Special Report

Requirements of New Jersey Expanded WARN Act

By Timothy D. Speedy, James M. McDonnell & Justin B. Cutlip

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Meet the Authors

Timothy D. Speedy
Principal
908-795-5219
Timothy.Speedy@jacksonlewis.com

James M. McDonnell
Principal
908-795-5208
James.McDonnell@jacksonlewis.com

Justin B. Cutlip
Of Counsel
908-795-5136
Justin.Cutlip@jacksonlewis.com

On January 21, 2020, New Jersey Governor Phil Murphy signed into law an amendment to the Millville-Dallas Airmotive Plant Job Loss Notification Act to mandate 90 days' advance notice of a defined mass layoff, transfer of operations, or termination of operations (for companies with at least 100 employees) that affects at least 50 employees, among other provisions. N.J.S.A. § 34:21-1, *et seq.* The Act takes effect on July 19, 2020.

The amendment eliminates the definitions of *full-time employee* and *part-time employee* and, unlike its federal counterpart, focuses solely on the total number of job losses to determine whether a mass layoff or transfer or termination of operations has occurred.

The amendment also mandates payment of severance (in an amount of one week for each full year of employment) to any employee affected by the covered action.

This Special Report analyzes the revisions to the Act, compares an employer's obligations under the Act with those under the federal Worker Retraining and Notification Act (WARN), 29 U.S.C. § 2101, *et seq.,* and discusses practical implications of the changes to businesses and potential legal challenges to the Act.

Definitions, notice timelines, employers' severance obligations, and payment requirements for failure to provide notice are among the provisions revised. Under the expanded scope of coverage and new financial burdens on employers, employers seeking to restructure or remove business operations within the New Jersey will face increase risks.

Definitions

The Act revises four defined terms: (1) *establishment;* (2) *full-time employee;* (3) *part-time employee;* and (4) *mass layoff.* These changes expand the Act's coverage to previously exempted employers and employment actions, place differing obligations on employers with multistate operations that include locations within the state, and may create confusion if left as is.

Establishment

Previously, the Act applied only to a "single place of employment" in which a *mass layoff,* termination of operations, or transfer of operations occurred. The new definition eliminates the "single place of employment" qualification:

> *Establishment* means a place of employment which has been operated by an employer for a period longer than three years, but shall not include a temporary construction site. *Establishment* may be a single location or group of locations, including any facilities located in this State.

The Legislature intended the changes to expand what is a covered *establishment* under the Act. However, it is not clear how far the Legislature intended to go. For instance,

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any multistate, multilocation, or multifacility operation that implements a covered employment action (*i.e.,* mass layoff, termination of operations, or transfer of operations) arguably must meet the notice and severance obligations in the Act. Thus, a company with operations at five separate locations, with a loss of at least 10 employees (whether full-time or part-time) at each location, arguably may be subject to the notice and severance pay requirements under the elimination of the "single place of employment" qualification and the inclusion of "any facilities located in this State" to the definition. If interpreted this way, any time at least 50 employees suffer a termination of employment within a 30- or 90-day period in New Jersey would trigger the notice and severance requirements under the Act.

Full-Time Employee/Part-Time Employee

The Act makes no distinction between *full-time* and *part-time employees.* Previously, and consistent with its federal counterpart, the Act limited notice obligations to covered employment actions that affected *full-time employees.* The statute previously defined *full-time employees* and *part-time employees* as follows:

> [*Full-time employee* means an employee who is not a part-time employee.
>
> ...
>
> *Part-time employee* means an employee who is employed for an average of fewer than 20 hours per week or who has been employed for fewer than six of the 12 months preceding the date on which notice is required pursuant to the act.]

(The brackets reflect elimination of the definitions from the statute's text.)

Eliminating the distinction expands the scope of the Act's coverage and when an event triggers an employer's notice and severance obligations. Employers with at least 100 employees, whether full-time or part-time, are covered employers under the Act.

Moreover, any employee suffering a termination of employment is counted toward whether a mass layoff, transfer, or termination of operations has occurred. This makes it more likely that an employment action would require an employer to provide advance notice and severance.

Mass Layoff

The Act expands the definition of *mass layoff* to include reductions in force (some of which may not trigger notice requirements under federal WARN). The previous statutory definition:

> *Mass layoff* means 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 ***for 500 or more full-time employees or*** for 50 or more ***full-time*** employees ***representing one third or more of the full-time employees*** at the establishment.

The revised statutory definition:

> *Mass layoff* means 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 for 50 or more of the employees at ***or reporting to*** the establishment.

(Language in bold and italics denotes changes in the statutory language between the pre-January 13, 2020, Act and the language effective July 19, 2020.)

The new the definition, coupled with the revised definition of *establishment* (*i.e.,* the apparent elimination of the single or contiguous site requirement), will result in more *mass layoffs* occurring under the Act. A *mass layoff* arguably could occur if 50 or more employees are terminated at any of an employer's facilities in the state.

The definition's vagueness is open to many possible interpretations. For example, the revised definition arguably expands application of the Act to out-of-state employees (*e.g.,* field employees, remote employees, and so on) who only *report to* an *establishment* within the state. The definition also raises questions regarding operations with satellite offices, home offices, and companies with work-from-home policies or practices. Neither the statutory language nor the committee statements provide sufficient context or guidance for employers faced with the prospect of a *mass layoff* to determine the extent of their notice and severance payment obligations.

Some argue that a *mass layoff* should not be interpreted so expansively. Yet, the definition provides that a *mass layoff* requires 50 or more employees to be *"at or reporting to the establishment."* If the intent was to count all terminations at any facility in the state to determine whether a *mass layoff* has occurred, "or reporting to" would not be needed. By including "or reporting to" in the definition, the Legislature arguably intended to include terminations at other facilities only if the employees at the other location were "reporting to the establishment." For instance, if an employer had two locations and 30 employees at each will be terminated, this arguably would be a *mass layoff* only if the employees at one of the locations were reporting to the other *establishment.* If not, each location would constitute a separate *establishment* and there would be no *mass layoff,* because each *establishment* had only 30 employees suffer a termination of employment. Unfortunately, the Legislature's intent in including the requirement that the employees be "at or reporting to" the *establishment* is unclear.

What is clear is that, effective July 19, 2020, any reduction in force of at least 50 employees at *a single place of employment* will require 90 days' notice and severance. Whether the revisions to these core definitions of the law also mean that a reduction of 50 or more employees at "any facilities located in the State" requires 90 days' notice and severance pay remains unclear. Unfortunately, there is a tremendous risk if employers are incorrect.

Notice and Severance Pay Mandates

Under federal WARN, covered employers must provide 60 days' written notice to affected employees of a mass layoff, or a plant closing. Previously, the Act followed WARN and required 60 days' written notice; this has been increased to 90 days' written notice under the Act.

Under the amendment, an employer also must pay each affected employee one week of severance for each full year of employment, even if the employer provides the full 90 days' notice. If an employer fails to provide the full 90 days' notice, it must pay each employee an additional four weeks of severance pay. This has made New Jersey one of

the first, if not the first, state to require 90 days' advance notice and force employers to pay severance to employees who experience an employment loss by a mass layoff, transfer of operations, or termination of operations.

The new notice and severance requirements are unlikely to attract businesses to the state. Instead, the law appears to trap existing businesses by making it difficult to leave the state. Significantly, it poses the most substantial challenges to businesses seeking to reorganize, transfer operations, or reduce headcount. Businesses thinking of relocating to the state or expanding operations into the state first must consider the potential financial consequences associated with the Act. Businesses already operating within the state may want to explore accelerating or designing restructuring plans to avoid the burdensome financial consequences associated with these provisions before the Act's effective date.

90 Days' Notice

As noted above, Federal WARN requires only 60 days' advance notice of a covered employment action. New Jersey law will now require 90 days' advance notice.

Under the new law, an employer that fails to provide timely notice must pay an extra four weeks of pay, in addition to the severance obligations discussed below. This poses operational challenges to companies possibly facing decreased productivity, lost contracts, sudden changes in the economy or cash flow, and sooner-than-planned worker departures. The additional expense of the mandatory severance pay requirements may devastate an employer trying to remain in business.

Although meant to provide advance notice to employees, the law as drafted arguably could encourage employers not to provide notice when federal WARN is not triggered. Unlike WARN, the New Jersey law originally required severance payment only if the full notice is not provided. Under the original law, the employer must pay severance of one week for each full year of service regardless of whether one day or 59 days of notice was provided. The severance could be offset by any back pay provided by the employer under WARN. (Under WARN, the penalty for failing to provide the required notice is back pay for each day of the violation. Thus, if an employer provides only 50 days of advance notice, an employee would be entitled to 10 days of back pay. Courts differ as to whether WARN damages for violating the notice period requirement should be calculated by calendar days or workdays.)

The new law arguably requires an employer to pay only four additional weeks of pay to each employee who is provided with less than 90 days' notice. Further, there does not appear to be a requirement to pay the employee for any missed notice period, unless the triggering event also was covered under WARN. For instance, because the definition of *mass layoff* is substantially different under New Jersey law than WARN, an employer might have a *mass layoff* that only triggers New Jersey law. In this situation, it is unclear what would happen if an employer decided not to provide the full 90 days' notice. Certainly, the employer would have to pay each terminated employee one week of severance for each full year of employment and an additional four weeks of pay. But what if the employer only provided one day's advance notice? Would the employer owe each employee 89 days of back pay or is the additional four weeks of pay the only penalty? If the latter, then employers may choose to provide less notice and simply pay the four weeks of pay plus severance.

Employers should consult with legal counsel before taking any action, especially when it involves compliance with the notice requirements under the Act.

Guaranteed Severance

The Act requires employers to provide "severance pay equal to one week of pay for each full year of employment" to each employee affected by a *mass layoff,* transfer, or termination of operations. The language, which lacks any qualifiers, presumably applies to any employees, including highly compensated executives, affected by a covered employment action.

The rate of severance is the employee's regular rate over the last three years of employment or the final regular rate, whichever is higher. To the extent a collective bargaining agreement, company policy, or employee agreement provides for severance, the Act requires the employer to pay whichever is greater.

Without defining *severance,* the Act describes the term as follows:

> Severance under this subsection shall be regarded 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,* notwithstanding the calculation of the amount of the payment with reference to the employee's length of service.

The definition increases the burden on a company with financial challenges. Further, under N.J.S.A. § 34:11-4.2, the severance related to a covered employment action under the Act is viewed as wages earned upon termination. Therefore, severance cannot be paid as a continuation of wages over a period of time; it must be paid in a lump sum on the first regularly scheduled pay day following the employee's final day of employment. The financial costs may be substantial if a large group of employees are terminated on the same day.

Expanded Definition of *Employer* and Waivers

Although the statute already defines *employer,* a separate provision has been added, likely to include private equity or venture capital firms within the definition. According to a report, ***New Jersey Mandates Severance Pay For Workers Facing Mass Layoffs*** bill sponsor Senator Joseph Cryan stated, "When these corporate takeover artists plunge the companies into bankruptcy, they walk away with windfall profits and pay top executives huge bonuses, but the little guys get screwed."

> *Employer* has been expanded to include:
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> 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.

This expanded definition suggests that an individual with no ownership interest, but who was directed to reduce headcount, reorganize operations, or develop and implement cost-saving measures that result in a covered employment action, may be

held liable.

The Act also curtails an employer's ability to obtain a waiver of severance. New Jersey prohibits waiver of any severance payments absent approval by the Commissioner of the Department of Labor or a court of competent jurisdiction.

Lastly, given the mandated severance, an employer's prior practice of conditioning severance upon signing a general release agreement may no longer satisfy the "consideration" requirement to support a release of claims. Companies may have to offer *more* than the severance guaranteed in the Act to obtain an effective release of claims. This may still not be enough. The amended law requires an employer to provide an employee the severance payment under the law, a collective bargaining agreement, or an employer policy for any other reason, *whichever is greater.* Arguably, an employer that provides greater severance under its own plan may be required by the statute to provide such severance and the severance cannot constitute consideration for a release agreement. This interpretation likely would result in employers eliminating any severance policy that provided severance beyond New Jersey law.

Obligations under WARN Versus the Act

The Act provides a new set of obligations for companies that intend to implement a mass layoff, transfer of operations, or termination of operations. Jackson Lewis has summarized in a chart the obligations under the Act as compared to those under WARN.

Employers with operations in New Jersey must undertake a broader analysis of the legal implications associated with any covered employment decision that results in the termination of at least 50 employees. A company must determine whether the notice and severance obligations apply to any contemplated action to ensure that the company maintains sufficient funding to meet any obligations imposed by the statute, among other considerations.

Potential Challenges

No court challenge to the new law has been announced, but certain laws appear to provide a basis for a challenge, *e.g.,* the Employee Retirement Income Security Act, 29 U.S.C. § 1001, *et seq.* (ERISA), the National Labor Relations Act, 29 U.S.C. § 151, *et seq.* (NLRA), and the U.S. Bankruptcy Code. However, the U.S. Supreme Court has held that neither ERISA nor the NLRA preempted a similar mandatory severance pay statute in Maine. *Fort Halifax Packing Co. v. Coyne,* 482 U.S. 1, 107 S. Ct. 2211, 96 L. Ed. 2d 1 (1987). In that case, the Supreme Court held that ERISA did not preempt the Maine statute because the statute concerned employee benefits (not regulated by ERISA), rather than employee benefit *plans* (governed by ERISA). The Court also held that the establishment of mandatory severance in the event of a mass layoff or closing constituted a valid exercise of the state's police powers. Indeed, the Court described the Maine statute as an "unexceptional exercise of the state's police power" in the establishment of a minimum labor standard.

Implications

The Act may have wide-ranging implications for employers. First, to the extent an employer maintains plans to implement a mass layoff, transfer of operations, or termination of operations, it may consider accelerating those plans to avoid the financial burdens imposed by the new law after its effective date.

Second, employers may implement phased reductions in force to avoid any single employment action falling within the definition of a *mass layoff* or other covered employment action.

Third, if an employer must implement a covered employment action, the company must ensure it maintains adequate funding to pay the severance obligations imposed by the Act.

Fourth, if an employer seeks a release of claims as part of any severance payment, the company should include additional consideration to support the release of claims or modifying existing severance plans to strengthen its argument that additional consideration has been provided.

Fifth, determine whether, as a result of a change in New Jersey operations, employees at other New Jersey locations or out-of-state employees are affected and are "reporting to" the New Jersey location. This may include satellite operations or remote employees that "report to" the New Jersey location where a mass layoff, transfer, or termination of operations occurs.

The effect on potential business operations in New Jersey appears uncertain. Indeed, before expanding operations to include locations within the state or starting a new business venture within the state, a company may consider its overall business goals and the challenges to any efforts to reorganize, relocate operations, or even cease operations. While the bill sponsors explained the Act targets "corporate takeover artists," legitimate business operations facing financial difficulties and decisions to reduce headcount, relocate, or cease operations may suffer the collateral consequences of the state's intentions.

Employers must revisit severance plans, policies, and general procedures for obtaining releases from employees in exchange for severance pay to ensure compliance with the Act. Please contact a Jackson Lewis attorney if you have any questions.