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Unforeseen Business Circumstances May Relieve Company of WARN Obligation

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By Maria Greco Danaher

The federal Worker Adjustment and Retraining Notification (WARN) Act generally requires that companies of 100 or more employees provide advance notice of plant closings. The purpose of such notice is to allow employees some time to adjust to the prospective loss of employment, and to seek other jobs or retraining. The WARN Act requires 60 days written notice before a closing or mass layoff by covered employers.

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Currently, the WARN Act includes certain defenses to the 60-day notice requirement: the "natural disaster" exception, the "faltering company" exception, and the "unforeseeable business circumstances" exception. Recently the 10th U.S. Circuit Court of Appeals affirmed summary judgment in favor of an employer that had relied on the "unforeseeable business circumstances" exception as an explanation for failure to provide the required notice prior to a total shut-down of the company. *Gross v. Hale-Halsell Co.*, 10th Cir., No. 08-5028, January 20, 2009.

In that case, a group of plaintiffs were employed by Hale-Halsell Company (HHC), a wholesale grocer in Tulsa, Oklahoma. HHC's largest customer was United Supermarkets, located in West Texas and the Texas panhandle. HHC and United had enjoyed a 30-year business relationship, during which United provided forty percent of HHC's orders. Occasionally, however, HHC would fall short on orders submitted by United – a circumstance termed a "stockout" or "out." Beginning in 2002, the percentage of recorded stockouts in response to United's orders began to increase, and by the end of 2003 had risen to 18.9% of orders placed by

United. At that point, United was not considering terminating its relationship with HHC. But in early in 2004, that number rose abruptly to 53.8%, and on January 8, United wrote to let HHC know that it would have to "place orders with alternative suppliers" and that its orders to HHC "would be declining." At the same time, United reiterated its willingness to continue to do business with HHC, despite the stockouts.

During that 2003-2004 time period, HHC was working with LaSalle Bank on obtaining a capital loan. As late as December 8, 2003, LaSalle was still considering a $15 Million loan to HHC. However, at the beginning of 2004, LaSalle declined to approve the funding. That event occurred just after the January 8 letter from United to HHC. On January 15, United wrote to HHC to announce that it planned to replace HHC as its primary supplier, and that this change would adversely affect its orders to HHC. On Friday, January 16, HHC wrote back to United, expressing hope that HHC's problems still could be solved. However, on Tuesday, January 20 (Monday having been a bank holiday), HHC met with its primary accounts holder, F&M Bank. Based on that meeting, HHC decided it could no longer survive as a company. The following day, HHC informed office personnel and warehouse staff of the impending company closure. One day later, the approximately 200 employees who would be laid off received notice in their paychecks.

The employees brought a federal court action, alleging violation of the WARN Act. The company's motion for summary judgment based upon the exceptions to that Act was granted, and was upheld on appeal. The Tenth Circuit specifically held that United's termination of HHC was unforeseeable at the time that the 60-day WARN notice should have been given, and that HHC had provided notice of the closure to the employees "as soon as practicable," as required under the Act.

In order to invoke the "unforeseen business circumstances" exception, a company must show a sudden, unexpected event outside of the employer's control. In this case, while HHC was aware of United's dissatisfaction, there was reason for HHC to believe that the situation could improve . . . until LaSalle declined to approve the funding necessary for HHC to continue its operations.

Companies contemplating plant shut-downs or large lay-offs should have a clear recognition of the pre-conditions and requirements set forth in the WARN Act. Companies seeking to assert an available exception or defense to the requirements of the WARN Act should work closely with legal counsel, human resource personnel, and funding sources in order to avoid the financial penalties associated with violation of that Act.

Further, employers should be aware that if passed, the FOREWARN Act of 2007, originally co-sponsored by then-Senators Clinton and Obama, would substantially expand the reach of the WARN Act. Proposed provisions include covering employers with 50 or more employees (as opposed to the current 100), requiring 90 days of notice (rather than the current 60), and would define "mass layoffs" as a loss of employment for a minimum of 25 employees at a single site (as opposed to WARN's 50). Those provisions, along with the proposed increase in penalties for violations could have a substantial adverse impact on some employers, especially in these difficult economic times.

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