

HOUSE JUDICIARY COMMITTEE SUBSTITUTE FOR
HOUSE BILL 180

49TH LEGISLATURE - STATE OF NEW MEXICO - SECOND SESSION, 2010

AN ACT

RELATING TO LABOR; ENACTING THE WORKER ADJUSTMENT AND
RETRAINING NOTIFICATION ACT; PROVIDING PENALTIES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. SHORT TITLE.--This act may be cited as the
"Worker Adjustment and Retraining Notification Act".

Section 2. DEFINITIONS.--As used in the Worker Adjustment
and Retraining Notification Act:

A. "affected local government" means the
governmental entity that has jurisdiction over the site where a
mass layoff occurred;

B. "employee" means a person who reasonably expects
to experience employment loss as a consequence of a proposed
mass layoff, worksite closing or transfer of operations
undertaken by the employee's employer or who experiences

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1 employment loss as a foreseeable result of downsizing, a
2 proposed mass layoff, a worksite closing or a transfer of
3 operations. "Employee" includes a home-based employee who may
4 not work at the worksite but reports to the worksite or who
5 supervises one or more employees who do not work at the
6 worksite;

7 C. "employer" means a business enterprise that
8 employs one hundred or more employees within New Mexico,
9 including part-time employees, and including the parent
10 corporation of a corporate subsidiary that directly owns and
11 operates a business. An employer may include a corporation
12 that succeeds the employer when circumstances indicate that the
13 corporation is a continuation of the operations of the
14 employer. Factors to consider in determining whether a
15 successor corporation is a continuation of the employer's
16 operations include its proximity to the closing of the
17 employer's operations and whether it has common ownership,
18 business purposes, products or services, workforce, facilities,
19 plant, equipment or management structure;

20 D. "employment loss" means:

21 (1) an employment termination other than a
22 discharge for cause or voluntary departure; or

23 (2) a layoff exceeding four months;

24 E. "mass layoff" means a reduction in force that:

25 (1) is not the result of a worksite closing or

1 transfer of operations; and

2 (2) results in an employment loss of twenty-
3 five or more employees, including part-time employees, at a
4 worksite during any thirty-day period;

5 F. "representative" means an exclusive
6 representative of employees as defined in Section 9(a) of the
7 federal National Labor Relations Act, 29 U.S.C. Section 151 et
8 seq., and the federal Railway Labor Act, 45 U.S.C. Section 151
9 et seq.;

10 G. "transfer of operations" means the removal of
11 all or substantially all of the operations of a worksite to a
12 different location at least fifty miles away that results in
13 employment loss to twenty-five or more persons, including part-
14 time workers; and

15 H. "worksite closing" means the permanent or
16 temporary shutdown of a worksite, or one or more facilities or
17 operating units, that will result in an employment loss for
18 twenty-five or more persons, including part-time employees.

19 Section 3. NOTIFICATION TO EMPLOYEES REQUIRED.--

20 A. An employer shall give notification of at least
21 sixty days before the date of an order for a mass layoff,
22 worksite closing or transfer of operation. Notification shall
23 be given to:

24 (1) each employee;

25 (2) each representative of an employee;

.181901.1

1 (3) local work force investment boards
2 established pursuant to the federal Workforce Investment Act of
3 1998 for the locality within which the mass layoff, worksite
4 closing or transfer of operations is to occur;

5 (4) the chief elected official of the unit of
6 local government within which the mass layoff, worksite closing
7 or transfer of operations will occur; and

8 (5) the state dislocated worker unit.

9 B. Individual employment losses shall be aggregated
10 to determine whether the following conditions necessary to
11 require notification pursuant to the Worker Adjustment and
12 Retraining Notification Act have been met:

13 (1) within a one-hundred-eighty-day period,
14 individual employment losses occur at a single worksite for two
15 or more groups of employees and one group has less than the
16 minimum number of employees; and

17 (2) the employer fails to demonstrate that the
18 employment losses arise from separate and distinct causes.

19 C. Pursuant to the Worker Adjustment and Retraining
20 Notification Act, the seller of a business is responsible for
21 the notification required pursuant to this section up to and
22 including the effective date of sale, and the purchaser of a
23 part of or the entirety of the business is responsible
24 thereafter. Notwithstanding any other provision of the Worker
25 Adjustment and Retraining Notification Act, a person considered

1 an employee of the seller shall also be considered an employee
2 of the purchaser on the effective date of sale.

3 D. Mailing to an employee's last known address by
4 first class or certified mail or inclusion of notification in
5 an employee's paycheck shall be considered as fulfillment of
6 the employer's obligations to give notification to an employee
7 pursuant to the Worker Adjustment and Retraining Notification
8 Act.

9 E. An employee who voluntarily leaves the company
10 during the notice period in anticipation of a mass layoff,
11 worksite closing or transfer of operations shall be counted
12 toward all minimum numerical thresholds.

13 Section 4. REQUIRED CONTENT OF NOTIFICATION.--A
14 notification distributed pursuant to the Worker Adjustment and
15 Retraining Notification Act shall include a statement of:

16 A. the number of employees whose employment is to
17 be terminated in connection with the mass layoff, worksite
18 closing or transfer of operations and the date or dates on
19 which the mass layoff, worksite closing or transfer of
20 operations shall begin;

21 B. the reasons for the mass layoff, worksite
22 closing or transfer of operations;

23 C. the job description, address, pay, benefits,
24 terms and conditions of employment for work available at any
25 other operation of the employer; and

.181901.1

1 D. employee rights with respect to wages, severance
2 pay, benefits, pension or other terms of employment related to
3 the termination, including rights based on a collective
4 bargaining agreement or other existing employer policy.

5 Section 5. EXEMPTIONS TO NOTIFICATION REQUIREMENTS AND
6 REDUCED NOTIFICATION.--

7 A. The notification provisions of the Worker
8 Adjustment and Retraining Notification Act do not apply if:

9 (1) a mass layoff, worksite closing or
10 transfer of operations involves a temporary facility or is the
11 result of a completion of a facility, project or undertaking in
12 which employees were advised that employment was limited to the
13 duration of the facility, project or undertaking;

14 (2) a mass layoff, worksite closing or
15 transfer of operations is caused by business circumstances that
16 were not reasonably foreseeable at the time the notification
17 would have been required;

18 (3) a mass layoff, worksite closing or
19 transfer of operations is caused by any form of physical
20 calamity, natural disaster or act of war; or

21 (4) the employer was actively seeking capital
22 or business that would have enabled the employer to avoid or
23 postpone a mass layoff, worksite closing or transfer of
24 operations and the employer reasonably and in good faith
25 believed that giving the required notification would have

.181901.1

1 precluded the employer from obtaining the needed capital or
2 business.

3 B. An employee who, prior to the layoff, closing or
4 a transfer, has been offered a reassignment to a different
5 worksite within a reasonable commuting distance, with no more
6 than a one-month break in employment or an employee who, prior
7 to the layoff, closing or transfer, has been offered a
8 reassignment to a different worksite, regardless of commuting
9 distance, with no more than a two-month break in employment is
10 not entitled to notification pursuant to this section if the
11 employee accepts the reassignment within thirty days of the
12 offer or of the layoff, closing or transfer, whichever is
13 later.

14 C. An employer relying on this section shall give
15 as much notification as is practicable and, at that time, shall
16 give a brief statement of the basis for reducing the
17 notification period.

18 Section 6. COMPLAINTS--ADMINISTRATIVE PROCEDURES.--

19 A. An employee may file a complaint with the
20 attorney general within one hundred eighty days of an alleged
21 violation of the Worker Adjustment and Retraining Notification
22 Act. The employee shall not proceed with another civil action
23 unless one hundred eighty days have passed since the filing of
24 a complaint pursuant to the Worker Adjustment and Retraining
25 Notification Act and the employee has filed a request to

.181901.1

1 withdraw the complaint with the attorney general before filing
2 a civil suit in district court.

3 B. The attorney general shall develop rules and
4 procedures for complaint investigation. The rules and
5 procedures may authorize:

6 (1) an examination of the books and records of
7 an employer; and

8 (2) holding in trust any proceeds from a lien
9 pending adjudication of claims to proceeds by the employer.

10 Section 7. PENALTIES--LIABILITY.--

11 A. An employer who violates the provisions of the
12 Worker Adjustment and Retraining Notification Act shall be
13 liable to each employee for:

14 (1) double back pay for each calendar day of
15 the violation up to a maximum of sixty days at the employee's
16 rate of compensation, which is the average regular rate
17 received by the employee during the last three years of
18 employment or the final regular rate received by the employee,
19 whichever is higher. These damages are limited to each
20 calendar day of violation, up to a maximum of sixty days, in
21 which the employee remained unemployed and the difference in
22 rates of pay and benefits between the wages and benefits earned
23 between the lost and new employment;

24 (2) the value of benefits from the employer's
25 employee benefit plan during the notification period, including

.181901.1

1 the cost of medical expenses incurred during the employment
2 loss that would have been covered under an employee benefit
3 plan if the employment loss had not occurred;

4 (3) other economic and exemplary damages
5 suffered by an employee and proved by a preponderance of the
6 evidence to have been caused by the employer's violation of the
7 provisions of the Worker Adjustment and Retraining Act; and

8 (4) reasonable attorney fees and costs for the
9 employee who prevails in court.

10 B. The attorney general and an affected local
11 government may bring a civil action in district court; the
12 attorney general may bring suit on behalf of the state, the
13 local government and an employee; and a local government may
14 bring suit on its own behalf or on behalf of an employee.
15 Before an affected local government brings suit, it shall
16 provide the attorney general with sixty days' notice of the
17 intended suit. If the attorney general does not bring a suit
18 during this time period, the attorney general shall not file a
19 suit or recover any damages except for those listed in
20 Paragraph (3) of Subsection C of this section.

21 C. An employer that violates the provisions of the
22 Worker Adjustment and Retraining Notification Act is liable to
23 the state or affected local government but not liable to more
24 than one governmental entity for damages under this section,
25 for:

.181901.1

1 (1) five hundred dollars (\$500) per day for
2 each calendar day of the violation multiplied by the number of
3 employees who suffered an employment loss as a result of the
4 employer's failure to provide timely notification to a state
5 official or agents of state government and a designated local
6 government official;

7 (2) one thousand dollars (\$1,000) per day for
8 each calendar day of the violation multiplied by the number of
9 employees who suffered an employment loss if the employer acted
10 in bad faith through intentional, willful or reckless conduct
11 in violation of the provisions of the Worker Adjustment and
12 Retraining Notification Act or to avoid application of that
13 act; and

14 (3) repayment of any tax breaks, business
15 loans, subsidies or other incentives the employer received from
16 the state or affected local government to operate a business at
17 a location where the mass layoff occurred during the twelve
18 months preceding the mass layoff.

19 D. The attorney general has a valid lien upon
20 business revenues and all real and personal property of the
21 employer for a violation of the Worker Adjustment and
22 Retraining Notification Act; provided that the attorney general
23 records a notice of lien in each county in New Mexico in which
24 the employer holds an interest in real property. In order to
25 perfect the lien against business revenues and personal

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1 property of the employer, the attorney general shall record a
2 notice of lien in the office designated in Article 9 of the
3 Uniform Commercial Code. The notice of lien shall constitute a
4 lien of the attorney general that is effective as of the date
5 and time of the recording or filing. The attorney general
6 shall send a copy of the notice of lien to the employer by
7 certified mail, return receipt requested, postage prepaid, in
8 the following form:

9 NOTICE OF LIEN PURSUANT TO THE WORKER ADJUSTMENT AND
10 RETRAINING NOTIFICATION ACT

11 NOTICE is hereby given that the attorney general of the
12 state of New Mexico claims a lien against (name and
13 address of employer) pursuant to the Worker Adjustment and
14 Retraining Notification Act for liabilities arising under
15 that act in the aggregate amount of \$_____.

16 In accordance with the Worker Adjustment and Retraining
17 Notification Act, this notice shall be recorded with the
18 county clerk in the county in which the employer holds
19 property and shall constitute a lien against property of
20 the employer identified above.

21 Dated this ___ day of _____, 20__.

22 STATE OF NEW MEXICO

23 ATTORNEY GENERAL

24 By: _____.

25 Section 8. WAIVERS AND RELEASES.--

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1 A. An agreement to waive the rights of an employee
2 pursuant to the Worker Adjustment and Retraining Notification
3 Act is voidable before, during and within thirty days after the
4 advance notification period unless payment is received by the
5 employee in an amount that meets or exceeds the wages and value
6 of benefits to which the employee would have been entitled
7 throughout the advance notification period. If an employee
8 renders void such an agreement, the employee shall return the
9 lesser amounts paid by the employer within fourteen days of
10 such election.

11 B. An employee's acceptance of severance payments
12 shall not be used to offset an award of damages when such
13 payments are:

14 (1) voluntarily and unconditionally paid in an
15 amount less than the value of wages and benefits to which the
16 employee is entitled during the advance notification period; or

17 (2) paid pursuant to contractual obligations
18 of the employer owed to the employee.

19 C. An employee's waiver of claims or acceptance of
20 a severance payment does not absolve or mitigate an employer's
21 obligation to provide notification to other persons or entities
22 entitled to notification pursuant to the Worker Adjustment and
23 Retraining Notification Act.