No WARNing of Bankruptcy?

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When Reston-based Simplexity, LLC (known more commonly as Wirefly.com and its related sites) recently filed for chapter 11 bankruptcy it had, sadly, already terminated nearly its entire workforce. According to pleadings filed in the case, Simplexity had hoped to market and sell its assets outside of bankruptcy in order to maximize creditor recovery and preserve the jobs of its employees. Instead, its liquidity reached such a critical level that it was forced to cease operations on March 12 and file for bankruptcy protection on March 16, 2014. Just one day later, on March 17, a proposed class action adversary complaint was filed against Simplexity, alleging violations of the WARN Act on behalf of 350 of its employees.

The WARN Act

Codified in 1988, the Federal WARN Act (29 U.S.C. §§ 2101-2109) provides that a business enterprise that employs 100 or more employees must provide at least 60 days advance written notice of any "plant closing" or "mass lay-off" to each employee who will be terminated. A "plant closing" is a shutdown (permanent or temporary) that results in the loss of employment of 50 or more full-time employees at a single site of employment. A "mass layoff" is the loss of employment of 500 or more people or the loss of employment of at least 50 employees constituting more than 33 percent of the full-time employees at a single employment site.

The purpose of the WARN Act was to protect workers, their families and communities by providing fair notification of an impending layoff. The hope was that with 60 days' notice, workers could seek other employment, pursue skill training or otherwise adjust to the future job loss. Employers who fail to provide the required notice are liable to each terminated employee for a full 60 days' pay and benefits.

Although employers must still provide notice as soon as practicable, there are three stated defenses to the 60 day notice requirement under the WARN Act:

1. when an employer reasonably believes that advance notice would impede its active pursuit of capital or business;
2. unforeseeable business circumstances; and
3. natural disasters.

Some employers have also defeated WARN Act claims by asserting that, at the time of the layoffs, it was no longer a business enterprise but simply a "liquidating fiduciary" that does not fit the Act's definition of an employer.

Bankruptcy Implications

Somewhat naturally, companies seeking bankruptcy protection are often forced to abruptly terminate employees before providing the required notice. In addition to developing the "liquidating fiduciary" principal discussed above, bankruptcy courts have examined, and often disagreed, about certain applications of the WARN Act once the "employer" is bankrupt.

It is somewhat well-settled law, at least in the circuit where the Simplexity case is pending, that WARN Act claims may be brought as an adversary proceeding. This is based on the principal that WARN Act claims are equitable in nature because they seek reimbursement of salary and benefits due to them, rather than damages resulting from their termination. Some courts have disagreed, however, in cases like Simpexity where the notice was due and/or the termination occurred pre-petition, and have relegated WARN Act claims to be adjudicated during the general claims allowance process in the bankruptcy case.

Although their adversary proceeding is unlikely to be dismissed as improperly brought as an adversary proceeding, former Simplexity employees may still face challenges to their claims. Simplexity claims to have had only "219 employees and 285 full time equivalent contractors" split between at least two separate locations – raising questions as to whether the employees or the "site" fall squarely into the Act's definitions. Still, many bankrupt companies have been forced to pay millions in settlements with their former employees for WARN Act violations, and Simplexity may be no exception.

In re Symplexity, LLC, et al., is pending in the United States Bankruptcy Court for the District of Delaware (Case No. 14-10569).