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New York Federal Court Does and Doesn't Address Contours of Employer Liability under the Federal and New York State WARN (Worker Adjustment and Retraining Notification) Acts

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Under the federal **WARN Act,** and its more expansive counterpart, the New York State WARN Act, a sufficiently-sized employer must (absent limited exceptions) provide workers with a head's up that the employer might shut down its operations or layoff a sizeable portion of the workforce. This advance notice is supposed to provide workers with sufficient transition time, including by allowing them to successfully seek new jobs or enter a skills training programs. If the employer fails to provide sufficient advance notice – 60 days' notice under federal law and 90 days' notice under the NY law – the employer may be on the hook for up to 60 days of back pay and benefits to the employees, which in the aggregate, can prove rather costly to an already struggling company. That was the case in *1199 SEIU United Healthcare Workers East v. South Bronx Mental Health Council, Inc.*, a recent decision out of New York's Southern District, where terminated workers asked the court to award them more than $1.4 million. While the employer's violation was clear, the court took issue with the workers' requested damage award, reducing it to just over $500,000 – a substantial reduction, for two reasons:

First, the employees claimed that language in the New York State WARN Act allowed for maximum recovery under both the federal and state laws – $700,000 under the federal law and a separate $700,000 under the state law. But the court confirmed that the New York State WARN Act actually required it to offset any liability under the state law by any liability already attributable to the federal law. Since the violation of both statutes emanated from a single act, the employees were not able to double dip thereby cutting their damages request in half. But the court was not done.

Next, the employees claimed that they were entitled to compensation for every day South Bronx failed to provide sufficient notice up to 60 days. So, for example, if the federal WARN act required South Bronx to provide 60 days' advance notice of the shutdown, and it only provided 15 days' advance notice, South Bronx, the employees claimed, owed them 35 days' of back pay and benefits. But the court further reduced the requested award finding that the employees were not entitled to back pay for every day of the notice period that the employer failed to provide notice of the shutdown. Instead, the court said, the federal WARN Act only entitled them to recover back pay and benefits for the days *they would have actually worked* during that notice period. So going back to our example, if the employees would have only worked 20 days out of the 35 days they were not provided advance notice, then they would only be entitled to payment for those 20 days, not the requested 35 days.

This is all well and good for employers seeking to reduce their WARN liability, but here is where the case caught my attention. In its analysis regarding days actually worked, the court only mentions the federal WARN Act, leaving us, the reader, to possibly assume the same analysis would apply to the New York State WARN Act. I don't doubt that's true with respect to the court's finding that you only count the days the employee would have actually worked as opposed to counting every day in the notice period. However, I think the court failed to address an important point.

The New York State WARN Act requires *90 days' advance notice* as compared to the federal law's 60-day notice requirement. But like the Federal WARN Act, the New York law only permits employees to recover up to 60 days' of back pay and benefits. The court never mentioned whether the employees can count every day they would have worked *during the 90-day notice period* in counting up to 60 days' of back and benefits under the New York law. If it had done so, query whether the workers' damage award would have increased. I have not read the briefs so I don't know whether the parties ever addressed this issue, nor is it clear from the decision whether it ever entered the court's mind.

To illustrate, let's say South Bronx only provided notice 15 days before they shut down their operations. That would leave 35 days of insufficient notice under the federal WARN Act, 20 days of which the employees would have worked, and therefore, they would have been on the hook for 20 days of back pay and benefits under the federal law. But under the New York State WARN Act, it would have left an additional 30 days of insufficient notice, and let's say the employees would have actually worked 25 of those 30 additional days. Thus, in this example, South Bronx could have been on the hook for an additional 25 days of back pay and benefits under the New York State WARN Act.

In any event, despite the court's damage reductions in this case, $500,000 is still very much a real number (and as shown above, it could have been higher). It shows that employers must be mindful of WARN Act liability well before the execution of any shutdown or layoff.

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