Legal Update Article

Fourth Circuit Provides Guidance on How to Count Affected Employees Under WARN Act

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July 16, 2021

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A federal contractor that could not secure extended financing and suddenly laid off its workers when it could not make payroll was not a covered "employer" under the Worker Adjustment and Retraining Notification Act (WARN Act), the U.S. Court of Appeals for the Fourth Circuit has held. ***Schmidt v. FCI Enters. LLC***, Nos. 19-02384, 20-01076 (June 24, 2021).

The Fourth Circuit has jurisdiction over Maryland, North Carolina, South Carolina, Virginia, and West Virginia.

The Facts

Virginia-based FCI Enterprises, LLC, was a government contractor that provided financial, management, engineering, cybersecurity, and IT solutions and services. Many FCI employees worked on-site at various federal locations throughout the United States. When FCI was unable to negotiate an extension on a $10 million loan on the Thursday evening before FCI was scheduled to fund its payroll, the lender took the remaining funds (about $1.8 million) from FCI's accounts.

On Friday morning, FCI's CFO sent an email to all employees informing them that the creditor had "cut off [FCI's] access to all funds in its bank accounts" and instructing the employees "to cease all work, effective immediately." Employees received several updates over the course of the weekend, and the following Monday, FCI informed its employees they had been "officially laid off as of close of business" on the previous Friday.

Shortly thereafter, 22 terminated FCI employees filed suit in federal court against FCI and its five officers and owners, alleging violations of the WARN Act and the Fair Labor Standards Act (FLSA). They contended their terminations constituted a "plant closing" and FCI failed to provide them with 60 days of advance written notice required by the WARN Act.

FCI filed unsuccessful motions to dismiss and for summary judgment, asserting that FCI was not an "employer" under the WARN Act, among other defenses.

After a trial, the jury issued a verdict for FCI on the FLSA claims and issued an advisory verdict on the WARN Act claim. The trial court denied FCI's motion for judgment as a matter of law. FCI appealed.

Federal WARN Act

The WARN Act requires covered employers to provide 60 days of advance written notice to affected employees, the state dislocated worker unit, the chief elected official of local government and (if applicable) unions of a "plant closing" or a "mass layoff." (There are certain exceptions to the 60-day requirement that permit an employer to

provide fewer than 60 days of advance written notice.)

Under the WARN Act, an "employer" is defined as any business enterprise that employs 100 or more employees, excluding "part-time" employees, or 100 or more full- and part-time employees who, in the aggregate, work an average work week of more than 4,000 hours, exclusive of overtime. The WARN Act provides a unique definition of "part-time": an employee who, as of the date the WARN Act notice is due, works an average workweek of fewer than 20 hours or was employed by the employer for fewer than six of the 12 preceding months.

Not an "Employer" Under WARN Act

In reversing the judgment against FCI, and citing the federal WARN Act regulations, the Fourth Circuit held the relevant date for determining whether an employer is covered by the WARN Act is the date the first WARN Act notice is required to be given (*i.e.,* 60 days before the "plant closing"). The appellate court found the trial court used an incorrect date — a date six months prior to the date when notice was required, rather than 60 days prior to the date of the plant closing — when it determined that FCI met the 100-employee threshold and, therefore, was an "employer" under the WARN Act.

In light of that error, the Fourth Circuit reviewed the evidence presented at trial and determined that FCI employed fewer than 100 employees, excluding part-time employees, as of the date the first WARN Act notice was required to be given. Although the appellate court excluded from the headcount for purposes of coverage under the WARN Act employees who had worked for FCI for fewer than six months prior to the date the notice was required (August 6, 2018), because those employees were considered to be "part-time," the Court stated in a footnote that the six-month employment threshold *need not be continuous*. That is, an employee would not be considered a "part-time" employee if they intermittently worked for the employer for more than six months in the one-year period prior to the date the notice was required.

Other than the language of the WARN Act, the Court did not set forth any basis for its view that intermittent employment could satisfy the requirements that an employee be employed for six or more months as of the date WARN notice is due. Significantly, neither the WARN Act nor its regulations address the possibility of non-continuous employment. The Court also noted that neither party raised the argument that there were employees who had worked during six non-continuous months and that it did not find in the record any employee who fell within that category.

The Fourth Circuit concluded that FCI was not an "employer" covered by the WARN Act. Accordingly, FCI had no obligation to provide WARN Act notices with respect to the sudden shutdown of its facility. Relying on its reversal of the district court's erroneous finding that FCI was an "employer under WARN," the Court of Appeals declined to address whether FCI's Chantilly, Virginia, headquarters was properly viewed as a "single site of employment" for purposes of analysis under the WARN Act.

Takeaways

The Court's unique view as to how to determine "part-time" status under the WARN Act is a reminder that employers must take great care in determining the number of employees it employs and the number of affected full-time versus part-time employees it employs in any such analysis.

Moreover, employers should consider the fact that an employee who works any six months during the one year prior to the date on which WARN notice is required could be deemed a full-time employee, even if their work was intermittent.

If you have any questions about this decision, mass layoffs, or any other WARN Act issue, please contact a Jackson Lewis attorney.