

WARNing Employees

New York is the latest state to adopt its own version of the WARN Act, which requires notification of plant closings and mass layoffs. Each state's law may be slightly different, so HR leaders need to ensure compliance -- and lawsuits alleging violations of such laws seem to be on the rise.

By Kristen B. Frasch

New York has become the 22nd state to adopt a law relating to plant-closing and mass-layoff notifications -- in addition to the federal Worker Adjustment and Retraining Notification Act.

The New York WARN Act, which went into effect Feb. 1, is modeled after the federal WARN Act of 1989. While the federal law requires employers with 100 or more full-time employees to provide workers with a minimum of 60 days' notice in the event of mass layoffs due to plant closings, New York's law applies to employers that have 50 or more full-time employees.

The state law also requires a minimum 90 days' notice and goes into effect when as few as 25 full-time employees -- representing at least 33 percent of the workforce -- are affected during a 30-day period.

Employers who violate either the state or federal law would owe 60 days of back pay to every affected employee.

With the current economic dive causing layoffs of a frequency unseen in recent times, "many states are now looking at whether they should have their own WARN acts," says Jonathan Stoler, head of the labor and employment practice for the New York office of Sheppard Mullin Richter & Hampton.

"Given this increase in layoffs and the numbers at each company, the federal WARN Act is certainly coming into focus much more sharply by plaintiffs' counsels," he says, "and employers should be aware of this."

Though he doesn't have actual statistics, Stoler says, he and his partners "are seeing a considerable uptick" in the number of lawsuits alleging WARN Act violations being brought by workers who have recently been terminated -- particularly in New York and other business centers throughout the country.

"I know, for example, that within the last three to four months, one prominent plaintiffs' firm has filed 20 class-action suits" based on employers' alleged failures to abide by either federal or state notification laws.

"What really concerns me about HR," Stoler says, "is, while you may think you're abiding by the law based on federal guidelines, you now need to be confirming if those similar WARN obligations do or do not apply under state law."

"What's worse, what if layoffs are occurring in one company, but across multiple states? There, you'll need an HR executive who is familiar with not just the federal and possible state law, but with all the relevant state laws where layoffs are happening."

Stoler notes "the WARN Act has not been something on employers' radar screens. In times of layoffs, they're keeping their minds on age discrimination and gender discrimination -- those single kinds of complaints that could lead to litigation."

But WARN cuts a much wider swath, he says, and has become an attractive class-action vehicle.

To further complicate matters in New York, the new law there adds "relocation" to the type of events requiring advanced notice whereas the federal act requires notification only in the event of a "mass layoff" or "plant closing."

"So even if you're not terminating, you're required to notify employees if you're simply planning to move a plant That could be much more problematic for an employer," he says.

In addition to New York, states with existing plant-closing and mass-layoff statutes similar to the federal WARN Act include Alabama, California, Connecticut, Hawaii, Illinois, Maine, Maryland, Massachusetts, Minnesota, Montana, Nevada, New Hampshire, New Jersey, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee and Wisconsin. Puerto Rico also has such a law.

State governments may be choosing to pass such laws because of a general perception that the federal law has passed its prime, says Lawrence Z. Lorber, a Washington-based partner in the law firm of Proskauer Rose.

"Employee advocates have questioned for some time just how substantive and protective [the federal] WARN is," says Lorber.

States "are looking at all the layoffs today, and the fact that people are being terminated without any sort of notice at all With that extended notice, the thought is you're going to lessen the impact," he says.

But, with businesses turning employees out in droves and potential WARN violations more in the news -- such as the December sit-in by workers after Republic Windows and Doors in Chicago closed down -- more people are wising up to the fact that "the federal law doesn't really cover everyone," he says.

The newer state laws raise the bar, he says. Such laws raise awareness and raise the chance that employees will "hopefully have a better chance to get a job" before their employers shut their doors, says Lorber.

"Nevertheless, things are getting awfully complicated with these overlapping federal and state laws," he says.

Stoler says no one disputes the WARN Act's merit. "The overall purpose of WARN is certainly well-intended," he says.

The U.S. Department of Labor states the purpose of the WARN Act is to give advance notice so that "workers and their families [have] some transition time to adjust to the prospective loss of employment, to seek and obtain other jobs, and, if necessary, to enter skill training or retraining that will allow these workers to compete successfully in the job market."

The state WARN laws, however, often target smaller and mid-sized companies "that, for one reason or another, may not be able to provide a 90-days notice," Stoler says.

Or, as Lorber puts it, "for the smaller employers, it's welcome to the world of WARN."

For such organizations, Lorber says, "WARN is a shutdown notice. ... How do you deal with a situation in which employers are trying to stay in business, yet once you have WARN, people are going to start looking" for new jobs?

Stoler echoes that concern. "Think about it," he says, "you start telling employees they'll be laid off in 90 days and they might start leaving just when you need them more than ever to carry on continuing business operations. That could be crippling."

According to Richard F. Shaw, an employment law partner with Pittsburgh-based Jones Day, the federal and many state notification laws contain "unforeseeable-business-circumstances" exceptions that allow companies that are actively seeking funding and trying to delay plant closings some leeway as to when their notice is required.

"I think there's an understood problem employers have with WARN," says Shaw, "that if you give people warning in advance, it's like rats leaving a sinking ship with only those who can't find work left behind. So the laws do address that."

Why are the state laws, in general, more restrictive?

"It's hard to say why New York and some other states think the federal law doesn't go far enough," says Shaw. "I really don't think it's any more complicated than that they think more time is needed for everyone, employees and state agencies [including unemployment offices], to get their ducks lined up and be able to make contingency plans."

Shaw, too, sees a sharp increase in calls from clients concerned about the rules of WARN in today's economic climate.

"[I tell them] WARN is a numbers game really," he says. "As long as you have a clear head and can decipher which statutes apply, you can really get through whatever you're facing without it bringing you to your knees."

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