

EMPLOYMENT ALERT

NEW LAWS TO IMPACT NEW YORK EMPLOYERS IN 2009

As the calendar turns from 2008 to 2009, New York employers will begin having to comply with a series of new labor and employment laws governing their relationships with their employees. These laws include both federal and state statutes, and impose a range of new obligations and risks. Some highlights follow.

THE ADA AMENDMENTS ACT OF 2008

On January 1, 2009, the federal ADA Amendments Act of 2008 (ADAAA) takes effect. This law expands the definition of “disability” under the Americans with Disabilities Act (ADA) (42 U.S.C. § 12101, *et seq.*), thus increasing the reach of the law. Employers can expect to face an uptick in federal ADA litigation in light of these changes, as well as new challenges in obtaining dismissal of claims on pre-trial motions. Some of the more notable changes include the following—

- The ADAAA effectively overturns key Supreme Court decisions that limited the definition of “disability,” including, for example, *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002). The new law also directs the Equal Employment Opportunity Commission (EEOC) to revise certain regulations governing the definition of disability and requires that the definition of “disability” be construed broadly.
 - For example, under the ADAAA, an individual now may be disabled even if his or her workplace limitation can be corrected by mitigating measures (such as medication, prosthetics, etc.). This alters Supreme Court precedent that had excluded from the definition of “disability,” conditions that were ameliorated through the use of such measures. (*See, e.g., Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999).)

- The ADAAA also alters the law regarding conditions that are episodic or in remission. Under the new law, such conditions will constitute disabilities if they would substantially limit a major life activity when active.
- The ADAAA also provides increased protections for individuals who claim they are “regarded as” disabled, even if those individuals are not actually disabled.

IMPLEMENTATION OF THE NEW YORK STATE WARN ACT

Effective February 1, 2009, New York employers will be subject to the New York State Worker Adjustment and Retraining Notification Act (“New York WARN Act”) (N.Y. Lab. Law § 25-A), which will impose new obligations and potential liabilities in connection with mass layoffs and plant closings. A state analog to the federal Worker Adjustment and Retraining Notification (WARN) Act, 29 U.S.C. §§ 2101, *et seq.*, the New York law will contain more stringent requirements than its federal counterpart. Some key components of the new legislation are—

- *More employers covered:* Unlike the federal WARN Act, which covers only those employers with at least 100 full-time employees, the New York WARN Act will reach employers with 50 or more full-time employees.
- *More force reductions covered:* The state law also will require notification in more closings and layoffs. The new law requires advance notice of closings affecting 25 or more employees in the course of 30 days (as opposed to 50 or more employees under the federal WARN Act). The law also broadens the definition of “mass layoff” to reach more employment decisions.¹
- *Longer notice period:* While the federal WARN Act generally requires employers to provide 60 days’ notice of a plant closing or mass layoff, the New York law will require 90 days’ advance notice.
- *Additional notice requirements:* Unlike the federal law, the New York WARN Act also requires notice for any relocation of all or substantially all of the industrial or commercial operations of an employer from one location to another 50 or more miles away. Moreover, New York employers must now provide notice to affected employees represented by a union, which is not required by the federal WARN Act.
- *Enforcement by the Department of Labor:* Unlike the federal WARN Act, which can be enforced only by affected individuals, the New York law can be enforced either by individuals or by the New York State Department of Labor.

¹ “Mass layoff” is defined as a reduction of (a) 25 or more employees constituting 33 percent or more of all employees on site or (b) a total of 250 employees. Under the federal WARN Act, mass layoffs require a reduction of 50 employees constituting 33 percent of all on-site employees or at least 500 employees total.

Notably, under the view taken by the New York Department of Labor (NYDOL), employers must comply with the new notice requirements for all plant closings, mass layoffs and relocations occurring on or after February 1, 2009, *even if this means providing notice before the law's effective date*. Employers planning layoffs in early 2009, thus, should be aware that their notice requirements may be triggered as early as late 2008 or January 2009. Even for layoffs and plant closings occurring before February 2009, the NYDOL has “strongly encouraged” employers to provide 90 days’ notice to the affected employees.

N.Y. CORRECTION LAW: BACKGROUND CHECKS

Effective February 1, 2009, New York employers also will be subject to additional obligations when conducting background checks on potential hires. While these requirements are largely administrative in nature, a failure to adhere to them can subject employers to potential liability. Key amendments to the New York General Business Law include—

- Employers who request an “investigative consumer report” in connection with an offer of employment must provide prospective employees with written notice, along with a copy of Article 23-A of N.Y. Correction Law.
- When an employer receives a background report containing criminal conviction information, the employer must provide a copy of Article 23-A of N.Y. Correction Law to the applicant or employee who is the subject of the report.
- Every employer must post the new law in a “visually conspicuous manner” in the workplace.²

OTHER FEDERAL AND STATE INITIATIVES

The new year also will usher in other changes to the employment laws governing New York’s employers. At the federal level, the Department of Labor’s long-awaited final rulemaking in light of the 2008 amendments to the Family and Medical Leave Act (FMLA) go into effect in January. Among the new state laws going into effect is the Broadcast Employees’ Freedom to Work Act, which limits the ability of broadcast industry employers to impose post-employment restrictions on employees. In addition, the New York State Insurance Department recently issued Circular Letter No. 27, requiring recognition of same-sex marriages validly entered into in other states for purposes of New York insurance law. While it does not have the force of law, this Circular Letter raises a host of legal issues, including whether or not its principles are meant to apply to Employee Retirement Income Security Act (ERISA)-covered benefit plans and, if so, whether or not ERISA preempts the Circular and the state nondiscrimination principles cited therein.

² In a change intended to foster the re-entry of those with criminal records into the workforce, an employer who hires ex-offenders in compliance with the new law will enjoy a presumption that a prior conviction should be excluded from evidence in any claim of negligent hiring or retention filed against the employer.

RECOMMENDATIONS

New York employers should immediately revise their handbooks, policies, protocols and plans to ensure compliance with the new federal and state laws. Employers also should use this opportunity to revisit their ADA and FMLA compliance practices and their efforts to train managers and supervisors in these practices. With motions to dismiss and summary judgment motions likely harder to come by in ADA actions in the future, the ADAAA places a premium on avoiding claims where possible and resolving workplace concerns before they ever lead to litigation. For those employers considering reductions in force in 2009, the New York WARN Act imposes increased discipline and planning so as to avoid unexpected liability for failure to provide required notification.

CONTACT INFORMATION

If you have any questions about the matters raised in this alert, please contact—

Richard J. Rabin	rrabin@akingump.com	212.872.1086	New York
Christine A. Samsel	csamsel@akingump.com	212.872.1012	New York/Washington, D.C.
Michelle A. Burg.....	mburg@akingump.com	212.872.8087	New York