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Second Circuit: Parent Company has Liability for Subsidiary's WARN Violations

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The Worker Adjustment Retraining and Notification Act ("WARN") requires employers with 100 or more employees to provide 60 calendar days' notice of plant closings or mass layoffs to give transition time to workers and their families to adjust to the prospective loss of employment, seek alternative jobs, and/or enter skill training or retraining to successfully compete in the job market. 29 U.S.C. §2201 et seq. Employers who fail to comply with WARN are liable to affected employees for up to 60 days of pay and benefits. 29 U.S.C. §2104(a)(1).

In this case, the employee was laid off by the employer and filed a class action alleging that the employer and its parent company and other related ownership entities violated WARN. Specifically, the employee claimed that the parent was liable for the employer's WARN violations because the parent company disregarded the employer's corporate form and exercised de facto control of the employer. As it turns out, the parent company was the sole member and manager of the employer, and the parent company's board operated as the employer's board.

The Second Circuit reversed summary judgment in favor of the parent company, finding that a triable issue of fact existed that would allow a jury to conclude that the employer was so controlled by the parent that the employer lacked the ability to make any decisions independently and that a parent company resolution authorizing the employer to layoff this employee and the class of similar employees was a function of being an employer and created liability. Adopting Department of Labor regulations to determine if separate entities are a single employer, the court considered whether there was (1) common ownership; (2) common directors and/or officers; (3) de facto exercise of control; (4) unity of personnel policies emanating from a common source; and (5) dependency of operations. The Second Circuit observed that the inquiry is a fact-specific balancing test, no one factor controls, and all factors need to be present for liability to attach to the related entity. Significantly, a separate legal existence will not insulate a parent company from liability for a subsidiary's WARN violations if the parent is the decision-maker responsible for the employment practice giving rise to the litigation.

If you have questions about *Guippone v. BH S&B Holdings, LLC* et al., No. 12-183 (2nd Cir. December 10, 2013), please contact David I. Dalby.

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