Be ForeWARNed: WARN Act obligations not easily avoided

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Employers considering reductions in force or the purchase (or sale) of another entity have typically remained mindful of their obligations under the Worker Adjustment and Retraining Notification Act, although court decisions addressing and exploring the application of the Act have generally remained sparse. In July 2016, the U.S. Court of Appeals for the Eighth Circuit issued one of the few WARN Act opinions of this year. In Day v. Celadon Trucking Services, Inc., the Eighth Circuit held that the purchaser of a business was responsible under the WARN Act for providing notice of a mass layoff to employees, even though the sales agreement characterized the transaction as a sale of assets and further stated that the seller—not the buyer—was responsible for providing the WARN notice. This case serves as an important reminder that companies cannot contract out of WARN Act obligations where the operative facts fall squarely within WARN’s purview.

Overview of WARN

The WARN Act generally requires an employer to provide 60 days’ written notice of a plant closing or mass layoff. The purpose of the Act is to give employees time to adjust to the prospective loss of employment, seek other positions, and, if necessary, seek retraining. An employer who violates the notice requirement must pay damages to employees suffering an “employment loss,” which the Act defines as

(A) An employment termination, other than a discharge for cause, voluntary departure, or retirement;

(B) A layoff exceeding 6 months; or

(C) A reduction in hours of work of more than 60 percent during each month of any 6-month period.

The focus of the Eighth Circuit in Day, however, was on an exception
to the definition of “employment loss” contained in another provision of WARN. That exception pertains to the sale of a business and states in relevant part as follows:

In the case of a sale of part or all of an employer’s business, the seller shall be responsible for providing notice for any plant closing or mass layoff up to and including the effective date of the sale. After the effective date of the sale of part or all of an employer’s business, the purchaser shall be responsible for providing notice for any plant closing or mass layoff. Notwithstanding any other provision of this chapter, any person who is an employee of the seller (other than a part-time employee) as of the effective date of the sale shall be considered an employee of the purchaser immediately after the effective date of the sale.

The key language in this exception is the statement that “[a]fter the effective date of the sale of part or all of an employer’s business, the purchaser shall be responsible for providing notice of any plant closing or mass layoff.” That sounds simple enough, but it often yields more questions, because the Act does not define the term “sale” of a “business.” Although few courts have squarely addressed the issue, the Eighth Circuit has drawn a distinction between a sale of assets, which it has held does not trigger the WARN notice requirement, and the sale of a business as a “going concern,” which does. (One other federal court, the Southern District of Texas, has drawn a similar distinction, although the U.S. Court of Appeals for the Fifth Circuit has not expressly adopted it.)

Specifically, in a 1997 decision, Burnsides v. MJ Optical, Inc., and again in a 2006 decision, Wilson v. Airtherm Prods., Inc., the Eighth Circuit held that “when a case involves simply a sale of assets, as opposed to the sale of a business as a going concern, the seller retains the WARN Act notice requirement because the seller is the party actually closing the plant that results in employment losses. . . .” The court explained in Wilson that “when the sale of a business as a going concern is involved, the sale of business exclusion creates a presumption that the buyer is the employer for WARN Act purposes if the seller still employs its employees on the day of the sale.” With that background in mind, the Eighth Circuit in its July 2016 Day decision revisited the sale-of-business exception and the scope of its distinction between a sale of assets and the purchase of a business as a going concern.

The Day decision

Day involved an asset purchase agreement entered into on December 4, 2008, between two commercial trucking companies: Continental Express, Inc. (the seller) and Celadon Trucking Services, Inc. (the purchaser). The preliminary recitals of the Agreement stated, among other things, that Celadon “desires to purchase certain assets and assume certain liabilities of Continental.” Among the assets purchased by Celadon were the right to use the name “Continental Express.” The Agreement specifically provided that Celadon would have no WARN Act liability and that Continental would be responsible for sending any WARN notices. At the time of the sale, Continental had 658 employees. Celadon hired 201 of Continental’s employees, and terminated the others between December 5 and December 17, 2008. Neither Celadon nor Continental provided those employees with the notices required by WARN.
On January 16, 2009, the terminated employees filed a WARN class action against Celadon. Celadon notified Continental, which initially agreed to pay Celadon’s defense costs but later said it could not because it was “out of cash.” After discovery, the employee-plaintiffs moved for, and won, partial summary judgment on the issue of WARN Act liability. Celadon appealed, arguing that it was not liable because it had merely purchased Continental’s assets rather than purchasing Continental as a going concern. The Eighth Circuit, however, rejected this argument and affirmed the district court’s decision.

The Eighth Circuit first noted that the asset purchase agreement did not govern the extent of Celadon’s WARN Act liability. The court noted that “[a]lthough Celadon and Continental styled the sale as a sale of assets by entering into an asset purchase agreement, its terms bind only its signatories.” In other words, the agreement was binding only on Continental (which, presumably, had no funds) and Celadon. It was not binding on the affected employees: “Congress passed the WARN Act to protect employees; it is not a technical labyrinth that sophisticated corporate lawyers can navigate to the disadvantage of employees.”

Emphasizing the need to examine the transaction between Continental and Celadon from a “common-sense approach,” the Eight Circuit found that the transaction was, as a practical matter, a purchase of Continental as a going concern, rather than a simple sale of assets because, among other things,

- Per the Agreement, Celadon purchased “all of the instruments” that were key to Continental’s business, such as its name, customer list, bids, and quotations;
- The Agreement required Continental to maintain the viability of its business, particularly as to some of its largest customers;
- The Agreement required Continental’s president and vice-president to execute noncompete agreements; further, the noncompete agreements stated that Celadon “intended to merge the operation of the business known as [Continental] into Celadon. . . .”

Thus, notwithstanding the agreement’s characterization of the transaction as a purchase of assets, the Court found that Celadon intended to continue operating Continental’s trucking business as a going concern. The Court also rejected Celadon’s argument that purchase of an entity as a going concern necessarily requires (1) the automatic transfer of the seller’s employees to the buyer and (2) the purchase of the seller’s accounts receivable. Celadon cited Burnsides for those propositions, but the court concluded that Burnsides did not stand for either proposition and distinguished Burnsides on the ground that the employment loss in that case occurred on the sale’s effective date.

The court reiterated in Day that a purchaser may be liable under WARN even if it does not actually hire the seller’s employees because the Act “deems a seller’s employee to be a purchaser’s employee immediately after the effective date of the sale of a business.” Because Celadon had
purchased Continental as a going concern, the situation was governed by the language in WARN stating that “after the effective date of the sale of part or all of an employer’s business, the purchaser shall be responsible for providing notice for any plant closing or mass layoff.” And because the employment terminations at issue occurred after the effective date of the transaction, the Eighth Circuit found that Celadon was responsible for providing WARN notices.

Points to Remember

The Day decision is an important cautionary tale. Companies contemplating a potential sale of business should keep the following points in mind and confer with counsel as appropriate:

• Be wary of trying to “contract out” of legal obligations to employees, particularly statutory ones such as WARN notices. As Day demonstrates, courts generally take a dim view of such tactics.

• Carefully consider the real intent of a contemplated transaction or action and discuss its potential benefits and risks with counsel.

• Avoid attempts to manage potential risk (or avoid compliance) by the use of legal technicalities that are inconsistent with your intent. This might be far more costly in the long run than an accurate assessment of the costs and obligations incurred in a contemplated transaction.

Finally, remember that when employees’ statutory rights are at stake, the courts will err on the side of upholding those rights.