Lawlor, Shannon (LABOR)

To: RLemert@constangy.com

Cc: Jones, Kevin E (LABOR); Faraone, Janet M (LABOR); Fellner, Janice (LABOR); Hartnett, Timothy (LABOR)

Subject: FW: Constangy, Brooks & Smith, LLC

Mr. Lemert,

You asked whether employees hired through a temporary agency "should be counted for triggering the NYS WARN Act." I presume that you are speaking of a situation in which the temporary agency ("agency") has placed the employees with a "company" who has engaged in some activity precipitating an employment loss for the employee.

The short answer of whether or not the employee should be counted for WARN purposes is that it depends upon who is determined to be the employer. If it is determined that the affected individuals are employees of the company, they will be counted when determining: (1) if the company is an employer subject to the WARN Act and, if so, (2) whether the requisite number of employees are affected by an employment loss so as to trigger the WARN notice requirement. If the individuals are employees of the agency, then they will not be counted by the company in determining WARN applicability.

The Department will consider the following factors, among others, in determining whether the company has an employer-employee relationship with the individuals suffering an employment loss:

Control over the employee;
Authority to hire and fire;
Authority to assign or place the employee;
The entity from which the employee receives wages and employee benefits; and
The entity the employee considers to be his or her employer.

Even if the company is determined to be an employer subject to the WARN Act, you should be aware that a placement by a temporary employment agency may also bring these employees within the "temporary employment" exception of the Act. Under the Act, notice is not required "if the closing or layoff results from the completion of a particular project or undertaking, and the affected employees were hired with the understanding that their employment was limited to the duration of the facility, project, or undertaking." 12 NYCRR 921-5.1(a). The burden of proof is on the employer to show that the employee understood on the day of hire that the job was temporary. A placement by a temporary agency does not, in and of itself, make an employee temporary if the employee has experienced a long term placement. The employer must still show that the employee knew at the time of hire that their employment was limited to the duration of the facility, project, or undertaking.

If the "temporary employees" are, in fact, employees for whom a Professional Employer Organization (PEO) has contractually assumed responsibility, whether the PEO is registered as such or not, the PEO may be considered the joint employer with its client-employer. As defined under New York State Labor Law § 922, both the PEO and its client employer may be considered joint employers for certain purposes. A PEO and client-employer both maintain a certain degree of "direction and control" over the employees. Unless the the PEO agreement provides otherwise, both the PEO and its client-employer may share the responsibility for providing notice under the WARN Act.

Shannon J. Lawlor
Attorney 1
Counsel's Office
New York State Department of Labor

From: Faraone, Janet M (LABOR)
Sent: Wednesday, April 29, 2009 11:22 AM
To: Colavito, Maria L (LABOR)
Cc: Jones, Kevin E (LABOR); Connell, Joan (LABOR); Golden, Kenneth L (LABOR); Lawlor, Shannon (LABOR); Hartnett, Timothy (LABOR); Fellner, Janice (LABOR)
Subject: FW: Constangy, Brooks & Smith, LLC

May I request a legal opinion on the below inquiry regarding NYS WARN? Thank you for considering this request.

From: Lemert, Bob [mailto:RLemert@constangy.com]
Sent: Wednesday, April 29, 2009 10:48 AM
To: Faraone, Janet M (LABOR)
Subject: Constangy, Brooks & Smith, LLC

I would appreciate advice on the following situation: Agency temporary empoyees have been working for a client for several months. They are paid by the temp agency but are directly supervised by the client's supervisors and managers. But for the fact that they are paid by the temp agency, if the have worked for the client 6 of the past 12 months, they would meet the definition of a covered employee, ie., not a "part-time" employee. Should they be counted for triggering NY state WARN Act notice pursosed? Thanks for your assistance.

Bob Lemert
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communication in error, please contact the sender by reply e-mail immediately and destroy all copies of the original message.