SPONSOR: Rep. Mulrooney & Sen. Marshall
Reps. Brady, Kowalko

HOUSE OF REPRESENTATIVES
149th GENERAL ASSEMBLY

HOUSE BILL NO. 409
AS AMENDED BY
HOUSE AMENDMENT NO. 2

AN ACT TO AMEND TITLE 19 OF THE DELAWARE CODE RELATING TO THE DELAWARE WORKER ADJUSTMENT AND RETRAINING NOTIFICATION ACT.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

Section 1. Amend Part I, Chapter 19, Title 19 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

Chapter 19. Delaware Workplace Adjustment and Retraining Notification Act.

Subchapter I. General Provisions.

§ 1901. Short title.

This chapter shall be known and may be cited as the "Delaware Worker Adjustment and Retraining Notification Act."

§ 1902. Statement of purpose.

This chapter is intended to direct employers that meet the qualifications of this chapter to provide at least 60 days advance notice to the Department of Labor Division of Employment and Training of mass layoffs, plant closings, or relocations. The intent is to provide dislocated workers the Rapid Response services and benefits that are due to them through the Department of Labor and other service providers. The desire of the Department is to assist dislocated workers to return to work as quickly as possible with minimal disruption to their economic well-being.

§ 1903. Definitions.

(a) For purposes of this chapter:

(1) "Affected employees" means employees who may reasonably be expected to experience an employment loss as a consequence of a proposed mass layoff, plant closing or relocation by their employer.

(2) "Days" means calendar days.

(3) "Department" means the Delaware Department of Labor.

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(4)a. “Employment loss” means any of the following:

1. An employment termination, other than a discharge for cause, voluntary departure, or retirement.

2. A mass layoff exceeding 6 months in duration.

3. A reduction in hours of work of more than 50% during each month of any consecutive 6-month period.

b. The term “Employment loss” shall not result under circumstances where a mass layoff or plant closing is the result of the relocation or consolidation of part or all of the employer's business and, before the mass layoff or plant closing, the employer offers to transfer the employee to a different site of employment within a reasonable commuting distance with no more than a 6-month break in employment, or the employer offers to transfer the employee to any other site of employment, regardless of distance, with no more than a 6-month break in employment, and the employee accepts within 30 days of the offer or of the mass layoff or plant closing, whichever is later.

(5) “Employer” means:

a. Any business enterprise that employs 100 or more employees, excluding part-time employees, or 100 or more employees that work in the aggregate at least 2,000 hours per week.

b. “Employer” does not include the federal or state government or any of their political subdivisions, including any unit of local government or any school district or charter school.

(6) “Mass layoff” means a reduction in workforce which includes all of the following:

a. Is not the result of a plant closing.

b. Results in an employment loss at a single site of employment during any 30-day period for:

1. 50 or more employees if they make up 33% of the employer’s total workforce at the site, excluding part-time employees or

2. 500 or more employees.

(7) “Part-time employee” means an employee who is employed for an average of fewer than 20 hours per week or who has been employed for fewer than 6 of the 12 months preceding the date on which notice is required.

(8) “Plant closing” means the permanent or temporary shutdown of a single site of employment, or one or more facilities or operating units within a single site of employment, if the shutdown results in an employment loss at the single site of employment during any 30-day period for 50 or more employees (other than part-time employees).

(9) “Representative” means an exclusive representative within the meaning of § 9(a) or § 8(f) of the National Labor Relations Act (29 U.S.C. §§ 159(a), 158(f)) or § 2 of the Railway Labor Act (45 U.S.C. § 152).

(10) “Relocation” means the removal of all or substantially all of the industrial or commercial operations of an employer to a different location 50 miles or more away.

(11) “Secretary” shall mean the Secretary of the Delaware Department of Labor or a designated subordinate of the Secretary.

(12) “WARN Act” shall mean the federal Worker Adjustment and Retraining Notification Act (29 U.S.C. §§ 2101 et seq.).

§ 1904. Notice.

(a) An employer may not order a mass layoff, plant closing or relocation if any of the above will cause an employment loss unless, at least 60 days before the order takes effect, the employer gives written notice of the order to all of the following:

(1) Affected employees and the representatives of affected employees.

(2) The Delaware Department of Labor Division of Employment and Training, WARN Act Administrator.

(3) The Delaware Workforce Development Board established pursuant to the federal Workforce Innovation Opportunity Act (P.L. 113-128) for the locality in which the mass layoff, plant closing or relocation will occur.

(b) An employer required to give notice of any mass layoff, plant closing or relocation under this chapter shall include in its notice the elements required by the federal Worker Adjustment and Retraining Notification Act (29 U.S.C. §§ 2101 et seq.). Notice shall include the name, job title, home address, telephone number, and email address of each planned dislocated worker. Notice shall also include general information regarding any payouts, severance packages, job relocation opportunities and retirement options that will be offered to the dislocated workers. Notice shall include whether the employer is self-insured for workers’ compensation insurance pursuant to Chapter 23 of Title 19 of the Delaware Code.

(c) Notwithstanding the requirements of paragraph (a) of this section, an employer is not required to provide notice if a mass layoff, plant closing or relocation is necessitated by a physical calamity or an act of terrorism or war.

(d) The mailing of notice to an employee's last known address by either first class or certified mail, the hand delivery of notice to an employee, or the inclusion of notice in an employee's paycheck shall be considered acceptable methods for fulfillment of the employer's obligation to give notice to each affected employee under this chapter.

(e) In the case of a sale of part or all of an employer's business, the seller shall be responsible for providing notice for any mass layoff, plant closing or relocation where any of the above will cause an employment loss, in accordance with this section, up to and including the effective date of the sale. After the effective date of the sale of part or all of an employer's business, the purchaser shall be responsible for providing notice for any mass layoff, plant closing or relocation where any of the above will cause an employment loss, in accordance with this section. Notwithstanding any other provision of this

chapter, any person who is an employee of the seller as of the effective date of the sale shall be considered an employee of the purchaser immediately after the effective date of the sale.

(f) Nothing set forth herein shall be read to abridge, abrogate, or restrict the right of any state or local entity to require an employer that is receiving state or local economic development incentives for doing or continuing to do business in this state from being required to provide additional or earlier notice as a condition for the receipt of such incentives.

(g) Nothing set forth herein shall be read to prevent an employer who is not required to comply with the notice requirements of this section, to the extent possible, to provide notice to its employees about a proposal to close a plant or permanently reduce its workforce.

§ 1905. Exceptions.

(a) In the case of a mass layoff, plant closing or relocation, an employer is not required to comply with the notice requirements of this chapter under any of the following circumstances:

(1)a. At the time the notice would have been required, the employer was actively seeking capital or business;

b. The capital or business sought, if obtained, would have enabled the employer to avoid or postpone the relocation or termination; and

c. The employer reasonably and in good faith believed that giving the notice required by this chapter would have precluded the employer from obtaining the needed capital or business.

(2) The mass layoff or plant closing is caused by business circumstances that were not reasonably foreseeable at the time the notice would have been required. A business circumstance that is not reasonably foreseeable may be established by the occurrence of some sudden, dramatic and unexpected action or condition outside of the employer's control. Examples include a principal client's sudden and unexpected termination of a major contract with the employer, a strike at a major supplier of the employer, an unanticipated and dramatic major economic downturn or a government-ordered closing of an employment site that occurs without prior notice. The employer shall exercise commercially reasonable business judgment in determining whether a business circumstance is reasonably foreseeable.

(3) The plant closing is of a temporary facility or the mass layoff or plant closing is the result of the completion of a particular project or undertaking, and the affected employees were hired with the understanding that their employment was limited to the duration of the facility or project or undertaking or a specific portion of such project or undertaking. This includes industries such as construction and their related projects; however, this does not exempt a construction company if they suffer a mass layoff or plant closing not related to a specific project or undertaking.

(4) The mass layoff or plant closing is due to any form of natural disaster, such as a flood, earthquake, or drought.

(5) The mass layoff or plant closing constitutes a strike or constitutes a lockout not intended to evade the requirements of this chapter. Nothing in this chapter shall require an employer to serve written notice when permanently replacing a person who is deemed to be an economic striker under the National Labor Relations Act (29 U.S.C. §§ 151 et seq.). Nothing in this chapter shall be deemed to validate or invalidate any judicial or administrative ruling relating to the hiring of permanent replacements for economic strikers under the National Labor Relations Act.

(b) An employer unable to provide the notice otherwise required by this chapter in a timely fashion as a result of circumstances described in paragraph (a) of this section shall provide as much notice as is practicable and at that time shall provide a brief statement of the basis for reducing the notification period. The failure to provide such notice in as timely a manner as possible shall constitute a violation of this chapter.

§ 1906. Extension of Mass Layoff Period.

A mass layoff of more than 6 months which, at its outset, was announced to be a mass layoff of 6 months or less shall be treated as an employment loss under this chapter unless the following:

(a) The extension beyond 6 months is caused by business circumstances (including unforeseeable changes in price or cost) not reasonably foreseeable at the time of the initial mass layoff.

(b) Notice is given at the time it becomes reasonably foreseeable that the extension beyond 6 months will be required.

§ 1907. Determinations with Respect to Employment Loss.

An employer must also give notice if the number of employment losses which occur during a 30 day period fails to meet the threshold requirement of a mass layoff or plant closing, but the number of employment losses of 2 or more groups of workers, each of which is less than the minimum number needed to trigger notice, reaches the threshold level during any 90-day period of a mass layoff, plant closing or relocation. Job losses within any 90-day period will count toward WARN threshold levels unless the employer demonstrates that the employment losses during the 90-day period are the result of separate and distinct actions and causes.

§ 1908. Powers of the Secretary.

(a) The Secretary shall prescribe such rules and regulations as may be necessary to carry out this chapter. The regulations shall, at a minimum, include provisions that allow the parties access to administrative hearings for any actions of the Department under this chapter.

(b) In any investigation or proceeding under this chapter, the Secretary has, in addition to all other powers granted by law, the authority to examine any information of an employer necessary to determine whether a violation of this chapter has occurred, including to determine the validity of any defense.

(c) Except as provided in this section, information obtained through administration of this chapter from an employer subject to this chapter and which is not otherwise obtainable by the Department under other chapters in this title shall be confidential and not be published or open to public inspection.

(1) Notwithstanding any other provisions of this section, the Secretary shall be entitled to use any information and documents received by any employer under this chapter in connection with any investigation or proceeding under this chapter, including in any administrative hearing under this chapter.

(2) Prior to public disclosure of any such information in connection with any court or administrative action or proceeding, the employer shall be given a reasonable opportunity to make application to protect the information's confidentiality during such action or proceeding.

(3) Notwithstanding any other provisions of this section, information obtained by the Department from any notice required by the federal WARN Act or this chapter shall not be considered confidential, except as set forth in subsection (4) of this section.

(4) Notwithstanding any other provisions of this section, names and personal information, including addresses, phone numbers, email addresses, contact information, and social security numbers, of planned dislocated workers contained in any notice required by the federal WARN Act or this chapter, or otherwise provided to the Department by an employer pursuant to this chapter, shall remain confidential and shall not be published or open to public inspection.

(5) Any information or documents regarding or relating to a potential mass layoff, plant closing, or relocation that is provided by an employer to the Department pursuant to this chapter prior to the Department's receipt of any notice required by the federal WARN Act or this chapter shall be confidential and shall not be published or open to public inspection.

(d) If, after an administrative hearing, it is determined that an employer has violated any of the requirements of this chapter or any rules or regulations promulgated hereunder, the Secretary shall issue an order which shall include any penalties assessed by the Secretary under this chapter. Upon the entry of such order, any party aggrieved thereby may commence a proceeding for the review thereof, which proceeding must be filed in the Superior Court for the county in which the employer's place of business is located within 30 days after the date the order was mailed to the employer's last known address. In any proceeding under this section the findings of the Secretary as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive and the jurisdiction of the Court shall be confined to questions of law. If such order is not reviewed, or is so reviewed and the final decision is in favor of the Secretary, the Department may file the order of the Secretary containing the amount found to be due with the Prothonotary of the Superior Court in the county where the employer resides or has a place of business. The filing of such order shall have the full force and effect of a judgment duly docketed in

the office of such Prothonotary. The order may be enforced by and in the name of the Secretary in the same manner, and with like effect, as that prescribed by the civil practice law and rules for the enforcement of a money judgment.

(e) The Department shall distribute to all employees entitled to notice under this chapter any back pay and the value of the cost of any benefits recovered by the Department from an employer who did not provide such notice.

§ 1909. Violation; Liability.

(a) An employer who fails to give notice as required by this chapter before ordering a mass layoff, plant closing, or relocation if any of the above will cause an employment loss is liable to each employee entitled to notice who lost his or her employment for the following:

(1) Back pay at the average regular rate of compensation received by the employee during the last three years of his or her employment, or the employee's final rate of compensation, whichever is higher.

(2) The value of the cost of any benefits to which the employee would have been entitled had his or her employment not been lost, including the cost of any medical expenses incurred by the employee that would have been covered under an employee benefit plan.

(b) Back pay and other liability under this section is calculated for the period of the employer's violation, up to a maximum of 60 days, or 1/2 the number of days that the employee was employed by the employer, whichever period is smaller.

(c) Payments to an employee under this chapter by an employer who has failed to provide the advance notice of a mass layoff, plant closing or relocation that is required by this chapter or the federal Worker Adjustment and Retraining Notification Act (29 U.S.C. §§ 2101 et seq.) shall not be construed as wages. Unemployment insurance benefits under this title may not be denied or reduced because of the receipt of payments related to an employer's violation of this chapter or the federal Worker Adjustment and Retraining Notification Act.

(d) The amount of an employer's liability under this chapter shall be reduced by the following:

(1) Any wages, except vacation moneys accrued before the period of the employer's violation, paid by the employer to the employee during the period of the employer's violation.

(2) Any voluntary and unconditional payments made by the employer to the employee that were not required to satisfy any legal obligation.

(3) Any payments by the employer to a third party or trustee, such as premiums for health benefits or payments to a defined contribution pension plan, on behalf of and attributable to the employee for the period of the violation.

(4) Any liability paid by the employer under any applicable federal law governing notification of mass layoffs, plant closings, or relocations.

(5) In an administrative proceeding by the Secretary, any liability paid by the employer prior to the Secretary's determination as the result of a civil action brought under this chapter.

(6) In a civil action brought under this chapter, any liability paid by the employer in an administrative proceeding by the Secretary prior to the adjudication of such civil action.

(e) Any liability incurred by an employer under paragraph (a) of this section with respect to a defined benefit pension plan may be reduced by crediting the employee with service for all purposes under such a plan for the period of the violation.

(f) If an employer proves to the satisfaction of the Secretary that the act or omission that violated this chapter was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of this chapter, the Secretary may, in his or her discretion, reduce the amount of liability provided for in this section. In determining the amount of such reduction, the Secretary shall consider the following:

(1) The size of the employer.

(2) The hardships imposed on employees by the violation.

(3) Any efforts by the employer to mitigate the violation.

(4) The grounds for the employer's belief.

(g) An aggrieved employee, local government, or an employee representative seeking to establish liability against an employer may bring a civil action on behalf of the person, other persons similarly situated, or both, in any court of competent jurisdiction, within 3 years of the alleged violation of this chapter. The court may award reasonable attorneys' fees as part of costs to any plaintiff who prevails in a civil action brought under this chapter. If the court determines that an employer conducted a reasonable investigation in good faith, and had reasonable grounds to believe that its conduct was not a violation of this chapter, the court may reduce the amount of any penalty it would otherwise impose against the employer under this chapter.

(h) Neither the Secretary nor any court shall have the authority to enjoin a mass layoff, plant closing, or relocation under this chapter.

§ 1910. Civil Penalty.

(a) An employer who fails to give notice as required by this chapter is subject to a civil penalty of $1,000 per day of violation or $100 per day of violation per dislocated worker, whichever is greater. The employer is not subject to a civil penalty under this section if the employer pays to all applicable employees the amounts for which the employer is liable under this chapter within 3 weeks from the date the employer orders the mass layoff, plant closing, or relocation if any of the above will cause an employment loss. Any penalty received will be deposited into the Employment and Training WARN Account.

(b) The total amount of penalties for which an employer may be liable under this section shall not exceed the maximum amount of penalties for which the employer may be liable under federal law for the same violation.

(c) Any penalty amount paid by the employer under federal law shall be considered a payment made under this chapter.

(d) If an employer proves to the satisfaction of the Secretary that the act or omission that violated this chapter was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of this chapter, the Secretary may in his or her discretion reduce the amount of the penalty provided for in this section. In determining the amount of such reduction, the Secretary shall consider the following:

(1) The size of the employer.

(2) The hardships imposed on employees by the violations.

(3) Any efforts by the employer to mitigate the violation.

(4) The grounds for the employer's belief.

§ 1911. Other Rights.

The rights and remedies provided to employees by this chapter are in addition to, and not in lieu of, any other contractual or statutory rights and remedies of the employees, and are not intended to alter or affect such rights and remedies, except that the period of notification required by this chapter shall run concurrently with any period of notification required by contract or by any other state or federal statute.

Section 2. Amend § 3302, Chapter 33, Title 19 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 3302. Definitions.

(19) “Wages” does not include:

(F) Payments to an employee under Chapter 19 of this title by an employer who has failed to provide the advance notice of a mass layoff, plant closing or relocation that is required by Chapter 19 of this title or the federal Worker Adjustment and Retraining Notification Act (29 U.S.C. §§ 2101 et seq.) shall not be construed as wages. Unemployment insurance benefits under this title may not be denied or reduced because of the receipt of payments related to an employer's violation of Chapter 19 of this title or the federal Worker Adjustment and Retraining Notification Act (29 U.S.C. §§ 2101 et seq.).

Section 3. This Act shall take effect 180 days after its enactment into law.