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Second Circuit Court of Appeals Adopts Single Employer Test Under WARN

In a case dealing with the after-effects following the bankruptcy of clothing retailer Steve & Barry's Industries, Inc., the Court of Appeals for the Second Circuit (which has jurisdiction over New York employers) has ruled, in *Giuppone v. BH S&B Holdings LLC*, on the analysis to be applied in determining whether nominally separate entities should be considered a single employer for purposes of coverage under the Worker Adjustment and Retraining Notification Act ("WARN").

The federal and state WARN laws generally require that employers provide employees with notice of employment losses due to a plant closing or mass layoff. In *Guippone*, the Court resolved an open question in the Circuit concerning the test to be applied when analyzing the single employer issue. The single employer issue is particularly important in the WARN context because an entity that is theoretically not the "employer" of the discharged employees – for example, an investment entity or corporate parent – may nevertheless become liable under WARN if a court determines that the "employer" and the related entity are a "single employer" for WARN purposes. The "single employer" theory also may entangle a larger, related entity, where the employer of record is too small for purposes of coverage under WARN.

In *Guippone*, the Court concluded that a five-factor test set forth in the regulations of the United States Department of Labor ("USDOL") should be applied when analyzing the issue. Those five factors are: (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. The Court held that the five factors are non-exclusive, with no one factor controlling and the absence of any factor not dispositive on the question of WARN liability.

The Court largely affirmed the lower court's ruling dismissing the case against certain related entities, based upon application of the USDOL factors. However, it concluded that a question of fact existed with regard to the *de facto* exercise of control factor as applied to another related entity. In particular, the Court focused on whether the evidence indicated that a related entity "was the decision-maker responsible for the employment practice giving rise to the litigation." Among the evidence cited by the Court was:

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- the absence of a board of directors at the subsidiary;
- selection by the parent of the subsidiary's management team;
- negotiation of the subsidiary's financing by the parent's board of directors; and
- a resolution passed by the parent's board of directors "authorizing" the subsidiary "to effectuate the reduction in force."

An employer considering any type of reduction in force should property assess its potential obligations under the federal and state WARN statutes before implementing the reduction in force. Furthermore, when assessing those obligations, an employer must consider whether it is a "single employer" along with other related entities to trigger coverage under WARN even if the employer by itself would not otherwise be covered under WARN. Finally, an employer should pay particular attention to the degree of control exercised by a related entity over the reduction in force decision.

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