

## PENDING STATE LAW WOULD IMPOSE EXPANDED REQUIREMENTS ON EMPLOYERS IN CONNECTION WITH PLANT CLOSINGS AND MASS LAYOFFS

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Under the federal Worker Adjustment and Retraining Notification (“WARN”) Act, employers with one hundred (100) or more employees, not including employees who have worked less than six of the last twelve (12) months or working an average of less than twenty (20) hours per week, are required to provide at least sixty (60) calendar days advance written notice of plant closings or layoffs affecting fifty (50) or more employees at a single site of employment. There are exceptions to the notice requirements where layoffs occur as a result of unforeseeable business circumstances, faltering companies and natural disasters. The purpose of the Act is to provide workers with transition time to seek other employment, and, if necessary, to obtain retraining that will enable them to compete successfully in the job market. The Act also provides for notice to State dislocated worker units and to appropriate units of local government so that they can be prepared to provide available benefits to affected individuals.

On April 8, 2009, the New Hampshire Senate passed a bill that would parallel the federal WARN Act in some respects, and impose even stricter requirements on employers in this State. The bill (SB 40), entitled the “New Hampshire Worker Adjustment and Retraining Notification Act,” is intended to protect workers “by requiring advance notice of significant employment losses and by providing a means for workers to seek a remedy through administrative procedure.” The New Hampshire WARN Act would allow the State of New Hampshire to pursue claims for employees whose rights under the law are violated and would provide a mechanism for asserting liens against the assets of employers who are liable for violations. Many in the business community have expressed concern about the reach of the bill and its impact on the already ailing New Hampshire economy.

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For purposes of SB 40, a mass layoff would include a reduction in force that does not occur as a result of a plant closing and that causes an “employment loss” at a single site of employment during any thirty (30) day period for a) at least 250 employees, excluding part-time and seasonal employees, or b) at least twenty-five (25) employees, excluding part-time and seasonal employees, if they constitute thirty-three (33) percent of the full-time employees of the employer. “Employment loss” is defined as an employment termination other than a termination for cause, voluntary quit, or retirement; a layoff exceeding six (6) months in duration; or a reduction in hours of work of more than fifty (50) percent during each month of any six (6) month period. A plant closing is defined as the permanent or temporary shutdown of a single site of employment resulting in an employment loss during any thirty (30) day period for fifty (50) or more employees, excluding part-time employees.

Among the most controversial features of the bill is its jurisdictional limit. The law would apply to employers who employ seventy-five (75) or more employees, excluding part-time employees. As noted above, the federal WARN Act only covers employers with one hundred (100) or more employees, excluding part-time and seasonal employees. Thus, the proposed New Hampshire WARN Act would cover many employers not currently covered by the federal WARN Act. The variance in jurisdictional limits would arguably create a compliance nightmare for national companies contemplating a move into New Hampshire, who would now be required to track compliance under two standards at all sites of employment potentially covered by the two laws.

The bill’s expanded definition of “employer” is also controversial. The New Hampshire WARN Act would hold employers liable for failing to give advance notice of covered layoffs or plant closings. For purposes of the Act, “employer” would include any entity that directly or indirectly owns and operates a business enterprise that employs seventy-five or more qualifying employees. However, and beyond the provisions of the federal WARN Act, the New Hampshire law would also provide that “any parent corporation is an employer as to any business enterprise directly owned and operated by its corporate subsidiary.” RSA 275-F:2, IV.(a)(2)(b). Many in the New Hampshire business community have expressed concern that this definition of employer, which extends broadly to parent companies, might make companies hesitate to expand their businesses to New Hampshire.

Also of great concern to the New Hampshire business community are the penalties attached to violations of the law. In terms of compensatory damages, the Act provides for back pay and the value of back benefits for employees who are denied the

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required notice of impending plant closures or layoffs, as well as reasonable attorney's fees and costs. Beyond compensatory damages, the bill also provides for civil penalties of \$2,500, plus additional civil penalties of up to \$100 per employee for each day of noncompliance. Given that the provisions of the law would only apply to layoffs of many employees, the amounts of civil penalties could easily approach or exceed any amounts due to employees for violations.

Due to the changing nature of business conditions, particularly in these difficult times, it can be difficult for businesses to calculate whether and when they may have to engage in layoffs. Certainly, businesses should not wait until they are closing their doors to notify employees that layoffs are imminent. However, there are drawbacks to forcing businesses to make the decision to either unnecessarily notify employees of layoffs or face the prospect of penalties of \$100 per day per employee. The exception provided in the New Hampshire law for faltering companies is helpful, but would obviously not apply in all situations.

Since its enactment in 1988, the federal WARN Act has provided a mechanism for advance notice of mass layoffs and plant closings to the benefit of employees and affected governmental units. It has served its purpose well without incorporating private rights of action and draconian penalty provisions. Given the state of the economy nationally and in New Hampshire, it is likely that additional layoffs and plant closures lie ahead. The New Hampshire WARN Act, if enacted as written, will certainly have the affect of increasing the pressure and burden on existing New Hampshire businesses and, if the fears of many in the business community are realized, could discourage others from doing business here. As a saving grace to employers, if enacted, the bill would have an effective date of January 1, 2010.

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