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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Case Study: In Re Flexible Flyer

(May 12, 2010, 1:04 PM EDT)

A Mississippi bankruptcy court recently addressed several employer defenses to liability under the Worker Adjustment and Retraining Notification Act ("WARN Act"), which is noteworthy in the context of the current economy. In re FF Acquisition Corp. d/b/a Flexible Flyer, 423 B.R. 502 (Bankr. N.D. Miss. January 20, 2010).

The employer, Flexible Flyer, manufactured swing sets, hobby horses, go-carts, utility vehicles and fitness equipment, which it sold to retailers. Flexible Flyer obtained its operating capital by selling its anticipated receivables to a financing company for an advance of 80 percent of the amount of such anticipated receivables. This arrangement and infusions of other capital from Flexible Flyer's parent company were its primary sources of operating funds.

Flexible Flyer experienced significant financial problems in 2005. Its go-carts were subjected to a recall and three of its major customers deferred purchasing \$5,000,000 in swing sets. Another important customer withheld payments for merchandise that had already shipped. As a result, the 80 percent rate advanced to Flexible Flyer on receivables by its financing company was reduced to 50% and then to zero, effectively terminating the financing arrangement for the company's operating capital.

Flexible Flyer's parent company also refused to infuse additional capital due to a lack of written commitments from customers. With no other sources of working capital, Flexible Flyer sought bankruptcy protection on September 9, 2005. On the same day, and because more than 100 employees worked at the plant at the time it closed, Flexible Flyer provided notice of the closing to its employees pursuant to the WARN Act.

The terminated employees brought claims under the WARN Act as an adversary proceeding in bankruptcy court because Flexible Flyer failed to give 60 days advance notice as required by the statute. Flexible Flyer admitted that it did not provide 60 days notice of the mass layoff and plant closing, but asserted two affirmative defenses to avoid liability: (1) the unforeseen business circumstances exception; and (2) the faltering company exception.

The court addressed each defense separately. To avoid WARN Act liability under the unforeseen business circumstances exception, an employer must establish (1) that the circumstances were indeed unforeseeable, and (2) that the layoffs were caused by those circumstances. The employees argued the plant shutdown was not unforeseeable for the following reasons: (1) from its inception Flexible Flyer was in a deficit position that steadily increased yearly; (2) Flexible Flyer knew as early as the spring of 2005 that layoffs could occur because it informed its go-cart employees of possible layoffs during that same year; (3) in the spring of 2005, several large retailers deferred purchasing swing sets valued at \$5,000,000; (4) the go-carts were recalled in June of 2005; (5) the parent company warned that it would close Flexible Flyer if it failed to earn a profit; and (6) Flexible Flyer knew that its financing arrangement would dry up because of the cascade of losses it was experiencing.

In response, Flexible Flyer produced affidavit testimony from its chief financial officer that the abrupt and dramatic reduction of the advance rate for receivables was the unforeseen circumstance that primarily caused the plant to close. Further, Flexible Flyer argued that it was completely unforeseeable that its parent company would refuse to supply additional capital. Faced with conflicting evidence on these issues, the court held that whether the plant closing resulted from unforeseen business circumstances was a genuinely disputed issue of fact that precluded summary judgment in favor of the employees.

The court also found that a genuine factual dispute as to the "faltering company" defense. The court reviewed the Department of Labor regulation interpreting the defense, which includes four requirements the employer must establish: (1) the employer was actively seeking capital at the time the 60 day notice would have been required; (2) the employer had a realistic opportunity to obtain the financing sought; (3) the financing would have been sufficient, if obtained, to enable the employer to avoid or postpone the shutdown; and (4) the employer reasonably and in good faith believed the 60 day notice would have precluded it from obtaining the financing it needed.

The employees filed a motion for summary judgment arguing that Flexible Flyer did not meet these four requirements. Flexible Flyer opposed the motion and contended that it met each of requirements. The court denied the employees' motion because there was a genuine dispute with regard to material facts. This decision highlights the ability of employers to avoid liability for failing to provide advance notice of mass layoffs or plant closures as required under the WARN Act where one or more of these key defenses apply.

--By Jay Thornton, Hunton & Williams LLP

Jay Thornton is an attorney in the labor and employment practice at Hunton & Williams LLP in the firm's Miami office.

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