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NJ's Novel Severance Law Ruins Small Biz Growth, Attys Say

By Jeannie O'Sullivan

Law360 (February 28, 2020, 10:16 PM EST) -- Management-side attorneys say they are aghast at New Jersey's move to require severance pay for laid-off workers, fearing it will dismantle the state's small business base that is already struggling under a blanket of what they see as anti-business laws that threaten to ship industry out of the Garden State.

The bill Gov. Phil Murphy signed into law Jan. 21 requires severance pay when a business plans to lay off 50 or more employees in a 30-day period, and orders those businesses to give the workers 90 days notice, which is a month longer than required under the federal Worker Adjustment and Retraining Notification Act.

Management-side employment lawyers and groups such as the New Jersey Business and Industry Association are among the detractors of what has been dubbed the Toys "R" Us legislation in reference to the retailer's 2017 bankruptcy that left more than 2,000 workers jobless. They consider it the latest blow from an administration that has saddled businesses financially with the impending \$15 minimum wage and the Wage Theft Law, which imposes steep monetary judgments on employers for underpaying workers.

While New Jersey is home to global powerhouses in the health care and pharmaceutical sectors, to name a few, it's the state's mom-and-pop businesses that will bear the brunt of the law, according to Alan S. Pralgever of Greenbaum Rowe Smith & Davis LLP.

Pralgever, who counts small and mid-sized companies among his clientele, lamented the law's potential impact on what he calls "brave, very soulful, very courageous people."

"They take such risk every day of their lives," said Pralgever, a partner in the firm's Roseland, New Jersey, office.

"They should be rewarded for that risk, not penalized for it. We want as many small businesses and startups that we can create. We don't want to see businesses deterred from coming to New Jersey," he said.

But that's exactly what will happen at this rate, experts say. New Jersey's business climate is the "worst in the region," according to a February analysis from the New Jersey Business and Industry Association of five types of tax rates and the minimum wage in the Garden State, along with Connecticut, Delaware, Maryland, Massachusetts, New York and Pennsylvania. Delaware ranked the most competitive in the region, while New Jersey came in last.

The new law will force struggling businesses to make serious financial decisions in a compressed time frame, according to NJBIA's Chief of Government Affairs Chrissy Buteas. In a statement to Law360, she said the first-of-its-kind legislation makes New Jersey an outlier once again in terms of an anti-business agenda.

"Overall, we feel it will add to the many challenges New Jersey faces in attracting businesses, and it will add to the burdens business owners already face in operating their businesses in our state," she said.

Pralgever wondered how businesses resorting to layoffs are going to find the money to comply with the new law if they're already struggling, noting that the legislation also comes with strict penalties for noncompliance. In addition to one week of severance pay for every year worked, employees will get an additional four weeks of severance pay if the business has to shut down in less than 90 days.

The law evolved from Democratic-led twin bills launched by Sens. Joseph Cryan of Union County and Nellie Pou of Passaic County, and Assemblywoman Annette Quijano of Union County, Assemblyman Matthew Milam of Cape May County, and former Assemblyman R. Bruce Land of Cumberland County. In a statement at the time, Pou slammed the "massive bonuses" Toys "R" Us' executives got in the wake of the Wayne, New Jersey, company's insolvency, while employees were left "out in the cold."

Cryan said the legislation protects workers whose severance gets pillaged amid corporate buyouts, and the increased notice period prevents workers from being kept in the dark about the fate of their jobs.

The experts acknowledged the legislation's mission to shield the workforce from unscrupulous employers, but said it inadvertently punishes honest entrepreneurs grappling with rough patches.

"Legislative overreach" is the phrase that came to mind for attorney Kerri A. Wright, co-chair of Porzio Bromberg & Newman PC's employment and education practices. The Morristown-based attorney said the law is an "overreaction" to the Toys "R" Us situation, in which she said the venture capitalists who bought the business in 2005 "destroyed the company" before leaving with millions.

"That situation is not typical," said Wright, who shared her colleagues' fears that the law will deter businesses from setting up shop or expanding in the Garden State.

Potential litigation is another unintended consequence of the law, according to Glenn Smith, a labor and employment partner in Seyfarth Shaw LLP's New York City office. Smith pointed to language in the law that seems unclear about which employers the severance and notice period apply to, as well as the law's confusing definition of "employer."

Smith likewise predicts that some employers could allege the law is preempted by worker protection provisions in the Employee Retirement Income Security Act.

"There's so much ambiguity in it, it's going to create a hotbed of litigation," Smith told Law360.

The law goes into effect July 19, giving employers about five months to prepare. It wouldn't be surprising to employment attorney Christopher S. Mayer, a partner in McCarter & English LLP's Newark office, if businesses contemplating layoffs take the plunge right away in order to avoid the new mandates.

Mayer also decried the increased 90-day notice period requirement, noting that it gives impacted employees and local officials an additional month, compared to the federal notice requirement, to oppose impending layoffs.

Aside from the Wage Theft Act, Mayer said, "I think this is probably right at the top of the list of the most anti-business new laws in New Jersey."

--Editing by Breda Lund and Michael Watanabe.