



# AMERICAN BENEFITS COUNCIL

August 5, 2020

Senator Stephen Sweeney  
Senate President  
935 Kings Highway  
West Deptford, NJ 08086

Assemblyman Craig Coughlin  
Assembly Speaker  
569 Rahway Avenue  
Woodbridge, NJ 07095

Senator Thomas Kean, Jr.  
Republican Leader  
425 North Avenue East, Suite C  
Westfield, NJ 07090

Assemblyman Jon Bramnick  
Republican Leader  
251 North Avenue West, 2nd Floor  
Westfield, NJ 07090

## **Re: Repeal New Severance Pay Requirements (SB 3170)**

Dear President Sweeney, Leader Kean, Speaker Coughlin, & Leader Bramnick:

On behalf of the American Benefits Council (“the Council”), I am writing to strongly urge the New Jersey Legislature to repeal the recent amendments to the Millville Dallas Airmotive Plant Job Loss Notification Act (“New Jersey’s WARN Act”). Those amendments, if not repealed, will be invalidated when they take effect because they are preempted by federal law through the Employee Retirement Income Security Act of 1974 (ERISA). Accordingly, we urge the legislature to act now in order to avoid any unnecessary costs and confusion that will be created for New Jersey employers before the law is struck down.

The Council respects the sincere interest of the New Jersey legislature to seek means of assisting individuals who lose their job. Regrettably, the legislature has addressed this matter in a way that will not survive a challenge pursuant to a federal law that clearly preempts it. Accordingly, during this period of severe economic challenges caused by the COVID-19 pandemic, strained employer resources will be diverted in an attempt to comply with an invalid law, and achieving the purpose of the law – to assist New Jersey residents – will be delayed due to a failure of the legislature to pursue a legally valid course of action.

The Council’s approximately 400 members are primarily large, multistate U.S. employers that sponsor benefit plans for active and retired workers and their families. Members also include organizations that offer employee benefit services to employers of all sizes. Collectively, the Council’s members directly sponsor or provide services to health, retirement and other benefit plans covering virtually every American who

participates in an employer-sponsored benefit program.

## OVERVIEW OF NEW SEVERANCE PAY REQUIREMENTS

Since 2007, New Jersey's WARN Act has required certain New Jersey employers to provide notice to affected employees and the New Jersey Department of Labor and Workforce Development in advance of certain plant closings, transfers, and mass layoffs. If an employer subject to the law failed to provide timely notice, the law required employers to provide each terminated employee with severance pay equal to one week of pay for each full year of employment.

On January 13, 2020, the New Jersey Senate and General Assembly passed Senate Bill 3170, legislation that significantly expands New Jersey's WARN Act in terms of its scope and in terms of the severance benefits required by the law. New Jersey's Governor signed these changes into law on January 21, 2020.

*Most relevantly, pursuant to Senate Bill 3170, New Jersey's WARN Act will, once effective, require all employees who have been terminated as a result of a covered plant closing, transfer, or mass layoff to receive severance pay equal to one week of pay for each full year of employment. Further, if an employer fails to provide a timely notice of termination to an employee, employers must provide an additional four weeks of pay.* For purposes of determining (a) whether a plant closing, transfer, or mass layoff triggers New Jersey's WARN Act, and (b) whether individual employees are entitled to benefits, employees who have been discharged for misconduct are not treated as employees who have experienced a "termination of employment." Among other changes, the recent amendments to the law also: (1) aggregate worksites across the state in determining whether the law applies; (2) lower the termination thresholds for determining whether the law applies; (3) lengthen the requisite notice period; and (4) remove important carve-outs applicable to part-time employees.

As enacted in January 2020, the recent amendments to New Jersey's WARN Act were set to become effective on July 19, 2020. However, in light of the ongoing pandemic, the New Jersey legislature passed a law that will make the amendments effective 90 days after the Governor's public health emergency declaration expires. The Governor most recently extended that declaration for 30 days on August 1, 2020 through Executive Order 171.

## NEW SEVERANCE PAY REQUIREMENTS ARE PREEMPTED BY ERISA

ERISA is a comprehensive federal statute regulating employer-sponsored benefit plans, including retirement, health, and severance pay plans. When Congress enacted ERISA, it included an explicit and far-reaching preemption provision. According to that provision, and except as otherwise provided by law, ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" (emphasis added).<sup>1</sup> As explained in greater detail below, because New Jersey's recently amended WARN Act

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<sup>1</sup> ERISA § 514 (29 U.S.C. § 1144).

requires employers to establish a severance pay plan, the law will be preempted by section 514 of ERISA.

### **Fort Halifax v. Coyne**

The seminal case addressing ERISA's preemption of state-mandated severance pay programs is the U.S. Supreme Court's 1987 decision in *Ft. Halifax Packing Co., Inc. v. Coyne*. In that case, the Supreme Court ruled that ERISA did not preempt a Maine law requiring employers who close or relocate certain worksites to make severance payments to employees who lost their jobs. However, the circumstances applicable in that Maine law differ in substantial respects from the New Jersey WARN Act. Under the Maine law, employers were required to make severance payments to terminated employees who had worked at the worksite for at least three years. Employers were required to make severance payments in an amount that was at least equal to the rate of one week's pay for each year of employment. In *Ft. Halifax*, the Court concluded that the Maine law did not establish or require an ERISA-covered employee benefit plan because it did not require "an ongoing administrative program to meet the employer's obligations." Rather, the Court concluded that the Maine law only required "a one-time, lump-sum payment triggered by a single event" with "no administrative scheme whatsoever to meet the employer's obligation."

Although the Court concluded that the particular Maine law being disputed was not preempted by ERISA, it clearly recognized that state severance pay laws can be preempted by ERISA if they require the kind of "ongoing administrative scheme" that creates an ERISA-covered severance pay plan. By comparison, if a state severance pay requirement merely requires employers "to do little more than write a check" upon the occurrence of a single event, it will not create the type of arrangement that is preempted by ERISA.

As further discussed below, and in light of subsequent court decisions applying the holdings from *Ft. Halifax*, it is clear that the recent amendments to New Jersey's WARN Act are preempted by ERISA because they require the kind of "ongoing administrative scheme" that creates an ERISA-covered severance pay plan.

### **Ongoing Administrative Schemes**

Since 1987, the *Ft. Halifax* decision and its examination of ERISA-covered severance pay "plans," have frequently been cited by courts when considering the application of ERISA to severance benefits. Most relevant to the recent amendments to New Jersey's WARN Act, a 1993 decision from the First Circuit Court of Appeals acknowledged the Supreme Court's ruling in *Ft. Halifax*, but nevertheless concluded that ERISA preempted a Massachusetts law that required employers to pay severance benefits to employees who were terminated from employment (unless terminated for cause) within a specified time period following a corporate takeover. Under that law, employers were required to make severance payments based on weekly compensation and years of service to employees who were terminated within 24 months of a "transfer of control" of their employer.

The case was *Simas v. Quaker Fabric Corp. of Fall River*, and in distinguishing the *Ft. Halifax* decision, the First Circuit stated:

The present case may be close to Fort Halifax. The Massachusetts statute, like the Maine statute, calls for payments to all eligible employees based on a specific event, here, the takeover. That similarity, however, must be set against several differences. Each of these differences increases the administrative burden imposed by the Massachusetts statute, in contrast to Maine's statute; and each makes the label "plan" better suited to the tin parachute statute. It is a matter of degrees but under Fort Halifax degrees are crucial.

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.<sup>2</sup>

The First Circuit ultimately struck down the Massachusetts severance law because it required the type of "ongoing administrative scheme" that gives rise to an ERISA-covered plan. In reaching this conclusion, the First Circuit specifically emphasized the fact that the Massachusetts law involved a prolonged time period, individualized decisions about whether employees were terminated for cause, and at least one criterion that was "far from mechanical."

Following the First Circuit's decision in *Simas*, in 1999, the United States District Court for the District of Rhode Island struck down a Rhode Island law that was nearly identical to the Massachusetts severance law.<sup>3</sup> The District Court in Rhode Island analyzed the ERISA preemption issue in a way that was nearly identical to the First Circuit's decision in *Simas*.

### **New Jersey's WARN Act**

Based on the relevant authorities discussed above, the recent amendments to New Jersey's WARN Act are preempted by ERISA because they will impermissibly require employers to establish the type of "ongoing administrative scheme" that creates an ERISA-covered severance pay plan. As discussed in greater detail below, the recent amendments to New Jersey's WARN Act are preempted because they will require employers to exercise discretion with regard to individual eligibility and impose ongoing administrative obligations on employers over an extended period of time.

#### *Misconduct/For Cause Termination*

Because the law carves out discharges for misconduct, it will require employers to exercise discretion in determining whether each employee is being terminated for misconduct or some other reason. As discussed in the First Circuit's decision striking down a Massachusetts law that was similar to New Jersey's law, this level of employer discretion is close to conclusive in determining that the New Jersey WARN Act is preempted. Moreover, this type of employer discretion has been highly relevant in other

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<sup>2</sup> *Simas v. Quaker Fabric Corp. of Fall River*, 6 F.3d 849, 853 (1st Cir. 1993).

<sup>3</sup> See *United Paperworkers Intern. Union Loc. 1468 v. Imperial Home Decor Group*, 76 F. Supp. 2d 179 (D.R.I. 1999).

cases considering whether severance programs that are not mandated by state law establish an ongoing administrative scheme that rises to the level of an ERISA-covered plan.<sup>4</sup>

#### *Administrative Scheme Required Over Extended Period of Time*

Employer discretion is not the only factor that makes preemption applicable in the case of New Jersey's WARN Act. As discussed above, the law requires employers to establish ongoing systems to administer the benefit due over extended periods of time. For example, an employer will owe severance benefits under the law any time that 50 or more employees in total are terminated during any 30-day period from all of the employer's New Jersey locations. This necessarily requires ongoing monitoring of all terminations at all facilities in the state in order to determine whether the severance requirement has been triggered. This necessary ongoing administrative process goes far beyond the apparatus that was necessary to comply with the Maine law upheld by the Supreme Court in *Ft. Halifax*, which was limited to worksite closings.

When an employer closed a plant subject to the Maine law, its severance obligations could be calculated and satisfied without much information or effort leading up to the plant closure. By comparison, to comply with the amended New Jersey WARN Act, employers will need to establish ongoing systems that monitor and track information about each employee termination that occurs in New Jersey. And as explained above, each termination will require the employer to determine whether an employee was discharged for misconduct or some other reason. Without an ongoing administrative system, an employer could not possibly comply with the law.

#### *Ongoing Scheme Must Account for Specified Periods of Time*

As discussed above, in *Simas*, the First Circuit struck down the Massachusetts severance law, in part, because it required employers to identify and administer the severance program with regard to a specified period of time – i.e., for 24 months before and after a corporate takeover. In a similar regard, the New Jersey law will require employers to identify and administer the severance program with regard to employee terminations that have occurred in each preceding 30-day period. In fact, the law is more burdensome because it applies every year, not just after a change in control. Moreover, the change in the threshold for triggering New Jersey's WARN Act – from the involuntary termination of 500 or more full-time employees (or 50 or more full-time employees

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<sup>4</sup> See e.g., *Shaver v. Siemens Corp.*, 670 F.3d 462, 477 (3d Cir. 2012) (explaining that relevant factors in determining whether an ongoing administrative scheme exist are: (1) whether an employer must exercise managerial discretion to determine benefits; and (2) whether a reasonable employee would perceive an ongoing commitment by the employer to provide some employee benefits); *Angst v. Mack Trucks, Inc.*, 969 F.2d 1530, 1539 (3d Cir. 1992) (explaining that an ongoing administrative scheme includes a program that requires "the creation of an administrative apparatus that would analyze each employees' situation in light of particular criteria."); *Pane v. RCA Corp.*, 667 F. Supp. 168, 170 (D.N.J. 1987), *aff'd*, 868 F.2d 631 (3d Cir. 1989) (explaining that an ongoing administrative scheme is necessary when the employer makes a separate analysis of each employee's eligibility for benefits); *Schonholz v. Long Island Jewish Med. Ctr.*, 87 F.3d 72 (2d Cir. 1996) (articulating three non-exclusive factors for determining whether a severance program is an ERISA plan: (1) whether an employer's commitment requires managerial discretion; (2) whether a reasonable employee would perceive an ongoing commitment by the employer to provide benefits; and (3) whether the employer was required to analyze the circumstances of each employee's termination separately in light of certain criteria).

representing one-third or more of the employer's full-time employees) to 50 or more employees (full- or part-time) from all facilities in the state – makes it much more likely that a large employer, or even a medium-sized employer, could trigger New Jersey's WARN Act during a given year. Again, this is a significant distinction from the Maine law considered in *Ft. Halifax*, which was triggered only upon the occurrence of an unusual and extraordinary event: a plant closing.

#### *Employee by Employee Notices*

In addition to tracking employee terminations to determine if and when New Jersey's WARN Act will require severance payments, the law also requires employers to provide notifications to employees in advance of termination. Pursuant to the recent amendments, the failure to provide a timely notice will increase an employee's severance payment by an additional four weeks of pay. Not only does this notice requirement, by itself, create an administrative obligation for employers in connection with any severance benefit program, employers will be required to track and monitor the delivery of these notices on an employee by employee basis over a specific period of time in order to properly determine employee severance benefits. Moreover, unlike the law's severance pay requirements, which are only triggered based on the number of terminations occurring in any 30-day period, the law includes a special rule that can activate its pre-termination notice requirements based on the number of terminations that occur within any 90-day period and on whether different groups of employees are being terminated for "separate and distinct" reasons. These special notice rules, which predate the recent amendments but have only become more onerous in light of those changes, require employers to (1) track terminations occurring in a timeframe that applies in addition to the 30-day window that is relevant to the law's general severance pay obligations and (2) exercise additional discretion in determining why different groups of employees are being terminated. Collectively, these notice obligations even further cement ERISA preemption because they contribute to the ongoing administrative scheme that employers must maintain in order to pay benefits in compliance with the law.

#### **CONCLUSION**

For all of the reasons discussed above, the recent amendments to New Jersey's WARN Act are preempted by ERISA and will be invalidated when they eventually become effective. Accordingly, we urge the New Jersey Legislature to act now to repeal those recent amendments to avoid unnecessary costs and the confusion that will be created for New Jersey employers and employees before the law is struck down. If the legislature does not act quickly to remove these impending requirements, employers operating in the state will be forced to dedicate time and resources in an effort to comply with a law that is preempted and this will thwart the ultimate purpose of the amendments to the law that are intended to support individuals who have lost their jobs.

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Thank you for your consideration of our comments. Should you have any questions or wish to discuss our comments further, please contact me at (202) 289-6700 or by email at [ldudley@abcstaff.org](mailto:ldudley@abcstaff.org).

Sincerely,

A handwritten signature in black ink that reads "Lynn D. Dudley". The signature is written in a cursive, flowing style.

Lynn D. Dudley  
Senior Vice President, Global Retirement and Compensation Policy

cc: Senator Fred Madden (Labor, Chair)  
Senator Joseph Cryan  
Senator Nellie Pou