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NY Employers: WARN Notices May Be Required if Furloughs and/or Layoffs Extend Beyond Six Months

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Considering that many furloughs and layoffs are approaching six months in length (and are likely to last longer), employers need to reassess whether they are now required to issue employment-related notices under New York law.

When COVID-19 started spreading rapidly in March 2020, many New York employers closed their businesses and laid off and/or furloughed their employees. At that time, no one knew how long the furloughs/layoffs would last. As such, employers had to determine whether they had to issue notices required under the New York Worker Adjustment and Retraining Notification Act (NY WARN Act),^[1] which requires certain employers to send advance notice to employees and relevant government offices prior to implementing a mass layoff, plant closing, relocation or covered reduction in work hours.

As the terms are used in this Alert, a **furlough** is a mandatory temporary leave of absence, such that the employee is still considered employed but their work hours have been reduced to zero for a period of time. A **layoff** is akin to an employment separation, but with the express understanding that the employee will likely be rehired. A termination is a permanent separation from employment with no reasonable expectation of rehire.

Employers Affected by the WARN Act

As detailed in a [prior Alert](#), absent one of the exceptions specifically enumerated in the NY WARN Act, employers with 50 or more employees in New York (excluding part-time employees) are typically required to provide detailed, written notice to employees and various governmental entities 90

days in advance of certain employment events, including:

1. Mass layoffs of at least 25 full-time employees (if those 25 employees constitute at least 33% of the workforce) or at least 250 employees, during any 30-day period at a single site of employment if the layoff is expected to exceed six months;
2. A reduction in hours of work of more than 50% each month of any consecutive six-month period for at least 25 full-time employees (if those 25 employees constitute at least 33% of the workforce) or at least 250 employees; and
3. 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.

In March 2020, at the time employers conducted layoffs and/or furloughs, it was unclear how long the COVID-19 pandemic would last. Therefore, some employers may have decided not to send out WARN notices for “mass layoffs” because at the time the employer took those actions, they were not expected to last six months. Most employers who engaged in terminations and otherwise met the requirements under WARN sent out notices in March. Nevertheless, if an employer opted not to send WARN notices for mass layoffs or furloughs in March, and a significant portion of their workforce remains on mass layoffs and furloughs, they may need to reassess the situation as the layoffs/furloughs approach the six-month mark. Indeed, many such employers may now be required to send WARN notices to the affected employees as well as various governmental entities.

Navigating WARN Act Compliance

Under the NY WARN Act, an employer with 50 or more employees employed within the State of New York that previously announced and carried out a short-term layoff/furlough of less than six months, which is now being extended beyond six months due to COVID-19, may need to provide WARN notices immediately. In such event, the notices need to contain an explanation for why WARN notices are being sent at this time (*i.e.* that a short-term layoff is being extended beyond six months).

If you are an employer in such a situation, there are several questions you need to consider to determine whether you have to send WARN notices, and the contents of such notices:

- Did you send WARN notices out in March 2020 when you first conducted layoffs or placed employees on furlough? If so, how did you characterize the employment action — were they “furloughs” or “layoffs”?
 - **If they were furloughs**, did you furlough at least 25 employees (and did those 25 employees constitute at least 33% of the employees at the place of employment (excluding part-time employees)) or 250 employees (excluding part-time employees) regardless of whether they comprise 33% of the employees at the site?
 - If so, for each employee placed on furlough, confirm that their hours of work were reduced by at least 50% during each month of the past six months. If all 25 employees (constituting 33% of the workforce) or all 250 employees had their hours reduced by at least 50% for each of the past six months, you may need to prepare and send new WARN notices stating that employees are receiving the notices due to a reduction in work hours extending beyond six months.
 - **If they were layoffs**, what language did you use to inform employees about the layoff? Did the employer expressly state that the employees would be brought

back to work within six months?
Did you lay off at least 25 full-time employees (constituting at least 33% of the workforce) or at least 250 employees?

- If so, you may need to prepare and send new WARN notices stating that employees are receiving the notices due to mass layoffs extending beyond six months.
- If you did not previously send WARN notices because you did not believe (at that time) that the furloughs or layoffs would extend beyond six months, you may need to prepare and send WARN notices identifying the reason for such notices — either because of a mass layoff or because of a reduction in work hours (*i.e.* furloughs).
- In either situation, you must include a statement that the notices are being sent with as much advance notice as possible under the unique circumstances presented by the COVID-19 pandemic and the long-term layoffs and/or furloughs were not reasonably foreseeable and are outside the employer’s control.

Complying with NY WARN Act requirements can be onerous, confusing and very technical. Employers who are faced with any of the above situations should consult with counsel to ensure they comply with the nuances of the act.

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[1] Because the requirements of the NY WARN Act are either analogous to, or more protective than, the federal Worker Adjustment and Retraining Act, this alert addresses only employer requirements under NY WARN.