



## **New Jersey Mini -WARN Act is Not Preempted**

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### **For Discussion Only**

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.*

In addition to the federal WARN Act, employers in New Jersey must now comply with the state WARN Act which provides 60 days notice prior to any mass layoff or termination of operations. The law will most likely not be preempted by the Employee Retirement Income Security Act ("ERISA"). ERISA was passed in 1974. The purpose of ERISA was to "promote the interests of employees and their beneficiaries in employment benefit plans." ERISA regulates employee benefit plans of private employers.

To achieve uniformity by supplanting an assortment of federal labor laws and state regulations, Congress included an express preemption provision in ERISA. Section 514(a) of ERISA provides for the provisions of Title I and IV to "supersede any and all State laws" so far as "[the State laws] relate to any employee benefit plan." Determining the meaning of the inherently vague phrase "relate to" is frequently a key issue in ERISA litigation.

The seminal case regarding the applicability of ERISA to state mandated severance payment laws is the US Supreme Court case, *Fort Halifax Packing Co. v. Coyne*, 482 US 1 (1987). The *Fort Halifax* Court, which reviewed a Maine statute that required employers to provide one-time severance payments to employees in the event of a plant closing, held that such statute did not create an obligation for employers to maintain an employee welfare benefit plan subject to ERISA. The *Fort Halifax* Court reasoned that

the Maine statute, which required a "one-time, lump sum payment triggered by a single event requires no administrative scheme whatsoever to meet the employer's obligation" and that the Maine statute therefore did not create a benefit plan subject to ERISA. New Jersey's WARN Act is quite similar to the Maine statute, specifically since it provides severance payments to employees in the event of a plant closing that are calculated without resort to an administrative scheme or formula.

### **Covered Employers**

The statute applies to any employer that employs 100 full-time employees. The law does not state whether or not employees outside of New Jersey count toward the 100-employee test for coverage, although it is safe to assume that all employees, in and outside of New Jersey, should be counted. "Part-time" employees are not counted. Part time employees are employees who are employed for an average of fewer than 20 hours per week or who have been employed for fewer than six of the 12 months preceding the date on which the notice is required.

### **Circumstances Requiring Notice**

Covered employers shall give not less than 60-days notice (or the period of time required under the federal WARN Act) under the following circumstances:

1. A mass layoff: a reduction in force which is not the result of a transfer or termination of operations and which results in the termination of employment at an establishment during any 30-day period (or in some cases 90 days) of 500 or more full-time employees, or 50 or more of the full-time employees representing one-third or more of the full-time employees at the establishment.
2. The termination of 50 or more employees as the result of a transfer or termination of operations.

The "transfer of operations" means the permanent or temporary transfer of a single establishment, or one or more facilities or operating units within a single establishment, to another location, inside or outside the state.

The "termination of operations" means the permanent or temporary shutdown of a single establishment, or one or more facilities or operating units within a single establishment, but not because of flood, fire, national disaster or emergency.

"Facility" means a building.

"Operating Unit" means an organizationally distinct product, operation, or specific work function within or across facilities at a single establishment.



“Establishment” may mean 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.

“Termination of employment” means a layoff of an employee without a commitment to reinstate the employee to his previous employment within six months of the layoff. It does not include voluntary departures, retirements, or discharges or suspensions for misconduct.

A layoff of more than six months which, at its outset, was announced to be a layoff of six months or less, is not a “termination of employment” if the extension beyond the six months was caused by business circumstances not reasonably foreseeable at the time of the initial layoff; provided that notice is given at the time it becomes reasonably foreseeable that the extension beyond six months is required.

A “termination of employment” does not mean the layoff of any seasonal employee or if the employer offers to an employee, at a location within New Jersey and not more than 50 miles away from the previous place of employment. The same or equivalent job, with the same pay, benefits and conditions of employment.

#### **Application of the time Periods**

Same as federal WARN Act.

#### **Exceptions to Requirement of Notice**

None.

#### **Shortened Notice**

In cases of natural disaster, flood, fire, national emergency, etc. notice should be given as soon as practicable.

#### **Recipients of Notice**

Same as federal WARN Act, except part-time employees are excluded. Notice must be given to every employee before the first termination of employment occurs.

#### **Content of Notification**

Same as federal WARN Act.

#### **Penalties**

Failure to provide 60-days notice (or 90-days where appropriate) requires the payment of severance.

Under the federal WARN Act, the penalty for failing to provide notice is calculated by the **day**. For example, if an establishment gave only 55-days notice, the penalty would be 5 days of pay. Under the New Jersey law, however, the penalty is calculated **by the week for every year of service**. Therefore, if an establishment gave only 55-days notice, the employer would be liable for up to five weeks of pay per year of service for each employee who should have received notice. In other words, under the federal WARN Act, an employee who worked for 25 years, he would receive 5 days of pay. Under the New Jersey law that same employee would receive 25 weeks of pay (offset by the 5 days paid under the federal WARN Act).

### **Private Suits**

Employees can file suit in the superior court to collect severance and apply for reimbursement of attorneys' fees. Severance liability applies regardless of any other severance obligation owed by employer.

While courts consider a variety of factors in determining whether a severance benefit arrangement in an employment agreement implicates an ongoing administrative program, the one overriding element has been the degree of discretion given to an employer in administering severance benefits and deciding employee eligibility. Because one of the underlying purposes of ERISA is to prevent employer abuse in administering benefits, and it is employer discretion which creates the opportunity for such abuse, if an employer is given no discretion in an employment contract's severance provisions most reported decisions to date indicate that no ERISA plan has been established.<sup>16</sup> The courts have held that severance provisions with a total lack of employer discretion are not plans within the meaning of ERISA because they do not create a need for an ongoing administrative program.

Since New Jersey's law requires no administrative program to administer the severance payments, it is most likely that *Fort Halifax Packing Co* will apply and New Jersey employers will be required to comply with both federal and state WARN acts.