EMPLOYMENT LAW REPORT

Enforcing the WARN Act In The Shadow Of The Great Recession

By Justin D. Cummins

Introduction

Congress adopted the Worker Adjustment and Reemployment Notification Act ("WARN Act") to enable employees and their communities to have an opportunity to plan for, and minimize the dislocation caused by, mass layoffs and facility closings. In other words, the WARN Act is properly understood as partly a response to the impact of globalization. Toward that end, the statute provides for important remedies to aggrieved parties.

To make remedies under the WARN Act more than illusory, however, plaintiff counsel must take care to ensure that the proper parties in interest are included in any litigation pursued. Toward that end, the integrated enterprise doctrine and the successor liability doctrine should guide plaintiff counsel's investigation and analysis of potential WARN Act claims both before and during the prosecution of a case.

I. WARN Act Basics

The WARN Act creates a private right of action to address various actions by employers in connection with mass layoffs and facility closings.[1] If an employer does not provide 60-days notice to the workforce before doing a mass layoff or closing a facility, aggrieved employees and/or their representatives – typically labor unions – may sue the employer.[2]

An "employment loss" that triggers the WARN Act happens when an employer reduces work hours by more than 50 percent during each month of a 6-month period or lays off at least 33% of the workforce for at least 6 months.[3] A facility closing occurs for purposes of the WARN Act if there is a permanent or temporary shutdown of "facilities or operating units" within a single worksite.[4] In other words, a facility closing occurs even if some employees continue to work so long as there is an "effective cessation of production of the work performed by a unit."[5]

The relevant regulations promulgated by the United States Department of Labor ("DOL") include temporary employees for calculating whether a mass layoff has occurred under the WARN Act – but those temporary employees are not entitled to WARN Act notice and the corresponding damages for not receiving such notice.[6] The DOL regulations also define a facility under the WARN Act as including "contiguous locations," sites within "reasonable geographic proximity" if they are "used for the same purpose and share the same staff and equipment," and the location to which traveling employees "are assigned as their home base, from which their work is assigned, or to which they report."[7]

WARN Act cases typically involve adverse conduct that affects a large number of people in virtually same way, so the corresponding claims are especially amenable to class certification. Indeed, various federal courts have ruled that a bankruptcy judge may apply the standards of Federal Rule of Civil Procedure 23 to permit class-wide pursuit of creditor claims under the WARN Act.[8] In any event, that labor unions plaintiffs can prosecute claims on behalf of aggrieved members means that a WARN Act case can be litigated as a de facto class action that renders broad relief.

Employers have several potential defenses. The faltering-business defense applies only to facility closings and will be successful if an employer can show that it reasonably believed it would be able to obtain necessary financing or business and that giving notice would preclude receipt of the financing or business.[9] The unforeseen-business-circumstances defense, if both non-forseeability and causation are proven, allows employers to give less than 60 days notice – or even no notice at all, depending on the proven facts.[10] The good faith defense can be asserted to lessen liability under the WARN Act if the employer proves both subjective and objective good faith and an objectively reasonable belief that the employer's conduct complied with the statute.[11]

Employers subject to collective bargaining agreements can also avoid providing WARN Act notice if the workforce is not working due to a legitimate lockout – so long as the lockout is not intended as a subterfuge to evade obligations under the statute.[12] Whether a lockout is a subterfuge turns on the pretext analysis applied under Title VII and similar federal

employment statutes.[13] That issue generally should not be decided by a motion for summary judgment.[14]

If they prevail, plaintiffs can recover up to 60 days worth of compensation under the WARN Act.[15] Virtually every Circuit has held, however, that plaintiffs can recover only for the work days within the 60-day time period – meaning approximately 45 days of compensation.[16] If the facility in question has operated 7 days a week, then plaintiffs are far more likely to be able to recover 60 days of compensation.[17] Employees may be able to recover scheduled overtime compensation as well.[18]

Like many other employment statutes, the WARN Act provides for the award of reasonable attorney's fees and litigation costs to prevailing plaintiffs.[19] In addition, the statute authorizes the assessment of civil penalties against employers that run afoul of their legal obligations.[20] Importantly, the limitations period governing WARN Act claims in the Eighth Circuit is far longer than for other employment claims; the period is 6 years.[21]

II. Ensuring Full Accountability: Proving Integrated-Enterprise Liability Under The WARN Act

Perhaps because the WARN Act concerns employers experiencing severe economic problems, the corresponding regulations promulgated by the DOL specifically address whether multiple companies can be considered "the employer" for purposes of WARN Act liability. The five factors considered under the DOL regulations are as follows:

(1) common ownership;
(2) common directors and officers;
(3) de facto control;
(4) common personnel policies; and
(5) dependency of operations.[22]

In issuing its regulations on joint-employer liability, the DOL expressly confirmed that the DOL's 5 factors do not displace existing Federal or State law, including the broadly interpreted integrated enterprise standard recently reaffirmed by the Eighth Circuit in *Sandoval v. Am. Bldg. Maint. Indus., Inc.*, 578 F.3d 787, rhrg. and rhrg. en banc denied 578 F.3d 787 (8th Cir. 2009).[23] The four factors considered under the integrated enterprise test are as follows:

(1) interrelationship of operations;
(2) common management;
(3) centralization of labor relations; and
(4) common ownership.[24]

The 4-factor integrated enterprise standard – which is construed liberally – is highly similar to the 5-factor DOL test.[25] Accordingly, federal courts around the country have used the integrated enterprise standard in WARN Act cases.[26] In *Sandoval*, the Eighth Circuit emphatically established that, pursuant to the integrated enterprise doctrine, "liberal construction is . . . given to the definition of 'employer.'"[27]

Both pre- and early post-suit discovery should focus on obtaining testimony and documents relevant to the factors constituting the integrated enterprise standard and the DOL factors. That way, the lawsuit will capture all appropriate defendants or, if not, the pleadings can be amended appropriately and consistent with the Court's scheduling order.

III. Keeping The Eyes On The Prize: Establishing Successor Liability Under The WARN Act

To ensure that plaintiffs can actually collect any judgment they obtain, plaintiff counsel should conduct both pre- and post-suit discovery with an eye toward identifying any potential successor issues. Successor companies are more likely to exist in the context of WARN Act cases than in other employment matters given the substance of the WARN Act, which by definition concerns employers in dire financial circumstances.

continued on page 33

***JUSTIN D. CUMMINS**, a partner at Miller O'Brien Cummins, PLLP, is past Chair of the MSBA's Labor & Employment Law Section as well as a past Officer of the National Employment Lawyers Association's Eighth Circuit and Minnesota Boards. Justin has taught courses on civil rights and employment law at the University of Minnesota Law School and William Mitchell College of Law, and he spearheaded the development of the Workers' Rights Clinic at the University of Minnesota Law School.*

According to the Eighth Circuit, the doctrine of successor liability "was settled law even in the time of Blackstone."[28] The doctrine has been applied when a company becomes effectively insolvent due to, for example, tactical asset transfers. As the Eighth Circuit put it, "[t]he purpose of corporate successor liability, as indicated, is to prevent corporations from evading their liabilities through changes of ownership when there is a buy out or merger."[29]

Federal courts have invoked the doctrine in an array of employment cases out of concern for equity and for maintaining the rule of law: "[i]n the case where the predecessor company no longer had any assets, monetary relief would be precluded. Such a result could encourage evasion in the guise of corporate transfers of ownership."[30] Consequently, federal courts have applied the successor liability doctrine under the WARN Act.[31]

The Eighth Circuit has long held that successor liability exits when any one of the following applies:
(1) The purchasing company explicitly or implicitly assumed liability;
(2) The transfer of assets amounts to a de facto consolidation;
(3) The purchasing company is a continuation of the purchased company; or
(4) The transfer of assets occurred to escape liability.[32]

More recently, the Eighth Circuit outlined considerations that are relevant to whether a company has successor liability:

(1) Whether the successor company had notice of the claims;
(2) Whether the predecessor company can provide relief;
(3) Whether the successor company has continued business operations;
(4) Whether the successor company uses the same plant;
(5) Whether the successor company uses substantially the same work force;
(6) Whether the successor company uses substantially the same supervisory personnel;
(7) Whether the same jobs exist under substantially the same working conditions with the successor company;
(8) Whether the successor company uses the same machinery, equipment, and methods of production; and
(9) Whether the successor company produces the same product.[33]

In short, "[t]he ultimate inquiry always remains whether the imposition of the particular legal obligation at issue would be equitable and in keeping with federal policy."[34] Effective use of discovery procedures, including requests for admissions, document requests, and company representative depositions, can uncover evidence probative of successor liability as established by the Eighth Circuit precedent outlined above.

In any case, plaintiff counsel should be prepared to resist efforts by defense counsel to apply State-law standards. First, the WARN Act is a federal statute enforced in federal court, so State law should not control. Second, State law on successor liability is difficult standard to meet. A plaintiff typically has to prove that intangible assets were transferred without consideration or that the transfer was otherwise fraudulent before successor liability will attach.[35] The alter ego doctrine under State law also provides little assistance as it is challenging to pierce the corporate veil, especially in this era of increasing corporate complexity and sophistication.[36]

Conclusion

The WARN Act has been more frequently invoked in the past few years as the economic crisis persists. The statute offers important remedies that can lessen the devastating impact on entire communities caused by mass layoffs and facility closings.

Before filing suit and continuing through litigation, Plaintiff counsel should investigate carefully the corporate structure of the companies potentially implicated under the WARN Act to ensure full accountability and relief. The integrated enterprise doctrine and the successor liability doctrine are two powerful tools for plaintiff counsel in that regard.

---

[1] 29 U.S.C. § 2101, et seq.
[2] 29 U.S.C. §§ 2102, 2104.
[3] 29 U.S.C. § 2102(a)(3), (6).
[4] 29 U.S.C. § 2101(a)(2).

continued on next page

Engineering Consultant

- Metallurgical Engineering
- Failure Analysis
- New Product Development
- Railroad Engineering
- Accident Reconstruction
- Product Liability

Investigative Reports and Expert Testimony

Thomas E. Johnson, P.E.
Railroad & Metallurgical Engineering, Inc.
4601 Excelsior Blvd., Suite 305
St. Louis Park, MN 55416
Phone: (952) 920-5204
Fax: (952) 924-0803
E-Mail: tom@railmet.com
Website: www.railmet.com

[5] 29 C.F.R. § 639.3(b).
[6] 29 C.F.R. § 639.3(3)(a)(3), (c)(2); see also Adames-Milan v. Centennial Commc'ns. Corp., 500 F. Supp. 2d 14, 12 (D.P.R. 2007).
[7] 29 C.F.R. § 639.3(1)(1), (3), (6).
[8] See generally In re Am. Reserve Corp., 840 F.2d 487 (7th Cir. 1988).
[9] 29 U.S.C. § 2102(b)(1); 29 C.F.R. § 639.9(a).
[10] 29 U.S.C. § 2102(b)(2).
[11] 29 U.S.C. § 2104(4); see also Castro v. Chicago Hous. Auth., 360 F.3d 721, 733 (7th Cir. 2004).
[12] 29 U.S.C. § 2103.
[13] See, e.g., Reeves v. Sanderson Plumbing Prod., Inc., 530 U.S. 133, 148-49 (2000); St. Mary's v. Hicks, 509 U.S. 502, 511 (1993).
[14] Id.
[15] 29 U.S.C. § 2104(a).
[16] See, e.g., Breedlove, 140 F.3d 797, 801 (8th Cir. 1998), cert. denied 525 U.S. 921 (1998).
[17] Id.
[18] UMW. v. Eighty-Four Mining Co., 159 Fed. Appx. 345, 348 (3rd Cir. 2005); Local Joint Exec. Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc., 244 F.3d 1152, 1157 (9th Cir. 2001).
[19] 29 U.S.C. § 2104(6).
[20] 29 U.S.C. § 2104(3).
[21] N. Star Steel Co. v. Thomas, 515 U.S. 29, 37 (1995); Aaron v. Brown Group, Inc., 80 F.3d 1220, 1223-26 (8th Cir. 1996), cert. denied 519 U.S. 950 (1996); Minn. Stat. § 541.05.
[22] 20 C.F.R. § 639.3(a)(2) (confirming that affiliated companies will be considered one company under the WARN Act when they are insufficiently independent).
[23] 54 Fed. Reg. 16.045 (Apr. 20, 1989), 1989 WL 278605, *16045 (1989) ("[T]he regulation is not intended to foreclose any application of existing law or to identify the source of legal authority for making determinations of whether related entities are separate. To the extent that existing law recognizes the joint employer doctrine . . . nothing in the regulation prevents application of that law.").
[24] Sandoval v. Am. Bldg. Maint. Indus., Inc., 578 F.3d 787, 792-93, rhrg. and rhrg. en banc denied 578 F.3d 787 (8th Cir. 2009).
[25] Sandoval, 578 F.3d at 792-95.
[26] Childress v. Darby Lumber, Inc., 357 F.3d 1000, 1005-06 (9th Cir. 2004) (holding that the parent and subsidiary were one company under the WARN Act); Hollowell v. Orleans Reg. Hosp., LLC, 217 F.3d 379, 388-89 n.12 rhrg. and rhrg. en banc denied 232 F.3d 212 (5th Cir. 2000) (observing that the factors identified in the WARN Act regulations, 20 C.F.R. § 639.3(a)(2), "are similar to those applied in civil rights actions, when determining whether superficially distinct entities may be exposed to liability if they are, in fact, a "'single, integrated enterprise.'").
27 Sandoval, 578 F.3d at 792-93 (quoting Baker v. Stuart Broad. Co., 560 F.2d 389, 391 (8th Cir. 1977)).
[28] U.S. v. Mexico Feed and Seed Co., Inc., 980 F.2d 478, 486 (8th Cir. 1992) (citation omitted).
29 Mexico Feed and Seed, 980 F.2d at 487 (citation omitted).
[30] EEOC v. MacMillan Bloedel Containers, Inc., 503 F.2d 1086, 1091-92 (6th Cir. 1974) (citation omitted).
[31] See, e.g., Hollowell, 217 F.3d at 391 (affirming the plaintiff verdict under the WARN Act based on successor liability even in the absence of fraud).
[32] Mexico Feed and Seed, 980 F.2d at 487.
[33] Prince v. Kids Ark Learning Ctr., 622 F.3d 992, 995 (8th Cir. 2010).
[34] Id. (citation omitted).
[35] See generally Schwartz v. Virtucom, Inc., 2009 WL 1311816 (Minn. Ct. App. 2009), rev. denied (07/22/09). For an in-depth discussion of successor liability under Minnesota law, see David E. Schlesinger, "Disappearing Defendant: Successor Liability Under Minnesota Law," Bench & Bar 31-34 (July 2010).
[36] See generally Victoria Elevator Co. v. Meriden Grain Co., 283 N.W.2d 509 (Minn. 1979) (discussing the factors relevant to the alter ego inquiry).

LAWYER-TO-LAWYER NETWORKING

The law firm of Schwebel, Goetz & Sieben, P.A. congratulates Jim Schwebel on being named "Minneapolis Personal Injury Litigator of the Year" for 2011 by *Best Lawyers in America*.

Best Lawyers in America has chosen only a single lawyer in each community for this unique legal honor.

"THE PERSONAL INJURY POWERHOUSE."

612.377.7777 • Toll Free: 800.752.4265
51st Floor IDS Center • Minneapolis, MN 55402
schwebel.com

mark your calendar

29th ANNUAL CONVENTION

August 11, 12 and 13, 2011
Arrowwood Resort, Alexandria, MN