Ninth Circuit holds that resignations in advance of, but in response to, announced plant closure are not “voluntary departures” under WARN Act

By Michael C. Hallerud

In a case of “first impression,” the United States Court of Appeals for the Ninth Circuit held that employee separations in advance of, but because of, an announced plant closure are not “voluntary departures” under the Worker Adjustment Retraining Notification Act (“WARN”). The ruling expands the number of employees with a potentially compensable “employment loss” and who are counted to reach the threshold of 50 employees triggering WARN notice obligations.

WARN

WARN requires covered employers—generally those with 100 or more employees—to give 60 days’ advance notice before ordering a “plant closing” or “mass layoff.” A plant closing is the permanent or 30-day or longer shutdown of a single employment site resulting in an “employment loss” for 50 or more employees. A mass layoff is a reduction in force creating an employment loss in any 30-day period for a substantial proportion of the workforce, but at least 50 employees.

Employees who, during the notice period, retire, are discharged for cause, or separate by “voluntary departure”—independent of the impending closure or layoff—are deemed not to have experienced a WARN employment loss. Accordingly, they are not counted in reaching the 50-affected employee WARN notice threshold and are ineligible for WARN damages in case of insufficient notice.

The failure to provide the required advance notice to employees and state and local governments exposes the employer to liability for back pay and benefits for the period of the violation (i.e., up to 60 days). The exposure can be substantial. For instance, in a workforce of 150 employees who each earn on average $1,000 weekly in salary, wages, and benefits, the failure to provide the full 60-day notice may result in WARN damages exceeding $1 million. Moreover, unlike normal back pay liability under labor and employment laws, interim earnings through replacement employment, and

1 29 U.S.C. § 2101 et seq.
earnings that could have been achieved by reasonable effort, do not offset any WARN damages owed by the employer.

**Recent Ninth Circuit decision**

*Collins v. Gee West Seattle LLC* involved the sudden closure of Gee West’s automobile dealerships employing 150 employees in Seattle. Gee West gave notice only 11 days before the planned closure. Employees immediately stopped reporting for work in substantial numbers, presumably to seek replacement employment. By the date of closure, only 30 employees remained. Gee West argued that the 120 employees who abandoned employment after the announcement of the impending closing had voluntarily departed, thereby excluding them from WARN’s application only to employees experiencing an “employment loss.” Gee West argued that not only did those 120 employees not qualify for WARN damages, but that, with only 30 employees experiencing an employment loss on the plant closing date, there were insufficient affected employees to trigger Gee West’s WARN notice obligations.

The United States Court of Appeals for the Ninth Circuit disagreed with Gee West, holding that employees who separate from employment because the business is closing have not “voluntarily departed” within the meaning of WARN. Instead, because at the time notice was required they could reasonably have been expected to experience an “employment loss” upon closure of the business, they must be counted to reach the WARN notice threshold and are eligible for WARN damages to the extent notice was not given.

The Ninth Circuit reasoned that employees experience an employment loss if they depart as a consequence of a plant closing. To count only those employees who have not yet commenced new employment or who just retired or quit before the final day of operations would be to turn “the WARN Act on its head.” That is, employers could escape liability if sufficient employees leave because, but before the effective date, of the plant closing. The Ninth Circuit further reasoned that Congress intended, by the 60-day notice period, to protect employees from the pressure of retiring precipitously or immediately accepting replacement employment that may be undesirable or below the employee’s market value. Instead, Congress afforded a reasonable period—with a continued income stream—to locate suitable replacement employment.

The Ninth Circuit did leave open the possibility that some employees who depart after insufficient notice of an impending plant closing or mass layoff could still be voluntary departees excluded from WARN coverage. The court cited as examples persons who leave during the notice period because of pregnancy, health, or a better job opportunity. By extension, persons who separate by retirement (instead of resignation) for reasons unrelated to the notice of impending plant closure or mass layoff would also not be counted against the WARN notice threshold or be eligible for WARN damages. These exceptions are fact-intensive and must be determined on a case-by-case basis in the trial court. The employer would have the evidentiary burden of proving the exceptions.

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2 Case No. 09-36110 (9th Cir., filed Jan. 21, 2011)
Conclusion

The Ninth Circuit’s decision dramatizes the need for careful advance planning, with advice of counsel, of any facility closing or reduction-in-force or work hours where WARN may be implicated. Also, many states have adopted “Little WARN” acts, which may set lower thresholds for employer size and numbers of affected employees triggering notice. The Gee West decision will likely influence the interpretation and application of these state laws, too.

For further information, or for assistance in complying with WARN and applicable state plant closing and layoff laws, please contact your Nixon Peabody attorney or:

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