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# Client Alert

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# New Mini-WARN Statute in New Jersey Could Lead to Huge Severance Payments for Employees

Effective December 20, 2007, New Jersey now has a law similar to the federal Worker Adjustment and Retraining Notification Act ("WARN"), mandating 60 days' advance notice to employees who are terminated in a mass layoff or in a shutdown of operations, if certain triggering numerical thresholds are reached. P.L. 2007, c. 212. New Jersey employers need to be aware, though, that there are a number of important and more onerous provisions in the New Jersey law that differ from WARN, including:

- a draconian penalty provision which could result in one week of severance pay for every year of employment for full-time employees, on top of any other severance pay that may already be provided, if an employer falls even one day short of the required notification period;
- no exception for layoffs or shutdowns caused by business circumstances that were unforeseeable at the time notice would have been required;
- no exception for employers seeking financing or additional business to keep operations going;
- no express exception for strikes or lockouts;
- notice may need to be given directly to bargaining unit employees, as well as their unions;
- notice may need to be given to all employees to be terminated 60 days before the first employee is terminated;
- notice may need to be given to employees terminated for performance reasons, if the terminations occur in the same 30-day time period as a mass layoff or shutdown;
- employees who refuse a transfer over state lines will be counted as "terminated," regardless of commuting distance;
- additional information must be included in the notice and a mandatory notice form will soon be issued;
- employers must allow the state's response team to come on the work site to meet with employees during "worktime."

These and other significant differences are discussed in this Alert.

## What Triggers the Notice Requirement

Similar to WARN, the New Jersey statute requires an employer with at least 100 full-time employees to give 60 days' notice prior to any mass layoff, if, in any 30-day period at a single place of employment: (1) at least 500 full-time workers or one-third of the workforce with a minimum of 50 full-time employees experience a loss of employment; or (2) at least 50 employees are terminated in a transfer or termination of operations. Like WARN, the New Jersey law also requires notice if the total number of layoffs or terminations resulting from the same action or cause will reach those levels in any 90-day period at a single work site. Under both laws, a part-time employee is someone who is employed for an average of fewer than 20 hours per week or who has been employed for less than 6 of the 12 months preceding the date when notice is required.

The New Jersey law does not state whether or not employees outside of New Jersey count toward the 100 employee test for coverage. The state's New Jersey Family Leave Act regulations, however, count all employees, both within and without the state, to determine whether that statute's 50 employee standard is met. Thus, absent a regulation or court decision to the contrary, employers should assume that all employees, in or out of New Jersey, should be counted to see if the employer is covered by the New Jersey mini-WARN law. Under WARN, the 100 employee test is also met if the employer has 100 or more employees who in the aggregate work at least 4,000 hours per week, excluding overtime, but including part-time employees. There is no such provision in the New Jersey statute.

Both statutes define a loss of employment as including only those layoffs which exceed six months and excluding voluntary retirement or resignation. Under WARN, a termination also includes a reduction of hours by greater than 50 percent in each month over a six month period. There is no comparable provision in the New Jersey statute. The New Jersey law states that the layoff of a seasonal employee is not considered a termination of employment. Treatment of seasonal workers under WARN depends on the circumstances.

WARN does not count discharges "for cause" as employment losses, while the New Jersey law excludes discharges or suspensions "for misconduct of the employee connected with the employment." What this difference in wording may mean, if anything, is unclear. For example, would a performance-based discharge qualify as "misconduct," such that the termination would not have to be counted in determining whether notice was triggered or required as to that employee? Absent regulatory or judicial clarification, it appears that terminations for poor performance will not necessarily qualify as "misconduct" and may have to be included as a loss of employment that is covered by the New Jersey statute.

WARN regulations and the New Jersey law define a "single" worksite or place of employment as including either a single location or a group of contiguous locations, including office parks or campuses, or separate facilities across the street from one another. WARN regulations further note that facilities that are not that close together may nonetheless constitute a single "site," if they are in "reasonable geographic proximity, are used for the same purpose, and share the same staff and equipment." The New Jersey law, however, excludes any single place of employment that has been operated by the employer for less than three years, which at least affords some relief to new businesses. Temporary construction sites are also excluded under the state law. Similar to WARN, the New Jersey law provides that a transfer or termination of operations includes an "organizationally distinct product, operation, or specific work function within or across facilities" at a single place of employment.

## Penalties for Failure to Provide the Required Notice

The penalty provisions of the state and federal laws are dramatically different. Under WARN, an employer is liable for back pay and benefits for each day of violation, to a maximum of 60 days. The state statute, however, provides that any full-time employee who does not get the full 60 days' notice is entitled to severance pay of one week for every full year of service. Thus, under WARN, an employer who provides only 59 days' notice would be liable for only one day of pay and benefits for the one missed day of advance notice. Under the New Jersey law, however, an employer who misses the 60-day notice requirement by even one day is potentially liable for the full severance pay penalty, just as if no notice had been given at all. There is no provision in the statute that would permit an employer to obtain a release in exchange for this statutory severance pay. Thus, an employer who owes such severance pay and who also wants a release of claims would have to provide additional compensation as consideration for the release.

The New Jersey "all-or-nothing" approach is extreme and could result in a huge windfall for employees with lengthy service, merely because a relatively few days' notice is omitted. An employer is allowed to offset any WARN penalties against severance owed under the New Jersey statute, but the statutory severance pay must be in addition to any severance pay provided under a collective bargaining agreement or "for any other reason." Both statutes mandate payment at the employee's last pay rate or the average of the employee's last three years of service, whichever is higher.

## Exceptions to the Notice Requirement

The New Jersey statute eliminates two important notice exceptions contained in WARN. The federal law allows an employer to give less than 60 days' notice where: (1) the closing or mass layoff is due to business circumstances that were not reasonably foreseeable at the time that notice would have been required; or (2) the employer is seeking capital or business which, if obtained, would obviate the need for a closing, but which would be jeopardized by providing notice (known as the "faltering business" exception, it applies only to shutdowns and not mass layoffs). The New Jersey law, however, contains no such provisions to allow for less than the full notice period in such exigent circumstances.

The state statute does permit a lesser notification period where a termination of operations was necessitated by fire, flood, natural disaster, national emergency, war, civil disorder, national sabotage, or certain decertifications from Medicare/Medicaid or license revocations — but that does not apply to a mass layoff where there is no shutdown of operations. WARN's "natural disaster" provision applies to both closings and mass layoffs. Both statutes require notice to be given as soon as practicable for such exceptions.

Further, unlike WARN, there is no express exception in the statute for closings or layoffs that constitute a strike or lockout. The effect of this omission, however, is unclear. Any attempt to apply the New Jersey notice requirements to employees who go on strike or who are locked out for reasons relating to labor negotiations or disputes might be preempted by federal labor laws. In any event, it could be argued that strikers essentially are absent from the workplace on a voluntary basis and, even if they are permanently replaced because of that absence, that they have not been terminated or laid off. In a lockout, even if such is akin to a layoff, the exception for layoffs that are not expected to last six months at the inception may apply, such that notice would not need to be given until such time as it becomes foreseeable that the lockout will exceed six months.

As to non-striking employees who lose their employment as a consequence of the strike or lockout, WARN provides that they are entitled to notice, but, as the regulations note, the unforeseeable business circumstances or faltering business exceptions may apply, depending on the circumstances. New Jersey, however, does not contain those exceptions, other than an exception for a layoff that is "announced" as one that will not exceed six months but is extended beyond six months, due to business circumstances that were not reasonably foreseeable at the time of the layoff. Notice must still be given as soon as it is foreseeable that the layoff will exceed six months. It is not clear when, or if, that exception may apply in a strike or lockout situation, as the "duration" is not usually "announced" at the time. A further issue is whether, if a strike or a lockout extends beyond six months, that could qualify as resulting from "business circumstances" that were not reasonably foreseeable at the outset.

## Transfer of Employees to Another Worksite

Under WARN, an employee who is offered a transfer to another job within a reasonable commuting distance is not considered to have lost his or her employment in the shutdown or layoff, even if the employee rejects the offer. The job offered is not required to be the same, but it cannot amount to a "constructive discharge."

Under the New Jersey statute, the test for a transfer does not require a determination of "reasonableness." Rather, an employee will not be considered to have been "terminated" if the employer offered the employee the same or an equivalent position in New Jersey, within 50 miles of the previous work site. Thus, under WARN, the new position could be in another state, as long as it is within reasonable commuting distance. Under the state law, however, an employee who refuses a transfer across state lines will be counted as a "termination," regardless of how close the new location may be. Further, under the New Jersey law, the job offered must be "equivalent" in pay, benefits, status and "other terms and conditions of employment," or the employee is free to reject it and will be counted as a "termination" under the New Jersey law. Under either statute, if the employee accepts an offer to transfer, that employee will not count toward the calculation for the notice requirement regardless of the location or "equivalence" of the new job.

## Who Must Receive Notice and When

The New Jersey statute directs employers to notify all employees whose employment is to be terminated and any collective bargaining units representing the employees, as well as the Commissioner of the Department of Labor and Workforce Development and the top elected official of the local government where the terminations are to occur. This is similar to WARN, except that with respect to represented employees, federal law requires only that notice be given to their representative — not to the employees directly. The New Jersey statute states that notice must be given to "each employee whose employment is to be terminated *and* any collective bargaining units of employees at the establishment." This language was in the original bill as first introduced to the legislature. The Statement of the Senate Labor Committee issued when the bill was reported out stated that in addition to the government entities specified, notice would have to be provided to "the employees and their representatives." Until any clarifying regulations are issued, it appears that the state law requires notice to be given to each employee, including represented employees.

Under WARN, once the numerical threshold triggering the notice requirement is reached, all "affected" employees must be given notice — not just those who had to be counted in determining whether the threshold was reached. For example, employees at locations other than the "site" of the mass layoff or shutdown of operations are not counted in calculating the numerosity threshold, but if they lose their employment as a result of the mass layoff or shutdown, they are entitled to the notice.

New Jersey's statute does not contain any specific reference to "affected" employees. Nonetheless, the state law provides that once a transfer or shutdown of operations results in the number of employment losses triggering the notice requirement, then notice must be given to "each employee whose employment is to be terminated" at least 60 days "before the first termination of employment occurs in connection with the termination or transfer of operations, or mass layoff." Thus, although the WARN reference to "affected employees" is not used in the state law, it appears that such employees may have to be given notice under the New Jersey statute, as well, if their termination is interpreted to occur "in connection with" the shutdown of operations or the mass layoff. This may even include employees who are terminated outside of the 90-day window, if those terminations are "in connection with" the shutdown or mass layoff, which could be difficult to predict in some circumstances. It might not, however, include employees in other states, as it is not clear that the New

Jersey law is intended to or could require notice to employees outside of New Jersey. Further, even though part-time employees are not counted under the New Jersey statute in calculating whether a layoff or shutdown is covered, it may be that they would have to be given the New Jersey notice (which is also the case under federal law). As noted above, part-time employees are not entitled to the severance pay penalty, though, and it is unclear what such employees could recover as damages if they were not given the notice.

Further, it is unclear how the language requiring notice "before the first termination of employment occurs" will be interpreted, i.e., whether *all* employees to be terminated must receive notice 60 days before the first termination, which may be virtually unworkable in some phased layoffs. WARN only requires that employees receive notice 60 days before the date their own employment is terminated.

## Sale of Business

WARN expressly addresses who is responsible for providing notice where a layoff or shutdown occurs in connection with the sale of a business. The seller is responsible for providing notice for any closing or mass layoff that takes place up to the effective date and time of the sale; thereafter the buyer is responsible. New Jersey's statute does not mention the subject. To avoid issues, buyers and sellers may wish to include a provision in the sales contract concerning responsibility for notice obligations.

## Contents of the Notice

The New Jersey statute contains a detailed list of information that must be in the notice that far exceeds WARN requirements. The state-mandated notice must include: the reason for the termination; the number of employees being terminated in connection with the layoff or shutdown; the dates of the layoffs or shutdown; the date each termination of employment will occur; a statement regarding "employee rights with respect to wages, severance pay, benefits, pensions or other terms of employment as they relate to the termination"; a statement of any employment available elsewhere in the employer's business and information as to the pay, benefits and terms and conditions of employment there; a disclosure of any severance pay that is owed to the employee because of a violation of the notice provision of the New Jersey law; and a statement specifically explaining what information the employees are entitled to receive from the state's response team (see below).

WARN regulations allow employers to list either a specific date when separations from employment will occur or a 14-day period in which the separations are expected to occur. If the dates are subsequently extended for not more than 60 days, the employer may send out an additional notice, but does not have to start the entire 60-day notice period all over again. Further, WARN regulations state that employers who provide notice based on the best information available should not be liable if that information later turns out to be erroneous because of subsequent events, nor if there are minor, inadvertent mistakes. While the New Jersey statute does not have any similar provisions, it may be that, as with WARN, these issues will be addressed in regulations.

The law requires the Commissioner to issue a notice form within 90 days, which, once available, *must* be used by New Jersey employers.

## Response Team Access in NJ

The New Jersey statute requires employers to provide access to the work site to the Department of Labor and Workforce Development response team, in order for the team to provide information, referral and counseling as rapidly as possible to the employees. The employer must provide the response team with as much "work-time access" to the employees at the work site as the team may deem necessary to accomplish its responsibilities. In the case of a transfer or termination of operations, the statute specifically requires the response team to inform the employees of available job training programs, available public programs that "make it possible to delay or prevent the transfer or termination of operations," and employees' legal rights with respect to wages, severance, benefits or other terms of employment. The statute does not expressly say that the employees must be paid for this time, but use of the term "work-time" may suggest that such will be considered working time that must be paid. The response team is also required to offer to meet with management to discuss public programs such as economic development incentive and workforce development programs, which could delay or prevent a transfer or termination of operations.

## Enforcement and Damages

Aggrieved employees may bring an action in state court to recover compensatory damages "including lost wages, benefits and other remuneration" lost by the failure to give the requisite notice, although damages for "lost wages" are limited to the severance pay provided under the statute. WARN similarly permits employees to recover lost wages and benefits, but only for the period in which notice was not afforded and does not mention "other remuneration." What this term may encompass remains to be determined in regulations or litigation. The employer must also pay costs and attorney fees for prevailing employees.

*EDITORS' COMMENT:* This bill initially required 180 days' notice of layoffs or shutdowns, which was reduced to 90 days by the time it was sent to the Governor for signature. The Governor conditionally vetoed it, saying that he would not sign it unless the notification period was reduced to 60 days, as "employers benefit from consistency with respect to notification of this type." As discussed above, there remain an alarming number of other "inconsistencies" between this statute and WARN, such that the New Jersey law substantially increases the burden on New Jersey employers. It can only be hoped that some of these inconsistencies might be eliminated through clarifying regulations, although many will certainly remain in any event. The new statute contains other details in addition to those discussed above, and employers contemplating a mass layoff or a termination or transfer of operations in New Jersey should consult with legal counsel to assure compliance with the new law's standards, particularly in light of the potentially severe severance pay penalty for providing less than the number of days of notification required.

The notice would apparently only require a description of rights existing as of the time the notice issues. If additional rights are subsequently granted or negotiated with a union, it may be that the notice should be amended. Care should be taken, however, not to include any information in a notice that is given directly to bargaining unit employees that could be characterized as unlawful direct dealing with those employees, regarding matters not bargained with the union. Employers may wish to consult with legal counsel regarding this issue or provide the union with a copy of the notice before it is distributed, to see if the union raises any issues prior to issuance of the notice to bargaining unit employees.

Further, many employers already include language in their severance plans and policies that offset any WARN notice provided. New Jersey employers should review language in their severance plans, policies and contractual provisions, and consider whether to add language to take into account any severance that might be owed under the New Jersey law. Counsel should be consulted, though, as such language should be carefully crafted in light of the statute's edict that the severance penalty is "in addition to" any severance pay provided in a union contract or otherwise. Even so, it is not clear whether any modifications to contracts, plans or policies that are intended to avoid "double" severance would be upheld as lawful under this statute.





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