

HR Update 4/10

New York State Department of Labor Revises state WARN Act Regulations

The New York State Department of Labor has issued revised emergency regulations under the [New York State Worker Adjustment and Retraining Notification Act](#) (NYS WARN). NYS WARN became law in August 2008 and took effect on February 1, 2009. The revised regulations replace the January 2009 WARN regulations and are effective immediately.

NYS WARN is now more stringent covering more private sector employers who employ workers in the state and has lower thresholds which give rise to earlier notice obligations. A covered employer under NYS WARN is any business enterprise whether for-profit or not-for-profit that employs 50 or more employees within NYS, excluding part-time, or 50 or more employees including part-time employees within the state that work in aggregate at least 2,000 hours per week.

Under NYS WARN employers must provide at least 90 calendar days advance written notice for the following events: plant closings, mass layoffs and relocations. Employers are responsible to provide notice to the affected employees and their labor representatives.

Violations of the NYS WARN may result in civil penalties and fines up to \$500 for each day of the employer's violation.

To read more on the NYS WARN Act visit:

<http://www.labor.ny.gov/workforcenypartners/warn/warnportal.shtm>

Hiring Incentives to Restore Employment Act of 2010 (HIRE Act)

Under the HIRE Act an employer who hires an employee after February 3, 2010 and before January 1, 2011 can receive a tax credit equal to the employer's portion of the Social Security tax. All employers, with the exception of government employers, are eligible for this tax credit. Public institutions of higher education are the only government institutions that are eligible for the tax credit.

The HIRE Act provides qualified employers with temporary payroll tax forgiveness of the employer's 6.2 percent share of Social Security payroll taxes on wages paid to new hires who have been previously unemployed. The employer of a qualified employee will not have to pay the employer match for the 6.2% SS portion of that employee's wages in 2010. A qualifying employee:

- Is hired after Feb. 3, 2010 and before Jan. 1, 2011;

- Certifies by signed affidavit, under penalty of perjury that he/she has not been employed for more than 40 hours during the 60-day period ending on the date his/her employment begins with the new employer;
- Is not employed to replace another employee (unless employee is terminated for cause or voluntarily leaves) ; and
- Is not related to the employer.

Click here to get the [IRS HIRE Act affidavit](#).

There is also a retained worker credit employers can receive which is a general business credit of up to \$1,000 which cannot be applied against an employer's payroll tax liability. A "retained employee" is one who:

- Was employed by the taxpayer/employer on any date during the tax year;
- Was employed for at least 52 consecutive weeks; and
- Had wages during the last 26 weeks of that same 52 week period equaling at least 80% of his/her wages during the first 26 weeks of the periods.

For more information on the HIRE Act please visit:

<http://www.irs.gov/newsroom/article/0,,id=221036,00.html>

Healthcare Reform Update: Breastfeeding/Expressing Requirements for Employers

In May 2008 the New York State Department of Labor established guidelines for the implementation of the statutory requirements protecting the right of nursing mothers to express breast milk at their place of employment. At the state level this law applies to all businesses regardless of size.

This law has now been enacted at the federal level. The 2010 Healthcare Reform Act has now amended the Fair Labor Standards Act (FLSA) by requiring that employers provide a reasonable break time for an employee to express breast milk for her nursing child for 1 year after the child's birth each time the employee has need to express milk, at the federal level. Under the Act, employers provide a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk. Employers are not required to pay employees for such break time.

It is important that employers are notifying employees of their right to express milk by notice on their bulletin board or policy change/addition in their handbooks.

To download and post the NYS guidelines on the right to express breast milk in the workplace visit:

<http://www.labor.ny.gov/workerprotection/laborstandards/pdfs/guidelinesexpressionofbreastmilkfinal.pdf>

COBRA Subsidy Program Deadline Arrives

There has been anticipation on extending the COBRA subsidy once again extending the dates on which assistance eligible individuals could receive the subsidy. As it turns out the Senate recessed without giving final approval to an extension to the COBRA subsidy program, so workers who are involuntarily terminated after March 31, 2010 will not be eligible for the subsidies for healthcare continuation coverage.

The Senate is scheduled to return April 12, when proponents of an extension are likely to push for Congress to act.

The COBRA subsidy program was created by the American Recovery and Reinvestment Act of 2009 (ARRA). Under the law, as amended, workers who are or were involuntarily terminated between September 1, 2008 and March 31, 2010 are eligible for 65 percent COBRA subsidies. Workers can receive the subsidies for up to 15 months.

The Senate recessed without voting on House-approved legislation that would extend the program through April. While the Senate has yet to act on that legislation, the Senate has approved a bill that would extend the program through the end of 2010.

To learn more about the COBRA subsidy visit:

<http://www.dol.gov/ebsa/faqs/faq-cobra-premiumreductionEE.html>

COBRA Subsidy Third Extension

As mentioned in the last HR update, the COBRA subsidy was to be reviewed again by Congress for a possible third extension period. On April 15, 2010, the President signed into law an extension of unemployment benefits and the COBRA premium assistance that helps with the cost of health benefits for Americans who lost their jobs. This extension provides a COBRA premium subsidy for eligible individuals who are involuntarily terminated from employment through May 31, 2010.

The new law also provides retroactive eligibility for individuals who lost their jobs after the prior COBRA subsidy expired on March 31, 2010. The provisions of the extension remain the same “assistance eligible individuals” who are involuntarily terminated between September 1, 2008 through May 31, 2010 are eligible to receive 15 months of the subsidy in which they pay 35% of their health benefits premium.

The DOL has not yet modified the model notices to reflect the extension date. Employers can use the [current forms](#) available on the website and update the information.

To find out more information on the new COBRA extension visit:

<http://www.dol.gov/ebsa/COBRA.html>

Interns vs. Employees

As the summer season approaches, many employers look to take on interns at their companies and many students off of school are looking for these internships to gain experience. It is very important employers know what an intern is and how to utilize them in their company. Misconceptions about interns can lead to violations of the FLSA and can result in many hardships to the employer.

Defining an Employee

FLSA defines an employee as performing activities controlled or directed by "an employer." Such an employee performs work for an employer's benefit, even if the employer doesn't require but instead "permits" the work. The FLSA notes that people who work for their own interest are not employees, but may be independent contractors or students and trainees acquiring experience. Many businesses misinterpret the meaning of these phrases and unwittingly violate the FLSA.

What defines an Intern?

Interns spend time for their own benefit to get experience. They can't be promised jobs or pay, cannot spend time on the production of the company's normal business and can't contribute to "commerce." An intern is an unpaid trainee who is not doing any work that the business can use to further its goals or meet commitments and is spending time gaining experience but is not expected to provide anything that the company might use, whether working on the company's premises or at home. This suggests a company should view the role of an intern's "mentor" as time donated by the firm. Many companies view internships as part of corporate citizenship. Being realistic, companies use interns to bolster their image within their community and in campus recruiting efforts. In addition, an internship of a high potential candidate can sway a decision to apply for a job upon completing college.

Here are some suggestions to avoid classifying an intern as an employee. First, it is important to be clear on the personal growth objectives of the internship and to communicate those in writing to the intern and those mentoring the intern. Second, someone should be appointed to monitor how the internship is understood by others and the intern's actual work and activities. Third, the company should communicate the objectives of an internship to the intern's school and, where appropriate, to the intern's advisor. The company should not provide the intern any compensation and should avoid paying for any of the intern's personal or quasi-business expenses.

Paying an Intern/Trainee

On the other hand, firms can view a paid intern as a cost-effective employee. It may be beneficial to call the position a *trainee* rather than intern, to avoid confusion where other parts of the company use unpaid internships. In this case, the summer trainee should be designated a temporary employee, a category that could limit the total number of hours

per year an individual may work, pay only for hours or days worked (not for holidays or other time off), and exempt the individual from benefits such as health insurance, life insurance, and retirement and thrift plans. In such cases, pay should at least be at the minimum wage and equitable with other employees performing similar work. It is possible to determine a bonus which might be paid at the end to the intern trainee or perhaps paid strategically just after the beginning of the next year as the individual is considering applying for "career employment."