



Employment Notes

TERMINATING EMPLOYEES IN TURBULENT TIMES

Businesses coping with the current challenging economic environment may be forced to make strategic workforce reductions. This article summarizes several issues employers should be conscious of when considering employee terminations.

Federal & New York WARN Acts

When an employer's WARN Act obligations are triggered, the business must provide written notice to employees who may reasonably be expected to experience an employment loss, as well as certain governmental and other entities.

The federal WARN Act provides protection to workers by mandating that businesses with 100 or more employees, not including specified part-time employees, supply 60 days advanced notice of certain plant closings and mass layoffs. A "plant closing" is the shut down of a business site resulting in an employment loss for 50 or more employees during any 30-day period. A "mass layoff" results from an employment loss at a business site during any 30-day period for 500 or more employees or for 50-499 employees if they constitute at least 33% of the employer's active workforce.

Effective February 1, 2009, the NY WARN Act applies to employers who employ 50 or more full-time workers and will affect more employers than the federal WARN Act. Covered employers must provide 90 days advanced written notice to affected employees in connection with (i) plant closings, (ii) mass layoffs and (iii) relocations of all or substantially all of the industrial or commercial operations of a business to a location 50 or more miles from the current location. Under the NY WARN Act, a "plant closing" results from the employment loss of 25 employees over any 30-day period, while a "mass layoff" results from the employment loss of 25 or more full-time employees who represent at least 33% of the workforce or the employment loss of at least 250 full-time employees, over a 30-day period.

Employers violating the federal or NY WARN Acts may face damages in the form of back wages, fines and attorneys' fees.

Recouping Employee Loans & Recovering Company Property

Under New York law, employers may not make deductions from the wages of an employee, except certain permitted deductions that are for the employee's own benefit and are expressly authorized in writing by the employee. These permitted deductions are generally limited to payments for insurance premiums, pension or health benefits and other similar payments.

As a consequence, employers seeking to recover money loaned to or the value of company property retained by a former employee may not deduct such amounts from the employee's wages. Employers seeking to recover such amounts should consider instituting a separate legal action or filing a police report. To avoid this situation, employers should implement policies which require terminated employees to immediately turn over all company equipment and property before exiting the business premises, including phones, ID cards, laptops and keys. Businesses illegally deducting from wages may face civil and criminal sanctions, including punitive damages and attorneys' fees.

Payout of Accrued Vacation Days

There is no requirement under New York law that employers pay terminated employees for accrued vacation time. However, in order for a policy that accrued vacation days are forfeited upon termination to be enforceable, employees must have received written notice of such a policy in advance. An Employee Handbook is a good location for such a policy.

Continuation of Health Benefits

Generally under COBRA and comparable New York State law, businesses which provide group health insurance must offer qualifying terminated employees and each of their covered dependents the opportunity to continue their coverage for a period of time. Employers must notify their health plan administrator within 30 days of an employee's termination and the administrator will notify the covered individuals of their right to continue coverage. A qualified individual has 60 days to elect coverage from the date of termination or notice of a qualifying event, whichever is later.

Severance and a Release

In the absence of an agreement or business policy to the contrary, there is no legal requirement that employers provide terminated employees with severance. A company may make the business decision to offer severance in consideration for the employee's execution of a release in favor of the employer. In addition to any monetary severance offered, a company may offer to pay for continued health benefits, provide the employee with a letter of reference or arrange for outplacement services at the company's expense to assist the employee with finding new employment. A release should be required in exchange for severance in order to eliminate any potential claims the terminated employee may consider filing.

The Termination Itself

The terminated employee should be informed in private and given time to absorb the situation, although it is advisable to have one employee as a witness in addition to the employee performing the termination. Keep the meeting short and to the point, but take time to remind the employee of any continuing confidentiality obligations he or she may have and make clear the company's intent to enforce such obligations. Let the employee know who will be available to answer follow-up questions he or she may have. While it is generally best that terminated employees leave the premises after being informed of the termination, do not treat them like a criminal with a full security escort (unless warranted by the circumstances). NY Labor Law also requires that within 5 business days of termination employers give the terminated employee written notice of the date his or her employment terminated and the date on which his or her employee benefits will be cancelled as a result.

One of the best protections against an employee lawsuit is to part on amicable terms to the extent possible. Treat the terminated employee with respect throughout the termination process. Whether an employee ultimately brings a lawsuit or files a claim can turn on how that employee is treated on his or her way out the door.

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This is a general summary of issues related to workforce reductions and is not intended to be legal advice rendered in response to a specific set of facts. If you have any questions regarding workforce reductions or other issues of employment law please feel free to contact any of the following partners in our Employment Law Group:

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