

Management Alert

New Jersey Expands Two State Laws Regarding Religious Discrimination and Protection for Displaced Workers

New Jersey Expands Law Against Religious Discrimination

On January 13, 2008, New Jersey Governor Jon Corzine signed legislation that immediately expands the New Jersey Law Against Discrimination (LAD) to provide greater protection than federal law to public and private sector employees seeking religious accommodation.

The LAD amendments require an employer to reasonably accommodate an employee's "sincerely held religious observance or practice," by allowing an employee to modify his or her work schedule to observe a Sabbath or holy day, unless such an accommodation would pose an "undue hardship." The time taken for religious observance may either "be made up at a mutually convenient time," charged against paid leave (other than sick leave) or treated as unpaid leave.

While the reasonable accommodation requirement should be familiar to most New Jersey employers, because of their longstanding obligations in this regard under Title VII of the Civil Rights Act of 1964, the amendments define the "undue hardship" exceptions more narrowly than federal law. Specifically, an "undue hardship" is "an accommodation requiring unreasonable expense or difficulty, unreasonable

interference with the safe or efficient operation of the workplace or a violation of a bona fide seniority system or a violation of a bona fide collective bargaining agreement." N.J.S.A. 10:5-12q(3). On its face, this "unreasonableness" standard is more stringent than federal regulations, which permit an employer to claim that a requested accommodation poses an undue hardship where it requires anything "more than a *de minimis* cost." 29 C.F.R. § 1605.2(e)(1). See generally *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977) ("To require [an employer] to bear more than a *de minimis* cost in order to give [an employee] Saturdays off is an undue hardship.")

Importantly, where a scheduling accommodation would result in an employee working during hours when premium wages or benefits would normally be paid (for example, where the employer provides a shift differential or extra pay for Sunday work), and the employee would only be working those hours because of his or her religious accommodation, then the employee will not be entitled to the premium wages or benefits and such premiums therefore cannot be considered part of the cost of a requested accommodation. N.J.S.A. 10:5-12q(1). An employer may consider factors such as lost productivity, transferring or hiring other employees, and the number of individuals requesting the accommodation in determining whether cost poses an undue hardship.

The new provisions both borrow from and distinguish the law concerning accommodation of disabilities. On one hand, any accommodation that renders an employee unable to “perform the essential functions” of his or her position will automatically be deemed an undue hardship. N.J.S.A. 10:5-12q(3)(c). At the same time, the new definitions of “reasonable accommodation” and “undue hardship” are limited to employees’ religious observances, and explicitly shall not be applied to accommodation of employees with disabilities. N.J.S.A. 10:5-12(q)(d)(2).

New Jersey Expands Law Protecting Displaced Workers

On December 20, 2007, New Jersey enacted a new law that is similar to the federal Worker Adjustment and Retraining Notification (WARN) Act in that it requires 60 days’ advance notice to employees affected by certain types of covered events, such as facility closures or reductions in force. Named after a plant closing event that occurred in 2004, the statute is called the “Millville Dallas Airmotive Plant Job Loss Notification Act,” but for ease of reference is called “NJ WARN” in this alert.¹ NJ WARN contains a number of *significant differences* from federal WARN. These differences include new types of notice-triggering events, fewer exceptions and exclusions that would excuse or reduce the 60-day notice period, and much more onerous monetary penalties for non-compliance. There also are many ambiguities and gaps in the new law that may dramatically increase the risk of litigation for employers in New Jersey.

Who Is Covered?

NJ WARN applies to any “individual or private business entity that employs the workforce at an establishment.” An “establishment” is defined as a single place of

1. NJ WARN is codified at N.J. Stat. §34:21-7 (2007)

employment that has been operated by an employer for at least three years. Employers required to give notice must have 100 or more full-time employees, but it is unclear whether this number includes employees located at all locations operated by the employer or only in New Jersey.

What Triggers Notice?

Employers with 100 or more full-time employees are to give at least 60 days’ advance notice whenever there is a “mass layoff,” a “transfer of operations” or a “termination of operations.” (If federal WARN is ever amended to require more than 60 days’ notice, NJ WARN automatically will adopt that increased notice period.)

A “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 (or 90-day) period of at least 50 full-time employees representing at least 1/3 or more of the full-time employees at the establishment, or at least 500 full-time employees, regardless of the percentage of the establishment’s workforce.

A “transfer of operations” means 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]” of at least 50 full-time employees at the establishment within a 30-day (or 90-day) period.

A “termination of operations” means the “permanent or temporary shutdown of a single establishment, or of one or more facilities or operating units within a single establishment” of at least 50 full-time employees at the establishment within a 30-day (or, in aggregating a series of smaller events, 90-day) period.

A “termination of employment” means the “layoff of an employee” without a commitment to reinstate the employee within six (6) months. It does not include

(i) a voluntary departure or retirement; (ii) a discharge or suspension for misconduct; (iii) any layoff of a seasonal employee; or (iv) any situation where an employer offers the same or equivalent employment to an employee at another location inside New Jersey within 50 miles from the previous site of employment (and on “equivalent” employment terms).

Who Gets The Notice?

Notice is given to: (i) each affected employee; (ii) any “collective bargaining unit” of employees at the establishment; (iii) the Commissioner of Labor and Workforce Development; and (iv) the chief elected official of the municipality where the establishment is located.

What Does The Notice Contain?

The notice content requirements are more onerous than those under federal WARN. The notices must provide: (i) a statement of the number of employees who will be terminated, the date when the covered event will occur, and the dates when each termination of employment will occur; (ii) the reasons for the transfer or termination of operations or mass layoff; (iii) information regarding any employment available to employees at any other establishment operated by the employer, including the benefits and pay of that employment; (iv) a statement of any employee rights regarding wages, severance pay, benefits, pension, or other terms of employment as they relate to the employment termination; (v) disclosure of the amount of severance pay that is payable as a penalty under the statute; and (vi) a detailed statement of the employees’ right to receive various information and aid from the state “response team.”

The New Jersey Commissioner of Labor is developing a notice form that is to be issued within 90 days of the statute’s effective date, *i.e.*, by March 19, 2008.

What Will The State’s “Response Team” Do?

NJ WARN requires the state’s Department of Labor and Workforce Development to establish a “response team” that will provide appropriate information, referral and counseling, as rapidly as possible, to workers affected by closings or mass layoffs. The response team will also: (i) offer to meet with management to discuss available programs to prevent or delay the transfer or termination of operations; (ii) meet on site during work time with employees to provide information, referral, and counseling regarding, among other things, employee rights under the statute, other laws regarding benefits, and available public assistance programs; and (iii) seek to facilitate cooperation between representatives of management and employees to use available public programs that may make it possible to prevent or delay the transfer or termination of operations. Significantly, the employer must provide the response team with sufficient onsite access during work time as the response team deems necessary to fulfill these functions.

What Are The Penalties?

The penalties for non-compliance are significant. While federal WARN provides for a day of backpay and certain benefits for each day of violation, an employer that “provides less than the number of days of notification” required by NJ WARN is liable to each affected full-time employee for “severance pay” equal to one week of pay for each full year of employment. NJ WARN does not expressly reduce its penalty for partial compliance/notice by an employer. In other words, it appears that a notice that is even one day short of full 60 days’ notice could result in the full severance pay penalty. Severance owed under NJ WARN is in addition to any other severance payments to which the employee may be entitled (*e.g.*, through an employment agreement or plan), although any penalties owed pursuant to the federal WARN Act’s

provisions will offset the amount required under the NJ WARN. Similar to federal WARN, there does not appear to be any provision in NJ WARN that would prevent an employer from offsetting contractual severance entitlements by amounts owed under the state statute. NJ WARN has no provision that expressly permits an employer to obtain a release in exchange for statutorily owed severance pay; presumably, the employer would need to provide additional consideration.

How Else Does NJ WARN Differ From Federal WARN?

There are a number of notable ways in which NJ WARN and federal WARN differ. They include:

- the definition of a covered “establishment” excludes facilities that have not yet been operated by the employer for at least three (3) years;
- notice must be given to individual affected union-represented employees, not just to the union;
- certain operational “transfers” are covered, in addition to covered mass layoffs or plant closings;
- the “transfer” exception to an employment loss only applies to in-state transfers;
- there is no express exception for employees technically terminated in connection with the sale of a business and hired by the buyer;
- there are no notice reduction provisions for a “faltering business seeking capital” or in case of “unforeseeable business circumstances”;
- there is no express exception for loss of employment due to strikes or lockouts;

- NJ WARN only exempts a termination of operations (but not a transfer of operations or mass layoff) that is made necessary by a fire, flood, natural disaster, national emergency, act of war, civil disorder or industrial sabotage, or other highly limited circumstances; and
- under a literal reading of the new law, it is arguable that notices must be given to all employees to be terminated in a covered event at least 60 days before the first termination of any employee as part of that event.

Given the number of technical requirements and the potentially draconian severance penalties, employers considering reductions in force, transfers, or closures in New Jersey should pay close attention to this new law.

If you have any questions regarding this Management Alert, please contact the Seyfarth Shaw attorney with whom you work, or any Labor & Employment attorney on our website, www.seyfarth.com.

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