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ALERT
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Coronavirus – Legal Risks for NY Business Closures and Mass Layoffs

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New York businesses, especially in the retail and hospitality sectors, have seen a precipitous decline in business due to coronavirus over the past few weeks. The immediate outlook is grim and many anticipate that the local economy will get worse before it gets better. Accordingly, New York employers face the difficult decision of whether to lay off employees or temporarily close establishments, which raises significant issues under the federal and New York Worker Adjustment and Retraining Acts (NY WARN).

Employers should consult with counsel to determine whether potential layoff decisions or cutting worker hours would trigger noncompliance penalties with NY WARN, which stipulates specific advance notice requirements to employees and relevant municipal and government administrations.

About NY WARN

The requirements of the New York Worker Adjustment and Retraining Act are either analogous to, or more protective than, the federal Worker Adjustment and Retraining Act. Therefore, this alert will only address issues under the NY WARN. Generally, under NY WARN, an "employer" is defined as any business that employs 50 or more employees within New York (excluding part-time employees[1]), must provide 90 days of advance, written notice prior to ordering a mass layoff, plant closing, relocation or a covered reduction in work hours. These employment events are defined as:

- **Mass layoff** – a reduction-in-force of at least 25 full-time employees and 33% of the workforce, or at least 250 employees, during any 30-day period at a single site of employment;
- **Plant closing** – the permanent or temporary shutdown of a single site of employment that results in an employment loss for 25 or more full-time employees in a 30-day period;
- **Relocation** – the removal of all or substantially all of the operations of an employer to a different location 50 miles or more away; and
- **Reduction in work hours** – a reduction in hours of work of more than 50% during each month of any consecutive six-month period that impacts at least 25 employees provided those affected employees constitute at least 33% of the workforce at the site of employment or that impacts at least 250 employees at the site of employment.

If notice is required, under the NY WARN, it must be provided to:

- The affected employees;
- The affected employees' collective bargaining representative (if any);
- The New York State Department of Labor; and

- The local workforce investment board established pursuant to the federal Workplace Investment Act for the locality in which the employment losses will occur. The local workforce investment board for New York City is listed, along with the workforce investment boards for other jurisdictions, on the New York Department of Labor website.

In addition, under the Federal WARN Act, notice must also be provided to the chief elected official of the municipality where the establishment is located (e.g., the Mayor of the City of New York) and the State Dislocated Worker Unit (which, in New York, is the New York State Department of Labor).

Exceptions to NY WARN

In limited circumstances, an employer is not required to provide written notice 90 days in advance for a NY WARN event. In such a situation, the employer must still provide required, written notice, but it only needs to be provided as soon as practicable. Further, the required notice must, among other things, contain a statement explaining the basis for reducing the notification period.

With respect to the coronavirus pandemic, there are only two exceptions that might be applicable to employers: (i) the natural disaster exception; and (ii) the unforeseen business circumstance exception. Under the **natural disaster exception**, an employer can provide reduced notice in the event the job losses are due to a "natural disaster" such as a flood, earthquake, or drought. Whether this exception applies to the coronavirus pandemic is unclear as pandemics are not necessarily similar to floods, earthquakes or droughts. Further, it is unclear whether the job losses have to be a direct result of the natural disaster (e.g., the establishment closed because it was destroyed by an earthquake) or whether they can be an indirect result of the natural disaster (such as the current situation).

The **unforeseen business circumstance** exception allows an employer to provide notice as soon as practicable, rather than 90 days in advance, if the employment losses are caused by business circumstances that were not reasonably foreseeable. An important indicator of a business circumstance that is not reasonably foreseeable is that the circumstance is caused by some sudden, dramatic and unexpected action or condition outside the employer's control that directly prevents the employer from providing the required 90 days' notice. While this exception is construed narrowly, it is very likely to apply to New York business that have to take employment actions that produce job losses triggering NY WARN as a result of the coronavirus pandemic.

If a New York employer has to take the unfortunate step of laying off employees, closing establishments and/or greatly cutting back on worker hours, such employment actions may trigger NY WARN. Therefore, if a New York employer is contemplating such employment actions, the employer should consult with counsel to determine what notice, if any, needs to be provided to the impacted employees as well as the government and others.

For more information about this alert, please contact Glenn S. Grindlinger at 212.905.2305 or ggrindlinger@foxrothschild.com, or any member of the firm's national Labor & Employment Department.

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[1] A part-time employee under NY WARN is any employee who averages less than 20 hours of work per week over the last ninety (90) days as well anyone who has been employed for less than six months regardless of the number of hours the employee averages per week.