

## LABOR & EMPLOYMENT LAW ALERT

MARCH 2009

*Jed L. Marcus, Esq.*

### Deepening Recession Continues to Drive Fundamental Changes in Labor and Employment Environment

**Employers navigating through these trying economic times continue to face a constantly changing legal environment.** In-house counsel and human resource professionals must be prepared to meet these challenges. New York just passed its own plant shutdown/mass layoff notification law, which became effective on February 1, 2009. Congress, in passing the stimulus bill on February 17, 2009, amended the Consolidated Omnibus Budget Reconciliation Act ("COBRA") so that, among other things, employees who are involuntarily terminated need only pay 35% of their health care premiums, with employers receiving a tax credit for the 65% that they will pay. Careful attention should be paid to each of these new laws, both of which are discussed in detail below.

Employers also need to be aware of a bill currently before the Senate, the Employee Free Choice Act ("EFCA"), a piece of legislation that will fundamentally change union organizing and collective bargaining. If the EFCA passes, unions will no longer be required to win a secret ballot election before certification. They will only be required to secretly and without supervision collect authorization cards from a majority of employees. This is a dramatic departure from current law. Under the National Labor Relations Act ("Act") unions do not get to represent employees without a secret ballot election. The process starts when a petition is filed by any union or worker. In order to get an election, at least 30% of employees must have signed a petition or authorization card.

Unions are certified as employee representatives only if a majority of employees voting in an election supervised by the National Labor Relations Board ("Board") choose to be represented by a union. The EFCA changes all that. If the EFCA passes, unions will need only collect cards from more than 50% of all employees in the unit. Representation is achieved without an election.



While most commentators have focused on the loss of the secret ballot election, the worst part of the bill is what I have referred to as the "contract cram down provision." This little nugget forces government mandated contracts on those employers who do not give in to union demands, mandating that if a first agreement cannot be reached through negotiation, the dispute would be subject to binding arbitration. A government arbitrator would then impose a two-year contract specifying wages and working conditions. Experience with binding arbitration in the public sector shows that it is a terrible idea, encouraging unions to take unreasonable positions during bargaining in the hope that they would win them in arbitration. In many cases, unions only pretend to bargain long enough to demand mediation and arbitration.

These are just a few of the changes employers can expect over the next year. Stay tuned, and be sure to call us if you have questions or concerns. ■

## The Implications of the New York WARN Act

**With the state of the current economy, it is a wise and prudent decision to critically consider the federal and state laws which pertain to layoffs, prior to implementing reductions in force.** On August 5, 2008, Governor David Paterson signed into law the NY WARN Act, which took effect on February 1, 2009. Additionally, the New York regulations were issued on an emergency basis until April 29, 2009 and apply retroactively to February 1, 2009.

The NY WARN Act, Article 25-A, amending New York Labor Law, is more expansive than its federal counterpart, the Federal Worker Adjustment and Retraining Act (“Federal WARN Act”), and provides additional requirements with regard to certain provisions such as covered private sector employees, covered events requiring notice to employees and the number of days notice required. The following are the key differences between the NY WARN Act and the Federal WARN Act.

### 1. The NY WARN Act Applies to More Employers

The NY WARN Act applies to private sector employers who employ fifty (50) or more full-time employees. The Federal WARN Act only applies to employers with one hundred (100) or more full-time employees.

### 2. The NY WARN Act Requires a Longer Notice Period and is More Easily Triggered

First, the NY WARN Act requires ninety (90) days notice of a “mass layoff.” A “mass layoff,”

triggers the NY WARN Act where there is a layoff at a single site during a thirty (30) day period of either: a) at least 33% of employees, which calculates to be at least 25 or more employees; or b) a total of 250 employees. In contrast, the Federal WARN Act is triggered where a proposed “mass layoff” would constitute: a) at least 33% of employees, which calculates to be at least 50 or more employees; or b) a total of 500 employees.

Next, it appears, despite drafting ambiguity, that the NY WARN Act while omitting “plant closings,” tracks the Federal WARN Act, and would require ninety (90) days notice of a plant closing resulting in 25 employees losing their jobs within any 30-day period, rather than the 50 employee minimum of the Federal WARN Act. As drafted by the Legislature, the basic notice provision in NY WARN requires employers to provide notice only in advance of a mass layoff, relocation or employment loss, with no mention of plant closings triggering the notice obligation. The proposed rules, however, expressly extend the NY WARN Act’s notice requirements to include plant closings, as affected employees are “those who may reasonably be expected to experience an employment loss as the result of a proposed plant closing . . . .” The proposed regulations define a **plant closing** as “the permanent or temporary shutdown of a single employment site, or one or more facilities or operating units within a single employment site, if the shutdown results in an employment loss within a thirty (30) day period for at least 25 full-time employees.”

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## 3. Content of the Notice

Under the NY WARN Act, notice must include all of the same elements that the Federal WARN Act requires, including notices to the State Rapid Response Dislocated Worker Unit and the chief elected official of the local government. However, once the NY WARN Act is triggered, additional requirements are required in the contents of the notice.

Under the NY WARN Act, advance written notice on the employer's official letterhead must be provided of at least ninety (90) days to: a) the affected employees; b) their collective bargaining representative, if applicable; c) the New York State Department of Labor; and d) the local workforce investment board (established pursuant to the Federal Workplace Investment Act).

The major difference between the NY WARN Act and the Federal WARN Act in this respect is that the NY WARN Act requires notice to both the employee and their collective bargaining representative, whereas under the Federal WARN Act, it is not required.

## 4. Exceptions to the Notice Requirement

The NY WARN Act provides for exceptions to the ninety (90) day notice requirement in certain circumstances, which track the Federal WARN Act. In all circumstances however, the employer must provide as much notice as possible, including a statement for why the notice period was reduced. The exceptions include:

- a) there was a realistic opportunity for the employer actively seeking capital, which if obtained would have sufficiently

enabled the company to avoid or postpone the layoff or plant closing and it reasonably and in good faith believed that giving notice would have precluded the ability to obtain the capital or business;

- b) the need for notice was not reasonably foreseeable at the time the notice would have been required due to some sudden, dramatic and unexpected action or condition outside of the employer's control;

- c) the mass layoff, plant closing or relocation was due to a natural disaster including floods, earthquakes, droughts, storms, tidal waves, tsunamis, or similar effects of nature.

Additionally, no notice is required to be given for the following circumstances:

- d) the mass layoff, plant closing or relocation is the result of a labor strike or lockout not intended to evade the requirements of the statute; and

- e) the plant closing or mass layoff is the result of the completion of a particular project, and the affected employees were hired with the understanding that their employment was limited to the duration of the particular project.

## 5. Enforcement, Remedies & Penalties

First, the NY WARN Act provides that employees have the right to sue their employers in court for violations, and also gives

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administrative enforcement authority to the New York State Department of Labor. The Federal WARN Act provides only for a private cause of action.

Under the Federal WARN Act, in the event of a violation, the employer may be held liable for back pay and the value of lost benefits for the period of the violation, but not longer than sixty (60) days.

Under the NY WARN Act, an employer is liable for back pay and the value of benefits for the period of any violation, up to a maximum of 60 days, as well as a civil penalty of \$500 for each day of the violation. The proposed regulations expressly provide that the \$500 civil penalty is to be imposed in the aggregate and not individually for each affected employee, substantially reducing the potential impact of these fines. The penalty can be avoided if the employer, within three weeks from the date of the WARN triggering event, satisfies its liability to each affected employee.

Attorneys' fees are available to a prevailing plaintiff under both the Federal and NY WARN Acts. Finally, under the NY WARN Act, the

Commissioner of Labor does not have the authority to enjoin any plant closing, relocation or mass layoff.

## The Bottom Line

In sum, employers are recommended to revisit their employment "policy" practices to ensure compliance with regard to this new legislation and its interplay with the Federal WARN Act. We also recommend that you contact a labor and employment attorney prior to a reduction in force, plant closing or relocation, for assistance in determining whether notice is required, and if so, assistance in drafting a notice that is compliant with both laws. Failure to do so could result not only in a violation of law and a lawsuit, but fines, damages and attorneys' fees in the event that you lose. ■



*Emily J. Wexler, Esq.*

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## Don't Bet on Your Arbitration Clause Surviving Your Contract

**Many companies operate under the assumption that contractual obligations continue despite the expiration of the contract itself.** Although the law provides several exceptions to the

survival of certain contractual terms, the endurance of an arbitration clause has created inconsistent results. While parties to expired labor contracts, for instance, may find

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themselves bound by arbitration provisions in the contracts, even for conduct occurring after its expiration, businesses may not find themselves in the same position with arbitration clauses in their general commercial contracts.

Historically, the issue had been quite murky. For example, in 1994 the Third Circuit was faced with whether to enforce an arbitration provision pursuant to an expired collective bargaining agreement in *Luden's Inc. v. Local Union No. 6 of Bakery, Confectionary and Tobacco Workers' Int'l*, 28 F.3d 347 (3d Cir. 1994). There, the labor union attempted to compel arbitration against an employer despite the recent lapse of the collective bargaining agreement which mandated arbitration of such disputes. The union argued that employees had continued to fulfill their duties under the same collective bargaining agreement, while the new one was being negotiated. The Court agreed with the labor union and held that employers and unions who continue their relationships with one another after expiration of their collective bargaining agreements may be able to force arbitration, even where the obligations that were violated arose after the written contract had expired. The Court reasoned that “[t]he employer’s uninterrupted fidelity to the arbitration provision stood as the implied consideration for the employees’ continued diligent and loyal service.” However, in dissent, Judge Samuel A. Alito Jr., now a justice of the U.S. Supreme Court, said he was skeptical about Becker’s conclusion that the parties had agreed to an “implied-in-fact” arbitration clause, and cautioned that the majority had bound the parties to arbitration “by operation of law” rather than by mutual assent.

As such, general businesses were still left with the question of whether they may continue to conduct business with one another after their contract expired. However, it looks like there is some new guidance, in which the answer appears to be “no.”

Recently, the United States District Court for the Eastern District of Pennsylvania refused to extend their decision in *Luden* to general commercial contracts in *Vantage Technologies Knowledge Assessment, LLC v. College Entrance Exam. Bd.*, Civil Action No. 08-4743(E.D.Pa. Dec. 18, 2008). The parties there entered into a contract in 1998 that contained an agreement to arbitrate all disputes and which was renewed in 2001. But when the second contract was set to expire in 2002, the College Board rejected Vantage’s draft of a new contract and the parties continued to do business without a contract. Vantage again proposed a new contract in 2005 that provided for arbitration in language identical to the original agreement, but the College Board again rejected it. In July 2008, a new contract was signed without an arbitration clause.

When a dispute erupted over payment for Vantage’s post-contractual services, the College Board initiated an arbitration in August 2008 seeking a declaratory judgment concerning unpaid sums claimed by Vantage, and Vantage responded by filing suit in federal court alleging claims of unjust enrichment, breach of contract, fraud in inducement, negligent misrepresentation and false prosecution of an arbitration claim.

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The College Board relied heavily on *Luden* to argue that the arbitration provision survived the contract's expiration. The court disagreed, distinguishing labor contracts, where arbitration clauses are "typically included for the express benefit of labor in exchange for a promise not to strike." Although federal policy favors arbitration and mandates that any doubts about the scope of coverage should be resolved in favor of arbitration, the court found that "this policy cannot be invoked to create an arbitration provision in a contractual relationship where no such provision exists." "No similar exchange exists," the court determined, "where two sophisticated commercial entities mutually decide to continue their relationship on a day-to-day basis in the absence of an agreement signed by both."

## The Bottom Line

As a result of this holding in *Vantage Technologies Knowledge Assessment, LLC*, it is recommended that other than agreeing in writing to new contractual terms, drafters who want arbitration provisions to survive should explicitly state in all of their contracts that the arbitration provisions survive the contract's termination. ■



*Shannon M. Ryman, Esq.*

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## Employees Engaged in the Storage and Delivery of a Retail Business's Merchandise are Entitled to Time-and-a-Half of their Regular Wages for Overtime

**Retail employers seeking exemptions from New Jersey Wage and Hour Law's overtime laws need to be careful before failing to pay employees overtime at the rate of time-and-a-half of their regular wages.** Such employers are urged to critically examine whether they are actually entitled to the exemption and seek legal advice.

On March 2, 2009, the New Jersey Appellate Division, in a published decision, affirmed the Commissioner of the Department of Labor and Workforce Development's (the "Labor Department") determination holding that Raymour & Flanigan Furniture ("R & F") did not qualify as a trucking industry employer, and thus was not exempt from paying its customer service and distribution center

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employees time-and-a-half of their regular wages. *In the Matter of Raymour and Flanigan Furniture, and Neil Goldberg, President and Individually*, Docket No. A-4622-07T1 (App. Div. 2009). The issue at hand involved New Jersey Wage and Hour Law, N.J.S.A. 34:11-56a to 56a38, which provides that every employer must pay its employees 1 ½ times the employee's regular hourly wage for all hours worked over forty (40) in one week. N.J.S.A. 34:11-56a4. This law provides exemptions to the 1 ½ time requirement for "trucking industry employers," which is defined under the law as "any business or establishment primarily operating for the purpose of conveying property from one place to another by road or highway, including the storage and warehousing of goods and property." *Id.*

R & F is a bedding and furniture retail company which operates sixty-seven (67) retail showrooms, five (5) clearance centers, sixteen (16) customer service centers and (2) two distribution centers throughout the northeast, including New Jersey. It consists of two divisions: retail/sales and operations/delivery. The retail division is the showroom stores in which customers can view samples and place sales for furniture and bedding. The delivery division, maintains the inventory of furniture and arranges the delivery of furniture to customers. The employees in the delivery division schedule and route truck deliveries, maintain inventory in the warehouses, load and dispatch trucks and manage truck maintenance.

In 2005, the Labor Department investigated an employee complaint that alleged that R & F was not paying its delivery division employees

the correct overtime rate. In the course of its investigation, it requested that R & F provide an audit of its employee overtime payments. Instead of doing so, R & F claimed that, because of its trucking operations in the delivery division, it was a "trucking industry employer," and was thus exempt. The Labor Department transmitted the matter to the Office of Administrative Law for a ruling by an Administrative Law Judge (the "ALJ") as to whether R & F actually did qualify for the exemption. The ALJ found in favor of the Labor Department ruling that R & F did not qualify as a "trucking industry employer." The ALJ stated that R & F is not **primarily** engaged in the trucking industry but is rather a retailer of furniture. R & F's contention, the ALJ held, was contrary to the legislative intent of the law. Back before the Labor Department, it agreed with the ALJ's conclusion that R & F did not meet the statutory definition of a "trucking industry employer," but in using different reasoning, it stated that the delivery division did not operate as a separate establishment, but that the delivery division remained part of R & F's overall retail business.

On appeal, R & F again argued that it qualifies for the exemption because the delivery division is primarily trucking, and thus it qualified as a separate establishment under the law. However, the Appellate Division rejected this argument, agreeing with the Labor Department's original decision. The Appellate Division held that R & F's argument that it is a "trucking industry employer" because of its delivery division is contrary to the legislative intent of the New Jersey Wage and Hour Law. Specifically, it stated that the term

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“establishment” as used in the wage and hour law does not “simply mean a separate location of one branch of a complete business enterprise, but in fact refers to the business itself, which must primarily operate to transport property by road from one place to another.”

## The Bottom Line

The Court’s holding reiterates the humanitarian purpose of the Wage and Hour Law, and shows the Court’s narrowing of the “trucking industry” exemption, *e.g.*, it narrows the group

of employers excluded from the law. It is also wise for employers to remember that proving entitlement to exemptions under the Wage and Hour Law is on the employer. Employers are advised to seek the advice of a Labor and Employment attorney prior to not paying its employees overtime wages. ■

■ Emily J. Wexler, Esq.

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**Employers must take immediate action, if you have not already done so, to review and update your administrative practices in response to the Stimulus Bill.**

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## What You Need to Know About How the Stimulus Bill Affects Your Company and the Immediate Actions You Must Take

**The substantial American Recovery and Reinvestment Act of 2009 (the federal “Stimulus Bill”), signed into law by President Obama on February 17, 2009, includes numerous provisions on federal spending.** The most important impact of the Stimulus Bill on employers is with regard to group health plans subject to the Consolidated Omnibus Budget Reconciliation Act (“COBRA”).

Employers must take immediate action, if you have not already done so, to review and update your administrative practices in response to the Stimulus Bill. The information contained in this

article explains some of the most important provisions of premium assistance for COBRA benefits.

The new changes only affect employees who are fired, laid off or were otherwise involuntarily separated from their company. These affected employees are only responsible for 35% of their health care premiums. Finally, you should note that these changes are only temporary, at least for now, and only apply to those who are involuntarily terminated during the period of September 1, 2008 until December 31, 2009.

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At this point, you must be wondering what to do since February 17, 2009 was the middle of the month. The good news is that while the Stimulus Bill went into effect on that date, the subsidy does not technically start until the first period of coverage on or after that date. For most employers that means March 1, 2009.

Also, there is a 60 day grace period of sorts for the subsidy. COBRA participants may be required to continue to pay the full premiums until April 19, 2009, allowing employers time to make the changes with regard to their billing practices. However, after this date, the employer must refund any excess amounts paid by COBRA participants after February 17, 2009 or apply them to future subsidized premiums.

Next, you should take a look at all employees who were laid off, fired, or otherwise left employment with your company as early as September 1, 2008. The Stimulus Bill requires that employers look back to September 1, 2008 and track down all of these employees. The employees who did not originally enroll in COBRA must receive notice of these changes, and be given a second opportunity to enroll in COBRA. They have 60 days to decide whether they want to re-enroll. Their COBRA coverage would start as early as March 1, 2009 and would continue to the date that would have ended their coverage, had they elected COBRA initially. All employees who elected COBRA benefits before the Stimulus Bill was passed would be eligible for the subsidy, but **not retroactive** to their termination dates. The subsidy will generally apply to premiums paid for periods of coverage beginning on or after March 1, 2009.

Going forward, all employees who are involuntarily terminated must receive notice and 60 days to decide whether to participate. The U.S. Department of Labor is supposed to provide a model notice within 30 days of the Stimulus Bill's enactment.

Employers that provide group health insurance must initially cover the 65% premium subsidy. However, employers will be reimbursed for the subsidy via a credit against their federal payroll taxes.

The Stimulus Bill does not affect individuals terminated for "gross misconduct," and who did not receive COBRA coverage (as allowed by COBRA). Additionally, more highly compensated individuals, who earn over \$125,000 annually, are eligible for a declining subsidy or none at all.

Employees who elect coverage are entitled to the subsidy for up to 9 months. Moreover, it does not affect or extend the maximum COBRA continuation periods. Coverage also ends if an individual becomes eligible for another plan, a health flexible spending account, Medicare, or Medicaid.

## The Bottom Line

Take a deep breath and jump in. These changes are temporary, and despite your company being initially responsible for the COBRA premiums, they will be refunded in the form of tax subsidies. Determine who has been involuntarily terminated since September 1, 2008 and figure out how to track them down. Prepare notices to those

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employees and their dependents informing them about the subsidy. Going forward, determine how to modify your current procedures when dealing with employees who will be laid off or terminated. Revise your regular COBRA notice to include these changes. Finally, notify your payroll department to prepare them for the subsidy reimbursements and new payment arrangements.

Finally, contact an attorney to help with the transition if you have any specific questions about how the new Stimulus Bill will affect your company. ■

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## Upcoming Speaking Engagements:

**Bressler Labor and Employment Practice lawyers will be speaking on the following subjects in the coming months:**

**April 23, 2009:** The Association of Trial Lawyers of America Boardwalk Seminar 2009. Jed Marcus will be speaking on issues relating to the direct examination and cross-examination of plaintiffs in employment cases. Atlantic City, NJ.

**June 5, 2009:** Hot Tips in Labor and Employment Law: 2009. Jed Marcus will be speaking on Legal Ethics in Labor and Employment Law. Sponsored by the Labor and Employment Section of the New Jersey State Bar Association. New Brunswick, NJ.

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