2023

COVID-19 & The WARN Act During a Bankruptcy Case

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2023 Volume XV No. 33

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Cite as: *COVID-19 & The WARN Act During a Bankruptcy Case*, 15 ST. JOHN'S BANKR. RESEARCH LIBR. NO. 33 (2023).

Introduction

The Worker Adjustment and Retraining Notification Act ("WARN Act") provides that "an employer shall not order a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice of such order to each impacted employee."[1] Under the WARN Act, a plant closing is "permanent or temporary shutdown of a single site of employment, or one or more facilities or operating units within a single site of employment…."[2] A mass layoff is "a reduction in force which…(a) is not the result of the plant closing; and (b) results in an employment loss at the single site of employment."[3] To determine who gets notice under the WARN Act, one must be an impacted employee.[4] The main purpose of the WARN Act is to allow for "good faith, well-grounded hope, and reasonable expectations" that seek to "protect the employer's exercise of business judgment and are intended to encourage employers to take all reasonable actions to preserve the company and the jobs."[5]

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[1] Worker Adjustment and Retraining Notification Act, 29 U.S.C. § 2101 (1988).
[2] *See generally* 29 U.S.C. § 2101 (2018).
[3] *Id.*
[4] *Id.*
[5] *In re* Flexible Flyer Liquidating Tr., 511 F. App'x 369, 374 (5th Cir. 2013).

If an employer fails to comply with the WARN Act, and a claim is made against them, the plaintiff must show that "(1) the defendant was 'an employer;' (2) the defendant ordered a 'plant closing' or 'mass layoff;' (3) the defendant failed to give employees 60-days' notice before the closing or layoff; and (4) the plaintiff is an 'aggrieved' or 'affected' employee."[6] If a plaintiff can prove all four elements, "the employer may avoid liability by providing an affirmative defense that qualifies for one of the Act's three exceptions."[7] Those three exceptions to the WARN Act are the faltering company exception, the unforeseen business circumstances exception, and the natural disaster exception.[8]

Prior to the pandemic, the aforementioned exceptions to the Act were used by businesses that filed for relief under Chapter 11 of the United States Code (the "Bankruptcy Code") to argue why they could not comply with the WARN Act. However, businesses added COVID-19 as a defense after the virus became widespread and impacted business operations. Some courts, like the Delaware bankruptcy courts, held that COVID-19 was a valid excuse for businesses to not give notice under the WARN Act, meanwhile in other bankruptcy courts, COVID-19 is considered not to be an excuse as it is not explicitly named within the act.

This article examines the varying standard held by the bankruptcy courts in regard to whether COVID-19 is an exception to complying with the WARN Act and the different methods courts have interpreted this exception during Chapter 11 proceedings. Part I addresses how the bankruptcy courts dealt with WARN Act violations prior to the pandemic. Part II discusses how the courts dealt with WARN Act violations during the pandemic.

I. Treatment of WARN Violations Prior to the Pandemic

[6] *See In re* Art Van Furniture, 638 B.R. 523, 532 (Bankr. D. Del. 2022).
[7] *Id*. at 533.
[8] *Id.*

Prior to the pandemic, WARN Act violations brought against employers varied in reasoning. However, the following main issues typically gave rise to WARN Act cases, those being: (1) laid-off employees claiming lack of adequate notice; (2) employees not receiving full wages and benefits during the 60-day notice period; and (3) the business was acting as an employer during the alleged closing of business.

In *In Re World Marketing Group, LLC*, the debtor-employer, World Marketing Group, faced WARN Act claims resulting from an allegation that it gave insufficient notice to employees.[9] The decision in this case hinged on whether the lack of adequate notice resulted in "liability under the WARN Act."[10] In examining whether there was liability under the WARN Act, the court considered one of the three traditional statutory exceptions to the notice period, namely the faltering company exception. The faltering exception "permits an employer to withhold notice if it is 'actively seeking capital or business that would allow it to postpone or avoid closing…."[11] Here, the court held that under this exception, the debtor could not avoid liability.[12] The court stated that the faltering company exception "should be applied sparingly" as "anything other than a narrow interpretation runs the risk of allowing circumstances well beyond those intended" by the Department of Labor.[13] In addition, the court stated that "allowing the Debtors to act publicly in one manner and privately in another…would be abhorrent" as "the parties in a Chapter 11 case should not be entitled to rely on the public representations of a debtor in possession or trustee regarding its intent to reorganize."[14] Thus, the debtors were not entitled to the benefit of the faltering company exception.[15]

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[9] *See In re* World Marketing Chicago, LLC, 564 B.R. 587, 594 (Bankr. N.D. Ill. 2017).
[10] *Id.*
[11] *See In re* United Healthcare System, 200 F.3d 170, 175 (3d Cir. 1999).
[12] *Id.* at 598.
[13] *Id.* at 603.
[14] *Id.*
[15] *Id.*

In the Wisconsin Bankruptcy court, lack of full wages and benefits gave rise to a WARN Act violation claim against World Marketing Holdings. In, *Carroll v. World Marketing Holdings, LLC*, World Marketing Holdings, a direct mail marketing business "was organized as a separate subsidiary of defendant World Marketing Holdings, LLC", and towards the end of 2015, "the companies' lender swept their bank accounts of all operating capital."[16] Thus, facing a liquidity crisis, each subsidiary filed for bankruptcy under Chapter 11 and the companies informed their employees that each facility was shutting down and their employment would be terminated.[17] The court assessed whether the shutdown violated the WARN Act, specifically whether the company was liable to each terminated employee who did not get back pay and benefits.[18] As seen in *In re World Marketing Chicago*, the Wisconsin court also assessed the matter using the three affirmative defenses used to not comply with the WARN Act.[19] The court found that the 60-day notice requirement could not be reduced or eliminated as that language would not match what is explicitly written within the statute.[20] Thus, the defendants did not "provide any reason why they could not give WARN-compliant notice" on the date of termination and were then obligated to have given their employees notice, with full compensation and wages, of the termination 60-days in advance.[21]

In *In re United Healthcare*, creditors asserted a WARN Act claim premised on the business acting as an employer during the alleged closing of business. There, United Healthcare Systems appealed the finding that their former employees were "entitled to WARN Act back pay" and "received first priority administrative status in their Chapter 11 bankruptcy case."[22]

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[16] *See* Carroll v. World Marketing Holdings, 418 F. Supp. 3d 299, 300 (E.D. Wis. 2019).
[17] *Id.*
[18] *Id.*
[19] *Id.* at 304.
[20] *Id.* at 311.
[21] *Id.* at 312.
[22] *In re* United Healthcare Systems, 200 F.3d 170, 172 (3d Cir. 1999).

This court assessed the matter under the faltering company and unforeseeable business exceptions. According to the court, it had to determine whether United Healthcare was acting within the meaning of "employer" within the WARN Act.[23] The WARN Act defines employer as "any business enterprise that employs - (a) 100 or more employees, excluding part-time employees; or (b) 100 or more employees who in the aggregate work at least 4,000 hours per week."[24] Furthermore, to be considered an employer the court had to determine whether the entity was "engaged[d] in business" during the time prior to the plant closing or mass layoff.[25] Applying the definition of employer, the court held that United Healthcare Systems was not acting as an employer during bankruptcy proceedings.[26] The court reasoned that because "there is no evidence United Healthcare knew in advance that it would be forced to close" and that "the record demonstrates that United Healthcare made repeated and intensive good-faith efforts to remain financially viable" that United Healthcare was not liable to their former employees under the WARN Act.[27]

II. Treatment of WARN Act Violations During the Pandemic

Some debtors that filed for Chapter 11 bankruptcy during the pandemic asserted that COVID-19 was a defense to WARN Act claims. Some courts held that COVID-19 was a valid excuse under the exceptions of the statute. Other courts did not.

In *In re Art Van Furniture*, the Delaware Bankruptcy court found that COVID-19 was a valid excuse for not giving notice under the WARN Act.[28] In this matter, Art Van Furniture "publicly announced that it was liquidating and going out of business."[29] After this

[23] *Id.*
[24] *Id.* at 176,
[25] *Id.*
[26] *Id.* at 178.
[27] *Id.* at 178–179.
[28] *See In re* Art Van Furniture, 638 B.R. 523, 540 (Bankr. D. Del. 2022).
[29] *Id.* at 529.

announcement, Art Van Furniture filed its petition for relief under Chapter 11 of the Bankruptcy Code to implement a sale of the business.[30] However, within the same week of Art Van filing bankruptcy, the COVID-19 outbreak occurred.[31] This led to various states mandating stay at home orders, Delaware being one of them.[32] As a result of these orders, "the proposed purchaser for the Levin Sale notified the Debtors that they would not proceed with the transaction."[33] Thus, causing Art Van Furniture to issue a WARN notice to some of its employees stating that COVID-19 was why the company could not support its retail operations.[34] Following this notice, certain former employees of Art Van filed a class action adversary proceeding complaint for violation of the WARN Act.[35] The court assessed the matter under the unforeseen business circumstance exception.[36] Here, the court held that "Art Van was in dire financial restraints which led to the Chapter 11 filing and the stay at home orders impacted their operations."[37] Thus, COVID-19 was an unforeseeable business circumstances that caused the mass layoffs.[38] However, COVID-19 would not be a valid excuse under another bankruptcy matter presented to the Fifth Circuit.

In *Easom v. US Well Services*, US Well Services shutdown multiple well sites in Texas due to a decrease in oil demand during the pandemic.[39] As a result, US Well Services sent termination letters on March 18, 2020, stating that the employees termination was "due to unforeseeable business circumstances resulting from a lack of available customer work caused

[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *See In re* Art Van Furniture, 638 B.R. at 540.
[35] *See id.* at 531.
[36] *Id.*
[37] *Id.* at 538.
[38] *Id.*
[39] *See* Easom v. US Well Services, 37 F.4th 238, 240 (5th Cir. 2022).

by . . . the unexpected adverse impact that the Coronavirus has caused."[40] Former employees filed suit against US Well arguing that the notice violated the WARN Act.[41] Meanwhile, US Well Services argued that COVID-19 was a natural disaster under the WARN Act which exempted them from complying.[42] The Fifth Circuit disagreed. The court reasoned that because the statute states explicitly, "[n]o notice under this chapter shall be required if the plant closing or mass layoff is due to any form of natural disaster, *such as* flood, earthquake, etc.," COVID-19 did not qualify as a natural disaster as viruses were not considered nor written within the statute.[43]

Conclusion

Prior to the pandemic, all three defenses to WARN Act claims would be assessed and weighed to determine whether a company in Chapter 11 could be excused for noncompliance before the bankruptcy courts. Following the pandemic, debtors asserted COVID-19 as a defense against alleged WARN Act Violations. Some courts agreed based on the tradition of assessing through all three of the WARN Act defenses, finding that COVID was an excuse under the unforeseen business circumstance exception of the WARN Act. Other courts disagreed as the WARN Act does not explicitly state a virus or disease being an excuse not to comply with the Act.

[40] *Id.* at 241.
[41] *Id.*
[42] *Id.*
[43] *Id.* at 242.