

## **LEGISLATIVE UPDATE**

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### **New Jersey Employers "Warned"** **Over Job Losses**

A new law, purportedly designed to combat "take-the-money-and-run" plant closings and mass layoffs and effective immediately, may give New Jersey employers another reason to call their lawyers. The Millville Dallas Airmotive Plant Job Loss Notification Act ("NJ Warn") was signed by Governor Corzine on December 20, 2007. While the new state law (which takes its name from the closing of a large facility in 2004 leaving hundreds of employees without jobs) tracks the existing federal plant closing law in a number of respects, it goes well beyond its federal counterpart in others.

NJ Warn, as well as other state plant closing laws, typically are referred to as "mini WARN acts" because they offer slight variations of the federal plant closing law, the Worker Adjustment and Retraining Notification ("WARN") Act, 29 U.S.C. § 2101, et seq. The WARN Act requires, inter alia, that employers of more than 100 persons provide a minimum of sixty days' written notice before a "plant closing" or a "mass layoff." Similarly, NJ Warn requires New Jersey employers with 100 or more full-time employees to provide sixty days' notice to employees impacted by a mass layoff, transfer of operations or termination of operations. NJ Warn also sets penalties for violations at a greater level than those found in its federal counterpart.

#### **Who is Impacted?**

The law covers employers who have an "establishment" in New Jersey. Under the NJ Warn, an "employer" is "an individual or private business entity" which employs a workforce at an establishment and has at least 100 employees.<sup>1</sup>

An "establishment" is "a single place of employment which has been operated by an employer for a period longer than three years . . . ." It may be "a single location or a group of contiguous locations," such as an industrial park or separate facilities (i.e., a building) across the street from each other." (A temporary construction site is excluded from the definition.)<sup>2</sup>

#### **When is Notice Required?**

NJ Warn requires an employer who employs 100 or more full-time<sup>3</sup> employees to provide advance notice to employees in the event of a "termination of employment," "termination of operations," "transfer of operations," or "mass layoff." Under the law, "staged layoffs" or

multiple transfers of work are potentially subject to the notice requirements of the law. Notice is required only if 50 or more full-time employees are affected by:

1. A "termination of employment;" that is, a "layoff of an employee without a commitment to reinstate the employee to his previous employment within six months of the layoff[.]" The layoff of seasonal employees is not a covered event. Employees who are offered the same job with equivalent status, benefits, pay and other terms and conditions of employment at another location within fifty miles from the prior workplace are not considered to have been "terminated" under the NJ Warn.

Moreover, a termination of employment does not include "a layoff of more than six months which, at its outset, was announced to be a layoff of six months or less if business circumstances not reasonably foreseeable at the time of the initial layoff and notice are responsible for the extension beyond the six-month period, and the employer gives notice when it becomes reasonably foreseeable that the extension beyond six months will be required." This exception is similar to WARN's unforeseen business circumstances exception to providing full notice. However, notice is still required, even if not a full 60-day notice.

2. A "termination of operations," defined as "the permanent or temporary shutdown of a single establishment, or of one or more facilities or operating units within a single establishment." Importantly, a termination of operations does not occur if it is the result of "a fire, flood, natural disaster, national emergency, act of war, civil disorder or industrial sabotage, decertification from participation in the Medicare and Medicaid programs as provided under titles XVIII and XIX of the federal 'Social Security Act' ... or license revocation pursuant to P.L. 1971, c.136[.]" In those cases, notice is not required as the event is excepted from the definition of a "termination of operations" (i.e., for plant closings only).
3. (3) A "transfer of operations," defined as "the permanent or temporary transfer of a single establishment, or of one or more facilities or operating units within a single establishment, to another location inside or outside of this State." It is irrelevant that the transfer of operation could be to a location within New Jersey—rather, any transfer of operations affecting the employment of 50 or more full-time employees is subject to the notice obligations.

4. (4) A "mass layoff;" the termination of (a) 500 or more full-time employees during any thirty-day period or (b) 50 or more full-time employees which represent one-third or more of the employer's full-time employees during any thirty-day period.

Furthermore, in determining whether a termination or transfer of operations or mass layoff is subject to the NJ Warn, it provides that employees must include any terminations of employment for two or more groups at a single establishment occurring within any ninety-day period where each group has less than the number of terminations which would trigger the notification requirements (i.e., a non-covered event), but where the aggregate for all of the groups exceeds that number, there is a covered event under NJ Warn subject to the notification requirements; unless, the employer demonstrates that the cause of the terminations for each group is separate and distinct from the causes of the terminations for the other group or groups. This is similar to WARN's aggregation of non-WARN events occurring within a ninety-day look-forward and look-back period.

### **How Much Notice is Required?**

Both the federal WARN and NJ Warn require sixty days' advance notice.

### **Who Gets the Notice?**

NJ Warn requires that written notice be provided to: (1) the employee; (2) the Commissioner of Labor and Workforce Development (currently, David J. Socolow, Office of the Commissioner, 1 John Fitch Way, P.O. Box 110, Trenton, NJ 08625-0110);<sup>4</sup> (3) the chief elected official of the municipality where the establishment is located; and (4) any collective bargaining units of employees at the establishment.

### **What Must A NJ Warn Notice Include?**

The content of the New Jersey notice is materially different from WARN. More particularly, the NJ Warn notice must include:

1. statement of (a) the number of employees whose employment will be terminated due to a mass-layoff, transfer or termination of operations, (b) the date(s) on which the termination of operations, transfer of operations or mass layoff, and (c) each termination will occur;
2. statement of the reasons for the termination of operations, transfer of operations or mass layoff;
3. statement of any employment available to employees at any other establishment operated by the employer, and information regarding the location, benefits, pay and other terms and conditions of employment at the other establishment;
4. statement of any employee rights with respect to wages, severance pay, benefits, pension or other terms of

employment as they relate to the termination, including any rights under a collective bargaining agreement or existing employer policy;

5. disclosure of the amount of the severance pay which is payable under the NJ Warn (see below); and
6. statement of the employees' right to receive from the State Response Team information, referral and counseling regarding: public programs which may make it possible to delay or prevent the transfer or termination of operations or mass layoffs; public programs and benefits to assist the employees; and employee rights based on law.

The notification shall be in writing and, after the commissioner has made a form for the notification available to employers, provided on that form. The form will be available in ninety days.

### **What Damages Exist for Failure to Give Appropriate Notice?**

If an employer fails to provide an employee with the required notification, the employer must pay each employee "severance pay equal to one week of pay for each full year" the employee worked for the employer. The rate of severance is calculated as the higher of: (1) the average rate of compensation that the employee received during his "last three years of employment with the employer . . .;" or (2) the final rate of compensation the employee received. Thus, an employee with ten years of employment would be entitled to ten full weeks of severance at the higher rate, as calculated above. This severance penalty is "in addition to" any other severance benefit provided by the employer; however, the severance penalty under NJ Warn can be offset by any back pay damages paid as a result of a violation of the federal WARN Act.

This is significantly different than damages set forth under the federal WARN Act. If an employer violates the federal law, an employer is liable for back pay and benefits of the employees only for each day the employer failed to provide notice. Therefore, if an employer provides only fifty days' notice, the employer is liable for ten days of back pay. NJ Warn makes no distinction based upon the amount of notice provided and does not expressly provide for any reduction of damages based upon the amount of notice provided. Thus, an employer who provides notice that is even one day less than that which is required would have to pay the same damages as an employer who simply fails to provide any notice.

### **The State Response Team**

NJ Warn also creates a State Response Team designed to provide information, referrals and counseling to workers who lose their jobs. Therefore, any employer subject to the NJ Warn must give the State Response Team access to its employees in order to meet its obligations under the legislation. It is noteworthy that the State Response Team's responsibility and purpose is not limited to advising and assisting employees under this law; it also provides information on employee rights under any other law which applies to employees regarding wages, benefits or other issues related to the termination of employment.

Moreover, the State Response Team is designed to provide guidance and suggestions to employers on ways to possibly delay or prevent any terminations. Specifically, in each case where there is a termination or transfer of operations the Response Team will:

1. offer to meet with the employer "to discuss available public programs which may make it possible to delay or prevent the transfer or termination of operations . . .";
2. seek to facilitate cooperation between management and employees "to most effectively utilize available public programs which may make it possible to delay or prevent the transfer or termination of operations or to assist employees . . ."; and
3. meet on-site with employees to provide information, referral and counseling regarding:
  - a. "[a]vailable public programs which may make it possible to" prevent or delay the termination or transfer of operations;
  - b. "[p]ublic programs or benefits which" are available to assist employees; and
  - c. employee rights under the "act or any other law which applies to the employees with respect to wages, severance pay, benefits, pensions or other terms of employment."

NJ Warn does not require employers to accept the invitation to meet with the State Response Team but does require employers to give access to its affected employees. NJ Warn is effective immediately and employers who institute covered layoffs must plan carefully and immediately.

<sup>1</sup> The law fails to state expressly whether the employer's size is based only upon the number of employees in New Jersey, or whether employees outside of the State will be aggregated to determine what amount of notice is required. Thus, an employer with a location in New Jersey that employs less than one hundred employees, but has at least 100 employees in the United States, may be required to give sixty days notice of a layoff in New Jersey that impacts at least 50 employees. Such a result would be consistent with New Jersey court decisions interpreting the state Family Leave Act ("FLA"). In *Essex Crane Rental Corp. v. Director, Div. On Civil Rights*, 294 N.J. Super. 101 (App. Div. 1996), the court considered whether the FLA requires that an employer have at least fifty employees in the State. The court held that it did not and noted that the FLA's definition of employer contains no limiting language based on the employer's location. Since the court could "perceive no compelling reason in the language of the Act, its legislative history or its policy objectives to add [such] limiting language," the court concluded the FLA applied to all New Jersey employers who had 100 total employees, regardless of where those employees were located. Thus, it is likely that the courts will interpret NJ Warn similarly.

<sup>2</sup> There remain many uncertainties as to the scope of these definitions. For instance, if an employer moves a facility within three years, will the notification requirement not apply simply

because the employer's address has changed? How will employers with multiple locations in the State be impacted? These other questions are unanswered by the law.

<sup>3</sup> Similar to the federal WARN Act, the NJ Warn excludes "part-time" employees from the calculation of affected employees. The NJ Warn has defined a part-time employee as "an employee who is employed for an average of fewer than 20 hours per week or who has been employed for fewer than six of the 12 months preceding the date on which notice is required pursuant to this act."

<sup>4</sup> WARN requires notice to the State Dislocated Worker Unit, whose contact information can be obtained from the U.S. Department of Labor web site at: [http://www.doleta.gov/layoff/rapid\\_coord.cfm#NewJersey](http://www.doleta.gov/layoff/rapid_coord.cfm#NewJersey).