

## **FOCUS ON POLICY**

SHB's National  
Employment & Policy  
Practice Represents  
Corporate Employers  
Exclusively



### **TENTH CIRCUIT REAFFIRMS THE WARN ACT'S UNFORESEEN BUSINESS CIRCUMSTANCES EXCEPTION**

This Newsletter is prepared by Shook, Hardy & Bacon's National Employment Litigation & Policy Group<sup>sm</sup>. Contributors to this issue: Bill Martucci, Brian Baggott, and Jennifer Oldvader.

Contact us by e-mail to request additional documentation or unsubscribe.

Attorneys in the Employment Litigation & Policy Practice represent corporate employers throughout the United States in all types of employment matters. To learn more about the SHB employment group and its members, see [SHB.com](http://SHB.com).

In 1988, Congress responded to a decade's worth of plant closings and lost manufacturing jobs by enacting the Worker Adjustment and Retraining Notification Act, more commonly known as the WARN Act. Instead of giving only sudden notice of layoffs or plant closings, employers with at least 100 employees must give at least 60-days' advance notice to affected employees. Failure to provide such notice permits employees to file suit and recover back pay and lost benefits for every day notice was not provided, up to a maximum of 60 days.

Although Congress intended to limit unscrupulous employers from suddenly laying off employees when it enacted the WARN Act, it did not ignore the fact that layoffs are sometimes entirely the result of unforeseen circumstances. Under the WARN Act, an employer may close a plant or order a layoff with less than 60-days' notice if the closing or layoff is caused by business circumstances that were not reasonably foreseeable when notice would have been required.

One of three exceptions to the notice requirements, this "unforeseeable business circumstances" exception is construed broadly. The Department of Labor has noted that a sudden and dramatic business event that could not have been anticipated using commercially reasonable business judgment will generally meet the exception if the event, in fact, caused the plant closing or layoff. This exception, however, does not permit an employer to avoid providing notice altogether. Even when an employer suffers a business-ending event, it must still provide "as much notice as is practicable."

In the current economic climate, employers might be able to take some comfort in a recent decision from the Tenth Circuit Court of Appeals applying the WARN Act and its unforeseen business circumstances exception. In *Gross v. Hale-Halsell Co.*, a wholesale grocery warehouse laid off 200 workers three days after learning that its largest customer, after doing business for more than 30 years with Hale-Halsell, had decided to go with another company as its primary supplier. Eventually, the laid-off workers filed suit for violation of the WARN Act.

By finding that Hale-Halsell could not have foreseen the loss of its largest customer, the Tenth Circuit reaffirmed Congress's intent in enacting exceptions to the WARN Act notice requirement: employers should not be liable under the Act for closings and layoffs resulting from unforeseen, catastrophic business events.

Although Hale-Halsell had suffered a series of financial setbacks before its largest customer left, the Tenth Circuit held that none of the setbacks put Hale-Halsell on notice that the customer would go elsewhere. The Tenth Circuit also warned against construing the WARN Act too broadly and requiring employers to provide premature or inaccurate notice of a layoff at the first sign of financial trouble. More often than not, employers weather the financial storms they face and never need to layoff large numbers of employees.

While the WARN Act protects employees against un-noticed plant closings and layoffs, its notice provisions are not absolute. Employers faced with unforeseen business circumstances necessitating a closing or layoff are exempted from the 60-day notice requirement. The Tenth Circuit's decision in *Hale-Halsell* only reinforces this fact.

To read the Tenth Circuit's complete decision, see <http://www.ca10.uscourts.gov/opinions/08/08-5028.pdf>.

**Kansas City | Houston | Miami | Orange County | San Francisco | Tampa | Washington, D.C.**

Shook, Hardy & Bacon L.L.P. respects the privacy of our clients and friends. Your contact information is maintained in our database and may be used to advise you of firm news, events and services, as well as for internal statistical analysis. We may forward contact details to our appointed marketing agencies but will not provide this information to any other party for marketing or any other purposes as required by law. If you wish to correct your information or would like to be removed from our database, please contact us at [interaction@shb.com](mailto:interaction@shb.com).