Lawlor, Shannon (LABOR)

From: Lawlor, Shannon (LABOR)
Sent: Tuesday, March 31, 2009 12:00 PM
To: 'JGodwin@hodgsonruss.com'
Subject: FW: RE: NYS WARN regulations

Mr. Godwin,

Please find the answers to your questions on the New York WARN Act below.

Thank you for your questions and comments. The Department is actively reviewing all the points raised in your comments and others received during the public comment period on our rule. You should follow the rulemaking process so you can keep abreast of any changes in provisions or interpretations set forth in the answers to your questions.

I have the following comments/questions on the NY WARN Act Regulations that I would like the Department of Labor ("Department") to provide guidance on:

(1) Where an employer is preparing to sell all or part of its business, would there by an employment loss if an employee is offered employment with the buyer? The preamble to the federal WARN Act regulations recognize that notice is not required to employees that are hired by a buyer within six months after being temporarily laid off in connection with an asset sale. In addition, a number of courts have taken a similar functional approach and held that there is no employment loss (even if the seller technically lays off the employee prior to the sale) if the employee is still performing the same job in a "substantially equivalent" position with the buyer. In these cases, the courts have reasoned that a change in employer identity is irrelevant. Will New York follow a similar rule? The rule in New York provides 90 days of notice to affected employees. Affected employees are those employees who may reasonably be expected to experience an employment loss. An employment loss can be a mass layoff, relocation, etc. If an employment loss is expected, affected employees are entitled to notice. Where there will not be an employment loss, no notice is required. If an employer is selling a business and laying off employees without planning to rehire them within six months, notice is required.

(2) With respect to single site of employment determinations, will the Department consider non-contiguous sites in the same geographic area that do not share the same staff or operational purposes to constitute a single site of employment? Such a provision is present in the federal regulations, but conspicuously absent from the New York Emergency Regulations. If New York is going to depart from the federal interpretation of single site of employment, please explain the basis why a different interpretation is merited in New York. The single-site determination is fact-based. The New York regs provide that separate buildings or facilities which are not directly connected will be considered a single site if they are in reasonable geographic proximity, are used by the employer for the same purpose, and share the same staff or equipment. The scenario you describe is not a single site under the New York regs, New York will not look outside the boundaries of New York State in enforcing its State WARN Law.

(3) What is the starting point for measuring the "reasonable commuting distance"? Is it the current site of employment? Or is it each employees' residence? Each employee's residence.

(4) Why is "reasonable commuting ***distance***" measured in a unit that does not measure distance (i.e., hours)? It takes into account different areas where traveling the same distance takes more time. A reasonable commuting distance is a distance that can be traveled in 1.5 hours. In New York City, for example, traveling a distance of fifteen miles could take the same amount of time it would take to travel 30 miles upstate. In some areas of upstate New York, given road conditions etc., it could take twice as much time to travel the same distance in one county as compared to another.

(5) What mode of travel is used to determine the usual travel time? Bus? Vehicle? Train? Walking? Plane? We cannot imagine a scenario where plane would be considered a normal mode of transportation for going to and from work. We would normally be talking about modes of transportation that are commonly used in the geographic area where the job is located. In New York City, for example, public transportation would be commonly available and used. This is not the case when traveling to work in most of upstate New York.

(6) At what time is the employee's usual travel time measured? Would it be different depending on which shift the employee is

working? We would apply the reasonable person standard here as well. We would take in account the mode of transportation used by a reasonable person living in this area, traveling this distance, and traveling at this time of day. For example, if an individual works at a location at which most workers on a day shift take public transportation to and from work but he works on the 10pm to 7am shift when public transportation might be less readily available, we might view travel time differently for both employees.

(7) With respect to the unforeseeable business circumstances exception, what difference, if any, is there between "sound and reasonable" business judgment and "commercially reasonable" business judgment? If there is no difference, shouldn't the Department adopt the federal "commercially reasonable" standard to avoid confusion? The Department will consider the recommendation to adopt the federal language.

(8) Can the Department provide more guidance on what types of strikes and lockouts qualify for the exception under the Emergency Regulations? This provision is straightforward -- any strike or lockout not intended to evade the requirements of the Act.

(9) In an August 25, 2008 Opinion Letter, the Department states that "an employer is only required to provide a WARN notice where at least 25 of its employees would suffer an employment loss or relocation". The text of the NY WARN Act, however, literally requires employers to provide advance notice of each employment loss or any "relocation"--regardless of how many employees are affected. Why has the Department not incorporated its August 25, 2008 interpretation into the regulations? Although the Emergency Regulations suggest that no notice is required unless the employment loss or relocation affects 25 or more employees (*see* § 921-2.1(b)(1)), why doesn't the Department expressly state that a relocation or employment loss do not require notice unless 25 employees are affected? The regulations make it clear that 25 employees must be affected in order for notice to be required. It is not the intent of the Act to provide notice anytime a single employee is laid off. However, it is the intent of the Act to always encourage employers to give reasonable notice to employees being laid off, even where, pursuant to the Act, no notice is required.

(10) On what statutory basis does the Department require notice for plant closings? A plant closing is a shutdown of a single site of employment if there is an employment loss of 25 or more employees during any 30-day period. Under Section 860-b, notice is required for all employment losses. There cannot be a plant closing without an employment loss. Therefore, all plant closings require notice since an employment loss has occurred.

(11) On what statutory basis do the faltering company and unforeseeable business circumstances exceptions apply outside of the plant closing context? On what statutory basis does the natural disaster exception apply outside of the plant closing and mass layoff contexts?

The faltering company, unforeseeable business circumstances and natural disaster exceptions apply to all employment losses covered under the WARN Act. With regard to the exceptions, the regulations do not distinguish between plant closings, mass layoffs, relocations or covered reductions in work hours - there is no practical reason to do so. While the statute is not explicit on this point, mass layoffs, relocations and covered reductions in work hours can all result from unforeseeable business circumstances and natural disasters, and can occur even after a faltering company has taken steps to avoid these results through attempts to raise capital etc.

The intent of the WARN Act is to require employers to provide 90 days notice to affected employees of all employment losses, with very limited exceptions. The Department has taken steps to ensure that employers do not use these exceptions hastily. Under those exceptions, it is the burden of the employer to establish each component of the exception applies in their situation. The stringent requirements of proof for this exception are not easily met. The Department will apply all exceptions narrowly.

We are currently reviewing comments received during the rulemaking process with regard to this topic to determine if the Department should change its position in this regard.

(12) Under the federal WARN Act, an employer is not liable for any civil penalty where the employer satisfies its liability to each affected employee within three weeks after the notice triggering event. Why do the Emergency Regulations require the employer to satisfy its liability within three weeks from the date the employer ***orders*** the triggering event? What is the statutory basis for such a divergent interpretation? The statutory basis for the language in the regulation is Section 860-h of the Labor Law which provides that such payments must be made within three weeks from the date the employer orders the mass layoff etc.

(13) The calculations for determining "average regular rate of compensation" and the "final rate of compensation" do not appear to be well suited for employees who are compensated on an other than hourly basis (e.g., salary, commission, drawing account). It is easy to see how under the "final rate of compensation" calculation the amount owed could be well in excess of what the employee's compensation truly averaged. For example, if a salaried employee worked only one day in his or her last pay period due to vacation or other paid leave, his "final rate of compensation" would be too high (e.g., salary = $2,000/wk; "days worked" in last pay period = 1; "final rate of compensation = $2,000/day). The Department should modify these calculations so that they take into account all

different types of compensation schemes. We would consider days worked to be days in a pay period that the employee was scheduled to work -- even if the employee was on paid leave.

(14) The Appeals regulation does not appear to allow for recourse beyond the Appellate Division. The Department should expressly clarify whether it would seek to enforce such judgments where the employer appeals to the Court of Appeals. The Department notes your recommendation and will discuss clarifying language in this regard.

I await your responses. If you have any questions or would like to discuss this matter further, please contact me.

Best regards,

John

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