

Financial and Economic Crisis – Law Firms

The Federal WARN Act And New Jersey's "Mini" WARN: Not Perfect Together

**Patrick G. Brady
and Suzanne K. Brown**

EPSTEIN BECKER & GREEN, P.C.

With the sizeable layoffs of 2008 and early 2009 expected to continue as segments of the economy adjust to lower earnings, restrictions on credit, and corporate bankruptcies and reorganizations, New Jersey's "mini" WARN has the potential to become a major headache for employers.

The "Millville Dallas Airmotive Plant Job Loss Notification Act" ("NJ WARN Act"), N.J.S.A. 34:21-1, et seq., named for the sudden closing of a large New Jersey facility employing over 200 employees, is modeled, in part, after the Federal WARN Act. There are, however, significant differences between the NJ WARN Act and its federal counterpart, differences which impose additional compliance obligations – and potentially much greater exposure to damages – on covered employers in New Jersey.

Further, with the exception of issuing the form of the notice an employer is required to provide in the event of a covered closing or layoff, the statute does not authorize New Jersey's Commissioner of the Department of Labor to promulgate regulations relating to implementation,

Patrick G. Brady is a Member of the Firm in the Labor and Employment practice in the firm's Newark office. Suzanne K. Brown is an Associate in the Firm's Labor and Employment practice in the firm's Newark office.

and the New Jersey Department of Labor has advised that it has no enforcement authority with respect to the statute.¹ Moreover, though structurally similar, the NJ WARN Act departs significantly from its federal analog, suggesting that Federal WARN Act case law may not necessarily be useful in interpreting the New Jersey statute. Thus, clarification of the ambiguities which remain with respect to the scope and application of the NJ WARN Act are likely to require – and perhaps invite – litigation and/or amendments to the statute.

With that in mind, the following table focuses on the key provisions of the NJ WARN Act and provides what we hope is a useful summary of the notable differences between the New Jersey law and the Federal WARN Act.

Effective Date

FEDERAL WARN ACT

February 4, 1989

NEW JERSEY WARN ACT

December 20, 2007

Statutory and Regulatory Provisions

FEDERAL WARN ACT

29 U.S.C. § 2101, *et seq.*

20 C.F.R. § 639.1, *et seq.*

NEW JERSEY WARN ACT

N.J.S.A. 34:21-1, *et seq.*

No regulations have been promulgated or authorized.

Covered Employers

FEDERAL WARN ACT

Private employers, including non-profit organizations, and public/quasi-public agencies which "engage in business," with (a) **100** or more employees, excluding part-time employees, or (b) **100** or more employees, including part-time employees, who work a combined total of at least 4,000 hours per week (exclusive of hours of overtime). Regular Federal, State and local governments are not covered. 29 U.S.C. § 2101(a)(1); 20 C.F.R. § 639.3(a).

NEW JERSEY WARN ACT

An individual or private business entity which employs **100** or more full-time employees. A covered "establishment" is a single place of employment which has been operated by an employer for a period longer than **3 years** (but does not include temporary construction sites). N.J.S.A. 34:21-1 and 2a.

Definition of Loss of Employment Giving Rise to a Covered Event

FEDERAL WARN ACT

"**Employment Loss**" means: (a) an employment termination, other than a discharge for cause, voluntary departure, or retirement; (b) a layoff exceeding 6 months; or (c) a reduction in hours of work of individual employees of more than 50 percent during each month of any 6-month period. 29 U.S.C. § 2101(a)(6); 20 C.F.R. § 639.3(f).

No employment loss will be deemed to have occurred if the **plant closing or mass layoff** is the result of the "**relocation or consolidation**" of part or all of the employer's business and, prior to the plant closing or layoff: (a) the employer **offers to transfer** the employee to a different site of employment within a reasonable commuting distance with no more than a 6-month break in employment; or (b) the

Please email the authors at pbrady@ebglaw.com or skbrown@ebglaw.com with questions about this article.

employer offers to transfer the employee to any other site of employment regardless of distance with no more than a 6-month break in employment, and the employee **accepts** within 30 days of the offer or of the plant closing or layoff, whichever is later. 29 U.S.C. § 2101(b)(2); 20 C.F.R. §§ 639.3(f)(3) and 639.5(b).

No employment loss will be deemed to have occurred when the sale of all or part of a business results in the technical “termination” of the employees of the seller and “re-hiring” of those employees by the buyer. 29 U.S.C. § 2101(b)(1).²

NEW JERSEY WARN ACT

“**Termination of Employment**” means the layoff of an employee without a commitment to reinstate the employee to his previous employment within 6 months of the layoff, except it does *not* include voluntary departure or retirement, discharge or suspension for cause, or any layoff of a seasonal employee. N.J.S.A. 34:21-1.

No termination of employment will be deemed to have occurred in any situation in which an employer **offers** to an employee, at a location **inside New Jersey** and not more than **50 miles** from the previous place of employment, the same employment or a position with equivalent status, benefits, pay and other terms and conditions of employment. N.J.S.A. 34:21-1.

In the case of the sale of part or all of a business, the NJ WARN does not provide an express exception to the notice requirements to address the “technical termination” of the seller’s employees, prior to being “rehired” by the buyer on the effective date of the sale.

Definition of “Part-Time” Employee

FEDERAL WARN ACT

“**Part-Time Employee**” means an employee who: (a) is employed for an average of fewer than 20 hours per week; or (b) has been employed for fewer than 6 of the 12 months preceding the date on which notice is required, including workers who work full-time. 29 U.S.C. § 2101(a)(8); 20 C.F.R. § 639.3(h).

NEW JERSEY WARN ACT

“**Part-Time Employee**” means an employee who: (a) is employed for an average of fewer than 20 hours per week; or (b) has been employed for fewer than 6 of the 12 months preceding the date on which notice is required. N.J.S.A. 34:21-1.

Covered Events

FEDERAL WARN ACT

Plant Closing – the permanent or temporary shutdown of a “single site of employment,” or one or more “facilities or operating units” within a single site of employment if the shutdown results in an “employment loss” for **50** or more full-time employees at the single site of employment during any 30-day period. 29 U.S.C. § 2101(a)(2); 20 C.F.R. § 639.3(b).

Mass Layoff – a reduction in force which: (a) is not the result of a plant closing, and (b) results in an employment loss at a single site of employment during any 30-day period for: (1) **500** or more full-time employees, or (2) **50** or more full-time employees representing at least **33%** of full-time employees. 29 U.S.C. § 2101(a)(3); 20 C.F.R. § 639.3(c).

NEW JERSEY WARN ACT

Termination of Operations – the permanent or temporary shutdown of a single establishment, or of one or more facilities or operating units within a single establishment that results, “during any continuous period of not more than 30 days,” in the termination of employment of **50** or more full-time employees. N.J.S.A. 34:21-1 and 2.

Transfer of Operations – 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 of New Jersey, that results, “during any continuous period of not more than 30 days,” in the termination of employment of **50** or more full-time employees. N.J.S.A. 34:21-1 and 2.

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 for: (1) **500** or more full-time employees; or (2) **50** or more full-time employees representing **1/3** or more of the full-time employees at the establishment. N.J.S.A. 34:21-1.

Aggregation of Smaller Events – the 90-Day “Look Back/Ahead”

FEDERAL WARN ACT

90-day look back/ahead – employment losses for **2 or more groups** at a single site of employment, each of which does not affect the requisite number of employees when taken alone, but which do so when viewed in the **aggregate**, and which occur in any **90-day period**, will trigger the notice requirements, *unless* the employer demonstrates that the employment losses are the result of separate and distinct causes and not an attempt to evade the notice requirements. 29 U.S.C. § 2102(d); 20 C.F.R. § 639.5(a).

NEW JERSEY WARN ACT

90-day look back/ahead – terminations of employment for **2 or more groups** at a single establishment, each of which does not affect the requisite number of employees when taken alone, but which do so when viewed in the **aggregate**, and which occur in any **90-day period**, will be regarded as subject to the notification requirements, *unless* the employer demonstrates that the cause of the terminations for each group is separate and distinct. N.J.S.A. 34:21-2.

Notice Period

FEDERAL WARN ACT

At least 60 calendar days notice prior to any planned plant closing or mass layoff. When all employees are not terminated on the same date, the date of the first individual termination triggers the 60-day notice requirement. 29 U.S.C. § 2102(a); 20 C.F.R. § 639.5(a). When providing notice of a planned employment loss, an employer may refer to a 14-day period during which the employment loss is expected to occur, but the notice must be given at least 60 days in advance of the first day of the period. 20 C.F.R. § 639.7(b).

NEW JERSEY WARN ACT

Not less than 60 days (or the period of time required pursuant to Federal WARN, whichever is longer) before the first termination of employment. N.J.S.A. 34:21-2.

The NJ WARN has no provision for providing notice of a “window” period, in lieu of a specific date, during which the terminations of employment are expected to occur.

Exemptions From 60-Day Notice Requirement—No Notice Required

FEDERAL WARN ACT

No notice is required when the **plant closing** is of a **temporary facility** or the **plant closing or mass layoff** is the result of the **completion of a particular project** or undertaking, and the affected employees were hired with the understanding that their employment was limited to the duration of the facility or the project or undertaking. 29 U.S.C. § 2103(1); 20 C.F.R. § 639.5(c).

No notice is required when a **plant closing or mass layoff** constitutes a **strike or lockout** which is not intended to evade the requirements of the Federal WARN. 29 U.S.C. § 2103(2). Non-striking employees may be entitled to notice (though “unforeseeable business circumstances” or “faltering company” exceptions may apply (see below), reducing the amount of notice). 20 C.F.R. § 639.5(d).

NEW JERSEY WARN ACT

No notice is required for a **termination of operations, transfer of operations, or mass layoff** occurring at a **temporary construction site** or a single place of employment which has not been operated by an employer for a period of more than **3 years**. N.J.S.A. 34:21-1.

No notice is required for a termination of operations made necessary because of a fire, flood, natural disaster, national emergency, act of war, civil disorder or industrial sabotage, decertification from participation in the Medicare and Medicaid programs, or license revocation under New Jersey's Health Care Facilities Planning Act. (No similar provision is made for transfers of operations or mass layoffs occasioned by fire, flood, etc.) N.J.S.A. 34:21-1.

No express exception to the notice requirements for strikes or lockouts.

Exceptions to Full 60-Day Notice Requirement – Notice Required as Soon as “Practicable”

FEDERAL WARN ACT

Plant closings or mass layoffs due to any form of **natural disaster**. 29 U.S.C. § 2102(b)(2)(B). Employer must be able to demonstrate the plant closing or mass layoff is a direct result of the natural disaster and must provide as much notice as is practicable. 20 C.F.R. § 639.9(c).

Plant closings or mass layoffs caused by **“unforeseeable business circumstances”** that were not reasonably foreseeable as of the time notice would have been required. 29 U.S.C. § 2102(b)(2)(A).

The **“faltering company”** exception applies **only to plant closings** and if, as of the time that notice would have been required, the employer was actively seeking capital or business which would have enabled the employer to avoid or postpone the shutdown and the employer reasonably and in good faith believed that giving the notice would have precluded it from obtaining the needed capital or business. 29 U.S.C. § 2102(b)(1); 20 C.F.R. § 639.9(a).

When a layoff announced to be a **layoff of 6 months or less is extended** because of business circumstances not reasonably foreseeable at the time of the initial layoff, notice must be given at the time it becomes reasonably foreseeable that the extension beyond 6 months will be required. 29 U.S.C. § 2101(c); 20 C.F.R. § 639.4(b).

NEW JERSEY WARN ACT

No termination of employment will be deemed to have occurred when a layoff of more than 6 months which, at its outset, was announced to be a layoff of 6 months or less, if the **extension of the layoff beyond 6**

months is caused by business circumstances **not reasonably foreseeable** at the time of the initial layoff and notice is given at the time it becomes reasonably foreseeable that the extension beyond 6 months will be required. N.J.S.A. 34:21-1.

The NJ WARN does not otherwise provide for a reduction in the notice requirements for a “faltering company” or “unforeseeable business circumstances.”

When Additional Notice Is Required

FEDERAL WARN ACT

Additional notice is required when the date or schedule or dates of a planned plant closing or mass layoff is extended beyond the date or ending date of any 14-day period announced in the original notice. 20 C.F.R. § 639.10.

NEW JERSEY WARN ACT

The NJ WARN does not expressly provide for a situation in which the actual date of a covered event is extended beyond that provided for in the original notice.

Who Must Receive Notice

FEDERAL WARN ACT

Each representative of the affected employees as of the time of the notice **or**, if there is no such representative at that time, to each affected employee; the chief elected official of the unit of local government within which the closing or layoff is to occur; and the State dislocated worker unit. 29 U.S.C. § 2102(a); 20 C.F.R. § 639.6. See also N.J.A.C. 12:40-1.1 and 1.2.

NEW JERSEY WARN ACT

Each employee to be terminated **and** any representative of collective bargaining units of employees at the establishment (apparently regardless of whether any employees in the particular collective bargaining unit will be affected by the planned terminations of employment); the chief elected official of the municipality where the establishment is located; and the New Jersey Commissioner of Labor and Workforce Development. N.J.S.A. 34:21-2a.

Required Content of Notice

FEDERAL WARN ACT

Separate **written notice** is to be given to the representative(s) of affected employees, each affected employee (if not represented), the chief elected official of the unit of local government, and the State dislocated worker unit. The content of each required notice varies slightly and differs somewhat from that required under the NJ WARN. 20 C.F.R. § 639.7(b)-(f).

NEW JERSEY WARN ACT

Separate **written notice** is to be given to representative(s) of affected employees, each affected employee, the chief elected official of the municipality, and the New Jersey Commissioner of Labor and Workforce Development. The New Jersey Department of Labor and Workforce Development has promulgated a **required form** that employers must use when providing such notice. The form can be found at the New Jersey Department of Labor and Workforce Development's website. N.J.S.A. 34:21-3a-f.

How Notice Is Served

FEDERAL WARN ACT

Any reasonable method of delivery which is designed to ensure **receipt** of notice at least **60 days before** separation is acceptable. 20 C.F.R. § 639.8.

NEW JERSEY WARN ACT

The NJ WARN does not provide for the manner of delivery.

State Dislocated Worker Unit and Rapid Response Team Services

FEDERAL WARN ACT

The U.S. DOL “encourages maximum coordination” with respect to State dislocated worker units and worker adjustment programs. 20 C.F.R. § 639.1(f).

NEW JERSEY WARN ACT

Employers must provide the amount of **on-site work-time access** to employees that the response team determines is necessary. N.J.S.A. 34:21-2c and 5.

Enforcement

FEDERAL WARN ACT

Private right of action. 29 U.S.C. § 2104(a).

NEW JERSEY WARN ACT

Private right of action. N.J.S.A. 34:21-6.

Penalties

FEDERAL WARN ACT

Back pay for each day of violation (circuit split concerning whether back pay is computed for each **calendar day** or each **workday** during the period of violation).

Benefits under an employee welfare or pension plan, including medical expenses incurred during the employment loss which would have been covered under the employee benefit plan if the employment loss had not occurred.

At the court's discretion, reasonable **attorney's fees** may be awarded to the prevailing party.

Civil penalty of up to \$500 for each day of the violation which “shall not” apply if the employer pays to each aggrieved employee the amount for which the employer is liable to that employee within 3 weeks from the date the employer orders the shutdown or layoff. 29 U.S.C. § 2104(a).

NEW JERSEY WARN ACT

Severance pay to each full-time employee to whom the employer provides less than the number of days of notice required (with no apparent reduction for partial compliance), in an amount equal to **one week of pay for each full year of employment**, and is in addition to any severance pay provided for any other reason (except that back pay provided pursuant to the Federal WARN is credited toward the NJ WARN severance pay requirement). N.J.S.A. 34:21-2b.

The court “shall” award the prevailing plaintiff(s): (a) **costs of the action**, including reasonable attorney’s fees, and (b) **compensatory damages**, including lost wages, benefits and “other remuneration.” Any award of compensatory damages for lost wages shall be limited to amount of severance pay required under the NJ WARN. N.J.S.A. 34:21-6.

Good Faith Defense

FEDERAL WARN ACT

Good faith defense to liability or penalty. 29 U.S.C. § 2104(a)(4).

NEW JERSEY WARN ACT

The NJ WARN does not provide for a good faith defense to liability or penalty.

Conclusion

In light of the distinctions between the Federal and New Jersey WARN obligations detailed herein, employers would be well advised to be familiar with the New Jersey statute when considering a plant shutdown or mass layoff in New Jersey, rather than to rely solely on compliance with Federal WARN.

¹ “The role of the Department of Labor and Workforce Development under [the NJ WARN Act] is limited to (1) dispatching the rapid response team to, among other things, provide appropriate information, referral and counseling to workers who are subject to plant closings or mass layoffs and (2) making available to employers the form upon which notification shall be provided under [the Act].” NJ Mass Layoff Notification Form (3/13/08).

² With respect to employment losses occurring before or after the sale, “[t]he seller is responsible for providing notice of any plant closing or mass layoff which takes place up to and including the effective date (time) of the same, and the buyer is responsible for providing notice of any plant closing or mass layoff that takes place thereafter. ... It may be prudent for the buyer and seller to determine the impacts of the sale on workers, and to arrange between them for advance notice to be given to affected employees or their representative(s), if a mass layoff or plant closing is planned.” 29 C.F.R. § 639.4(c).