

PUBLICATION

No Need to Count Severed Employees for WARN Purposes

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In the current climate of downsizing, the Supreme Court declined to reconsider a WARN Act case from the U.S. Court of Appeals for the Seventh Circuit. The fact pattern and holding of the Seventh Circuit's decision (which the Supreme Court declined to reconsider) provide a practical lesson in WARN Act analysis. In sum, the case reiterates that employees who accept voluntary severance agreements do not need to be counted for the purposes of WARN Act layoff thresholds.

In *Ellis v. DHL Express, Inc.*, 633 F.3d 522 (7th Cir. 2011), the Court found that shipping giant, DHL, did not violate the WARN Act by laying off workers at its Chicago-area facilities in 2008. DHL negotiated voluntary severance options with the various unions representing employees at the affected facilities. Some of the employees were given two days to accept the severance, and the severance agreement contained a seven day revocation period.

Plaintiff asserted a class action claim under the WARN Act, asserting that the employees who accepted the severance did not do so voluntarily. Therefore, the Plaintiff reasoned that the employees who accepted the severance involuntarily should be counted as laid off employees for the purpose of triggering WARN Act liability for a "mass layoff." The District Court dismissed the case on summary judgment, and the Seventh Circuit upheld the District Court's decision.

The court held that "worker participation in incentive programs is generally considered voluntarily, unless the employer improperly induced workers to leave their jobs, either by creating a hostile or intolerable work environment or by applying other forms of undue pressure or coercion." *Id* at 527. The Court noted that the fact that the employees had to make a tough decision of whether to accept the severance in a relatively short amount of time did not make the severance involuntary. The Court also noted that the fact that the choice employees were presented with was not particularly attractive does not make the severance involuntary. Therefore, the employees who accepted the severance package were not required to be counted for the purpose of determining whether there was a "mass layoff" under the WARN Act.

The take-away for HR professionals and counsel is that employees accepting voluntary severance agreements are not counted for the purpose of WARN Act layoff thresholds.