

Employment Terminations in New York

Legal Parameters and Best Practices

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Presented by

HORTON
Management Law



Forms of Separation

- Resignation
- Retirement
- Involuntary termination



At-Will Employment

Assume it's a Myth

Either party may end the employment relationship:

- at any time,
- with or without notice,
- for any reason or no reason at all.

Limitations on Discipline

- Discrimination laws
- Public employers
- Employment agreements
- Collective bargaining agreements
- Company policies
- Local laws

Discrimination Laws

- Title VII
- Americans with Disabilities Act
- Age Discrimination in Employment Act
- Equal Pay Acts
- Genetic Information Nondiscrimination Act
- New York State Human Rights Law
- New York City Human Rights Law

NYS Protected Characteristics

- Age
- Race
- Creed
- Color
- National origin
- Sexual orientation
- Gender identity or expression
- Prior arrest / conviction record
- Citizenship / immigration status
- Military status
- Sex
- Disability
- Predisposing genetic characteristics
- Pregnancy-related condition
- Familial status
- Marital status
- Status as victim of domestic violence

NYC Protected Characteristics

- Age
- Arrest or conviction record
- Caregiver status
- Color
- Credit history
- Disability
- Gender
- Gender Identify
- Immigration status
- Marital or partnership status
- Military service
- National origin
- Pregnancy
- Race
- Religion/creed
- Salary history
- Sexual and reproductive health decisions
- Sexual orientation
- Status as victim of domestic violence, sexual violence, or stalking
- Unemployment status

*Effective Nov. 22, 2023, will include Height and Weight

Civil Service Law § 75

- “Incompetence” or “Misconduct”
- Written charges
- Hearing
- Final determination
- Appeal



Education Law § 3020-a

- “Just Cause”
- Charges
- Probable Cause Determination
- Hearing
- Decision
- Appeal



Contractual Parameters

- At-will
- “For cause”
- “Good reason”
- Notice
- Expiration
- Renewal

CBA and Policies

- Is there a relevant negotiated rule or provision?
- Another adopted policy (e.g., sexual harassment)?
- What disciplinary procedures will apply?
- Past practices and approach to prior similar situations
- Progressive discipline

Grievance/Arbitration

- Employee or union files grievance over discipline
- Employer considers grievance, often in multiple “steps”
- Final step is binding arbitration
- Arbitrator’s decision is (usually) final

PIP/Last Chance Agreements

- Alternative (precursor?) to termination
- Misconduct/Performance issues
- Drug/Alcohol issues

Unemployment

- Employer paid employee benefit
- Utilization affects costs
- Pros and cons of challenging
- Complicated charge allocation when multiple employers involved

Disqualifying Conditions

- Voluntary Quit
- Refusal to Accept Suitable Employment
- No Longer Available to Work
- On Strike – 7-week suspension from benefits
- Misconduct

Proving Misconduct

Prior Notice

Did the employee have clear notice that engaging in certain behavior would result in termination of employment?

Extreme Violation

Was the employee's conduct so bad that it was illegal or clearly unacceptable and likely to result in termination of employment?

Disqualifying Misconduct

Criminal acts

Falsifying material documents

Theft

Assault

Unemployment Determinations

Claimant Seeks Unemployment



Employer Provides Information

DOL Initial Determination



Claimant/Employer Requests Hearing

Hearing



ALJ Decision

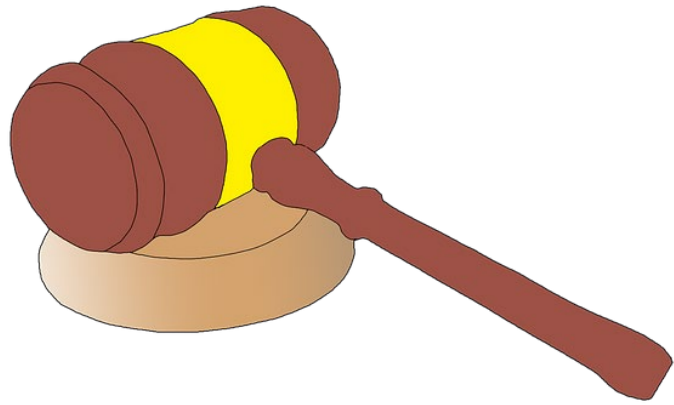
UI Appeals Board



Final Determination*

*Possible Challenge to Appellate Division, Third Department

Severance Agreement



- 1 Use explanatory cover letter
- 2 Address any outstanding issues
- 3 Allow time (days) to review
- 4 Expect them to meet with attorney
- 5 Older Workers Benefit Protection Act

Scope Narrowing?

- ▶ Limits on restricting disclosure of facts underlying discrimination claims
- ▶ NLRB objects to confidentiality and non-disparagement provisions in severance agreements
- ▶ Offering an employee such an agreement may be found unlawful even if employee doesn't accept
- ▶ Release of claims still available

Older Workers Benefit Protection Act

Requirements to waive federal age discrimination claims:

- Written agreement “calculated to be understood by” the employee
- Reference rights under the ADEA
- No prospective waiver
- Employee must receive something additional of value
- Employer must advise employee in writing to consult with an attorney
- Allow at least 21 days to consider the agreement
- Allow at least 7 days after employee signs to revoke
- Additional requirements for “group” terminations

OWBPA Group Programs

Requirements to waive federal age discrimination claims:

- Written agreement “calculated to be understood by” the employee
- Reference rights under the ADEA
- No prospective waiver
- Employee must receive something additional of value
- Employer must advise employee in writing to consult with an attorney
- Allow at least **21 45** days to consider the agreement
- Allow at least 7 days after employee signs to revoke
- **Lists of ages of employees by positions**
- **Program Description**

OWBPA Age Lists

Employees Selected

Position	Age
Assembler	50
Assembler II	34
Mechanic	28
Mechanic	59
Quality Asst.	24
Quality Asst.	32

Employees Not Selected

Position	Age
Assembler	53
Assembler II	49
Mechanic	54
Mechanic	55
Mechanic	57
Quality Asst.	45

WARN Acts



Worker Adjustment and Retraining Notification Acts



Federal law and similar state laws, incl. New York



Require companies to provide notice before taking certain actions to reduce the size of their workforce



New York law imposes greater burdens than federal law

Covered Employers

- Sufficiently large business enterprises
- Private employers
- Possibly some public employers engaged in business activities separate from government functions (not under NY WARN)

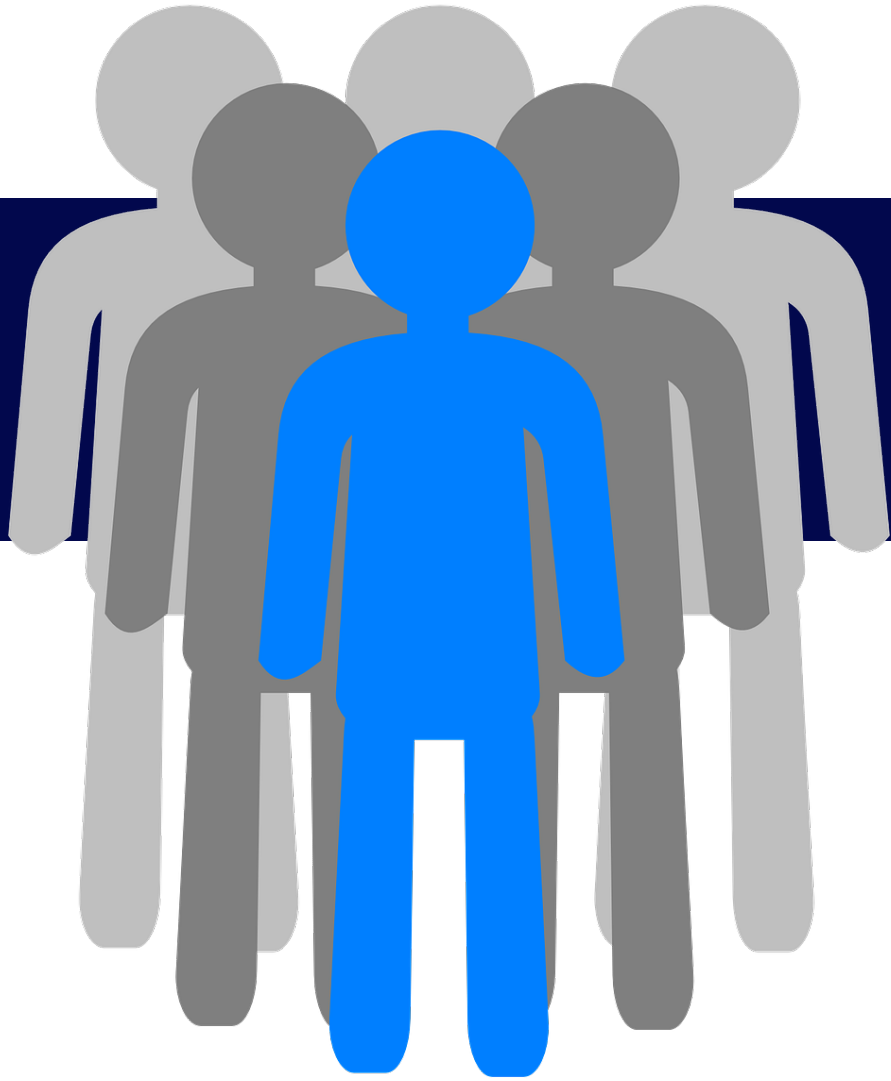
Federal WARN

100+ employees in U.S.

NY WARN

50+ employees
in NY

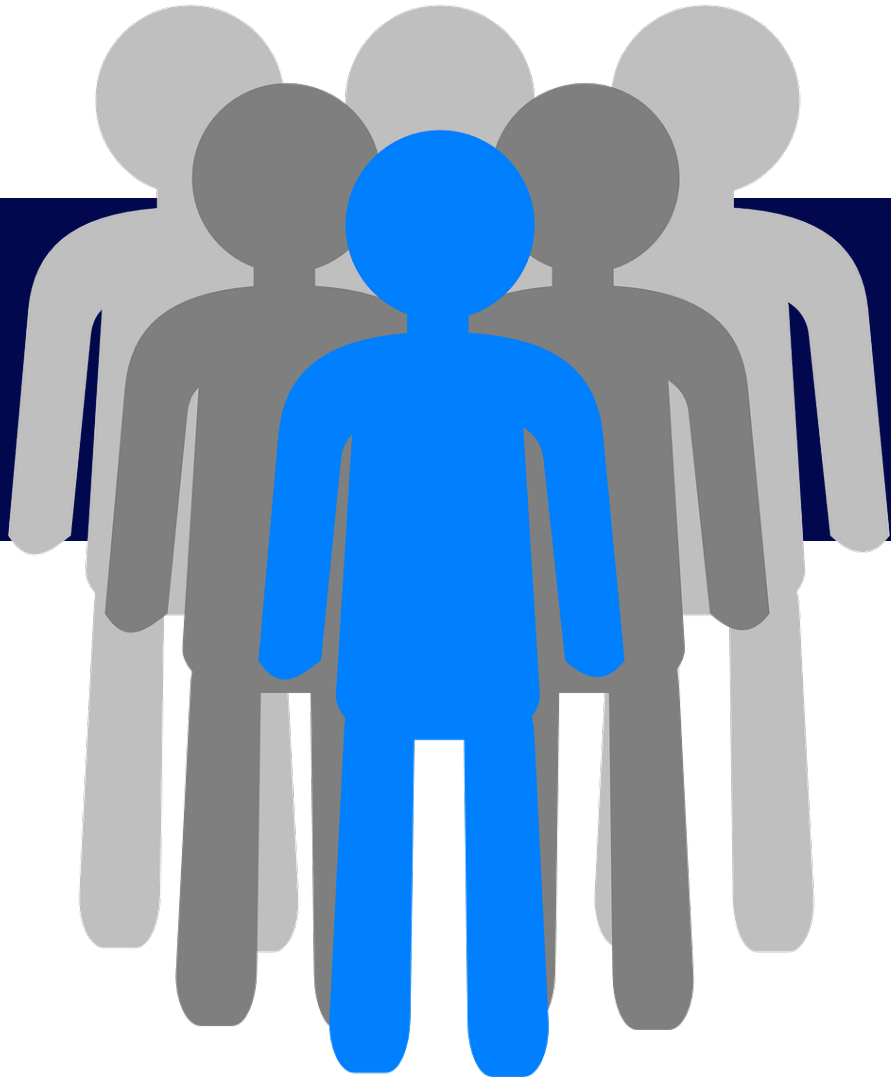




“Plant Closing”

- An employment site is being shut down and will result in an employment loss for 25(New York)/50(Federal) or more employees* during a 30-day period.

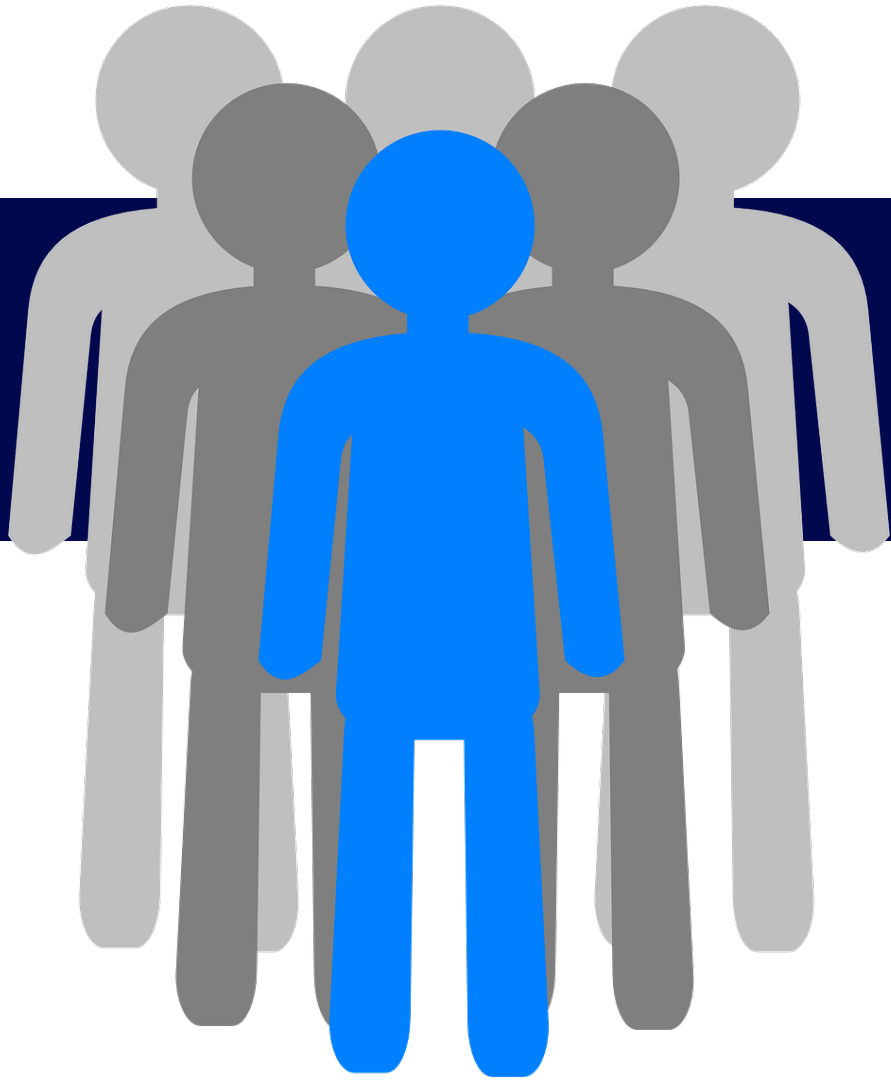
*excludes part-time employees



“Mass Layoff”

Reduction in workforce that results in an employment loss during any 30-day period for:

- 250/500 or more employees*; or
- 25-249/50-499 employees* if at least 33% of active workforce.



“Relocation”

All or substantially all of employer operations will move to a different location 50 miles or more away from original site and 25 or more employees* lose their jobs.

*excludes part-time employees



Notice Period

- 60 days under federal WARN
- 90 days under NYS WARN
- Penalties for insufficient notice
- Some exceptions

But, be WARNed . . .

**30 days sometimes
means 90 days.**

Notice Recipients



“Affected Employees,”
including part-time



Unions (if applicable)



Government officials

NYS WARN Updates

- ▶ New online notice portal
- ▶ DOL proposed new regulations, including providing:
 - NYS DOL personal contact information and pay status for each affected employee
 - Additional information regarding severance and dislocated worker assistance to employees
 - Request to DOL for exceptions to notice requirements

Written Termination Notice

- ▶ Private employers must provide written notice to discharged employees, stating the effective date of termination
- ▶ Exact date that any employee benefits, such as health, accident, and life insurance, will cease
- ▶ Within 5 working days after the date of termination
- ▶ Applies whether employees resign, retire, or separate involuntarily

Final Paycheck

- ▶ Private employers must issue final paycheck by the next regularly scheduled pay date after separation
- ▶ Unused leave time (PTO, sick, vacation, etc.) does not have to be paid out, if policy makes that clear
- ▶ Commissions and bonuses depend on when/whether “earned”

Questions?



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