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Experts discuss how to stay on top of legal and regulatory changes

By Bennett Loudon

Staying on top of changes to laws and regulations affecting your workforce can be a daunting task for businesses.

Unfortunately, non-compliance can lead to civil liability and statutory penalties.

During the Rochester Business Journal's webinar on labor and employment law presented Feb. 22, experts explained that your best option is to call on an attorney with expertise in the proper practice areas as a guide.

Kevin Mulvehill

The one-hour presentation, sponsored by Phillips Lytle LLC, included information about the Worker Adjustment and Retraining Notification Act (WARN), New York state's new law on pay transparency in hiring, and a discussion of how a recent Supreme Court decision might influence diversity, equity, and inclusion programs.

The panel of experts included: Kevin Mulvehill, a partner at Phillips Lytle LLP; Nicholas Fedorka, an associate attorney at Phillips Lytle; Stephanie Hoppe Fedorka, an associate attorney at Bond Schoeneck & King PLLC; and Jacqueline Phipps Polito, office managing shareholder at Littler.

Nicholas Fedorka explained that the federal WARN Act was enacted in 1988 in order to provide employees with time to prepare for layoffs by getting a head start searching for new jobs and learning about unemployment benefits and training programs. Since then, other states have enacted their own version of the law. New York 's WARN Act was enacted in 2008.

The New York WARN Act is more expansive than the federal law.

"The big thing to take away from this is both the New York and federal WARN Act are very technical statutes. There's very specific content that needs to go into the notices you need to provide," Fedorka said.

"I recommended that if you ever have any of these qualifying events that you contact your labor attorney or your employment attorney to walk through this … There are firms that specialize in WARN lawsuits. Damages can be immense," Fedorka said.

The federal WARN Act applies to companies with 100 or more employees with qualifying events that affect at least 50 employees at a single site. The notices need to be provided within 60 days prior to the actual event.

The New York WARN Act applies to companies with 50 or more employees with qualifying events that affect 25 employees in a single place of employment. The New York WARN Act requires 90 days advance notice.

There are several triggering events under the New York WARN Act that will require the employer to provide a notice, such as:

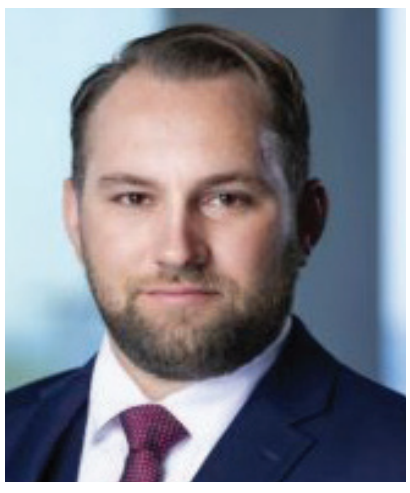
- A mass layoff that affects at least 250 employees, or 25 employees if they comprise 33% of the workforce.
- A shutdown affecting at least 25 employees.
- When an employer relocates to a new site or to a new location that affects 25 employees.
- When the hours are reduced by 50% during a 6-month period.

In New York, the notice is made to each affected employee, union representatives, the chief elected officials of the local government, school district officials, emergency services and the Labor Department.

If all employees are not terminated at once, the date that the notice needs to be provided is the date of the first individual termination.

There are exceptions under the WARN Act. No notice is required for mass layoffs at the end of seasonal projects. Also, in the event of a shutdown caused by a strike or lockout, there would be no notice requirement.

In some cases, the notice period can be reduced. The first is the faltering business exception. This only applies to plant closings where the employer "reasonably believes that notice would prevent them from obtaining capital that's necessary to postpone or avoid a plant closing," Fedorka said.



Nicholas Fedorka

The unforeseeable business circumstances exception applies to situations where it's not reasonably perceivable that notice needed to be provided.

Examples could be a sudden or unexpected termination of a major contract, a strike at a major supplier, a major economic downturn, or a natural disaster.

In June, the state Labor Department made amendments to the WARN Act to help employers understand how to comply in the wake of the COVID-19 pandemic.

Remote workers can now be included in the count to determine whether an employer meets that 50-employee threshold, and the unforeseeable business circumstances exception now includes a public health emergency or a terrorist attack, Fedorka said.

"The big picture here is that if you have any expected mass layouts, any plant closings, any type of reduction of hours or any of these other qualifying events, you want to make sure you are complying with that statute to ensure you are protecting your business from any type of future liability," Fedorka said.

Stephanie Hoppe Fedorka explained that New York state's new pay transparency law is an effort to close pay disparities among different demographics and protected classes.

The specific rules and details of the law are still being developed by the state Labor Department.

> **"There are firms that specialize in WARN lawsuits. Damages can be immense."**
>
> ***- Nicholas Fedorka***

"It's important to keep in mind in this age of a lot of remote work and workers … not just concentrated in Monroe County or Rochester or upstate New York, other local laws might exist in other states that have to do with pay transparency," Fedorka said.

New York's law applies to private-sector employers with four or more employees, employment agents and recruiters, she said.

It does not apply to public sector employers and governmental agencies. It also does not apply to temporary help firms, as defined in New York Labor Law, Hoppe Fedorka said.

The law does require two main things: A job description in the job posting or advertising, and a compensation range for the job, promotion, or transfer opportunity advertised.

There are only limited exceptions when a job description would not be required, such as when the job is self-defining, like a dish washer who is only going to be washing dishes.

"The key will be including some description — a few sentences about what this job and position entails," she said.

The advertisement must include a minimum and maximum annual salary or hourly rate. Commission-based positions must clearly state that the position is based entirely on commission, or that commission is part of the compensation, Hoppe Fedorka said.

Stephanie Hoppe Fedorka

The law applies to any job promotion or transfer opportunity, internal and external advertisements, or opportunities that are going to be physically performed at least in part in New York or that may physically be performed outside of New York, for example a remote worker who reports to a supervisor, office, or other work site in New York, she said.

Employees who work outside of New York but come to the state annually or incidentally won't trigger the requirement. If the remote worker is outside of New York state and there's only a direct supervisor working in New York state remotely that might not be enough to be covered by the law potentially, she said.

"If you have employees in other states or localities it's always a good practice to do some due diligence and check to make sure that there aren't any other pay transparency laws that might apply," Hoppe Fedorka said.

The key issue in the law is whether the job is advertised, which is defined as "making available to a pool of potential applicants." That happens any time you advertise to more than one person, such as sending an email with an opportunity to internal employees.

"That will be at advertisement for purposes of this law," she said.

"Documentation is going to be key when you're sending all of these pay ranges and putting these advertisements together," Hoppe Fedorka said.

Polito explained that many companies are re-evaluating their DEI initiatives in light of the Supreme Court's decision in Students for Fair Admissions v. Harvard. In that case, the Court held that race-based affirmative action programs in college admissions processes violate the Equal Protection Clause of the Fourteenth Amendment.

At Harvard, an applicant's race was considered when giving the applicant a rating as to whether or not they would be admitted to the university, Polito explained.

Additionally, the university monitored the racial composition of the admitted students to ensure a racially diverse class.

"What a lot of our universities have done is change their admission criteria; but they allow the student to write in their essay how their race or background might have impacted them," Polito said.

Jacqueline Polito

"A lot of companies wanted to just stop doing any type of (DEI) program. That's not what the Supreme Court decision said, but you should be looking at your programs to make some minor changes to your programs," Polito said.

Employers with affinity groups should make sure that the membership and leadership in each of those groups is now open to all employees.

"Every time you send out an invite you should make sure that you are including all other individuals and employees to participate if they want to participate," Polito said.

"You have to be careful. Look at your job descriptions. Look at what the criteria is. Talk to your hiring managers and make sure that you're making decisions based on what's required for the job," she said.

"It's still important for us as employers to have really solid inclusion equity and diversity programs. They're not going away they don't need to go away. It's very important to have them and it's very important for your company, as you grow, to recognize the strength that those programs give to your company," she said.

"Keep in mind the younger generation is very interested in inclusion equity and diversity. As you're hiring that workforce, those are programs that they are looking for to enter your company and stay with your company," Polito said.

"You need to be careful in terms of what you're saying to your applicants, what you're saying to your current employees, and most importantly, you really need to be mindful of quotas and goals," Polito said.

She recommended that businesses evaluate the implication of the Supreme Court decision on programs.

"If you have significant plans, consider doing an audit of your plans under the context of attorney client privilege," she said.

"It's important to reach out to your employment counsel to ask some questions and make sure that it's under the guise of an audit that it's privileged in case an issue is discovered for what you need to make some modifications," Polito said.

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