

CLIENT ALERT

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Third Circuit Sets Penalties for WARN Violations

When an employer fails to provide affected employees with adequate notice of an impending layoff that is subject to the Worker Adjustment and Retraining Notification Act (the “WARN Act”), the central question becomes how much its penalties will cost. In a recent decision, *United Mine Workers of America v. Eighty-Four Mining Co.*, the U.S. Court of Appeals for the Third Circuit clarified the guidelines for calculating this amount. The decision serves as a reminder that employers must carefully follow the WARN Act’s requirements.

The WARN Act

The WARN Act generally prohibits an employer from ordering a “plant closing or mass layoff until the end of a 60-day period after the employer serves written notice of such an order on ... each representative of the affected employees as of the time of the notice or, if there is no such representative at that time, to each affected employee; and to the State ...” 29 U.S.C. §2102(a).

Under 29 U.S.C. §2104(a)(1), an employer that fails to comply with the sixty-day notice requirement is liable to each “aggrieved employee” for:

- (A) back pay for each day of violation at a rate of compensation not less than the higher of—
 - (i) the average regular rate received by such employee during the last 3 years of the employee’s employment; or
 - (ii) the final regular rate received by such employee; and

(B) benefits under an employee benefit plan described in section 3(3) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(3)), including the cost of medical expenses incurred during the employment loss which would have been covered under an employee benefit plan if the employment loss had not occurred.

Such liability shall be calculated for the period of the violation, up to a maximum of 60 days,

Under 29 U.S.C. §2104(a)(7), an “aggrieved employee” is an employee who, as a result of the employer’s failure to comply with §2102, did not receive timely notice either directly or through his or her representative.

The Facts

In September 1998, defendant Eighty-Four Mining Company (“Eighty-Four”) laid off several hundred of its employees without providing the sixty-day advance notice mandated by the WARN Act. Eighty-Four paid its employees “back pay” as required by §2104, but the unions representing the employees (the “Unions”), claimed that the payments were inadequate and initiated a WARN action. Eighty-Four recognized that the sixty-day WARN notice had not been given and, therefore, that the employees were entitled to damages, but disagreed with the Unions as to the required amount of damages.

In particular, Eighty-Four and the Unions disagreed over: (1) whether the back pay owed to employees under §2104 was for the calendar days or the actual work days within the violation period; (2) what types of remuneration were included in the term “back pay”; and (3) whether employees who were on disability leave were entitled to damages under the WARN Act.

Calendar Versus Work Days

First, the Third Circuit considered whether §2104's requirement that an employer pay employees who did not receive WARN notice "back pay for each day of violation" meant, as Eighty-Four argued, that the employees were entitled to payment for every work day or, as the Unions argued, every calendar day. In deciding this issue, the Court considered its prior decision in *United Steelworkers of America v. North Star Steel Co.*, in which it had held, based upon the plain language of the statute, that "a violating employer is liable for 'back pay' for each of the calendar days of the violation." Noting that its holding was contrary to the majority view of the U.S. Courts of Appeals, the Court explained that it was "bound to adhere to [its] prior precedents."

Defining "Back Pay"

Next, the Third Circuit considered what items were encompassed in "back pay" under §2104. The Unions contended that back pay encompassed all of the wages and benefits that the employees would have earned during the violation period. According to the Unions, these items included overtime, birthday, holiday, and vacation pay. Eighty-Four maintained that the text of §2104 did not support such a broad interpretation of "back pay."

The Court started its analysis by focusing on its *North Star* decision and the plain language of the statute. In *North Star*, the Third Circuit had rejected the contention that the back pay provision of §2104 implied a "lost earnings concept." Based upon *North Star*, the Court rejected the Unions' argument that back pay includes all items of remuneration necessary "to make the employees whole."

The Third Circuit then looked at the statutory language. Acknowledging that the provision regarding back pay was "not a model of clarity," it nonetheless held that "the statutory scheme" establishes that a particular employee's historical earnings must be the basis for his or her back pay. Specifically, an employee's "rate of compensation" under §2104 is derived from the higher of his or her "average regular rate ... during the last 3 years" or the employee's "final regular rate." The Court concluded that the §2104(a)(1)(A) back pay computation includes compensation for overtime that was normally or regularly available.

The Third Circuit further held, however, that this approach, which required the inclusion of overtime pay, was not consistent with compensating employees "for the mere fortuity" that a holiday or birthday fell within the violation period. It explained that the computation of back pay under §2104 "is not concerned with a particular period of time." Instead, the number of days in a given violation are supposed to be calculated and then multiplied by an employee's regular rate of pay per day. The resulting number is the "starting point" for a particular employee's damage award.

The Court likewise rejected the Unions' argument that back pay under §2104 includes payment of vacation pay. It explained that such an interpretation ignores the plain text of §2104(a)(1)(B), which states that employers who violate the notice provision of the WARN Act are liable for "benefits," but only to the extent specified in an ERISA employee benefits plan. Therefore, the Court concluded that "the WARN Act does not encompass all fringe benefits offered by an employer."

Employees On Disability

The Court then turned to Eighty-Four's argument that it was not liable for damages to employees who were on disability status at the time of the layoff, because they were not entitled to receive notice under the WARN Act. The Third Circuit considered the plain text of the WARN Act and disagreed, concluding that "a disabled employee is an aggrieved employee under §2104(a)(1) and (7) who is entitled to damages."

Conclusion

The requirements of the WARN Act are often triggered when a company is going through a period of upheaval and is distracted by numerous pressing issues. Nonetheless, it is important for such companies to focus on their obligations under the Act in order to avert liability for damages at a time when they may be least able to afford them.

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