



New Jersey Plant Closing Law More Onerous Than Federal WARN

In December 2007, New Jersey enacted a plant closing law requiring employers to provide 60 days' advance notice to certain employees and others of impending employment losses due to a mass layoff, shutdown or transfer of operations. Although the New Jersey law is similar to the federal Worker Adjustment and Retraining Notification Act (WARN), it differs in significant respects and is potentially more costly for employers.

Background

On December 20, 2007, New Jersey Governor Jon Corzine signed the "[Millville Dallas Airmotive Plant Job Loss Notification Act](#)" into law, making New Jersey the latest of sixteen states to enact plant closing laws. Like WARN, the New Jersey law basically requires employers to provide advance notice to employees of terminations of employment associated with mass layoffs, shutdowns or transfers of operations, but it contains fewer exceptions and more onerous penalties for noncompliance than the federal law. Importantly, employers that do not timely provide required notices must pay statutory severance benefits to affected employees – in addition to any other severance benefits provided by the employer under collective bargaining agreements, existing severance plans, or for any other reason.

New Jersey Plant Closing Law

Like WARN, the New Jersey plant closing law generally applies to private employers with 100 or more full-time employees. The law covers employers who have an "establishment" (i.e., a single place of employment which has been operated for more than three years) in New Jersey, excluding temporary construction sites. For purposes of this law, full-time employees are those who work at least 20 hours per week on average or who have been employed for at least six of the 12 months immediately preceding the date notice must be given.

BUCK COMMENT. *The new law is silent on whether the employer's size is based only on the number of employees in New Jersey or includes out-of-state employees as well. Both are counted for purposes of the 50-employee coverage threshold of New Jersey's Family Leave Act, but it is unclear whether a similar rule applies to determine whether employers are covered by the state's new plant closing law.*

Covered employers must generally give affected employees and any collective bargaining units at the establishment at least 60 days' advance notice of a termination or transfer of operations or a mass layoff that will result in the loss of employment for at least 50 full-time employees at a single worksite during a 30-day period. Notice must also be given to the New Jersey Commissioner of Labor and Workforce Development and the chief elected official in the municipality in which the worksite is located. Separate layoffs resulting from the same cause during any 90-day period are aggregated for purposes of these notice requirements.

Determining Employment Loss. Qualifying employment losses include terminations or permanent job eliminations and layoffs exceeding six months (excluding layoffs of seasonal workers). Voluntary retirements and resignations, discharges and suspensions for misconduct and certain transfer offers (i.e., offer for an in-state transfer to the same or an equivalent position within 50 miles of the previous worksite) are not considered employment losses for this purpose. A New Jersey employee who refuses a transfer to work in a neighboring state (regardless of commuting distance) or to an in-state job that is not equivalent in terms of pay, benefits, status or other terms and conditions of employment, will be counted as a termination. As under WARN, an employee that accepts an offer of transfer wherever located will not be counted as an employment loss.

BUCK COMMENT. *Unlike federal WARN, the New Jersey law does not count a reduction in hours of more than 50% in each month of a six-month period as an employment loss. However, New Jersey law may require notice in circumstances when federal law would not (e.g., transfer offers).*

What Triggers Notice. As indicated earlier, notice must be provided in anticipation of a permanent or temporary termination of the employer's operations (unless due to circumstances such as fires, floods, or national emergencies), a permanent or temporary transfer of the employer's operations, or a mass layoff (defined as the termination of employment of 500 or more full-time employees, or 50 or more full-time employees representing at least one third of the full-time workforce).

Who Receives Notice. When the New Jersey law is triggered, each affected employee must receive notice. Importantly, notice must also be given to "any collective bargaining units of employees at the establishment," not just to the union representative(s) of affected employees, as under WARN. Notice may also have to be given to part-time employees and those terminated for performance reasons (other than for "discharge or suspension for misconduct") during the 30-day period.

When Notice Must Be Given. The notice must be provided at least 60 days before the first employment loss occurs in connection with a triggering event. Where there are successive layoffs within a 90-day period, notice must be given to *all* employees to be terminated 60 days before the *first* employee is terminated – unless the employer can demonstrate that the reason for terminating each group of employees is separate and distinct.

BUCK COMMENT. *As a practical matter, meeting this timing requirement may not always be possible, particularly with respect to employees that an employer may not know with certainty will be terminated.*

Content of the Notice. The notice required under New Jersey law must include substantially more information than federal law calls for. Specifically, the notice to affected New Jersey employees must include –

- the number of employees to be terminated
- the date(s) on which the transfer or termination of operations or mass layoff will occur and when *each* employee termination will occur
- the reason(s) for the termination or transfer of operations or mass layoff
- available jobs (including pay, benefits and other information) at other employer worksites
- any employee rights with respect to wages, severance pay, benefits, pension or other terms of employment (including rights under a collective bargaining agreement or existing employer policies) relating to their termination
- amount of severance pay available under the law, if the employer has failed to give timely notice
- employee's right to receive information, referral and counseling from the New Jersey response team, public programs and benefits available to assist displaced workers, and the employee's legal rights.

Notice must be provided in writing on a [form](#) issued by the Commissioner of Labor and Workforce Development.

No Significant Exceptions to Notice Requirements. Unfortunately, the New Jersey law does not contain many of the important exceptions to the notice requirements included in federal law – i.e., for employment losses caused by the sale of a business, a strike/lockout, the closing of a temporary facility or the completion of a particular project. As indicated above, New Jersey law expressly exempts a shutdown of operations – but not a mass layoff or transfer of operations – from the 60-day notice requirement in certain circumstances such as flood, fire, natural disaster or national emergency.

The New Jersey law does not contain the provisions in federal law allowing an employer to give less than 60 days' prior notice in the case of a faltering business (e.g., where the employer's capital seeking efforts to prevent closing would be jeopardized by providing notice) or unforeseeable business circumstances (e.g., the loss of a major contract or an unexpected economic downturn). However, when a layoff that was originally intended to be shorter than six months is extended beyond six months due to business circumstances that were not foreseeable at the time of the initial layoff, notice may be given as soon as the employer anticipates the layoff will exceed six months.

Penalties for Noncompliance. The New Jersey law provides more substantial penalties for noncompliance than federal law. Significantly, if a covered employer fails to comply with the New Jersey law, full-time employees are eligible to receive one week's severance pay for each full year of service. This statutory severance is in addition to any severance pay that may already be provided under a collective bargaining or other agreement, but may be offset by any back pay owed under WARN. Severance pay for purposes of the New Jersey law is calculated at

the employee's average compensation rate during the past three years or the employee's last rate, whichever is higher.

Since this penalty attaches for any delay in providing required notice, an employer providing only 59 days' notice will pay the same statutory severance as an employer providing no notice – and for long-service employees, the amount could be significant. By contrast, federal WARN would only permit recovery of one day of lost wages and benefits for each day the employer failed to give required notice (up to a maximum of 60 days). Although federal law would excuse minor or inadvertent errors in the notice or that occur as a result of changed circumstances during the 60-day notice period, there is no corresponding provision in the New Jersey law.

BUCK COMMENT. *This severance pay penalty seems overly severe, particularly in the absence of the key exceptions from the 60-day notice requirement provided under federal law.*

Response Team. Another significant difference from the federal law is that upon receiving the employer notice, the New Jersey Department of Labor and Workforce Development will dispatch a response team to work with both affected employees and the employer. The response team will conduct on-site informational meetings with employees on public programs and benefits and will be available to provide guidance to employers on ways to delay or avoid terminations. By law, the state is entitled to as much on-site, work-time access to employees as it deems necessary.

Effective Date. The law took effect on December 20, 2007.

Conclusion

The New Jersey plant closing law places significant burdens and potential penalties on employers during a time that is otherwise very difficult for them. Careful advance planning of a reduction in force, including compliance with both state and federal law as well as analyzing all of the complex benefit issues, is essential. Buck's consultants can assist you in dealing with these and any other issues relating to the downsizing of your workforce.

This FYI is intended to provide general information. It does not offer legal advice or purport to treat all the issues surrounding any one topic.