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DATE: February 6, 2009

TO: Kane Kessler Clients

FROM: Kane Kessler, P.C.
Labor and Employment Law Department

RE: **WORKER ADJUSTMENT AND RETRAINING NOTIFICATION ACT ("WARN") – DETERMINING WHETHER AN "EMPLOYMENT LOSS HAS OCCURRED"**

As previously advised, the New York WARN Act will become effective on February 9, 2009. While proposed regulations will be published in the New York State Register on February 11, 2009, it appears that the New York WARN Act follows most of the definitions and requirements of the federal WARN Act, except that it cuts in half the number of employees who incur an employment loss before WARN notice is required. Because of these stricter WARN notice requirements, it is more important than ever to understand when WARN notice may be required and to plan ahead so that your Hotel is not caught off-guard by a larger employment loss than you originally anticipated.

Coverage

The Federal WARN Act covers employers with 100 or more full-time employees. The New York WARN Acts covers employers with 50 or more full-time employees.[1] A full-time employee is defined as an employee who works more than 20 hours per workweek and has worked at least six (6) months before the date of discharge or layoff. The term "employee" includes Union, non-Union, management or supervisory employees.

Definitions

[1] An employer with fewer than 50 employees may still be covered if its employees work in the aggregate more than 2,000 hours per week.

Under both federal and state law, advance notice to employees, the Union and certain government officials is required in the event of a "Plant Closing" or "Mass Layoff." The federal WARN Act requires 60 calendar days advance notice and the New York WARN Act requires 90 calendar days advance notice.

A Plant Closing is defined by the federal WARN Act as a permanent or temporary shutdown of an employment site or a facility or operating unit within that site, which results in an employment loss for 50 or more full-time employees within a 30-day period. Under the New York WARN Act, the minimum number of full time employees suffering a job loss under the definition of a Plant Closing is cut in half to 25.[2]

A Mass Layoff is defined by the federal WARN Act as a reduction in force (without a Plant Closing) resulting in an employment loss within a 30-day period of at least 1/3 of the employer's full-time employees and at least 50 employees, or at least 500 full-time employees, even if that does not equal 1/3 of the full-time employees. Under the New York WARN Act, the number of employees is again cut in half – 1/3 of full-time employees and at least 25 full-time employees or at least 250 employees.

An "employment loss" is defined under both Acts as a discharge other than for cause or voluntarily, a layoff exceeding 6 months or a 50% or more reduction in hours during each month of a 6-month period.

Calculating an "Employment Loss"

Under both Federal and New York law, it is critically important to understand that employers cannot evade a "Plant Closing" or "Mass Layoff" by laying off employees in increments smaller than the minimum number required for notice over a period of time longer than 30 days. The 30-day period within which the minimum number of employment losses must occur is a rolling 30-day period. Specifically, both statutes provide that if there are two (2) or more employment losses at a single site, each of which is less than the minimum number of employees to be a Plant Closing or a Mass Layoff, but these separate employment losses in the aggregate exceed the minimum number within any consecutive 90-day period, these separate employment losses added together will constitute a Plant Closing or Mass Layoff unless the employer can establish that the employment losses are the result of "separate and distinct actions and causes" and not an attempt by the employer to evade the requirements of the law. Therefore, when an employer intends to lay off employees, it must look backward and forward in time to determine if it has a WARN obligation.

For example, on February 15, 2009, your Hotel decides to discontinue dinner service in the restaurant outlet due to a severe down-turn in business and you layoff 15 full-time employees. On March 15, 2009, with business still not improved, you decide to eliminate lunch service and lay off another 8 full-time employees. Finally, on April 15, 2009, with the down-turn in business continuing, you decide to close the restaurant completely, laying off the remaining 8 full-time employees. Although you have not laid off 25 employees within any 30-day period, you have laid

[2] Both Union and non-Union employees are counted.

off 31 employees within a 90-period. If the closing of your restaurant lasts – or is anticipated to last - more than six (6) months, it is deemed a "Plant Closing" and New York WARN Act requires that all the laid off employees should have received 90-days notice of layoff at the time they were laid off. [3]

Another example: Your Hotel employs 100 employees in total (Union and non-Union). Business has dropped off significantly. On February 15, 2009, you lay off 15 employees and on April 1, 2009, you lay off another 20 employees. You have now laid off more than 1/3 of your workforce and more than 25 employees within a 90-day period. If the layoff lasts more than six (6) months, you have a Mass Layoff and all of these employees should have received 90 days notice.

Obviously, a major problem in complying with WARN is that employers frequently anticipate a layoff shorter than six (6) months and therefore do not know they have a notice requirement until long after those notices should have been given. One solution is to send out notices preventatively if you think there might be a long-term layoff in the near future. The problem with this option is that it has a very negative effect on morale and if you announce that the layoffs will or might last longer than six (6) months, the Union will insist on severance pay at the time the layoff occurs on the grounds that this constituted a "permanent" closure.

Another option is to keep a very careful watch on the numbers of employees laid off and the time-frame within which you effectuate the lay offs. In the first example, if the closings of the various shifts were accomplished more slowly – say over a 120-day period – or if some of the employees could be found alternative positions within the Hotel, thus not suffering an employment loss, the WARN obligations would be avoided. Similarly, in the second example, if you keep the number of employees laid off to under 1/3 of your workforce or recalled some or all of the employees before the expiration of six (6) months, you would also avoid WARN obligations.

Severance pay which is required by IWA cannot be applied as a "credit" against the 60 calendar day notice requirement. Thus, severance pay as required by Article 52 of the IWA cannot be credited to the notice requirement, but an enhanced severance beyond the requirements of Article 52 can be considered pay, in whole or in part, in lieu of the 60 calendar day notice requirement.

Notice

Both the Federal and New York WARN require that written notice of a Mass Layoff or Plant Closing be provided to the affected employees, collective bargaining representative of the affected employees, the New York State Commissioner of Labor. For notice to New York City, New York WARN requires notice to the City's Workforce Investment Board; Federal WARN requires notice to New York City's Office of the Mayor. New York WARN's proposed regulations also provide a slightly different notice content than Federal WARN.

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[3] A restaurant in a Hotel may or may not be an "operational unit" for purposes of determining whether its closure is a "Plant Closing" as defined by New York WARN. Unfortunately, the proposed New York regulations do not provide clarity. It is obvious that a determination depends on the organizational structure of your Hotel and the integration of, in the example, the restaurant with food and beverage generally. If you intend to close a restaurant or other department in your Hotel, please call us so that we can assist you in determining if this closure meets the definition of a "Plant Closing."

If you are experiencing layoffs which you anticipate will be both large and long-lasting, please contract us so that we can advise you on whether you have any Federal or State WARN obligations and if so, how to comply. Advanced planning is essential and may even help you avoid WARN requirements entirely.

If you have any questions, please do not hesitate to call David R. Rothfeld, Judith A. Stoll, Stephen Steinbrecher, Robert L. Sacks, Niki J. Franzitta, Lois M. Traub or Alexander Soric.