New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 255—NO. 62
FRIDAY, APRIL 1, 2016

LABOR RELATIONS

Expert Analysis

WARN Act Update: New Questions and Application

As companies adapt to volatile economic conditions, it is a good time to review the requirements of the Worker Adjustment and Retraining Notification Act, 29 USC §§2101 to 2109 (WARN Act), and similar state laws that place notice requirements on employers prior to implementing a plant closing or mass layoff. This month's column provides an overview of WARN and discusses developments regarding WARN liability as a single employer, offsets of WARN notice pay from voluntary severance pay and aggregation rules for calculating the number of layoffs necessary to trigger WARN notice.

By **John P. Furfaro**

And **Risa M. Salins**

WARN

WARN requires covered employers to provide 60 calendar days advance notice of plant closings and mass layoffs to affected employees. In general, employers are covered by WARN if they have 100 or more employees, exclusive of employees who have worked less than six of the last 12 months and employees who work an average of less than 20 hours a week. For plant closings, a covered employer must give written notice if an employment site (or one or more facilities or operating units within an employment site) will be shut down, and the shutdown will result in an employment loss for 50 or more employees during any 30-day period.

A covered employer also must give written notice if there is to be a mass layoff. A mass layoff is one that results in an employment loss at the employment site during any 30-day period for 500 or more employees, or for 50 to 499 employees if they make up at least 33 percent of the employer's work force. Certain narrow exemptions (such as unforeseen business circumstances) may apply, but even in those cases the employer must give as much notice as is practicable.

An employer that violates WARN is liable to each employee for an amount including back pay and benefits for the period of violation, up to 60 days. An employer that fails to provide notice as required to a unit of local government is also subject to civil penalties up to $500 for each day of violation.

Many states, including New York, New Jersey and California (among other states), have enacted state mini-WARN Acts, whose provisions differ in various respects from WARN and often are more demanding. For example, under the New York State WARN Act, NY Labor Law §§860 et seq., employers with 50 or more full-time employees in New York State must provide at least 90 calendar days advance written notice for a plant closing (resulting in employment loss for 25 or more full-time employees) or mass layoff (a reduction-in-force that results in an employment loss for at least 25 full-time employees who represent at least 33 percent of employees at the site, or for at least 250 full-time employees).

An employer that violates WARN is liable to each employee for an amount including back pay and benefits for the period of violation, up to 60 days.

Under the California WARN Act, Cal Labor Code §§1400 to 1408, which covers an establishment with 75 or more full-time or part-time employees, plant closings, layoffs or relocation of 50 or more employees within a 30-day period, regardless of the percentage of work force, requires notice. In New Jersey, the Plant Job Loss Notification Act, NJSA 34:21-1, et seq., requires that severance pay be provided to each full-time employee to whom the employer provides less than 60 days' notice, in an amount equal to one week of pay for each full year of employment.

Single Employer

An entity that is not the employer of record of the affected employees in a layoff may sometimes be liable under WARN as a "single employer" with the company conducting the layoff, typically when such entity acts as an employer or assumes control of the employer. Indeed, in WARN litigation, the direct employer often is in bankruptcy, so employees may bring claims against a solvent parent or investor, arguing that entity is liable for directing the closure.

The U.S. Department of Labor (DOL) has set out five factors to be considered when evaluating the "single employer" doctrine under WARN: (i) common ownership; (ii) common directors and/or officers; (iii) de facto exercise of control; (iv) unity of personnel policies emanating from a common source; and (v) dependency of operations. 20 CFR §639.3(a)(2).

A 2013 decision by the Court of Appeals for the Second Circuit, *Guippone v. BH S&B Holdings*, 737 F3d 221 (2d Cir. 2013), signals to private equity investors that they should be careful to observe corporate formalities and distance themselves from the employment decisions of their portfolio companies. In *Guippone*, management of bankrupt retail chain Steve & Barry's (S&B) notified its holding company and sole managing member, that due to the store's financial trouble, it needed to lay off workers. The holding company's board passed a resolution stating it received this notice from S&B management and authorized S&B to carry out the layoff. Former S&B employees affected by the layoff brought suit against S&B and the holding company on the basis that they did not receive proper WARN notice.

The Second Circuit followed a leading Third Circuit case, *Pearson v. Component Tech.*, 247 F3d 471 (3d Cir. 2001), in holding the DOL factors govern whether a "related or parent entity," including an "equity investor," is a single employer with the company that conducted

JOHN P. FURFARO *is a partner at Skadden, Arps, Slate, Meagher & Flom.* RISA M. SALINS *is a counsel at the firm.*

the layoffs. The U.S. Court of Appeals for the Second Circuit reversed the district court's order dismissing the case and found there was a dispute of material fact regarding whether the holding company had de facto control over the employer. The court held a jury could reasonably find the holding company exercised control over S&B and was therefore liable under WARN. The court focused on the facts that the holding company's board issued the resolution authorizing the layoff, S&B did not have its own board, the holding company and S&B shared common officers, and the holding company chose S&B management.

Similarly, in *Hampton v. Navigation Capital Partners*, 64 FSupp3d 622 (D. Del .2014), the court refused to dismiss a putative class action that former employees of an electricity grid services firm brought against a private equity firm for mass layoffs conducted allegedly in violation of WARN. The private equity firm had a majority interest in the parent of plaintiffs' direct employer, Metadigm.

The court held plaintiffs stated a plausible case for single-employer liability under the DOL factors, focusing on de facto control, because the private equity firm had a pattern of acquiring companies in the electricity grid services sector and incorporating them in Metadigm, created a holding company to control Metadigm, installed executives and a majority of the board of directors at Metadigm, and had an employee who plaintiffs characterized as overseeing or managing Metadigm.

On the other hand, in *Administaff Cos. v. N.Y. Joint Bd.*, 337 F3d 454 (5th Cir. 2003), the U.S. Court of Appeals for the Fifth Circuit found staffing agency Administaff was not liable under WARN for a decision by a plant owner to close a plant where Administaff employees worked. The court found Administaff had no input with respect to ordering or implementing the closing, and in fact did not know of it until after the fact. Moreover, the court found Administaff was not a joint employer with the plant owner under the DOL standards because the employees did not actually perform services for Administaff, there was no common ownership or shared management, and Administaff was not involved in the operations of the plant.

Severance Offsets

Employers with severance plans sometimes include offset language in their severance plans allowing for the reduction of severance pay by WARN notice pay received by an employee. Case law indicates that while such provisions may be permissible where an employer complies with WARN, provisions that offset severance pay for a WARN violation may not be lawful.

In *Braden v. LSI Logic Corp.*, 340 FSupp2d 1066 (N.D. Cal. 2004), plaintiffs were given WARN notices 60 days prior to their layoff and were paid their regular pay and benefits during the 60-day period. The employer then offset plaintiffs' payments under the employer's severance plan by such wages paid to them during the WARN notice period, as the employer's severance plan provided: "[S]hould the termination of your employment be deemed to be covered by the WARN Act, the severance benefits above shall be considered to be payments required by that Act. . . ."

In response to plaintiffs' claims that the denial of severance benefits constituted a WARN violation, the California district court held that "it is certainly the province of the employer to draft the metes and bounds of its ERISA benefit plan—or to offer a plan at all." The court also rejected plaintiffs' argument that the severance plan only permitted the employer to offset severance pay by back pay owed for violating WARN, reasoning that if the court were to interpret the plan as plaintiffs suggested, the plan terms would actually give the employer an incentive not to comply with WARN.

Subsequently, in *Gray v. Walt Disney Co.*, 915 FSupp2d 725 (D. Md. 2013), where an employer did not provide adequate WARN notice to laid off employees, the employer was not entitled to offset the amounts it paid to employees as pay in lieu of WARN notice by the amount of severance owed under the employer's severance plan, despite a provision in the employer's severance plan that contemplated such circumstance.

> An entity that is not the employer of record of the affected employees in a layoff may sometimes be liable under WARN as a "single employer" with the company conducting the layoff, typically when such entity acts as an employer or assumes control of the employer.

The Maryland district court held the purpose of WARN is to provide employees a federally protected "make-whole compensatory remedy" in the event an employer has failed to give adequate WARN notice, which includes paying all benefits, including severance benefits, to which an employee is entitled. The court stated, as the Braden court cautioned, employers cannot "craft benefits provisions that permit violations of federal law and then reduce their liability in the event of such violations."

Aggregation

When assessing whether there will be a sufficient number of employees suffering an employment loss to trigger WARN, an employer must be cognizant of WARN's 90-day aggregation rule. Under this rule, separate layoffs during a 90-day period at a single site, each of which is less than the minimum number of employees required to trigger WARN, but which in the aggregate exceed that minimum number, are presumed to be part of the same plant closing or mass layoff. The employer can rebut the presumption by demonstrating the employment losses are the result of separate and distinct actions and causes and not an attempt by the employer to evade WARN. 29 USC §2102(d).

In *Morton v. Vanderbilt University*, 809 F3d 294 (6th Cir. 2016), the U.S. Court of Appeals for the Sixth Circuit recently examined whether two separate layoffs were within 90 days and, therefore, subject to WARN under its aggregations provision. Plaintiffs were a group of 194 individuals terminated by defendant in July 2013. The number of individuals terminated in July 2013 was insufficient to constitute a mass layoff under WARN. A second group consisting of an additional 279 employees of defendant was notified on Sept. 17, 2013. that their jobs would be eliminated 60 days later, on Nov. 16, 2013. Although the individuals in the second group were told to no longer report to work effective immediately, they continued to receive pay and benefits until November 2013. The district court held the second layoff occurred when the termination notices were given in September—less than 90 days after the first layoff—and therefore both layoffs were subject to WARN under its aggregation provision.

The Sixth Circuit reversed, holding the date of the second layoff was not until Nov. 16, 2013, and, since such date was more than 90 days from the plaintiffs' terminations, the second layoff could not be aggregated to meet the mass layoff definition under WARN. The court held that for so long as the second group of employees continued to receive their full pay and benefits, there had not been a permanent cessation of employment. The Sixth Circuit noted there is no obligation under WARN for employers to permit employees to continue to perform work after proper notice is given.

Conclusion

WARN, at the federal, state and increasingly local levels, remains an evolving area of the law on which employers should be focused when planning for layoffs.

Reprinted with permission from the April 1, 2016 edition of the NEW YORK LAW JOURNAL © 2016 ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited. For information, contact 877-257-3382 or reprints@alm.com. # 070-03-16-44