

## I New York Updates State WARN Act

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On June 21, 2023, the New York Department of Labor (“DOL”) adopted amendments to the New York State Worker Adjustment and Retraining Notification Act (the “Act”) regulations to “address the post-pandemic employment climate.” Among other things, the changes to the Act will now:

- Include remote workers as working at the “single site of employment” where they are “based” for purposes of calculating whether advance WARN notice is required;
- Amend a company’s notification requirements when there is a sale of a business;
- Add a framework for an employer to seek approval from the DOL Commissioner as to whether one of the Act’s exceptions applies to excuse advance notice.

As employers may be aware, any time they conduct a layoff, they need to be mindful of considerations under both the federal WARN Act and any applicable state WARN Acts. There are situations where a state’s WARN Act is triggered without the federal WARN Act being triggered.

### Single Site of Employment

New York employers are required to give 90 days’ advance notice to impacted employees and various government officials before conducting a mass layoff or plant closing. Previously, the Act required private businesses with 50 or more full-time employees at a **single site of employment in New York State** to give the 90 days’ advance notice if the company intended to conduct a mass layoff, meaning a layoff of either (1) 25 or more full-time employees constituting at least 33 percent of all employees at the site or (2) at least 250 full-time employees, regardless of whether they constitute 33 percent of the employees at the site.

Now, employees who work **remotely** but are “**based**” out of an employment site will be included in the site’s 50-employee threshold. The consideration of remote employees as being based at the single site of employment threshold is clearly a pandemic-related response to the uptick in the number of remote employees. New York employers with remote employees should be aware of the impact of remote employees in determining whether employees are deemed to work at a particular employment site and are legally entitled to advance notice of a mass layoff.

### Sale of a Business

In the event of a sale of a business, the Act requires the seller to notify employees of any event triggering the Act before and including the date of the sale. The buyer is required to notify employees of any triggering event after the date of the sale. The new regulations add that if the transfer of the seller’s employees is a “good faith condition of the purchase agreement” and if the buyer declines to employ the seller’s employees, the buyer is obligated to provide notice and the seller is relieved of this obligation.

### Key Change in Process to Qualify for a WARN Act Exception

The regulations did not change the four exceptions by which employers are excused from providing 90 days’ advance notice or are permitted to give a lesser notice period: (1) the faltering company exception in the case of a plant closing only; (2) the unforeseeable business circumstances exception, which now expressly includes a public health emergency such as a pandemic; (3) the natural disaster exception; and (4) the strikes or lockouts exception. Further, the amended regulations did not change that the employer has the burden of proving that the requirements for an exception

have been met, by presenting documentation in support of the claimed exemption.

Previously, the Act contemplated that the employer's burden to prove that it met an exception would be decided by a court in the event of litigation. But, now, in a significant change under the new regulations, an employer may avail itself of an exception to the Act **only** if the employer submits certain documentation to the DOL Commissioner and the DOL Commissioner concludes the employer qualifies for an exception. In other words, while it was previously up to a court to determine whether an exception applied, it is now up to the DOL. This is a material change in the law.

Under the new regulations, an employer must submit its request for an exception within 10 business days of when the written WARN notice would be due to the DOL Commissioner, unless the DOL Commissioner grants an extension. Next, the employer must provide documentation demonstrating the applicability of an exception. For the faltering company and unforeseen business circumstances exceptions, the employer should provide a written record proving that the employer was actively seeking business or that the need for notice was not reasonably foreseeable, as well as an affidavit swearing

to the validity of the documents provided in support of the request. For the other exceptions, the employer should provide a statement setting forth the reason for the mass layoff, a description of the basis for the exception, any other relevant documentation, and an affidavit swearing to the validity of these documents. The DOL Commissioner will then review the documentation and determine whether the employer qualifies for an exception. If not, and the employer cannot provide the requisite 90 days' advance notice or pay in lieu of notice, the employer will be liable for violating the Act.

### Online Portal

Gov. Kathy Hochul announced plans to launch a new Worker Adjustment and Retraining Notification Act Portal. Employers will be able to file notifications of New York WARN Act events through this portal. Hochul expects that the portal will "streamline" the notification process and help ensure compliance with the Act.

If you need assistance navigating the New York WARN Act, please contact Lowenstein Sandler's Employment Counseling & Litigation practice group.

## Contacts

Please contact the listed attorneys for further information on the matters discussed herein.

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