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Confusion Over "Voluntary" Departures When Evaluating WARN Notice Requirements: Employers Beware

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One challenge faced by many employers is the need to anticipate whether and when a workforce reduction requires the issuance of advance written notices under the federal Worker Adjustment and Retraining Notification Act (WARN) or various state notification laws. Because of exit incentive programs and other voluntary employee departures, plant closings often cause fewer than 50 involuntary employment losses at a particular employment site. In such situations, employers frequently conclude WARN notices are *not* required because a WARN-triggering "plant closing" or "mass layoff" cannot occur if there are fewer than 50 involuntary employment losses at a single site over a 30- or 90-day period.

A new divided Ninth Circuit decision, *Collins v. Gee West Seattle*, __ F.3d __, 2011 WL 182447 (9th Cir. Jan. 21, 2011), creates confusion about whether voluntary employee departures that occur because of a potential plant closing must be considered *involuntary* "employment losses" under WARN. Under the *Collins* majority's reasoning, there could be many more situations resulting in WARN liability, based on a failure to issue WARN notices 60 days in advance, even though a shutdown causes fewer than 50 involuntary separations. The *Collins* case also gives rise to other potential claims that appear irreconcilable with WARN—for example, suggestions that even if employers issue 60-day WARN notices, such employers should have WARN liability relative to those employees who choose to stop working sooner than the termination date announced by the employer.

The Court of Appeals for the Seventh Circuit adopted a contrary view in another recent WARN case, *Ellis v. DHL Express Inc.*, __ F.3d __, 2011 WL 67787 (7th Cir. Jan. 11, 2011), where the court concluded there was not a WARN-triggering "mass layoff" where hundreds of employee departures—all considered voluntary—occurred pursuant to a union-negotiated severance arrangement.

The Seventh Circuit's reasoning in *Ellis* is consistent with the approach adopted by the U.S. Department of Labor (DOL) in the DOL regulations interpreting WARN. However, employers should keep this new controversy in mind when evaluating whether it is necessary to issue WARN notices (or state law notices) in advance of major business restructuring.

WARN Plant Closing/Mass Layoff Notice: In General

WARN provides that covered employers must give advance written notice to unions, affected employees who are not represented by a union, and certain government representatives 60 days before any "mass

layoff" or "plant closing." Whether a "mass layoff" or "plant closing" has occurred depends on the number of employees who have experienced an "employment loss" at a single site of employment over a 60- or 90-day period.[1]

The WARN statute provides that the term "employment loss" means: "(A) An employment termination, other than a discharge for cause, *voluntary departure*, or retirement, (B) A layoff exceeding 6 months, or (C) A reduction in hours of work of more than 50 percent during each month of any 6 month period." WARN § 2(a)(6), 29 U.S.C. § 2101(a)(6) (emphasis added).

Voluntary Departures in Closing/Layoff Situations

In anticipation of many workforce reductions or shutdown decisions—frequently to avoid involuntary separations—employers often offer exit incentives to encourage voluntary departures. It is also common, regardless of whether exit incentives are offered, to have significant employee turnover when voluntary departures occur in the face of unfavorable business conditions or announced shutdown or restructuring plans.

Under WARN, important issues are raised if these types of voluntary separations are considered "involuntary" departures.

- Since WARN's notice requirement is predicated on reaching certain thresholds, the inclusion or exclusion of voluntary separations can affect *whether* WARN notice is required.
- If certain voluntary separations are deemed "involuntary," this also may affect *who* is entitled to WARN notice.
- Treating voluntary separations as "involuntary" departures can affect *when* WARN notices are required. For example, if an employer issues 60-day WARN notices in advance of a planned shutdown or workforce reduction, a decision by employees to leave earlier—if deemed "involuntary"—conceivably could mean the employer did not provide sufficient advance notice relative to such earlier departures.

Treatment of Voluntary Departures Under the WARN Regulations

During the development of WARN regulations, the DOL considered what constitutes a "voluntary departure" for purposes of WARN's exclusion of voluntary departures from the statute's "employment loss" definition. In the preamble accompanying the final WARN regulations, the DOL seemingly rejected the position—now adopted by a majority of the Ninth Circuit panel in *Collins*—that earlier

1. A "plant closing" occurs under WARN if there is a "permanent or temporary shutdown of a single site of employment, or one or more facilities or operating units within a single site of employment" with a resulting employment loss at the site "for 50 or more employees excluding any part-time employees" over a 30- or 90-day period. WARN §§ 2(a)(2) and 3(d), 29 U.S.C. §§ 2101(a)(2), 2102(d). A "mass layoff" occurs (i) if a workforce reduction results in an "employment loss" for 33% or more of a single site's employees (excluding part-time employees) over a 30- or 90-day period, so long as employment losses are experienced by at least 50 employees (again excluding part-time employees); or (ii) if 500 employees (excluding part-time employees) are included in a reduction over a 30-day period, a "mass layoff" will have occurred regardless of whether the affected employees comprised 33% of the site's full-time workforce. See WARN §§ 2(a)(3), 3(d), 29 U.S.C.§§ 2101(a)(3), 2102(d).

For more detailed information concerning WARN requirements, see *Morgan Lewis Workforce Change/Inside Business*, "Top Four WARN Mistakes," available at http://www.morganlewis.com/pubs/LEPG_WorkforceChangeInsight_Feb2009.pdf.

employee departures following notice of a plant closing should be considered "involuntary" under WARN.

After expressing agreement that "some clarification of the concept of voluntary departures is appropriate," the preamble to the WARN regulations states: "DOL does not . . . agree that a worker who, after the announcement of a plant closing or mass layoff, decides to leave early has necessarily been constructively discharged or quit 'involuntarily.'" 54 Fed. Reg. 16042, 16048 (1989).

Rather than adopting a more restrictive definition of "voluntary," the DOL embraced existing legal standards governing voluntary departures, and indicated that an employee's departure, at his or her election, would be deemed involuntary only if the person experienced a "constructive discharge" based, for example, on a "hostile or intolerable work environment" or "pressure or coercion which forced the employee to quit or resign." *Id*.

New Confusion in the Courts

In the more than two decades since WARN was enacted in 1988, courts and employers have treated voluntary departures in a fairly consistent manner. However, the Ninth Circuit *Collins* decision and the Seventh Circuit *Ellis* decision—rendered within 10 days of each other—create new confusion about what types of employee separations should be counted as an "employment loss" under WARN.

In *Ellis*, the Seventh Circuit concluded that hundreds of union-represented employees who accepted a severance package did not suffer a WARN "employment loss." After DHL announced its plans to stop offering U.S. domestic shipping, the company negotiated severance agreements with the union that represented workers at certain affected facilities. Employees who participated signed a release and resigned their employment in exchange for severance pay and benefits; those who did not participate retained their seniority status and recall rights, as well as the right to bring legal claims against their employer, but received no severance pay. Consistent with the DOL's treatment of voluntary departures as explained in the preamble accompanying the final WARN regulations, the Seventh Circuit evaluated traditional evidence of voluntariness. The court stated that the employees were in an "unenviable position," but concluded that those who accepted the severance package had done so voluntarily. After excluding those separations that were voluntary, the remaining involuntary "employment losses" were insufficient to trigger WARN's notice requirements. Consequently, the Seventh Circuit upheld the district court's grant of summary judgment in the defendants' favor.

In *Collins*, the Ninth Circuit majority took a much different view, based on the majority's holding that employees who stop working because a business is closing are not voluntary departures under WARN. The employer in *Collins* issued a written memo to employees stating it was actively pursuing the sale of the business but, if the sale was not successfully consummated, the employer would terminate the employment of all but a few designated employees. Thereafter, large numbers of employees stopped reporting to work, and the employee departures actually forced the employer to cease business sooner than previously announced because the small number of remaining employees prevented the employer from continuing operations.

Although the number of employees displaced by the actual shutdown in *Collins* were not sufficient to constitute a "plant closing" under WARN, the plaintiffs asserted that employment losses were experienced by all of the employees, including those who stopped working after the employer's announcement of a sale and potential shutdown. The district court rejected the plaintiffs' claims and granted summary judgment to the employer.

The Ninth Circuit majority in *Collins* reversed the lower court, and held that "if an employee leaves a job because the business is closing, that employee has not 'voluntarily departed' within the meaning of the WARN Act. Rather, that employee has suffered an 'employment loss.'" Rather than applying WARN's "employment loss" definition, the Ninth Circuit majority focused on WARN's definition of "affected employees," which includes all those who "may reasonably be expected to experience an employment loss as a consequence of a plant closing." 29 U.S.C. § 2101(a)(5). The Ninth Circuit majority asserted that "how many positions will be eliminated by the closing" provided the "starting point" for determining the "actual or reasonably expected employment loss" resulting from a plant closing. In the court majority's view, an employee's departure should not be considered voluntary under WARN if it is based on the "unexpected and urgent need to find new employment." Rather, according to the majority, an employee departure should be deemed voluntary only if "there is some evidence of imminent departure for reasons other than the shut down."

Applying the Ninth Circuit *Collins* standard of voluntariness—turning on each employee's actual "reason for departing"—places employers in the impossible situation of making a determination as to whether a departure is voluntary more than 60 days *before* any eventual shutdown (*i.e.*, before employees have even decided whether to leave voluntarily in advance of any shutdown's implementation). The Ninth Circuit majority in *Collins* did not acknowledge this practical difficulty, as evidenced by a cryptic statement (by the court majority in a footnote) that "an employee's reason for departing is a factual inquiry better suited for district courts."

Implications for Employers

All employers face substantial challenges when attempting to determine, prior to major restructuring decisions, whether advance notices are required under WARN or state law variations on WARN. Under WARN, this type of determination must be made more than 60 days prior to significant changes, because the statute requires the issuance of written notices at least 60 days before any "plant closing" or "mass layoff." Under some state laws, the amount of required notice is even longer—for example, the New York state version of WARN requires 90 days' advance notice. WARN determinations also require employers to evaluate the anticipated duration of projected layoffs (since only layoffs exceeding six months in duration are considered an "employment loss" under WARN). Finally, employers evaluating WARN obligations must determine how many employment losses will occur within up to 90 days of one another (since WARN provides that successive groups of employment losses—each insufficient to trigger WARN—may be aggregated over a 90-day period unless the employer can demonstrate, among other things, that the different groups result from "separate and distinct actions and causes").

For the time being, employers should consider taking the following actions:

- All employers implementing workforce reductions within the Ninth Circuit should be careful, especially when dealing with planned shutdowns, to regard all employees at a particular site as experiencing "employment losses" under WARN, even if large numbers of employees participate in exit incentive programs or otherwise terminate their employment on a voluntary basis.
- Employers in other jurisdictions, either under WARN or similar state law notice statutes, should more carefully consider the possibility that a reviewing court or state agency may adopt reasoning similar to that utilized by the Ninth Circuit majority in the *Collins* case.
- Employers should monitor future developments, including the potential appeal of the Ninth

Circuit *Collins* case, and the treatment of similar WARN issues in future cases.

- WARN has always provided that voluntary notices are encouraged, even when not required under the statute. Employers should err on the side of issuing 60-day WARN notices, particularly when it appears that a particular shutdown or workforce reduction may be close to reaching the "plant closing" or "mass layoff" thresholds established in WARN.

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