

New Jersey Enacts Baby WARN Act With Important Differences from the Federal WARN Act and Stiffer Penalties

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New Jersey has joined a growing number of states that have enacted their own plant closure and mass layoff notification laws that supplement the federal Worker Adjustment and Retraining Notification (WARN) Act.¹ New Jersey's new law is called the Millville Dallas Airmotive Plant Job Loss Notification Act (the New Jersey Act), and became effective on December 20, 2007. While modeled generally after the federal law, the New Jersey Act contains several important differences—including significantly greater penalties in the form of extended severance obligations—that any entity engaging in a closing, transfer, or other significant reduction in force (RIF) in New Jersey must now carefully consider.

Basic Notice Requirements

Similar to WARN, the New Jersey Act generally requires employers with 100 or more employees to give at least 60 days advance notice of a transfer or termination of operations, or mass layoff, to (i) affected employees, (ii) any collective bargaining units at the establishment, (iii) the Commissioner of Labor and Workforce Development, and (iv) the chief elected official of the municipality where the establishment is located.

WARN requires notice in advance of a “plant closing” or “mass layoff” (as these terms are defined in WARN). By comparison, the New Jersey Act applies to “terminations” or “transfers” of operations that result in the permanent or temporary shut down of a single establishment, or one or more facilities or operating units within a single establishment, that results in the termination of employment of 50 or more full-time employees during any 30-day period. The New Jersey Act, however, defines an “establishment” to exclude facilities that have not yet been operated by the employer for at least three years. Similarly, a “mass layoff” is a RIF that is not the result of a transfer or termination of operations, but still results in the termination of employment at an establishment during any 30-day period of 500 or more full-time employees, or 50 or more full-time employees representing at least one-third of the full-time employees at the establishment. Similar to WARN, the New Jersey Act provides a 90-day window

¹ Other states with so-called “baby WARN Acts” include California, Connecticut, Hawaii, Illinois, Kansas, Maine, Massachusetts, Michigan, Minnesota, New Hampshire, Oregon, Rhode Island, South Carolina, Tennessee, and Wisconsin. These and other states also have a variety of other state laws that may have an impact on facility shutdowns, workforce reductions, and similar changes.

for potentially aggregating two or more group terminations.

A “termination of employment” means the “layoff of an employee” without a commitment to reinstate the employee within six months, but does not include (i) a voluntary departure or retirement, (ii) a discharge or suspension for misconduct, (iii) any layoff of a seasonal employee, or (iv) any situation where an employer offers the same or equivalent employment to an employee at another location inside New Jersey that is not more than 50 miles from the previous site of employment. The law does not define the term “misconduct,” which likely will be a subject of future litigation. A layoff that is announced to be six months or less, but is extended beyond six months due to unforeseeable business circumstances, also is not a termination of employment provided that notice of the extension is given once reasonably foreseeable.

Exceptions to Notice Under the New Jersey Act

The New Jersey Act does not contain several of the exemptions, exclusions, and notice-reduction provisions contained in the federal law.

- The New Jersey Act does not contain an express exclusion from the definition of the “termination of employment” in the case of the sale of all or part of the business. While notice under these circumstances would not seem consistent with the intent of the New Jersey Act and may become the fodder for litigation, the absence of exclusionary language provides sufficient cause for concern that the allocation responsibility for potential liability should be addressed clearly in any transactional documents.
- The New Jersey Act does not contain the notice-reduction provisions for a faltering business or unforeseeable business circumstances that are available under federal law.
- The New Jersey Act expressly exempts a *termination of operations* (but not a transfer of operations or mass layoff) that is made necessary by a fire, flood, natural disaster, national emergency, act of war, civil disorder or industrial sabotage, or certain other very limited circumstances.

Notice Requirements

The New Jersey Act contains some unique requirements for the required notice. Among other things, the notice shall include:

- A statement of the number of employees whose employment will be terminated, the date on which the transfer or termination of operations or mass layoff will occur, and the date on which each termination of employment will occur
- A statement of the reasons for the transfer or termination of operations or mass layoff
- A statement and certain information regarding employment available to employees at any other establishment operated by the employer
- A statement of any employee rights regarding wages, severance pay, benefits, pension, or other terms of employment as they relate to the termination of employment
- A disclosure of the amount of severance pay that is payable as a penalty for failure to provide the required 60-days’ notice
- A statement of the employees’ right to receive information, referral, and counseling from the Department of Labor and Workforce Development’s response team (discussed in the next section)

The employer is required to provide the notice on a form to be developed by the Commissioner of Labor and Workforce Development, which is required to be available by March 19, 2008.

Creation of a Response Team

The New Jersey Act also mandates that the New Jersey Department of Labor and Workforce Development create a response team that must be available to provide appropriate information, referral, and counseling to workers who receive layoff notices. For each transfer or termination of operations (but not for mass layoffs), the response team shall (i) offer to meet with representatives of management to discuss available programs to prevent or delay the transfer or termination of operations, and (ii) meet with workers to provide information, referral, and counseling regarding, among other things, employee rights under the New Jersey Act or any other law that applies to the employees with respect to wages, severance pay, benefits, pensions, or other terms of employment as they relate to the termination of employment. In what many employers may find to be highly intrusive, the employer must provide the response team with “the amount of on-site work-time access to the employees . . . that the response team determines is necessary” to carry out its duties.

Steep Penalties for Failure to Provide the Required 60-Days’ Notice

The New Jersey Act provides for potentially far more significant penalties for violations than under the WARN Act. Whereas the federal law provides for a day of back pay for each day of violation (with disagreement in the courts about whether this means 60 days of pay versus the number of paid days an employee would normally work of a 60-day period), an employer that “provides less than the number of days of notification” required by the New Jersey Act shall pay to each full-time employee whose employment is terminated severance pay equal to one week of pay for each full year of employment. In what employers may view to be a fairly draconian penalty, the New Jersey Act does not expressly reduce its penalty for partial compliance. Although this is likely to be another dispute to be addressed in litigation, it is conceivable that employees will seek full penalties even if the notice provided is no more than one day late, making it extremely important to ensure as much advance notice as possible. The severance provided under the New Jersey Act shall be in addition to any other severance to which the employee may be entitled, though any penalties owed pursuant to the WARN Act’s provisions will offset that amount owing under the New Jersey Act. As with WARN, nothing in the New Jersey Act would appear to prohibit an employer from offsetting severance entitlements by amounts payable under the New Jersey Act. Accordingly, employers should review and, if necessary, amend their severance pay plans to ensure that severance obligations provide for such offsetting.

Proper Implementation of a Reduction in Force

The implementation of the New Jersey Act serves as a reminder that, in connection with any RIF, one element remains the same—an employer may be required to answer for its business decisions in court. Therefore, careful consideration and planning is critical to implementing a RIF that will be viewed by employees as fair given the circumstances, and ultimately defensible if challenged by governmental agencies or in litigation. After determining if a RIF is necessary, an employer should define and document the business rationale for the RIF, establish termination selection criteria consistent with that rationale, and be guided by this rationale and criteria when making the remainder of the decisions associated with the RIF. Beyond WARN and the New Jersey Act, when planning and implementing a RIF, employers should consider and ensure compliance with other applicable state and federal fair employment practices laws (e.g., Title VII, the ADEA, the New Jersey Law Against Discrimination).

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