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On the Edge

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Yellow Corp.: Del. Bankruptcy Court's WARNing to Distressed Employers

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A reduction in workforce is a common measure for distressed companies to preserve liquidity, but it is not without cost. Various statutes mandate satisfaction of payroll costs upon termination, imposing personal liability for nonpayment. In addition, the Federal Worker Adjustment Retraining Notification (WARN) Act[1] requires employers with 100 or more full-time employees to provide 60 days of advance notice of a mass layoff or plant closure.[2] Employers face liability[3] to "aggrieved employees" for salary and benefits accruing during the required — but not provided — notice period.[4]

For a faltering company, providing "premature warning" of layoffs might "accelerate a company's demise and necessitate layoffs that otherwise may have been avoided."[5] A prospective chapter 11 debtor must also consider the possibility that accruing employee claims entitled to statutory priority increase the cost of reorganization and plan confirmation.[6] In these circumstances, the distressed "employer" could benefit from any of the following WARN Act "exemptions" from required notice:

1. The "faltering company exception" allows an employer to "order the shutdown of a single site of employment before the conclusion of the 60-day period if *as of the time that notice would have been required* the employer was actively seeking capital or business,[7] which, if obtained, would have enabled the employer to avoid or postpone the shutdown and the employer reasonably and in good faith believed that giving the notice required would have precluded the employer from obtaining the needed capital or business."[8]
2. Under the "unforeseeable business circumstances" exception, reduced notice is appropriate if a "closing or mass layoff is caused by business circumstances that were *not reasonably foreseeable as of the time that notice would have been required*."[9] A majority of circuit courts have held that the notice requirement is only triggered when the objective facts reflect that the layoff was "probable," not merely possible.[10] The employer must demonstrate that the allegedly unforeseeable event caused the layoff.[11]

1 Some states have WARN Acts with similar or stricter requirements. *See* Cal. Lab. Code §§ 1400-1408; Del. Code Ann. tit. 19, § 1903.

2 29 U.S.C. §§ 2101-2102. The WARN Act contains definitions of "plant closing" and "mass layoff." *Id.* at 2101(a)(3).

3 *Id.* at § 2104. The implementing regulations provide additional guidance. *See* 20 C.F.R. §§ 639, *et seq.*

4 Individuals in control of a faltering "employer" might face personal liability for breach-of-fiduciary-duty claims when WARN Act claims accrue. *See, e.g., Stanziale v. MILK072011 LLC (In re Golden Guernsey Dairy)*, 548 B.R. 410, 412-14 (Bankr. D. Del. 2015) (individual owner breached fiduciary duties by failing to comply with WARN Act).

5 *Varela v. AE Liquidation Inc. (In re AE Liquidation Inc.)*, 866 F.3d 515, 530-31 (3d Cir. 2017).

6 *See In re Powermate Holding Corp.*, 394 B.R. 765, 778 (Bankr. D. Del. 2008) ("[W]hether a WARN Act claim is an administrative expense depends on whether the termination without notice occurred pre- or post-petition."); *Neal v. United Furniture Indus. Inc. (In re United Furniture Indus. Inc.)*, 672 B.R. 297, 305 (Bankr. N.D. Miss. 2025) (damages awarded in class action for violation of WARN Act are entitled to priority under § 507(a)(4)).

7 The implementing regulations contain a definition of "new financing." 20 C.F.R. § 639.9(a)(1).

8 29 U.S.C. § 2102(b)(1). The WARN Act also contains a notice exception if "the plant closing or mass layoff is due to any form of natural disaster." 29 U.S.C. § 2102(b)(2)(B).

9 29 U.S.C. § 2102(b)(2) (emphasis added); 20 C.F.R. § 639.9(b).

10 *See In re APA Transp. Corp. Consol. Litig.*, 541 F.3d 233, 246-47 (3d Cir. 2008), *as amended* (Oct. 27, 2008); *In re AE Liquidation Inc.*, 866 F.3d at 623; *Wilson v. Airtherm Prods. Inc.*, 436 F.3d 906, 912 (8th Cir. 2006). Relatedly, when a "going concern" sale is negotiated, 60 days of notice is not required until it becomes reasonably foreseeable that the sale will not close, given the presumption that the sale "involves the hiring of the seller's employees unless something indicates otherwise," regardless of "boilerplate" language in the purchase agreement disclaiming liability for employee-related claims. 29 U.S.C. § 2101(b)(1); *In re AE Liquidation Inc.*, 866 F.3d at 623.

11 The implementing regulations provide that closings and layoffs are *not* foreseeable when they are "caused by some sudden, dramatic, and unexpected action or condition outside the employer's control." 20 C.F.R. § 639.9(b)(1).

3. A company implementing layoffs may assert that it was a "liquidating fiduciary" rather than an "employer," and that it must be exempted from the advance notice requirements and associated liability for failure to do so.[12]

A WARN Act "employer" relying on statutory exceptions must still "give as much notice as is practicable," which includes "a brief statement of the basis for reducing the notification period."[13] Courts have discretion to reduce an employer's WARN Act liability when the employer acted in "good faith," with the employer asserting this affirmative defense bearing a "substantial burden" of proof.[14]

Against this backdrop, the U.S. Bankruptcy Court for the District of Delaware considered whether the claims of former employees and their union representatives for back pay arising under the WARN Act following layoffs[15] implemented by trucking company Yellow Corp. and its affiliates prior to filing for bankruptcy[16] on Aug. 6, 2023, had merit.[17] Yellow Corp. invoked statutory exceptions for "faltering companies" and "unforeseeable business circumstances," then argued that it was a "liquidating fiduciary" when the layoffs occurred.[18]

Dispositive motions were filed and argued on a consolidated basis on Oct. 28, 2024. The court subsequently issued bifurcated holdings that provide a road map for the financially distressed "employer" to consider when balancing efforts to sustain going-concern operations against the potential liability associated with defective notice under the WARN Act. On Dec. 19, 2024, the court issued its first ruling on summary judgment through a memorandum opinion (the "initial decision")[19] granting and denying competing summary judgment motions in part.

Initial Decision Summary

Faltering-Business Exception

The court held that while Yellow Corp.'s internal restructuring was insufficient to support the "faltering company" defense, the retention of an investment banker to refinance existing debt demonstrated that Yellow Corp. was "actively seeking capital" at the start of the 60-day notice period preceding each layoff round for purposes of the WARN Act's statutory exception to liability. This affirmative defense was available even though, as the union asserted, Yellow Corp. should have realized that financing could not be obtained while disputes with the union were ongoing. The court found that the "statutory exception requires only that a reasonable company in the employer's circumstances would not have issued a WARN notice because doing so would [have] prevented the company from obtaining new financing," as Yellow Corp. had demonstrated.[20]

Unforeseeable-Business-Circumstances Exception

In considering "whether a similarly situated employer" using its "commercially reasonable business judgment would have foreseen" the business's closure, the court found that the "unforeseeable business exception" excused Yellow Corp.'s advance-notice requirement. Given the established "history of brinksmanship" between the debtors and the union each time they engaged in high-stakes negotiations but ultimately reached a deal, the court held that the collapse of the business this final time was not *probable* or reasonably foreseeable prior to early July 2023. According to the Court:

> In a game of chicken that went terribly wrong, the [union] responded to that missed payment [to the pension fund] by issuing a notice that they intended to strike in 72 hours ... the well-publicized strike notice led the debtors' customers to send their business elsewhere. Within days, all hope of saving the company had been lost.[21]

Forms of Notice

Nonetheless, the court determined that these affirmative defenses were *unavailable* to reduce Yellow Corp.'s liability because the notices eventually issued were deficient and failed to include sufficient descriptions of the "basis for reduction of the notice period." The WARN Act notices informed union employees that (1) Yellow Corp. "hoped to complete one or more transactions and secure funds" to prevent the shutdown but failed to do so; and (2) "[t]hese circumstances were not reasonably foreseeable" when notice would have been required, and summarily "notice is ... excused because the business is being liquidated." The non-union notices merely stated that Yellow Corp. was "not able to provide earlier notice" because it "qualifies under the unforeseeable business circumstances, faltering company, and liquidating fiduciary exceptions."

The court found both forms of notice insufficient for purposes of the "unforeseeable business circumstances" as failing to provide the simple statement required, including the assertion that "the Company did not expect that the [union] would issue strike notices, which in turn caused irreparable harm to the Company's business." In assessing whether the notices supported the "faltering company" exception, the court compared the Yellow Corp. forms to language evaluated in six prior bankruptcy cases, noting that precedent established that employers must typically provide *some* language *specific to the company's circumstances* in its notice to invoke the WARN Act's statutory exceptions. A notice stating that "the company had been working, through its investment banker, on potential transactions to refinance

12 *See Official Comm. of Unsecured Creditors of United Healthcare Sys. Inc. v. United Healthcare Sys. Inc. (In re United Healthcare Sys. Inc.)*, 200 F.3d 170, 179 (3d Cir. 1999) (finding debtor that filed for chapter 11 as business in liquidation was not an "employer" under WARN Act, even though it retained employees post-petition).

13 29 U.S.C. § 2102(b)(3). Neither the statute nor the implementing regulations explain what a sufficient form of "brief statement" is. *In re United Furniture Indus. Inc.*, *supra* (addressing whether sufficient brief statement was provided).

14 Courts may exercise discretion to reduce liabilities if the employer proves that an omission was made "in good faith and ... the employer had reasonable grounds for believing that the act or omission was not a violation." 29 U.S.C. § 2104(a)(4).

15 Yellow Corp. laid off approximately 3,500 non-union employees on July 28, 2023, and 22,000 union employees on July 30, 2023.

16 *In re Yellow Corp., et al.*, No. 23-11069 (Bankr. D. Del. Aug. 6, 2023) (jointly administered).

17 Individual employees, unions, pension funds and government entities filed proofs of claim asserting liability for alleged violations of the WARN Act. Separately, two adversary proceedings were filed asserting WARN Act liability against Yellow Corp. by (1) a class of plaintiffs consisting of nonbargaining unit employees, and union and (2) non-union employees that retained a separate law firm to assert WARN Act claims.

18 The court also considered whether non-union WARN claims were properly released, which are issues beyond the scope of this article.

19 *In re Yellow Corp.*, No. 23-11069, 2024 WL 5181660 (Bankr. D. Del. Dec. 19, 2024).

20 *Id.* at *11.

21 *Id.* at *2-3. Yellow Corp. sued the union for breach of contract, seeking damages for what Yellow Corp. deemed to have been a deliberate effort by the union to destroy the company's value; claims pending before the U.S. District Court for the District of Kansas.

its existing indebtedness and/or to obtain new borrowings" would have sufficed, according to the court. The court was also unpersuaded that the deficiencies were "cured" by earlier correspondence with employees[22] and the widespread publicity regarding Yellow Corp.'s disputes with its union, again referencing and comparing examples of communication involved in and found sufficient in prior cases.

Liquidating Fiduciary Exception

The court considered whether the "liquidating fiduciary" exception applied as of the date of each layoff, an objective question involving consideration of whether there were "signs of normal operations" in the period immediately before the layoffs. The court summarized the important aspects of the timeline:

> After the issuance of the strike notice on July 17, 2023, the debtors' business fell off precipitously. While the debtors had typically picked up more than 50,000 packages a day, on July 27, 2023, they picked up only 178. The next day, July 28, 2023, they picked up only 43. That same day, the non-union employees were laid off. The day after that, on July 29, 2023, the debtors picked up their final shipment. That shipment was delivered on July 30, 2023. That same day, the debtors laid off the union employees.

The court rejected Yellow Corp.'s argument that it was a liquidating fiduciary on July 26, 2023, when it decided to liquidate its business. Rather, the court concluded that the debtors were running a "business enterprise" on July 20, 2023, when still making deliveries to customers. The court held that a genuine dispute existed regarding whether the July 30, 2023, layoff of the union employees occurred *before or after the last delivery was completed* that day, denying competing summary-judgment motions regarding whether Yellow Corp. was then a "liquidating fiduciary." The court determined the record to be insufficient to support the entry of summary judgment regarding Yellow Corp.'s attempt to reduce its liability for actions made "in good faith" with "reasonable grounds for believing that the act or omission was not a violation" of the WARN Act.[23]

The Feb. 26, 2025, Decision

A three-day trial was held in January 2025 regarding whether Yellow Corp. was an "employer" under the WARN Act when it laid off its union employees, or instead a "liquidating fiduciary" beyond the WARN Act's scope, as well as whether the court should reduce the damages on account of Yellow Corp.'s "good faith." By that time, Yellow Corp. had funded approximately $12.3 million to settle WARN Act claims filed by its non-union employees, narrowing the issues to whether Yellow Corp. was liable to the union employees, and if so, in what amount. At trial, Yellow Corp. presented evidence demonstrating that it made its final delivery at 11:30 p.m. EST on July 29, 2023.

On Feb. 26, 2025, the court held that Yellow Corp. was a "liquidating fiduciary" rather than an "employer" when the union employees were terminated.[24] As a result, Yellow Corp. was no longer subject to the WARN Act's notice requirements and associated employee claims. Alternatively, the court was convinced that if there was a basis for imposing liability under the WARN Act, "Yellow Corp.'s good-faith efforts to comply with the statute provide a basis for reducing its liability to 14 days of pay and benefits, rather than the 60 days to which they would otherwise be entitled."

The Takeaway

The decision demonstrates the importance of timing and communication. For the faltering company in liquidation, delaying layoffs until business activities have ceased could be critical to avoid liability. For any other distressed company, the court's rulings provide examples of what an appropriate form of notice is — and is not — based on the circumstances. The decision is on appeal before the U.S. District Court for the District of Delaware. Meanwhile, the bankruptcy court confirmed Yellow Corp.'s proposed chapter 11 plan on Nov. 25, 2025.[25] abi

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22 The court noted that this communication was relevant to the issue of "good faith." *Id.* at *4.
23 Summary judgment was denied regarding enforceability of claim waivers executed by certain former employees.
24 *In re Yellow Corp.*, 668 B.R. 337 (Bankr. D. Del. 2025).
25 The court's order included an overview of the requirements for court approval of a form of liquidating trust and associated trust-governance issues in determining whether the plan was filed in "good faith."