

Lawlor, Shannon (LABOR)

To: Salderman@bswlaw.com
Cc: Faraone, Janet M (LABOR); Hartnett, Timothy (LABOR)
Subject: 401k inquiry re: WARN ACT RO-09-0078

Ms. Alderman,

Under Labor Law Section 860-g an employer who fails to give notice to an employee entitled to receive notice under the State WARN Act, is liable to each affected employee for the "value of the cost of any benefits to which the employee would have been entitled had his or her employment not been lost," Under 12 NYCRR 921-7.3(a) (2), these benefits include " employer paid retirement contributions." Therefore, these benefits include employer paid contributions to a 401(k) if the employee was entitled to them during his or her employment.

You ask whether an employer's contribution to a 401(k), in which the employee is not yet vested, is considered to have vested under the WARN Act's definition of fringe benefits. We have consulted with staff at the United States Department of Labor with regard to your ERISA questions and have been informed that the answer to this question is "no." Where an unvested employee is laid off without notice and is entitled to 60 days of benefits, they would only be entitled to their individual contributions to the plan for those 60 days. Where a vested employee is laid off without notice and is entitled to 60 days of benefits, they would be entitled to their individual contributions and their employer's contributions and earnings (for whatever percent they are vested on the date of layoff). The employee's vesting schedule is determined by the employer's 401(k) plan. That plan would be the controlling authority for the employee's vesting and should be consulted. If an employee is laid off because an employer goes out of business, all employees may automatically vest if the employer files for termination of the plan. Automatic vesting is not required by law, but may be found in the employer's plan. Under ERISA, an employee can request a copy of the employer's summary plan in writing free of charge or the plan documents at a reasonable copying cost.

Please let me know if you have any questions.

Shannon J. Lawlor
Attorney 2
Counsel's Office
New York State Department of Labor

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From: Fellner, Janice (LABOR)
Sent: Friday, May 29, 2009 10:03 AM
To: Colavito, Maria L (LABOR)
Cc: Jones, Kevin E (LABOR); Connell, Joan (LABOR); Golden, Kenneth L (LABOR); Lawlor, Shannon (LABOR); Hartnett, Timothy (LABOR); Faraone, Janet M (LABOR)
Subject: FW: 401k inquiry re: WARN ACT

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

6/26/2009

for considering this request.

From: Alderman, Suzanne H. [mailto:Salderman@bswlaw.com]
Sent: Friday, May 29, 2009 9:39 AM
To: Fellner, Janice (LABOR)
Subject: 401k inquiry re: WARN ACT

Janice -

Per our discussion, I am submitting a formal inquiry to find out if an employer's match contribution to a 401k, which has not yet vested, would be considered to have vested (i.e. does this trigger "cliff vesting") under the WARN Act's definition of fringe benefits that become payable within 30 days of being laid-off.

Many thanks for your kind attention to this inquiry.

Regards,
Suzie

Suzanne H. Alderman

Brenner, Saltzman & Wallman LLP

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Thank you.

6/26/2009