DELAWARE
EMPLOYMENT LAW LETTER
Part of your Delaware Employment Law Service

William W. Bowser, Editor; Scott A. Holt and Adria B. Martinelli, Associate Editor
Young, Conaway, Stargatt & Taylor

Vol. 15, No. 8
August 2010

LAYOFFS

A warning for parent corporations subject to the WARN Act

by Lauren E. Moak

The federal Worker Adjustment and Retraining Notification Act (WARN Act) generally requires covered employers to provide 60 days' notice of a plant closing or mass layoff. Failure to comply with the requirements of the Act may subject employers to substantial liability. Furthermore, a recent decision by Delaware's federal court reminds parent corporations that they may also be liable for damages under the WARN Act if a subsidiary lays off employees in a manner that violates the statute.

Facts

A group of employees filed a class-action lawsuit seeking damages from Infineon Technologies AG and Qimonda AG, the parent corporations that owned the company where the workers were formerly employed. The employees couldn't sue their former employer directly because it had declared bankruptcy. They asserted a litany of claims, including that they were the subject of a mass layoff without 60 days' notice — a violation of the WARN Act.

To recover from Infineon and Qimonda, the employees alleged that their employer and its parent corporations were "a single business enterprise" for purposes of the WARN Act. Of course, Infineon and Qimonda asked the court to dismiss the case, claiming that the employees had failed to allege facts sufficient to support their "single business enterprise" theory.

Discussion

In addressing the request for dismissal, the court noted that "the standard for inter-corporate liability under the WARN Act rests on whether the relevant companies have become 'so entangled with [one another's] affairs' that the separate companies 'are not what they appear to be, [and] in truth they are but divisions or departments of a single enterprise.'"

The court considered five factors in determining liability:

1. common ownership of the businesses;
2. common directors and/or officers;
3. *de facto* exercise of control by the parent corporation over the subsidiary;
4. unity of personnel policies among the parent and subsidiary; and
5. dependency of operations.

The five factors are not all weighted equally, and the first and second factors alone are not sufficient to establish that a parent and subsidiary are a single enterprise under the WARN Act. Further, the factors indicate a fact-intensive inquiry. As a result, each case alleging single-enterprise liability is determined based on the details of the relationship between the parent and subsidiary involved in the litigation.

The court found that the employees sufficiently made their case in support of all five factors. To satisfy the first and second elements, the employees presented evidence showing that the employer and its parent corporations had common ownership and directors because the parent corporations held the majority of the subsidiary's stock and appointed several of the parents' officers as officers of the subsidiary. The third factor, *de facto* control, was satisfied because the parent corporation made the decision to close the subsidiary's facilities.

Finally, the court held that the fourth and fifth factors were met because the employees alleged that the parents and subsidiary shared employee recruitment efforts and benefit plans and filed consolidated financial reports. Furthermore, Infineon removed funds from the subsidiary to help support Qimonda.

Because the court found that the employees pleaded facts sufficient to support their single-enterprise theory, the case was permitted to move forward to discovery (the pretrial exchange of evidence). *Blair v. Infineon Technologies AG.*

Bottom line

This case is a reminder of the importance of complying with the WARN Act's notification requirements. The easiest way to prevent the problems faced by Infineon and Qimonda is to ensure that your business — along with any wholly or partially owned subsidiaries — complies with the WARN Act. If you are planning a plant closing or layoff, consult with

your company's attorney to determine whether your business and the particular downsizing activity fall within the Act.

A company's liability for violating the WARN Act may be substantial. And as this case reminds us, liability isn't just restricted to the employer — it may extend to parent corporations as well. While the economy remains volatile and layoffs loom, the WARN Act should be in the back of every HR professional's mind.