

Guidance For New Jersey Employers In Response To COVID-19

In an effort to mitigate the impact of COVID-19, Governor Philip Murphy has signed Executive Order 107, which specifically supersedes Executive Order 104, dated March 16, 2020, and orders all New Jersey residents to remain in their homes, with certain defined exceptions.

Despite whether an employer has been ordered to close its physical locations, it must accommodate its workforce by permitting employees to telecommute or work from home. If an employer is an essential business and cannot operate through telecommuting or working-from-home arrangements, employers may reduce staff to the minimal number necessary to ensure that essential operations can continue. Below are some New Jersey specific guidelines to assist employers in navigating this unprecedented societal terrain.

I. THE NEW JERSEY EARNED SICK LEAVE LAW

The New Jersey Department of Labor has set forth various scenarios which employers should be prepared to address in the event that an employee is unable to work or telework because of COVID-19. In October 2018, New Jersey enacted the Earned Sick Leave Law, which requires that all New Jersey employers, regardless of size, provide full-time, part-time, and temporary employees with up to 40 hours of earned sick leave per year so they can care for themselves or a loved one.

The Earned Sick Leave Law may be used by an employee whose employer is subject to a Federal, State, or local quarantine or isolation order related to COVID-19. The Law also applies to employees who are experiencing symptoms of COVID-19 and are seeking a medical diagnosis, as well as to employees who have tested positive for COVID-19 and are unable to work. Likewise, if an employee has been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19, the employee may use the Earned Sick Leave Law.

New Jersey's Earned Sick Leave Law also provides coverage for caregivers. For example, in the event that an employee is unable to work or telework because he or she is caring for a child under 18 years old whose school or place of care has been closed, or the childcare provider of the employee's child is unavailable due to COVID-19, the Earned Sick Leave Law specifically provides:

- Time during which the employee is not able to work because of a closure of the employee's workplace, or the school or place of care of a child of the employee, by order of a public official due to an epidemic or other public health emergency, or because of the issuance by a public health authority of a determination that the presence in the community of the employee, or a member of the employee's family in need of care by the employee, would jeopardize the health of others.

In sum, the Earned Sick Leave Law may be used for self-care, or for the care of a family member, including a child, grandchild, sibling, spouse, parent, grandparent, domestic or civil union partner, anyone related by blood to the employee, or anyone whose close association with the employee is the equivalent of family.

If an employee exhausts his or her Earned Sick Leave and cannot return to work, he or she may be eligible to apply for (1) Temporary Disability Insurance ("TDI") or (2) Workers' Compensation. To apply for TDI, a claim must be filed online at myleavebenefits.nj.gov. The employee must then have his or her health care provider report the diagnosis and duration the individual is expected to be out of work. A person who is laid off as a result of the COVID-19 pandemic is eligible for unemployment compensation.

Alternatively, an individual may be entitled to workers' compensation if he or she contracts COVID-19 because he or she waited on or worked with someone who had the virus, or contracted the virus for any other work-related reason. Similarly, if an individual has been directed to self-quarantine by his or her employer or a public health official following known exposure to the virus during the course of his or her work, that person could be eligible for workers' compensation.

II. FURLOUGH

Partial Unemployment Benefits

Under New Jersey law, an employer may reduce an employee's hours in response to new policies resulting from the COVID-19 pandemic. However, an employee may be eligible for partial unemployment benefits while working part time due to lack of work if the employee works less than 80% of the hours normally worked.

III. TERMINATIONS/LAYOFFS/REDUCTIONS IN FORCE

A. Terminations

On March 20, 2020, Governor Phil Murphy signed a new law (A3848) prohibiting employers in the state from firing, demoting or otherwise punishing workers if they take time off because they have or are likely to have COVID-19. The employer shall not, following that specified period of time off, refuse to reinstate the employee to employment in the position held when the leave commenced with no reduction in seniority, status, employment benefits, pay or other terms and conditions of employment. Employers may not retaliate against, terminate or discipline an employee because the employee took leave during the COVID-19 pandemic. At minimum, employers should be mindful not to base layoff or furlough decisions on which employees are likely to need leave—or they risk a potential claim for retaliation and/or interference.

If an employer violates this law, the employee affected may file a written complaint with the Commissioner of Labor and Workforce Development or initiate an action in a court of competent jurisdiction, to seek reinstatement to employment. If the employer is found to be in violation, the court or the commissioner shall order the reinstatement of the employee to the position previously held with no reduction in seniority, status, employment benefits, pay, and other terms and conditions of employment and fine the employer \$2,500.00 for each violation of this law.

B. Layoffs and/or Reductions in Force

A layoff is a temporary separation from payroll because there is not enough work for the employee to perform. For example: an employer may consider initiating layoffs related to the COVID-19 crisis. Employees are typically able to collect unemployment benefits while on an unpaid layoff, and frequently an employer may allow employees to maintain benefit coverage as an incentive to remain available for recall.

A reduction in force (RIF) occurs when a position is eliminated without the intention of replacing it and involves a permanent cut in headcount. A layoff may turn into a RIF or the employer may choose to immediately reduce their workforce. A RIF can be accomplished by terminating employees or by means of attrition.

C. Federal and New Jersey WARN Acts

If a NJ employer needs to lay off employees, are there any notification requirements?

When an employer conducts a layoff, Federal WARN and NJ WARN statutes may require advance notification (90 days) to employees and government officials in certain situations. Not all layoffs trigger these requirements, however, and exceptions may apply.

What level of layoffs will trigger notice under Federal WARN?

Generally, 60 days' specific written notice must be provided for a plant closing or a mass layoff. A plant closing is defined as 50 or more countable employment losses at a single site of employment in a 90-day period that results from ceasing operations in one or more operating units. A mass layoff is defined as 50 or more countable employment losses at a single site of employment in a 90-day period that also involves 33% of the active workforce at the site. Employees with less than 6 months of service in the prior 12 months, or who work less than 20 hours per week, are not countable. Notably, temporary layoffs of less than 6 months are not counted as an employment loss under Federal WARN.

If Federal WARN or NJ WARN is triggered, are there any exceptions that apply?

Yes. Federal WARN permits shortened notice if terminations result from circumstances that were not reasonably anticipated 60 days before employees are terminated. However, shortened notice requires giving actual written notice, with as much advance notice as can be given and an explanation for the shortened notice. The State of New Jersey has a WARN statute that does not include an unforeseeable business circumstance ("UBC") defense. The statute does provide a six-month layoff notification exception, but the employer is required to guarantee reinstatement of the affected employee within six months.

Is there an exception to Federal WARN or NJ WARN for the COVID-19 pandemic?

The Federal WARN statute has provisions addressing terminations due to natural disasters. Those provisions have not been interpreted yet as to whether they apply to cover an epidemic. It is unclear whether a court would consider pandemics to be "similar effects of nature" to "floods, earthquakes, droughts, storms, tidal waves or tsunamis..." as referenced in the Federal WARN regulation relating to natural disasters. NJ WARN includes a "national emergency" defense, which may offer a defense to a claim for failure to give NJ WARN notice.

What are the possible implications of the new NJ WARN amendments to the COVID-19 pandemic?

New Jersey recently made sweeping changes to NJ WARN that take effect on July 19, 2020. Some of those changes include automatic severance pay for employers that trigger notice under NJ WARN and 90-days' (rather than 60-days') notice. It is unclear if this statute would be applied retroactively as a result of the COVID-19 pandemic. Theoretically, that means that if someone was on furlough through July 19, 2020, the new statute could apply to that leave and retroactively impose NJ WARN liability.

IV. HEALTH CARE COVERAGE

A. Health Care Insurance

As a result of COVID-19, employers should be aware that New Jersey has not made any additional revisions related to health insurance that are not mandated by federal law. A group health plan must provide coverage without any cost-sharing requirements, such as deductibles, co-payments and co-insurance, or prior authorization or other medical management requirements, for:

- The costs of a test to detect or diagnose the virus that causes COVID-19; or
- Health care provider visits, including telehealth visits, urgent care and emergency room visits, that result in an order for or administration of a test to detect or diagnose the virus that causes COVID-19.

B. Health Care Coverage After Termination or Reduction in Hours

The Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA") requires employers that employ at least 20 employees to temporarily extend their group health coverage in certain instances where coverage under the plan would otherwise end. No amendments or modifications have been made to COBRA in response to the COVID-19 pandemic. The law remains the same for continued healthcare coverage after an employee separates from its employer as a result of certain qualifying events. For example, if an employee is terminated (other than for gross misconduct), has a reduction of hours, or leave of absence, the employee, their spouse, and dependent children are entitled to 18 months of health coverage. For loss of coverage due to the death of the employee, the continuation term for dependents is 36 months.

C. New Jersey Continuation Law

The New Jersey Continuation Law ("NJCL") applies to employers that offer health insurance for 2 to 50 employees. As a practical matter, NJCL applies to employers that are not subject to COBRA because they have fewer than 20 employees. NJCL mandates the continuation of health insurance coverage for employees, their spouse and their dependent child. An employee and their dependents are qualified for continued coverage for up to 18 months if the employee was terminated (other than cause) or whose hours were reduced to below 25 hours per week. In addition, health care coverage is extended for up to 36 months for a spouse or dependent child in the event of death of the employee and up to 29 months in cases where an employee is determined to have been disabled under the Social Security Act. Note that employees who qualify for continued coverage under COBRA are not eligible for coverage under NJCL.

In this challenging and unprecedented time, the Kaufman, Dolowich & Voluck attorneys look forward to assisting employers who are grappling with complex issues in an effort to mitigate the impact of the COVID-19 pandemic on their employees and businesses. KD's Labor and Employment Law Group is continuing to monitor New Jersey directives and will provide updates accordingly. For guidance and/or more information, please contact an experienced member of KD's Labor & Employment Law Practice Group at (201) 488-6655.