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WARN Act Applies if Government Enforcement Action Is Foreseeable

By Matthew Neff 9/24/2015

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An employer may be liable under the Worker Adjustment and Retraining Notification (WARN) Act for failing to comply with the act's notification provisions when a mass layoff occurs due to a foreseeable government enforcement action, according to the 6th U.S. Circuit Court of Appeals.

The WARN Act requires that employers give a 60-day notice to affected employees before a plant closing or mass layoff. The full 60-day notice period is not required if the closing is caused by business circumstances that were not reasonably foreseeable at the time the notice would have been required. In order to qualify for this exception, the defendant must prove the following elements: 1) the circumstances complained of were unforeseeable, and 2) the circumstances complained of actually caused the mass layoff or plant shutdown. While a government-ordered closing of an employment site that occurs without prior notice may be an unforeseeable business circumstance, the most important indicator of an unforeseeable business circumstance is whether that circumstance is caused by some sudden, dramatic or unexpected action or condition outside the employer's control.

For several years prior to 2009, Caraco Pharmaceutical Laboratories, a pharmaceutical manufacturer, had been issued numerous notifications from the Food and Drug Administration (FDA) outlining regulatory violations related to their products and processes, also known as "Form 483s." Specifically, the FDA issued Caraco numerous Form 483s from 2005 through 2009 in addition to the previously provided warning letters and Form 483s from 2000 through 2002.

As a result of the continued violations, Caraco hired two outside consultants in 2008-09 who both said that the company would likely soon face some form of enforcement action from the FDA. The FDA issued Caraco another warning letter in 2008 outlining its continued failure to correct the previously noted violations. Importantly, the FDA warned that Caraco's continuing failure to correct their violations may result in a legal enforcement action, including possible seizure and injunction. After it received the last warning, Caraco publicly acknowledged the warning letter on two separate occasions and issued nationwide recalls stemming from their continued failure to correct the violations, but still received two additional Form 483s.

As a result of Caraco's continued failure to correct the violations, on June 24, 2009, the FDA filed a complaint for forfeiture of adulterated articles of drug. The following day, the FDA served Caraco with the complaint and a warrant for arrest and seized various products manufactured by the company at its Detroit and Farmington Hills, Mich., facilities. On June 26, 2009, without providing any prior notice, Caraco initiated a mass layoff of hourly and salaried workers at the affected Detroit and Farmington Hills facilities. Eleven days later, on July 6, 2009, the company finally issued WARN Act notices and stated that the notices were late because Caraco did not reasonably foresee that the FDA would take the action it did.

Accordingly, the plaintiffs filed suit against Caraco alleging that the company violated the WARN Act by failing to provide a 60-day notice of the mass layoff to the affected employees. The district court granted judgment for the plaintiffs and held that it was reasonably foreseeable on April 27, 2009 (60 days before the layoff), that the FDA would execute a large-scale enforcement action against Caraco, necessitating the mass layoff.

In finding that the FDA's enforcement action was foreseeable, the 6th Circuit affirmed the district court's determination and held that Caraco's actions in the months leading up to April 27 demonstrated that the company was aware of the serious deficiencies at its facilities that would likely result in imminent enforcement action and render the ensuing mass layoff foreseeable.

The court held that because Caraco was aware of the continuing and escalating violations, knew enforcement action could result from the continuing violations, and knew an enforcement action was likely based on the information provided by its consultants, the FDA's actions and ensuing layoff were foreseeable. The facts the court relied on in this finding were Caraco's receipt of the increasingly critical Form 483s and the warning letters, and feedback from both of its consultants that the company was at serious risk of an enforcement action that could include a mass seizure. Additionally, Caraco's actions, including publicly acknowledging one of the warning letters and issuing nationwide recalls, and the results of an internal audit, in addition to the FDA's dissatisfaction with Caraco's previous corrective actions, made the enforcement action foreseeable by the time the WARN Act notifications were required.

Moreover, the court rejected Caraco's argument that it could not provide notice because it did not know the exact date of the shutdown, due to the fact that Caraco could have issued a conditional notice of probable layoffs without actually conducting the layoffs, in the event the enforcement action never occurred. Because a reasonable employer would have foreseen the enforcement action at least 60 days before the mass layoff, Caraco was not entitled to the unforeseeable business circumstances exception. Thus, Caraco violated the WARN Act by failing to provide the affected employees with a 60-day notice of the layoff.

James Calloway v. Caraco Pharmaceutical Laboratories Ltd., 6th Cir., No. 14-2526 (Aug. 26, 2015).

Professional Pointer: Employers should always be mindful of the potential for a government enforcement action, especially when faced with numerous and continued warnings, and should consult counsel about the need to issue WARN Act notices well before initiating a mass layoff or plant closure.

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