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- *Summary:* In October 2013, various states – including New York, New Jersey and Connecticut – enacted changes to their unemployment insurance laws pursuant to the federal Unemployment Insurance Integrity Act (the "Act"). As part of an overarching effort to deter and decrease erroneous overpayment of benefits, the Act requires, among other things, employers to respond to agency requests for information, and imposes penalties on employers who fail to comply.

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Second Circuit Adopts DOL Factors For WARN Single Employer Analysis In A Private Equity Transaction

- *Summary:* In a decision of interest to the private equity industry, the Second Circuit Court of Appeals recently clarified the standard for determining whether related entities are single employers for purposes of the Worker Adjustment Retraining and Notification Act ("WARN"), which imposes certain obligations on employers when engaging in plant closings or mass layoffs. Although other U.S. Circuit Courts of Appeals had previously considered the issue, in December 2013, the Second Circuit in *Guippone v. BH S&B Holdings LLC* officially adopted the five non-exclusive factor analysis set forth in U.S. Department of Labor ("DOL") regulations to determine whether a holding company or various private equity investors were a single employer with the holding company's closely-held subsidiary that employed the plaintiff employees. Applying the five-factor analysis, the Second Circuit affirmed dismissal of the complaint as against the private equity firms, but reversed dismissal of the holding company.

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Employment Law Practice Group

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U.S. Supreme Court Holds That SOX Whistleblower Protections Extend To Employees Of Contractors Of Public Companies, Including Mutual Fund Investment Advisers

In a March 4, 2014 plurality opinion, the U.S. Supreme Court decided Lawson v. FMR LLC, 571 U.S. __, 134 S. Ct. 1158, 188 L. Ed. 2d. 158 (2014), holding that Section 806 of the Sarbanes-Oxley Act of 2002 ("SOX"), codified at 18 U.S.C. §1514A, extends whistleblower protection to employees of contractors and subcontractors to public companies. In so holding, the Court clarified that employees of investment advisers to mutual funds are protected under SOX from retaliation by their employers, even if they are not employed by the mutual fund, which is the public company. The Court also stated that employees of law firms and accounting enterprises who perform work for public companies would also be protected under SOX.

The petitioners in *Lawson* were former employees of an investment adviser to mutual funds. Both the district court and the U.S. Court of Appeals for the First Circuit held that SOX prevented the investment adviser from retaliating only against employees of the public company itself, and dismissed the claims. In its reversal, the Supreme Court noted that mutual funds are public companies without employees, reasoning that "if the whistle is to be blown on fraud detrimental to mutual fund investors, the whistleblowing employee must be on another company's payroll, most likely, the payroll of the fund's investment adviser or manager." 134 S. Ct. at 1162, 188 L. Ed. 2d. at 170. The Court further explained that whistleblower protection for mutual fund investment adviser employees protects investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws, which disclosures are written by the employees of the investment adviser.

Lawson is a significant decision having implications not only for the mutual fund industry, but for all employers who perform services for public companies. Investment advisers, law firms and accounting firms, as well as any other enterprises that contract with public companies, should take note of the decision and conform their policies and procedures with respect to employee whistleblowing. ◆

Changes In Unemployment Rules Affect Tri-State Employers

In October 2013, various states – including New York, New Jersey and Connecticut – enacted changes to their unemployment insurance laws pursuant to the federal Unemployment Insurance Integrity Act (the "Act"). As part of an overarching effort to deter and decrease erroneous overpayment of benefits, the Act requires, among other things, employers to respond to agency requests for information, and imposes penalties on employers who fail to comply.

Employers Who Fail to Timely or Adequately Respond to Information Requests Are Subject to Penalties

Under the Act, states must enact legislation where employers will no longer be relieved of charges relating to erroneous overpayment of unemployment payments if the employer is determined to be at "fault" in responding to requests for information concerning the applicant. An employer will be deemed at "fault" when it has failed to respond timely or adequately to a request for information, or where the employer has established a pattern of failing to timely or adequately respond to requests for information. The Act permits states to define the terms "timely," "adequately," and "pattern." Unemployment Insurance Integrity Act, Pub. L. No. 112-40, sec. 252, § 3303, 125 Stat. 401, 421-22 (2011).

New York, New Jersey and Connecticut adopted the following changes to implement the Act.

New York

Effective October 1, 2013:

- The Department of Labor must receive an employer's response to a notice of potential charges within 10 calendar days of the date of notice. 12 N.Y.C.R.R. § 472.12(a).
- An "adequate" response requires a good faith response specifying the reasons for separation and the issues affecting eligibility. It must also include all relevant documentation. *Id.* § 472.12(f).
- Employers who fail to timely or adequately respond to a request for information and are first-time offenders may be relieved of charges resulting in overpayment of benefits if they can show good cause for their failure to reply in a timely and adequate manner. Relief is available when an unanticipated event affects the employer's ability to react.

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For example, the statute explicitly states that failure to reply is excusable on account of a disaster emergency as declared by the federal or state government. *Id.* §472.12(h).

Notably, effective January 1, 2014, an individual is not entitled to collect both dismissal pay and unemployment benefits within the same week if the amount of dismissal pay exceeds the amount of unemployment benefits due. When the individual's dismissal payment is a lump sum, or for an indefinite period, dismissal payments should be allocated on a weekly basis and the claimant will not be eligible for unemployment benefits for the weeks where the claimant is collecting dismissal pay. Employees receiving severance pay more than 30 days from the end of the employment relationship may still collect unemployment. However, it is uncertain how this provision will be interpreted. N.Y. Labor Law § 591(6).

New Jersey

- Effective October 22, 2013, a "pattern of failing" will be established when there is repeated failure by the employer to respond to requests for information related to claims for benefits. However, no "pattern of failing" will be established when (1) the employer has failed to respond on three occasions or less within the past year, or (2) the employer has failed to respond to less than two percent of the total number of requests for information, whichever is greater. N.J. Stat. § 43:21-6(j)(2).
- New Jersey law requires employers to respond to agency requests for information within 10 days after the mailing of the request. N.J. Stat. § 43:21-6(b)(1).

Connecticut

- Effective October 1, 2013, Connecticut adopted language that requires employers to timely and adequately respond to requests for information. However, Connecticut has not adopted any language regarding a "pattern of failure." *See* Conn. Gen. Stat. § 31-273(k).

Increased Penalties for Individual Fraud

The Act requires states to impose fines of at least 15% of the erroneous payment on individuals who submit fraudulent claims. States are permitted to set stricter penalties at their discretion. Unemployment Insurance Integrity Act, Pub. L. No. 112-40, sec. 251, § 303(a), 125 Stat. 401, 420-21 (2011).

New York penalizes offenders by demanding either 15% of the overpayment, or $100, whichever is greater. N.Y. Labor Law § 594(4). New Jersey sets the rate slightly higher, at 25% of the overpayment. N.J. Stat. § 43:21-16(a)(1). Finally, Connecticut imposes the strictest penalty by fining first-time offenders 50%, and subsequent offenders 100% of the overpayment. Conn. Gen. Stat. § 31-273(b)(2)(A).

Conclusion

Employers should be aware of these changes so that they can timely and appropriately respond to requests for information from state agencies. New York employers should also note the consequence of offering severance pay to employees who may otherwise be eligible for unemployment benefits. ◆

Second Circuit Adopts DOL Factors For WARN Single Employer Analysis In A Private Equity Transaction

In a decision of interest to the private equity industry, the Second Circuit Court of Appeals recently clarified the standard for determining whether related entities are single employers for purposes of the Worker Adjustment Retraining and Notification Act ("WARN"),[1] which imposes certain obligations on employers when engaging in plant closings or mass layoffs.[2] Although other U.S. Circuit Courts of Appeals had previously considered the issue, in December 2013, the Second Circuit in *Guippone v. BH S&B Holdings LLC*, 737 F.3d 221 (2d Cir. 2013), officially adopted the five non-exclusive factor analysis set forth in U.S. Department of Labor ("DOL") regulations to determine whether a holding company

[1] WARN requires employers with 100 or more employees to give employees 60 days' advance notice of plant closings and mass layoffs, including notice of the expected date of the plant closing or mass layoff, and the expected date the individual employee will be separated. 29 U.S.C. § 2101(a)(1); 20 C.F.R. § 639.7(d)(1)-(4). Employers who fail to comply with WARN are liable to affected employees for up to 60 days of pay and benefits. *See* 29 U.S.C. § 2104(a)(1).

[2] Under WARN, a plant closing occurs when the shutdown, permanent or temporary, of a single site of employment results in the loss of employment for 50 or more employees during a 30-day period. *Id.* at § 2102(a)(2). A mass layoff occurs when a reduction in force that is not the result of a plant closing results in the loss of employment for (1) at least 33% of employees and at least 50 employees at a single site of employment during a 30-day period, or (2) at least 500 employees. *Id.* at § 2101(a)(3).

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or various private equity investors were a single employer with the holding company's closely-held subsidiary that employed the plaintiff employees. Applying the five-factor analysis, the Second Circuit affirmed dismissal of the complaint as against the private equity firms, but reversed dismissal of the holding company ("HoldCo").

The District Court Decision

We first reported on the U.S. District Court for the Southern District of New York's decision (*Guippone v. BH S&B Holdings LLC*, 09 Civ. 1029 (CM), 2010 U.S. Dist. LEXIS 50482, at *11 (S.D.N.Y. May 18, 2010)) in our Winter 2011 Newsletter. In *Guippone*, Steve & Barry's Industries, Inc. ("S&B Industries") was managed by HoldCo along with another holding company which employed the S&B Industries employees ("Holdings"). HoldCo was funded by certain private equity investors whose representatives populated the HoldCo board of directors. In response to S&B Industries' financial situation and recommendation that it lay off employees, the HoldCo board passed a resolution authorizing the layoff and that notice be provided to affected employees in accordance with applicable law. Days after Holdings began sending WARN notices, Holdings filed for Chapter 11 bankruptcy. Former employees of S&B Industries subsequently sued Holdings, HoldCo and the private equity investors for violations of WARN.

The district court dismissed the private equity investors from the case because the plaintiffs failed to allege sufficient facts to establish the investors and holding companies were a single employer under WARN. *See* U.S. Dist. LEXIS 50482 at *12. The district court later dismissed on summary judgment the complaint against HoldCo on the basis of the DOL factors of (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) dependence of operations, and concluded that plaintiff failed to raise a triable issue of fact that HoldCo and Holdings were a single employer for WARN purposes. *See* 2011 U.S. Dist. LEXIS 145435, at *28 (S.D.N.Y. Dec. 15, 2011).

The Second Circuit's Analysis

On appeal, the Second Circuit affirmed the district court's dismissal of the private equity investors but vacated the decision with respect to HoldCo, finding that the court applied the DOL factors incorrectly. Adopting the five DOL factors, the Second Circuit explained that the first two factors (common ownership and common directors/officers) carried less weight for WARN liability purposes than the last three, which related to the amount of control each defendant wielded relating to the employee terminations. *Id.* at 227-228.

Considering the record, the Court noted that although the private equity investors' representatives met with employees, consulted with management and participated in certain employment-related decisions for management level employees, there was an insufficient showing that the private equity investors controlled the employee terminations at issue for purposes of WARN liability. However, considering the same facts and DOL factors, the Court also concluded that there were sufficient facts to find that HoldCo controlled Holdings, and thus exerted a sufficient amount of control for WARN liability purposes. *Id*. at 227 (evidence of *de facto* control included testimony by a member of HoldCo's board and an officer of Holdings who did not know of the distinction between the two, and that HoldCo's board of directors negotiated Holdings' financing and chose Holdings' management).

Looking Ahead

The Second Circuit's decision in *Guippone* provides clearer guidance in determining whether related entities are single employers for purposes of WARN obligations and liabilities which is an important consideration for private equity investors. *Guippone* illustrates that merely having separate corporate entities may not be sufficient to insulate related entities from WARN liabilities. In structuring transactions, observing corporate formalities and, as appropriate, maintaining independence with respect to directors and/or officers, operations, and personnel policies can help to minimize WARN Act liability. ◆