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April 17, 2020

Major Changes to New Jersey's WARN Act Delayed; Will Be Effective 90 Days after Public Health Emergency Executive Order Is Terminated

By: **David J. Reilly**

New Jersey employers considering layoffs need to be mindful of the recently enacted amendments to New Jersey's WARN Act – the “Millville Dallas Airmotive Plant Job Loss Notification Act,” N.J.S.A. 34:21-1, *et seq.* (“NJ WARN”). The new amendments will significantly increase employer obligations in several ways:

- broaden the scope of NJ WARN's coverage by including part-time employees,
- increase the required notice period from 60 to 90 days,
- require employers to pay impacted employees severance pay, and
- expand the circumstances under which NJ WARN may be triggered, both by including impacted part-time employees and by combining all NJ facilities.

These amendments originally were scheduled to become effective on July 19, 2020. On April 15, 2020, however, Governor Murphy signed a bill (S-2353/A-3938) postponing the effective date until 90 days after the termination of his executive order declaring a public health emergency due to the COVID-19 pandemic. This bill also recognizes an exception to the NJ WARN notice requirement for a mass layoff related to a national emergency or other specified extraordinary events.

Currently, NJ WARN closely tracks the requirements of its federal counterpart, the Worker Adjustment and Retraining Notification Act, 21 U.S.C. 2100 *et seq.* (“federal WARN”). Under NJ WARN, individuals or private business entities employing 100 or more full-time employees are required to provide at least 60 days' notice of a mass layoff or transfer or termination of operations, as those terms are currently defined. Notification must be provided not only to impacted employees, but also to state and local governments and any union representing such employees.

"Termination of employment" under NJ WARN generally means the involuntary layoff of an employee (other than a seasonal employee or an employee suspended or discharged for misconduct) without a commitment to reinstate the employee within six months. Excluded from this definition are situations where the employer offers the employee equivalent employment within New Jersey not more than 50 miles from the current place of employment. Also excluded are layoffs, initially expected and announced to be six months or less, that extend beyond six months due to “business circumstances not reasonably foreseeable at the time of the initial layoff,” provided that the required notice is given once “it becomes reasonably foreseeable that the extension beyond six months will be required.” This definition is unaffected by the amendments.

Once the new amendments become effective, both full-time and part-time employees will count towards the 100-employee threshold for coverage. The new amendments also will increase the amount of notice covered employers must provide from 60 to 90 days.

In addition, the amendments will require all covered employers to pay impacted employees severance if the notification requirements are triggered. This is a significant change from the current law, which only imposes statutory severance payments as a penalty for non-compliance with NJ WARN's notification requirements. The amendments will require employers – including those who have made the required notifications – to pay each impacted employee the greater of: (1) one week's pay for each

full year of employment, or; (2) severance pay as provided for by any applicable collective bargaining agreement “or for any other reason.” Employers who provide less than 90 days’ notice will be required to pay an **additional** four weeks of severance. The amendments prohibit any waiver of the right to the mandatory severance without the approval of the state Department of Labor “or a court of competent jurisdiction.”

Compliance with the new severance requirement may prove onerous for businesses that need to reduce staff due to financial difficulties. Where possible, an employer potentially can avoid this severance requirement by impacting fewer employees, so as to not trigger NJ WARN. The severance requirement also will impact employers who offer severance to impacted employees in exchange for a signed waiver and release of claims. For such a release to be effective, the employee must receive “consideration” for the release in excess of payments to which the employee is independently entitled. Severance pay mandated by NJ WARN arguably would not be sufficient consideration because the employee would be entitled to it without signing the release. Therefore, employers seeking to obtain an enforceable waiver and release of claims from employees separating as a result of a force reduction covered by NJ WARN may have to consider additional or alternative forms of consideration.

The amendments also expand the circumstances under which NJ WARN’s notice and severance requirements will be triggered. A “mass layoff” is currently defined as the termination of 500 or more full-time employees, or the termination of 50 or more full-time employees who comprise at least 33% of the workforce at an “establishment.” Under the new definition, the termination of 50 or more employees (full or part-time) located at or “reporting to the establishment” will constitute a “mass layoff” regardless of the percentage of the workforce impacted. Further, the term “establishment” will now include “all facilities located in this State,” instead of just a single location. The net effect of these changes is that NJ WARN’s notice and severance requirements will be triggered by any force reduction by a covered employer which results in the termination of 50 or more employees, full or part-time, anywhere in New Jersey within any 30-day (or in some cases, 90 day¹) period.

One positive note for employers among these changes is that the bill signed on April 15, 2020, in addition to postponing the effective date of the amendments, also amends the definition of “mass layoff” to exclude, retroactive to March 9, 2020, any mass layoff made necessary by fire, flood, natural disaster, national emergency, act of war, civil disorder or industrial sabotage, decertification from participation in the Medicare and Medicaid programs provided under the federal Social Security Act, or license revocation pursuant to New Jersey’s Health Care Facilities Planning Act. This would include mass layoffs made necessary by the current COVID-19 national emergency.

The definitions of NJ WARN’s two other triggering events, “termination of operations” and “transfer of operations,” remain the same, except that part-time employees are now counted towards the 50-employee termination threshold. Note that the definition of “termination of operations” already excludes the current COVID-19 national emergency.

The below chart summarizes the changes:

	Current NJ WARN	NJ WARN Amendments Effective 90 Days after Public Health Emergency Executive Order Is Terminated
Covered employers	Individuals or private business entities which employ 100 or more <u>full-time</u> employees	Individuals or private business entities which employ 100 or more employees (full <u>and</u> part-time)
“Establishment”	A “ <u>single</u> place of employment” operated by the employer for more than 3 years (other than a temporary construction site). It may be a single location or a group of contiguous locations (such as an office or industrial park or facilities across the street from each other).	A “place of employment” operated by the employer for more than 3 years (other than a temporary construction site). The “place,” however, may be a single location <u>or a group of locations, including any facilities located in this State.</u>

<p>Covered “Mass Layoff”</p>	<p>A reduction in force (not the result of a transfer or termination of operations) which results in the termination of employment at an establishment during any 30-day (or in some cases, 90-day) period for</p> <p>(1) 500 or more <u>full-time</u> employees; or</p> <p>(2) 50 or more of <u>full-time</u> employees who represent 1/3 or more of the full-time employees at the establishment.</p> <p>Retroactive to March 9, 2020, excludes any mass layoff made necessary by fire, flood, natural disaster, national emergency, act of war, civil disorder or industrial sabotage, decertification from participation in the Medicare and Medicaid programs provided under the federal Social Security Act, or license revocation pursuant to New Jersey’s Health Care Facilities Planning Act.</p>	<p>A reduction in force (not the result of a transfer or termination of operations) which results in the termination of employment at an establishment during any 30-day (or in some cases, 90-day) period for</p> <p>50 or more of the employees (<u>full or part-time</u>) at <u>or reporting to the</u> “establishment” (which now includes any facilities located in New Jersey).</p> <p>Retroactive to March 9, 2020, excludes any mass layoff made necessary by fire, flood, natural disaster, national emergency, act of war, civil disorder or industrial sabotage, decertification from participation in the Medicare and Medicaid programs provided under the federal Social Security Act, or license revocation pursuant to New Jersey’s Health Care Facilities Planning Act.</p>
<p>Covered “transfer of operations”</p>	<p>Permanent or temporary shutdown of a single establishment, or one or more facilities or operating units within a single establishment, which results in the termination of 50 or more <u>full-time</u> employees.</p> <p>Excludes any termination of operations made necessary by fire, flood, natural disaster, national emergency, act of war, civil disorder or industrial sabotage, decertification from participation in the Medicare and Medicaid programs provided under the federal Social Security Act, or license revocation pursuant to New Jersey’s Health Care Facilities Planning Act.</p>	<p>No change, except that part-time employees are now counted towards the 50-employee termination threshold.</p>
<p>Covered “termination of operations”</p>	<p>Permanent or temporary transfer of a single establishment, or one or more facilities or operating units within a single establishment, to another location, which results in the termination of 50 or more <u>full-time</u> employees.</p>	<p>No change, except that part-time employees are now counted towards the 50-employee termination threshold.</p>
<p>Mandatory severance pay if the required notice has been given</p>	<p>None.</p>	<p>The greater of:</p> <p>(1) one week for each full year of employment, or;</p> <p>(2) severance pursuant to a collective bargaining agreement “or for any other</p>

		reason.”
Mandatory severance pay if less than the required notice is given	One week for each full year of employment in addition to any severance provided pursuant to a collective bargaining agreement “or for any other reason.”	The greater of: (1) one week for each full year of employment, or; (2) severance pursuant to a collective bargaining agreement “or for any other reason,” plus four <u>additional</u> weeks.
Required notice period	60 days prior to the first termination of employment	90 days prior to the first termination of employment

¹Similar to federal WARN, NJ WARN provides that if the terminations of employment of two or more groups of employees at an “establishment” occur within any 90-day period, and each group separately would not trigger NJ WARN, but when combined would trigger NJ WARN, the notice and severance requirements are triggered. To avoid notice and severance obligations based on the aggregate of phased layoffs or closings, an employer must demonstrate 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.

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