

ERIC NJ WARN Act Litigation: FAQs

**ERIC's Legal Complaint About NJ WARN Act Expansion:
What You Need to Know**

Q: What is the federal WARN Act?

A: The Worker Adjustment and Retraining Notice Act (WARN) is a federal law, enacted by Congress in 1988, which requires employers with 100 or more full-time employees to provide notice to covered employees 60 days in advance of a covered plant closing that would result in the loss of employment for 50 or more employees within a 30-day period. Similarly, employers are also required to provide similar notice in advance of covered mass layoffs that would result in the loss of employment for 500 or more employees, or 50 or more employees if they represent at least 33% of the employer's total workforce, within a 30-day period.

Employees who have been terminated for cause and those that work an average of fewer than 20 hours a week are not counted when determining the number of employees who have lost employment and who are counted toward the WARN notice requirement threshold; however, these employees must still be granted notice if the notice requirements threshold is triggered. An employer that fails to provide the required 60-day notice is liable to each aggravated employee for back pay and benefits for the period of violation, as well as attorney's fees associated with bringing a civil enforcement claim.

Q: Do states have similar mass layoff notice laws?

A: Yes. Since the establishment of the federal WARN Act, many state lawmakers have proposed and established "mini-WARN" laws applicable to mass layoffs implemented by employers within their jurisdictions. While these state WARN laws address the same general issue as the federal WARN Act and are modeled off of its policy standards, individual states have typically added to or altered various aspects of the original federal language to achieve different specific policy goals that are not achieved by the federal WARN Act alone.

To date, 20 states (including New Jersey) have enacted laws pertaining to employer practices during mass layoffs or plant closures. Of these, the majority are qualified as some form of a "mini-WARN" law drawn from the federal WARN Act. The NJ WARN Act currently in effect is among the most robust of these state laws and generally adheres to the standards established by the federal WARN Act.

Q: What did the NJ WARN Act require before it was amended by SB 3170?

A: The NJ WARN Act, or the Millville Dallas Airmotive Plant Job Loss Notification Act (P.L. 2007, c.212, C.34:21-2), is essentially the Garden State’s “mini-WARN” law covering mass layoffs and plant closures. Before it was amended, the NJ WARN Act generally followed the standards of the federal WARN Act on issues such as covered employers, covered employees, employee loss of employment threshold, and required notice period. However, the previous NJ WARN Act has two major differences from its federal forebear, providing that:

- Employers are also required to provide notice in advance of the transfer of a single place of work to another location that would result in the loss of employment for 50 or more full-time New Jersey-based employees within a 30-day period.
- Employers that fail to provide the required 60-day WARN notice are also liable through civil suit to provide affected employees with one week of severance pay for each year that they have been with the employer.

While these standards have been in effect and followed by New Jersey employers for over a decade, the NJ WARN Act was recently amended by state lawmakers to drastically expand several aspects of the original law far beyond what is required by the federal WARN Act or other state laws in this space.

Q: What changes have been made to the NJ WARN Act by recent amendments?

A: On January 21, 2020, New Jersey Governor Chris Murphy signed [Senate Bill 3170](#) into law, drastically expanding many provisions of the existing NJ WARN Act and setting a new and problematic precedent for state “mini-WARN” laws across the country. As it amends the existing NJ WARN Act, SB 3170 would:

- **Lower the threshold for NJ WARN requirements** from the layoff of 500 or more employees to 50 or more employees in a 30-day period, regardless of whether the number of laid-off employees represents 33% or more of the total workforce.
- **Increase the scope of NJ WARN applicability** to include total layoffs across all employment locations within the state of New Jersey instead of limiting the count to layoffs at one particular place of employment.
- **Broaden the standard of covered employees** to include part-time employees in the tally of impacted employees when determining if a WARN notice is required.
- **Broaden the standard for covered employers** 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.”
- **Increase the required notice period** from 60 days to 90 days.

- **Guarantee severance pay** for employees impacted by a mass layoff equal to one week of pay for each year with the employer, whether or not proper notice was given; if proper notice was not given, the required severance pay automatically increases by four weeks.
- **Require state or court approval to allow an employee to waive their rights to severance** under the NJ WARN Act, also impacting employers with policies that require a release of claims as a condition of employer-provided severance.

Q: When does the expanded NJ WARN Act go into effect?

A: The expanded provisions of the NJ WARN Act, as amended by SB 3170, were scheduled to go into effect on July 19, 2020. However, the severe impact that the COVID-19 public health emergency had on New Jersey, as well as the country as a whole, led to the enactment of [Senate Bill 2353](#) in April of 2020. This bill delayed the effective date of the amended NJ WARN Act until 90 days after the end of Governor Murphy’s public health emergency declaration. While the Governor’s declaration was initially made on March 9, 2020, and was set to last for a 30-day period, the Governor has continued to renew the public health emergency declaration each month before it expires.

Most recently, the Governor’s declaration was renewed on August 1, 2020, meaning that the amended NJ WARN Act will currently take effect on November 29, 2020, unless the declaration is subsequently renewed again.

Q: How are employers impacted by the expanded provisions of the NJ WARN Act?

A: The amendments made to the NJ WARN Act drastically broaden the standards with which employers must comply and, therefore, drastically broaden the compliance efforts and costs with which employers must now cope when managing personnel changes across the state. Several of these changes will impact employers by directly requiring a longer notice period for employees, expanding the classes of covered employees, requiring employers to provide severance to impacted employees regardless of notice provided, and forcing employers to coordinate layoffs across the entire state instead of within individual places of employment.

At the same time, these expanded provisions collectively make it impossible for employers to know if and when personnel changes across all statewide places of employment, when counted together, have crossed the 50 employee threshold and triggered NJ WARN requirements without first establishing an elaborate statewide administrative tracking system that would allow them to do so. While such an employer mechanism is not expressly mandated by the language of the amended NJ WARN Act, it is made unavoidably necessary by the compliance requirements that are imposed on employers within the state, essentially amounting to an indirect requirement. Forcing employers to create such an administrative system in order to comply with the amended NJ WARN Act, therefore, represents an attempted application of New Jersey state laws to affect employers’ employee benefits administration practices, which are supposed to be expressly and solely governed by the federal Employee Retirement Income Security Act of 1974 (ERISA).

Q: Why is ERIC seeking legal relief from the State of New Jersey?

A: ERIC is seeking legal relief from the State of New Jersey because the amended NJ WARN Act violates federal ERISA law. Since its enactment in 1974, ERISA has provided a uniform set of rules and regulations for the design and administration of certain employee retirement and welfare benefit plans, including severance plans. The uniform national standards created by ERISA have proven critical for large, multistate employers that would otherwise be subject to a patchwork of state and local employee benefits management ordinances as well as employees across the country, the value of whose retirement and welfare benefits would otherwise also be subject to the ordinances of their state or locality.

As part of our ongoing efforts to uphold nationwide ERISA preemption of state and local laws that pose to violate its legal primacy, ERIC is challenging the legal validity of the amended NJ WARN Act and requesting an injunction against its enforcement until our underlying legal challenge is resolved. Additionally, it is critical that such an overreaching state law must be struck down before other states begin to propose and consider similarly expansive laws concerning mass layoffs and employee severance, which also threaten to violate ERISA law.

Q: Why does ERIC believe the expanded NJ WARN Act violates ERISA?

A: Federal ERISA law expressly and solely governs the design and administration of employer-operated employee benefit programs (including severance benefit programs) to the exclusion of state laws that attempt to do so. In this case, New Jersey lawmakers have overreached their jurisdiction and have enacted a law that attempts to modify aspects of the employer-operated programs that ERISA is supposed to alone control. The amended NJ WARN Act violates federal ERISA law by requiring employers to create an additional statewide tracking and management mechanism within their employee benefits administration system, or by requiring employers to create an ongoing administrative system to provide the severance benefits. Employers are not simply required to provide an additional benefit to their employees but must also coordinate an ongoing administrative system in order to determine when benefits are warranted and when proper notice must be given. Such an interference with employer benefits administration is indicative of a state violation of ERISA preemption.

Q: Why is ERIC pursuing a legal challenge of the State of New Jersey instead of seeking legislative corrections to the amended NJ WARN Act?

A: Many organizations expressed their concerns with the legislation amending the NJ WARN Act as it was being considered by the New Jersey legislature. Now that the amended NJ WARN Act has been enacted and has an effective date that is approaching, the only way to prevent its expansive provisions from impacting employers and the ERISA plans that they operate is to secure a legal ruling that invalidates the law as a violation of ERISA law. It is critical to address this issue of federal ERISA preemption now, before these amendments go into effect and other states propose similar legislative policies modeled off of the amended NJ WARN Act, giving rise to a more critical need for legal action to protect ERISA preemption and employers with a nationwide workforce.

Q: Does ERIC support mass layoff notice laws generally?

A: ERIC supports the traditional protections that are provided to employees by the federal WARN Act, generally followed by current state “mini-WARN” laws, and incorporated into the voluntary layoff and severance policies of large, multistate employers across the country. However, the drastic expansion of employer requirements created by the amended NJ WARN Act steps far beyond these traditional protections, forces employers to restructure their statewide and national employee benefits programs, and ultimately violates the federal ERISA law that was established to ensure the uniform administration of employee benefits programs across the country. Because of this reality, ERIC is strongly opposed to the expanded provisions of the amended NJ WARN Act.

Q: Under what circumstances is an employee counted toward the total layoff threshold for NJ WARN requirements?

A: Under the amended NJ WARN Act, all employees (whether full- or part-time) are terminated via layoffs, closure of operations, or a transfer of operations more than 50-miles away are counted toward the total layoff threshold. However, employees who are terminated for misconduct, voluntarily resign, or retire are not counted towards the threshold.

Q: Are franchises or their employees impacted by the expanded NJ WARN requirements?

A: While there is nothing in the NJ WARN Act specifically mentioning franchises, the amended NJ WARN Act’s broader definition of covered employers could implicate franchises that indirectly employ workers in New Jersey, depending on the facts of the franchisor/franchisee relationship.

Q: Are union employees or employees covered by a collective bargaining agreement covered by NJ WARN requirements?

A: The NJ WARN Act applies to union employees both before and after the amendments. Specifically, the Act states that notice of termination must be provided to “any collective bargaining units of employees.” Moreover, in the current version of the Act, it states that any severance pay required must be in addition to “severance pay provided by the employer pursuant to a collective bargaining agreement.” In the amended version, the employer must make severance payments pursuant to the Act or pursuant to a collective bargaining agreement . . . whichever is greater.”