BUYER BEWARE: LABOR AND WARN ACT
ISSUES IN AN ASSET SALE OF A FAILING BUSINESS
WITH A UNIONIZED WORKFORCE

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When a company is purchased through a sale of assets, there is a question as to which, if any, rights and liabilities held by the selling company will be assumed by the purchasing company. This raises at least several important issues with regard to labor law. First, will a purchasing company be bound by the collective bargaining agreement that existed between the selling company and its employees? Second, will a purchasing company inherit the duty to bargain with the certified bargaining agent that was elected by the employees of the selling company? Third, will the selling company be required to bargain with its employees about the effects of the sale? Fourth, does the buyer or seller have the responsibility to notify the workers of layoffs associated with the sale under the WARN Act, and who is liable for violation under WARN? This article will answer those questions. Part I will briefly discuss an employer’s general duty to bargain. Part II will explain why a change in employer generally does not affect a certified bargaining agent but does eliminate a collective bargaining agreement. Part III will discuss the “effects bargaining” obligations of the selling company, or the duty to bargain over the effects that the sale will have on the employees. Finally, Part IV will focus on the WARN Act, particularly in the context of a bankruptcy filing.

I. THE GENERAL DUTY TO BARGAIN

The two most important aspects of the general duty to bargain are the role of certified bargaining agents and an employer’s duties under a collective bargaining agreement.

1. Certified Bargaining Agents

Under the National Labor Relations Act (“NLRA”), a group of two or more employees can join together to create a bargaining unit.1 The National Labor Relations Board (“NLRB” or “the Board”) is then responsible for determining whether the group of employees is an “appropriate” bargaining unit. Once an appropriate bargaining unit is formed, that unit can elect an individual or a union to represent the employees and bargain with the employer. Once elected or voluntarily recognized, the NLRB certifies the union as the bargaining agent for the employees.

Once certified, the bargaining agent is empowered to negotiate a collective bargaining agreement with the employer on behalf of the bargaining unit (the employees). The bargaining agent is empowered to bargain with the employer so long as the bargaining agent has majority status, or the support of a majority of the employees. Regardless of how long the collective bargaining process takes, the bargaining agent must be recognized by the employer and the bargaining agent’s majority status is presumed for at least one full year after initial certification.2 Once a collective bargaining agreement is signed, the employer’s duty to bargain with the certified bargaining agent will necessarily continue for the duration of the agreement, up to three years.3 Under the contract bar doctrine, the existence of a valid contract bars the employer from

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2 See, e.g., Chelsea Indus., 331 NLRB 1648 (2000).
3 See, e.g., General Cable Corp., 139 NLRB 1123 (1962).
bargaining with a different agent. If the collective bargaining agreement lasts longer than three years, the duty to bargain with the certified bargaining agent becomes rebuttable presumption for the duration of the agreement.4

II. SUCCESSORSHIP ISSUES WHEN THE EMPLOYER CHANGES THROUGH A SALE OF ASSETS

1. A Sale of Stock Compared to a Sale of Assets

Companies are typically purchased through a sale of stock or a sale of assets. When a business is sold through a stock sale, the entity’s ownership changes to the purchaser, but the entity retains its assets, rights, contracts, and liabilities, including all employment contracts and claims. In a sale of assets, however, only the specified assets are sold, which may prevent certain rights and liabilities from moving to the purchaser. This is one reason why a sale of assets is preferable. For example, a purchasing company may be able to acquire the equipment and operations of the selling company without being bound by all the liabilities of the predecessor, including employment contracts and claims.

The Supreme Court and NLRB have developed special labor law rules for employer liability when one company sells its assets to another company. In Wiley v. Livingston, the Supreme Court referred to the policy considerations underlying the collective bargaining process and said that the contracts that resulted from this process were not ordinary contracts and might be assumed by a new employer.5 Thus, it cannot be presumed that all of the obligations held by a selling company as a result of the collective bargaining process will remain with the seller by a sale of its assets to a purchaser.

2. A Purchaser of Assets’ Duty to Bargain With The Seller’s Certified Bargaining Agent

A. General rule

Typically, a company that purchases the assets of another company will be bound by the duty to bargain with the certified bargaining agent of the previous employer when the new employer is considered a “successor.”6 However, a company may be considered a successor and still not assume the obligations of the previous employer if certain conditions are not met.7 The key determination of whether the new employer is a successor and will assume the previous employer’s duty to bargain is whether there is a sufficient continuity in the work force.8 Other considerations include whether there is a continuity in the employing industry and business operations, and whether there is a long hiatus between the demise of the previous employer and the purchase of assets by the new employer.

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4 See, e.g., General Cable Corp., 139 NLRB 1123 (1962).
8 See NLRB v. Burns Int’l Sec. Servs., 406 U.S. 272 (1972); Fall River, 382 U.S. 27.
B. Continuity in the work force

If there is a sufficient continuity in the work force, the certified bargaining agent’s majority status is presumed as it would have been under the original employer. The Supreme Court has held that when “a majority of the employees hired by the new employer are represented” by the previously certified bargaining agent, the employer is required to bargain with that agent. Although the Burns case did not involve a sale of assets, the Court applied the Burns rule to a sale of assets transaction in Fall River. Thus, the general rule is that a sale of assets will not extinguish the duty to bargain with a certified bargaining agent when a majority of the new employer’s employees come from the previous employer.

This rule is typically applied when the successor company simply hires all or nearly all of the workers from the predecessor company. Occasionally, however, there are questions about whether the employees hired by the new employer should be counted toward a majority. For example, what happens when an employee is laid off by the previous employer several months prior to the sale of assets and then hired by the new employer upon purchase of those assets? The determination of whether an individual was an employee of the predecessor company is a factual one. The Board or the courts will generally examine the duration of the individual’s employment with the predecessor along with the amount of time that passed between the termination of the employee’s relationship with the predecessor and the sale of assets.

There is also a question as to when the duty to bargain will attach to the successor company if the predecessor’s employees are hired over time or if the successor intends to hire additional outside employees in the near future. In Fall River Dyeing & Finishing Corp., the Supreme Court held at the moment that “a majority of the successor’s employees had been employed by its predecessor, then the successor has an obligation to bargain with the union that represented these employees.” This is known as the “substantial and representative complement” rule. Until a substantial complement of employees have been hired, a successor employer may set the initial terms of employment unilaterally unless it is “perfectly clear” that the employer plans to hire all of the employees in the unit or the successor forfeits that right by refusing to hire union employees.

In determining whether the successor has in fact hired a substantial and representative complement of the predecessor’s employees, the board and the courts have considered:

(1) Whether the job classifications designated for the operation were occupied or substantially so, (2) whether the operation was in normal or substantially normal production, (3) the size of the

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9 Burns, 406 U.S. 272, 281.
10 482 U.S. 27.
12 See id.
13 482 U.S. at 47.
14 See Burns, 406 U.S. 272.
complement on the date of normal production, (4) the time expected to elapse before a substantially larger complement would be at work, and (5) the relative certainty of the employer’s expected expansion.

The Developing Labor Law, 1131-32 (John E. Higgins, Jr. ed., 2006). All five factors do not need to be met to find a substantial and representative complement. They are weighed on a case-by-case basis. See, e.g., Sullivan Industries v. NLRB, 957 F.2d 890 (D.C. Cir. 1992) (finding that 79 employees were a substantial and representative complement despite the fact that 180 employees would be hired).

In some cases, the purchasing employer might try to avoid the duty to bargain by not hiring a substantial or representative complement of the predecessor’s employees or by hiring a far greater number of other employees. This strategy might work in limited circumstances. For example, the bargaining obligation may not attach even at the moment of a substantial complement if the employer expects with reasonable certainty that it will substantially increase its employee complement within a relatively short period of time. However, a new employer may not attempt to avoid the duty to bargain by discriminatorily refusing to hire a substantial complement of the predecessor’s employees. Thus, it is common for a new employer to hire or retain a substantial and representative complement of the predecessor’s employees, which will preserve the union’s majority status and will transfer the duty to bargain to the new employer.

A final question in determining whether there is a sufficient continuity in the work force is whether a majority of the employees continue to support the certified bargaining agent or whether that majority status will be presumed. If the new employer is properly considered a successor of the previous employer, the majority status of the collective bargaining agent will be presumed. Thus, the certified bargaining agent will be protected by the same presumptions of majority status that would attach after its initial election by the bargaining unit.

C. Other considerations when determining if a new employer is a successor and will be bound by the duty to bargain

Continuity in the work force is the key factor in determining whether the duty to bargain will be assumed by a new employer. However, courts or the NLRB typically supplement a finding of continuity in the work force with a consideration of other factors such as continuity in the employing industry or business activities and the length of any hiatus between the demise of the previous employer and the purchase of assets by the new employer.

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15 See also Fall River Dyeing & Finishing Corp., 482 U.S. at 49-52.
16 Myers Custom Prods., 278 NLRB 636 (1986).
18 See Fall River, 482 U.S. 27.
19 Fall River, 482 U.S. 27.
20 See The Developing Labor Law, 1153, 1170.
Courts have considered several factors to determine whether there is a continuity of the employing industry or business activities, including:

Whether (1) there has been a substantial continuity of the same business operations; (2) the new employer uses the same plant; (3) the same or substantially the same work force is employed; (4) the same jobs exist under the same working conditions; (5) the same supervisors are employed; (6) the same machinery, equipment, and methods of production are used; and (7) the same product is manufactured or the same services offered.

The Developing Labor Law, 1154.

These factors are considered on a case-by-case basis and the determination of successorship ultimately rests upon the totality of the circumstances. Because of the comprehensive analysis and the weight placed on the continuity in the work force, courts are willing to overlook somewhat significant differences in the business operations of a new employer. Thus, courts and the NLRB have found successorship even when there has been a down-sizing of operations, a change in the distribution of operations, a change in business structure, and even a change from a public to a private employer.21 The determination may ultimately lie with a factor that the Ninth Circuit addressed in Jeffries Lithograph Co.: “whether there was an ‘essential change in the business that would have affected employee attitudes toward representation.’”22

Even if there is continuity in the work force and continuity in the employing industry, courts and the NLRB may also consider whether there has been a hiatus between the demise of one company and the inception of the next. Such a hiatus would occur when one company liquidates and attempts to sell its assets and there is a gap of weeks, months, or years before those assets are purchased by another company. For example, in Fall River Dyeing & Finishing, the Supreme Court was tasked with determining successorship in a sale of assets transaction that occurred seven months after the demise of the predecessor company. In that case, the Court found that the seven-month hiatus was not sufficient to prevent a finding of successorship.23 In the later case of Straight Creek Mining, the Board found that even a 52-month hiatus would not necessarily defeat a finding of successorship.24 There is no set length at which a hiatus will be a key factor, however, and the D.C. Circuit court held in 1995 that a 23-month hiatus could support a finding of “discontinuity.”25 Ultimately, a hiatus in operations will usually only be relevant when there are “other indicia of discontinuity.”26

21 See, e.g., IMS Mfg Co. v. NLRB, 813 F.2d 112 (6th Cir. 1987); NLRB v. Jeffries Lithograph Co., 752 F.2d 459 (9th Cir. 1985); Shares Inc. v. NLRB, 433 F.3d 939 (7th Cir. 2006); Siemens Bldg. Techs., 345 NLRB No. 91 (2005).
22 752 F.2d at 464.
23 482 U.S. at 45.
24 32 NLRB 759 (1979), enforced, 164 F.3d 292 (6th Cir. 1998).
25 Citisteel USA v. NLRB, 53 F.3d 350 (D.C. Cir. 1995).
26 482 U.S. at 45.
Finally, a court or the NLRB will also consider whether the bargaining unit itself continues to be “appropriate” under the new employer.\textsuperscript{27} Issues of continuity in the bargaining unit can arise when only a portion of the previous bargaining unit is hired or when the newly hired employees are combined with employees that are part of a separate bargaining unit. In those cases, the Board or the courts consider factors such as the previous make-up of the bargaining unit and the nature and extent of its integration into the new company to determine if the unit remains appropriate. For example, the Board has found that a bargaining unit remained appropriate when a new employer purchased only a portion of the previous company’s assets and hired only some of the employees, but those employees were, on their own, an appropriate bargaining unit.\textsuperscript{28} Other considerations include whether there is any significant change from the perspective of the employees (if not, the unit often remains appropriate regardless of whether the size of the unit is diminished) and whether the bargaining unit remains intact and is treated as an accretion to an existing unit and the new company (purchaser bears burden of showing the unit is no longer appropriate).\textsuperscript{29}

\textbf{D. When the duty to bargain will attach: demand requirement}

The duty to bargain with the certified bargaining agent of a predecessor company will not attach to a successor until the bargaining agent makes demand to bargain.\textsuperscript{30} The demand does not need to be made in any particular form, but it must clearly indicate a desire to bargain on behalf of the employees in a bargaining unit.\textsuperscript{31} The bargaining agent may, however, be excused from making demand if demand would be futile.\textsuperscript{32}

If the bargaining agent fails to make demand, a successor employer may set initial terms of employment without first consulting with the bargaining agent. This rule is based on the economic reality that a new employer may need to set initial terms of employment to begin operations before engaging in a lengthy bargaining process.\textsuperscript{33} The exception to this rule is that when the successor employer makes it “perfectly clear that [it] plans to retain all of the employees in the unit and [under circumstances in] which it will be appropriate to have [the employer] initially consult with the employees’ bargaining representative,” the employer must consult with the bargaining representative before setting terms of employment.\textsuperscript{34}

\textsuperscript{27} See The Developing Labor Law, 1161.
\textsuperscript{28} Stewart Granite Enters., 255 NLRB 569 (1981).
\textsuperscript{29} See, e.g., Bronx Health Plan, 326 NLRB 810 (1998); Indianapolis Mack Sales & Serv., 288 NLRB 1123, 1123 n.5 (1988).
\textsuperscript{30} See, e.g., Briggs Plumbingware v. NLRB, 877 F.2d 1282 (6th Cir. 1989).
\textsuperscript{31} See, e.g., Al Landers Dump Truck, 192 NLRB 207 (1971).
\textsuperscript{32} Armco, Eastern Steel Div., Ashland Works, 279 NLRB 1184 (1986).
\textsuperscript{33} See Burns, 406 U.S. at 287-88.
\textsuperscript{34} Id. at 294-95.
3. A Successor’s Duties Under the Predecessor’s Collective Bargaining Agreement

A. General rule

Generally, a successor company will not be involuntarily bound by the collective bargaining agreement entered into between the predecessor company and its employees. This is true even when the successor company retains employees from the predecessor without the predecessor firing and successor rehiring those employees. See, e.g., Stewart Granite Enterprises, 255 NLRB 569 (1981) (where a successor that retained employees was required to bargain with collective bargaining agent to set initial terms of employment instead of being bound by prior collective bargaining agreement). There are, however, some exceptions to this general rule. First, a new employer may be bound to the collective bargaining agreement if it operates as an “alter ego” of the previous employer. Second, a successor will be bound if the successor assumes or adopts the contract.

B. When a successor acts as an alter ego of the predecessor

A new employer will be considered an alter ego of the previous employer if the two enterprises have “substantially identical” management, business purpose, operation, equipment, customers, and supervision, as well as ownership. The determination of whether a new employer is an alter ego of a previous employer rests primarily on the continuity of ownership. If there is a continuity in ownership and the new employer is an alter ego of the previous employer, the new employer inherits all of the employment duties of the previous employer. Thus, the new employer will inherit the duty to bargain, will be bound by the collective bargaining agreement, and will assume any unresolved liability for unfair labor practices (see section II.4.B, infra, for further discussion of liability for unfair practices).

C. When a successor assumes or adopts the contract

A successor will be bound by the collective bargaining agreement of a predecessor if the successor assumes or adopts the contract. Whether a successor has assumed or adopted the contract is determined on a case-by-case basis and involves a detailed analysis of the facts. Generally, the Board will find adoption or assumption of the contract if there is clear evidence of consent, regardless of whether that consent was actual or constructive.

36 See, e.g., Crawford Door Sales, 226 NLRB 1144 (1976); Marquis Printing Corp. & Mutual Lithograph Co., 213 NLRB 394 (1974).
38 Crawford Door Sales, 226 NLRB at 1144.
39 Shearer dba George C. Shearer Exhibitors Delivery Serv., 262 NLRB 622 (1982).
41 See, e.g., Haley & Haley v. NLRB, 880 F.2d 1147 (9th Cir. 1989).
42 See, e.g., Service Employees Local 32B-32J v. NLRB, 982 F.2d 845 (2d Cir. 1993).
4. Other Issues and Liabilities in Successorship

A. The contract-bar doctrine

The contract bar doctrine protects the majority status of a certified bargaining agent during the existence of a valid collective bargaining agreement, for up to three years. The role of the contract bar doctrine in cases of successorship continues to evolve, however, and issues can arise in two main areas.

First, a contract must generally be in writing if the contract bar doctrine will apply. If a preexisting collective bargaining agreement is adopted by a successor, that adoption must be expressed in writing for the doctrine to apply.\textsuperscript{43} Even if a successor adopts the collective bargaining agreement in writing, however, the doctrine still may not apply. The doctrine will not apply, for example, if the contract accelerates the termination date to reduce the period for filing a timely petition.\textsuperscript{44}

Second, the successor might enter into a collective bargaining agreement with the certified bargaining agent that has the effect of extending the agent’s majority status beyond the preexisting duration. In the non-successorship context, this scenario is addressed by the premature extension doctrine, which prevents the contract bar doctrine from taking effect and allows for the majority status of the certified bargaining agent to be challenged. In the successorship context, a new contract entered into by a successor and a certified bargaining agent during the duration of a previously existing agreement will operate as a bar against challenges to the agent’s majority status for the term of the new agreement.\textsuperscript{45}

B. Successor liability for predecessor’s unfair practices

Generally, a successor company will be liable for a predecessor’s unfair labor practices if the successor had actual or constructive knowledge of the unfair practices at the time of purchase. If a successor has knowledge of the significant facts and the predecessor’s relevant conduct, liability may be found even if charges were not actually pending against the predecessor at the time of the transfer.\textsuperscript{46} If the issue of prior knowledge is raised, the burden is on the successor to show that it did not have the required knowledge.\textsuperscript{47}

The new employer may also try to avoid liability by showing that it is not a successor or alter ego, that the Board does not have jurisdiction, or that the imposition of liability is inappropriate for other reasons.\textsuperscript{48} The successor may not avoid liability, however, by relying on

\textsuperscript{43} Trans-American Video, 198 NLRB 1247 (1972).
\textsuperscript{44} Longview Terrace Co., 208 NLRB 699 (1974).
\textsuperscript{45} Ideal Chevrolet, 198 NLRB 280 (1972).
\textsuperscript{47} Mansion House Ctr. Mgmt. Corp., 208 NLRB 684 (1974).
\textsuperscript{48} Dews Constr. Corp., 246 NLRB 945 (1979); Northgate Cinema, 233 NLRB 586 (1977); NLRB v. Fabsteel Co. of La., 587 F.2d 689 (5th Cir. 1979).
the assurances of the predecessor, because the successor assumes the risk that the actions will later be found unlawful.\footnote{Amersig Graphics Inc., 334 NLRB No. 109 (2001).}

\section*{III. Effects Bargaining}

Just as a successor company may be required to bargain after hiring employees from a predecessor, a predecessor may be required to bargain prior to closing the business and selling its assets. One common type of pre-sale bargaining is called “effects bargaining,” which is where the employer bargains with the certified bargaining agent about the effects of the sale. Effects bargaining is mandatory.

The subjects of bargaining between an employer and a certified bargaining agent may be split into two categories: mandatory and permissive. If a topic is a permissive subject of bargaining, either party may request to bargain about that topic but neither party is required to actually bargain. If a topic is a mandatory subject of bargaining, then if either party requests to bargain about it, the other party is required to bargain. Mandatory subjects of bargaining include wages, hours, and other terms of employment.\footnote{29 U.S.C. § 158(d).} The closure of a business clearly raises issues that are mandatory subjects of bargaining.

The Supreme Court has held that a business may close entirely for any reason, even anti-union animus.\footnote{Textile Workers v. Darlington Manufacturing Co., 380 U.S. 263 (1965).} Thus, the decision to close a business is not a mandatory subject of bargaining.\footnote{See First Nat’l Maint. Corp. v. NLRB, 452 U.S. 666, 682 (1981).} Similarly, the decision to close part of a business is not a subject of mandatory bargaining so long as that decision is motivated by entrepreneurial concerns and not by labor costs.\footnote{See, e.g., Oklahoma Fixture Co., 314 NLRB 958 (1994).} However, the effects of such a decision are subjects of mandatory bargaining.\footnote{See, e.g., Liberty Source W LLC, 344 NLRB No. 137 (2005).} Failure to engage in effects bargaining can result in a court order for pay employees back pay and bargain in good faith about the effects of the sale.\footnote{See id.}

In \emph{Liberty Source}, the NLRB held that the selling company violated Section 8(a)(5) and (1) of the NLRA by “terminating bargaining unit employees and partially closing its business without prior notice to the Federation and the IUE and without bargaining over the effects of the termination and the partial closure.”\footnote{344 NLRB at 1140.} The Board ordered the company to

\begin{quote}
[P]ay the terminated unit employees back pay at the rate of their normal wages when last in the Respondents’ employ from 5 days after the date of this Decision and Order until occurrence of the earliest of the following conditions: (1) the date the Respondents bargain to agreement with the Unions on those subjects pertaining
to the effects of the partial closing of the business on their employees; (2) a bona fide impasse in bargaining; (3) the Unions’ failure to request bargaining within 5 business days after receipt of this Decision and Order, or to commence negotiations within 5 business days after receipt of the Respondents’ notice of their desire to bargain with the Unions; (4) or, the Unions’ subsequent failure to bargain in good faith.

344 NLRB at 1128. Thus, a company that is closing or partially closing its business must bargain with the employees about the effects of that closing. The company is not, however, required to reach an agreement with the employees. Rather, the requirement is that the company notify the union of its intent to close and engage in a good faith bargaining process. See id.

IV. THIS IS A WARNING:
THE WORKER ADJUDGMENT AND RETRAINING ACT IN SALES OF ASSETS

1. WARN Act Remedies in the Bankruptcy Context

The remedies available under WARN to plaintiffs employed by bankrupt entities differ depending on whether the employee was terminated without the 60-day WARN notice either before the employer petitioned for bankruptcy (“prepetition”), or after the employer petitioned for bankruptcy (“post-petition”). “The broad purpose of the Bankruptcy Act is to bring about an equitable distribution of the bankruptcy’s estate among creditors…”57 Employers that declare bankruptcy (“debtors”) are unable to pay all of their creditors in full. Congress set out a statutory priority scheme in the Bankruptcy Code under which creditors receive their distributions from the debtor.

A WARN Act claim vests entirely when the employee is terminated.58 When the employer fails to give proper notice under the WARN Act, the affected employee is entitled to back pay and benefits for up to 60 days.59 The Bankruptcy Act prioritizes claims made under the WARN Act under the same provisions that govern claims made for wages.60 More specifically, three of the wage priority sections from the Bankruptcy Code are applicable to WARN Act remedies: Section 503, which governs higher priority administrative expense claims; and Sections 507(a)(4) and 507(a)(5), which govern claims wage and benefits with lower priority. Again, priority of the WARN Act claims is determined by two dates: the date the employee was terminated without notice and the employer’s bankruptcy petition filing date.

Courts generally appear to hold that “[w]hether a WARN Act claim is an administrative expense depends on whether the termination without notice occurred pre or post-petition.”61 “If a claim vests prepetition, then the back pay is attributable to the time occurring prior to the

58 Id. at 19.
60 In re Powermate Holding Corp., Case No. 08-10498(KG), at 8 (Bankr. D. Del. 2008).
61 Id. at 22.
commencement of the case and therefore it is not an administrative expense claim,” and the claim is given lower priority status under Section 507(a)(4)-(5).62 “If, on the other hand, a claim vests post-petition, the back pay is attributable to the time occurring after the commencement of the case and therefore it is an administrative expense claim,” and given higher priority status.63

2. Priority of Employee’s WARN Remedies When Terminated Without Notice Post-Petition

Section 503 of the Bankruptcy Code, 11 U.S.C. § 503, governs administrative expense claims64, where “[a]dministrative expenses are those which either preserve the estate in a reorganization or facilitate the winding-down in a liquidation.”65

Section 507(a)(2) sets forth that administrative claims receive second priority, which means that they get paid to creditors ahead of most other claims, and they “are often paid in full while lower priority claims are only partially paid.”66 “The rationale for providing priority treatment [to administrative claims] is that it benefits all creditors by encouraging lenders and others to continue or commence doing business with the debtor” while the debtor either reorganizes or liquidates.67 Thus, if the employee was terminated without notice post-petition, there is a greater chance that the remedies that the employee is entitled to under the WARN Act will be paid in full by the bankrupt company. WARN payments to laid-off workers, however, have generated protests from unsecured creditors in a Chapter 11 bankruptcy as contrary to the purpose of a successful reorganization.68

62 Id. at 15-16 (emphasis added); see also In re Cargo Inc., 138 B.R. 923, 928, 7 IER Cases 481 (Bankr. N.D. Iowa 1992). Cf. In re Bluffton Casting Corp., 186 F.3d 857, 162 LRRM 2096, 15 IER Cases 786 (7th Cir. 1999) (holding that employees were precluded by WARN Act’s exclusive remedy provision from using state mechanics and employee lien laws to establish priority of their WARN Act claims over the claims of secured creditors in a bankruptcy proceeding).

63 In re Powermate Holding Corp., at 15-16 (emphasis added); see also In re Hanlin Group, Inc., 176 B.R. 329, 332-34 (Bankr. D.N.J. 1995).

64 11 U.S.C. §503(b)(1)(a) provides that:

“(A) the actual, necessary costs and expenses of preserving the estate including--

(i) wages, salaries, and commissions for services rendered after the commencement of the case; and

(ii) wages and benefits awarded pursuant to a judicial proceeding or a proceeding of the National Labor Relations Board as back pay attributable to any period of time occurring after commencement of the case under this title, as a result of a violation of Federal or State law by the debtor, without regard to the time of the occurrence of unlawful conduct on which such award is based or to whether any services were rendered, if the court determines that payment of wages and benefits by reason of the operation of this clause will not substantially increase the probability of layoff or termination of current employees, or of nonpayment of domestic support obligations, during the case under this title[.]”

65 In re Powermate Holding Corp. at 9.

66 Id. at 10.

67 Id.

68 Unsecured creditors in Chapter 11 bankruptcies may attempt to block WARN payments as contrary to the purposes of reorganization, as they are trying to do in the Circuit City bankruptcy. In re Circuit City, Case No. 08-35653 (Bankr. E.D. Va.); “Circuit City Creditors Balk at WARN Act Payments,” Shannon Hanson, Employment 360 (Dec. 2, 2008).
3. **Priority of Employee’s WARN Remedies When Terminated Without Notice PrePetition**

For wage claims that do not qualify as administrative expense claims, Section 507(a)(4)-(5) of the Bankruptcy Code governs. Under 11 U.S.C. § 507(a)(4), fourth priority status is given to “unsecured claims for wages, salaries and commissions, vacation pay, severance pay, and sick leave pay earned by an individual.” And under 11 U.S.C. §507(a)(5), fifth priority status is given to “unsecured claims for contributions to an employee benefit plan.” Under either section (4) or (5), “the maximum dollar amount each individual is allowed to receive is $10,950, and the claim must have been “earned” by the employee within 180 days before the employer filed for bankruptcy. The priority is lower for these sections, compared to the higher priority of administrative claims, so prepetition WARN claims are less likely to be paid in full the post-petition WARN claims. Moreover, an individual is only allowed a maximum amount for a prepetition claim. Any employee’s claim exceeding $10,950 becomes a general unsecured claim. Thus, employees terminated without notice prepetition are less likely to receive WARN payments than employees with WARN claims terminated after filing.

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69 *Id.* at 11.

70 “(a) The following expenses and claims have priority in the following order:

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(4) Fourth, allowed unsecured claims, but only to the extent of $10,000 [10,950 effective 4-1-07. Adjusted every 3 years by section 104.] for each individual or corporation, as the case may be, earned within 180 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first, for--

(A) wages, salaries, or commissions, including vacation, severance, and sick leave pay earned by an individual; or

(B) sales commissions earned by an individual or by a corporation with only 1 employee, acting as an independent contractor in the sale of goods or services for the debtor in the ordinary course of the debtor's business if, and only if, during the 12 months preceding that date, at least 75 percent of the amount that the individual or corporation earned by acting as an independent contractor in the sale of goods or services was earned from the debtor."

71 *Id.*

72 “(a) The following expenses and claims have priority in the following order:

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(5) Fifth, allowed unsecured claims for contributions to an employee benefit plan—

(A) arising from services rendered within 180 days before the date of the filing of the petition or the date of the cessation of the debtor’s business, whichever occurs first; but only

(B) for each such plan, to the extent of—

(i) the number of employees covered by each such plan multiplied by $10,000[$10,950 effective 4-1-07. Adjusted every 3 years by section 104.]; less

(ii) the aggregate amount paid to such employees under paragraph (4) of this subsection, plus the aggregate amount paid by the estate on behalf of such employees to any other employee benefit plan."

73 *Id.*
