The WARN Act: An “Employment Loss” by any Other Name Would Smell

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The federal Worker Adjustment and Retraining Notification Act of 1988 (WARN Act) requires covered employers to provide affected workers 60 calendar days’ notice prior to a plant closing or a mass layoff that results in an employment loss. Whether a reduction in workers constitutes a “plant closing” or a “mass layoff” is the subject of much debate, determined by the definitions provided within the WARN Act. However, whether an affected employee suffers an “employment loss” would seem to be less debatable. In Simonyan v. Countrywide Financial Corp., No. 10-2455 (January 26, 2011), a federal district court held that the phrase “employment loss” may not be limited narrowly to situations in which the employer tells the employee, “you are laid off” or words to that effect.

According to the WARN Act, an “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” 29 U.S.C. § 2101(a)(6). An “employment loss” does not occur as a result of (i) a sale of all or part of a business, (ii) a relocation, (iii) a consolidation, (iv) an employee receives an offer to transfer to a different work site within a reasonable commuting distance, or (v) an employee’s receipt receives and accepts a transfer to a different work site regardless of distance.

The Act’s 60-day notice period is intended to provide workers (and certain government officials) sufficient notice of an impending change in job status, pay, and benefits. Many employers provide notice to affected employees and eliminate the employee’s obligation to return to work for some or all of the notice period. If an employer commits to paying full wages and benefits during this period, the cessation of production does not equate to an employment loss. In one case, International Alliance of Theatrical and Stage Employees and Moving Picture Machine Operators, AFL-CIO v. Compact Video Services, Inc., the Ninth Circuit Court of Appeals held that an acquiring employer’s modification of employees’ wages and benefits was not an event covered under the WARN Act.

In a 2011 case decided by a federal District Court in California, the plaintiff was an account executive whose compensation consisted of 20.6 percent base salary and 79.4 percent commission-based pay. Sixty days before laying off the plaintiff, the employer sent the plaintiff a WARN notice. The notice informed him of his layoff date and his continued employment until a date 60 days in the future. The employer also informed the plaintiff that business would continue as usual and that he would continue to receive regular pay and benefits until his layoff date. According to the plaintiff, after receiving the notice, he was prohibited from returning to work, contacting clients, or engaging in any work-related activity that allowed him to earn commissions. The employee filed suit alleging, among other things, a WARN Act violation.
Denying the defendant’s motion to dismiss, the court determined that an alleged 80 percent reduction in wages was more than a simple modification to wages and benefits. Because the WARN Act was intended to protect an employee’s wages and benefits during the notice period, the court held that the deprivation of the right to earn almost all of an employee’s income was sufficient to state a WARN Act claim. Therefore, on the basis of this case, one might reason that despite the Act’s specific definition of “employment loss,” a court may take a more holistic approach to determine whether the intent of the WARN Act was violated.

Conclusion

Consistent with the requirements of the WARN Act, courts allow a discontinuation of work as long as full wages and benefits are protected during the 60-day notice period. While a modification to employee wages and benefits is not a WARN covered event, according to the federal court in the Central District of California, an 80 percent reduction in pay is sufficient to establish an “employment loss” and therefore a violation of WARN. Whether a lesser reduction in pay creates similar WARN Act issues will remain to be seen.

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