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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

THE ERISA INDUSTRY COMMITTEE, **Plaintiff,** **v.** **ROBERT ASARO-ANGELO, in his official capacity as THE COMMISSIONER OF THE NEW JERSEY DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT,** **Defendant.**	Civil Action No. 3:20-cv-10094 **MOTION DATE: JUNE 21, 2021**

NOTICE OF MOTION FOR SUMMARY JUDGMENT

PLEASE TAKE NOTICE that, on June 21, 2021, or as soon thereafter as it may be heard, Plaintiff The ERISA Industry Committee ("ERIC"), by and through

its attorneys, Morgan, Lewis & Bockius LLP, will move under Federal Rule of Civil Procedure 56 for an Order granting Summary Judgment in favor of ERIC.

PLEASE TAKE FURTHER NOTICE that, in support of this Motion, ERIC will rely upon the accompanying Brief and Rule 56.1 Statement of Undisputed Material Facts. ERIC also submits for the Court's consideration a proposed form of Order.

Dated: May 19, 2021

Respectfully submitted,

s/ Richard G. Rosenblatt

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CERTIFICATE OF SERVICE

I hereby certify that, on the date indicated herein, the Notice of Motion and accompanying Brief, Rule 56.1 Statement of Undisputed Material Facts, and Proposed Order were electronically filed on the CM/ECF system and therefore served on all counsel of record.

Dated: May 19, 2021

s/ *Richard G. Rosenblatt*
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PLAINTIFF'S LOCAL RULE 56.1 STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, and Rule 56.1 of the Local Civil Rules of the United States District Court for the District of New Jersey ("Local Rules"), Plaintiff The ERISA Industry Committee ("ERIC")

respectfully submits the following statement of material facts as to which it contends there is no genuine issue to be tried in support of its Motion for Summary Judgment:

1. On January 21, 2020, Governor Murphy signed into law Senate Bill 3170 ("S.B. 3170"), amending the New Jersey WARN Act. 2019 N.J. Sess. Law Serv. Ch. 423 (Senate Bill No. 3170) ("S.B. 3170"), codified as N.J. Stat. Ann. §§ 34:21-1 et seq. ("the NJ WARN Act").

2. Prior to the amendments, the NJ WARN Act required employers with 100 or more full-time employees to provide 60 days' notice to affected full-time employees in the event of a "mass layoff" or "transfer or termination of operations," and imposed certain penalties for failure to comply. N.J. Rev. Stat. § 34:21-1 (pre-2020 Amendment).

3. Previously, employers covered under the NJ WARN Act were only required to make payments to certain employees as a penalty if they failed to provide the required amount of notice of termination or layoff. *Id.* § 34:21-2. Under the amended law, however, an employer conducting a "mass layoff" or a "transfer" or "termination" of operations must pay each affected employee one week of severance for each full year of his/her employment, even if the employer provides sufficient and timely notice. N.J. Stat. Ann. § 34:21-2.

4. If affected employees are entitled to severance under a collective bargaining agreement "or for any other reason," the employer is required to pay either the statutorily mandated severance or the severance provided for such "other reason," whichever is greater. *Id*.

5. The term "mass layoff" was previously defined as the termination of employment within any 30-day period (or 90-day period within which two or more group terminations can potentially be aggregated) of either (1) 500 or more full-time employees at an establishment, or (2) 50 or more full-time employees comprising at least 33% of the full-time employees at an establishment. N.J. Rev. Stat. § 34:21-1 (pre-2020 Amendment).

6. The amendments remove the 500-employee and 33% requirements, and count both employees "at" an establishment and employees "reporting to" an establishment. Accordingly, 50 or more qualifying terminations will trigger notice and severance requirements regardless of what percentage of the workforce that may constitute, and regardless of whether those employees work in one location, are at different locations throughout the State, or "report[] to" a location in New Jersey. N.J. Stat. Ann. § 34:21-1.

7. Previously, the NJ WARN Act defined "establishment" as either a single location operated for longer than three years or a group of *contiguous* such locations, such as a group of buildings forming an office park. N.J. Rev. Stat. §

34:21-1 (pre-2020 Amendment). The amendments remove "contiguous" from this definition, meaning that *all* of an employer's facilities within New Jersey are considered one aggregated "establishment," with only temporary construction sites and operations in effect for three years or less being excluded. N.J. Stat. Ann. § 34:21-1.

8. Before the amendments, the separation of "part-time" employees (working fewer than 20 hours per week on average or employed for fewer than 6 of the preceding 12 months) was not counted when calculating whether a New Jersey WARN event had occurred. N.J. Rev. Stat. § 34:21-2 (pre-2020 Amendment).

9. The amendments remove the distinction between "full-time" and "part-time" employees, making it even more likely that "mass layoff" triggering of the Act will occur. *Id.* Indeed, now all employees (regardless of their hours or the length of their employment) count toward NJ WARN trigger thresholds, and if the Act is triggered, all employees must receive notice and severance. N.J. Rev. Stat. § 34:21-2.

10. Furthermore, the NJ WARN Act, as amended, now covers all employers with 100 or more employees (including employees outside the state), regardless of how many are "full time" or "part time"; previously only those employers with 100 *full-time* employees were covered. *Id.*

11. Before S.B. 3170, the NJ WARN Act required covered employers to provide 60 days' written notice to affected employees (and any collective bargaining units or other employee representatives) and certain state and local government officials of a mass layoff, transfer of operations, or termination of operations. N.J. Rev. Stat. § 34:21-2 (pre-2020 Amendment).

12. The new law increases the required period of advance notice to 90 days for covered employers. If this increased notice requirement is not met, employers must add 4 weeks of severance pay for each affected employee. N.J. Rev. Stat. § 34:21-2.

13. On March 9, 2020, the Governor issued Executive Order Number 103, declaring a Public Health Emergency and a State of Emergency throughout the State of New Jersey in response to Coronavirus disease 2019 ("COVID-19"). By its terms, Executive Order Number 103 "shall remain in effect until such time as it is determined by [the Governor] that an emergency no longer exists." *See* Executive Order 103.

14. Pursuant to N.J.S.A. 26:13-3(b), Public Health Emergencies declared by the Governor automatically terminate after 30 days.

15. On April 7, 2020, the Governor issued Executive Order Number 119, declaring that the Public Health Emergency declared in Executive Order Number

103 continues to exist throughout the State of New Jersey. *See* Executive Order 119.

16. On April 14, 2020, the Governor signed Senate Bill 2353, 2020 NJ Sess. Law, Ch. 22, amending the definition of "mass layoff" under S.B. 3170 to exclude, among others, "a mass layoff made necessary because of a . . . national emergency" and amending the effective date of S.B. 3170. Instead of being effective on July 19, 2020, S.B. 3170 "shall take effect on the 90th day next following the termination of Executive Order Number 103 of 2020."

17. Since then, Governor Murphy has extended Executive Order Number 103 several times, most recently on May 14, 2021. Executive Order No. 240.

18. The current effective date of S.B. 3170 is September 11, 2021.

Dated: May 19, 2021

Respectfully submitted,

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PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF THE MOTION FOR SUMMARY JUDGMENT

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Plaintiff The ERISA Industry Committee ("ERIC") respectfully submits this Memorandum of Law in support of its Motion for Summary Judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure.

I. PRELIMINARY STATEMENT

ERIC brings this action seeking a declaration that the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.* ("ERISA"), expressly preempts New Jersey Senate Bill No. 3170 ("S.B. 3170"), which amends the Millville Dallas Airmotive Plant Job Loss Notification Act (a/k/a "NJ WARN Act"),[1] as well as injunctive relief to halt future enforcement of the S.B. 3170 amendments to the NJ WARN Act on ERISA preemption grounds.

Section 514(a) of ERISA, 29 U.S.C. § 1144(a), provides that it "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." Congress enacted this preemption provision with "the goal . . . to minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government." *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142 (1990). Thus, a state law will be preempted by ERISA if it requires employers to create or

[1] The "WARN Act" nickname is a reference to parallel federal legislation called the Worker Adjustment Retraining and Notification Act ("WARN Act"), 29 U.S.C. §§ 2101 et seq.

modify an "employee benefit plan," even if the law does not conflict with ERISA's own requirements.

The amended NJ WARN Act requires (among other things) that covered employers provide severance pay to full- and part-time employees who incur a *qualifying* severance event as part of a "mass layoff," defined as 50 or more employees within the State of New Jersey. This law is preempted because severance pay obligations are governed by ERISA wherever they require any discretion or ongoing administration. *E.g.*, *Pane v. RCA Corp.*, 868 F.2d 631, 633-35 (3d Cir. 1989) (contractual requirements to pay severance are governed by ERISA where they require any ongoing "administrative scheme"); *Simas v. Quaker Fabric Corp. of Fall River*, 6 F.3d 849, 852 (1st Cir. 1993) (ERISA preempts Massachusetts statute requiring severance pay). Here, the amended NJ WARN Act creates severance obligations that are subject to an ongoing administrative scheme because:

- Employer discretion is necessary to determine who is eligible for severance benefits. Employees who are terminated for misconduct, who retire or voluntarily leave their employment, or who are offered similar employment with the employer within New Jersey and within 50 miles of their existing work location, are not entitled to severance under the amended NJ WARN Act. Employers thus have to consider, as to each individual employee, whether the employee qualifies for severance pay pursuant to the Act.
- Employers must establish an ongoing administrative program to continuously monitor all New Jersey terminations to determine when severance benefits must be paid. Specifically, given the amendments'

new definition of "mass layoff," employers must monitor all of their terminations in New Jersey, as well as employees "reporting to" a New Jersey location, and pay severance benefits whenever 50 or more such employees are involuntarily terminated (without cause, etc.) during any 30-day period.

- By reducing the number of employee terminations that trigger the statutory requirements from 500 to 50, the amended New Jersey WARN Act makes it much more likely for larger employers, including ERIC member companies that individually have at least 10,000 employees, to have multiple "mass layoffs" in a year and regular "mass layoffs" in successive years. This further exemplifies the ongoing administrative scheme required of employers to comply with the amended law.

- Defining "establishment" with reference to the entire state instead of a single facility requires employers to set up new systems and operations across different facilities within the state in order to comply with the amended statute.

As such, S.B. 3170's amendments to the NJ WARN Act are preempted by ERISA.

For these reasons, which are further explained below, ERIC respectfully requests that the Court grant this motion for summary judgment.

II. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND[2]

On January 21, 2020, Governor Phil Murphy signed into law S.B. 3170, amending the NJ WARN Act. 2019 N.J. Sess. Law Serv. Ch. 423, codified as N.J. Stat. Ann. §§ 34:21-1 *et seq.* Before the amendments, the NJ WARN Act required employers with 100 or more full-time employees to provide 60 days' notice to

[2] A complete statement of material facts not in dispute is set forth separately pursuant to Local Rule 56.1. *See* Plaintiff's Rule 56.1 Statement of Material Facts Not in Dispute in Support of its Motion for Summary Judgment. ERIC provides a summary of those facts herein for the Court's convenience.

affected full-time employees in the event of a "mass layoff" or "transfer or termination of operations," and imposed certain penalties for failure to comply. N.J. Rev. Stat. § 34:21-1 (pre-2020 Amendment). S.B. 3170's amendments made sweeping changes to the Act.

A. The Amended NJ WARN Act Requires Employers To Pay Severance When Employees Are Terminated Under Certain Circumstances.

Under the amended NJ WARN Act, an employer conducting a "mass layoff" or a "transfer" or "termination" of operations must give severance pay to an affected employee who incurs a "termination of employment," regardless of whether timely and proper notice of the termination is provided.[3] N.J. Stat. Ann. § 34:21-1. Not all terminations of employment qualify as a "termination of employment" under the statute, however, even if they are part of a "mass layoff," "transfer," or "termination of operations." Rather, a "termination of employment" is defined to mean a "layoff" and does not include an employee whose termination of employment is due to "voluntary departure," "retirement," or a "discharge or suspension for misconduct," among other things. As a result, to determine whether each and every employee's termination is a "termination of employment" under the

[3] Before the 2020 amendments, the NJ WARN Act did not require employers to give severance pay to employees. Instead, monetary payments were only required as a penalty if an employer failed to provide a required notice under the NJ WARN Act.

statute, an employer needs to evaluate (a) whether there was a mass layoff, transfer or termination of operations, and (b) whether the employee's employment ended because of layoff, or because of misconduct, retirement, or voluntary termination.

The amount of severance pay an employer is required to pay is "one week of pay for each full year of employment." N.J. Stat. Ann. § 34:21-2. An additional four weeks of severance pay must be made if any of the covered employees did not receive the requisite 90 days' notice of their termination. *Id.* The rate of pay for purposes of the calculation is set by statute based on "the average regular rate of compensation received during the employee's last three years of employment with the employer or the final regular rate of compensation paid to the employee, whichever rate is higher." *Id*. Thus, employers must keep compensation records for their employees going back at least three years, and once employers determine that severance payments must be made pursuant to the amended NJ WARN Act, they must review those records for each affected employee to calculate his or her proper severance payment rate.

The amended law also made other changes that substantially increase the scope of the statute and require employers to implement ongoing administrative schemes to ensure their compliance with the law:

1. The amended NJ WARN Act significantly expands the "Mass Layoff" definition.

Before the amendments, the term "mass layoff" generally was defined as the termination of employment within any 30-day period of either (1) 500 or more full-time employees at an establishment, or (2) 50 or more full-time employees comprising at least 33% of the full-time employees at an establishment. N.J. Rev. Stat. § 34:21-1 (pre-2020 Amendment). The amendments substantially broaden the definition of "mass layoff" to include any "termination of employment" of 50 (not 500) or more full *or* part time employees, without regard to whether the termination of employment impacts 1% or 33% of the employees. In other words, employers will need to implement an administrative scheme to determine whenever there are 50 or more qualifying terminations that would trigger severance pay requirements, regardless of what percentage of the workforce that may constitute. N.J. Stat. Ann. § 34:21-1.

2. The amended NJ WARN Act significantly expands the "Establishment" definition.

Before the amendments, the NJ WARN Act analysis was site-specific and conducted separately for each different "establishment," which was defined as either a single location operated for longer than three years or a group of *contiguous* such locations, such as a group of buildings forming an office park. N.J. Rev. Stat. § 34:21-1 (pre-2020 Amendment). The amendments remove

"contiguous" from this definition, meaning that *all* of an employer's facilities within New Jersey are considered one aggregated "establishment," with only temporary construction sites and operations in effect for three years or less being excluded. N.J. Rev. Stat. § 34:21-1. This adds more administrative burdens on employers because they will need to track and aggregate upcoming terminations throughout the state to determine if severance payments must be made.

3. The amended NJ WARN Act significantly expands the scope of covered employees.

Before the amendments, "part-time" employees were not counted when calculating whether an NJ WARN event had occurred. The amendments remove the distinction between "full-time" and "part-time" employees, making it even more likely that "mass layoff" triggering of the Act will occur. *Id.*

4. The amended NJ WARN Act significantly expands the scope of covered employers.

Before the amendments, only those employers with 100 *full-time* employees were covered. N.J. Rev. Stat. § 34:21-1 (pre-2020 Amendment). The Amended NJ WARN Act now covers all employers with 100 or more employees (including employees outside the state), regardless of how many are "full time" or "part time." The amendments also expand the definition of "employer" by adding the following:

> [A]ny individual, partnership, associate, 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.

N.J. Rev. Stat. § 34:21-1. This expanded definition suggests that large companies with multiple subsidiaries employing individuals in New Jersey could be covered by the amended NJ WARN Act, even if the individual subsidiaries do not employ enough individuals on their own.

B. The Effective Date Of The Amended NJ WARN Act Is Subject To The Pending State Of Emergency.

The NJ WARN Act amendments were scheduled to become effective on July 19, 2020. 2019 N.J. Sess. Law Serv. Ch. 423 (effective on the 180th day after enactment on January 21, 2020). On April 14, 2020, however, Governor Murphy signed into law further amendments to the NJ WARN Act in light of the COVID-19 pandemic. Those amendments (1) exclude layoffs caused by any "national emergency" (among other causes such as fire, flood, or natural disaster) from the definition of "mass layoff," and (2) delay the effective date of the prior amendments until 90 days after the Governor's declaration of emergency expires. 2020 N.J. Sess. Law Serv. Ch. 22 (Senate Bill No. 2353). Every thirty days (approximately), the Governor has extended the declaration of emergency, which delays the effective date of the amendments in thirty-day increments. The

Governor's executive order declaring a state of emergency is scheduled to expire on June 13, 2021, which would mean that the amended NJ WARN Act will become effective on September 11, 2021 unless the state of emergency is extended again.

III. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *See* Fed. R. Civ. P. 56(c). A factual dispute is genuine only if there is "a sufficient evidentiary basis on which a reasonable jury could find for the non-moving party," and it is material only if it has the ability to "affect the outcome of the suit under governing law." *Kaucher v. Cty. of Bucks*, 455 F.3d 418, 423 (3d Cir. 2006); *see also Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986).

Where the movant satisfied its initial burden of showing the basis for its motion, the non-moving party must point to record evidence creating a genuine issue of material fact. *Anderson,* 477 U.S. at 256. The party "opposing a properly supported motion for summary judgment may not rest upon mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial." *Id*. "[C]onjecture and speculation will not create a

genuine issue of material fact sufficient to withstand the grant of summary judgment." *Wiest v. Tyco Elecs. Corp*., 812 F.3d 319, 328 (3d Cir. 2016); *Kohn v. AT & T Corp*., 58 F. Supp. 2d 393, 411 (D.N.J. 1999) ("[U]nsupported, conclusory allegations . . . do not create a genuine issue of material fact.").

In the present case, the dispositive issues before the Court are purely legal. Thus, the case is ripe for decision on summary judgment. *See, e.g.*, *Liberty Mut. Ins. Co. v. Donegan*, 746 F.3d 497 (2d Cir. 2014), *aff'd sub nom. Gobeille v. Liberty Mut. Ins. Co*., 136 S. Ct. 936 (2016) (reversing district court's grant of summary judgment in favor of the State of Vermont and holding that a law requiring the reporting of health insurance claims data was preempted by ERISA, and remanding with instructions to enter summary judgment for plaintiff because the case involved a legal dispute with no need for trial); *Simas*, 6 F.3d at 852 (affirming the district court's grant of summary judgment finding ERISA preemption of a Massachusetts statute requiring severance pay); *NGS Am., Inc. v. Barnes*, 998 F.2d 296, 297 (5th Cir. 1993) (affirming a district court's summary judgment order holding that ERISA preempted a Texas statute).

IV. ARGUMENT

A. The Scope Of ERISA's Preemption Clause Is Broad By Design To Preclude All State Laws That Relate To Employee Benefit Plans.

Congress enacted ERISA to regulate any employee benefit plan established or maintained by a private employer or employee organization nationwide. 29

U.S.C. § 1003(a). However, "ERISA does not guarantee substantive benefits." *Gobeille*, 136 S. Ct. at 943. Rather, ERISA leaves employers free, "for any reason at any time, to adopt, modify, or terminate [benefit] plans." *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995).

To encourage employers to adopt employee benefit plans and provide benefits to employees, Congress sought to create a system "that is [not] so complex that administrative costs, or litigation expenses, unduly discourage employers from offering plans in the first place." *Conkright v. Frommert*, 559 U.S. 506, 517 (2010) (brackets in original). That is, "ERISA 'induc[es] employers to offer benefits by assuring a predictable set of liabilities, under *uniform* standards of primary conduct and a *uniform* regime of ultimate remedial orders and awards when a violation has occurred.'" *Id.* (emphasis added) (quoting *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 379 (2002)).

With this purpose in mind, Congress enacted ERISA's preemption provision, which states that "the provisions of [ERISA] . . . shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). Congress enacted this provision with "the goal . . . to minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government." *Ingersoll-Rand*, 498 U.S. at 142. As the Supreme Court has explained,

"[r]equiring ERISA administrators to master the relevant laws of 50 States and to contend with litigation would undermine the congressional goal of 'minimiz[ing] the administrative and financial burden[s]' on plan administrators – burdens ultimately borne by the beneficiaries." *Gobeille*, 136 S. Ct. at 944 (quoting *Egelhoff v. Egelhoff*, 532 U.S. 141, 149-50 (2001)); *see also Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981) (ERISA's preemption provision is intended to make the regulation of such plans "exclusively a federal concern").

The Supreme Court has described the language of ERISA's preemption provision as "conspicuous for its breadth," *FMC Corp. v. Holliday*, 498 U.S. 52, 58 (1990), and "deliberatively expansive," *Cal. Div. of Labor Standards Enf't v. Dillingham Constr., N.A.*, 519 U.S. 316, 324-25 (1997). This Court has also recognized the broad scope of ERISA's preemption clause. *See Riordan v. Optum & Oxford Health Plan*, No. 3:17-cv-6472-BRM-TJB, 2018 WL 3105426, at *3 (D.N.J. June 25, 2018) (Martinotti, J.) (granting motion to dismiss state law claims pursuant to ERISA preemption and holding that "[t]he Supreme Court has interpreted 'relate to' broadly").

Any state law may "relate to any employee benefit plan" and be preempted by ERISA "if it has a connection with or reference to such a plan." *Id.* (citing *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47 (1987)). This is true "even [if the law] does not conflict with ERISA's own requirements and represents an otherwise

legitimate state effort to impose or broaden benefits for employees." *See Simas*, 6 F.3d at 852 (citing *D.C. v. Greater Wash. Bd. of Trade*, 113 S. Ct. 580, 583 (1992), and *Mass. v. Morash*, 109 S.Ct. 1668, 1673 (1989)). Moreover, "a state statute that obligates an employer to establish an employee benefit plan is itself preempted even though ERISA itself neither mandates nor forbids the creation of plans." *Id.*

B. The Amended NJ WARN Act Is Preempted By ERISA Because It Requires Employers To Establish Or Modify ERISA-Governed Severance Plans.

The amended NJ WARN Act is precisely the type of state law that ERISA seeks to preempt because it disrupts the uniform body of federal law governing employee benefit plans. The amendments require employers to implement ongoing administrative schemes to evaluate whether and when severance benefits are owed, to whom, and for how much. That requires employers either to adopt new severance plans for their New Jersey employees and operations or to modify their existing severance plans specifically for New Jersey employees and operations. Either way, ERISA's preemption provision prevents New Jersey from forcing employers to implement severance plans in this way, and therefore, the amended NJ WARN Act is preempted.

1. ERISA preempts state laws that compel employers to provide severance benefits requiring ongoing administrative programs.

Severance plans are generally considered employee welfare benefit plans governed by ERISA. *Mass. v. Morash*, 490 U.S. 107, 116 (1989) ("[P]lans to pay employees severance benefits, which are payable only upon termination of employment, are employee welfare benefit plans within the meaning of the Act." (emphasis omitted)); *Koenig v. Automatic Data Processing*, 156 F. App'x 461, 466 (3d Cir. 2005) ("Severance pay plans are classified under [ERISA] as welfare benefit plans"). However, for a severance plan to be governed by ERISA and, in turn, trigger ERISA's preemption clause, it must require an ongoing administrative program or scheme. *See, e.g.*, *Pane*, 868 F.2d at 633-35 (finding that a severance plan was subject to ERISA because implementing that plan required an "administrative scheme"). In contrast, a severance benefit payable upon a one-time plant closing could be exempt from ERISA, and not trigger ERISA preemption, if it does not require an ongoing administrative program. *See Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 11-12 (1987).

This distinction governs the scope of ERISA preemption as applied to state laws requiring severance pay. In *Fort Halifax*, the Supreme Court ruled that ERISA did *not* preempt a Maine statute that simply required employers to make severance payments to employees terminated in a one-time plant closing. 482 U.S.

at 1-4. Although the Court recognized that severance plans could be preempted by ERISA, the Maine law did not require "an ongoing administrative scheme whatsoever to meet the employer's obligations" under that law. *Id.* at 12. "The employer assumes no responsibility to pay benefits on a regular basis, and thus faces no periodic demands on its assets that create a need for financial coordination and control." *Id.* Instead, the law only required "a one-time, lump-sum payment triggered by a *single* event," indeed with "no administrative scheme whatsoever to meet the employer's obligation." *Id.* (emphasis added).

By the same token, state severance requirements that do require employers to establish an ongoing administrative scheme effectively do mandate severance plans and are thus preempted. The First Circuit reached that conclusion in *Simas*, holding that ERISA preempted a Massachusetts statute requiring the payment of severance benefits. 6 F.3d at 849. That state law required employers to pay severance benefits to employees terminated within a certain period following a corporate takeover. In particular, employers were required to make severance payments – based on weekly compensation and years of service – to employees who were terminated within 24 months after a "transfer of control" of their employer, provided that the employees were not terminated for cause. *Id.* at 851-52. Applying *Fort Halifax*, the First Circuit held that the law was preempted by ERISA because it required the type of "ongoing administrative [scheme]" that

gives rise to an ERISA-covered plan. *Id.* at 853-55. What distinguished the Massachusetts law in *Simas* from the Maine law in *Fort Halifax* was how the Massachusetts statute imposed administrative burdens that the Maine statute did not. Specifically, the First Circuit noted:

> The Maine statute [in *Fort Halifax*] starts and ends with a single, once and for all event, the plant closing, after which all payments are due. . . .
>
> Thus, the Maine employer on closing its plant need do little more than write a check to each three-year employee. The Massachusetts employer, by contrast, needs some ongoing administrative mechanism for determining, as to each employee discharged within two years after the takeover, whether the employee was discharged within the several time frames fixed by the tin parachute statute and whether the employee was discharged for cause or is otherwise ineligible for unemployment compensation under Massachusetts law. ***The "for cause" determination, in particular, is likely to provoke controversy and call for judgments based on information well beyond the employee's date of hiring and termination.***

Id. at 853 (emphasis added).

The Third Circuit has taken the same basic approach: severance benefit plans must be governed by ERISA, as opposed to any state laws, when they require an ongoing "administrative scheme." *See Pane,* 868 F.2d at 633-35. The plaintiff in *Pane* brought claims under New Jersey law, seeking severance benefits. *Id.* The district court dismissed those claims, holding that the employer's severance plan had to be governed exclusively by ERISA. *Pane v. RCA Corp*., 667 F. Supp. 168, 171 (D.N.J. 1987), *aff'd*, 868 F.2d 631 (3d Cir. 1989). Specifically, the district court distinguished the one-time-only requirement in *Fort Halifax* and

found that when "an employee is entitled to [severance] benefits only if a 'triggering event' occurs, such as termination of an employee for reasons other than for cause[,] . . . the circumstances of each employee's termination must be analyzed in light of these criteria, and an ongoing administrative system constituting an ERISA plan exists." *Id.* at 170-71. The Third Circuit affirmed the district court's holding and held that the severance plan is covered by ERISA because "[i]t required an administrative scheme." *Pane*, 868 F.2d at 633-35.

Other courts have also found that severance plans must be governed by ERISA when the plans require an administrative scheme that gives an employer discretion to provide or withhold benefits. *See, e.g.*, *Bogue v. Ampex Corp.*, 976 F.2d 1319, 1323 (9th Cir. 1992) (citing *Pane* and holding that a severance benefit plan was covered by ERISA because it allowed employer to withhold benefits for employees terminated for cause or for employees offered a "substantially equivalent" position, which required an "administrative scheme"); *Makwana v. Express Scripts, Inc.*, No. 14-7096, 2015 WL 4078048, at *14 (D.N.J. July 6, 2015) (holding that an employer's severance program was an ERISA plan (not just a payroll practice) because it required the employer to analyze whether employees were terminated for cause); *Darlin v. Consol. Rail Corp.*, 93 F. Supp. 2d 599, 601 (E.D. Pa. 2000) (same); *Zgrablich v. Cardone Indus., Inc.*, No. CV 15-4665, 2016 WL 427360, at *5-6 (E.D. Pa. Feb. 3, 2016) (same); *Lawson v. Consol. Rail Corp.*,

No. CIV. A. 97-7206, 1999 WL 171431, at *3 (E.D. Pa. Mar. 29, 1999), *aff'd*, 208 F.3d 206 (3d Cir. 2000) (severance plan was an ERISA plan because it required an administrative scheme to evaluate circumstances of employee terminations); *Whalen v. Revlon, Inc.*, No. CIV. 89-4373 (CSF), 1991 WL 10019, at *3 (D.N.J. Jan. 22, 1991) (finding severance plan subject to ERISA because it "involved ongoing administration of a severance plan whose benefits were payable in the event of numerous occurrences").

2. The amended NJ WARN Act compels employers to establish burdensome ongoing administrative programs to pay severance benefits.

Under *Fort Halifax*, *Simas*, and the Third Circuit's decision in *Pane*, two factors help determine whether the payment of severance benefits requires an ongoing administrative program: (1) whether an employer must exercise managerial discretion to determine eligibility and the amount of severance benefits; and (2) whether the employer has an ongoing commitment to provide those benefits. *See Simas*, 6 F.3d at 851-55; *Pane*, 868 F.2d at 635 (holding that severance plan giving managers discretion to select participants over a lengthy period required an administrative scheme); *Bogue*, 976 F.2d at 1323 (holding that a severance plan involving a "case-by-case, discretionary application of its terms" over an indefinite period required an administrative scheme). Under this framework, it is clear that the amended NJ WARN Act mandates the creation of

severance pay plans that require ongoing administrative schemes or the modification of existing ERISA-governed severance plans.

a. *The amended NJ WARN Act requires employers to exercise managerial discretion to determine severance benefits.*

First, discretion is necessary to determine whether an individual employee is eligible for severance pay *and* whether severance pay must be paid at all under the amended NJ WARN Act. This is because the amended law exempts employees who are terminated for misconduct, retire, or voluntarily resign from the severance pay requirement. It also exempts terminations of "seasonal employees" and employees who are involuntarily terminated without cause, but offered "the same employment or a position with equivalent status" within 50 miles of their previous work establishment and within New Jersey. N.J. Stat. Ann. § 34:21-1.

Entire lawsuits have been litigated under ERISA about whether an employee's termination of employment was voluntary or involuntary, whether the termination was for cause or not, or whether a "similar job" was offered after an involuntary termination. *See, e.g.*, *Darlin*, 93 F. Supp. 2d at 601 (holding that a severance plan was governed by ERISA because "plan eligibility is restricted to employees who 'are terminated (or constructively terminated) without cause'—a standard involving the use of subjective discretion by the plan administrator," in a dispute over whether the plaintiff was entitled to severance benefits); *Fresolone v.*

Fiserv, Inc., No. 12-3312, 2013 WL 135111, at *1 (D.N.J. Jan. 9, 2013) (denying motion to dismiss in a case where plaintiff brought a claim under ERISA for severance benefits that hinged on whether he was terminated for cause); *Mallon v. Tr. Co. of N.J. Severance Pay Plan*, 282 F. App'x 991, 996 (3d Cir. 2008) (upholding plan administrator's determination that employee's alleged constructive discharge was not an "involuntary discharge" under the plan, but noting the plaintiffs could have claimed benefits if they refused the newly merged company's offer of employment); *Otero Carrasquillo v. Pharmacia Corp*., 466 F.3d 13, 16 (1st Cir. 2006) (assessing whether a rejected offer of employment was for a "comparable position"); *Yochum v. Barnett Banks, Inc. Severance Pay Plan*, 234 F.3d 541, 545–47 (11th Cir. 2000) (determining whether a rejected written offer of employment was "comparable employment" under the terms of a severance plan).

Many courts have held that when employers have to determine whether a termination is for cause or without cause for purposes of severance eligibility, that requires an administrative scheme implicating ERISA preemption. *See, e.g.*, *Simas*, 6 F.3d at 851-55; *Makwana*, 2015 WL 4078048, at *14 (holding that an employer's severance program was an ERISA plan because only employees terminated without cause were eligible for severance); *Darlin*, 93 F. Supp. 2d at 601 (same); *Lempa v. Rohm & Haas Co*., No. 05-cv-0985, 2007 WL 878496, at *3 (E.D. Pa. Mar. 20, 2007) (determining "whether an employee was terminated other

than for cause … militates towards the applicability of ERISA"); *Cole v. Champion Enters., Inc.*, No. 1:05-00415, 2005 WL 8167130, at *5 (M.D.N.C. Nov. 1, 2005) (individualized determination of eligibility and the exercise of managerial discretion weigh in favor of finding that the agreement is an ERISA plan). As discussed already, in *Simas*, the First Circuit found that the Massachusetts statute was distinguishable from the Maine statute in *Fort Halifax* primarily because the Massachusetts statute exempted employees terminated for cause, whereas the Maine statute did not. *Simas*, 6 F.3d at 853-54. The same is true here of the NJ WARN Act.

b. *The amended NJ WARN Act requires employers to exercise this managerial discretion on an ongoing and indefinite basis.*

Second, given the new definitions of "mass layoff" and "establishment" in the amended NJ WARN Act, employers will need to monitor all of their terminations in New Jersey as well as terminations of employees "reporting to" a New Jersey location, then pay severance benefits whenever 50 or more employees at or reporting to any location within the state are terminated for qualifying reasons during any 30-day period. This analysis, in turn, intersects with the evaluation of the circumstances of each individual termination. For example, if an employer terminates a total of 55 employees in a 30-day period, but six of those terminations

were for misconduct (or retirement or relocation), then the employer may not owe severance to *any* of its employees.

Thus, to comply with the amended NJ WARN Act's mandated severance payment requirement, employers will need to establish the following administrative process and adhere to it on an ongoing basis:

- Continuously monitor every upcoming employee termination in any establishment in New Jersey that has been operating for more than three years and terminations of employees reporting to such establishments;
- Determine the reasons for each employee's termination, including whether each of those terminations is (a) voluntary, (b) involuntary without cause, (c) involuntary with cause, or (d) involuntary but for a "seasonal" employee;
- On a rolling basis, determine whether there are 50 or more involuntary terminations without cause upcoming for non-seasonal employees in the covered New Jersey establishments during any 30-day period, and if so, issue 90-day notices of the anticipated terminations to those affected employees (as well as to the New Jersey Commissioner of Labor and Workforce Development and to the chief elected official of the municipality where the affected establishment(s) is (are) located);
- During the 90-day notice period, determine whether any of the involuntarily terminated employees have been offered "the same employment or a position with equivalent status" within 50 miles of their previous work establishment and within New Jersey and, if so, remove such employees from the count toward the 50-employee threshold that applies in determining whether any employees are entitled to severance pay under the Act;
- Provide each covered, terminated, eligible employee with severance pay equal to one week of pay for each full year of employment, using the verage regular rate of compensation received during the employee's last three years of employment with the employer or the final regular rate of compensation paid to the employer, whichever is higher (which requires keeping track of historical employee compensation for each employee); and

- Any employers who already maintain an ERISA-covered severance program for their employees in New Jersey must take the additional step of evaluating the severance payment under their program, comparing it against the mandated severance payments under the amended NJ WARN Act, and then paying the higher severance amount.[4]

Employers cannot meet these obligations without establishing ongoing systems that track all of the necessary information about each employee termination that occurs in New Jersey and for employees reporting to a location in New Jersey. Employment turnover and terminations are a regular part of conducting business for all employers, but especially for large employers like ERIC member companies with substantial presences in New Jersey. This is true even where such employers also are hiring employees in other locations or for other job functions. And given the current global economic recession, it is possible and even likely that large employers could trigger the amended NJ WARN Act thresholds every year, and multiple times per year. Even medium-sized employers will have to constantly evaluate whether they are triggering severance eligibility. In other words, the amended NJ WARN Act requirements are not just one-time

[4] Moreover, many employers, including ERIC's member companies, offer ERISA-governed severance benefits to their employees nationwide under the terms and conditions of ERISA-governed severance plans and conditioned on their acceptance of a general release. Now, with the amendments to the NJ WARN Act, employers will be compelled to provide severance benefits to employees in New Jersey without a release, or they must alter the terms of their existing severance plans to provide additional severance pay beyond the amount required by the amended Act if they want to still receive a release from the affected employees.

events occasioned by the complete shutdown of operations in the State, but rather require ongoing administration.

ERISA preempts state laws to avoid precisely this problem. If the NJ WARN Act amendments are allowed to stand, other states could pass similar laws but with their own (lower or higher) thresholds, or their own conditions for inclusion or exclusion from severance eligibility, or with different severance amounts, and employers would face exactly the sort of lack of uniformity that ERISA preemption was intended to avoid.

Accordingly, the Court should declare S.B. 3170's amendments to the NJ WARN Act void as preempted by ERISA and enjoin their enforcement. The amendments undermine the regime of nationally uniform employee benefit plans for which ERISA was enacted. And given that the amendments are preempted by ERISA, Defendant should be enjoined from informing employees about the severance payments required by the amendments, instructing employers to provide such severance payments, or otherwise engaging in any conduct to enforce the amendments pursuant to his statutory authority as Commissioner of the New Jersey Department of Labor and Workforce Development. *See* Plaintiff's Opposition to Defendant's Motion to Dismiss, Dkt. 12, 7-10 (describing Defendant's responsibilities with regard to enforcing the NJ WARN Act).

V. CONCLUSION

For the foregoing reasons, ERIC respectfully requests that this Court hold that ERISA preempts the amendments to the NJ WARN Act made in S.B. 3170, so that the law can remain in its pre-amended form. ERIC also respectfully requests that this Court enjoin Defendant from enforcing the amendments to the NJ WARN Act.

Dated: May 19, 2021

Respectfully submitted,

s/ Richard G. Rosenblatt

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

THE ERISA INDUSTRY COMMITTEE, Plaintiff, v. ROBERT ASARO-ANGELO, in his official capacity as THE COMMISSIONER OF THE NEW JERSEY DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT, Defendant.	Civ. Action No. 3:20-cv-10094

[PROPOSED] ORDER

THIS MATTER, having been brought before the Court by way of Motion for Summary Judgment by Morgan, Lewis & Bockius LLP, attorneys for Plaintiff The ERISA Industry Committee ("ERIC"), under Federal Rule of Civil Procedure 56, and proper notice having been given to counsel for Defendant Robert Asaro-Angelo, in his official capacity as the Commissioner of the New Jersey Department of Labor and Workforce Development ("Defendant"), and the Court having considered the written submissions of the parties, any oral argument of counsel, and good cause appearing therefore,

IT IS on this _____ day of _____ 2021,

ORDERED that ERIC's Motion for Summary Judgment is hereby GRANTED;

DECLARED that ERISA preempts the amendments made by New Jersey Senate Bill 3170 to the Millville Dallas Airmotive Plant Job Loss Notification Act, and that the Act remains effective in its pre-amended form; and

ORDERED that Defendant is enjoined from enforcing the amendments made by New Jersey Senate Bill 3170.

Dated: _____ _____
The Honorable Brian Martinotti, U.S.D.J.