

The Amended New Jersey WARN Act

Labor and Employment Alert
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On January 10, 2023, Governor Murphy signed Assembly Bill No. 4768, which gives permanent effect to sweeping amendments previously enacted to New Jersey's WARN Act ("NJ WARN")^[1]. Originally slated to take effect in July 2020, the Legislature deferred enacting the amendments throughout the state of emergency which followed the COVID-19 pandemic. With the signing of Assembly Bill No. 4768, the amendments, discussed below, take effect on April 10, 2023.

CHANGES TO NJ WARN ACT

Expanded Notice Obligations

Under existing NJ WARN, employers with 100 or more employees nationwide who report to an establishment, defined below, must provide at least sixty (60) days' notice before discharging any employee as part of a mass layoff, termination of operations, or transfer of operations.^[2] Effective April 10, 2023, employers with 100 employees nationwide must provide at least 90 days' notice to all affected employees.

Mandatory Severance

Prior to the amendments, affected employees received severance only when the employer had failed to provide the required sixty days' notice. Beginning April 10, 2023, employers must provide severance to all affected employees, even when the employer provides 90 days' notice of a mass layoff, termination or transfer of operations. This severance, based on longevity, must be paid at a rate equal to one week's pay for each full year worked. This calculation is made using either the employee's average rate of regular pay over the previous three years, or the employee's final rate of regular pay, whichever is greater. Separately, but additional to the longevity payment described above, if the employer provides an affected employee with less than 90 days' notice, the employer must, in addition to mandatory longevity payments, compensate the affected employee with a separate payment equal to four weeks of regular pay.

With respect to individual employment contracts, the amended statute provides that "[a]n employer shall provide an employee the severance pay required pursuant to this subsection . . . or any severance pay provided by the employer pursuant to a collective bargaining agreement or for any other reason, whichever is greater." (emphasis added). This suggests that employers will be required to pay the greater of either WARN Act severance, or contractual severance, but not both. The right to severance may be waived only by approval of the New Jersey Commissioner of Labor and Workforce Development ("Commissioner"), or by court order.

Significantly, the amended statute defines severance as "compensation due to an employee for back pay and losses associated with the termination of the employment relationship, and earned in full upon the termination of the employment relationship[.]" This definition of severance as "back pay" suggests an attempt to transform the severance payments into "wages" such that they would be subject to the provisions contained in New Jersey wage laws, including those providing for prompt payment and treble damages. However, the severance payment still arguably does not meet the definition of "wages" set forth in the New Jersey Wage Payment Law, the New Jersey Wage and Hour Law, or the New Jersey Wage Collection Law.^[3] Nevertheless, it is expected that plaintiffs' attorneys will argue that the severance payments constitute "wages" protected by New Jersey wage laws – a question that will almost certainly have to be resolved by the courts.

A lawsuit captioned *The ERISA Industry Committee v. Robert Asaro-Angelo* has been filed in the United States District Court for the District of New Jersey challenging the mandatory severance provision. The lawsuit claims that since severance pay is subject to the Employee Retirement Income Security Act ("ERISA"), ERISA preempts, and therefore invalidates, the NJ WARN Act.

Expanded Definition of "Establishment"

The original NJ WARN Act defined "establishment" as "a single location or a group of contiguous locations, including groups of facilities which form an office or industrial park or separate facilities just across the street from each other." The statute now provides that an establishment means a "place of employment which has been operated by an employer for a period longer than three years" with the exception of a temporary construction site. According to the amended statute, this can include "a single location or a group of locations, including any facilities located in [New Jersey]." This provision can be subject to multiple interpretations. The amendments replace "single place of employment" with "any facilities located in this State." This suggests a triggering of the Act whenever an employer that has operated in New Jersey for at least three years terminates 50 or more employees across any or all of its locations within the state. Put differently, if, within a 90-day period, an employer that operates 10 locations in New Jersey lays off five employees per location, the layoff triggers notice and severance requirements under the amended NJ WARN.

In addition, the amendments contain language stating that the 50-or-more-employees calculation must include not only those employees working "at" a New Jersey establishment, but those "reporting to" the establishment. Plaintiffs' attorneys are expected to argue that this means that any remote or field employees reporting into New Jersey locations must count towards the 50 or more employees needed for a triggering event – another issue that will likely need to be resolved by the courts.

Expanded Definition of "Employer" - Personal Liability for Corporate Managers

Currently, the statute defines "employer" as "an individual or private business entity which employs the workforce at an establishment." The amendments leave this definition unchanged. However, regarding the mandatory severance provision specifically, the amendments provide that "employer" shall mean "any individual, partnership, association, corporation, or any person or group of persons acting directly or indirectly in the interest of an employer in relation to an employee, and includes any person who, directly or indirectly, owns and operates the nominal employer, or owns a corporate subsidiary that, directly or indirectly, owns and operates the nominal employer or makes the decision responsible for the employment action that gives rise to a mass layoff subject to notification."

The ramifications of this change are sweeping. A failure to carry out the notice and severance provisions of NJ WARN creates personal liability for "any person or group of persons acting directly or indirectly in the interest of an employer." This includes any person who functions as the nominal employer, owns a corporate subsidiary that owns and operates the nominal employer, or makes the decision that gives rise to the mass layoff or termination or transfer of operations. Conceivably, this could include individuals with no ownership interest, but who bear responsibility to drive cost-saving measures such as reductions in force or reorganizations. As mentioned, such liability appears to be without cap or limitation.

Particularly troubling to those who fall within this expanded definition, it can be anticipated that the plaintiffs' bar will attempt to argue that the definition of severance set forth above constitutes "wages," thus inviting treble damages and personal liability.

Broader Definition of "Mass Layoffs"

The amendments also narrow the threshold for what constitutes a "mass layoff." Under existing law, a mass layoff means the discharge of either: (1) 500 employees or more; or (2) 50 employees when that number represents at least 33 percent of the entity's total workforce. The new law eliminates the 500-employee provision, and the 33 percent threshold. Therefore, the obligations of an employer under NJ WARN become triggered whenever a mass layoff, transfer or termination of operations affects at least 50 New

Jersey employees, with no additional qualifier.

Whether an employer has 500 employees and reduces its workforce statewide by 10%, or it employs 5,000 and reduces its workforce by 1%, in both cases, the employer will be subject to the amended NJ WARN Act.

Provisions for Part Time Employees

Effective April 10, 2023, part-time employees must be counted toward the 100-employee threshold for purposes of the 90-day notice requirement. Part-time employees must also be counted among the 50-person threshold constituting a "mass layoff." Under the amendments, part-time employees receive the same 90-day notice and same mandatory severance pay as full-time employees.

Recommendations

To avoid onerous burdens that will take effect on April 10, 2023, employers contemplating a mass layoff, termination of operations, or transfer of operations as defined under the current version of the statute should give notice to all affected employees no later than February 8, 2023. This will ensure full compliance with the 60-day notice requirement and render the employer's action subject to the current version of the NJ WARN Act. The termination of any employee as part of a mass layoff whose last day of work falls on or after April 10, 2023, will be subject to the 90-day notice requirement, mandatory severance, and all other provisions of the amendments.

White and Williams attorneys are monitoring these developments. Please contact a member of the Labor and Employment Practice Group with any questions.

[1] Colloquially referred to as the NJ WARN Act in accord with its federal counterpart, The Worker Adjustment and Retraining Notification ("WARN") Act, NJ WARN is officially titled the "Millville Dallas Airmotive Plant Job Loss Notification Act."

[2] "Termination of operations" excludes fire, flood, natural disaster, national emergency and act of war. Unlike its federal counterpart, NJ WARN does not contain a "faltering company" exception.

[3] The New Jersey Wage Payment Law defines "wages" as "direct monetary compensation for labor or services rendered by an employee, where the amount is determined on a time, task, piece, or commission basis excluding any form of supplementary incentives and bonuses which are calculated independently of regular wages and paid in addition thereto." The New Jersey Wage and Hour Law defines "wages" as "any moneys due an employee from an employer for services rendered or made available by the employee to the employer as a result of their employment relationship including commissions, bonus and piecework compensation and including the fair value of any food or lodgings supplied by an employer to an employee..." The New Jersey Wage Collection Law defines "wages" as "any moneys due an employee from the employer whether payable by the hour, day, week, semimonthly, monthly or yearly and shall include commissions, bonus, piecework compensation and any other benefits arising out of an employment contract."

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