

CHAPTER 475

AN ACT to amend the labor law, in relation to enacting the New York state worker adjustment and retraining notification (WARN) act

Became a law August 5, 2008, with the approval of the Governor.

Passed by a majority vote, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The labor law is amended by adding a new section 598 to read as follows:

§ 598. Effect of payments for failure to provide notice of a facility closure. Payments to an employee under article twenty-five-a of this chapter by an employer who has failed to provide the advance notice of a facility closure required by such article or the federal Worker Adjustment and Retraining Notification Act (29 U.S.C. Sec. 1201 et seq.) or amendments thereto, shall not be construed as remuneration under this article. Unemployment insurance benefits may not be denied or reduced because of the receipt of payments related to an employer's violation of article twenty-five-a of this chapter or the federal Worker Adjustment and Retraining Notification Act.

§ 2. The labor law is amended by adding a new article 25-A to read as follows:

ARTICLE 25-A

NEW YORK STATE WORKER ADJUSTMENT AND RETRAINING NOTIFICATION ACT

Section 860. Short title.

860-a. Definitions.

860-b. Notice.

860-c. Exceptions.

860-d. Extension of mass layoff period.

860-e. Determinations with respect to employment loss.

860-f. Powers of the commissioner.

860-g. Violation; liability.

860-h. Civil penalty.

860-i. Other rights.

§ 860. Short title. This article shall be known and may be cited as the "New York state worker adjustment and retraining notification act".

§ 860-a. Definitions. As used in this article, the following terms shall have the following meanings:

1. "Affected employees" means employees who may reasonably be expected to experience an employment loss as a consequence of a proposed plant closing or mass layoff by their employer.

2. "Employment loss" means:

(a) an employment termination, other than a discharge for cause, voluntary departure, or retirement;

(b) a mass layoff exceeding six months;

(c) a reduction in hours of work of more than fifty percent during each month of any consecutive six-month period.

"Employment loss" shall not result under circumstances where a plant

closing or mass layoff is the result of the relocation or consolidation of part or all of the employer's business and, before the closing or mass layoff, the employer offers to transfer the employee to a different site of employment within a reasonable commuting distance with no more than a six-month break in employment, or the employer offers to transfer the employee to any other site of employment, regardless of distance, with no more than a six-month break in employment, and the employee accepts within thirty days of the offer or of the closing or mass layoff, whichever is later.

3. "Employer" means any business enterprise that employs fifty or more employees, excluding part-time employees, or fifty or more employees that work in the aggregate at least two thousand hours per week. "Employer" shall not include the federal or state government or any of their political subdivisions, including any unit of local government or any school district.

4. "Mass layoff" means a reduction in force which:

(a) is not the result of a plant closing; and

(b) results in an employment loss at a single site of employment during any thirty-day period for:

(i) at least thirty-three percent of the employees (excluding part-time employees); and

(ii) at least twenty-five employees (excluding part-time employees);

or

(iii) at least two hundred fifty employees (excluding part-time employees).

5. "Part-time employee" means an employee who is employed for an average of fewer than twenty hours per week or who has been employed for fewer than six of the twelve months preceding the date on which notice is required.

6. "Plant closing" means 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 at the single site of employment during any thirty-day period for twenty-five or more employees (other than part-time employees).

7. "Representative" means an exclusive representative within the meaning of section 9(a) or 8(f) of the National Labor Relations Act (29 U.S.C. 159(a), 158(f)) or section 2 of the Railway Labor Act (45 U.S.C. 152).

8. "Relocation" means the removal of all or substantially all of the industrial or commercial operations of an employer to a different location fifty miles or more away.

§ 860-b. Notice. 1. An employer may not order a mass layoff, relocation, or employment loss, unless, at least ninety days before the order takes effect, the employer gives written notice of the order to the following:

(a) affected employees and the representatives of affected employees;

(b) the department; and

(c) the local workforce investment boards established pursuant to the federal Workforce Investment Act (P.L. 105-220) for the locality in which the mass layoff, relocation, or employment loss will occur.

2. An employer required to give notice of any mass layoff, relocation, or employment loss under this article shall include in its notice the elements required by the federal Worker Adjustment and Retraining Notification Act (29 U.S.C. 2101 et seq.).

3. Notwithstanding the requirements of subdivision one of this section, an employer is not required to provide notice if a mass layoff, relocation, or employment loss is necessitated by a physical calamity or an act of terrorism or war.

4. The mailing of notice to an employee's last known address by either first class or certified mail or the inclusion of notice in an employee's paycheck shall be considered acceptable methods for fulfillment of the employer's obligation to give notice to each affected employee under this article.

5. In the case of a sale of part or all of an employer's business, the seller shall be responsible for providing notice for any plant closing or mass layoff in accordance with this section, up to and including the effective date of the sale. After the effective date of the sale of part or all of an employer's business, the purchaser shall be responsible for providing notice for any plant closing or mass layoff in accordance with this section. Notwithstanding any other provision of this article, any person who is an employee of the seller as of the effective date of the sale shall be considered an employee of the purchaser immediately after the effective date of the sale.

6. Nothing set forth herein shall be read to abridge, abrogate, or restrict the right of any state or local entity to require an employer that is receiving state or local economic development incentives for doing or continuing to do business in this state from being required to provide additional or earlier notice as a condition for the receipt of such incentives.

7. Nothing set forth herein shall be read to prevent an employer who is not required to comply with the notice requirements of this section, to the extent possible, to provide notice to its employees about a proposal to close a plant or permanently reduce its workforce.

8. Calendar days. All references in this article to "days" shall be deemed to mean calendar days.

§ 860-c. Exceptions. 1. In the case of a plant closing, an employer is not required to comply with the notice requirement in subdivision one of section eight hundred sixty-b of this article if:

(a)(i) at the time the notice would have been required, the employer was actively seeking capital or business; and

(ii) the capital or business sought, if obtained, would have enabled the employer to avoid or postpone the relocation or termination; and

(iii) the employer reasonably and in good faith believed that giving the notice required by subdivision one of section eight hundred sixty-b of this article would have precluded the employer from obtaining the needed capital or business;

(b) the need for a notice was not reasonably foreseeable at the time the notice would have been required;

(c) the plant closing is of a temporary facility or the plant closing or mass layoff is the result of the completion of a particular project or undertaking, and the affected employees were hired with the understanding that their employment was limited to the duration of the facility or project or undertaking;

(d) the plant closing or mass layoff is due to any form of natural disaster, such as a flood, earthquake, or drought; or

(e) the closing or mass layoff constitutes a strike or constitutes a lockout not intended to evade the requirements of this article. Nothing in this article shall require an employer to serve written notice when permanently replacing a person who is deemed to be an economic striker under the National Labor Relations Act (29 U.S.C. 151 et seq.). Nothing

in this article shall be deemed to validate or invalidate any judicial or administrative ruling relating to the hiring of permanent replacements for economic strikers under the National Labor Relations Act.

2. An employer unable to provide the notice otherwise required by this article in a timely fashion as a result of circumstances described in subdivision one of this section, shall provide as much notice as is practicable and at that time shall provide a brief statement of the basis for reducing the notification period.

§ 860-d. Extension of mass layoff period. A mass layoff of more than six months which, at its outset, was announced to be a mass layoff of six months or less shall be treated as an employment loss under this article unless:

1. the extension beyond six months is caused by business circumstances (including unforeseeable changes in price or cost) not reasonably foreseeable at the time of the initial mass layoff; and

2. notice is given at the time it becomes reasonably foreseeable that the extension beyond six months will be required.

§ 860-e. Determinations with respect to employment loss. In determining whether a plant closing or mass layoff has occurred or will occur, employment losses for two or more groups of employees at a single site of employment, each of which is less than the minimum number of employees specified in subdivisions four or six of section eight hundred sixty-a of this article but which in the aggregate meet or exceed that minimum number set forth in such subdivisions, and which occur within any ninety-day period shall be considered to be a plant closing or mass layoff unless the employer demonstrates that the employment losses are the result of separate and distinct actions and causes and are not an attempt by the employer to evade the requirements of this article.

§ 860-f. Powers of the commissioner. 1. The commissioner shall prescribe such rules as may be necessary to carry out this article. The rules shall, at a minimum, include provisions that allow the parties access to administrative hearings for any actions of the department under this article.

2. In any investigation or proceeding under this article, the commissioner has, in addition to all other powers granted by law, the authority to examine any information of an employer necessary to determine whether a violation of this article has occurred, including to determine the validity of any defense.

3. Except as provided in this section, information obtained through administration of this article from an employer subject to this article and which is not otherwise obtainable by the commissioner under this chapter shall: (a) be confidential; and (b) not be published or open to public inspection. Prior to public disclosure of any such information in connection with any court action or proceeding, the employer shall be given a reasonable opportunity to make application to protect the information's confidentiality.

4. No decision or order issued pursuant to this article shall be admissible or used in evidence in any subsequent court proceeding except in an action by the commissioner or the employer to implement, enforce, or challenge a determination made by the commissioner pursuant to this article.

5. Any officer or employer of the state, any officer or employee of any entity authorized to obtain information pursuant to this section, and any agent to this state or of such entity who, except with authority of the commissioner under this section, discloses information is guilty of a misdemeanor.

6. If, after an administrative hearing, the commissioner shall determine that an employer has violated any of the requirements of this article or any rules or regulations promulgated hereunder, the commissioner shall issue an order which shall include any penalties assessed by the commissioner under sections eight hundred sixty-g and eight hundred sixty-h of this article. Upon the entry of such order, any party aggrieved thereby may commence a proceeding for the review thereof pursuant to article seventy-eight of the civil practice law and rules within thirty days from the notice of the filing of the said order in the office of the commissioner. Such proceeding shall be commenced directly in the appellate division of the supreme court. If such order is not reviewed, or is so reviewed and the final decision is in favor of the commissioner, the commissioner may file with the county clerk of the county where the employer resides or has a place of business the order of the commissioner containing the amount found to be due. The filing of such order shall have the full force and effect of a judgment duly docketed in the office of such clerk. The order may be enforced by and in the name of the commissioner in the same manner, and with like effect, as that prescribed by the civil practice law and rules for the enforcement of a money judgment.

7. The commissioner shall distribute any back pay and the value of any benefits recovered to any employees subject to the violation.

§ 860-g. Violation; liability. 1. An employer who fails to give notice as required by paragraph (a) of subdivision one of section eight hundred sixty-b of this article before ordering a mass layoff, relocation, or employment loss is liable to each employee entitled to notice who lost his or her employment for:

(a) Back pay at the average regular rate of compensation received by the employee during the last three years of his or her employment, or the employee's final rate of compensation, whichever is higher.

(b) The value of the cost of any benefits to which the employee would have been entitled had his or her employment not been lost, including the cost of any medical expenses incurred by the employee that would have been covered under an employee benefit plan.

2. Back pay and other liability under this section is calculated for the period of the employer's violation, up to a maximum of sixty days, or one-half the number of days that the employee was employed by the employer, whichever period is smaller.

3. Payments to an employee under this section by an employer who has failed to provide the advance notice of a facility closure required by this article or the federal Worker Adjustment and Retraining Notification Act (29 U.S.C. Sec. 1201 et seq.) shall not be construed as remuneration under article eighteen of this chapter. Unemployment insurance benefits under article eighteen of this chapter may not be denied or reduced because of the receipt of payments related to an employer's violation of this article or the federal Worker Adjustment and Retraining Notification Act.

4. The amount of an employer's liability under subdivision one of this section, shall be reduced by the following:

(a) Any wages, except vacation moneys accrued before the period of the employer's violation, paid by the employer to the employee during the period of the employer's violation.

(b) Any voluntary and unconditional payments made by the employer to the employee that were not required to satisfy any legal obligation.

(c) Any payments by the employer to a third party or trustee, such as

pension plan, on behalf of and attributable to the employee for the period of the violation.

(d) Any liability paid by the employer under any applicable federal law governing notification of mass layoffs, plant closings, or relocations.

(e) In an administrative proceeding by the commissioner, any liability paid by the employer prior to the commissioner's determination as the result of a private action brought under this article.

(f) In a private action brought under this article, any liability paid by the employer in an administrative proceeding by the commissioner prior to the adjudication of such private action.

5. Any liability incurred by an employer under subdivision one of this section with respect to a defined benefit pension plan may be reduced by crediting the employee with service for all purposes under such a plan for the period of the violation.

6. If an employer proves to the satisfaction of the commissioner that the act or omission that violated this article was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of this article, the commissioner may, in his or her discretion, reduce the amount of liability provided for in this section. In determining the amount of such reduction, the commissioner shall consider (a) the size of the employer; (b) the hardships imposed on employees by the violation; (c) any efforts by the employer to mitigate the violation; and (d) the grounds for the employer's belief.

7. An aggrieved employee, local government, or an employee representative seeking to establish liability against an employer may bring a civil action on behalf of the person, other persons similarly situated, or both, in any court of competent jurisdiction, within the time period provided by section two hundred thirteen of the civil practice law and rules. The court may award reasonable attorneys' fees as part of costs to any plaintiff who prevails in a civil action brought under this article. If the court determines that an employer conducted a reasonable investigation in good faith, and had reasonable grounds to believe that its conduct was not a violation of this article, the court may reduce the amount of any penalty it would otherwise impose against the employer under this article.

8. Neither the commissioner nor any court shall have the authority to enjoin a plant closing, relocation, or mass layoff under this article.

§ 860-h. Civil penalty. 1. An employer who fails to give notice as required by paragraph (b) of subdivision one of section eight hundred sixty-b of this article is subject to a civil penalty of not more than five hundred dollars for each day of the employer's violation. The employer is not subject to a civil penalty under this section if the employer pays to all applicable employees the amounts for which the employer is liable under section eight hundred sixty-g within three weeks from the date the employer orders the mass layoff, relocation, or employment loss.

2. The total amount of penalties for which an employer may be liable under this section shall not exceed the maximum amount of penalties for which the employer may be liable under federal law for the same violation.

3. Any penalty amount paid by the employer under federal law shall be considered a payment made under this article.

4. If an employer proves to the satisfaction of the commissioner that the act or omission that violated this article was in good faith and

that the employer had reasonable grounds for believing that the act or omission was not a violation of this article, the commissioner may in his or her discretion reduce the amount of the penalty provided for in this section. In determining the amount of such reduction, the commissioner shall consider (a) of the size of the employer; (b) the hardships imposed on employees by the violations; (c) any efforts by the employer to mitigate the violation; and (d) the grounds for the employer's belief.

§ 860-i. Other rights. The rights and remedies provided to employees by this article are in addition to, and not in lieu of, any other contractual or statutory rights and remedies of the employees, and are not intended to alter or affect such rights and remedies, except that the period of notification required by this article shall run concurrently with any period of notification required by contract or by any other statute.

§ 3. This act shall take effect on the one hundred eightieth day after it shall have become a law.

The Legislature of the STATE OF NEW YORK ss:

Pursuant to the authority vested in us by section 70-b of the Public Officers Law, we hereby jointly certify that this slip copy of this session law was printed under our direction and, in accordance with such section, is entitled to be read into evidence.

JOSEPH L. BRUNO
Temporary President of the Senate

SHELDON SILVER
Speaker of the Assembly
