



New York State Department of Labor
David A. Paterson, Governor
Colleen C. Gardner, Commissioner

April 13, 2010



Re: WARN Act
File No. RO-10-0044

Dear [REDACTED]:

I have been asked to respond to your e-mail inquiry of March 25, 2010, wherein you requested an opinion regarding the applicability of the NYS WARN Act to a New York company that is planning to sell its principal business assets at its only site. You indicate that this company employs a total of fifty three employees, forty eight full-time and five part-time. Two of the part-time employees are directors, one of whom is also an officer, and both draw a salary. The part-time employees each work an average of 1,853 hours per year. You seek guidance on the following: are part-time salaried officer/directors employees; is a shareholder/officer who receives a salary and works full-time deemed to be an employee for the 50 employee WARN threshold; is it reasonable to assume, for purposes of the average hours criteria, that a full-time salaried employee works 2000 hours per year?

As you may be aware, under the NYS WARN Act, private sector employers with fifty (50) or more employees (excluding part-time employees) are required to provide at least ninety (90) days notice to affected employees, representatives of affected employees, the New York State Department of Labor, and the applicable local workforce investment board before ordering a plant closing, mass layoff, or a covered reduction in work hours, that falls within the qualifying circumstances set forth in the WARN Act and corresponding regulations.

You ask whether a director/officer would be considered an affected employee for purposes of the WARN Act and whether a shareholder/officer that receives a salary and works full time would be deemed an employee under the WARN Act. In New York State corporate officers and directors who perform services for compensation for the corporation are employees. Under the WARN Regulations, the only individuals who are excluded from the definition "affected employee" are business partners, consultants, or contract employees who have a separate employment relationship with another employer and are paid by that employer or are self employed. (See 12 NYCRR §921-1.1(a)). Accordingly any officer or director who draws a salary would be deemed an affected employee for purposes of the WARN Act.

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You next inquire if it is reasonable to assume, for purposes of the "average hours" criteria, that a full-time salaried employee works 2,000 hours per year? For purposes of applying the WARN Act, the answer is no. You must make a determination as to the average number of hours for which a salaried worker is paid per year, including paid time off. Many salaried workers work far greater than forty hours a week. Others work a regular eight hour per day, five days a week job. Some may actually work fewer than 40 hours per week (e.g. you indicate the full time Directors work 35.6 hours per week [1863 hours including hours on paid vacations & holidays/52 weeks]). Accordingly, to the extent that your salaried workers generally work a 40-hour week, a 2080 hour assumption is warranted. For those who do not fall into this category, a reasonable estimate needs to be made on an individual employee basis.

As previously stated, under the NYS WARN Act, private sector employers with fifty (50) or more employees (excluding part-time employees) are required to provide at least ninety (90) days notice to affected employees. Pursuant to 12 NYCRR 921-1.1(e) (1) an employer means any business enterprise, whether for-profit or not-for-profit, that employs fifty (50) or more employees within New York State, excluding part-time employees, or fifty (50) or more employees including part-time employees within the state that work in aggregate at least 2,000 hours per week. Pursuant to 12 NYCRR §921-1.1(e)(7) (i), all individuals employed at a single site of employment, other than part time employees, are counted as employees for purposes of determining coverage as an employer.

Accordingly, based on the information you provided, this company appears to be an "employer" under the NYS WARN Act because it employs fifty or more full-time employees. Given that we do not know the total average work hours for all the business's employees, regardless of whether they are full or part-time, it would appear to be an open question as to whether the business's employees work in aggregate at least 2,000 hours per week. Nonetheless, it appears likely that this test will be met as well.

Please note that this opinion is based solely upon the information you provided up to the date of this letter. A different opinion could result if the information you provided was inaccurate, or if relevant facts were not disclosed.

Should you have any further questions please do not hesitate to contact me.

Very truly yours,



Kristen L. Balzer
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KLBJc

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Opinion File