



Mini-WARN Acts: New York

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A Q&A guide to state versions of the federal Worker Adjustment and Retraining Notification (WARN) Act for private employers in New York. This Q&A addresses notice requirements in cases of plant closings and mass layoffs. Federal, local or municipal law may impose additional or different requirements.

OVERVIEW OF STATE MINI-WARN LAW

1. Is there a mini-WARN Act or other notice requirement for group layoffs in your jurisdiction?

New York enforces its own Worker Adjustment and Retraining Notification Act, which requires 90 days advance, written notice to certain agencies and parties when there is a covered:

- Plant closing.
- Mass layoff.
- Reduction in work hours.
- Relocation of substantially all facility operations.

(*N.Y. Lab. Law §§ 860 to 860-i (2011)* and *N.Y. Comp. Codes R. & Regs. tit. 12, § 921 (2011)*.)

For more information, see *Question 6*.

For the text of the New York Codes, Rules and Regulations, see the New York Department of State, Division of Administrative Rules *website*.

ADMINISTRATION OF MINI-WARN ACT

2. What governmental body administers law(s) identified in response to *Question 1*?

The New York Worker Adjustment and Retraining Notification Act is administered by the New York Commissioner of Labor (*N.Y. Lab. Law § 860-f (2011)* and *N.Y. Comp. Codes R. & Regs. tit. 12, § 921-7.1 (2011)*).

For the text of the New York Codes, Rules and Regulations, see the New York Department of State, Division of Administrative Rules *website*.

COVERED EMPLOYERS

3. Which employers are covered by the law(s) identified in response to *Question 1*?

The New York Worker Adjustment and Retraining Notification (WARN) Act applies to private sector employers that employ either:

- At least 50 employees located in New York state, not including part-time employees.
- At least 50 employees who work a total of 2,000 hours per week in New York state, including overtime hours earned by employees on a regular basis (meaning the employee has earned overtime pay in at least seven of the 12 weeks immediately before notice is required (*N.Y. Comp. Codes R. & Regs. tit. 12, § 921-1.1(e)(1)(ii) (2011)*)).

(*N.Y. Lab. Law § 860-a(3) (2011)*.)

Worksite employees provided by a registered professional employer organization are counted as employees for purposes of determining whether the New York WARN Act applies, in certain circumstances (*N.Y. Comp. Codes R. & Regs. tit. 12, § 921-1.1(e)(4) (2011)*).

For the text of the New York Codes, Rules and Regulations, see the New York Department of State, Division of Administrative Rules *website*.

4. Under any law(s) identified in response to *Question 1*, if a business is sold, at what point in the transaction does the buyer become the employer?

Under the New York Worker Adjustment and Retraining Notification (WARN) Act, if all or part of a business is sold, individuals who are employees of the seller as of the effective date of the sale are deemed to be employees of the buyer immediately after the effective date of the sale (*N.Y. Lab. Law § 860-b(5) (2011)* and *N.Y. Comp. Codes R. & Regs. tit. 12, § 921-2.1(b) (2011)*).

The New York WARN Act also specifies that responsibility for giving any required notice falls on the:

- Seller, up to and including the effective date of the sale.
- Buyer, after the effective date of the sale.

(*N.Y. Lab. Law § 860-b(5) (2011)* and *N.Y. Comp. Codes R. & Regs. tit. 12, § 921-2.1(b) (2011)*.)

For the text of the New York Codes, Rules and Regulations, see the New York Department of State, Division of Administrative Rules *website*.

5. Are subsidiaries considered separate employers from their parent company under the law(s) identified in response to *Question 1*?

Under the New York Worker Adjustment and Retraining Notification Act, wholly or partially owned subsidiaries and independent contractors may be considered separate employers from the parent company, depending on how independent they are from the parent company. There is no definitive test for determining independence, but the regulations list the following factors to consider:

- Common ownership.
- Common officers or directors.
- Exercise of control (for example, where the parent company, in practice, exercises control over the subsidiary).
- Shared personnel policies.
- Dependency of operations.

(*N.Y. Comp. Codes R. & Regs. tit. 12, § 921-1.1(e)(2) (2011)*.)

For the text of the New York Codes, Rules and Regulations, see the New York Department of State, Division of Administrative Rules *website*.

TRIGGERING EVENTS

6. How are the notice requirements of the law(s) identified in response to *Question 1* triggered?

EVENTS TRIGGERING NOTICE REQUIREMENTS

Under the New York Worker Adjustment and Retraining Notification Act, the notice requirement is triggered when there will be a:

- Mass layoff, meaning a workforce reduction (other than a plant closing) that results in an employment loss, lasting longer than six months, at a single site of employment during any 30-day period for:
 - at least 250 employees; or
 - at least 25 employees, if they comprise at least 33% of the workforce at that site.

(*N.Y. Comp. Codes R. & Regs. tit. 12, § 921-1.1(i) (2011)*.)

- Plant closing, meaning “the permanent or temporary shutdown of a single site of employment, or one or more facilities or operating units within a single site of employment, if the shutdown results in an employment loss during any 30-day period” at the site for at least 25 employees (*N.Y. Comp. Codes R. & Regs. tit. 12, § 921-1.1(m) (2011)*).
- Relocation of an employer to a location at least 50 miles away, causing an employment loss for at least 25 employees (*N.Y. Comp. Codes R. & Regs. tit. 12, § 921-1.1(n) (2011)*).



- Covered reduction in hours, meaning a reduction by more than 50% in hours of work during each month in any consecutive six-month period for:
 - at least 250 employees; or
 - at least 25 employees, if they comprise at least 33% of the workforce at that site.

(N.Y. Comp. Codes R. & Regs. tit. 12, § 921-1.1(f)(1)(iii) (2011).)

In certain circumstances, part-time employees and employees receiving unemployment benefits are not counted for purposes of determining whether the notice requirements have been triggered *(N.Y. Comp. Codes R. & Regs. tit. 12, § 921-1.1 (2011)).*

DETERMINING WHETHER THE EMPLOYMENT LOSS IS AT A SINGLE SITE OF EMPLOYMENT

In determining whether an employment loss is at a single site of employment, the following principles apply:

- A single building may include several single sites of employment, if separate employers conduct business within that building.
- A single site of employment may be:
 - a single location; or
 - locations that are close to one another, even if they are not connected. For example, several buildings in an industrial park or buildings across the street from one another that are owned by the same employer may be a single site of employment.
- Separate buildings that are not connected or close to one another may be a single site of employment if they:
 - are in reasonable geographic proximity to one another;
 - are used by the same employer for the same purpose; and
 - share personnel or equipment.
- Connected buildings occupied by the same employer will not be a single site of employment if each building:
 - has separate management;
 - produces different products or provides different services; and
 - has separate workforces.
- For an employee who primarily works off site (for example, an outside salesperson), the employee's regular employment site will be:
 - the employee's assigned employer home base;
 - the site from which the employee's work is assigned; or
 - the site to which the employee reports.

(N.Y. Comp. Codes R. & Regs. tit. 12, § 921-1.1(p) (2011).)

LOOK-BACK AND LOOK-FORWARD PERIODS

To determine whether notice is required, employers must look back and look forward:

- 30 days to determine whether the total number of employment actions taken and planned in any 30-day period will reach the minimum numbers to qualify as a plant closing or mass layoff.
- 90 days from the date of each employment action to determine whether employment losses taken and planned, which separately do not trigger the notice requirement, would if aggregated for any 90-day period reach the minimum numbers to qualify as a plant closing, mass layoff, relocation or reduction in hours. Employees who receive notice because of a 30-day look-back or look-forward period are not counted with other employees during any 90-day period to determine whether notice is required.

(N.Y. Comp. Codes R. & Regs. tit. 12, § 921-2.1(e) (2011).)

For the text of the New York Codes, Rules and Regulations, see the New York Department of State, Division of Administrative Rules *website*.

7. Are there any exceptions to the notice requirements identified in response to *Question 1*?

Notice is not required under the New York Worker Adjustment and Retraining Notification (WARN) Act if either:

- The plant closing or mass layoff results from the completion of a particular or seasonal project, and the affected employees were hired with the understanding that their employment was limited to that project *(N.Y. Comp. Codes R. & Regs. tit. 12, §§ 921-5.1 to 921-5.2 (2011)).*
- The employer is permanently replacing an economic striker under the National Labor Relations Act *(N.Y. Comp. Codes R. & Regs. tit. 12, § 921-6.5 (2011)).*

The New York WARN Act also has limited exceptions permitting less than 90 days of notice (see *Question 12*).

For the text of the New York Codes, Rules and Regulations, see the New York Department of State, Division of Administrative Rules *website*.

NOTICE

8. Who is required to receive notice under the law(s) identified in response to *Question 1*?

Under the New York Worker Adjustment and Retraining Notification Act, notice must be provided to:

- The New York Commissioner of Labor.
- The *local Workforce Investment Board* (*N.Y. Comp. Codes R. & Regs. tit. 12, § 921-2.2(d)(4) (2011)*).
- Each affected employee, including:
 - employees who may reasonably be expected to experience an employment loss (*N.Y. Comp. Codes R. & Regs. tit. 12, § 921-2.2(g) (2011)*);
 - unrepresented employees; and
 - represented employees.
- Each representative of an affected employee.

(*N.Y. Comp. Codes R. & Regs. tit. 12, § 921-2.2 (2011)*.)

For the text of the New York Codes, Rules and Regulations, see the New York Department of State, Division of Administrative Rules *website*.

9. Please describe the content that has to be included in the notice to be given to each group entitled to receive notice.

Under the New York Worker Adjustment and Retraining Notification Act, notice must:

- Be sent on the employer's letterhead or by the employer's computer system.
- Be signed by an authorized employer representative who:
 - can bind the employer; and
 - attests to the truth of the information provided.
- Contain the original signature of the authorized employer representative, if the notice is sent to the New York Department of Labor (NY DOL).

(*N.Y. Comp. Codes R. & Regs. tit. 12, § 921-2.2(c) (2011)*.)

Content in the notice varies depending on its intended recipients.

CONTENT OF NOTICE TO COMMISSIONER OF LABOR

Notice to the New York Commissioner of Labor must include:

- Name and address of the affected employment site.
- Name and telephone number of an employer representative to contact for further information.
- Name and telephone number of an employee representative to contact for further information.
- Name of the employer's liaison with the NY DOL for purposes of providing rapid response services to affected employees.

- Names, addresses and job titles of employees to be laid off.
- Expected date of the first separation of employees and anticipated schedule of separations.
- Whether bumping rights exist (for example, under a collective bargaining agreement (CBA)).
- Whether the planned action is expected to be permanent or temporary, including whether:
 - the entire plant is closing; and
 - some employment losses will be permanent and others temporary.
- Whether the other required notices have been given, and the date they were sent.
- How the notices to affected employees were delivered (for example, by first class mail, e-mail or in the envelope with the employee's pay check).
- Samples of the notices provided to employees and their representatives.

(*N.Y. Comp. Codes R. & Regs. tit. 12, § 921-2.3(a) (2011)*.)

CONTENT OF NOTICE TO EMPLOYEES

Notices to each affected employee must include:

- The expected date of the first separation of employees and the date when the employee receiving the notice will be separated.
- Whether the planned action is expected to be permanent or temporary, including whether:
 - the entire plant is closing; and
 - some employment losses will be permanent and others temporary.
- Whether bumping rights exist (for example, under a CBA).
- The name and telephone number of an employer representative to contact for further information.
- Information about unemployment insurance, job training and re-employment services for which affected employees may be eligible. Model language for this requirement is included in the regulations (*N.Y. Comp. Codes R. & Regs. tit. 12, § 921-2.3(b)(5) (2011)*).

(*N.Y. Comp. Codes R. & Regs. tit. 12, § 921-2.3(b) (2011)*.)

CONTENT OF NOTICE TO EMPLOYEE REPRESENTATIVES

Notices to the representatives of the affected employees must include:

- Name and address of the affected employment site.
- Name and telephone number of the employer representative to contact for further information.
- Whether bumping rights exist (for example, under a CBA).
- Whether the planned action is expected to be permanent or temporary, including whether:
 - the entire plant is closing; and
 - some employment losses will be permanent and others temporary.



- Expected date of the first separation of employees and the anticipated schedule of separations.
- Names, addresses and job titles of employees to be laid off.
- Information about unemployment insurance, job training and re-employment services for which affected employees may be eligible. Model language for this requirement is included in the regulations (*N.Y. Comp. Codes R. & Regs. tit. 12, § 921-2.3(c)(7) (2011)*).
- Whether the notices to the Commissioner of Labor and the local Workforce Investment Board have been given, including the date notices were sent.
- How notices to affected employees were delivered (for example, by first class mail, e-mail or in the envelope with the employee's pay check).

(*N.Y. Comp. Codes R. & Regs. tit. 12, § 921-2.3(c) (2011)*.)

CONTENT OF NOTICE TO LOCAL WORKFORCE INVESTMENT BOARD

Notice to the local Workforce Investment Board must include:

- Name and address of the affected employment site.
- Name and telephone number of the employer representative to contact for further information.
- Name and telephone number of the employee representatives to contact for further information.
- Whether the planned action is expected to be permanent or temporary, including whether:
 - the entire plant is closing; and
 - some employment losses will be permanent and others temporary.
- Expected date of the first separation of employees, and the anticipated schedule of separations.
- Job titles of positions to be affected, and the number of affected employees in each job title.
- Whether bumping rights exist (for example, under a CBA).
- Name of each union representing affected employees, and the name and address of the chief elected officer of each union.
- Whether the other required notices have been given, including the date notices were sent.
- How notices to affected employees were delivered (for example, by first class mail, e-mail or in the envelope with the employee's pay check).

(*N.Y. Comp. Codes R. & Regs. tit. 12, § 921-2.3(d) (2011)*.)

For the text of the New York Codes, Rules and Regulations, see the New York Department of State, Division of Administrative Rules *website*.

10. Please describe any alternatives to notice that the law(s) identified in response to *Question 1* allows for each group entitled to receive notice.

There are no alternatives to the notice required under the New York Worker Adjustment and Retraining Notification Act. However, an employer's liability for failure to provide the required notice is reduced by certain amounts paid by the employer (see *Question 16*).

11. Please describe the required timing of notice.

Under the New York Worker Adjustment and Retraining Notification Act, employers must give the required notice at least 90 days before a covered:

- Plant closing.
- Mass layoff.
- Work hours reduction.
- Relocation.

(*N.Y. Lab. Law § 860-b(1) (2011)*.) For more information on triggering events, see *Question 6*.

When notice is served by first class mail, the notice must be postmarked at least 90 days before the relevant employment loss (*N.Y. Comp. Codes R. & Regs. tit. 12, § 921-2.2(a) (2011)*).

The 90-day notice period may be reduced in limited circumstances (see *Question 12*).

For the text of the New York Codes, Rules and Regulations, see the New York Department of State, Division of Administrative Rules *website*.

12. Please describe any circumstances not already stated under which reduced or modified notice may be permitted.

Under the New York Worker Adjustment and Retraining Notification Act, the 90-day notice period can be reduced in three circumstances:

- Faltering company exception (see *Faltering Company Exception*).
- Unforeseeable business circumstances (see *Unforeseeable Business Circumstances*).
- Natural disaster (see *Natural Disaster*).

When any of these exceptions apply, the employer must:

- Give as much advance notice as possible.
- Include the reason for the reduced notice period and a factual explanation for the reduction as part of the notice.

(*N.Y. Comp. Codes R. & Regs. tit. 12, §§ 921-6.1 and 921-6.6 (2011)*.)

FALTERING COMPANY EXCEPTION

The 90-day notice period may be reduced when, at the time notice would have been required:

- The employer was actively seeking, and had a realistic opportunity to get, capital or business.
- The capital or business sought would have allowed the employer to avoid or postpone the employment loss.
- The employer reasonably and in good faith believed that giving notice would have prevented it from getting the capital or business.

(*N.Y. Comp. Codes R. & Regs. tit. 12, § 921-6.2 (2011).*)

This exception is only available on an employer-wide basis (*N.Y. Comp. Codes R. & Regs. tit. 12, § 921-6.2 (2011)*). For example, an employer that plans to close a single site of employment because of that site's financial condition cannot use this exception if the overall company is in good financial condition.

UNFORESEEABLE BUSINESS CIRCUMSTANCES

The 90-day notice period may be reduced if the employment loss was caused by business circumstances that were not reasonably foreseeable when the notice would have otherwise been required (*N.Y. Comp. Codes R. & Regs. tit. 12, § 921-6.3 (2011)*).

Examples provided in the regulations include:

- A significant client's sudden and unexpected termination of a major contract.
- A strike at a major supplier.
- An unanticipated and dramatic major economic downturn.
- A government-ordered closing of an employment site without prior notice.

(*N.Y. Comp. Codes R. & Regs. tit. 12, § 921-6.3 (2011).*)

NATURAL DISASTER

The 90-day notice period may be reduced when the employment loss was a direct result of a natural disaster, such as a:

- Flood.
- Earthquake.
- Drought.
- Storm.
- Tidal wave.
- Tsunami.

(*N.Y. Comp. Codes R. & Regs. tit. 12, § 921-6.4 (2011).*)

The employer is still required to give as much notice as possible under the circumstances, either before or after the employment loss (*N.Y. Comp. Codes R. & Regs. tit. 12, § 921-6.4 (2011)*).

This exception does not apply when the employment loss is an indirect result of a natural disaster (*N.Y. Comp. Codes R. & Regs. tit. 12, § 921-6.4 (2011)*).

For the text of the New York Codes, Rules and Regulations, see the New York Department of State, Division of Administrative Rules *website*.

13. Please describe how notice must be sent.

Notice required by the New York Worker Adjustment and Retraining Notification Act must be sent using a reasonable and timely method designed to ensure that it is received, including:

- First class mail.
- Personal delivery with optional signed receipt.

(*N.Y. Comp. Codes R. & Regs. tit. 12, § 921-2.2(a) (2011).*)

Notice also can be served on affected employees by:

- Inserting it into envelopes containing pay or receipts for direct deposit of pay.
- E-mail, if:
 - all affected employees have regular access in the workplace to personal computers where they can receive and view e-mail during work hours;
 - the employer can show that each affected employee received the notice;
 - the employer e-mailed the notice to e-mail addresses provided by the employer to the employees and used in the business context;
 - the e-mail is identified as "urgent";
 - the employer gives notice to the employees as quickly as possible (for example, by hand delivery, overnight mail or interoffice mail), when the e-mail notice is returned as undeliverable; and
 - the employer extends the notice period by the number of days between the date notice was first attempted and when it was received, if delivery of notice takes more than five days.

(*N.Y. Comp. Codes R. & Regs. tit. 12, § 921-2.2(b) (2011).*)

Notice may also be served on the Commissioner of Labor by facsimile, with a hard copy following by first class mail (*N.Y. Comp. Codes R. & Regs. tit. 12, § 921-2.2(e) (2011)*).

For the text of the New York Codes, Rules and Regulations, see the New York Department of State, Division of Administrative Rules *website*.

14. Are there any standard notice forms available from the administering government entities?

There are no standard forms provided by the New York Department of Labor for giving notice under the New York Worker Adjustment and Retraining Notification Act.



RECORDKEEPING

15. What recordkeeping obligations does the law(s) identified in response to *Question 1* impose on employers?

The New York Worker Adjustment and Retraining Notification Act does not impose any specific recordkeeping obligations.

PENALTIES FOR VIOLATION

16. What penalties may be imposed on employers that violate the law(s) identified in response to *Question 1*?

Under the New York Worker Adjustment and Retraining Notification (WARN) Act, an employer that fails to give the required notice is subject to a civil penalty of up to \$500 for each day of the employer's violation, applied in the aggregate and not per employee. The maximum amount of civil penalties under the New York WARN Act is limited to the maximum penalties that can be assessed under the federal WARN Act. An employer can avoid these penalties by both:

- Paying each affected employee the total amount for which the employer is liable under the New York WARN Act, including back pay and all fringe benefits, within three weeks of the layoff.
- Including required language set out in the regulations with the final payment of wages.

(*N.Y. Comp. Codes R. & Regs. tit. 12, § 921-7.2 (2011).*)

In addition to civil penalties, an employer that fails to give the required notice is liable to that employee for:

- Back pay at the greater of the employee's:
 - final rate of pay; or
 - average compensation rate over the three preceding years.
- The value of benefits the employee would have been entitled to receive if he had not lost his employment, including medical expenses incurred by the employee that would have been covered under an employee benefit plan.

(*N.Y. Comp. Codes R. & Regs. tit. 12, § 921-7.3 (2011).*)

An employer's liability is reduced by:

- Wages paid by the employer to the employee during the violation, except vacation accrued before the violation.
- Any voluntary and unconditional payments made by the employer to the employee:
 - not required to satisfy any legal obligations; and
 - made before a final determination issued by the Commissioner of Labor.

- Payments by the employer to a third party on behalf of the employee for the period of the violation, such as:
 - premiums for health benefits; or
 - payments to a defined contribution plan .
- Any liability paid by the employer under the federal WARN Act.
- In administrative proceedings by the Commissioner of Labor, any liability paid in a private action brought under the New York WARN Act prior to the Commissioner of Labor's determination.
- In a private action, any money paid in an administrative action prior to adjudication of the private action.

(*N.Y. Comp. Codes R. & Regs. tit. 12, § 921-7.3(c) (2011).*)

For the text of the New York Codes, Rules and Regulations, see the New York Department of State, Division of Administrative Rules *website*.

PRIVATE RIGHT OF ACTION

17. Do the law(s) identified in response to *Question 1* provide for a private right of action?

An aggrieved employee may sue under the New York Worker Adjustment and Retraining Notification (WARN) Act in any court of competent jurisdiction. A prevailing plaintiff may be awarded reasonable attorneys' fees as part of costs.

18. What is the statute of limitations for bringing a private action under the law(s) identified in response to *Question 1*?

The New York Worker Adjustment and Retraining Notification Act is part of the New York Labor Law, which has a six-year statute of limitations for private actions (*N.Y. Lab. Law § 663(3) (2011).*)

19. Are waivers of rights under the mini-WARN Act or other law(s) identified in response to *Question 1* valid and, if so, in what circumstances?

Neither the New York Worker Adjustment and Retraining Notification Act nor any case law addresses the validity of a waiver by an employee.

SEVERANCE

20. Does the mini-WARN Act or other law(s) identified in response to *Question 1* require payment of severance?

The New York Worker Adjustment and Retraining Notification Act does not require employers to pay severance.

UNEMPLOYMENT BENEFITS

21. Does your jurisdiction require employers to supplement unemployment benefits when the law(s) identified in response to *Question 1* are triggered?

New York employers are not required to supplement unemployment benefits when the New York Worker Adjustment and Retraining Notification Act is triggered.

OTHER SIGNIFICANT DIFFERENCES FROM FEDERAL WARN ACT

22. Please describe any other significant differences from the federal WARN Act that practitioners should be aware of with regard to a mini-WARN Act or other law(s) identified in response to *Question 1*.

The significant differences between the federal Worker Adjustment and Retraining Notification (WARN) Act and the New York WARN Act are addressed above. In addition, the New York Department of Labor and New York courts may interpret the New York WARN Act differently than the federal WARN Act.

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