

New Jersey's Toys "R" Us Bill: A Bellwether of Change Across the Nation?

In response to the Toys 'R' Us layoffs, the New Jersey legislature revisited the impact that a termination of operations had on employees, and ultimately amended NJ WARN to significantly expand its scope and to mandate severance pay for affected employees.

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When Toys "R" Us announced in early 2018 that it would be closing all of its 735 stores across the United States, protests erupted once employees learned that they would not be receiving any severance pay. At the time the announcement was made, Toys "R" Us was in full compliance with the federal Worker Adjustment and Retraining Notification Act, 29 U.S.C. §2101, et seq. ("WARN") and New Jersey's Millville Dallas Airmotive Plant Job Loss Act, N.J.S.A. 34:21-1, et seq. ("NJ WARN"), both of which require at least 60-days advance written notice of a mass layoff. By June 2018, more than 31,000 workers had been laid off across the country, including over 2,000 New Jersey employees. Although its employees were initially denied any severance, the public backlash prompted the establishment of a \$20 million severance fund. This fund, however, did little to assuage the protesters demanding that WARN and NJ WARN be revamped to afford greater protections for employees impacted by mass layoffs and plant closures.

The Federal Worker Adjustment and Retraining Notification Act

Currently, WARN imposes an obligation on most employers with 100 or more full-time employees to provide at least 60-days advance written notice of any "plant closing" or "mass layoff" to its employees and various government officials. A "plant closing" is the "permanent or temporary shutdown of a single site of employment if the shutdown results in an employment loss at the single site of employment during any 30-day period for 50 or more employees..." A "mass layoff" is a reduction in force that does not result from a plant closing, but results in an employment loss at a single site of employment during any 30-day period for at least 50 full-time employees if they represent at least 33% of the total active workforce, or 500 or more full-time employees.

New Jersey's Millville Dallas Airmotive Plant Job Loss Act, Explained

Originally enacted in 2007, NJ WARN, like WARN, initially required that employers with 100 or more full-time employees provide 60-days advance notice of a termination or transfer of operations or mass layoff. Under NJ WARN, the notice requirement is triggered if there is a termination or transfer of operations or mass layoff that results in an employment loss for 50 or more full-time employees within a 30-day period. Although NJ WARN applies in circumstances similar to its federal counterpart, NJ WARN was an attempt to close certain loopholes of WARN after the closure of the Millville Dallas

Automotive Plant – one of the largest employers in South Jersey. Consistent with that objective, NJ WARN requires significantly more detailed notice to impacted employees, including information regarding available employment at any of the employer's other establishments. In addition, NJ WARN also mandates that employers provide timely advance written notice to the Commissioner of Labor and Workforce Development, the chief elected official of the municipality where the establishment is located and any collective bargaining units.

NJ WARN also provides harsher penalties for an employer that failed to provide timely notice of a transfer or termination of operations or a mass layoff. Under WARN, employers which fail to provide the appropriate written notice of a mass layoff or plant closing are liable for back pay and other benefits for up to 60-days and civil penalties if proper notice is not provided to the affected employees and governmental officials. In comparison, NJ WARN, from the time it was enacted in 2007, mandated substantially higher penalties for employers who fail to provide the requisite notice. New Jersey employers which violate NJ WARN's notice provision must pay severance equal to one week of pay "for each full year of service to each full-time terminated employee, in addition to any other severance paid for any reason." Although NJ WARN provides that an employer would receive a credit against the penalty payments required under WARN, NJ WARN at the time it was enacted in 2007, contained the most draconian penalties in comparison to "mini-WARN" legislation enacted in other jurisdictions.

The 2020 Toys "R" Us Law

In response to the Toys "R" Us layoffs, the New Jersey legislature revisited the impact that a termination of operations had on employees and ultimately amended NJ WARN to significantly expand its scope and to mandate severance pay for affected employees. Senate Bill 3170, commonly referred to as the "Toys "R" Us Bill," was designed to protect workers forced out of jobs as a consequence of matters beyond their control, such as bankruptcy. On January 21, 2020, Governor Phil Murphy signed into law what can only be seen as a drastic overhaul of NJ WARN. This amendment to NJ WARN becomes effective on July 19, 2020.

This new amendment will greatly expand the coverage of NJ WARN. Significantly, the definition of "employer" has been expanded to include "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." Thus, an individual, even if not directly employed by the employer, who makes a decision responsible for the employment action can potentially be held liable for the employer's failure to satisfy its NJ WARN obligations.

In addition, NJ WARN, as amended, will require New Jersey employers to provide 90-days advance written notice of an impending job loss for 50 or more employees within a 30-day period. Moreover, while NJ WARN previously only required notice to and back pay for full-time employees, the amendment now affords part-time workers the same rights and benefits as full-time employees.

The most significant change is that the amendment to NJ WARN will make New Jersey the first state in the country to mandate severance pay in the event of a “plant closing” or “mass layoff,” even if an employer fully and properly complies with the notice obligations imposed by the NJ WARN. In fact, New Jersey employers will now be required to pay all employees terminated as part of a transfer or termination of operations or a mass layoff one week of severance for every year of employment, calculated based upon the average rate of compensation paid to the employee during the last three years of employment or the final rate of compensation, whichever is higher. Furthermore, if an employer fails to provide the 90-days advance notice of the employment loss, the employer must pay affected employees an additional four weeks of severance pay.

In addition to the obvious financial impact of mandatory severance, there are subtleties that cannot be overlooked. The recent amendment to NJ WARN defines severance pay as “compensation due to an employee for back pay and losses associated with the termination of the employment relationship,” and the severance pay is deemed “earned in full” upon termination. Inasmuch as this new law defines the severance pay due to employees as “compensation due for back pay and losses” and it is “earned in full” upon termination, it does not appear that employers required to pay severance as required by NJ WARN will be able to secure a waiver and release of claims as is typically the case when an employer provides severance upon termination of employment. Indeed, given the express statutory language, it appears that for an employer to secure an enforceable release of claims, it would be required to pay additional consideration to the employee over and above the statutorily mandated severance.

Potential Amendment to WARN on the Horizon

While other states have not yet taken the same drastic steps as New Jersey, sweeping changes across the country might not be far behind. Late last year, United States Representative Timothy Ryan (D-OH) introduced the “Fair Warning Act of 2019,” a proposed amendment to expand the scope of WARN to include businesses employing 50 or more employees, including part-time employees. Currently, WARN only applies to businesses with 100 or more full-time employees. Additionally, under this proposed legislation, WARN will also apply to any employer with an annual payroll of at least \$2 million regardless of the number of employees.

The proposed legislation would also further expand WARN’s definition of a “mass layoff.” If the Fair Warning Act of 2019 is enacted as presently drafted, a “mass layoff”

would consist of “a reduction in force that results in an employment loss during any 90-day period” of “10 or more employees of an employer at a single site of employment” or 250 employees regardless of the job site. WARN presently only applies where there is an employment loss of 50 or more employees during a 30-day period. Moreover, employees who work remotely would, under certain circumstances, be considered as employees at a single site. Similarly, a plant closing would trigger notice required by WARN if the shutdown results in an employment loss for as few as 5 employees in a 30-day period – down from the current requirement of a reduction of 50 or more employees.

Since the Fair Warning Act of 2019 was only recently introduced and referred to the House Committee on Health, Education, Labor, and Pensions, it is unclear whether, and in what form, this legislation will be enacted. While the die is cast for New Jersey employers, the potential for other states, and possibly the federal government, to follow suit should be on the radar of employers across the nation.

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