



New York State Department of Labor
David A. Paterson, Governor
Colleen C. Gardner, Acting Commissioner

VIA ELECTRONIC MAIL [REDACTED]

February 11, 2010

[REDACTED]

Re: WARN Act / [REDACTED]
Our File No. WARN 10-0006

Dear [REDACTED]:

I have been asked to respond to your inquiry made to [REDACTED] on or about January 14, 2010, wherein you requested an opinion as to whether or not you were entitled to ninety days notice of employment loss, or ninety days pay in lieu of notice, under the NYS WARN Act. You indicated that on January 8, 2010 you were laid off from your position as construction manager with [REDACTED]. You did not receive ninety days notice of this employment loss, nor did you receive pay in lieu of notice. It was your understanding that [REDACTED] laid off forty-two employees in their New York based corporate office and provided each of these affected employees with ninety days pay as well as previously negotiated severance pay. You believe you were entitled to the same under the NYS WARN Act and inquired on how to proceed.

In e-mail correspondence with me on January 15, 2010 you confirmed that you are not a New York State resident and you did not report to work to an office located in New York State; rather, you worked from your home in Texas. By e-mail on January 20, 2010 you indicated that while your territory included Texas, New Mexico, Oklahoma, Kansas, Missouri, South Dakota, North Dakota, Iowa, Illinois, and Wisconsin, you had completed projects nationwide. You further indicated that while you worked out of your home in Texas, your main responsibilities were to travel to these out of state jobsites to ensure that the store construction was being completed per the companies' requirements and on schedule. Finally, you stated that your immediate supervisor was located in the corporate office in New York.

In furtherance of our e-mail correspondence, I contacted [REDACTED] to get more information on the particular circumstances surrounding your employment. I spoke with [REDACTED] Vice President and Deputy General Counsel. [REDACTED] confirmed much of the information you provided to the Department, and provided further information and explanation regarding your employment and subsequent employment loss. Based on all of the information the Department received it is our determination that your employment loss is not covered under the NYS WARN Act.

Phone: (518) 457-4380 Fax: (518) 485-1819
W. Averell Harriman State Office Campus, Bldg. 12, Room 509, Albany, NY 12240

Under the NYS WARN Act, private sector employers with fifty (50) or more employees (excluding part-time employees) are required to provide at least ninety (90) days notice to affected employees, representatives of affected employees, the New York State Department of Labor, and the applicable local workforce investment board before ordering a plant closing, mass layoff, or a covered reduction in work hours, that falls within the qualifying circumstances set forth in the WARN Act and corresponding regulations. Regulation 12 NYCRR §921-1.1(d)(1) provides in part that an employer means business enterprise, whether for-profit or not-for-profit, that employs fifty (50) or more employees **within** (emphasis added) New York State. Accordingly, [REDACTED] was not required to provide you with either ninety days, or pay in lieu of notice, under the NYS Warn Act as you were not employed within New York State, nor was there a sufficient nexus with New York State to afford you such notice.

Finally, you inquired as to whether you had any right to notice of this layoff as an employee that worked out of your home. As stated, the provisions of the NYS WARN Act are not applicable to your employment loss. Under the NYS WARN Act an employer may, and is encouraged to, provide notice of employment losses to employees even if such notice is not required under the Act. However, such voluntary notice is not mandated for non-covered employees.

Please note that this opinion is based solely upon the information you provided via e-mail communications prior to the date of this letter, and information received from the employer. A different opinion could result if the information provided was inaccurate, or if relevant facts were not disclosed.

Should you have any further questions please do not hesitate to contact me.

Very truly yours,



Kristen L. Balzer
Senior Attorney

cc: Maria Colavito
Richard Grossi
Janet Faraone
Opinion File