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New York State Bar Association
Joint Report of
Commercial & Federal Litigation Section
Labor and Employment Law Section

New York WARN: A Flawed Statute That Can and Should Be Fixed

Scope of Report

For the most part, this report does not address the concept behind the New York Worker Adjustment and Retraining Notification Act [1] ("NY WARN"), about which attorneys representing management and workers each have strong views. Rather, it generally accepts that concept as a given and addresses what both the Commercial & Federal Litigation Section and Labor and Employment Law Section believe to be flawed language that creates unnecessary confusion. This report recommends that, for the sake of clarity, NY WARN be amended in a number of respects. The one exception to the consensus between those attorneys representing management and those attorneys representing employees is set forth in the section of the report entitled "Reductions in the Length of Notice – Five Situations," and the proposed amendments to Section 860-c of NY WARN. In brief, management side attorneys believe certain amendments to Section 860-c should be made, and worker side attorneys believe they should not be made. Since this dispute with respect to Section 860-c goes to the scope of the statute, we are just framing the issue for the Legislature and are not purporting to make a recommendation with policy implications.

Background: Federal WARN

The federal Worker Adjustment and Retraining Notification Act ("Fed WARN"), the mass layoff and plant closing law that has been in place since 1988, applies to employers with at least 100 employees[2]. Fed WARN comes into play if at least 50 employees (not counting so-called "part-time" employees) are to experience employment losses at a single site of employment.[3] Under those circumstances (provided some other factors are present, and with some exceptions) the employer must give employees and certain state and local officials 60 days' notice before effectuating the losses.[4]

Fed WARN has been subject to some harsh criticism. In September 2003, the Government Accounting Office issued a lengthy report condemning the confusion created by the WARN statute and its implementing regulations. In part, the report said: "On the basis of interviews with interested parties and a legal review of court cases, we found that certain definitions and requirements of WARN are difficult to apply when

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[1] N.Y. Lab. Law §§ 860 *et seq*. (McKinney 2011).
[2] 29 U.S.C. § 2101(a)(1).
[3] *See* 29 U.S.C. § 2101(a)(1) (definitions of "mass layoff" and "plant closing," each of which has a minimum threshold of 50 employees, not counting "part-time" employees).
[4] 29 U.S.C. § 2102(a).

employers and employees assess the applicability of WARN to their circumstances." United States Government Accounting Office, THE WORKER ADJUSTMENT AND RETRAINING NOTIFICATION ACT: REVISING THE ACT AND EDUCATIONAL MATERIALS COULD CLARIFY EMPLOYER RESPONSIBILITIES AND EMPLOYEE RIGHTS GAO-03-1003, (Sept. 19, 2003), *available at:*

http://www.gao.gov/docdblite/details.php?rptno=GAO-03-1003.

New York WARN Becomes Law

NY WARN followed Fed WARN by 20 years. It applies to employers with as few as 50 employees, and requires 90 days' notice when at least 25 employees (other than "part-time" employees) are to experience employment losses at a single site of employment. New York modeled its own statute on Fed WARN and like its federal prototype contains certain language or terms that employers may find difficult to apply and which call out for clarification.

The Sections issuing this joint report believe the problematic language can and must be corrected. We indicate how that might be done in a form attached to this report.

Definition of Employment Loss

One flaw of NY WARN is found in the definition of the term "employment loss." Under Fed WARN, the term is defined (with some exceptions) as:

> (A) an employment termination, other than a discharge for cause, voluntary departure, or retirement, (B) a layoff exceeding 6 months, or (C) a reduction in hours of work of more than 50 percent during each month of any 6-month period ….

29 U.S.C. § 2101(6).

Under the federal scheme, an employer counts "employment loss[es]" to determine whether a mass layoff or plant closing will occur. If there are to be fewer than 50 such losses (not including those suffered by "part-time" employees) within any 30 or 90-day period, the inquiry ends, for there is neither a mass layoff nor a plant closing. As indicated above, Fed WARN's definition of employment loss covers an employee out on layoff for six months or more.

In NY WARN, the term "employment loss" tracks the federal definition with respect to employment termination and reduction in hours. But then, departing from it, the NY statute inexplicably places the word "mass" before "layoff":

> 2. "Employment loss" means: …
>
> (b) a mass layoff exceeding six months ….

N.Y. Lab. Law § 860-a.2 (McKinney 2011).

As a consequence of the placement of the word "mass," the definition only applies to an employee on layoff longer than six months if the employee is part of a mass layoff. This is nonsensical. As a matter of strict interpretation, it means that an employee on layoff even for seven months or more does not suffer an "employment loss" unless he or she is part of a mass layoff. The circularity problem presented by the drafting very likely was unintended. The word "mass" should, therefore, be deleted from subsection (b).

Mass Layoff, Plant Closing, and a New Concept: Relocation

Mass Layoff and Plant Closing

The NY WARN definitions of "mass layoff" and "plant closing" are very similar to the Fed WARN definitions, except that these events can occur when half the number of employees triggering application of the federal law suffer employment losses.

Relocation

Fed WARN does not use the concept of "relocation" as a trigger for mandatory notice -- NY WARN does. The state law defines a "relocation" as "a removal of all or substantially all of the industrial or commercial operations of an employer to a different location fifty miles or more away."[5] Notably, the provision lacks any requirement of employment losses. Thus, on its face, NY WARN would cover a site with only a single employee, if it is moved to a new location 50 or more miles away.[6] The regulations adopted by the Department of Labor, albeit as an "emergency measure," add a requirement that 25 or more employees be affected.[7] This report recommends that the law be amended to include a minimum number of employment losses.

Another drafting flaw involving the term "relocation" stems from the fact that it appears to bear two different meanings within Section 860-a.2 of the statute. Seemingly borrowed from Fed WARN, this section of NY WARN contains additional wording that confuses the basic concept of what constitutes an "employment loss." Fed WARN excludes from the definition of employment loss situations where a closing or a layoff is the "result of the relocation or consolidation of part or all of the employer's business,"[8] and certain offers are made: If the employee receives an offer to remain employed at a new location, and the new location is within reasonable commuting distance, the employee will be deemed *not* to have suffered an employment loss whether or not the offer is accepted. If the offered employment lies beyond a reasonable commuting

[5] N.Y. Lab. Law § 860-a.8 (McKinney 2011).
[6] *See* N.Y. Lab. Law § 860-a.8 (McKinney 2011).
[7] N.Y. COMP. CODES R. & REGS. tit 12, § 921-1.1 (2010). The regulations were adopted, and revised, as emergency measures beginning on January 30, 2009, two days before NY WARN's effective date, and there were subsequent revisions. The current form of the regulations were published in the New York State Register, also as emergency regulations, on July 28, 2010, and referenced again in the New York State Register on September 22, 2010.
[8] 29 U.S.C. § 2101(b)(2).

distance, he or she will be deemed not to have suffered such a loss only if the offer is accepted.[9]

NY WARN Section 860-a.2 deals with a similar situation: neither offers of transfers within a reasonable commuting distance nor accepted offers of transfers outside a reasonable commuting distance are treated as employment losses. But its wording muddies, if not defeats, the intended purpose of the section. On the one hand it seems to employ the term "relocation" in its ordinary sense rather than in line with its statutory definition, which refers to a move "fifty miles or more away." *See* § 860-a.8, On the other hand, as actually written -- incorporating that definition -- the statute appears to require that an offer of a new position at a changed location of an employer's operations must be both within a reasonable commuting distance and fifty or more miles away. Conceivably, a court might strain to resolve this problem by finding that the New York legislature actually envisioned such a situation: perhaps a one-way commute of more than 50 miles can be deemed "reasonable" (although residents of any major metropolitan area in the state would be most surprised). More likely, this incongruous result was unintended. The problem can be fixed simply by changing the words "the relocation" to the word "moving" and by adding the word "the" before "consolidation."

There is one remaining problem with Section 860-a.2. The purpose of its last paragraph is to define what does not constitute an employment loss, so that when the stated conditions are met, the affected employees are not counted in determining whether a mass layoff or plant closing is occurring. Yet the drafters inserted "plant" before "closing" (once), and "mass" before "layoff" (three times). These words do not belong here since they create a circularity. It makes no sense to exclude these employees from the count of employment losses only if there already is a plant closing or mass layoff. The words "plant" and "mass" should, thus, be deleted wherever they occur in the final paragraph of Section 860-a.2.

What Triggers the 90-Day Notice Requirement: "Mass Layoff, Relocation or Employment Loss" -- But Not a Plant Closing?

The prohibition against executing a mass layoff or plant closing without giving advance notice in Fed WARN is contained in 29 U.S.C. § 2102(a): "An employer shall not order a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice of such an order ... ." The comparable provision in NY WARN is Section 860-b.1, which tracks some, but not all, of Fed WARN. Curiously, it does not prohibit an employer from ordering a *plant closing* without first giving the required 90 days' notice. Instead, it states: "An employer may not order a mass layoff, relocation, or *employment loss*, unless [notice is given]."[10] The omission of the term "plant closing" seems to be a drafting mistake.

It appears that the inclusion of "employment loss" as an event requiring advance notice, and the omission of a "plant closing" from the events that require advance notice follows

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[9] *See* 29 U.S.C. § 2101(b)(2).
[10] NY Lab. Law § 860-b.1 (McKinney 2011) (emphasis added).

the previously enacted Illinois version of WARN[11] -- which contains the same mistake.[12] In Illinois, however, the statute appears to be enforced solely by that state's Department of Labor, and the regulations promulgated in Illinois correct the error.[13] In New York, by contrast, while the "emergency" regulations also appear to rectify the error,[14] NY WARN allows direct lawsuits without the involvement of the Department of Labor, and in such litigation a court will have to interpret the statute.

The substitution of "employment loss" for "plant closing" in this section creates another problem as well. Such a loss is defined in pertinent part as "an employment termination, other than a discharge for cause, voluntary departure, or retirement."[15] As drafted, the statute would not require notice to be given to the single employees being terminated without cause because the mandate references only "affected employees" -- a term that is limited to employment losses associated with mass layoffs and plant closings (yet oddly, not employment losses associated with relocations).[16] But the statute technically requires an employer to notify governmental agencies before terminating *anyone*, even a single employee, without cause, on pain of a civil penalty of $500 (subject to a cap) for every day that notice is not given. That is surely unintended.

Fortunately, there is an easy fix for both of these problems. The phrase "plant closing" should be substituted for the phrase "employment loss" every place that the latter appears in Section 860-b(1). Parallel corrections should be made to Sections 860-g-1 and 860-h.1.

Reductions in the Length of Notice – Five Situations

Both Fed WARN and NY WARN allow for five situations where an employer may give less than the normally required notice. Fed WARN addresses the five situations in two different sections.[17] NY WARN combines the five situations into one section,[18] with an important distinction. Of the five situations allowing shortened notice under Fed WARN, only one, the so-called faltering company exception,[19] is limited to

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[11] 820 Ill. Comp. Stat. 65/1-99 (2005).
[12] *See* 820 Ill. Comp. Stat. 65/10(a) (2005) ("An employer may not order a mass layoff, relocation, or employment loss unless, 60 days before the order takes effect, the employer gives written notice of the order ... .").
[13] Ill. Admin. Code tit. 56, § 230.220(a) ("An employer ... must give notice 60 days before the order of a mass layoff or plant closing takes effect.").
[14] N.Y. Comp. Codes R. & Regs. tit 12, §921-2.1 (2010) ("[N]o employer may order a mass layoff, plant closing, relocation or a covered reduction in work hours covered by this rule unless, at least 90 calendar days prior to such mass layoff, plant closing, relocation or covered reduction in work hours, the employer provides notice ... .") Notably, the reference within the regulation to something called "a covered reduction in work hours" is wholly invented by its author. It has no basis in the statute as an event requiring notice of any kind. Rather a reduction of hours of a certain duration can create an employment loss, which when added to other employment losses may cause a mass layoff or plant closing. However, proposing amendments to the regulations is beyond the scope of this report.
[15] NY Lab. Law § 860-a.2(a) (McKinney 2011).
[16] *See* NY Lab. Law §860-a.1 (McKinney 2011).
[17] 29 U.S.C. §§ 2102(b), 2103.
[18] N.Y. Lab. Law § 860-c.
[19] The faltering company language in Fed WARN is as follows:

plant closings, while the other four (unforeseeable business circumstances,[20] the temporary nature of operations,[21] natural disasters[22] and labor disputes[23]) can apply to both plant closings and mass layoffs. The NY WARN single section describing all five situations begins with the phrase, "In the case of a plant closing …" and the section then lists the five situations in subsections. As described in the next paragraph, NY WARN as currently written limits both the faltering company exception and the unforeseeable business circumstances exception to plant closings.[24] The faltering company exception and the unforeseen business circumstances exception are the most common of the five situations.

With the introductory phrase "In the case of a plant closing" preceding the five situations, it initially appears that NY WARN only allows shortened notice in the case of a plant closing, but three of the five subsections (temporary nature of operations,[25] natural disaster[26] and labor disputes[27]) reference both plant closings and mass layoffs, the introductory phrase "In the case of a plant closing" notwithstanding. The subsection addressing unforeseeable circumstances[28] makes no reference to a mass layoff, and so appears to be limited by the section's overall introductory phrase, "In the case of a plant closing."

Whether the omission of the availability of shortened notice for a mass layoff in the situation of unforeseeable circumstances was intentional or the consequence of a drafting mistake is a point of contention as between members of the Labor and Employment Law Section's Committee on Legislation and Regulatory Developments who primarily represent management, and members who primarily represent individuals and WARN plaintiffs.[29] The New York Department of Labor, in its emergency

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> An employer may order the *shutdown of a single site of employment* before the conclusion of the 60-day period if as of the time that notice would have been required the employer was actively seeking capital or business which, if obtained, would have enabled the employer to avoid or postpone the shutdown and the employer reasonably and in good faith believed that giving the notice required would have precluded the employer from obtaining the needed capital or business.

29 U.S.C. § 2102(b)(1) (emphasis added).

[20] 29 U.S.C. § 2102(b)(2)(A).

[21] 29 U.S.C. § 2103(1).

[22] 29 U.S.C. § 2102(b)(2)(B).

[23] 29 U.S.C. § 2103(2).

[24] N.Y. Lab. Law §860-c(1)(a) and (b).

[25] N.Y. Lab. Law § 860-c.1(c).

[26] N.Y. Lab. Law § 860-c.1(d).

[27] N.Y. Lab. Law § 860-c.1(e).

[28] N.Y. Lab. Law § 860-c.1(b).

[29] The Commercial & Federal Litigation Section's Committee on Employment and Labor Relations acknowledges the same split. The members of the respective committees who primarily represent employees point out that NY WARN was intended to provide broader protection than FED WARN. For example, FED WARN has a coverage threshold of 100 employees, provides for a 60 day notice, and an employment loss threshold of 50 employees. NY WARN has a coverage threshold of 50 employees, provides for a 90 day notice period, and an employment loss threshold of 25 employees. These members contend that NY WARN, consistent with the Legislative intent to provide broader protections, permits a notice exception only for "plant closings", and not for "mass layoffs, in the case of the most common reduction in force circumstances, namely § 860-c(1)(a)(i) (faltering company exception) and § 860-c(1)(b) (unforeseeable circumstance exception). The section as written adds "mass layoffs" only in connection with

regulations,[30] clearly intend (in contradiction of the present wording of the statute) that the unforeseeable circumstances exception applies to mass layoffs, and not just plant closings.[31] The emergency regulations clearly contradict the current wording of the statute when they contend that the faltering company exception applies to mass layoffs.[32] In consequence, it appears that the emergency regulations may have been hastily drafted and appear to be of questionable aid.

The Labor and Employment Law Section invites the legislature to clarify its drafting which can be accomplished in a number of ways. The members who represent primarily management suggest that one way would be to remove the phrase "In the case of a plant closing" from the introduction of the overall section, and then include language in each subsection indicating whether the situation described applies to either a plant closing or mass layoff, or both. The members who represent primarily employees contend that changes to the statute are not necessary, but that in order to clarify what they regard as inartful drafting of little consequence, the phrase "In the case of a plant closing," now at the beginning of Section 860-c(1) could be moved to the beginning of Section 860-c(1)(a)(i) (the "faltering company exception"), and repeated at the beginning of Section 860-c(1)(a)(ii) (the "unforeseeable circumstance exception").

Extension of Layoff Period

Under Fed WARN, a layoff exceeding six months constitutes an employment loss.[33] Fed WARN contemplates the situation in which an employer may announce a shorter layoff, but because of unforeseen later circumstances it becomes clear that the layoff will extend beyond six months.[34] In such a situation, if the employer immediately gives notice that the layoff will be of longer duration, the employees receiving that notice are not deemed to have suffered employment losses.[35] If the layoff is not an employment loss for purposes of Fed WARN, the employee is not counted in determining whether a mass layoff or plant closing has occurred.

NY WARN tries to incorporate this concept, but does so badly. Section 860-d, entitled "Extension of mass layoff period" recites that a "mass layoff" that was expected to last for less than six months will be treated as an "employment loss" unless the extension beyond six months is caused by business circumstances not reasonably foreseeable at the time of the "initial 'mass layoff'" and notice is given when it becomes apparent that the extension beyond six months will be required.[36]

Within the context of WARN and its various technical definitions, this section lacks any meaning. There is no such thing as a "mass layoff period." Either there is a "mass

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relatively infrequent occurrences - namely § 860-c(1)(c) (temporary circumstances), § 860-c(1)(d) (natural disasters), and § 860-c(1)(e) (labor disputes).

[30] See n.7, above.

[31] N.Y. Comp. Codes R. & Regs. tit 12, § 921-6.3 (2010).

[32] N.Y. Comp. Codes R. & Regs. tit 12, § 921-6.2 (2010).

[33] 29 U.S.C. § 2101(6)(B).

[34] 29 U.S.C. § 2102(c).

[35] *See* id.

[36] N.Y. Lab. Law § 860-d (McKinney 2011).

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layoff," or there is not a "mass layoff"; and "employment losses" (including certain layoffs that exceed six months) are counted to see if there is a "mass layoff." The section of Fed WARN from which this was borrowed makes it clear that certain layoffs are not to be counted as employment losses, even if they extend beyond six months. To accomplish the same result, which was plainly intended, the word "mass" should be removed everywhere it appears in Section 860-d.

Miscellaneous Corrections

S. 8212, the genesis of NY WARN, added N.Y. Lab. Law § 598. Section 598 states that payments made to employees as damages for a violation of NY WARN do not count as remuneration for the purposes of unemployment insurance law. But the wording of that section limits the exclusion to an employer's "fail[ure] to provide the advance notice of a facility closure" as required by either NY WARN or Fed WARN.[37] There is no concept of "facility closure" in either the federal or the state law. Thus, if Section 598 is left unchanged, damages paid as a consequence of an employer's failing to give notice in a mass layoff situation (where no facilities are closed), should be counted as remuneration. That outcome would defeat the likely intent of the law.

Further, a similar "facility closure" reference appears in Section 860-g.3 of NY WARN, The language should be changed to strike the words "of a facility closure" from the phrase "the advance notice of a facility closure required by this article."

Finally, NY WARN makes a typographical error in a citation to Fed WARN. What now appears as "29 U.S.C. Sec. 1201[38] should be changed to read "29 U.S.C. Section 2101."

Conclusion

Both the Commercial & Federal Litigation Section and the Labor and Employment Law Section strongly urge that NY WARN be amended in accordance with the attachment to this report. However, with respect to Section 860-c regarding whether reduced notice is permissible for mass layoffs that occur in response to unforeseeable circumstances, the Commercial & Federal Litigation Section and the Labor and Employment Section acknowledge that there is no consensus among their members as to whether that section of the statute should be amended, as the management side attorneys contend that the intent of the Legislature needs to be clarified, and the worker side attorneys contend that the intent of the Legislature is sufficiently expressed in the language of the statute.

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[37] *See* N.Y. Lab. Law § 598.
[38] *See* N.Y. Lab. Law §§ 860--g.3. The same typographical error occurs at amended N.Y. Lab. Law § 598.

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