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The Impact of Executive Order 202.19 on the Notice Requirement of the New York State Worker Adjustment and Retraining Notification Act

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In response to the coronavirus ("COVID-19") pandemic affecting the nation, Governor Cuomo has signed a series of Executive Orders aimed at preventing the spread of the disease and adapting laws as necessary to reflect the current circumstances. On April 17, 2020, Governor Cuomo signed Executive Order 202.19 ("the Executive Order") which, among other things, suspended or modified the notice requirement contained in Section 860-b of the New York Labor Law ("Section 860-b"), which is part of the New York State Worker Adjustment and Retraining Notification Act ("the NYS WARN Act").

Per Section 860-a of the New York Labor Law, which defines the terms used in the NYS WARN Act, Section 860-b applies to "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." However, the government (both federal and state) and "any of their political subdivisions, including any unit of local government or any school district" are exempt.

The Executive Order specifically suspends or modifies subdivision one of Section 860-b ("Section 860-b(1)"). Normally, under Section 860-b(1), "[a]n 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 three groups: "(a) affected employees and the representatives of affected employees; (b) the department [of labor]; 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."

However, the Executive Order states that, from April 17, 2020 through May 17, 2020, Section 860-b(1) is suspended or modified "to the extent necessary to allow a business that receives federal Paycheck Protection Program funding and subsequently rehires employees, to provide the notice required under this section as soon as practicable but not necessarily within ninety days, provided that a business that receives federal Paycheck Protection Program funding provided the notice required under this section when it initially laid off employees."

Thus, under the Executive Order, the 90-day notice requirement does not apply to employers who get Paycheck Protection Program funding and subsequently rehire employees. Notice must still be given to the three groups in accordance with Section 860-b(1). However, the notice does not have to be at least 90 days prior to the mass layoff, relocation, or employment loss occurring; it simply must be "as soon as practicable."

Importantly, as implied by the Executive Order and confirmed on the New York State Department of Labor's website, the 90-day notice requirement has not been generally waived for every employer. Therefore, employers who do not obtain funding from the federal government under the Paycheck Protection Program and then rehire their employees are not exempt from the 90-day notice requirement under the Executive Order. However, the NYS WARN Act itself provides for some exceptions to notice requirements; the exceptions can be found in New York Labor Law Section 860-c ("Section 860-c").

Notably, Section 860-c states that "[a]n 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." One of the circumstances in subsection one is that "the need for a notice was not reasonably foreseeable at the time the notice would have been required." Thus, under certain circumstances, even employers who are not covered by the Executive Order may be exempt from the 90-day notice requirement.

We will continue to update this as more information becomes available. In the meantime, if you have questions regarding any aspects of employment law and/or the implications of the coronavirus ("COVID-19") on your place of business, feel free to contact James G. Ryan at (516) 357-3750 or via email at jryan@cullenllp.com, Thomas B. Wassel at (516) 357-3868 or via email at twassel@cullenllp.com, or Hayley B. Dryer at (516) 357-3745 or via email at hdryer@cullenllp.com.

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