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Fifth Circuit Revives WARN Act Case Against Private Equity Manager of Closed Business

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On September 27, 2023, the Fifth Circuit revived a lawsuit under the Worker Adjustment and Retraining Notification Act ("WARN Act") brought against private equity firm Black Diamond Capital Management LLC, concluding that there was a dispute about whether the firm exercised de facto control over one of its portfolio companies.[1]

Background: The WARN Act requires covered employers to provide affected employees with 60 days' notice before a plant closure or mass layoff—often known as a WARN Act notice.[2] If an employer fails to comply, affected employees may sue the employer for backpay, benefits, and attorney's fees.[3]

In this case, Bayou Steel operated a steel mill in LaPlace, Louisiana. On September 30, 2019, Bayou Steel closed the LaPlace mill without providing WARN Act notices. After briefly pursuing and then dismissing an action in bankruptcy court against Bayou Steel, Plaintiffs sued the Black Diamond holding company that indirectly owned Bayou Steel, as well as Black Diamond Capital Management, LLC ("BDCM"), the private equity firm acting as the investment advisor, alleging that those entities acted functionally as the combined "single employer" of Bayou Steel's employees. The district court concluded at summary judgment that the defendants were not liable under the WARN Act because they did not act as a single employer with Plaintiffs' actual employer, Bayou Steel. Plaintiffs appealed.

Issue Presented on Appeal: Can a private equity firm acting as an investment advisor be liable for a WARN Act violation by its portfolio company in conducting a mass layoff?

The Fifth Circuit's Holding: A private equity firm may be liable for employment claims arising from operations of a portfolio company if the firm exercised de facto control.

"The WARN Act imposes liability on the '*employer who orders* a plant closing or mass layoff' without giving the required notice."[4] To determine "whether a related entity is so intertwined with the employer that the two may be considered a single employer, such that the related entity may be liable for the actual employer's WARN Act violation," courts will consider:

> "(i) common ownership,
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> (ii) common directors and/or officers,
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> (iii) de facto exercise of control,
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> (iv) unity of personnel policies emanating from a common source, and
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> (v) the dependency of the operations."[5]

Related People

Karl G. Nelson

Claire Piepenburg

In 2016, the Third Circuit had applied a similar test in considering, but ultimately declining, to hold Sun Capital Partners liable for employment actions involving a portfolio company.[6] The Fifth Circuit's decision in *Fleming* demonstrates that, at least under appropriate facts, the single employer theory advanced in *Jevic* could result in wider exposure to liability for employment actions.

Specifically, the Fifth Circuit explained that "the hinge of this case" was the third factor, "de facto control," and examined whether BDCM was responsible for the WARN Act violation.[7] The evidence revealed that "BDCM was intimately involved in any number of significant decisions at Bayou Steel, so much so that Bayou Steel's CEO felt micromanaged by BDCM employees who were 'going around [him] constantly.'"[8] For example, BDCM had "helped Bayou Steel implement cost-cutting measures, including a reduction in force, changes to employee benefits and compensation, and renegotiation of vendor contracts" in 2017.[9] The Fifth Circuit ultimately held that the district court had "erred in granting summary judgment to BDCM because there [was] a genuine dispute of material fact as to whether BDCM exercised de facto control over Bayou Steel's decision to close its LaPlace steel mill and order Plaintiffs' layoffs."[10]

What It Means:

- *Fleming* makes clear that the issue of whether a private equity firm may be deemed a "single" or "joint employer" with a portfolio company for a WARN Act violation remains a potential area of risk for private equity managers and owners.
- Although the outcome in *Fleming* was highly fact-driven, the Fifth Circuit's decision may encourage plaintiffs to advance similar theories against private equity advisors (instead of or in addition to their direct employers) under the WARN Act and other employment statutes.
- The decision in *Fleming* is a reminder that private equity firms and other specialized investment entities should be thoughtful about how they engage, advise, and interact with affiliated companies—even when there is not direct ownership. Courts will carefully scrutinize, in particular, any conduct that suggests that a private equity firm exerted control in decision-making surrounding plant closures, mass layoffs, and other employment actions.
- Private equity firms should also be thoughtful in observing corporate formalities and maintaining appropriate corporate separateness, such as forming boards of directors and documenting decision-making processes.

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[1] *See Fleming v. Bayou Steel BD Holdings II L.L.C.*, No. 22-30260, 2023 WL 6284736, at *1 (5th Cir. Sept. 27, 2023).

[2] *See* 29 U.S.C. § 2102(a).

[3] *Id.* § 2104(a).

[4] *Fleming*, 2023 WL 6284736, at *10 (quoting 29 U.S.C. § 2104(a)(1)).

[5] *Id.* (citing 20 C.F.R. § 639.3(a)(2)).

[6] *See In re Jevic Holding Corp.*, 656 F. App'x 617, 619 (3d Cir. 2016).

[7] *Fleming*, 2023 WL 6284736, at *13.

[8] *Id.*

[9] *Id.* at *2.

[10] *Id.* at *15.

The following Gibson Dunn lawyers prepared this client alert: Karl Nelson, Anna Casey, and Claire Piepenburg.

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding the issues discussed in this update. Please contact the Gibson Dunn lawyer with whom you usually work, any member of the firm's Labor and Employment or Private Equity practice groups, or the following authors and practice leaders:

Labor and Employment Group: Karl G. Nelson – Partner, Dallas (+1 214-698-3203, knelson@gibsondunn.com) Jason C. Schwartz – Co-Chair, Washington, D.C. (+1 202-955-8242, jschwartz@gibsondunn.com) Katherine V.A. Smith – Co-Chair, Los Angeles (+1 213-229-7107, ksmith@gibsondunn.com)

Private Equity Group: Richard J. Birns – Co-Chair, New York (+1 212-351-4032, rbirns@gibsondunn.com) Ari Lanin – Co-Chair, Los Angeles (+1 310-552-8581, alanin@gibsondunn.com) Michael Piazza – Co-Chair, Houston (+1 346-718-6670, mpiazza@gibsondunn.com)

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