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Bankruptcy Advisory

Potential Shareholder Liability Arising From Subsidiary WARN Act Violations

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When a company begins experiencing financial difficulty, shareholders often ask whether they may be liable under the Federal Worker Adjustment and Retraining Notification ("WARN") Act for violations by the company. When the financial difficulty results in a quick shutdown and immediate layoff of the workforce, perhaps due to the very common scenario where a company's primary lender refuses to extend an existing line of credit, the answer is—maybe. Such was the situation addressed in *Blough v. Voisard Mfg.*, 2015 U.S. Dist. LEXIS 9267, 1:14 CV 263 (N.D. Ohio, Jan. 27, 2015) where former employees claimed that their former employer *and its shareholders* were jointly liable for the employer's WARN Act violations.

The trouble began when Voisard Manufacturing, Inc. ("Voisard") started experiencing financial difficulties in late 2012. In response to its struggles, Voisard began reducing its workforce through a series of layoffs in 2013. Throughout 2013 and into 2014, Voisard negotiated modifications with its senior secured lender (the "Bank"), in an attempt to stay afloat. Eventually, however, the Bank refused further advances and three days later, Voisard laid off the majority of its remaining employees. Thereafter, the former employees (the "Employees") brought suit against Voisard and Voisard's shareholders, LG Industries, LLP ("LGP") and LG Industries, Inc. ("LGI" and collectively, the "Defendants"). In the memorandum opinion and order cited above, the Court considered the Employees' Motion for Summary Judgment and the Defendants' Cross-Motion.

While multiple issues were considered on summary judgment, including whether Voisard was an "employer" under the WARN Act and whether the WARN Act's "unforeseeable business circumstances exception" applied to the credit crunch leading to the mass layoff, the Court only resolved one issue—whether the Defendants were a "single employer" under the WARN Act. And the issue was significant: if the Defendants were a "single employer," each would be jointly liable for any WARN Act violation.

"The question of whether entities constitute a 'single employer' for WARN Act purposes 'is ultimately an inquiry into whether . . . two nominally separate entities operated at arm's length' or whether, following an 'assessment of the amount of control' exercised by one entity over another, it can be determined that two entities should be considered jointly liable for the closing and the subsequent lack of notice." In analyzing the issue, the Court identified a non-exhaustive five-factor balancing test: (1) common ownership; (2) common directors and/or officers; (3) de facto exercise of control; (4) unity of personnel policies emanating from a common source; and (5) dependency of operations. The last three factors are often the determinative factors, and among those three, "de facto exercise of control" is the most important.

In this case, the facts weighed heavily in favor of a "single employer" finding. Specifically: (1) LGP was Voisard's sole shareholder; (2) LGI was the managing partner of LGP, and two individuals, Ronald Constein and William Walker (together, the "Owners") were the only two limited partners of LGI; (3) both Owners served as officers and directors of all three companies, (4) LGI and LGP had no employees or other operations; and (5) the Owners were Voisard's only two corporate officers and they controlled the employment and financial decisions at Voisard. In other words, the Defendants' structure and operations were very interrelated and the Court found that all factors favored the Employees (except the "unity of personnel policies," which favored neither party because neither LGI nor LGP had employees). Accordingly, Voisard, LGI and LGP were held to be a "single employer," and jointly liable for any WARN Act violation.

Most cases we come across do not have factual scenarios quite as extreme (as to company interrelatedness) as

existed in *Blough.* However, the important take away from this case is that the corporate shield protecting shareholders from a subsidiary's WARN Act violations is not impenetrable. Indeed, the protections become increasingly suspect as the shareholders become more entangled in a subsidiary's affairs.

If you have any questions about this advisory or its implications, please call your principal Mintz Levin attorney or one of the attorneys noted on this advisory.

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