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New Jersey's newly enacted plant closing law creates increased obligations and significant exposure to penalties for covered employers.

## East Coast Edition

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### Warning to New Jersey Employers: New WARN Notice Obligations in New Jersey and High Costs for Failure to Comply

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On December 20, 2007, New Jersey became the 16th state to enact a plant closing law modeled after the federal Worker Adjustment and Retraining Notification Act (29 U.S.C. section 2100 et seq.) ("Fed WARN"), when Governor Jon Corzine signed into law the oddly named "Millville Dallas Airmotive Plant Job Loss Notification Act" ("NJ WARN"). Employers planning layoffs in New Jersey must know they can no longer comply only with the notice requirements set out in Fed WARN.

The New Jersey law, which became effective immediately, imposes a 60-day notice requirement generally similar to Fed WARN and generally follows Fed WARN when defining which employers are covered and which layoffs trigger a notice obligation. But other provisions of the law substantially increase a covered employer's obligations and exposure to damages.

#### Summary of the Most Significant Differences Between NJ WARN and Fed WARN:

- NJ WARN grants to longer-term employees a far greater remedy than is available under Fed WARN when notice is not properly given: a severance penalty of one week's pay for each full year of service (which is triggered by any violation), *plus* a claim for certain compensatory damages for the extent to which the notice was short of the full number

of days required. Note that some provisions of NJ WARN may require more than 60-days' notice.

- In certain situations involving short-term layoffs and transfer offers, NJ WARN requires notice to be given when Fed WARN would not.
- NJ WARN has no "faltering business" exception, no "unforeseeable business circumstances" exception, and no express "sale of business" exception, and the "natural disaster" exception is narrower in NJ WARN than it is in Fed WARN.
- NJ WARN has no exception for layoffs that follow the closing of a temporary facility or the completion of a particular project (though there is an exception for construction sites), but the absence of this exception is tempered by an exclusion for places of employment that have been operating for three years or less.
- NJ WARN has no express strike/lockout exception.
- NJ WARN requires that much more information be contained in a lay-off/closing notice than is required by Fed WARN and requires that the notice be provided to more recipients. Notices for unionized employees are sent to both the union and the employees; by contrast, Fed WARN provides that the notice to unionized employees is sent only to the union.

- NJ WARN requires earlier notice in a serial layoff situation than does Fed WARN.
- NJ WARN provides less flexibility than Fed WARN to adjust termination dates after notice has been given.
- NJ WARN has no express “good faith” defense available to an employer having reasonable grounds for believing that it has complied.
- NJ WARN claims are less likely to receive administrative priority treatment in bankruptcy.

These differences will likely lead to substantial litigation over NJ WARN obligations. Some of these issues are discussed in more detail below.

**NJ WARN Has Greater Penalties for Noncompliance.** Under Fed WARN, if an employer fails to give proper sixty days’ notice of a “mass layoff” or “plant closing,” the employee may recover lost wages (backpay) for the period that the company failed to give notice, with a maximum of a 60-day period. NJ WARN takes a completely different approach to this issue by providing a severance penalty of one week’s pay for each year of completed service for any failure to give a proper notice (offset by any backpay damages paid “because of a violation of” Fed WARN). There are no limits to the number of weeks that may be required to be paid. Thus, under NJ WARN, a 26-year employee who fails to receive proper NJ WARN notice would be entitled to a severance penalty of 26 weeks’ pay, *in addition* to all other severance entitlements that may be available under existing policies and plans. Thus, New Jersey certainly has raised the stakes for employers contemplating layoffs in New Jersey.

Because this severance penalty is based on years of service, for shorter-tenured employees it often will be less than the backpay available under Fed WARN. Indeed, an employee with less than one full year of service is eligible for no NJ severance penalty at all, and the same is true for a “part-time” employee who worked less than 20 hours per week. This “limit-

ing” of the severance penalty will be of little benefit to employers in many cases, however, because if Fed WARN is also triggered (as will typically be the case), the employer must pay the greater of the amounts owed to an employee under the two statutes.

In addition to the severance penalty, NJ WARN includes a separate provision allowing recovery of compensatory damages for the period of time a notice was short, provided that the lost wage recovery is limited to the amount of the severance penalty. The better reading of this provision is that paying the severance penalty also satisfies any compensatory damages claim for lost wages. But employees may claim the law allows them to double-dip and recover both remedies. This is one of the many uncertainties that will likely generate litigation under this new law.

NJ WARN also allows an aggrieved employee to recover compensatory damages for benefits and “other remuneration” lost during the period of the violation. Unlike recoveries for lost wages, recoveries for benefits and “other remuneration” are not limited by the severance penalty amount. The ability to recover damages for lost benefits parallels Fed WARN, but allowing recovery of “other remuneration” is unique to NJ WARN. As the law does not define “other remuneration,” this is another aspect of the law that is likely to generate litigation. Further, as discussed below, the required notice period under NJ WARN in a serial layoff situation may extend longer than 60 days, thus extending the employer’s potential liability for compensatory damages to periods greater than 60 days.

**NJ WARN’s Triggers Are Similar to Fed WARN, But Differences Appear to Exist Where Short-Term Layoffs and Transfer Offers Are Concerned.** Fed WARN requires notice to all employees in the event of a “mass layoff” or “plant closing.” A Fed WARN “mass layoff” involves employment losses at a single site of employment of either 500 or more full-time employees, or 50 or more full-time employees where the number of employees suffering an employment loss equals

at least 33% of all full-time employees. A Fed WARN “plant closing” occurs when a single site of employment, or a facility or operating unit within a single site of employment, is permanently or temporarily shut down and 50 or more full-time employees suffer employment losses as a consequence.

The triggers for notice under NJ WARN are defined using different language, but the legislative history states that these terms were intended to be consistent with similar terms in Fed WARN. Thus, NJ WARN requires notice if there is a “mass layoff” (a concept consistent with a “mass layoff” under Fed WARN, except a slightly higher threshold of one-third, rather than 33%, is used where the layoff involves fewer than 500 full-time employees) or a “termination of operations” or “transfer of operations” (concepts that, taken together, are generally consistent with a “plant closing” under Fed WARN). Employers in most cases should be able to rely on federal authority when determining whether NJ WARN is triggered, and will be well advised to present this favorable legislative history as part of their defense. At the same time, employers should be mindful that the courts will not necessarily interpret all aspects of the NJ WARN triggers identically with federal law. Employers should give particular attention to the potential for claims in the following two areas:

- **Short Term Layoffs.** NJ WARN defines a “termination of employment” as a “layoff of an employee without a commitment to reinstate the employee to his previous employment within six months of the layoff.” This language is unique to NJ WARN, and arguably could cause a notice obligation to be triggered by a short-term layoff of 50 full-time employees unless a “commitment to reinstate” within six months is adequately documented. It is not clear, for example, whether a reinstatement priority provided by a collective bargaining agreement would itself be viewed as an adequate “commitment to reinstate.”

- **Transfer Offers.** Under Fed WARN, if an employee is discharged as part of a relocation or consolidation of part of a business, but is offered a transfer to a new location within a reasonable commuting distance, the employee is not deemed to have suffered an employment loss, and so is not counted when assessing whether Fed WARN notice must be given. The comparable provision in NJ WARN requires that the transfer offer be for a position with *equivalent status, benefits, pay and other terms and conditions of employment, not more than 50 miles away, and inside the state of New Jersey*. New Jersey, surrounded as it is by the states of New York, Pennsylvania and Delaware, has many business establishments near its borders with those states, and a transfer across state lines that would not trigger notice obligations under Fed WARN may do so under NJ WARN if the transfer is out of state, even within a few hundred yards (by the plain wording of the statute). Likewise, a transfer that involves some differences in employment terms, which would not trigger a Fed WARN notice obligation, could trigger a NJ WARN obligation if the position is not deemed to be “equivalent.” These ambiguities are an invitation to litigation.

**NJ WARN Has No Express Sale of Business Exception.** When a business sells its assets, the seller fires all of its employees, even though they may all immediately be rehired by the buyer. To avoid having this “technical” termination trigger a notice obligation, Fed WARN includes an express sale of business exception. Unfortunately, NJ WARN includes no such provision. As a result, employees predictably will argue that an asset sale involving 50 or more full-time employees will trigger a NJ WARN notice obligation, regardless of how many of the employees actually lose their jobs. The courts may choose to imply a sale of business exception in NJ WARN, but this is not a certain result. Until this issue

is definitely resolved, sellers of assets in New Jersey may wish to consider giving WARN notice, if feasible. Sellers should also consider negotiating an obligation from the buyer to extend offers for jobs with equivalent status, benefits, pay and other terms and conditions of employment, in New Jersey and within 50 miles of the previous place of employment. This should allow the seller to take advantage of the unique statutory exception in NJ WARN, noted above, which states that a “termination of employment” does not refer to a situation where such an offer is made by an employer.

**A NJ WARN Notice Must Contain Substantially More Information.** A NJ WARN notice must include substantially more information than is required by federal law. The New Jersey Commissioner of Labor is directed by the statute to create a form of notice, and use of the Commissioner’s form shall be mandatory. The form is to require that the following information, which is not mandatory in a Fed WARN notice, must be provided to all recipients of a NJ WARN notice:

- The number of employees whose employment will be terminated, the date(s) on which each termination of employment will occur, and the date(s) on which the mass layoff, transfer of operations or termination of operations will occur. (Fed WARN requires that similar but less extensive information be provided to bargaining representatives and governmental entities, but not to individual employees). It is arguable that a NJ WARN notice must contain this complete information for *all* terminations that are part of any given mass layoff, transfer of operations or termination of operations, even if the terminations occur over a period as long as 90 days.
- A disclosure of the amount of severance pay that NJ WARN would require to be paid to terminated full-time employees if an adequate NJ WARN notice was not provided.
- A statement of the reasons for the

mass layoff, transfer of operations or termination of operations.

- A statement of any employment available to employees at any other establishment operated by the employer, and information regarding the benefits, pay and other terms and conditions of that employment and the location of the other establishment.
- A statement of any employee rights with respect to wages, severance pay, benefits, pension or other terms of employment as they relate to the termination.
- A statement of the employees’ right to receive certain information, referrals and counseling from the NJ Rapid Response Team.

Fed WARN requires that a notice contain certain additional information not described above, such as contact information for a company representative from whom employees can obtain more information, and whether so-called bumping rights apply to employees working at the facility. If a NJ WARN event also triggers Fed WARN (which will usually be the case), the notice must comply with both sets of requirements, and likely two notice forms will be required – one being the state-mandated form, and the other containing Fed WARN information not set forth on the state-mandated form. Hopefully, when the State Commissioner of Labor issues the form, it will include the Fed WARN notice elements as well.

**A NJ WARN Notice Must be Provided to More Recipients.** A NJ WARN notice must be provided to the NJ Commissioner of Labor and Workforce Development, the chief elected official of the municipality where the establishment is located, each employee whose employment is to be terminated, and “any collective bargaining units” of employees at the establishment. This list is more expansive than Fed WARN in three important ways:

- NJ WARN notice must be provided to the NJ Commissioner of Labor and Workforce Development, even

though NJ law currently designates a different state official to receive Fed WARN notices.

- Notice must be provided to each employee whose employment is being terminated, even if the employee is represented by a collective bargaining agent. Note: The statute requires that notice be given to “any collective bargaining units.” This appears to be an error in statutory drafting. A collective bargaining unit is not the labor union that represents a group of employees. Rather, a “collective bargaining unit” is a concept created by the National Labor Relations Act (NLRA) regarding a group of employees, and whether the employees within the group possess a sufficient community of interests to justify a union representing the group as constituted, if the employees desired to be represented. This inartful use of the NLRA concept probably was meant to require notice to the labor organizations or unions that represent the collective bargaining units.
- The statute appears to require that notice be given to all collective bargaining units at the affected establishment, even if no one in a particular bargaining unit is affected. For example, there could be three craft units of employees at a single plant, with each unit represented by a different union. Under Fed WARN, if there is a mass layoff in only one of the units, the notice would be given to the union representing the unit of employees in which the layoff is occurring. Under NJ WARN, notice would have to be given to all three bargaining units (or, rather, the unions that represent them).

**A NJ WARN Notice Probably Must Be Provided Sooner in a Serial Layoff Situation.** A NJ WARN notice must be provided to all mandatory recipients at least 60 days before the *first* termination of employment occurs. Fed WARN also requires 60-days’ notice, but if groups of employees are being terminated at different times Fed WARN permits separate

notices to be given 60 days in advance of each group of terminations. NJ WARN may not permit this. Arguably, notice of all terminations that are part of any given NJ WARN-triggering event must be given to *all* required recipients at least 60 days before the *first* of the terminations occurs. Terminations occurring over a period of 30 days, and in some cases as long as 90 days, can be considered to be part of a single WARN-triggering event, depending upon the circumstances. This requirement will be logistically difficult for many employers who typically cannot predict layoffs with such certainty so far in advance.

**NJ WARN Appears to Provide Less Flexibility to Adjust Termination Dates After Notice Has Been Given.** Fed WARN allows the notice of termination to refer to a two-week period during which the termination may occur. There is no similar window period contained in NJ WARN, so it is not clear that this option is available under the state law. (Indeed, the state statute requires that the notice state “the date or dates on which ... each termination of employment will occur.”) Likewise, NJ WARN does not expressly incorporate the Fed WARN rule that allows termination dates to be extended by up to 60 days when circumstances change. Worse, the law encourages the state, upon receiving notice, to undertake efforts to “delay or prevent” the event, without giving any indication of whether, if the state is successful in delaying, but not preventing, the event, the employer continues to be obligated to issue new notices for the delayed event. It is likely that NJ WARN claims will be made asserting that when a termination date slips or is delayed, the employer is required to provide a fresh 60-day notice, and even claims that NJ WARN does not allow a termination date to be changed at all without triggering the severance pay penalty.

**Claims Under NJ WARN Are Less Likely to Receive Administrative Priority Treatment in Bankruptcy.** A recurring issue in bankruptcy proceedings is the priority status of employees’ claims for damages under Fed WARN. For this

purpose, the violation of Fed WARN occurs when an employer “orders” a plant closing or mass layoff without first having given the proper advance notice – i.e., the violation is not the failure to give notice, but implementing the layoff without first having given notice. If the layoffs occur after the bankruptcy petition is filed, then the claims of the employees laid off without notice may well have the highest of all unsecured priorities: an administrative claim. NJ WARN is structured differently, in that the violation of the statute occurs when the employer fails to give notice 60 days prior to the first layoffs. This will often place the time of the violation prior to a bankruptcy filing, which may cause the state law claim to be regarded as having no priority in bankruptcy (except to the extent a portion may be entitled to priority as a wage claim).

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