LABOR AND EMPLOYMENT LAW
INFORMATION MEMO
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Taking a Gamble: Plant Closings and Mass Layoffs Under the WARN Act

In a recent decision, the Second Circuit Court of Appeals overturned a district court's ruling that an employer was not subject to the Worker Adjustment and Retraining Notification Act and New York Labor Law § 860 (the WARN Acts) when they closed a buffet restaurant and laid off over one hundred employees. In *Roberts v. Genting New York, LLC*, No. 21-833, the Second Circuit held that a reasonable factfinder could conclude that for purposes of the WARN Acts, the buffet was an operating unit and, therefore, Defendants were subject to the written notice requirements as prescribed by law.

Background

The Defendants in *Roberts* owned Resorts World Casino located in Queens, New York. The Casino was home to more than 30 food and beverage options including the Aqueduct Buffet (the Buffet), an all-you-can-eat restaurant located on the property. On Jan. 6, 2014, the Defendants closed the Buffet, and without notice, laid off 177 employees. In certain circumstances, the federal WARN Act requires that employers with 100 or more full-time employees must provide written notice at least 60 calendar days in advance of covered plant closings and mass layoffs. A plant closing for purposes of the Act is defined as "the permanent or temporary shutdown of a single site of employment, or one or more facilities or operating units within a single site of employment." The New York WARN Act is comparable to the Federal WARN Act with a few insignificant differences.

In response to the layoffs, the Plaintiffs filed a putative class action alleging that the Defendants violated the WARN Acts by failing to provide notice in advance of the layoffs. The parties then filed cross-motions for summary judgment on the issue of notice. In March 2021, the district court granted the Defendant's motion, agreeing that the Buffet was not an "operating unit" as defined by the WARN Acts.

On appeal, the Plaintiffs maintained that the Buffet was both organizationally and operationally distinct to constitute an operating unit such that WARN Act notice was required.

Second Circuit's Decision

In a 2-1 ruling, the Second Circuit agreed in part with the Plaintiffs appeal, stating that "a reasonable fact-finder could determine that the Buffet was an operating unit" and, therefore, neither party was entitled to summary judgment. Under the WARN Acts, an operating unit is defined as "an organizationally or operationally distinct product, operation, or specific work function within or across facilities at the single site." Importantly, the Second Circuit cautioned that the term operating unit requires a fact-intensive inquiry which defies a one-size-fits-all, bright line rule.

In holding that the Buffet may qualify as an operating unit, the Court reasoned that limiting the term to "encompass only entities that could exist independently" severely undermined the statute's purpose. Furthermore, the Buffet's use of centralized services, which was a focus of the district

court's analysis, was not dispositive on the issue of whether the restaurant was operationally and organizationally distinct. Rather, the Second Circuit considered the totality of the circumstances, including facts such as the Buffet's physical location in the Casino, its unique all-you-can-eat model, whether foods were served exclusively at the Buffet, where food preparation took place, as well as staffing agreements, management structure, and the hiring process. Interestingly, even the Collective Bargaining Agreement, which failed to identify the Buffet as a separate department, division, or unit, was insufficient evidence in this Court's view to support the Defendants' argument that the Buffet was not an operating unit. Thus, the Second Circuit has set a relatively low bar for a party contesting the applicability of the WARN Acts to satisfy the reasonable factfinder standard and defeat a motion for summary judgment.

Circuit Judge Richard Sullivan dissented and agreed with the district court that the Buffet was not an operating unit because the meaning of the word distinct required that the Buffet was "discernably separate from the operation of the rest of Resorts World." Thus, Judge Sullivan opined that the Buffet was not discernably separate, nor operationally distinct given its centralized activities, hiring schemes, organizational structure and Collective Bargaining Agreement.

While the Second Circuit's decision may have created more questions than it answered, the key takeaway for employers is to use caution in the setting of plant closings and mass layoffs, especially when the number of employees affected falls within the scope of the Act.

If you have questions about any of the information contained in this memo, please contact Kali R. Schreiner, any attorney in Bond's labor and employment practice or the Bond attorney with whom you are regularly in contact.

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