



# The Practical Employer

RECENT COURT DECISIONS, LEGISLATION,  
DEVELOPMENTS, AND PRACTICAL TIPS ON  
LABOR AND EMPLOYMENT LAW ISSUES

JANUARY 2008

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## All Employers Now Required To Use New I-9 Form

The US Citizenship & Immigration Services (USCIS) (formerly the INS) issued a revised Employment Eligibility Verification Form (I-9), which all employers are now required to use. The old and new forms are basically the same and are completed the same way. The primary change involves List A - the List of Acceptable Documents, from which USCIA removed five documents :

- Certificate of U.S. Citizenship (Form N-560 or N-561),
- Certificate of Naturalization (Form N-550 or N-570),
- Alien Registration Receipt Card (I-151),
- Unexpired Reentry Permit (Form I-327), and
- Unexpired Refugee Travel Document (Form I-571)

The USCIS added one document : Unexpired Employment Authorization Document (I-766).

The USCIS removed those forms that lacked sufficient features to help deter counterfeiting, tampering, and fraud. Employers only may accept approved forms listed on the revised I-9.

Also, in Section 1 of Form I-9 the employee is not required to provide a Social Security Number, unless his/her employer participates in E-Verify (USCIS' Electronic Employment Eligibility Verification Program). The form now allows employers to sign and retain I-9 forms electronically.

**Practice Tip:** Employers can obtain the revised I-9 form on line through the following web address:  
<http://www.uscis.gov/files/form/i-9.pdf>

## New Jersey Bans Texting While Driving

New Jersey recently expanded the ban on using hand-held cell phones while driving to include a ban on sending text messages while driving. The law, which becomes effective March 1, now allows police officers to ticket any motorist using a hand-held phone while driving, whereas previously, police only could ticket a driver if stopped for another infraction. Violators of the cell phone ban face a \$250 fine; the fine for texting while driving is \$100.

**Practice Tip:** Consider revising your cell phone policy to include a prohibition against texting while driving.

## NJ Legislature Still Debating Paid Family Leave

The New Jersey Legislature is continuing efforts to enact a paid family leave bill that would provide up to six weeks' paid leave to employees absent due to the birth or adoption of a child or to care for a sick family member. (The original plan for 10 weeks of paid leave failed without even coming to a vote.) Employees on paid family leave would receive 2/3 of their weekly salary, up to \$500. The program would be funded by a \$1.00 weekly deduction from New Jersey workers' paychecks. Legislators claim employee funding means that the proposed law will not cost employers any money, but businesses have objected, stating that by making it more attractive for workers to take leave, the program would raise employers' costs for temporary workers, decrease their scheduling flexibility and make New Jersey less attractive to businesses thinking of relocating here. California is the only state that mandates six weeks of paid family leave.

## NJ Legislature Delays Action on 'Hostile Environment' Bill

The NJ Assembly Labor Committee recently passed a new bill that would add definitions of hostile work environment, abusive conduct, and physical and psychological harm to the Law Against Discrimination. The bill also ensures that the LAD clearly states that "derogatory remarks, insults and epithets" are part of the mix. The bill is in response to a decision by an Appellate Division panel reversing the trial court's decision in *Cutler v. Dorn*, 390 N.J. Super. 238 (App. Div. 2007) in which the jury agreed with a Jewish police officer that comments from his colleagues like "dirty Jews" created a hostile environment. The bill is on hold, pending the outcome of an appeal filed with the NJ Supreme Court because the Court's decision could make the bill unnecessary or could suggest additional revisions. No decision is expected until Spring.

SPECIAL ALERT  
SPECIAL ALERT

## FMLA Now Provides For Family Leave to Care for Members of Armed Forces

On January 28, President Bush signed the National Defense Authorization Act, which includes an amendment to the FMLA, effective immediately, that permits a "spouse, son, daughter, parent, or next of kin" to take up to 26 workweeks of leave to care for a "member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness." The Act also permits an employee to take FMLA leave for "any qualifying exigency arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces in support of a contingency operation." This provision is not effective until the Secretary of Labor issues final regulations defining "any qualifying exigency."

## EEOC Issues Final Regulations Allowing Employers to Coordinate Retiree Health Benefits with Medicare Eligibility

In December, the EEOC issued final regulations creating exemptions from the Age Discrimination in Employment Act (ADEA) for employers offering health insurance benefits to retired employees. The regulations permit such employee benefit/health insurance plans to alter, reduce or eliminate benefits once a retiree becomes eligible for Medicare health benefits (or a comparable state health benefits plan). The regulations also allow a plan to alter, reduce or eliminate health insurance benefits for the spouse or other eligible dependents of a retiree when that individual becomes Medicare-eligible, regardless of whether the retiree's health benefits are affected. The exemption applies to both existing and new retiree health benefit plans, but the exemption is narrow:

- No other aspects of ADEA coverage or employment benefits, other than retiree health benefits, are included in the exemption, so employers cannot impose similar requirements on active employees who become Medicare-eligible.

- The exemption does not affect any non-ADEA obligation an employer may have under Medicare or any other law.

The EEOC originally proposed these regulations in 2004, but AARP sued, challenging the exemption. In 2007, the US Court of Appeals for the Third Circuit (which includes New Jersey) issued a decision upholding the regulations and dismissing AARP's suit. AARP petitioned the US Supreme Court to review the Third Circuit's decision, but the EEOC implemented the regulations into law without waiting to determine if the Court will hear the appeal or how the Court will rule if it does take the case.

**Practice Tip:** These regulations offer the potential for significant cost savings to employers who offer group health insurance benefits to retirees and their eligible dependents. Insurance carriers offer numerous different options, including Medicare replacement and Medicare supplement plans. An independent benefits consultant can be very helpful in determining which plan is most appropriate for your company.

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## Delay Leads To Loss of Right To Enforce Arbitration

Court rejected employer's efforts to enforce agreement to arbitrate, where employer waited 20 months after former employee filed a CEPA claim to give notice of its intent to enforce arbitration agreement signed during employment. Court held that delay and "protracted pretrial litigation" would have put too much burden on the employee and, therefore, employer waived its right to compel arbitration. *Grella v. Prebon Yamane (USA) Inc.*, -- N.J. Super. -- (App. Div. 2007)(unpublished decision).

## New Jersey Enacts New Plant Closing Notification Law

On December 20, 2007, New Jersey enacted a plant closing law that is similar to the federal Workers Adjustment and Retraining Notification Act (WARN), but imposes additional burdens on NJ employers. Like WARN, the Millville Dallas Airmotive Plant Job Loss Notification Act (NJ WARN) requires employers to give 60 days notice to employees in the event of a plant closing or mass layoff, but imposes other obligations that are more restrictive. Highlighted below are some key similarities and differences between the two laws:

	<b>WARN</b>	<b>NJ WARN</b>
<b>Employers Covered</b>	100 or more full time & part-time (> 20 hours/week) employees	100 or more full time employees
<b>Notice Period</b>	60 days advance notice	60 days advance notice
<b>Reasons for Notice</b>	60 days advance notice <ul style="list-style-type: none"> <li>• Plant Closing (50 or more employees laid off for 30 days or more);</li> <li>• Mass Layoff (500 or more employees for 30 days or more or more than 50 employees if they make up at least 33% of the workforce)</li> </ul>	<ul style="list-style-type: none"> <li>• Termination or transfer of operations (permanent or temporary shut down of single establishment, facility or operating unit including termination of 50 or more full time employees during any 30 day period);</li> <li>• Mass Layoff (RIF related to transfer or termination of operations, including termination during any 30 day period of 500 or more full time employees or 50 or more full time employees representing at least 1/3 of full time employees at location)</li> </ul>
<b>Parties to Notify</b>	<ul style="list-style-type: none"> <li>• Affected employees (non-union),</li> <li>• Union president,</li> <li>• State Rapid Response Dislocated Worker Unit,</li> <li>• Chief elected official of municipality where business is located.</li> </ul>	<ul style="list-style-type: none"> <li>• Affected employees (union &amp; non-union),</li> <li>• Union representatives,</li> <li>• NJ Commissioner of Labor and Workforce Development,</li> <li>• Chief elected official of municipality where business is located.</li> </ul>
<b>Exceptions - No Notice Required</b>	<ul style="list-style-type: none"> <li>• Faltering company,</li> <li>• Unforeseeable business circumstances,</li> <li>• Natural disaster</li> <li>• Strike or lockout</li> <li>• Sale of business</li> <li>• Temporary facilities or end of project</li> </ul>	<ul style="list-style-type: none"> <li>• Termination of operations necessary due to fire, flood, natural disaster, national emergency, act of war, civil disorder or industrial sabotage</li> <li>• Facilities operating 3 years or less</li> </ul>

## New Jersey Enacts New Plant Closing Notification Law

	<b>WARN</b>	<b>NJ WARN</b>
<b>Content of Notices</b>	<ul style="list-style-type: none"> <li>• Name &amp; address where mass layoff or plant closing will occur,</li> <li>• Name &amp; telephone number of company contact person,</li> <li>• Whether employment loss will be temporary or permanent &amp; whether entire plant will close,</li> <li>• Expected date of 1<sup>st</sup> job losses, &amp; schedule of any further reductions (for individual employees - anticipated date of job loss),</li> <li>• Job titles of affected positions &amp; number of affected employees in each category,</li> <li>• Bumping rights, if any, and</li> <li>• Name of all union/employee representatives &amp; name &amp; address of chief elected officer of each union</li> </ul>	<ul style="list-style-type: none"> <li>• Number of employees to be terminated,</li> <li>• Date of transfer or termination of operations or mass layoff,</li> <li>• Date of each termination;</li> <li>• Reasons for transfer or termination of operations or mass layoff;</li> <li>• Other available employment with employer;</li> <li>• Employee termination rights regarding wages, severance pay, benefits, pension, etc.;</li> <li>• Amount of severance pay due as a penalty <b>if</b> employer failed to provide required 60 days' notice;</li> <li>• Employees' right to receive information, referral, and counseling from Department of Labor &amp; Workforce Development's response team</li> </ul>
<b>Penalties</b>	<ul style="list-style-type: none"> <li>• Inadequate notice to employees - back pay and benefits for period of violation, up to 60 days, less any wages employer paid employee during notice period</li> <li>• Inadequate notice to local government - civil penalty of up to \$500 for each day of violation, except if employer pays each employee total due within 3 weeks after employer orders closing or layoff</li> </ul>	<ul style="list-style-type: none"> <li>• Inadequate notice to employees - severance pay equal to one week of pay for each full year of employment (no reduction for partial compliance) - no limit;</li> <li>• Employers can offset WARN penalties but not severance due under policy or contract*</li> </ul> <p>*no express prohibition offsetting severance under policy or contract against WARN penalties</p>
<b>Enforcement</b>	Individual or class action suits by employees, unions or local government in US district court, attorneys' fees if prevail	Civil law suits by employees, unions or local government in NJ Superior Court, attorneys' fees if prevail

**Practice Tip:** Because NJWARN is new, employers can anticipate much litigation, particularly where definitions and requirements differ between NJWARN and federal WARN. Before implementing any plant closing or large scale RIF, speak to qualified counsel. Employers with written severance policies should ensure that their policy states that all severance benefits are reduced by the amount of any NJWARN severance penalties.

## NLRB Upholds Employers' Right to Prohibit Union E-mails

The NLRB recently ruled that an employer can ban certain types of union e-mail from a company system if part of a general policy prohibiting any "non-job-related solicitations." The Board distinguished personal e-mail by employees finding that, absent discrimination, employees have no statutory right to use an employer's equipment or media for Section 7 communications." In the specific case, although the employer allowed some non-work-related employee e-mails, it did not permit e-mails urging support for any groups or organizations, so it could prohibit e-mails urging support of the union, as well.

**Practice Tip:** Consider revising your e-mail policy to prohibit all e-mails that support any groups outside the company & enforce policy consistently.

*The Guard Publishing Company, d/b/a The Register Guard*, 351 NLRB No. 70 (December 16, 2007).

The information contained in this newsletter should not be construed as legal advice. If you have any questions about anything you read in this publication or any other labor or employment law related questions, please contact:

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