

**New York Enacts Worker Adjustment and Retraining Notification (WARN) Act**

In these uncertain economic times, it is an unfortunate fact that many nonprofits will have to consider a reduction in force (“RIF”). As you may be aware, under the federal Worker Adjustment and Retraining Notification Act (“Federal WARN Act”), organizations that have at least 100 employees must give 60 days’ advance written notice of, among other things, a mass layoffs affecting 50 or more employees. New York employers, including not-for-profit organizations, also need to be aware of the recently-enacted New York State Worker Adjustment and Retraining Notification Act (“NYS WARN Act”), which is more expansive than the Federal WARN Act and places more stringent obligations on smaller organizations. Most importantly, starting in February 2009, employers of 50 or more employees will need to give 90 days’ advance written notice when 25 or more employees will lose their jobs due to, among other things, a layoff. As a result, certain employers will be covered for the first time by WARN Act requirements. Employers who are already covered by the Federal WARN Act will now be covered by the NYS WARN Act and will also need to comply with the New York requirements, including the significantly longer period for providing written notice.

The chart below includes a summary of significant differences between the two statutes.

	<b>NYS WARN Act</b>	<b>Federal WARN ACT</b>
<i>Who is covered?</i>	<ul style="list-style-type: none"> <li>Applies to private employers with <b>50 or more full-time employees</b> (with certain exceptions).</li> </ul>	<ul style="list-style-type: none"> <li>Applies to private employers with <b>100 or more full-time employees</b> (with certain exceptions).</li> </ul>
<i>What is required?</i>	<ul style="list-style-type: none"> <li><b>90 days’ written notice</b> required before a covered plant closing, mass layoff or relocation at a single site of employment.</li> </ul>	<ul style="list-style-type: none"> <li><b>60 days’ written notice</b> required before a covered plant closing, mass layoff, or relocation at a single site of employment.</li> </ul>
<i>What event will trigger the notice requirement?</i>	<ul style="list-style-type: none"> <li>A “<i>plant closing</i>” triggering the written notice requirement occurs if facility or site of employment is shut down and <b>25</b> or more employees suffer an employment loss.</li> <li>A “<i>mass layoff</i>” triggering the written notice requirement occurs if the RIF results in employment loss for either (1) 33% of the workforce, which amount to at least <b>25</b> employees, or (2) a total of <b>250</b> employees.</li> <li>Written notice required for a “<i>relocation</i>” of all or substantially all of the covered employer’s industrial or commercial operations to a different location 50 miles or more away.</li> </ul>	<ul style="list-style-type: none"> <li>A “<i>plant closing</i>” triggering the written notice requirement occurs if facility or site of employment is shut down and <b>50</b> or more employees suffer an employment loss.</li> <li>A “<i>mass layoff</i>” triggering the written notice requirement occurs if the RIF results in employment loss for either (1) 33% of the workforce, which amount to at least <b>50</b> employees, or (2) a total of <b>500</b> employees.</li> <li>Written notice of a “<i>relocation</i>” not required unless relocation also constitutes a plant closing or mass layoff.</li> </ul>

<p><i>Are there any exceptions to the relevant written notice requirement?</i></p>	<ul style="list-style-type: none"> <li>• First, in the case of a plant closing (but not a mass layoff or relocation), if (1) at the time the written notice would have been required, the employer was actively seeking capital or business; (2) the capital or business sought would have enabled the employer to avoid or postpone the relocation or termination; and (3) the employer reasonably and in good faith believed that giving the written notice would have precluded the employer from obtaining the needed capital or business;</li> <li>• second, in the case of a plant closing (but not a mass layoff or relocation), if the need for notice was not reasonably foreseeable at the time the written notice would have been required;</li> <li>• third, the plant closing or mass layoff is because of natural disaster;</li> <li>• fourth, the mass layoff, relocation or employment loss is because of a physical calamity or an act of terrorism or war;</li> <li>• fifth, if the plant closing is of a temporary facility or the plant closing or mass layoff is the result of the completion of a particular project or undertaking, <i>and</i> the affected employees were hired with the understanding that their employment was limited to the duration of the facility, project or undertaking; and</li> <li>• sixth, the plant closing or mass layoff constitutes a strike or a lockout.</li> <li>• Employers who are unable to provide the required written notice must provide as much written notice as is practicable and a brief statement explaining the reduction of the notification period.</li> </ul>	<ul style="list-style-type: none"> <li>• Same as NYS WARN Act, except that Federal WARN Act does not include the exception for “physical calamity or an act of terrorism or war.”</li> </ul>
<p><i>Who must receive written notice?</i></p>	<ul style="list-style-type: none"> <li>• All employees who may reasonably be expected to experience an employment loss as a consequence of the proposed plant closing or mass layoff;</li> <li>• union representatives (if any) of the affected employees;</li> <li>• the New York State Department of Labor Department; and</li> <li>• the local workforce investment board for the locality in which the employment loss will occur.</li> </ul>	<ul style="list-style-type: none"> <li>• Each union representing the affected workers or each affected worker, if not represented by a union, including part-time and/or inactive employees plus employees who will likely suffer an employment loss due to bumping rights, to the extent known by the employer;</li> <li>• the State dislocated worker (Rapid Response) unit, designated under the Workforce Investment Act; and</li> <li>• the chief elected official of the unit of local government in which the employment site is located.</li> </ul>

<i>What must the notice look like?</i>	<ul style="list-style-type: none"> <li>• Contents must meet requirements of Federal WARN Act.</li> </ul>	<ul style="list-style-type: none"> <li>• The content of the notice to the required parties is listed in section 639.7 of the Federal WARN Act regulations.</li> </ul>
<i>Who can enforce the Act?</i>	<ul style="list-style-type: none"> <li>• Affected employees have the right to sue employers for violations of the NYS WARN Act.</li> <li>• New York State Department of Labor also has enforcement authority.</li> </ul>	<ul style="list-style-type: none"> <li>• Affected employees have the right to sue employers for violations of the Federal WARN Act.</li> </ul>
<i>What is an employer's potential liability?</i>	<ul style="list-style-type: none"> <li>• An employer who fails to give the required written notice may be held liable for back pay and the value of the cost of any lost benefits (including the cost of any medical expenses incurred by the employee that would have been covered by an employee benefit plan) for the duration of the violation, up to a maximum of sixty days or one half of the days the employee was employed by the employer, whichever is smaller.<sup>1</sup></li> <li>• The court may also award attorney's fees to a prevailing plaintiff.</li> <li>• Civil penalty of \$500 per day of each day of the employer's violation, which is not applicable if an employer pays all applicable employees the amounts for which it is liable.</li> </ul>	<ul style="list-style-type: none"> <li>• Same as NYS WARN Act.</li> </ul>
<i>Does the Act contain a good faith defense?<sup>2</sup></i>	<ul style="list-style-type: none"> <li>• Yes.</li> </ul>	<ul style="list-style-type: none"> <li>• Yes.</li> </ul>

The chart included above is only a summary and nonprofits should review each anticipated plant closing, mass layoff or relocation with counsel to ensure that they are in compliance with both the Federal WARN Act and the NYS WARN Act.

***This alert is meant to provide general information only, not legal advice. Please contact Judith Moldover at Lawyers Alliance for New York at (212) 219-1800 x 250 or visit our website [www.lawyersalliance.org](http://www.lawyersalliance.org) for further information.***

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<sup>1</sup> Under the NYS WARN Act, an employer's liability will be reduced by any liability paid by the employer under the Federal WARN Act.

<sup>2</sup> The good faith defense permits a court to reduce the amount of liability or penalty if it determines that the violation was in good faith, and that the employer had reasonable grounds for believing that it was not in violation.