Proskauer

New Jersey WARN Act Applies to Parent and Affiliated Companies, Including Private Equity Investors in Certain Circumstances

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New Jersey's Appellate Division has held that parents or affiliates (including a private equity investor) of a company that failed to give required notice of a closing or mass layoff under the New Jersey WARN Act ("NJ WARN")[1] may be liable for severance pay owed to the employees under the statute. *DeRosa v. Accredited Home Lenders, Inc.*, 2011 WL 2314304 (App. Div. 2011). The court adopted a five-factor test contained in federal WARN regulations to determine when related entities should be treated together as a "single" employer with direct liability for violations of the statute. The court further noted that the definition of "employer" in NJ WARN is "more expansive" than the federal law and that consideration may be given to additional factors if "relevant."

In *DeRosa*, Accredited Home Lenders ("Accredited") suddenly closed its New Jersey office without any notice. Two employees filed a class action lawsuit seeking the severance pay that must be paid under NJ WARN, when a covered employer fails to provide 60 days' notice of employment terminations resulting from a transfer or termination of operations, or a mass layoff, as defined in the statute. Accredited later filed for bankruptcy and was dismissed from the case. The court held, however, that the plaintiffs could recover damages under NJ WARN against the private equity fund that had acquired the company several months earlier and/or the company that managed the assets of the fund, if the plaintiffs can establish that those companies and Accredited were a "single employer" under the five-factor test.

The court's ruling in *DeRosa* illustrates that when an employer in financial difficulty fails to give required state or federal WARN notice, plaintiffs' attorneys will look to tap the deeper pockets of related entities if there is evidence of significant intertwining of the businesses in terms of operation, control or responsibility for decisions that affect employment. Thus, related companies should give careful consideration to the potential for an extension of liability if faced with such situations.

Further, while there are no regulations and a dearth of case law under the NJ WARN law, the *DeRosa* decision indicates that New Jersey courts will look to federal WARN regulations and case law for guidance in interpreting the state statute. Nevertheless, there are significant differences between the NJ WARN statute and federal law. Employers should not assume that compliance with federal WARN and its regulations automatically will satisfy NJ WARN's requirements.

NJ WARN Requirements

NJ WARN generally requires employers with 100 or more full-time employees to provide 60 days' advance notice of a transfer or termination of operations, or of a mass layoff, under certain conditions. If the full amount of notice required is not provided, the employer must pay severance pay to the employees who lose their jobs, in an amount equal to one week of pay for each full year of employment. Notice obligations are triggered if, in any 30-day period at a single establishment: (1) at least 500 full-time workers or one-third of the workforce with a minimum of 50 full-time employees experience a loss of employment; or (2) at least 50 employees are terminated in a transfer or termination of operations. Notice is also required if the total number of layoffs or terminations resulting from the same action or cause will reach those levels in any 90-day period at a single establishment.

The Lower Court's Decision

In this putative class action, two former employees of Accredited brought suit under NJ WARN after Accredited's New Jersey office closed in June 2008, without any notice. Accredited was a California-based subprime mortgage company that employed more than 100 individuals at offices located throughout the country. A private equity fund (the Fund") that acquires distressed assets had acquired Accredited just eight months earlier, through a series of interlocking companies created for that purpose. An asset advisory agreement stated that the purpose of the acquisition was for the Fund to "indirectly … acquire control of, and the entire equity interest in," Accredited's holding company. *DeRosa*, *5. Following the acquisition, the Fund's asset management company ("Asset Manager"), an entity created to manage and service assets acquired by the Fund, began evaluating Accredited's business. Although the parties disputed who made the decision to close the New Jersey office, the court described the Fund as "not a passive partner" and noted that the Asset Manager was involved in planning and implementing the shutdown.

Plaintiffs named virtually all of the related entities and some individuals as defendants. During the course of the litigation, Accredited and its holding company filed for bankruptcy. They were dismissed from the action, along with all other defendants except the Fund and its Asset Manager. The Fund and the Asset Manager then filed a motion for summary judgment arguing that they were not the plaintiffs' employer and, therefore, were not liable under NJ WARN. The lower court agreed, concluding that the term "employer" for purposes of NJ WARN should be read narrowly and limited to direct employers only, excluding parent companies and affiliates.

The Appellate Court Reversal

On its face, the definition of an “employer” in the NJ WARN statute does not mention parent or affiliated companies. Nevertheless, the Appellate Division held that NJ WARN can apply to parent and affiliated companies, if they act as a “single employer” with their affiliate. In so holding, the court looked to the “five-factor” test outlined in federal WARN Act regulations, 20 C.F.R. §639.3(a)(2). Further, the Appellate Division noted that numerous federal courts confronted with the very same issue had held that parent and affiliated corporations may incur federal WARN liability, including a Third Circuit decision wherein the court explained that “[b]ecause a plant closure often presages a corporation’s demise, leaving workers with no source of satisfaction from their employer, plaintiffs have frequently sought [federal WARN Act] damages from affiliated corporations." *Pearson v. Component Tech. Corp.*, 247 F.3d 471, 476-77 (3d Cir.), *cert. denied*, 534, U.S. 950 (2001).

The “Five-Factor” Test:

The five-factor “single employer” test adopted by the Appellate Division is used to determine whether liability should attach to parent and/or affiliate companies under the federal WARN statute and requires courts to weigh the following factors: (1) common ownership among the direct employer and parent or affiliate company; (2) common directors and/or officers among the direct employer and parent or affiliate company; (3) *de facto* exercise of control by the parent or affiliate company; (4) unity of personnel policies emanating from a common source (*e.g.,* centralized hiring and firing, payment of wages, personnel and benefits recordkeeping); and (5) dependency of operations between the direct employer and either the parent or affiliate company (*e.g.,* shared administrative or purchasing services, interchanges of employees, or equipment or comingled finances). 20 *C.F.R*. § 639.3(a)(2). The test is “fact-specific.” No one factor is determinative and it is not necessary for all factors to be present for liability to attach. *DeRosa*, *23. Factors one and two usually are considered “less significant,” while factor three is perhaps the most important. *Id.*

In applying the five-factor test in *DeRosa*, the court concluded that there was sufficient evidence for plaintiffs to withstand summary judgment. The Fund had a substantial ownership interest in the affiliated companies that owned Accredited; there was some overlap in senior management between Accredited and the Fund; and the Asset Manager was contractually required to provide substantial "administrative services" to Accredited. Further, although disputed by defendants, the plaintiffs had presented evidence that, if believed, could show that Accredited's senior management had lost day-to-day control of the company and that the Fund, through its Asset Manager, exercised control over Accredited and directed the closure of the New Jersey office.

Nevertheless, because the five-factor test had not been considered by the court below, the Appellate Court remanded the case to allow for development of additional evidence on the various factors, before the lower court determines whether the Fund and/or the Asset Manager could be considered the plaintiffs' "employer."

Additional Tests

While the Appellate Division's decision focused on the five-factor test, the court also discussed several other tests that may be applicable in determining whether parent or affiliated companies may be held liable under NJ WARN. These additional tests are supplemental to the five-factor test and may overlap to some degree. However, business entities that are related or have shared involvement with employment matters should keep all of these tests in mind in assessing the potential for liability, if the requisite statutory notice is not afforded. Other tests that may be used include:

Piercing the Corporate Veil Test: This test considers whether a subsidiary was "a mere instrumentality of the parent corporation." In other words, did the parent so dominate the subsidiary that it had no separate existence but was merely a conduit for the parent? If so, the parent/affiliate company may be subject to liability.

Joint Employer Test: This test asks whether two separate business entities share in the determination of matters governing the essential terms and conditions of employment. If so, both entities may be subject to liability.

Four-Factor Common-Law Single Employer Test: This test looks at whether the various business entities have: (1) common ownership or financial control; (2) common management; (3) an interrelation of operations; and (4) centralized control of labor and employment decisions. No one factor is dispositive, but control of labor relations and employment decisions typically is deemed the most significant.

[1] Also known as the Millville Dallas Airmotive Plant Job Loss Notification Act, *N.J.S.A.* 34:21-1, *et seq.*

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