

CLIENT ALERT

Three WARNings for Employers Facing Layoffs Or Bankruptcy in 2009

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As 2009 approaches, the worsening economy will force many employers to downsize, relocate, and, in some cases, contemplate bankruptcy. These decisions will trigger obligations under a variety of laws, including the federal and state¹ Worker Adjustment and Retraining Notification ("WARN") Acts.

This alert addresses three important developments: (1) the enactment of a new WARN Act in the State of New York; (2) a recent bankruptcy court decision clarifying when WARN Act obligations qualify as an administrative expense under the Bankruptcy Code as amended in 2005; and (3) the Obama Administration's potential plans to increase employer liability under the federal WARN Act.

February 1, 2009 Deadline Approaches for NY Employers

New York employers in the process of downsizing may want to take action before February 1, 2009. On that date, the New York WARN Act will go into effect, providing a new vehicle for lawsuits and imposing increased requirements on employers planning layoffs, plant closures or facility relocations. Until now, all WARN Act claims in New York have been controlled by the federal version of the law.

The New York WARN Act will apply to employers with at least 50 full-time employees and requires a minimum of 90 days' notice before a mass layoff, relocation, or plant closure occurs. Employers must give notice to three groups: (1) affected employees and their labor representatives; (2) the New York State Department of Labor; and (3) local workforce investment boards. Similar to the penalties under the federal WARN Act, employers violating the new state law will be liable for up to 60 days of back pay and employee benefits, as well as a civil penalty up to \$500 per day of violation.

By contrast to the New York state law, the federal WARN Act applies to companies with 100 or more full-time employees and requires only 60 days' notice to the appropriate parties. The New York law also takes a broader view than the federal law on what constitutes a "mass layoff" and a "plant closure." Importantly, the New York law also adds a provision for facility "relocation" that does not exist in the federal law.

Under the New York state WARN Act, triggering events will include:

- **Plant closures** resulting in an employment loss at a single site, over any 30-day period, for at least 25 full-time employees;
- **Mass layoffs or relocation** resulting in an employment loss at a single site, over any 30-day period, for at least 25 full-time employees who account for at least 33% of the employees at that site, or an employment loss at a single site for at least 250 employees; or
- **Relocation** of the employment site (requiring removal of substantially all of the industrial or commercial operations) to a different location at least 50 miles away.

At a time when economic hardship will force many employers to downsize, relocate, or close their doors entirely, the New York WARN Act will be a new headache for employers because it provides a state law cause of action that is more stringent than the federal law.

Companies Declaring Bankruptcy Risk Violating WARN Acts

Companies facing bankruptcy have a lot to worry about, but many do not realize that compliance with federal and state WARN Acts should be one of their priorities and that the timing of a failure to comply therewith may harm their ability to confirm a chapter 11 plan in bankruptcy.²

Compliance with federal and state WARN Acts applies to two situations in bankruptcy:

- Where the employer had knowledge pre-bankruptcy about events that required notice but files for bankruptcy to bypass WARN notice requirements; and
- Where the employer continues operating its business following the filing for bankruptcy as a debtor-in-possession.

Failure to provide proper notice under federal and state WARN Acts exposes the employer to claims that may harm the employer's ability to confirm a chapter 11 plan in bankruptcy. This risk relates to whether a claim under the federal or a state WARN Act is treated as an administrative expense that must be paid in full to confirm a chapter 11 plan.

Recently, the U.S. Bankruptcy Court for the District of Delaware formulated a bright-line test to determine when a claim under a WARN Act will be treated as an administrative expense in bankruptcy under the Bankruptcy Code as amended in 2005. The test hinges upon the timing of the termination. A WARN claim will be treated as an administrative expense *only if* the termination requiring notice occurs after the filing of a bankruptcy petition by the violating party. On the other hand, if the termination requiring notice occurs before the filing of the bankruptcy petition (even mere hours before the filing), the claim may be paid pennies on the dollar because it will be treated as a fourth or fifth-priority unsecured claim (up to \$10,950 per individual with any amount exceeding the statutory limit treated as a general unsecured claim). The court reasoned: "[B]ecause the vesting date is the only crucial time, and WARN Act claims vest entirely upon termination, whether the backpay was due for the time prior to the vesting or the time following the vesting is irrelevant."

Accordingly, as the economy continues to weaken and employers are faced with possibilities of laying off employees and filing for bankruptcy, they would be wise to seek the advice of their bankruptcy legal advisors to help ensure their ability to reorganize and to avoid unnecessary lawsuits under federal and state WARN Acts.

Obama Supports Changes to Federal WARN Act

The Obama Administration has promised to tighten regulations in the business sector, and labor law is one area where the President-Elect and his top advisors already have made their agenda clear.

The FOREWARN Act of 2007, co-sponsored last year by then-Senators Obama and Clinton, is designed to increase employer responsibilities under the existing federal WARN Act. As noted above, the federal WARN Act currently applies to employers with at least 100 full-time employees and requires 60 days' notice before implementing a mass layoff or plant closure. Three of the major changes proposed in the FOREWARN Act would be the same as those included in New York's recently approved state WARN Act. Specifically:

- Employers with a minimum of 50 full-time employees would be covered by the new act (as opposed to 100 employees under current federal law);
- "Mass layoffs" would be defined as an employment loss for a minimum of 25 employees at a single site (as opposed to 50 employees under current federal law); and
- Employers would be required to give 90 days' notice of the closure or layoff (as opposed to 60 days' notice under current federal law).

In addition, the FOREWARN Act:

- Would require employers to notify the U.S. Secretary of Labor within 60 days of a mass layoff or closing, and, perhaps most importantly,
- Would increase penalties for employers failing to comply with notification requirements by making employers liable for **double backpay** plus employee benefits for each day of the violation, **up to 90 days** (as opposed to current federal law, which limits liability to standard backpay and benefits at 60 days).

If implemented, these changes to the federal law will have a major impact on all private companies with more than 50 employees.

Conclusion

The next year will bring many unpredictable changes and challenges to employers. Crowell & Moring is committed to helping our clients implement difficult business decisions smoothly, successfully, and without incurring the cost of unnecessary litigation. For more information about federal and state WARN Act requirements, please contact the authors of this Alert.

¹ A number of states have enacted WARN Acts that are more stringent than the federal law. If your company is considering a layoff or other downsizing activity, please contact Crowell & Moring so that we can provide specific advice on the provisions of your state's WARN Act.

² A trustee in a bankruptcy whose job is to wind up or close a business is not required to comply with the notice requirements of federal and state WARN Acts.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.