employment loss at such site for at least 25 full-time employees during a 30-day period.

A “mass layoff” is a reduction in force that does not result from a plant closing and that causes, during any 30-day period employment loss for either: (1) 33% of full time employees and at least 25 employees; or (2) 250 full-time employees.

The following chart highlights the differences:

	Minimum # of Employees for the Act to apply:	Minimum # of layoffs if “plant closing”	Minimum # of layoffs if “mass layoff”	Advance Notice Required	Notice Required for Relocation?
US WARN Act	100	50 during any 30-day period	33% and at least 50 full time employees during any 30-day period; or at least 500 full time employees	60 days	NO, if the relocation does not constitute a mass layoff or plant closing.
NY WARN Act	50	25 during any 30-day period	33% and at least 25 full time employees during any 30 day period; or at least 250 full time employees	90 days	YES, if the relocation involves the removal of all or substantially all of the industrial or commercial operations of an employer to a different location 50 miles away or more.

Who do I have to tell?

Under the US WARN Act, an employer must notify (1) all affected employees or their representatives (such as union representatives); (2) the state dislocated worker unit; and (3) the chief elected local government official.

In contrast, under the NY WARN Act, an employer must notify (1) all affected employees and their representatives; (2) the New York Department of Labor; and (3) the local Workforce Investment boards.

What happens if I don’t comply?

Under both the US WARN Act and NY Warn Act , there are two possible consequences for failure to comply. First, an employee can sue an employer for back pay and benefits for up to 60 days if the employer fails to comply with the



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notice requirements. Second, the federal government can impose a civil penalty of not more than \$500 per day for each day of the employer's violation. Both acts allow employers to avoid the civil penalty by paying each aggrieved employee the amount for which the employer is liable within three weeks of ordering the relevant triggering event. Both acts also allow an employer's liability to be reduced upon a showing that its act or omission was in good faith and it had reasonable grounds for believing that the act or omission was not a violation.

The NY WARN Act further provides for an administrative enforcement proceeding by the New York State Department of Labor commissioner.

Are there any exceptions?

Yes, there always are, and the information in this update may not apply to all companies or all employees. Contact Herrick or your attorney to discuss whether one or both of these laws apply in your particular circumstances. At Herrick, please contact **Mara B. Levin** at **mlevin@herrick.com** or **(212) 592-1458**, or **Carol Goodman** at **cgoodman@herrick.com** or **(212) 592-1465**.

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