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A WARN Act Roundup: Jury Trial Rights, the Unforeseen Business Circumstances Defense, and the Single Employer Rule

February 27, 2015

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- ***Creech et. al. v. Virginia Fuel Corp.***, No. 2:14-CV-0006 (W.D. Va., November 24, 2014)

In *Creech et. al. v. Virginia Fuel Corp.*, the question presented to the court was whether a class of former employees of Virginia Fuel Corporation was entitled to try its WARN Act claims before a jury.

Because the court held—as all others have—that neither the text of the WARN Act nor its legislative history conveys a statutory right to a jury trial, the court turned its analysis to whether such a jury trial right is required by the Seventh Amendment to the U.S. Constitution, which assures the right to a jury "in Suits at common law." That analysis centered on whether WARN Act claims are legal or equitable in nature—an assessment focused on two subjects: (a) the nature of the issues involved, and (b) the remedy sought.

As to the first prong, the court rejected the employees' attempt to analogize WARN Act claims to common law claims for breach of contract or wrongful discharge (a tort), instead finding WARN Act claims more similar to a breach of an employer's fiduciary duty to safeguard employee welfare by providing appropriate notice of a layoff or, in the alternative, remuneration for that period.

The court found that the remedies provided by the Act—money damages in the form of back pay and benefits—are equitable in nature because such damages are similar to restitution and intended to restore the status quo, "a trademark indicium of equitable relief." The court was further persuaded of the equitable nature of the WARN Act's remedies because section 2104(a)(4) of the Act vests the district court with broad discretion to reduce liability upon a finding of employer good faith—another hallmark of equity. Last, the court easily rejected the plaintiffs' comparison of WARN Act remedies to statutory schemes under which jury trials have been permitted (such as the Family and Medical Leave Act and the Fair Labor Standards Act) because such schemes provide for separate and distinct categories of relief, which are both equitable and at law.

Notably, only the Sixth Circuit Court of Appeals has squarely addressed this issue, and found no jury trial right. As the jury trial question continues to percolate (with its obvious and important potential consequences for future class action litigation), the *Creech* decision is notable for its sound analysis and rejection of a broad array of arguments attempting to closely compare the WARN Act to various "suits at law."

- ***Moreno v. Total Frac Logistics, LLC, et al.***, 2:14-CV-437 (S.D. Tex. December 16, 2014)

In *Moreno v. Total Frac Logistics, LLC, et al.*), the court considered a defense motion to dismiss WARN Act claims pursuant to Federal Rule of Civil Procedure 12(b)(6). The claims had been asserted against multiple corporate defendants, the employer, Sundance, and other entities alleged to be so interrelated as to constitute a "single employer." Absent such a "single employer" finding, the claims would have failed because Sundance, alone, could not have been an "employer" under the WARN Act, which applies only to employers of 100 or more employees.

The court set forth the applicable test for determining whether interrelated entities should be treated as a single employer under the WARN Act. The test, which analyzes the degree of the entities' independence from one another, focuses on five key factors: (1) common ownership; (2) common directors and/or officers; (3) *de facto* exercise of control; (4) unity of personnel policies emanating from a common source; and (5) the dependency of operations.

In *Moreno*, the complaint alleged the following facts in favor of a "single employer" finding: (i) all defendants operated under the control of one individual and from the same location; (ii) the entities shared common officers and directors, with cross-entity responsibility for employment decisions; (iii) interrelation of operations among entities; (iv) joint control of business decisions across entities; and (v) the subject layoff had been agreed upon jointly among the entities. Focusing on the "overriding concern" of whether the complaint alleged facts to establish the "degree of independence" of a subsidiary entity from its parent, the court concluded that the complaint alleged sufficient facts to withstand the motion to dismiss.

Because the five allegations cited in the paragraph immediately above were noted prominently in the court's decision, *Moreno* is particularly instructive regarding the characteristics of business relationships that impact the single-employer analysis, including especially the decision-making processes employed by related entities, both in everyday activities as well as planning a force reduction.

- ***Varela and Dimura v. Eclipse Aviation Corp. (In re: AE Liquidation, Inc.)***, No. 08-13031 (Bankr. D. De. November 18, 2014)

The case *Varela and Dimura v. Eclipse Aviation Corp.* (*In re: AE Liquidation, Inc.*) arose in the extremely tricky context of deciding whether a WARN notice is required when the employer is making substantial efforts to stabilize and save the business. In *Varela*, the employer (which was also the debtor in bankruptcy) was financially troubled, having defaulted on secured notes and was faced with frozen cash accounts. Despite considering liquidation, the company's board of directors decided to file a Chapter 11 petition and seek bids for a going-concern sale—an attempt to continue the business. A bidder (ETIRC) emerged, and it entered into an asset purchase agreement with the debtor. The bankruptcy court approved the sale on January 23, 2009.

The financing was to be supplied by a Russian-owned bank. The financing and closing were delayed, however, and on February 18, 2009, the debtor advised its employees of the delays in a message notifying them of a mass furlough pending resolution of the financing and sale issues. Despite repeated inquiries by the debtor and its extensive efforts, and despite repeated assurances by ETIRC that the funding was imminent, the deal did not close. The debtor's creditors filed a motion to convert the bankruptcy to a Chapter 7 (liquidation) case and on February 24, 2009, the debtor advised its employees that the furlough had been retroactively converted to a termination of employment.

A class action seeking damages under the WARN Act followed, and this decision resolved the parties' cross motions for summary judgment. The issue presented was whether the debtor could successfully invoke either the "faltering company" or "unforeseeable business circumstances" exceptions to the WARN Act's 60-day notice requirement. The court quickly rejected the debtor's advancement of the "faltering company" exception because it requires, among other things, a finding that the debtor was actively seeking capital at the time when notice would have been required, and case law is clear that a "sale of business" does not constitute "seeking capital."

Nonetheless, the court found that the "unforeseeable business circumstances" exception applied, and granted summary judgment in favor of the employer, dismissing the WARN Act claims. In reaching this decision, the court outlined the factors that the employer must establish to qualify for the exception: (1) the claimed circumstance was unforeseeable 60 days in advance of the layoff, and (2) the layoffs were caused by that circumstance.

Unlike the "faltering company" defense, the WARN Act regulations do not mandate a narrow reading of the phrase "unforeseeable business circumstances." Foreseeability is a fact-intensive inquiry that focuses on whether a similarly-situated employer exercising reasonable business judgment would have foreseen the layoffs; unforeseeability is established when the circumstance is a "sudden, dramatic and unexpected action or condition outside the employer's control."

Here, the court was convinced that the failure to close the sale—and the layoff that ensued—were unforeseeable to a reasonable employer 60 days prior to the layoff because, following that date, (1) an asset purchase agreement was signed; (2) the court had approved the sale; (3) the prospective purchaser had already committed $20 million in financing to the debtor; and (4) the debtor was presented with evidence and representations that financing had been secured without contingency and that there was a "high likelihood" of sale approval by the Russian government. Helpfully, the court answered the plaintiffs' arguments in part by noting that forcing a company in the debtor's position to rush notice of a layoff could cause employees to overreact and prematurely leave their jobs, forfeiting valuable benefits. Causation was not much at issue, and the court further found that the debtor gave as much notice as was practicable. Summary judgment was thus granted in favor of debtor, dismissing the WARN Act claims.

Especially because the "foreseeability" analysis is objective, it is crucial that employers wrestling with whether—and when—to provide notice of a potential layoff closely monitor the likely success or failure of their efforts to save the business. Once the reasonable employer would have determined that such efforts were likely to fail, notice to employees is required. The employer's foresight and prompt communication greatly support the interposition of the exception.

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