IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
Wheeling

KEITH REED, LISA DOLENCE,
ELIZABETH SCHENKEL,
EMILY WINES, MARK GARAN
CHRISTINA LUCAS, and **AUGUST ULLUM, II,**
individually and on behalf of others similarly situated,

Plaintiffs,

v.

CIVIL ACTION NO. 5:19-CV-263
Judge Bailey

ALECTO HEALTHCARE SERVICES, LLC, and
ALECTO HEALTHCARE SERVICES
WHEELING, LLC, d/b/a Ohio Valley Medical Group d/b/a OVMC Physicians,

Defendants.

ORDER DENYING MOTION TO ALTER OR AMEND

Pending before this Court is Plaintiff's Motion to Alter or Amend Judgment [Doc. 199]. According to plaintiffs, this Court's order of August 25, 2022, contains clear error and will result in manifest injustice to the class members, depriving them of over $2,000,000 in wages due to them.

Plaintiff's argue that the notice given by the Alecto defendants on August 8, 2022, is a nullity because the date of expected closure was incorrect. Tellingly, the plaintiffs do not cite a single case to support their position.

This Court previously ruled that the August 8 Notice "sufficiently states whether the closing is permanent or temporary, provides the expected date when OVMC was closing; and a name and telephone number of a company official to contact for further information." [Doc. 193 at 30–31].

The Fourth Circuit has recognized that "WARN Act notice will not be deemed insufficient solely because a detail in the notice is incorrect." ***Graphic Commc'ns Int'l Union, Loc. 31-N v. Quebecor Printing (USA) Corp.***, 252 F.3d 296, 301 (4th Cir. 2001).

The Department of Labor ("DOL") regulations requiring information to be based on "the best information available to the employer at the time the notice is served" does not impose a separate requirement that, if the notice is not based on the best information available to the employer, it is insufficient. 20 C.F.R. § 639.7(a)(4). The next sentence in the same subparagraph explains that "[i]t is not the intent of the regulations, that errors in the information provided in a notice that occur because events subsequently change or that are minor, inadvertent errors are to be the basis for finding a violation of WARN." Id. Courts have stated that the regulation was intended to provide flexibility or a substantial compliance standard for notice under the WARN Act. ***Kalwaytis v. Preferred Meal Sys., Inc.***, 78 F.3d 117, 121–22 (3d Cir. 1996) ("Fairly read, the regulations require a practical and realistic appraisal of the information given to affected employees."); ***Drake v. U.S. Enrichment Corp.***, 63 F.Supp.3d 721, 726–27 (W.D. Ky. 2014) ("These common-sense regulations acknowledge the limited information upon which employers must act in an uncertain economic landscape."). "[N]either the Act nor the regulations suggest that defective notice is automatically to be treated as though no notice had been provided at

all." ***Carpenters Dist. Council of New Orleans & Vicinity v. Dillard Dep't Stores, Inc.***, 15 F.3d 1275, 1287 n.19 (5th Cir. 1994).

Consistent with the Fourth Circuit's rule that "WARN Act notice will not be deemed insufficient solely because a detail in the notice is incorrect," ***Quebecor Printing***, 252 F.3d at 301, the Fifth Circuit and Sixth Circuit have rejected arguments similar to plaintiffs' argument in this case. ***Saxion v. Titan-C-Mfg., Inc.***, 86 F.3d 553, 561 (6th Cir. 1996); ***Dillard Dep't Stores, Inc.***, 15 F.3d at 1287 n.19.

In ***Saxion***, the employer provided employees with a letter confirming statements at an earlier meeting that the plant where they worked would close. 86 F.3d at 555. Ten days later, the employer permanently closed the plant. ***Id***. The Sixth Circuit concluded that the district court improperly disregarded the notice, which was deficient, and awarded damages based on a 60-day violation period. ***Id***. at 561. The Sixth Circuit explained that the district court should have given the employer credit for the ten days' notice it did provide and use a violation period of 50 days because it was not "persuaded that the technical deficiencies in the [employer's] letter required the district court to proceed as if there had been no notice at all." ***Id***.

In ***Dillard Dep't Stores***, the employer provided notice that employees may be terminated within a range that exceeded the fourteen days allowed under the DOL's regulations. 15 F.3d at 1287 n.19. The employees argued that, because the employer's notice violated the regulations, it "amounted to no notice." ***Id***. The Fifth Circuit disagreed and explained that "neither the regulations nor the [WARN] Act itself addresses how the courts are to treat notices that are determined to be defective or inadequate," so there was

no support for the employees' argument that "defective notice is automatically to be treated as though no notice had been provided at all." ***Id***.

The WARN Act required defendants to state the "expected" date of OVMC's closure, not the exact date, because the law "acknowledge[s] the limited information upon which employers must act in an uncertain economic landscape." ***Drake***, 63 F.Supp.3d at 726–27; 20 C.F.R. § 639.7(a)(1). There is no legal basis for plaintiffs' argument that, if the expected date of a plant closing in notice under the WARN Act later turns out to be inaccurate, it is defective. *See* 20 C.F.R. § 639.7(a)(4) ("It is not the intent of the regulations, that errors in the information provided in a notice that occur because events subsequently change or that are minor, inadvertent errors are to be the basis for finding a violation of WARN."); ***Quebecor Printing***, 252 F.3d at 301. And there is no legal basis for plaintiffs' argument that, if notice of a plant closing is defective, it is the equivalent of no notice. ***Saxion***, 86 F.3d at 561; ***Dillard Dep't Stores, Inc.***, 15 F.3d at 1287 n.19.

The plaintiffs claim that this Court is depriving the class members of $2,000,000 in wages. To simplify the response, the WARN Act requires 60 days notice, so that the employees may get 60 days wages before closing. In this case, the employees have already received part of those wages, i.e. those between August 8 and September 4. This Court's decision provides the employees with the rest of the wages to which they are entitled.

Therefore, Plaintiff's Motion to Alter or Amend Judgment [**Doc. 199**] is hereby **DENIED**.

It is so **ORDERED**.

The Clerk is directed to transmit copies of this Order to all counsel of record.

DATED: September 12, 2022.

JOHN PRESTON BAILEY
UNITED STATES DISTRICT JUDGE