Fair Warning or Foul? An Analysis of the Worker Adjustment and Retraining Notification (WARN) Act in Practice

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In July 1988, Congress passed the Worker Adjustment and Retraining Notification (WARN) Act despite a Presidential veto of nearly identical legislation a few weeks earlier. This article reexamines the rationale for requiring employers to provide advance notice of major layoffs and plant closings. The legislative developments which produced the WARN Act are discussed, and the cases interpreting WARN are examined in light of the legislation's purposes. Based on case law and studies evaluating WARN, this article proposes a number of legislative improvements to better effectuate the Act’s notice and worker adjustment goals.

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INTRODUCTION

On August 4, 1988, the Worker Adjustment and Retraining Notification (WARN) Act became law.¹ With the WARN Act, Congress passed the first federal legislation requiring larger employers to provide advance notice of plant closings and long-term or permanent layoffs.² The WARN Act provides for sixty-days’ advance notice of plant closings or large layoffs.³ The rationale for such notice is to give workers, unions, and local and state governments time in which to react to worker dislocations.⁴ To enact the legislation, Congress reached a number of compromises. These compromises produced a number of exceptions, exemptions, and limits upon the scope of WARN. According to WARN’s supporters, these compromises unwisely reduced WARN’s scope and effectiveness. In contrast, WARN’s opponents believe these compromises merely eliminated unwanted burdens on employers.

A unique feature of the WARN Act, as compared to most federal labor statutes, is its complete reliance on enforcement in the federal courts through private civil lawsuits.⁵ As a result, a large number of enforcement issues have been left to the courts for resolution.⁶ The principal purpose of this article is to examine case law interpreting the WARN Act. Relatively few cases have been decided thus far, but already several judicial decisions reveal misunderstandings of WARN’s structure or the important role of advance notice. As a result, WARN’s intent has been undercut and its modest protections eroded.

In order to evaluate the case law surrounding WARN, a basic understanding of the legislative background is essential. Accordingly, this

⁶. The Labor Department expressly declined to issue regulations addressing the enforcement provisions in § 5. 54 Fed. Reg. at 16,043, reprinted in LEGISLATIVE HISTORY, supra note 2, at 17.
article first reviews the evidence demonstrating a need for advance notice legislation. Second, the article examines the intent of the WARN Act as shown by its legislative history.7

Next, the detailed structure of the statute and the related federal case law are analyzed and evaluated. The article then discusses the existing studies of employer compliance and the effectiveness of WARN in providing advance notice of worker dislocations. Based upon all these factors, the article proposes a number of improvements in the WARN legislation. The recommendations include lengthening the period of required notice, developing a governmental enforcement role, increasing the numbers of employers covered by the Act, and eliminating the good faith defense for employers potentially subject to back pay penalties.

I

THE NEED FOR ADVANCE NOTICE OF WORKER DISLOCATIONS

The overarching aim of WARN is to provide advance notice of worker dislocations to affected workers, unions, and governments. An understanding of the need for notice provides an essential backdrop to any evaluation of WARN.

The United States economy has seen a great deal of worker dislocation over the past fifteen years. The Department of Labor’s Bureau of Labor Statistics (BLS) has conducted a series of surveys of dislocated workers which have produced information on the extent of job losses and the characteristics of dislocated workers.8 These BLS data “indicate that 1.9 million adult workers (those 20 and older) lost full-time jobs, on average, each year between 1981 and 1988 because their employers closed or relocated, because their position or shift was eliminated, or because of slack work.”9 Of these, from 830,000 to 1,060,000 were displaced each

7. WARN’s published legislative history, supra note 2, includes the legislative debates, committee reports, and the final Labor Department regulations. Wherever possible, the LEGISLATIVE HISTORY citation, as well as the citation to the original source, will be provided as a convenience to the reader. The parallel citations will be separated by a comma.


year during this period as a result of plant closings alone.\textsuperscript{10}

Worker dislocation is by no means a diminishing phenomenon. In January 1992, the BLS dislocated worker survey found that between 1987 and 1992, 15.3 million workers lost jobs due to plant closings, business failures, slack work, and related reasons. Half of these lost work as a result of a plant closing or company relocation.\textsuperscript{11} Of the 5.6 million workers with over three years on the job prior to their displacement, only 2.7 million had found new full-time work by the most recent survey. Half of those who had found new full-time work reported earning at least as much as in their old jobs, while a third had suffered a pay cut of twenty percent or more.\textsuperscript{12}

There is considerable evidence that worker dislocations have negative public health effects\textsuperscript{13} and that advance notice promotes more positive adjustment to worker dislocations.\textsuperscript{14} Limiting the negative consequences of worker dislocation furnishes a powerful rationale for advance notice legislation.

Given the extent of worker dislocation, a continuing interest in adopting legislation to address plant closings and large layoffs is not surprising.\textsuperscript{15} Congress considered a variety of legislative proposals to ame-
liorate the problems associated with plant closings and other major worker dislocations for well over a decade before WARN. These debates produced a large number of hearings, studies, and reports regarding the need for advance notification of worker dislocation.

Legislation was first introduced in the Senate in late 1973 and in the House of Representatives in March 1974. Over the intervening years, a number of bills were introduced, and various congressional committees and subcommittees held hearings on the effects of plant closings.
Early legislative proposals attempted comprehensive resolutions to plant closings and worker dislocations. These bills tried to prevent or limit plant closings by: (1) providing technical and financial assistance to troubled firms and affected communities; (2) requiring advance consultation with unions and local governments; (3) requiring disclosure of financial data; and (4) providing adjustment assistance and training for workers, in conjunction with a considerable period of advance notice. The supporters of comprehensive plant closing legislation eventually lowered their sights, and focused their efforts on the issue of advance notice of worker dislocations.

As the legislative proceedings continued into 1985, some questioned the wisdom of advance notification and the need for legislation requiring employers to give advance notice. Both proponents and opponents of advance notice legislation had questions regarding the extent of worker dislocations, the amount of notice voluntarily provided by employers, the optimal duration of advance notice, and the adjustment practices of other countries. As I will discuss, three government reports were critical in debating these questions in 1986-87; these were produced by the Department of Labor, the Congressional Office of Technology Assessment, and the General Accounting Office. Ironically, the impetus generating the reports was the narrow defeat of a plant closing bill in the House of Representatives in late 1985.

The Labor-Management Notification and Consultation Act, H.R. 1616, was introduced on March 20, 1985. The bill focused on two issues: (1) advance notification and (2) consultation between employers and unions over plant closing or layoff decisions. Following a May 15, 1985, hearing held by the Education and Labor Committee, two Republican committee members wrote to Labor Secretary William E. Brock ask-
ing him to establish a task force on worker dislocation and plant closings. In October, 1985, Secretary Brock appointed the Task Force on Economic Adjustment and Worker Dislocation, which included a number of significant figures from business, labor unions, government, and academia. Soon after the appointment of the Task Force, the House of Representatives took up H.R. 1616 and rejected it on November 21, 1985, by a margin of five votes.

The Task Force began meeting in December 1985. Over the next year, the Task Force studied a number of issues relating to advance notice legislation. Its December 1986 report to Secretary Brock reviewed the evidence on worker dislocations and plant closings. The report included a number of findings and recommendations concerning the extent of dislocations, assistance for affected workers, and the question of international competitiveness. The Task Force advocated amending existing dislocated worker programs to improve their effectiveness and enlarge their scope. The Task Force failed to reach consensus, however, on whether mandatory prior notice of dislocations was a proper subject for legislation. Instead, the task force concluded that “advance notification is an essential component of a successful adjustment program.”

Despite the lack of consensus on mandatory advance notification, the Task Force Report produced some significant observations which assisted the proponents of advance notification. These included the finding that there was no evidence that worker productivity declined after notice, dispelling one of the opponents’ major arguments. The Task Force also studied the existing European notice requirements. It reported that advance notice was a useful step in assisting workers in seeking alternative employment or training before their separations from work. Most importantly, the Task Force looked at the Canadian system of rapid response to plant closings and layoffs. It found that the “quick response capability” of the Canadian model “appeared to offer

22. 1987 HOUSE REPORT, supra note 2, at 7, LEGISLATIVE HISTORY, supra note 2, at 591.
23. The vote was 203 in favor and 208 against. 131 Cong. Rec. 32,939 (1985); 1987 HOUSE REPORT, supra note 2, at 7, LEGISLATIVE HISTORY, supra note 2, at 591.
24. 1987 HOUSE REPORT, supra note 2, at 7-8, LEGISLATIVE HISTORY, supra note 2, at 591-92.
26. Id. at 22-23.
27. Id. at 23.
28. 1987 HOUSE REPORT, supra note 2, at 12, LEGISLATIVE HISTORY, supra note 2, at 596; AFL-CIO Industrial Union Department, Advance Notice: An Emerging Consensus, in Economic Dislocation and Worker Adjustment Assistance Act Hearings, supra note 17, at 532.
29. TASK FORCE REPORT, supra note 25, at 20; see also G. JOHN TYSSE, REGULATING PLANT CLOSINGS AND MASS LAYOFFS: A SUMMARY OF FOREIGN REQUIREMENTS (National Center on Occupational Readjustment, Inc., Washington, D.C., 1986).
the highest degree of replicability for the United States."\textsuperscript{30}

The second key report was a September 1986 report by the Congressional Office of Technology Assessment (OTA). OTA produced its report at the request of the House sponsors of H.R. 1616.\textsuperscript{31} The report examined arguments for and against advance notice, as well as the notice requirements in other nations.\textsuperscript{32} The OTA found that the "best time to start a project for displaced workers is before a plant closes or mass layoffs begin; advance notice makes early action possible—although it does not guarantee it."\textsuperscript{33} Based in part on its study of Canada's Industrial Adjustment Service,\textsuperscript{34} OTA found that two to four months' prior notice is generally needed to provide comprehensive adjustment services for dislocated workers.\textsuperscript{35}

OTA reported on two areas which undercut opposition to mandatory notice. OTA dismissed the potential for reduced productivity or trouble with a firm's workers after notification.\textsuperscript{36} OTA also found that Canadian divisions of U.S. companies reported no problems complying with Canadian advance notification requirements.\textsuperscript{37}

The third major report which followed the narrow defeat of H.R. 1616 was a survey conducted by the General Accounting Office (GAO).\textsuperscript{38} The GAO surveyed a statistical sample of firms which had experienced a displacement and reported on firm practices regarding notice.\textsuperscript{39} GAO's survey found that most employers gave little or no advance notice of a plant closing or permanent layoff.\textsuperscript{40} Specifically, the GAO reported that 32% of firms gave no notice of a closing or permanent layoff, 34% gave from 1 to 14 days' notice, 15% gave 15-30 days' notice, 14% gave 31-90 days' notice, and 5% of firms gave 91 or more

\textsuperscript{30} 1987 HOUSE REPORT, supra note 2, at 20, LEGISLATIVE HISTORY, supra note 2, at 604. Generally, Canadian law provided eight to 16 weeks' advance notice of layoffs. See DAVID G. NEWMAN & WILLIAM GARDNER, BUSINESS CLOSINGS AND WORKER READJUSTMENT: THE CANADIAN APPROACH 2-7 (National Center on Occupational Readjustment, Inc., Washington, D.C., 1987).

\textsuperscript{31} OFFICE OF TECHNOLOGY ASSESSMENT, PLANT CLOSING: ADVANCE NOTICE AND RAPID RESPONSE 5 (1986).

\textsuperscript{32} OTA's report was available to the Secretary's Task Force and was cited in its report. See 1987 HOUSE REPORT, supra note 2, at 11, LEGISLATIVE HISTORY, supra note 2, at 595.

\textsuperscript{33} 1987 HOUSE REPORT, supra note 2, at 13, LEGISLATIVE HISTORY, supra note 2, at 597.

\textsuperscript{34} 1987 HOUSE REPORT, supra note 2, at 33-35, 37-40, LEGISLATIVE HISTORY, supra note 2, at 617-19, 621-24.

\textsuperscript{35} 1987 HOUSE REPORT, supra note 2, at 49, LEGISLATIVE HISTORY, supra note 2, at 633.

\textsuperscript{36} 1987 HOUSE REPORT, supra note 2, at 22, LEGISLATIVE HISTORY, supra note 2, at 606.

\textsuperscript{37} 1987 HOUSE REPORT, supra note 2, at 38-40, LEGISLATIVE HISTORY, supra note 2, at 622-24.

\textsuperscript{38} GENERAL ACCOUNTING OFFICE, PLANT CLOSINGS: LIMITED ADVANCE NOTICE AND ASSISTANCE PROVIDED DISLOCATED WORKERS, H.R. Doc. No. 105, 100th Cong., 1st Sess. (1987). The GAO report was also requested by the congressional sponsors of H.R. 1616. Id. at 1.

\textsuperscript{39} Id. at 14-17.

\textsuperscript{40} Id. at 34-39.
days' notice. The GAO report gave the proponents of mandatory notice significant evidence that permitting employers to decide voluntarily whether to give advance notice was resulting in little or no advance notice for most workers.

In summary, the congressional hearings, the debates in Congress, and the narrow defeat of H.R. 1616 produced significant interest in the issue of advance notice by the mid-1980's. The subsequent reports of the Secretary's Task Force, the OTA, and the GAO survey built on that interest and resulted in the introduction of mandatory advance notice legislation soon after the 100th Congress convened.

II
THE LEGISLATIVE CONSIDERATION OF WARN

A. The Enactment of WARN

Whatever broader ambitions they might have held in promoting earlier comprehensive legislative proposals, the sponsors of legislation addressing plant closings started the 100th Congress with more modest ambitions. H.R. 1122 was introduced in the House by Representative William D. Ford and others on February 18, 1987. In the Senate, S. 538 was introduced on February 19, 1987, by Senator Howard Metzenbaum and others. Both of these bills placed advance notice within a context of broader worker adjustment programs as advocated by the Task Force on Economic Adjustment and Worker Dislocation.

The bills provided for employers of more than fifty employees to give from 90 to 180 days' advance notice of terminations and layoffs, depending on the number of employees being separated by the employer. Upon request, employers were required to provide employees and local government with financial information relevant to the plant closing or layoff and to consult with employees or unions about the closing or layoff decision.

Although both bills were reported out of their respective committees

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41. Id. at 78. A report based upon the BLS dislocated worker surveys, see BUREAU OF LABOR STATISTICS, supra note 8, found even less advance notice of job losses than detected by the GAO survey. This report found that 64% of the surveyed workers had no prior notice, 16% had 1 to 14 days' notice, and only 20% of workers had 15 or more days' notice. Sharon P. Brown, How Often Do Workers Receive Advance Notice of Layoffs? MONTHLY LAB. REV., June 1987, at 13, 14-15.

42. 1987 HOUSE REPORT, supra note 2, at 8, LEGISLATIVE HISTORY, supra note 2, at 597.


44. 1987 SENATE REPORT, supra note 43, at 14, LEGISLATIVE HISTORY, supra note 2, 719, 732; 1987 HOUSE REPORT, supra note 2, at 8, LEGISLATIVE HISTORY, supra note 2, at 592; see Yost, supra note 14, at 690.

as separate pieces of legislation, the Senate added a revised version of S. 538 to the trade legislation which was then pending before the Senate. The trade legislation subsequently moved through both houses of Congress and into a Conference Committee in August 1987.

The trade legislation's worker adjustment and advance notice provisions became Subtitle E of H.R. 3, the Omnibus Trade and Competitiveness Act of 1988. As revised, the bill required sixty days' advance notice of plant closings or mass layoffs resulting in permanent job losses or layoffs of at least six months in duration. Employers with 100 or more employees were covered and most employment losses affecting fifty or more employees were subject to the prior notice requirement. There were exceptions and exemptions for sales of businesses, unforeseen business circumstances, and faltering businesses seeking capital or new customers.

The trade legislation, with the provisions of Subtitle E, passed the House of Representatives on April 21, 1988, and the Senate on April 27, 1988.

The trade legislation was then vetoed by President Ronald Reagan, the President's principal objection being the presence of advance notification provisions. While the House of Representatives overrode the veto, the Senate failed to do so.

Since the Senate had sustained the President's veto, it became the focus of the renewed efforts to pass advance notice legislation. The advance notice proposal was removed from the trade legislation and introduced as S. 2527 by Senator Metzenbaum on June 16, 1988. As introduced, S. 2527 was virtually identical to the vetoed advance notice provisions of H.R. 3. The Senate began consideration of S. 2527 on 46. 1987 Senate Report, supra note 43, at 1, Legislative History, supra note 2, at 719; 1987 House Report, supra note 2, at 1, Legislative History, supra note 2, at 585.

47. The Senate version of the Trade Bill was S. 1420. It was amended on July 8, 1987, to include a substitute for S. 538. 133 Cong. Rec. S9492-94 (daily ed. July 8, 1987), Legislative History, supra note 2, at 714-16.


49. Conference Report, supra note 4, at 459-63, Legislative History, supra note 2, at 566-70.


55. 134 Cong. Rec. S8011, Legislative History, supra note 2, at 431-42.

June 22, 1988. Senator Edward Kennedy, the Chair of the Senate Committee on Labor and Human Resources and a sponsor of the bill, stated the purposes of the proposal:

First, advance notice is essential to the successful adjustment of the workers to the job loss caused by changing economic conditions. Times have changed for American workers. The person who will stay with one employer for thirty years is becoming more the exception and less the rule. Frequent changes are becoming more common.

An advance notice provision insures that large numbers of workers will not be displaced without warning and without planning. . . .

Second, advance notice saves the Government money. The Office of Technology Assessment estimated that advance notice could help save between $257 million and $386 million in unemployment compensation benefits each year. . . .

Third, advance notice makes each dollar that we appropriate for adjustment efforts go further. We know that with advance notice, adjustment programs are more effective in getting employees back to work more quickly, and at better wages.

Fourth, and perhaps most important, an advance notice requirement assures fair play for American workers.57

After several days of debate, and the adoption of some minor amendments, the Senate approved the bill on July 6, 1988.58 The House of Representatives passed the Senate bill without amendment a week later.59 WARN became law on August 4, 1988, without the President's signature, when President Reagan declined to either sign or veto the legislation.60

B. Basic Summary of WARN

The Worker Adjustment and Retraining Notification Act is a rela-


58. The Senate vote on S. 2527 was 72 in favor and 23 against, with 5 Senators not voting. 134 CONG. REC. S8868-69 (daily ed. July 6, 1988), LEGISLATIVE HISTORY, supra note 2, at 425.

59. The House vote was 286 yeas, and 136 nays, and 9 not voting. 134 CONG. REC. H5519-20 (daily ed. July 13, 1988), LEGISLATIVE HISTORY, supra note 2, at 175-76.

60. See Presidential Statement, supra note 1. As a result of the Presidential veto of H.R. 3, the precursor to S. 2527, and S. 2527's subsequent speedy passage through the Congress, there are no committee reports on S. 2527. However, given its genesis in the trade legislation, the conference report on H.R. 3, as well as the committee reports on S. 538 and H.R. 1122, has relevance to the interpretation of WARN. The sponsors of the separate advance notice bill, S. 2527, explicitly noted the relevance of the conference report on H.R. 3 in interpreting the newly introduced bill. See 134 CONG. REC. S8692 (daily ed. June 28, 1988) (statements of Sen. Durenberg and Sen. Metzenbaum), LEGISLATIVE HISTORY, supra note 2, at 368; 134 CONG. REC. H5504-05 (daily ed. July 13, 1988) (statements of Rep. Jeffords and Rep. Clay), LEGISLATIVE HISTORY, supra note 2, at 146-47.
tively modest statute, codified in just nine sections. In summary, WARN requires covered employers to give sixty days' advance notice of plant closings or mass layoffs, as defined in the Act. Notice must be given by the employer to the union, if any, or to the individual employees involved; to the appropriate unit of local government; and to the dislocated worker unit involved in administering dislocated worker programs in the state. Employers violating the Act by not giving the required advance notice are subject to federal suits seeking up to sixty days' back pay for each day each affected employee is deprived of notice as well as civil penalties of $500 per day to the local government involved. The statute also contains seven exceptions or exemptions to its notice requirements. In brief, these provisions concern (1) business conditions which excuse or shorten advance notice requirements, or (2) job losses which are not considered within the scope of WARN.

C. The Senate Debates

The Senate debated S. 2527 for several days. Despite their length, the Senate debates did not add a great deal in terms of critical legislative history. Some aspects of the debates, however, are worthy of discussion, most significantly those concerning two rejected amendments offered by WARN's opponents. These debates buttress the interpretation of WARN as an advance notice statute. Also significant are the debates accompanying the Senate's adoption of a number of amendments offered by Senator Orrin Hatch.

The opponents of S. 2527 made two major efforts to limit the impact

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62. Id. § 2102(a).
63. "The term 'State dislocated worker unit' means a unit designated or created in each State by the Governor under Title III of the Job Training Partnership Act." 20 C.F.R. 639.3(k) 1992.
64. 29 U.S.C. § 2102(a).
65. Id. § 2104(a)(1), (3).
66. Id. § 2101(b)(1) (allocating responsibility for notice in sales of a business), § 2101(b)(2) (excluding certain employee transfers from consideration as employment losses), § 2102(b)(1) (reducing notice period in cases of faltering business when notice would have precluded efforts to gain new capital or customers), § 2102(b)(2)(A) (reducing notice for closings or layoffs due to unforeseeable business circumstances), § 2102(b)(2)(B) (exempting closings due to natural disasters), § 2103(1) (excluding layoffs at or closings of temporary facilities or projects), § 2103(2) (exempting strikes or lockouts). These exceptions are discussed infra part III.C.
67. See Yost supra note 14, at 691 (stating that the debates did not add anything dramatic to the legislative history).
68. Senator Dale Bumpers sponsored an amendment which became § 10 of WARN, requiring the Comptroller General to submit a report to Congress on WARN's impact on small businesses, international competitiveness, and employees, within two years of enactment. The amendment was adopted by a voice vote. 134 CONG. REC. S8620-21 (daily ed. June 27, 1988). LEGISLATIVE HISTORY, supra note 2, at 303-05. The report was submitted on February 23, 1993. GENERAL ACCOUNTING OFFICE, DISLOCATED WORKERS: WORKER ADJUSTMENT AND RETRAINING NOTIFICATION ACT NOT MEETING ITS GOALS, H.R. DOC. No. 18, 102d Cong., 2nd Sess. (1993) [hereinafter 1993 GAO REPORT]. This report is discussed infra part V.
of the bill in the early days of the Senate debates. The first rejected amendment was proposed by then-Senator J. Danforth Quayle. Senator Quayle’s proposal would have permitted employers to make severance payments in lieu of advance notice.69 Senator Quayle argued that employers should have the option of severance payments in cases in which they did not wish to give advance notice.70 Senator Metzenbaum, opposing the amendment, stated:

The fact is we do provide that if the notice is not given then there is an obligation to make up the salary, but we do not want anybody to think that this bill is a way of providing additional financial obligations on the part of employers. That is not the object of this bill. The object of this bill is to give employees notice so that they can be involved in retraining and readjustment.71

The amendment was tabled by a vote of 59 to 31.72

The second notable rejected amendment was Senator Nancy Kassebaum’s attempt to exclude mass layoffs, as opposed to plant closings, from coverage under the legislation. Senator Kassebaum offered her amendment in the form of a substitute bill which deleted the definition of “mass layoff” in section 2(a)(3), as well as all other references to the term in the bill.73

Senator Kassebaum offered her substitute as a “fair and accommodating balance” between the interest of employees in advance notice and the need of employers for flexibility in setting employment levels.74 Senator Quayle argued that including layoffs in the legislation posed difficulties in application for employers, and that workers hurt by plant closings were the highest priority in terms of adjustment assistance.75 Senator Metzenbaum objected to the proposed amendment because it offered employers an opportunity to evade the plant closing provisions through a series of layoffs and it severed the link between advance notice and effective adjustment assistance.76 The Kassebaum amendment was rejected when it was tabled by a vote of 64 to 32.77

Senator Orrin Hatch introduced a number of amendments which were accepted by the sponsors of S. 2527 during the course of the de-

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70. 134 CONG. REC. S8541, LEGISLATIVE HISTORY, supra note 2, at 248; see also 134 CONG. REC. S8546, LEGISLATIVE HISTORY, supra note 2, at 256 (statement of Sen. Grassley).
71. 134 CONG. REC. S8542-43, LEGISLATIVE HISTORY, supra note 2, at 250.
72. 134 CONG. REC. S8547, LEGISLATIVE HISTORY, supra note 2, at 262-64.
74. 134 CONG. REC. S8599, LEGISLATIVE HISTORY, supra note 2, at 264-65.
75. 134 CONG. REC. S8601-02, LEGISLATIVE HISTORY, supra note 2, at 268-70.
76. 134 CONG. REC. S8602-03, LEGISLATIVE HISTORY, supra note 2, at 271-72.
77. 134 CONG. REC. S8609, LEGISLATIVE HISTORY, supra note 2, at 282-83.
bates. Senator Hatch first offered an amendment to WARN's remedies provisions to clarify that federal courts did not have authority to enjoin a plant closing or mass layoff. The amendment to section 5(b) was adopted by voice vote without opposition from the sponsors of S. 2527. Senator Hatch also succeeded in amending WARN to clarify that the hiring of permanent replacements for economic strikers did not require advance notice under the statute. This provision became section 4(2) of WARN.

Senator Hatch proposed three other successful amendments to WARN. One of these pertained to section 2(b), which concerns the apportionment of responsibility for advance notice of job losses resulting from the sales of businesses. As introduced, section 2(b) of S. 2527 excluded job losses resulting from the sale of a business only where the buyer agreed in writing to offer employment to the seller's employees or offered such employment within thirty days of the purchase. In no case was a break in employment of more than six months excluded from the notice requirement.

Senator Hatch's amendment changed the thrust of this provision, stating that the seller of a business is responsible for advance notice up to and including the date of the sale, while the buyer is responsible thereafter. The amendment also provided that employees of the seller are considered employees of the buyer "immediately after the effective date of the sale."

The debate on this amendment clarified the allocation of responsibility for notice between the purchaser and the seller, while eliminating any obligation on the part of the purchaser to hire the employees of the seller. The amendment was supported by S. 2527's sponsors and adopted.

Yet another amendment proposed by Senator Hatch concerned the method of service of advance notice. This amendment added section 8(b) to WARN and provided that mailing advance notice to the address of record or including the notice with the employee's paycheck was sufficient service of notice under WARN.

Three additional clarifying amendments by Senator Hatch were ac-

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78. Senator Hatch presented his overall objections to S. 2527 as it was introduced during the debate on the Kassebaum amendment. 134 CONG. REC. S8603-06 (daily ed. June 27, 1988), LEGISLATIVE HISTORY, supra note 2, at 272-78 (statement of Sen. Hatch).
79. 134 CONG. REC. S8611, LEGISLATIVE HISTORY, supra note 2, at 286.
81. See S. 2527, 100th Cong., 2d sess. (1988), LEGISLATIVE HISTORY, supra note 2, at 434.
83. 134 CONG. REC. S8679-80, LEGISLATIVE HISTORY, supra note 2, at 346.
84. 134 CONG. REC. S8681, LEGISLATIVE HISTORY, supra note 2, at 348-49.
85. 134 CONG. REC. S8680-81, LEGISLATIVE HISTORY, supra note 2, at 348-49.
cepted and voted upon as a single amendment. These amendments made minor changes in the language of section 3(a) pertaining to the notice requirement, in section 3(b)(1) relating to the faltering business exception, and in the attorney's fees provision of section 5(a)(6).

The final amendment adopted was Senator Robert Dole's proposal which modified the circumstances permitting reduced notification in section 3(b)(2)(B) by adding a subsection pertaining to job losses due to natural disasters.

The passage of S. 2527 ended fourteen years of congressional consideration of federal plant closing legislation. The resulting statute was a product of compromise. In the end, advance notice of worker dislocations was the sole object of the legislation.

III
DETAILED ANALYSIS OF WARN
A. Introduction

The final version of WARN, while an improvement over the prior legal situation, falls well short of comprehensive plant closing legislation. Even with its limitations, however, the Act establishes some new requirements for employers and some measure of financial compensation to workers harmed by a plant closing decision without advance notice.


87. 134 CONG. REC. S8686-88, LEGISLATIVE HISTORY, supra note 2, at 358-62.

88. See William D. Ford, supra note 18, at 1219-31 (providing an explanation of comprehensive plant closing legislation and a rationale for its adoption). As noted earlier, supra text accompanying note 18, comprehensive plant closing legislation would provide for such matters as prior consultation with unions and local governments, financial and technical assistance to firms and communities, disclosure of financial information, and adjustment assistance to dislocated workers, as well as advance notice. Unlike WARN, which leaves plant closing or mass layoff decisions within the exclusive domain of the employer, comprehensive plant closing legislation provided a role for workers, unions, and local communities. See Guinan, supra note 15, at 365-71; Economic Dislocation Study Tour, Economic Dislocation: Plant Closings, Plant Relocations, and Plant Conversion (May 1, 1979), in National Employment Priorities Act Hearings, supra note 17, at 78-126.


89. Portions of this section of the article are based on Richard McHugh, Basics of the Plant Closing Notification Law, 22 CLEARINGHOUSE REV. 932 (1989); see also Yost, supra note 14, at 692-
Before undertaking a survey of the developing WARN case law, a relatively detailed analysis of the WARN statute is warranted. WARN deserves in-depth consideration given its status as relatively new legislation, the specificity of its definitions and terms of art, its unique enforcement mechanism, and its unprecedented nature at the federal level. Moreover, a survey of case developments without a relatively complete account of the statute’s structure and content is difficult, if not impossible.

As already noted, WARN does not cover all employers or all job losses. Section 2 of WARN contains a number of definitions, several of which serve as terms of art for purposes of WARN. This analysis begins with an explanation of these definitions.

B. Definitions and Terms of Art

1. Employer Coverage

An “employer” must have 100 or more employees to be covered under WARN.\(^9\) The statute provides two alternative methods for determining whether the 100-employee threshold is met. Under the first alternative, an employer is covered if it has 100 or more employees, excluding part-time employees. “Part-time employees” are those who have worked an average of less than twenty hours a week over the previous ninety days. Employees who have worked less than six of the previous twelve months are also defined as part-time employees.\(^9\) Under the second alternative, an employer is covered if it has 100 or more employees, including part-timers, who work at least 4000 hours a week in the aggregate, excluding hours of overtime.\(^9\)

All employees at all of the employer’s workplaces count in determining if WARN covers an employer.\(^9\) Employees on temporary layoff or on leave with a “reasonable expectation of recall” count as employees.\(^9\) Salaried, clerical, and other non-bargaining unit employees also count.\(^9\) However, employees of independent contractors generally do not count under WARN.\(^9\)

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700 (providing a description of the Act). Section 8(a) of WARN directed the Secretary of Labor to prescribe regulations to carry out the Act’s provisions. 29 U.S.C. § 2107(a) (1988). The Department of Labor issued final regulations on April 20, 1989. 20 C.F.R. § 639 (1992). Where particularly pertinent, the applicable final regulations are discussed in conjunction with the description of their related statutory provisions.

90. 29 U.S.C. § 2101(a)(1). The number of employees required for coverage under WARN is measured on “the day first notice is required to be given.” 20 C.F.R. § 639.5(a)(2).

91. 29 U.S.C. § 2102(a)(1); 20 C.F.R. § 639.3(a)(1).

92. 29 U.S.C. § 2101(a)(1); 20 C.F.R. § 639.3(a)(1).

93. 20 C.F.R. § 639.3(a)(3)-(4), (e).

94. Id. § 639.3(a)(1)(ii).

95. Id. § 639.3(a)(3), (e).

96. Id. § 639.3(a)(2).
In addition to applying only to employers of more than 100 persons, WARN also applies only to "business enterprises." A "business enterprise" includes any employer which provides services, as well as any employer which manufactures a product. Federal, state, and local government employers are excluded from WARN coverage. In addition, some quasi-public agencies may be excluded if they do not conduct "commercial" activities. Generally, however, nongovernmental, nonprofit agencies are covered by WARN.

WARN's notice requirements apply to various actions taken by an "employer" at any "single site of employment." An employer may have several plants in different areas of a state or states, and normally, each plant will be a "single site of employment." In certain circumstances, separate locations which share a workforce, make similar products, and are in the same locality will be a single site of employment for purposes of WARN. The final regulations adopted by the Department of Labor provide a number of examples of "single sites of employment."

2. Employment Losses

Section 2 of WARN defines a number of key terms which determine whether job losses require advance notice. Of particular note, section 2 defines "employment loss," "mass layoff," and "plant closing." These key terms have specific definitions under WARN which differ from their everyday meanings, making comprehension of these terms of art critical to understanding the statute.

Not every job loss, layoff, or plant closing is covered by WARN. In order to decide whether a particular job loss is covered by WARN there are two related definitions which must apply. First, the job loss must amount to an "employment loss." Second, the employment loss must meet the definition of either a "plant closing" or a "mass layoff."

An "employment loss" is defined in section 2(a)(6) of WARN as (1) an employment termination, other than a discharge for cause, voluntary leaving, or retirement; (2) a layoff of more than six months; or (3) a 50% or more reduction in hours of work during each month of a six-month period.

In some cases, resignations or retirements may occur prior to a large
layoff or a plant closing as employees seek new jobs in the area or accept employer incentives to retire. Section 2(a)(6) does not spell out how "voluntary" is to be evaluated in this context. In particular cases, these job losses may be crucial in determining whether employment losses rise to the level necessary to require notice under WARN. The Department of Labor's final regulations define "voluntary" in a restrictive fashion, analogizing to the "constructive discharge" standard developed in case law under Title VII of the Civil Rights Act of 1964, the National Labor Relations Act [NLRA], and the Age Discrimination in Employment Act [ADEA].

Certainly, the "voluntariness" of any leaving or retirement in the context of an announced plant closing or mass layoff is subject to question.

3. Mass Layoffs and Plant Closings

WARN requires advance notice of two types of employment losses. The first type is a "mass layoff" as defined in section 2(a)(3). A mass layoff occurs when there are employment losses in any thirty-day period at a single site of employment and when the employment losses affect a minimum of 33% of the non-part time employees at the site and at least fifty employees. However, an employment loss of 500 or more non-part time employees always meets the definition of a mass layoff, even if the 33% threshold is not met. Separate employment losses in any thirty-day period (forward or backward) are added together in determining whether these thresholds have been met.

The WARN definition of "plant closing" includes situations which are broader than the everyday sense of the term. In fact, some job losses

105. 20 C.F.R. § 639.3(f). See Supplemental Information to the Final Rules, supra note 5, at 16,048. Legislative History, supra note 2, at 26-28. The Labor Department's adoption of the constructive discharge standard was inappropriately restrictive. In speaking of a "voluntary" departure, Congress must have intended the plain meaning of the term. Black's Law Dictionary defines "voluntary" as "unconstrained by interference, unimpelled by another's influence; spontaneous; acting of oneself." Black's Law Dictionary 575 (6th ed. 1990). In contrast, a "plaintiff alleging constructive discharge must prove two elements: 'deliberateness of the employer's actions, and intolerability of the working conditions.'" Paroline v. Unisys Corp., 879 F.2d 100, 114 (4th Cir. 1989) (Wilkinson, J., dissenting), adopted in Paroline v. Unisys Corp., 900 F.2d 27, 28 (4th Cir. 1990) (en banc). The constructive discharge standard is more akin to an "involuntary" departure than to a voluntary departure. The regulation's approach is also contrary to that taken by courts evaluating whether an individual has "voluntarily" left work under state unemployment compensation statutes. See Tomei v. General Motors Corp., 486 N.W.2d 100 (Mich. Ct. App. 1992); Reserve Mining Co. v. Anderson, 377 N.W.2d 494 (Minn. App. 1985). 106. The term "mass layoff" means a reduction in force which—(A) is not the result of a plant closing; and (B) results in an employment loss at the single site of employment during any 30-day period for—(i) (I) at least 33% of the employees (excluding any part-time employees); and (II) at least 50 employees (excluding any part-time employees); or (ii) at least 500 employees (excluding any part-time employees) . . . .

107. Id.
commonly thought of as layoffs which fail to meet the WARN definition of "mass layoff" will, nevertheless, meet the "plant closing" definition under section 2(a)(2). A "plant closing" for the purposes of WARN involves an employment loss of at least fifty employees in any thirty-day period, excluding part-time employees. In addition, the employment loss must be the result of a permanent or temporary shutdown at a "single site of employment." The shutdown can involve either the entire site or one or more facilities or operating units within a site. According to the final regulations, a facility or operating unit within a site of employment involves an organizationally or operationally distinct product, operation, or specific work function within or across facilities of the single site.

4. Applying the WARN Thresholds

There is no 33% threshold in the WARN definition of plant closing. As a result, every layoff affecting fifty or more employees resulting from the shutdown of a facility or operating unit within the employment site can potentially meet the WARN definition of a plant closing.

Both the mass layoff and plant closing definitions of WARN use a thirty-day period within which all employment losses count toward the pertinent threshold. A separate section of WARN was designed to prevent the spacing of layoffs by employers to avoid the mass layoff or plant closing thresholds. Under section 3(d), if separate employment losses, each of which is below the WARN thresholds at a single site of employment, together exceed the minimum levels for a plant closing or mass layoff within any ninety-day period, the definition of plant closing or mass layoff will be considered satisfied and sixty days' notice is required by WARN. In order to avoid the notice requirement, the employer must show that the various employment losses resulted from "separate and distinct actions and causes."

As explained in the final regulations, employment losses in both a thirty-day and ninety-day period must be considered to determine if the thresholds under the plant closing or mass layoff definitions have been

109. [T]he term "plant closing" means the permanent shutdown of a single site of employment, or one or more facilities or operating units within a single site of employment, if the shutdown results in an employment loss at the single site of employment during any 30-day period for 50 or more employees excluding any part-time employees . . . .

110. Id.
111. Id.
112. Id.
113. 20 C.F.R. § 639.5(j).
114. Id. § 639.3(b).
116. Id.
met. The two periods differ in that employment losses in a thirty-day period always are added together, while employment losses in a ninety-day period are added together unless there are separate and distinct reasons for the losses. Thus, in the case of any employment loss, section 3(d) requires looking forward and backward ninety days to determine if the combined employment losses at a site meet the definitions of either a plant closing or a mass layoff.\textsuperscript{117}

In some cases, an employer may start a temporary layoff which does not reach the six-month minimum necessary to satisfy the definition of employment loss. Later, an extension beyond six months may be announced or the temporary layoff may be converted to a permanent layoff. In such a case, section 3(c) of WARN provides that the initial layoff will be treated as an employment loss, unless the extension results from “business circumstances not reasonably foreseeable at the time of the initial layoff” and the employer gives notice at the time the initial layoff is extended.\textsuperscript{118} Again, the purpose of this provision is to prevent employer evasion of WARN through extensions of layoffs too short to initially meet the definition of employment loss.

\textbf{C. Exceptions and Exemptions}

WARN contains seven exceptions to or exemptions from its notice requirements. The exceptions begin with section 2(b)(1), which pertains to the allocation of responsibility for notice in cases involving sales of a business.\textsuperscript{119} Next, section 2(b)(2) exempts certain employment losses from consideration if transfers to other jobs are offered or accepted.\textsuperscript{120} Third, section 3(b)(1) reduces the notice period for businesses seeking new business or capital which believe in good faith that giving WARN notice would prevent them from succeeding in these efforts.\textsuperscript{121} Fourth, section 3(b)(2)(A) permits a reduction of notice when plant closings or mass layoffs arise from unforeseeable business circumstances.\textsuperscript{122} Fifth, section 3(b)(2)(B) provides for a reduction of notice in cases where natural disasters cause job losses.\textsuperscript{123} Finally, section 4(1) exempts the closing of temporary projects or facilities from WARN, while section 4(2) excludes strikes or lockouts.\textsuperscript{124}

While these exceptions provide a measure of employer flexibility,

\begin{itemize}
\item \textsuperscript{117} 20 C.F.R. § 639.5(a)(1)(ii).
\item \textsuperscript{118} 29 U.S.C. § 2102(c).
\item \textsuperscript{119} Id. § 2101(b)(1).
\item \textsuperscript{120} Id. § 2101(b)(2).
\item \textsuperscript{121} Id. § 2101(b)(1).
\item \textsuperscript{122} Id. § 2102(b)(2)(A).
\item \textsuperscript{123} Id. § 2102(b)(2)(B).
\item \textsuperscript{124} Id. § 2103(1).
\item \textsuperscript{125} Id. § 2103(2).
\end{itemize}
they also add complexity to the determination of the applicability of WARN's advance notice requirements. Both the final regulations and the Conference Report on H.R. 3126 provide considerable guidance in understanding WARN's exceptions.

I. Sale of Business

The first exception under WARN allocates responsibility for notice in the case of the sale of a business.127 Under section 2(b)(1), a sale does not necessarily cause any employment loss or require notice under WARN. In the event of an employment loss, responsibility for notice is the seller's up to and including the effective date of the sale.128 After the sale, the buyer is responsible for notice and the seller's employees are considered the buyer's employees, at least for purposes of WARN.129

The Labor Department's regulations state that at all times one of the parties to the sale is responsible for giving the WARN notice should the sale result in employment losses beyond the WARN thresholds.130 If employees of a business that has been sold are not rehired by the buyer, responsibility for giving advance notice lies with the buyer.131 At the same time, nothing in WARN requires a buyer actually to hire the seller's employees.132

2. Employee Transfers

WARN's second exemption reduces the extent of employment losses when the employer transfers employees to other sites. Section 2(b)(2) excludes certain job losses from the definition of employment loss. An exclusion is available when the employer consolidates or relocates all or a part of its business, and the employer offers a potentially affected employee a transfer to a job at a different employment site.133 To meet this

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126. CONFERENCE REPORT, supra note 4, LEGISLATIVE HISTORY, supra note 2, at 565.
[This] amendment clarifies our intent that employees receive notice if there is a plant closing or mass layoff incident to the sale of all of a business. Under this amendment, employees will be protected throughout the process of sale. And the responsibility for giving notice, the legal duty to give notice, will be apportioned fairly and logically between the seller and the purchaser. Until the sale is completed, the seller has the duty to give notice. Immediately upon completion of the sale the duty to give notice is the purchaser's. Employers and affected employees will always know clearly which employer must give notice if a plant closing or mass layoff is ordered. And, most importantly, at no time will affected employees be unprotected against mass layoffs or plant closings undertaken without fair notice.

129. Id.
130. 20 C.F.R. § 639.4(c).
131. Id. § 639.4(c)(1).
132. Supplemental Information to the Final Rules, supra note 5, at 16,052, LEGISLATIVE HISTORY, supra note 2, at 35.
133. 29 U.S.C. § 2101(b)(2).
exclusion, the transfer offer must involve a break in employment of six months or less. If the transfer falls into the exclusion, then the number of employment losses is reduced by the number of excluded transfers in determining whether the WARN definitions for a mass layoff or a plant closing have been met.

However, the transfer exclusion under section 2(b)(2) reduces the number of "employment losses" only in two situations. The first situation involves a job offer "within a reasonable commuting distance." In the situation in which the transfer offered is within a reasonable commuting distance, there is no employment loss, regardless of whether or not the employee accepts the offer. The statute provides no guidance on the meaning of "reasonable commuting distance," and the term is not effectively defined in the final regulations. In the second transfer situation, if the job offer is outside a reasonable commuting distance it must be accepted within thirty days of the offer or within thirty days of the plant closing, whichever is later, in order to ensure that no employment loss has occurred for purposes of WARN.

The Department of Labor once again adopted the "constructive discharge" standard in its final regulations implementing the transfer exclusion under section 2(b)(2). In its proposed regulations, the Department had initially stated that a transfer did not reduce the employment losses unless the jobs offered for transfers were "substantially equivalent" to the prior jobs. The Department indicated in the final regulations that this retreat was a result of its initial misreading of the legislative history. However, the constructive discharge standard represents an expansion of the transfer exclusion to situations in which workers have valid reasons for refusing a transfer, but not reasons onerous enough to establish a constructive discharge.

134. Id.
135. Id. § 2101(b)(2)(A).
136. Id.
138. 20 C.F.R. § 639.5(b)(3) (meaning of "reasonable commuting distance" will vary; accessibility of workplace, road quality, available transportation, and travel time should be considered).
139. Id. § 2101(b)(2)(B).
140. 20 C.F.R. § 639.5(b); see also Supplemental Information to the Final Rules, supra note 5, at 16,054-55, LEGISLATIVE HISTORY, supra note 2, at 39-40.
143. In the Title VII context, for example, a discriminatee has a right to turn down a job offer from his or her former employer which is offered in mitigation, unless the employer can show the job offered was substantially equivalent to the old job. Ford Motor Co. v. EEOC, 458 U.S. 219, 223-32 (1982). In contrast, under the Department of Labor's regulations, the worker must prove a "constructive discharge." 53 Fed. Reg. 49,084 (1988); see also supra note 105 and accompanying text.
3. **Faltering Company**

Section 3(b) shortens the required sixty-day notice period in three defined situations. In all these situations, the employer is still required to give as much notice as possible under the circumstances.\(^{144}\) Presumably, if no notice is possible, the employer is completely relieved of its notice obligations. Nevertheless, contemporaneous notice of the job loss and the reasons why advance notice was not given are required. The burden of proof is on the employer to show that it meets these requirements.\(^{145}\)

The first notice-shortening situation under section 3(b) is known as the “faltering company” exception. Under this exception, the notice period is reduced during the time an employer is “actively seeking capital or business” which could enable the employer to “avoid or postpone” a shutdown. The employer must have a reasonable good faith belief that giving notice would preclude it from obtaining the needed capital or business.\(^{146}\) The conference committee report on H.R. 3 indicated that:

\[\text{[t]}\text{o avail itself of this defense an employer must prove the specific steps it had taken, at or shortly before the time notice would have been required, to obtain a loan, to issue bonds or stock, or to secure new business. . . . Moreover, the employer must show the reasonable basis for its good-faith belief that giving the required notice would have prevented the employer from obtaining the capital or business that the employer had a realistic opportunity to obtain.}\(^{147}\)

4. **Unforeseeable Business Circumstances**

The second exception which shortens the notice period under section 3(b) applies where “the closing or mass layoff is caused by business circumstances that were not reasonably foreseeable as of the time that notice would have been required.”\(^{148}\) The conference report gives two examples of this section’s application:

\[\text{[A]}\text{principal client of the employer may suddenly and unexpectedly terminate or repudiate a major contract; or an employer may experience a sudden unexpected and dramatic change in business conditions such as price, cost, or declines in customer orders.}\(^{149}\)

5. **Natural Disasters**

The third exception which shortens the notice period under section

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\(^{144}\) 29 U.S.C. § 2102(b)(3) ("An employer relying on this subsection shall give as much notice as is practicable and at that time shall give a brief statement of the basis for reducing the notification period.").

\(^{145}\) 20 C.F.R. § 639.


\(^{147}\) CONFERENCE REPORT, supra note 4, at 1048-49, LEGISLATIVE HISTORY, supra note 2, at 574-75.


\(^{149}\) CONFERENCE REPORT, supra note 4, at 1049, LEGISLATIVE HISTORY, supra note 2, at 575.
3(b) is a closing or mass layoff due to a natural disaster such as a flood or earthquake.\textsuperscript{150} As noted, the employer must still give as much notice as possible of employment losses due to a natural disaster.

6. \textit{Temporary Facilities or Projects}

The sixth exemption involves temporary facilities or projects. If a mass layoff or plant closing results from the closing of a temporary facility or the completion of a specific project, the employment loss is exempt from WARN, so long as the employees were hired with the understanding that the duration of their employment was limited to the project's completion.\textsuperscript{151} According to the conference report, this exemption applies only when the understanding has been "clearly stated to the employees at the time they begin work."\textsuperscript{152} An employer cannot convert an ordinary project into a temporary project by giving notice after its employees are hired or operations have begun.\textsuperscript{153} The regulations also provide that the burden of proof is on the employer to show its employees clearly understood their jobs were temporary.\textsuperscript{154}

7. \textit{Strikes and Lockouts}

The seventh principal exception is provided by section 4(2) of WARN.\textsuperscript{155} This provision exempts from the notice requirement any plant closing or mass layoff due to a strike or lockout. The provision also exempts job losses resulting from the permanent replacement of economic strikers.\textsuperscript{156} WARN does not exempt lockouts "intended to evade the requirements of this Act."\textsuperscript{157} In addition, section 4(2) provides that WARN should not affect judicial or administrative rulings on the validity of an employer's decision to permanently replace economic strikers.\textsuperscript{158}

\textbf{D. Advance Notice Requirements}

Section 3(a) states, "[A]n employer shall not order a plant closing or mass layoff until the end of a sixty-day period after the employer serves written notice of such an order . . . ."\textsuperscript{159} The Act requires written notice

\begin{itemize}
\item \textsuperscript{150} 29 U.S.C. § 2102(b)(2)(B).
\item \textsuperscript{151} Id. § 2103(1); see also 134 CONG. REC. S8377 (daily ed. June 22, 1988) (colloquy between Senators Chaffee and Metzenbaum regarding the temporary facilities provision), LEGISLATIVE HISTORY, supra note 2, at 186-87.
\item \textsuperscript{152} CONFERENCE REPORT, supra note 4, at 1051, LEGISLATIVE HISTORY, supra note 2, at 577.
\item \textsuperscript{153} 20 C.F.R. § 639.5(c)(2), (3) (burden is on the employer to prove that employees were informed of the temporary nature of the project).
\item \textsuperscript{154} Id.; see also 29 U.S.C. § 2102(b)(3).
\item \textsuperscript{155} 29 U.S.C. § 2103(2).
\item \textsuperscript{156} Id.; see also 20 C.F.R. § 639.5(d).
\item \textsuperscript{157} 20 C.F.R. 639.5(d).
\item \textsuperscript{158} 29 U.S.C. § 2103(2).
\item \textsuperscript{159} Id. § 2102(a).
\end{itemize}
to the union, or, if there is no union, to each affected employee. Notice to the chief elected official of the affected local government and to the state dislocated worker unit is also required. Section 639.7 of the regulations provides that the form of the notice must be specific, should identify each affected employee by job title, give the date of planned separation, and indicate whether the separation will be permanent or temporary.

E. Enforcement

The WARN Act is enforced by civil actions to collect back pay and civil penalties whenever an employer orders a plant closing or mass layoff without proper notice. Section 5(b) limits enforcement of WARN to these monetary remedies, and further states that the Act does not give federal courts authority to stop a plant closing or mass layoff. WARN provides for reasonable attorneys’ fees to the prevailing party.

A lawsuit to enforce the Act’s remedies can be brought by the aggrieved employees, the employees’ union, or an aggrieved unit of local government. The Act permits an individual suit or a suit on behalf of “other persons similarly situated.” The lawsuit can be brought in any district in which the alleged violation occurred or where the employer transacts business. The term “aggrieved employee” is defined as an employee who did not receive timely notice under section 3 of the Act.

The remedies under WARN are strictly defined. The maximum liability of an employer is the value of sixty days’ back pay and fringe benefits for each aggrieved employee. The maximum liability is reduced for every day of notice actually provided. The sixty-day liability may be further reduced if the employee has worked less than 120 days for the employer.

In addition, the employer’s liability is reduced by any “voluntary and unconditional payments” made by the employer to the employee for the period of the violation that are “not required by any legal obliga-

160. Id. § 2102(a)(1).
161. Id. § 2102(a)(2).
162. 20 C.F.R. § 639.7.
164. Id. § 2104(b).
165. Id. § 2104(a)(6).
166. Id. § 2104(a)(5).
167. Id.
168. Id.
169. Id. § 2104(a)(7).
170. Id. § 2104(a)(1).
171. Id. (allowing damages for up to 60 days, “but in no event for more than one-half the number of days the employee was employed by the employer”)
172. Id.
In contrast, payments made by the employer due to the employment loss do not reduce the employer's liability. For example, contractual severance pay or supplemental unemployment benefits do not reduce the amount for which an employer is liable because they are a payment which the employer is legally obligated to make. In addition, payments to employees from third parties do not reduce liability. According to the conference report, this means that wages from other employers or unemployment insurance do not reduce an employer's liability.

The local government unit has a civil penalty remedy of $500 a day for a violation. This civil penalty can be avoided if the employer pays each aggrieved employee the full amount owed to the employee within three weeks from the date the employer ordered the shutdown or layoff.

Congress provided one additional escape hatch for employers. WARN gives a district court discretion to reduce the back pay liability or civil penalty, if the employer proves both that its violation of the Act was in good faith and that it had reasonable grounds for believing it was not violating the Act.

F. Other Provisions

Section 6 provides that WARN's provisions are in addition to any rights or remedies available under a collective bargaining agreement or other laws. Thus, more comprehensive or added protections can still be obtained in collective bargaining or enacted by local or state governments. This section was intended to foreclose any arguments that WARN preempted or disturbed other laws or collective bargaining provisions relating to advance notice.

Section 7 of WARN expresses the belief of Congress that employers not required to provide advance notice should do so when closing a plant or permanently reducing their workforce. Section 9 states that giving

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173. Id. § 2104(a)(2)(B).
174. Supplemental unemployment benefits are contractual payments a worker may receive under a collective bargaining agreement. The payments are intended to make up the difference between the employee's salary and the unemployment insurance payments received by the employee.
175. CONFERENCE REPORT, supra note 4, at 1052-53, LEGISLATIVE HISTORY, supra note 2, at 578-79.
176. CONFERENCE REPORT, supra note 4, at 1053, LEGISLATIVE HISTORY, supra note 2, at 579.
177. 29 U.S.C. § 2104(a)(3). As of March 1993, there was no reported instance of a local government unit filing a WARN suit.
178. Id.
179. Id. § 2104(a)(4).
180. Id. § 2105.
181. CONFERENCE REPORT, supra note 4, at 1054, LEGISLATIVE HISTORY, supra note 2, at 565, 580.
good faith notice shall not constitute a violation of the National Labor Relations Act or the Railway Labor Act.\textsuperscript{183}

Section 8(a) directs the Secretary of Labor to promulgate interpretative regulations to carry out the Act.\textsuperscript{184} Section 11 of S. 2527 provides that WARN would take effect six months after its date of enactment, except that the Labor Secretary's regulatory authority was made effective upon enactment.\textsuperscript{185} Pursuant to this regulatory authority, the Department of Labor issued interim regulations on December 2, 1988.\textsuperscript{186} Final regulations were promulgated on April 20, 1989.\textsuperscript{187}

IV

THE INTERPRETATION OF WARN IN THE COURTS

A. Introduction

The lines drawn in the legislative compromises during the passage of WARN have produced a number of judicial decisions. Most of these cases have not reached the courts of appeals, and many of the opinions concern pretrial matters. An analysis of developing case law shows mixed results from the first judicial decisions applying the Act.

The courts have confronted two questions: (1) Which employer entities are legally liable under WARN? and (2) What job losses meet the WARN thresholds? In both of these contexts, the exclusion of part-time employees has proven more significant than one might have thought. While the majority of courts have ultimately reached WARN's intended result, some have done so by reconsidering their initial approach. This shows that close attention is required when applying WARN to actual worker dislocations.

Before examining the case law applying WARN, a case challenging the constitutionality of WARN merits consideration. In \textit{Carpenters District Council v. Dillard Department Stores},\textsuperscript{188} the employer asserted that WARN was unconstitutionally vague, and violated the takings and due process clauses of the Fifth Amendment.\textsuperscript{189} The magistrate judge avoided the vagueness issue, ruling that since none of the assertedly vague WARN exceptions applied to the employer, the employer lacked standing to challenge their constitutionality.\textsuperscript{190} The court also denied

\textsuperscript{183} \textit{Id.} § 2108.
\textsuperscript{184} \textit{Id.} § 2107(a).
\textsuperscript{188} 778 F. Supp. 318 (E.D. La. 1991).
\textsuperscript{189} \textit{Id.} at 319.
the employer's unlawful takings argument, finding that WARN did not involve a prohibited government invasion of an employer's property, but properly addressed the adjustment of costs associated with economic activity. The court rejected the employer's due process argument, holding that the statute was rationally related to congressional concern over the economic harms caused by plant closings. Barring a return to the days of substantive due process, the constitutionality of WARN seems beyond serious question.

B. Employer Coverage

The opening question in any WARN lawsuit is whether or not the employer experiencing job losses is a covered "employer" under the Act. Recall that an "employer" is defined as a "business enterprise" with (a) 100 or more employees (excluding part-time employees), or (b) 100 or more employees whose aggregated hours are at least 4000 hours per week (excluding overtime hours). In Damron v. Rob Fork Mining Corp., the Sixth Circuit Court of Appeals affirmed the dismissal of a WARN case. In Damron, four workers sued a number of interrelated coal mine companies after they lost their jobs due to a sale of their company's mine. No advance notice was given of the employees' termination. The court upheld the dismissal because there were less than 100 "aggrieved employees" at the subject mine. The court's opinion turned on the question of whether approximately sixty former employees, who had been laid off eight to ten years prior to the sale, had a "reasonable expectation of recall" within the meaning of the final regulations. If so, the 100-employee requirement for employer coverage would have been met.

Following the lead of the district court, the court of appeals relied on case law under the NLRA for the meaning of "reasonable expectation of recall." Applying NLRA case law, the court concluded that the

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194. 945 F.2d 121 (6th Cir. 1991).
195. Id. One defendant was dismissed because it sold its interests in the mine to the other defendants prior to the February 4, 1981, effective date of WARN. Id.
196. Id. at 123.
198. 945 F.2d at 123-24. The circuit court adopted the five criteria used by the district court to evaluate the reasonableness of the plaintiffs' expectations of recall: (1) past experience of the employer; (2) the employer's future plans; (3) the circumstances of the layoff; (4) the expected length of the layoff; and (5) industry practice. Id. at 124. Under NLRA practice, the reasonable expectation of recall standard is used to determine whether or not laid-off workers can vote in representation...
district court correctly held that the long-term laid-off workers had no expectation of recall and could not count as employees in determining WARN coverage. As a result, the court upheld dismissal of the case.

At first glance, the Damron ruling is difficult to criticize since the opinion provides little evidence that the laid-off employees had employee status more than eight years after their layoff. However, a close reading of the Sixth Circuit’s statement of the legal standard for WARN coverage reveals that it was wrong. The court’s opinion stated that “100 aggrieved employees [are] required for application of the [WARN] Act.” WARN defines an employer in terms of having 100 “employees,” while the term “aggrieved employees” refers to employees deprived of notice.

By definition, “aggrieved employees” can be located only at the workplace where the employment loss has occurred. Thus, determining their number involves a more restrictive approach than determining the total number of employees. Both WARN’s legislative history and the final regulations demonstrate that Damron’s formulation of the standard for WARN coverage was wrong. The final regulations, for example, differentiate between an “employer” and a “site of employment”:

An employer may have one or more sites of employment under common ownership or control. An example would be a major auto maker which has dozens of automobile plants throughout the country. Each plant would be considered a site of employment, but there is only one “employer,” the auto maker.

In addition, the final regulations make it clear that even “U.S. workers” at foreign sites of employment count in determining whether the “employer” definition under section 2(a)(1) of WARN is met.

By using “aggrieved employees” as the initial threshold determination, the Damron court apparently looked solely at the number of employees at the closed site of employment to determine WARN coverage. In so doing, the Damron court may have erred in dismissing the lawsuit, unless the mine which was closed was the only site of employment for all elections. Id. at 124 n.6. The preamble to the final regulations indicates that the Labor Department looked to case law under the NLRA in developing the reasonable expectation of recall standard. 54 Fed. Reg. at 16,044-45 (1989).

199. 945 F.2d at 125.
200. Id.
201. Id. at 122.
203. Id. § 2104(a)(7).
204. 20 C.F.R. § 639.3(a)(4) (1992); CONFERENCE REPORT, supra note 4, at 1046, LEGISLATIVE HISTORY, supra note 2, at 572.
205. Id. § 639.3(i)(7).
the corporate defendants. The opinions of the court of appeals and the
district court are unclear on this point.

Regardless of the specific facts in the Damron appeal, formulating
the standard of WARN coverage in terms of "aggrieved employees" will
clearly lead to erroneous results. Evaluating WARN coverage in this
manner is contrary to the explicit definition of the term in section 5(a)(7)
and leads to unwarranted confusion. For that reason, Damron's ag-
rieved worker standard for employer coverage should be avoided in fu-
ture cases.

Three cases206 have presented the question of WARN liability when
the employer is shut down by a governmental entity. Two of these cases
grew out of the closing of an insolvent casino by New Jersey gaming
officials. Here, the question posed was, "Who is the employer?" The
casino moved to dismiss both of these cases, claiming it was not the "em-
ployer" for purposes of WARN.207

In Hotel Employees, the district court rejected the casino's conten-
tion that the state-appointed conservator was the employer when the ca-
sino was ordered closed.208 Examining the state's gaming laws, the court
ruled that the conservator only monitored the operation of the casino,
while the employer continued to run the business.209

In Finkler, the same judge rejected the employer's contention that
the plaintiffs were not "affected employees" under WARN because their
suit was filed only four days after a mass layoff.210 The court noted that
the casino's closing could be characterized as a plant closing, and, in any
event, no one contested the permanent nature of the layoffs.211 The
"conservator as employer" argument was rejected on the same basis as in
the Hotel Employees opinion.212

After the consolidation of Finkler and Hotel Employees, the issue of
the employer's identity was revisited on a motion for summary judgment
by the employer.213 At this point, the employer argued that WARN did
not impose liability upon employers in a government-ordered closing.214

The court first considered the language of section 3(a), requiring that "an

1989); Finkler v. Elsinore Shore Assoc., 725 F. Supp. 828 (D.N.J. 1989); Office Employees Int'l
207. Hotel Employees, 724 F. Supp. at 335; Finkler, 725 F. Supp. at 831.
208. Hotel Employees, 724 F. Supp. at 335-36.
209. Id.
210. 725 F. Supp. at 831.
211. Id.
212. Id. at 831-32.
213. Hotel Employees Int'l Union, Local 54 v. Elsinore Shore Assoc., 768 F. Supp. 1117
214. Id. at 1123.
employer shall not order a plant closing . . .". The court concluded that since the state gaming commission ordered the closing, this language rendered WARN "inapplicable on its face." The court found further support in WARN's legislative history, where questions concerning state gaming commissions and closings of banks by regulators were discussed. The district court also took note of the discussion of government-ordered closings in the Labor Department's analysis accompanying the final regulations. The court observed that the advance notice and worker adjustment purposes of WARN had been tempered by exceptions recognizing that WARN imposed "an obligation to furnish notice only to the extent that the employer is reasonably able to do so." Based upon these considerations, the court granted the employer's motion for summary judgment.

Despite the firm tone in the court's initial opinion, the district court reversed itself in a second opinion granting the plaintiffs' motion for reconsideration. In its second opinion, the court noted two factors which it had not fully considered in granting the employer's motion for summary judgment. First, although the unforeseeable business circumstances exception may apply, subsection 3(b)(3) still requires an employer to "give as much notice as practicable." This provision led the court to observe, "The distinction between treating government ordered closings as, on the one hand, entirely outside the purview of the Act and, on the other hand, falling within the exception provided for in the Act, is significant."

The second factor in reconsidering the case was the court's recognition that the final regulations included some government-ordered closings within coverage of the Act. Of special note was language in the preamble to the final regulations rejecting suggestions that the Labor Department entirely exempted government-ordered closings. Finally, the court reexamined the legislative history and concluded that it supported an exemption only for closings of savings and loans by the Federal Home Loan Bank Board, not a broader WARN exemption for government-ordered closings. Based upon this analysis, the court

215. Id.
216. Id. at 1123-24.
217. Id. at 1124-25.
218. Id. at 1125-26 (quoting the Supplemental Information to the Final Rules, supra note 5, at 16042-54, LEGISLATIVE HISTORY, supra note 2, at 13-68).
219. Id. at 1127.
220. Id.
222. Id. at 1063.
223. Id.
224. Id. (quoting Supplemental Information to the Final Rules, supra note 5, at 16042-54, LEGISLATIVE HISTORY, supra note 2, at 13-68).
225. Id. at 1064-65.
ruled that the casino's owners had not been "ousted from control" by state authorities, and that summary judgment was improper. As a result of the reconsideration ruling in Finkler, the validity of the employer's unforeseeable business circumstances defense will be subjected to further litigation, including a possible trial.

A similar case with different results arose from a bank closing involving 172 employees ordered by the Federal Deposit Insurance Corporation. The district court held that WARN does not apply to the closing of a bank by federal authorities. In light of the legislative history on this specific point (which was fully discussed in the Finkler opinions), this holding is not easily criticized, although the resulting gap in WARN coverage is troubling.

C. WARN Thresholds

Once an employer is found to be covered by WARN, the liability question turns to whether or not an "employment loss" within the WARN definitions of "plant closing" or "mass layoff" has occurred. A number of cases have considered the proper application of these thresholds under WARN. The cases illustrate the great variety of job losses occurring in the economy, and the challenges facing employers, the courts, and plaintiffs in applying the WARN Act.

Jones v. Kayser-Roth Hosiery, Inc. involved the shutdown of a hosiery factory in Tennessee. The factory's major customer began experiencing product quality problems and over a six-month period there were quality audits, meetings with the customer, and loss of some business. On May 18, 1989, the factory laid off 500 employees. Of these, 230 had a definite recall date, and 270 were laid off indefinitely. Of those laid off indefinitely, 111 were recalled prior to the closing announcement.

By May 26, the customer advised the factory management that it was again reducing its orders, resulting in an approximate $19 million loss of the $20 million annual business previously expected from the customer. A meeting was scheduled with the customer's senior manage-
ment on June 21, although the customer proceeded to plan the phaseout of the business with the factory and kept the factory's management advised of the phaseout schedule.\(^\text{232}\)

The June 21 meeting with the customer proved unavailing. At its conclusion, the customer advised the factory management that other suppliers were in place and that its decision to cease using the factory's products was irreversible.\(^\text{233}\) The factory's management soon concluded that it was not profitable to operate after the loss of 40% of its business. On June 26, the management gave the employees notice of the closing, effective September 8, 1989. Of the factory's 803 active workers, 496 were laid off the same day as the closing announcement, including 156 of the temporarily laid-off workers involved in the May 18 layoff.\(^\text{234}\)

Following a trial, the magistrate judge found that the May 18 layoff of 500 employees was not a WARN violation.\(^\text{235}\) The court found that all but 159 of those affected by this layoff were recalled by the date of the closing announcement, and as a result did not suffer an "employment loss" as required by section 2(a)(6)(B) of WARN.\(^\text{236}\) In addition, the court held that the ninety-day provision of section 3(d) did not require the combining of the May 18 temporary layoffs with the permanent layoffs of June 26.\(^\text{237}\) The court reached this conclusion because section 3(d) applies only to employment losses where each loss falls below the threshold of a plant closing or mass layoff.\(^\text{238}\)

The employer conceded that the June 26 layoff was a mass layoff or plant closing under WARN.\(^\text{239}\) Moreover, the court found that the 159 indefinitely laid-off employees from May 18 had a "reasonable expectation of recall" at the time of the June 26 plant closing announcement, and were therefore "affected employees" entitled to the same notice as the employees working on the date of the closing announcement.\(^\text{240}\) The court noted that the recall of 111 of the indefinitely laid off workers had enhanced the remaining laid-off employees' reasonable expectation of recall up to the date of the closing announcement.\(^\text{241}\)

In \textit{Mine Workers v. Harman Mining Corporation,}\(^\text{242}\) the district court considered a layoff involving bumping rights under a union collec-

\(^{232}\) Id.

\(^{233}\) Id.

\(^{234}\) Id. at 1283.

\(^{235}\) Id. at 1284.

\(^{236}\) Id. (citing 29 U.S.C. § 2101(a)(6)(B)).

\(^{237}\) Id. at 1283-84 (citing 29 U.S.C. § 2102(d)).

\(^{238}\) Id. at 1284 (citing 29 U.S.C. § 2102(d)).

\(^{239}\) Id. at 1285.

\(^{240}\) Id. at 1284-85.

\(^{241}\) Id. at 1285.

tive bargaining agreement. The involved employer operated two mines and a coal preparation plant. The facilities were unionized, represented by the same local union, and governed by a single seniority list, making them potential candidates for characterization as a single site of employment.

Due to a change in operations at the larger mine, the employer eliminated 57 of 107 positions at the mine. After the exercise of bumping rights, forty-three workers from the effected mine lost their jobs, and fourteen workers at the employer's smaller mine were bumped into layoff. The court found that the employer "knew" that fewer than fifty of the employees at the affected mine would be permanently laid off. No advance notice was given.

The court considered the case under a stipulation that the larger mine was a "single site of employment." Presumably, the plaintiffs' counsel agreed to this stipulation to avoid having the employees at all three facilities combined, which would have raised the one-third threshold for a mass layoff under section 2(a)(3)(B)(i)(I). However, the Harman court was constrained to view the employment losses at the smaller mine as outside the definition of a mass layoff, which requires an employment loss by at least fifty employees "at the single site of employment." As a result, the court correctly concluded that the mass layoff definition had not been met, since fewer than fifty employees suffered an employment loss at the employment site.

In Kildea v. Electro Wire Products, Inc., the court was faced with what it termed a "fine line" between a violation and no violation. To decide whether a WARN violation had occurred, the court had to determine the full-time or part-time status of specific employees, and whether or not six previously laid-off employees had a reasonable expectation of recall. The case involved the closing of an automotive parts manufacturing plant. The employer had about 150 full-time employees. On January 31, 1990, the employer announced the plant closing date as April 2,
giving notice to all employees working on that date, as well as to those on sick leave or workers' compensation leave.\textsuperscript{254} Prior to the date of the closing announcement, forty-two employees had been laid off. No notice was given to these laid-off employees.

Initially, the court examined the stipulated facts to determine whether a mass layoff occurred during the thirty days between December 15 and January 15, prior to the closing announcement. During that time period, forty-two full-time employees were laid off. The court held that five more employees worked full time prior to the potential mass layoff, because they worked for six or more months of the prior twelve months and had averaged more than twenty hours of work per week.\textsuperscript{255} The court then added these five employees to those laid off, bringing the total to forty-seven. The court next added six other full-time employees who were laid off but recalled during or just after the thirty-day period between December 15 and January 15.\textsuperscript{256} Based upon this calculation, the court found that more than fifty employees, and one third of the workforce, were laid off between December 15 and January 15, and that a mass layoff had occurred.\textsuperscript{257}

Upon reconsideration, the court revisited its holding regarding the inclusion of the six full-time employees laid off and recalled during the period at issue. In reaching its decision to include these workers, the court initially relied upon a Labor Department response to comments on the final regulations.\textsuperscript{258} Now the court realized that it "failed to make the distinction between 'employment loss' and 'lay-off' for determining whether a 'mass layoff' had occurred."\textsuperscript{259} Since the six critical employees had not been laid off more than six months they had not suffered an "employment loss"; thus, the court vacated the finding in its prior decision.\textsuperscript{260} The court now ordered briefing on the issue of whether a mass layoff had occurred under the ninety-day provision of section 3(d) of WARN.\textsuperscript{261}

\textsuperscript{254} Id. at 1576.
\textsuperscript{255} Id. at 1577.
\textsuperscript{256} Id. at 1577-78.
\textsuperscript{257} Id. at 1578.
\textsuperscript{258} Id. at 1579. The Labor Department stated:

Another commenter suggested that a series of closings or layoffs should be considered a plant closing or mass layoff 'only if each stems from the same business decision, personnel action, or other distinct cause'; where no distinct cause accounts for a threshold number of employment losses there is no WARN coverage. DOL disagrees with this interpretation. WARN sections 2(a)(2) and (3) say nothing about cause. Under the language of those provisions, one merely counts up all the employment losses in a 30-day period to determine coverage.

Id. (quoting Supplemental Information to the Final Rules, supra note 5, at 16,046, LEGISLATIVE HISTORY, supra note 2, at 22) (emphasis supplied by the court).

\textsuperscript{259} 6 Indiv. Empl. Rts. Cas. (BNA) at 1579.
\textsuperscript{260} Id. at 1579-80.
\textsuperscript{261} Id. at 1580.
In its third opinion in Kildea, the district court considered the question of whether the forty-seven laid-off employees who did not get notice of the plant's closing date when the January 31 notice was given were "affected employees." The court noted the definition of "affected employees" in section 2(a)(5). Applying Damron's reasonable expectation of recall standard, the court concluded that since laid off employees with a reasonable expectation of recall can count as employees, then they can suffer an "employment loss" and are thus entitled to receive notice.

Relying on the definitional language, the court reasoned:

Workers on lay-off status at the time of a plant closing who possess a reasonable expectation of recall would experience an employment loss because their expectations of recall would be dashed and their employment unequivocally terminated at the time of the plant closing. All employees so situated may reasonably be expected to experience an employment loss in such a situation.

Since other categories of active workers, such as those working in temporary facilities or those on strike are expressly exempted from WARN notice, while laid off workers are not specifically exempted, the court concluded that temporarily laid off workers are affected employees entitled to notice under section 3(a)(1). The court in Kildea concluded by finding that WARN's remedial policies were furthered by providing notice to temporarily laid-off employees.

The opinions in Kildea furnish further evidence of the close reading required to avoid WARN's definitional pitfalls. Eventually, the court did reach the correct result as to each of the issues before it. The holdings in Kildea and Jones v. Kayser-Roth Hosiery regarding the status of temporarily laid-off workers as affected employees are especially important in providing notice to workers who are certainly "affected" in the everyday sense of that word, and to whom notice is key in providing readjustment assistance. A contrary result would have resulted in a significant limitation on WARN's coverage.

The role of part-time workers was again considered in Solberg v. Inline Corporation. In Solberg, the employer increased its employment level from about thirty employees to about 330 in order to satisfy a major new contract. The added employees had hiring dates between January and May, 1989. The new customer canceled the contract in late May, and the added employees were laid off from May through October. In this group of newly hired workers, only eight had worked for the em-

262. 792 F. Supp. 1046, 1047.
263. Id. at 1048.
264. Id. at 1049.
266. Id. § 2103(2).
267. 792 F. Supp. at 1049 (citing 29 U.S.C. § 2102(a)(1)).
employer more than six months.269

   The court granted the employer's motion for summary judgment. Relying on the plain meaning of section 2(a)(3)'s definition of "mass layoff," which excludes part-time workers,270 the court found that the layoffs did not meet the threshold for a mass layoff.271 While recognizing that part-time employees are entitled to notice as "affected employees," the court refused to disregard the definition of a "mass layoff."272

   Solberg confirms that fairly large layoffs of part-time employees can still fall within WARN's part-time worker exclusion. The part-time definition was not written with newly-hired, full-time workers in mind. Instead, the legislative history indicates the six-month feature was adopted to exclude seasonal workers.273 However, the court had to dismiss the claim since the newly-hired employees were part-time employees within the literal terms of WARN's definition.


   The court focused on the WARN status of six employees who were laid off from one site on March 16, recalled, and then laid off again.276 The court found that these six employees did not suffer an employment loss on March 16, because their later recalls eliminated each of the three possible types of employment loss set out in section 2(a)(6) of WARN. That is, the six recalled workers were not terminated, they were not laid off for six months or more, and they did not suffer a 50% reduction in hours for six consecutive months.277 Without inclusion of these six employees, the March 16 layoff did not affect fifty or more employees at any single site. Accordingly, the court awarded summary judgment to the employer.278

   Cruz v. Robert Abbey, Inc. wrestled with a similar recall issue, reach-

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269. Id. Section 2(a)(8) defines as a part-time employee individuals working less than 20 hours per week or for less than six of the previous 12 months. 29 U.S.C. § 2101(a)(8).
272. Id. at 685.
273. See CONFERENCE REPORT, supra note 4, at 1047, LEGISLATIVE HISTORY, supra note 2, at 573.
275. Id. at 1064.
276. Id. at 1067.
277. Id. (citing 29 U.S.C. § 2101(a)(6)).
278. Id. at 1068.
ing a different result. There, the employer had layoffs of over fifty workers within each of two ninety day periods. Some of the affected workers were recalled for brief periods after the WARN suit was initiated. The court denied the employer’s motion for summary judgment which argued that the recalled workers did not experience an employment loss. The court found that a question of material fact existed as to whether the recalls constituted “an attempt by the employer to evade the requirements of this Act,” as prohibited in section 3(d) of WARN.

A number of threshold issues were decided in United Electrical Workers v. Maxim, Inc. First, the district court had to decide whether the employer was covered under the 100-employee standard. Relying on the regulations, the court rejected the employer’s argument that it was below the 100-employee threshold on the day it closed, looking instead to the number of employees working on the day notice was due.

The employer laid off twenty-four workers on November 1, 1989, and sixty-four workers on December 15. The court held that the first layoff was not covered, because less than fifty employees were affected. Like the court in Jones, the Maxim court held that it could not group the two layoffs under the ninety-day provision in section 3(d), because the second layoff was a mass layoff. Under section 3(d), each of the employment losses counted together must be below the thresholds.

Moore v. The Warehouse Club, Inc. again demonstrated the narrow margins within which WARN operates. In Moore, the employer closed one of its two operations without advance notice, laying off just over fifty employees. The employer offered its employees a transfer to the other operation at the same pay. The magistrate judge found that at least five employees accepted the transfer, which excluded them from the calculation of employment losses. As a result, the court found that, at most, forty-seven full-time employees lost work as a result of the closing and the district court affirmed.

D. Exceptions and Exemptions

As described earlier, the Act creates seven specific exceptions or ex-

280. Id. at 1227.
281. Id. (citing 29 U.S.C. § 2102(d)). In a later decision, the court dismissed a duty-of-fair-representation case against the plaintiffs’ union for failing to discover the employer’s WARN violations. Cruz v. Robert Abbey, Inc., 6 Indiv. Emp. Rts. Cas. (BNA) 1446 (E.D.N.Y. 1990).
284. 5 Indiv. Empl. Rts. Cas. (BNA) at 630.
285. Id. at 631.
287. Id. at 1122-24 (citing 29 U.S.C. § 2101(b)(2)).
288. Id.
289. Id. at 1121.
emptions from WARN's advance notice requirements: sale of business, employee transfers, faltering company, unforeseeable circumstances, natural disasters, temporary facilities or projects, and mass layoff due to strike or lockout. These provisions either completely relieve employers covered by WARN from providing advance notice of employment losses that exceed the WARN thresholds, or reduce the duration of notice required. Predictably, there has been considerable litigation concerning these provisions, especially the "faltering company" and "unforeseeable business circumstances" provisions of section 3(b).

The faltering company exception was considered in *Local 397, International Union of Electrical Workers v. Midwest Fasteners*. The case arose from a union's motion for a preliminary injunction to prevent an employer from dissipating assets potentially available to satisfy a judgment in the union's WARN action. The union had filed the underlying WARN suit in response to the closing of a plant without notice to 135 affected employees. The district court first rejected the employer's argument that WARN's exclusive remedies provision limited the court's power to issue a preliminary injunction. The court next assessed the union's likelihood of success on the merits of its WARN claim by evaluating the employer's faltering business defense. The court referred to the four requirements for the faltering business defense contained in the Department of Labor's final regulations. The first requirement that the court considered was a showing that, on the date notice was due under WARN, the employer was actively seeking additional business, credit, or capital in a commercially reasonable manner.

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290. See supra part III.C.
291. The temporary projects provision is an example of an exception providing complete relief from notice; the natural disasters provision is one of several that shorten the required notice period.
292. 29 U.S.C. § 2102(b) (1988). As of March 1993, there was no published case involving the natural disaster provision in subsection 3(b)(2)(B) (codified at 29 U.S.C. § 2102(b)). There were also no cases reported relating to section 4(1)'s exemption for temporary facilities or projects, or section 4(2)'s exceptions for layoffs involving permanently replaced strikers (codified at 29 U.S.C. § 2103).
294. Id. at 79.
295. Id. at 80-81.
298. Id. at 82-84.
300. Id. § 639.9(a)(1).
301. Conference Report, supra note 4, at 1048, Legislative History, supra note 2, at 574-75.
tering business exception.\textsuperscript{302} Observing that Congress specifically dealt with the responsibility for giving WARN notice when a business was sold,\textsuperscript{303} the court reasoned that Congress did not intend a sale of a plant to relieve an employer of its notice obligations under WARN.\textsuperscript{304} While concluding that the union could well prove a WARN violation, the court nevertheless denied the union a preliminary injunction in the absence of a showing that the employer was, in fact, dissipating its assets.\textsuperscript{305}

In a case involving the merger of two retail department store chains, a court again refused to apply the faltering company exception in \textit{Carpenters District Council v. Dillard Department Stores}.\textsuperscript{306} The affected employees were informed of their layoff dates a few weeks in advance, but did not receive the required sixty-days' notice.\textsuperscript{307} In an unusual move, however, the employer, "out of an abundance of caution," paid each full-time employee who did not receive full notice an amount that the employer calculated to satisfy the WARN penalty provision.\textsuperscript{308}

The employer defended the ensuing WARN suit by asserting both the faltering company exception and the unforeseeable business circumstances exception.\textsuperscript{309} With respect to the faltering company exception, the employer submitted an opinion letter from its accounting firm that giving WARN notice would have impeded ongoing efforts to obtain a line of credit.\textsuperscript{310} The magistrate judge held that the faltering company exception did not apply because the credit was sought by the company seeking the merger, and it was the merger that caused the plant closings, not the lack of credit.\textsuperscript{311} Moreover, some of the layoffs occurred after the date of the merger, and at that time the new, post-merger employer was not a faltering company seeking capital.\textsuperscript{312}

The employer in \textit{Dillard} also asserted that WARN's unforeseeable business circumstances exception applied to the merger because the merger was subject to approval by the Securities and Exchange Commission (SEC).\textsuperscript{313} The employer argued that since the date of the SEC's approval was uncertain and unforeseeable, the employer could not know when the merger would take place or when the resulting plant closings

\textsuperscript{302} 763 F. Supp. at 83.
\textsuperscript{304} 763 F. Supp at 83.
\textsuperscript{305} Id.
\textsuperscript{307} Id. at 301.
\textsuperscript{308} Id. at 301-02. The employer also deducted vacation pay and severance pay from its WARN payments and took the position that part-time employees were not entitled to WARN notice. Id.
\textsuperscript{309} Id. at 302, 304-06.
\textsuperscript{310} Id. at 305.
\textsuperscript{311} Id. at 305-06.
\textsuperscript{312} Id. at 306.
\textsuperscript{313} Id.
would occur. The court rejected this argument:

The merger itself did not cause the layoffs, but merely provided Dillard the opportunity, albeit for economic reasons, to lay off employees. We do not interpret the Act as allowing a decision to lay off employees based on any economic factor, such as to merely reduce costs, to fall within the exemption to the Act, but rather only those decisions based on unforeseeable business or economic circumstances that by their very nature necessitate or impel the closing of the plant.

In viewing all of the exceptions in the Act together, it is obvious that Congress intended only that unusual, unexpected and significant events, beyond the control of the employer, would excuse him from furnishing the full 60 day notice.

The court bolstered its interpretation by quoting the conference report, which gives examples of sudden and unexpected events that qualified as unforeseeable business circumstances. Based upon this analysis, the court found that the merger of the two employers did not qualify as an unforeseeable business circumstance excusing the employer from its advance notice obligations under WARN.

The court in Jones v. Kayser-Roth Hosiery, Inc. likewise considered the applicability of the unforeseeable business circumstances exception. As previously discussed, this case involved the cancellation of a substantial contract by a long-term customer of the factory. The court first rejected the plaintiffs' argument that the exception did not apply because the factory was a failing business likely to close in any event, and the cancellation of the major contract was only the "last straw" in bringing about closure. The court found that on the date when advance notice was otherwise due, the factory’s management could not have reasonably foreseen that they would lose the contract.

These findings, however, did not entirely relieve the employer from its WARN obligations. The court went on to assess the employer's behavior under the "commercially reasonable business judgment" standard of the final regulations. The court concluded that, after a fateful May 25, 1989, meeting with its customer, the employer did not make a com-

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314. Id.
315. Id. at 306-07 (citation omitted).
316. Id. at 307.
317. CONFERENCE REPORT, supra note 4, at 1049, LEGISLATIVE HISTORY, supra note 2, at 575.
320. Supra notes 229-41 and accompanying text.
322. Id. at 1285-86.
323. Id. at 1286-87.
324. Id. at 1288. The final regulations provide:

The test for determining when business circumstances are not reasonably foreseeable focuses on an employer's business judgment. The employer must exercise such commercially reasonable business judgment as would a similarly situated employer in predicting the de-
mercially reasonable judgment in waiting until after the June 21 meeting with the customer’s top officials to issue a WARN notice. This conclusion was in keeping with subsection 3(b)(3) of WARN, which requires employers relying upon the faltering company, unforeseeable business circumstances, or natural disaster exceptions to provide “as much notice as is practicable.”

E. Parent-Employer Liability

Typically, large layoffs and plant closings take place when an employer is in economic difficulty. This means that workers and unions seeking enforcement of WARN must sometimes seek relief from corporate divisions or entities related to the employer. While the statute and legislative history offer little guidance, the final regulations provide the courts with considerable direction in determining whether related corporate entities should be held financially responsible.

Initial court decisions concerning parent-employer liability have carefully considered the competing legal doctrines and policies and provide useful guidance to WARN litigators and the courts.

The Midwest Fasteners litigation nicely frames corporate liability issues under WARN. The case involved the closing of a plant without notice. The plaintiffs sued three related corporate entities: Midwest Fasteners, Inc., d/b/a Erico Fastening Systems ["EFS"], a wholly-owned subsidiary of Erico International, Inc. ["International"], which in turn was a wholly-owned subsidiary of Erico Investment Company, Inc. ["Investment"].

International and Investment sought dismissal, arguing that they were not liable for the WARN violations of EFS. At the urging of the parties, the court first examined the definition of “employer” in the mandates of its particular market. The employer is not required, however, to accurately predict general economic conditions that also may affect demand for its products or services.

325. 748 F. Supp. at 1288.
327. The final regulations, in their interpretation of the threshold for employer coverage under section 2(a)(1) (codified at 29 U.S.C. § 2101(a)(1)) addressed the issue in terms of the types of entities whose employees would count under the threshold. 20 C.F.R. § 639.3(a)(2) (1992). These regulations state:

Under existing rules, independent contractors and subsidiaries which are wholly or partially owned by a parent company are treated as separate employers or as a part of the parent or contracting company depending upon the degree of their independence from the parent. Some of the factors to be considered in making this determination are (i) common ownership, (ii) common directors and/or officers, (iii) de facto exercise of control, (iv) unity of personnel policies emanating from a common source, and (v) the dependency of operations.

Id.

330. Id. at 789-90. The plaintiffs voluntarily dismissed a fourth entity, Erico Products, Inc. Id.
The court, relying on the regulations and their pre-amble, determined that the rules of decision were furnished by state and federal common law as they relate to federal employment statutes and the five factors set out in the final regulations.

The corporate entities argued that the court should apply an "alter ego" test, giving less weight to cases under federal labor statutes or to the five factors in the regulations. Instead, the court held that the most appropriate analysis involved both the common law cases concerning "piercing the corporate veil" and the "alter ego" doctrine cited by the defendants, as well as the federal common law "single employer" doctrine developed under the federal labor statutes referred to in the Labor Department's explanatory comments.

Using this approach, the court first examined factors relevant to the "alter ego" and "piercing the corporate veil" inquiries. The court found that the corporate entities were operated separately, and that the parent corporations were not undercapitalizing EFS, or commingling or siphoning funds from the EFS subsidiary. As a result, the court found that the corporate parents of EFS could not be held liable for EFS' WARN.

The court proceeded to the "single-employer" theory, stating:

It should be noted that the determination of whether a parent corporation is an 'alter ego' of a subsidiary is an entirely different analysis from whether it can be found to be a 'single employer' with its subsidiary. . . . Under the single-employer or 'single-enterprise test, the question is whether the two nominally independent enterprises, in reality, constitute only one integrated enterprise.'

The court found that there were four factors to evaluate under the single-employer cases: (i) common ownership, (ii) common management, (iii) centralized control of labor relations, and (iv) functional integration of operations.

Applying these factors, the court first found that EFS was wholly

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331. 20 C.F.R. § 639.3(a)(2).
332. The Department's comments read:
   The intent of the regulatory provision relating to independent contractors and subsidiaries is not to create a special definition of these terms for WARN purposes; the definition is intended only to summarize existing law that has developed under State Corporations laws and such statutes as the NLRA, the Fair Labor Standards Act (FLSA) and the Employee Retirement Income Security Act (ERISA). The Department does not believe that there is any reason to attempt to create new law in this area, especially for WARN purposes when relevant concepts of state and federal law adequately cover the issue.

779 F. Supp. at 791 (quoting Supplemental Information to the Final Rules, supra note 5, at 16,045, LEGISLATIVE HISTORY, supra note 2, at 21).
333. Id. at 791.
334. Id. at 792.
335. Id. (citations omitted).
336. Id. at 796 (citation omitted).
337. Id. (citation omitted) (emphasis in original).
338. Id. (citation omitted).
owned by International and Investment, and that two individuals owned 75% of the stock in the holding company which owned Investment. This satisfied the common ownership factor.\footnote{339}

The court also found that the common management factor was met.\footnote{340} The president of EFS was also the president of International, Investment, and the holding company, and another individual served as secretary-treasurer of all four corporations. These same individuals served as the directors of EFS and International, joined by the president’s spouse, the corporate general counsel, and two other individuals on the board of Investment. The holding company’s board of directors included the president, the secretary-treasurer, and the president’s spouse. At the time of the closing, the secretary-treasurer’s son was the general manager of the plant.\footnote{341}

In analyzing the centralized control of labor relations, the court agreed with the defendants that day-to-day labor relations were controlled at the local level.\footnote{342} However, the court noted that the decision to close the plant, “the most critical policy decision in terms of control of labor relations,” was made by the two individuals at the top of the corporate hierarchy.\footnote{343} Thus the court found the third factor satisfied.\footnote{344}

Finally, the court concluded that EFS, International, and Investment were “inextricably intertwined” in terms of the functional integration of operations factor.\footnote{345} The court noted the close relationships among the various corporate entities and the services provided by International to EFS.\footnote{346}

Applying the four factors of the single-employer test, the court found it was “readily apparent” that International and Investment were a single enterprise with EFS.\footnote{347}

Recognizing the conflicting results under the alter ego and the single employer doctrines, the court proceeded to a third test under the five factors in the Department of Labor’s final regulations.\footnote{348} Reviewing the five factors, the court found the first four regulatory factors were essentially equivalent to the four factors already examined under the single employer doctrine.\footnote{349}

The court, therefore, turned to the fifth factor in the final regula-
tions, the _de facto_ exercise of control. Terming this factor the "most compelling" it examined, the court noted that two individuals, who served as directors of all the corporations, voted to close the EFS plant.\(^{350}\) These EFS officers were not paid by EFS, but by International. These officers represented EFS with its creditors, while International controlled and instructed its subsidiaries on numerous financial and corporate matters. In addition, the court noted a number of other circumstances indicating _de facto_ control of EFS by International and Investment.\(^{351}\)

Concluding its analysis, the court stated that federal labor statutes mandate the court "look to the economic reality of the parent-subsidiary relationship."\(^{352}\) Relying upon a 1960 Supreme Court case, _National Labor Relations Board v. Deena Artware, Inc._,\(^{353}\) the court held that WARN, like other federal labor statutes, was enacted to protect workers. In light of WARN's goals and the factors set out in the final regulations, the court found that EFS, International, and Investment were a single employer, stating that the "true wrongdoer should not escape liability simply because corporate formalities are observed."\(^{354}\)

As a final point, the district court considered the plaintiffs' argument that International and Investment were directly liable under WARN. Noting that the closing decision was made by the two directors of EFS, who then reconstituted themselves as the directors of International to confirm the decision, who then did the same as directors of Investment, the court accepted the plaintiffs' direct liability argument:

While the court applauds the corporations' strict adherence to corporate form, it is the function of this court under the federal labor statute at issue to assess the economic reality of the parent/subsidiary relationship. Therefore, because the court finds that the parents exercised _de facto_ control of the operations of the subsidiary, International and Investment may be held liable for the alleged WARN violation of the subsidiary, EFS.\(^{355}\)

The _Midwest Fasteners_ decision comprehensively examined the competing doctrines of parent corporation liability. The court's application of existing precedent to the facts before it in a WARN case reached a result consistent with WARN's worker protection purposes. Its recognition of federal labor policy, as well as the economic reality test it adopted, should serve as a useful precedent.

_Laboratory Film Technicians, Local 683 v. Metrocolor Laboratories_

\(^{350}\) _Id._ at 799-800.

\(^{351}\) _Id._ at 799.

\(^{352}\) _Id._ at 800.

\(^{353}\) 361 U.S. 398 (1960).

\(^{354}\) 779 F. Supp. at 800.

\(^{355}\) _Id._
involved the closing of a Los Angeles film laboratory. A month prior to the closing of the facility a partnership between three studios which operated the laboratory was dissolved. Since the remaining partner had closed the laboratory without consulting the former partners, the two who had left prior to the closing claimed they were not liable for any later WARN violations. The district court, relying on California law governing partnerships, denied the former partners' motion for summary judgment. The court found that state law regarding the winding up of a partnership permitted the remaining partner to act on behalf of the other partners in some cases. Presented with this legal situation, the court ruled that summary judgment for the former partners was inappropriate. On its facts, the decision in Laboratory Film properly recognized that the dissolution of the partnership might well have involved deciding to close the laboratory, making it possible to find that the former partners were employers for the purposes of WARN. In effect, the Laboratory Film court adopted, albeit sub silentio, the economic reality test employed in Midwest Fasteners.

The courts in Carpenters District Council v. Dillard Department Stores, Inc. and Cruz v. Robert Abbey, Inc. have examined the issue of whether individual corporate officers can be sued as "employers" under the WARN Act. Both concluded that in using the term "employer" and defining it as a "business enterprise," Congress did not intend to expose individuals to liability under WARN. The courts each drew support from the terminology employed in section 2(a)(1) and the legislative history. The court in Dillard rejected the plaintiffs' argument that parallel language in the Fair Labor Standards Act and WARN indicated that individual corporate officers could be sued under WARN. In Cruz, the district court relied upon the final regulations in reaching its determination.

The problems involved in parent-employer liability promise to continually challenge the courts and WARN litigators. These "piercing the corporate veil" cases will most likely continue in the future. If the courts follow the lead of Midwest Fasteners, the worker protection goals of

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357. Id. at 929.
358. Id. at 929-30.
359. Id. at 930.
360. Id.
363. Dillard, 778 F. Supp. at 315-16; Cruz, 778 F. Supp. at 608-09.
365. CONFERENCE REPORT, supra note 4, at 1046, LEGISLATIVE HISTORY, supra note 2, at 572.
WARN will be promoted and the economic realities of the corporate transformation will be recognized.

F. The Good-Faith Exception

Section 5(a)(4) of WARN provides that an employer violating the Act can have its WARN penalty reduced, at the discretion of the court, if the employer "proves to the satisfaction of the court that the act or omission that violated this Act was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of this Act . . . ."³⁶⁸ This article discusses four cases which have considered WARN's good faith provision.

In two of these cases, district courts have relieved employers completely from WARN liability. In UAW Local 1077 v. Shadyside Stamping Corp.,³⁶⁹ the employer advised the union in writing in late September 1988 that it expected layoffs from February 1, 1989, to April 30, 1989, due to the cancellation of a large contract. A second letter to the union in early January 1989 confirmed the layoffs would take place as previously advised. On February 3, 1989, thirty-one employees were laid off, and on February 27 another fifteen employees were laid off. A third letter to the union on March 15 warned of more layoffs on April 3. On that date, sixty-six employees were laid off. On April 10, the employer gave the union added information on the identities of the sixty-six employees already laid off on April 3, as well as providing advance notice of another layoff of fifty employees to take place on June 9.

In its opinion, the district court discussed a number of issues pertaining to the employer's potential WARN liability, and denied summary judgment for the defendant on two issues.³⁷⁰ In analyzing the good faith issue, the district court stated that the union's claim was focused on "technical non-compliance" with the notice requirements of the regulations. The statute itself, the court noted, simply required the employer to serve a written notice of the mass layoff on the union.³⁷¹ The court concluded:

[T]he employer notified the employees' representative five months in advance of the expected mass layoff and provided a subsequent reminder notice. The deposition testimony and exhibits before the Court indicate that the employer acted in an attempt to comply with the WARN Act. Nothing in the record before the Court suggests the Company attempted

³⁶⁹. 6 Indiv. Empl. Rts. Cas. (BNA) 1640 (S.D. Ohio 1991), aff'd without opinion, 947 F.2d 946 (6th Cir. 1991). The author acted as an advisor to the plaintiffs' lead counsel in Shadyside at the district court level, and assisted in the preparation of the UAW's brief in the Court of Appeals for the Sixth Circuit.
³⁷⁰. Id. at 1642.
³⁷¹. Id. at 1647.
to circumvent the notice requirements of the Act. There can be no question that the employer proceeded in good faith in its attempt to properly notify the employees of future layoffs. The Court is equally convinced that the employer had reasonable grounds for believing it was acting in compliance with the Act. Given the absence of any language in the Act to guide employers in preparing notices, and the fact that the interim interpretive rules prepared by the [Department of Labor] were generally not known, it is clear the Company sought to comply [with] the WARN Act in a manner that appears to have been very reasonable in light of the then existing circumstances. Indeed, the Company unquestionably complied with the spirit of the WARN Act.\(^{372}\)

Based upon this analysis, the court granted the employer's motion for summary judgment in regards to the good faith defense.

The decision in *Shadyside Stamping* was followed in *Oil Workers International Union v. American Home Products Corp.*\(^{373}\) The defendant-employer in *American Home Products* closed a plant in Elkhart, Indiana. Fifty-six employees were laid off in February 1990 without advance notice.\(^{374}\) Another forty-one workers were laid off without notice in July 1990. At the time of these layoffs, the union and the employer were engaged in collective bargaining and the employer informed the union of its plans to close the Elkhart plant. To formally announce the closing, the employer gave notice to the union on November 1, 1990, advising that it planned to close the plant in phases by “late 1991.”\(^{375}\) It then conducted a series of small layoffs, beginning on November 16, 1990, and continuing until May 24, 1991, most with one week’s specific notice. The plant closed completely on November 1, 1991.\(^{376}\)

The district court in *American Home Products* first found that neither the February 1990 nor the July 1990 layoffs were part of the plant closing, accepting a company official's affidavit to this effect.\(^{377}\) The court also found that employees laid off in November and December 1990 were not entitled to WARN notice because they were recalled temporarily prior to their permanent layoffs in April 1991.\(^{378}\) For that reason, the employees suffered no “employment loss” until their April layoffs.\(^{379}\)

The court next considered the content of the WARN notice provided to the union. The court rejected arguments that the notice lacked details required by the regulations, except for notice of expected separa-
With respect to this issue, the district court held that simply advising the union of job groupings with the projected number of layoffs by calendar quarter did not satisfy the requirements of WARN. The court commented, "The most a worker could glean from the November 1 notice was that his or her job would be terminated sometime within an identifiable ninety-day period."

With respect to good faith, the court agreed with the employer that it was entitled to a complete good faith defense for any violation under section 5(a)(4). The district court rejected any evidence of employer bad faith in its overall conduct, limiting its good faith inquiry to evidence related to the employer's WARN compliance efforts. The court found the record demonstrated that the employer "did nothing to attempt to skirt its obligations under the WARN Act." In finding good faith, the court noted these factors: "The closing of the plant was announced a year in advance, and some workers learned of the quarter in which they would lose their jobs much more than sixty days in advance. Workers laid off too soon were rehired to avoid violation of the Act."

The American Home Products court recognized that the good faith provision found in section 5(a)(4) of WARN required not only good faith, but that the employer had reasonable grounds for believing that its conduct did not violate a WARN Act provision. The court found reasonable grounds for the employer's failure to provide better notice of the separation dates based upon a determination that the regulations were ambiguous as to an employer's obligation to provide successive notifications of any additional required information which was not available at the time notice had to be given. As in Shadyside, the court found that the Act's silence and the regulation's ambiguity combined to give the employer a complete good faith defense to WARN liability.

In contrast to the decisions in Shadyside Stamping and American Home Products, two other courts have rejected employer good faith arguments under section 5(a)(4). In Jones v. Kayser-Roth Hosiery, Inc., the employer's good faith defense was based upon its providing some notice of the plant's closing, keeping the plant open for much of the workforce for several months, granting severance pay to its employees, and making

380. Id. at 1449.
381. Id. at 1450-51.
382. Id. at 1451.
383. Id.
384. Id.
385. Id. at 1452.
386. Id.
387. Id. (citing 20 C.F.R. § 639.7(a)(4)).
388. Id.
its usual United Way contribution.\textsuperscript{390}

The court held that the employer's conduct after its WARN violations was not relevant to determining good faith under WARN.\textsuperscript{391} More importantly, the district court rejected the employer's argument that it gave notice within two days of the decision to close the plant.\textsuperscript{392} The court found the delay in giving WARN notices which occurred between the May 25, 1989 termination of the major customer's contract with the employer, and the customer's final rejection of the employer's plea to continue the contract on June 21, 1989, unreasonable.\textsuperscript{393} The court relied, in part, on the fact that the final regulations permit conditional notice based upon the best information available at the time notice is due.\textsuperscript{394} In view of the employer's failure to provide any notice at an earlier date, the court found no basis for reducing the employer's liability for good faith.\textsuperscript{395}

In \textit{United Steelworkers of America v. North Star Steel Company},\textsuperscript{396} the employer closed a steel plant without any notice, permanently laying off 270 of its employees. The employer did not seriously contest liability under WARN, but asserted that it was entitled to a reduction in the WARN penalty for good faith.\textsuperscript{397} In ruling on the good faith defense, the district court reviewed an affidavit supplied by the employer which stated that the plant was closed because of an electrical transformer failure and "poor market conditions."\textsuperscript{398} The court concluded that the employer's submission addressed the issue of good faith, but there was no showing that the employer had reasonable grounds to believe that giving no notice was not a violation of WARN.\textsuperscript{399} In view of this omission, the court rejected the employer's good faith defense.\textsuperscript{400}

The legislative history of section 5(a)(4) indicates that the courts in \textit{Jones} and \textit{North Star Steel} adopt the better approach. Section 5(a)(4) emerged from section 334(a)(5) of S. 538, the Senate bill which was ultimately included in H.R. 3 and vetoed by President Reagan.\textsuperscript{401} The language of section 334(a)(5) was identical in all relevant respects to language eventually adopted in section 5(a)(4) of WARN. The committee report, in discussing section 334(a)(5) states:

\begin{footnotes}
\item[390] \textit{Id.} at 1291.
\item[391] \textit{Id.}
\item[392] \textit{Id.} at 1292.
\item[393] \textit{Id.}
\item[394] \textit{Id.} at 1291 (citing 20 C.F.R. § 639.7(a)(4)).
\item[395] \textit{Id.}
\item[397] \textit{Id.} at 619-20.
\item[398] \textit{Id.} at 620.
\item[399] \textit{Id.} at 621.
\item[400] \textit{Id.}
\item[401] 1987 \textit{SENATE REPORT, supra} note 43, at 68-69, \textit{LEGISLATIVE HISTORY, supra} note 2, at 786-87.
\end{footnotes}
Although the Committee believes that, as reported, the duties created by the bill are clear and easily applied, section 334(a)(5) authorizes a court to reduce a penalty if an employer proves that he acted in complete good faith and with an objectively reasonable belief in the lawfulness of his action. This provision is modeled after section 11 of the Portal-to-Portal Act, 29 U.S.C. sec. 260 and is to be interpreted in accordance with the prevailing law under that section.\textsuperscript{402}

Section 11 of the Portal-to-Portal Act\textsuperscript{403} pertains to relief from liquidated damages in addition to back pay for unpaid wages.\textsuperscript{404} Its language regarding good faith is virtually identical to the good faith language in WARN.\textsuperscript{405} The case law under section 11 requires a stronger good faith showing than that applied by the courts in \textit{Shadyside Stamping} and \textit{American Home Products}.\textsuperscript{406}

Correspondingly, even if the good faith defense were properly applicable in \textit{Shadyside Stamping} and \textit{American Home Products}, the courts' utilization of the defense prior to finding liability is contrary to the literal language of section 5(a)(4).\textsuperscript{407} The practice under the Portal-to-Portal Act leads to the same conclusion, since the issue of relief from liquidated damages does not arise under section 11 until after a violation has been established.\textsuperscript{408}

There are a number of practical consequences to employing the

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\item \textsuperscript{402} 1987 \textit{Senate Report}, \textit{supra} note 43, at 24-25, \textit{Legislative History}, \textit{supra} note 2, at 742-43.
\item \textsuperscript{403} 29 U.S.C. § 260 (1988).
\item \textsuperscript{406} Under section 11 of the Portal-to-Portal Act, a good faith defense to liquidated damages requires that the employer prove both that it acted in good faith and reasonably. Mireles v. Frio Foods, Inc., 899 F.2d 1407, 1415 (5th Cir. 1990); Joiner v. City of Macon, 814 F.2d 1537, 1539 (11th Cir. 1987). Employer action in the face of knowledge of a potential Fair Labor Standards Act violation is an indication of a lack of good faith. Reeves v. International Tel. & Tel. Corp., 616 F.2d 1342, 1353 (5th Cir. 1980). Good faith requires an honest intent to ascertain the requirements of the statute and to act accordingly. Dybach v. Florida Dep't of Corrections, 924 F.2d 1562, 1566-67 (11th Cir. 1991); EEOC v. First Citizens Bank, 758 F.2d 397, 403 (9th Cir. 1985). \textit{See also}, the Department of Labor's regulations defining "good faith" and "reasonableness," 29 C.F.R. § 790.22(c) n.139 (1992), incorporating by reference 29 C.F.R. § 790.13-16 ("'Good faith' requires that the employer have honesty of intention and no knowledge of circumstances which ought to put him (sic) upon inquiry." 29 C.F.R. § 790.15(a) (1990)). While the employers in both \textit{Shadyside Stamping} and \textit{American Home Products} may have had subjective good faith, the courts failed to require any showing as to the employer's knowledge or lack of knowledge about WARN's requirements and their efforts to comply with WARN. Under section 11, the issuance of a regulation forecloses a good faith defense to an action taken contrary to the regulation. \textit{See} Joiner v. City of Macon, 814 F.2d at 1539.
\item \textsuperscript{407} Section 5(a)(4) begins, "If an employer which has violated this Act . . . ." 29 U.S.C. § 2104(a)(4) (1988).
\item \textsuperscript{408} \textit{See} 29 C.F.R. § 790.22(a) n.137 (1992).
\end{itemize}
\end{footnotesize}
good faith defense prior to liability determination. First, the court is required to make its good faith evaluation based upon the written record. As the court conceded in American Home Products, summary judgment is rarely used with issues of intent, such as those involved in a determination of good faith. Second, the plaintiffs are deprived of a jury trial, assuming that juries are available to WARN plaintiffs. Third, if anything other than a total reduction of a WARN penalty were permitted after a liability finding, the plaintiffs would still have a claim for attorneys' fees as a “prevailing party” under section 5(a)(6). In short, while employers may properly claim the good faith defense under section 5(a)(4), the courts should act cautiously before dismissing an entire WARN case on that basis.

G. WARN Enforcement Issues

Earlier versions of federal plant-closing legislation contemplated a variety of enforcement mechanisms. These included: the Federal Mediation and Conciliation Service, the Secretary of Labor, and an amendment to the National Labor Relations Act [NLRA] to make plant closings and permanent layoffs mandatory subjects of bargaining. The final legislation provides in section 5 for federal lawsuits to seek monetary penalties for workers and local governments deprived of notice.

WARN did not have a statute of limitations provision when enacted. In Wallace v. Detroit Coke Corp., Michigan’s six-year statute of limitations for cause of actions based on a breach of contract was adopted by the district court. Finding the state’s breach of contract statute most analogous to WARN suits, the court rejected the employer’s argument that the six-month statute of limitations under the NLRA was applicable.

409. 790 F. Supp. at 1451.
410. As of March 1993, no court had ruled on the jury trial question in a WARN case. However, an employer has a right to a jury trial on a claim for liquidated damages under the Fair Labor Standards Act. See McLaughlin v. Owens Plastering Co., 841 F.2d 299 (9th Cir. 1988); Borck v. Superior Care, Inc., 840 F.2d 1054 (2nd Cir. 1988); see also International Bhd. of Teamsters, Local 391 v. Terry, 494 U.S. 558 (1990) (right to trial by jury in duty of fair representation case).
411. See Texas State Teachers Ass'n v. Garland Indep. Sch. Dist., 489 U.S. 782, 792 (1989) (only in case of a “purely technical or de minimus” success can a party be denied prevailing party status).
414. 1987 HOUSE REPORT, supra note 2, at 6, LEGISLATIVE HISTORY, supra note 2, at 590.
417. Id. at 518. The NLRA’s statute of limitations is codified at 29 U.S.C. § 160(b) (1988).
In *United Magazine Co.*, the district court adopted the six-month statute of limitations period of the NLRA. The district court recognized and discussed the conflicting cases on whether to borrow a state or federal statute of limitations, and ultimately determined that the NLRA limitations period was most analogous to WARN. Given the legislative history's references to the Fair Labor Standards Act, the court's analogy to the six-month NLRA statute of limitations is misplaced. Under the NLRA, a simple charge filed within six months of accrual initiates an administrative investigation. In contrast, WARN involves no administrative enforcement mechanism. Instead, as the cases discussed demonstrate, starting a WARN case can involve determining the proper parties to sue, the exact numbers of employees at a site, and other complex issues. The district court in *United Magazine Co.* failed to weigh these factors when it adopted a six-month statute of limitations.

The most significant issue concerning WARN remedies involves the calculation of WARN financial penalties under section 5. This provision makes employers liable to aggrieved employees for a penalty amount calculated as the back pay for each day of violation, as well as any lost fringe benefits, including medical costs. The Act permits the offset of some employer payments to its employees.

Section 5(a) of WARN originated as section 334 of S. 538. The Senate report analogizes the WARN financial penalties with the liquidated damages provision of the Portal-to-Portal Act. The report stated:

Section 334 provides for civil damage actions to enforce the provisions of this Part. For violations of the notice provisions, damages are to be measured by the wages and fringe benefits (including reimbursement for medical expenses) the employee would have received had the plant remained open or the layoff been deferred until the conclusion of the notice period, less any wages or fringe benefits received from the violating employer during that period. This is in effect a liquidated damages provision, designed to penalize the wrongdoing employer, deter future violations, and facilitate simplified damages proceedings.

Even with clarification from the legislative history, the WARN penalty provisions are far from clear and not easily applied.

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419. *Id.* at 191.
421. See KENNETH C. McGUINESS & JEFFREY A. NORRIS, HOW TO TAKE A CASE BEFORE THE NLRB 284-300 (3rd ed. 1986).
423. *Id.* § 2104(a)(2).
424. 1987 SENATE REPORT, supra note 43, at 68, LEGISLATIVE HISTORY, supra note 2, at 786.
The opinions in *Carpenters District Council v. Dillard Department Stores, Inc.* grappled with a number of issues under WARN’s penalty provisions. In its first opinion, the district court in *Dillard* ruled that the WARN penalty provision was not a back pay provision in the usual sense of back pay. As mentioned, the employer in *Dillard* had provided a payment to its employees based upon its calculation of WARN penalties. The employer essentially converted the sixty-day notice requirement into eight one-week pay periods. It then paid each employee one week’s pay for each week the employee did not receive advance notice.

The employer defended its calculation method, stating that it compensated its employees for the actual number of days they would have worked during the violation period. The court rejected this argument, holding that the language of section 5(a)(1)(A) that an employer shall be liable “for back pay for each day of violation” was dispositive. Rather than days of work over the penalty period, the court ruled the employer was liable for up to sixty days of back pay.

The district court in *Dillard* also considered whether the employer was entitled to credit for its payment of severance and vacation pay to its employees. Section 5(a)(2)(B) permits an employer to reduce its WARN liability by the amount of any “voluntary and unconditional payment by the employer to the employee that is not required by any legal obligation.” The court disallowed credit for the severance payments because they were required by the Employee Retirement Income Security Act (ERISA). The court similarly denied the employer credit for the payment of accrued vacation, finding that these payments were required by a Louisiana wage payment statute.

In its second opinion, the court in *Dillard* had to determine the period for which it would award damages in cases where the employees received conditional notices providing less than sixty days’ advance notice. This presented a difficult issue concerning the calculation of WARN penalties.

The employer had provided conditional written notice containing two possible layoff dates to some employees. In some cases, the employees had sixty days’ actual advance notice by the time of their second

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428. Id. at 308.
429. Id.
430. Id.
433. Id. at 309-11.
436. Id. at 311.
437. Id. at 312.
notice date, and their date of layoff was more than sixty days after they had received the conditional notice.\(^{438}\) Still, the court held that a notice which sets the earliest date of termination less than sixty days from the date of notice, "by its very terms, fails to meet the requirements of the Act."\(^{439}\) Accordingly, the court calculated the penalty period by crediting the employer for the days between the date of receipt and the first date upon which the employee was told that he or she would be terminated. Penalties were then calculated from the first date of termination in the conditional notice to the employee's actual date of termination.\(^{440}\)

The court also ruled that provisions in the final regulations pertaining to a fourteen-day period within which a noticed layoff can occur\(^{441}\) were inapplicable in the case of the conditional notices before it, since these regulations require at least sixty days between the receipt of notice and the first day of the fourteen-day period.\(^{442}\)

In a later clarification,\(^{443}\) the court held that employees who received two notices, with the second notice having a later termination date than the first notice, were entitled to a penalty based on the number of days between the date of termination in the earliest notice and the date which the employee was actually terminated.\(^{444}\) Conversely, the employer was credited for notice for the days between the receipt of the first notice and the earliest termination date reflected in that notice.\(^{445}\) Consistent with its ruling on the conditional notices, the court held that the employer could not avail itself of the provisions in the final regulations permitting an employer to extend a prior notice.\(^{446}\)

The \textit{Dillard} court cautioned that crediting the employer for any notice provided in the subsequent notices would permit an employer to circumvent the notice requirements of the Act.\(^{447}\) Permitting an employer to benefit from added periods of notice in later extensions, noted the court, would reduce an employer's liability even though the employee never received the required sixty-day advance notice.\(^{448}\)

The court in \textit{Dillard} also awarded prejudgment interest.\(^{449}\) The defendants contended that section 5(b), which states that WARN's reme-

\(^{438}\) \textit{Id.}
\(^{439}\) \textit{Id.} (footnote omitted). Section 3(a) requires that an employer "shall not order a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice of such an order." 29 U.S.C. § 2101(a).
\(^{440}\) 778 F. Supp. at 312.
\(^{441}\) 20 C.F.R. § 639.7(b) (1992).
\(^{442}\) 778 F. Supp. at 312 n.16.
\(^{444}\) \textit{Id.} at 663.
\(^{445}\) \textit{Id.}
\(^{446}\) \textit{Id.} The regulations referred to are codified at 20 C.F.R. § 639.10.
\(^{447}\) \textit{Id.} at 672 n.33.
\(^{448}\) \textit{Id.}
\(^{449}\) \textit{Id.} at 675.
dies "shall be the exclusive remedies for any violation of this Act," bar­red an award of prejudgment interest under section 1961 of the Judicial Code. The court held that section 6 of WARN which provides that the "rights and remedies provided to employees by this Act are in addi­tion to, and not in lieu of, any other . . . statutory rights and reme­dies of the employees," demonstrated that Congress did not clearly preclude awards of prejudgment interest in WARN cases.

In Jones v. Kayser-Roth Hosiery, Inc., the court also reached a number of WARN remedy issues. First, the court held that the employer was entitled to reduce its WARN liability by the four weeks of severance pay given to each employee upon termination. The amounts were not required by any statute, contract, plan, or employee manual, for either the hourly or salaried employees, and were, therefore, properly offset under section 5(a)(2)(B).

The court in Jones next considered the meaning of "benefits" in section 5(a)(1), which imposes liability on employers for "benefits under an [ERISA] employee benefit plan." The employer argued this pen­alty provision made it liable only for any medical costs incurred by the plaintiffs in the violation period. In contrast, the plaintiffs contended that this provision entitled all plaintiffs to the greater of (1) the em­ployer's cost of providing benefits to the employee, or (2) the benefits payable for a covered medical expense, death, or other incident during the violation period.

The court analyzed the issue by examining a Fourth Circuit Court of Appeals case concerning damages for lost insurance under the Age Discrimination in Employment Act [ADEA]. The court began with the premise that the intent of WARN's penalty provisions was to make the employees whole. In determining the proper valuation for the lost benefits, the court reasoned that the proceeds of the insurance were not a proper measure of damages. Instead, the court determined that the value of the benefits was the amount of premiums due for the violation period,

450. 29 U.S.C. § 2104(b).
451. 28 U.S.C. § 1961 (1988). This section provides for the payment of interest "on any money judgment in a civil case recovered in a district court." Id.
452. 29 U.S.C. § 2105.
453. 790 F. Supp. at 674.
455. Id. at 1276.
456. Id.
457. Id. at 1289-91.
459. 748 F. Supp. at 1289.
460. Farris v. Lynchburg Foundry, 769 F.2d 958 (4th Cir. 1985).
462. 748 F. Supp. at 1290.
along with reimbursement for any medical expenses incurred.  In a subsequent opinion, the court included the value of disability benefits, as well as the other fringe benefits.

In another opinion, the court in United Steelworkers v. North Star Steel Co. agreed with the result in Dillard that WARN's penalty provisions provide for sixty calendar days of pay, rather than the wages the employee would have normally earned in the working days falling within a sixty-day period. The court also awarded prejudgment interest.

In a few cases, state unemployment insurance agencies have reduced unemployment compensation benefits to workers when their employers have made WARN penalty payments to them. For example, in a case involving the closing of the Arkansas Gazette, the Arkansas Employment Security Department ruled that voluntary payments calculated by the employer as satisfying its WARN obligations should be offset against the first eight weeks of unemployment compensation. In California, Governor Pete Wilson vetoed a bill designated to prevent the offset of WARN payments from unemployment compensation benefits in September 1991. In a third situation, the Arizona Court of Appeals held that the Arizona statute and regulations defining wages did not require the offset of unemployment compensation benefits. These three illustrations show that the result will vary according to the treatment of WARN payments by each state's unemployment compensation law.

It is inappropriate to offset WARN penalties against other statutory benefits which have a different statutory purpose. In the case of unemployment compensation, the purpose is to provide a prompt partial wage replacement to unemployed workers. In the case of WARN, the penalties were designed to encourage employer compliance with WARN, deter future violations, and simplify damage computations. Permitting states to offset WARN penalties from unemployment compensation benefits defeats the purposes of both WARN and the unemployment compensation program.

463. Id. at 1290-91.
466. Id. at 8.
467. Id. at 9.
Evaluating WARN in Practice

Despite the depth of opposition to WARN, its implementation has not been a dramatic event in labor law. Clearly the predicted flood of litigation has not occurred. Examining the judicial response to WARN is only one way to gauge its success or failure. Given the relatively short time since WARN's enactment and the small number of reported cases, other sources of information concerning WARN's implementation provide a more complete picture.

The most significant overall evaluation of WARN is the February 1993 report of the General Accounting Office [GAO]. GAO's report evaluated 1990 data from the Bureau of Labor Statistics' Mass Layoff Statistics Program which was then matched with WARN notices provided to state dislocated worker units. Due to data limitations, GAO was unable to fully evaluate layoffs for employer compliance with WARN. Still, the GAO found that no WARN notice was given to the dislocated worker units in 54% of the closures which appeared to meet WARN criteria. GAO also evaluated 650 layoffs affecting fifty or more workers at firms with 100 or more employees. GAO found that

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473. See WARN Law's Impact Limited, DAILY LABOR REP. (BNA) No. 64, at C-1 (Apr. 3, 1990) (calling WARN's impact on business a "non-event"); Randall Samborn, A Fizzling Time Bomb, 12 NAT'L L.J. 1, 1 (Jan. 22, 1990) (noting only a dozen cases filed under WARN in its first year).

474. See, e.g., the remarks of Senator Hatch, the ranking Republican member of the Committee on Labor and Human Resources:

So do not keep referring to this as a simple plant closing bill which, in all equity and fairness, ought to be enacted. This is a complex plant closing and layoff bill that will interfere with business' right to exist and will stultify the growth of business in this country and probably bankrupt a lot of business in this country, certainly small businesses. They do not have the capacity to fight these lawsuits that will rise at every time. Labor lawyers are going to be the principal beneficiaries of this legislation, especially union labor lawyers and plaintiff labor lawyers.


Senator Quayle, another strong opponent of WARN, stated:

[This bill] will have tremendous adverse impact on litigation and costly jury trials for American companies who are trying to lay off workers in response to market conditions.

Every notification for layoffs will be an opportunity to get money from the employer's deep pockets.

134 CONG. REC. S4900 (daily ed. April 27, 1988), LEGISLATIVE HISTORY, supra note 2, at 532.

475. According to this author's count, there were 23 cases involving WARN provisions reported during the first four years of its enactment. The General Accounting Office [GAO] has attempted to identify all reported and unreported WARN cases filed to date. GAO found that 66 WARN cases were filed between its enactment and December 1992. 1993 GAO REPORT, supra note 68, at 54-61.

476. 1993 GAO REPORT, supra note 68.

477. Id. at 16-19. Section 3(a)(2) requires employers to give 60-days' advance notice to the dislocated worker unit of the state in which the plant closing or mass layoff occurs. 29 U.S.C. § 2102(a)(2) (1988).

478. The data base did not track layoff events long enough to enable GAO to determine whether WARN was implicated in a particular layoff. 1993 GAO REPORT, supra note 68, at 38.

479. Id. at 24.
64% (415 layoffs) were exempt under WARN. Of the exempt layoffs, about 76% were exempt due to the one-third requirement in the mass layoff definition. Layoffs accounted for 81% of the total number of the "events" analyzed by GAO, and 98% of the events were found to be exempt from WARN.

GAO reported only sixty-six lawsuits filed under WARN. Given its findings of large numbers of closures and layoffs for which no advance notice was provided, GAO suggested that Congress consider giving the Labor Department a WARN enforcement role.

Some observers have cast doubt on the efficacy of private federal lawsuits in enforcing WARN. These observers believe that the lack of WARN litigation is due to a lack of effective enforcement, rather than widespread employer compliance with WARN. The Sugar Law Center in Detroit, Michigan serves as a national clearinghouse on WARN litigation and supports efforts by workers and unions to pursue WARN enforcement. Its director made these observations concerning WARN's enforcement mechanism in public testimony:

[B]ecause the law does not provide for any governmental enforcement, reporting or oversight requirements, there is no way of knowing who is complying with the law and who is not. In addition, many workers have not even been made aware of the existence of the WARN Act, because there has been little or no concerted effort by the government to educate working people about their rights under this law. Consequently, these workers either do not know their WARN rights or do not know how to apply them when they do. . . . [B]ecause the only WARN Act remedy is the filing of a private civil action, many working people are deterred by the scarcity of lawyers who are willing to take these cases on, by the costs involved with litigation, by the extremely limited relief afforded under the Act and by the fact that it takes upward of two years, or longer, to litigate a case in court.

Professor John Portz, a political scientist at Northeastern University has studied WARN's implementation. He has concluded that difficulties for workers in litigating cases has limited WARN's enforcement:

In addition to costs, the courtroom is not familiar terrain for most workers. While the interest of attorneys could be sparked by class action suits and the ability to recover costs as part of the judgment, this is a new area of the law unfamiliar to many in the profession. In addition, the task of collecting awards from economically faltering companies could also dis-

480. Id. at 21.
481. Id. at 5.
482. Id. at 33. Interestingly, the Labor Department concurred with GAO's conclusions regarding the inadequacy of WARN enforcement, but demurred on the issue of whether the Department should assume an enforcement role. Id. at 37, 65-66.
courage interest by the legal profession. 484

The Federation for Industrial Retention and Renewal [FIRR] is a coalition of about twenty-five local job retention groups based in Chicago. FIRR has issued three "Plant Closing Dirty Dozen" lists. 485 The "dirty dozen" lists present evidence that, at least in these selected cases, significant shutdowns without adequate advance notice have continued despite the passage of WARN. Based upon its member groups' contacts with state dislocated worker units, FIRR does not believe the lack of WARN cases indicates a high rate of employer compliance. 486 FIRR and its member groups played an active role in the passage of WARN and FIRR's views are entitled to some weight in evaluating WARN's effectiveness.

The percentage of WARN cases in which unions assist the plaintiffs or act as plaintiffs is much higher than the percentage of the workforce which is unionized. 487 This supports a conclusion that lack of knowledge about WARN and a lack of resources to pursue litigation is a reason for the low number of WARN cases.

The contrasting school of thought finds the lack of cases an encouraging sign. An article reviewing the first two years of WARN concluded:

The general consensus among representatives of business and labor has been that employers are generally complying with the Act, but they do report that complying with WARN has been confusing. Most employers do not know whether they are subject to WARN, so over-compliance is common. 488

In light of the GAO report, claims of employer over-compliance are unwarranted.


487. Of the 23 reported cases discussed in this article, 13 involved a labor union as a plaintiff. In 1992, only 15.8% of the total workforce was unionized. Proportion of Union Members Declines to Low of 15.8 Percent, DAILY LAB. REP. (BNA) No. 25, at B-3 (Feb. 9, 1993).

488. T.S. Lough, Warn: The Rights, Duties, and Obligations of Employers, Employees, and Unions, 42 LAB. L.J. 285, 294 (1991); see also, Samborn, supra note 473, at 31 (reporting that the California Employment Development Department found that 16% of the WARN notices it received in the first nine months of WARN's operation were not required by statute). Interestingly, the managers of large firms still apparently fear the effects of advance notification based on grounds cited by WARN's opponents. See Terry H. Wagar, The Warn Act and Perceptions of Managers Concerning the Effect of Providing Advance Notice, 43 LAB. L.J. 588, 590-92 (1992). Professor Wagar's survey failed to ask managers if they had actually experienced any problems with WARN notification. Instead, it asked them their opinions about potential problems with WARN notice. Id.
There is no question that WARN, despite its limitations, has resulted in more workers getting notice prior to separation from employment. Professor Portz reports that there were 2608 WARN notices in the first program year (July 1, 1989 to June 30, 1990) and 2932 WARN notices in the second program year (July 1, 1990 to June 30, 1991). This is a considerable volume of notices. GAO estimated that 29% of employers with an event affecting 250 or more employees gave notice in 1990, as compared to the estimated 11-18% of employers in 1987.

There has been little evidence supporting the dire predictions of WARN's opponents, despite the fact that over 5000 WARN notices have been issued since the enactment of WARN. The GAO report included survey data in which employers responded to questions regarding the costs and consequences of WARN compliance. Sixty-one percent of the employers reported compliance costs under $500, 10% stated their costs fell between $500 and $999, and 29% claimed WARN compliance costs of over $1000.

GAO stated that 29% of the employers surveyed had experienced some loss of productivity after notice was given. GAO's report on this point is the first employer survey to confirm employer claims of lost productivity. This finding merits further scrutiny, since it is contrary to reports in other countries, anecdotal evidence reported in the United States prior to WARN, and economic studies in the United States since the enactment of WARN.

Labor economists have examined the impact of advance notice on workers in a number of studies which have some relevance to assessing WARN. Using the Bureau of Labor Statistics' displaced worker surveys, several of these studies have attempted to statistically estimate the benefits of advance notice in terms of either shorter periods

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489. See Portz, supra note 484, at 3. Professor Portz compared WARN data from 35 responding states in his survey to Bureau of Labor Statistics' figures regarding "layoff events." He found that the number of notices compared to layoff events were suggestive of a low level of WARN compliance. Since the BLS definition of a "layoff event" is more expansive than the WARN definitions of plant closings and mass layoffs, Professor Portz recommended additional research before more definite conclusions can be drawn. Id. at 5.

490. 1993 GAO REPORT, supra note 68, at 36.

491. The opponents of WARN repeatedly cited a study by Robert R. Nathan Associates, Inc. which predicted additional costs of $1 to $2 billion per year in complying with mandatory notice legislation, including $850 million in penalties. See 134 CONG. REC. S8850 (daily ed. July 6, 1988), LEGISLATIVE HISTORY, supra note 2, at 392 (remarks of Sen. Hatch). In the event that legislation is introduced to strengthen WARN, some opponents may regret statements which seem exaggerated in light of actual events.

492. 1993 GAO REPORT, supra note 68, at 33-34. GAO's survey did not determine the range of compliance costs within the three cost categories.

493. Id. at 34.

494. For a recent review of this research, see John Portz, Plant Closings, Mass Layoffs and Advance Notice Laws: Putting the Pieces Together (paper presented to the American Political Science Association Annual Meeting, Chicago, IL, Sept. 1992).
of unemployment after dislocation or reductions in earnings loss following worker dislocations.

Most of these studies suffer shortcomings as evaluative tools. First, the survey periods used for all but BLS' 1990 survey took place before the effective date of WARN. Second, the surveys counted as "advance notice" any notice at all, regardless of its duration. Third, the 1984 and 1986 surveys asked workers only if they had advance notice of their job loss or if they expected to be laid off. Despite these limitations, most of these earlier studies have found some benefits flowing to workers from advance notice. Principally, advance notice increases the likelihood that employees can find work prior to their date of displacement.

Based on the 1988 and the 1990 BLS surveys, more recent studies find a statistically significant relationship between advance notice and the avoidance of unemployment. A survey of workers in Pennsylvania affected by two plant closings in the early 1980's found that workers at the plant where four months of advance notice was provided suffered shorter periods of unemployment after the closing, had lower unemployment and poverty rates three years later, and had less usage of social welfare services than workers who got only seven-days' advance notice at a nearby plant. A study of Maine's plant closing law over its first decade of operation found that advance notice had a significant effect in reducing


496. Ehrenberg & Jakubson, supra note 15, at 68; Addison & Portugal, supra note 495, at 5; Portz, supra note 494, at 8.

497. Ehrenberg & Jakubson, supra note 15, at 68; Addison & Portugal, supra note 495, at 5; Portz, supra note 494, at 8.

498. Portz, supra note 494, at 7-13; see also John T. Addison & Pedro Portugal, Advance Notice and Unemployment: New Evidence from the 1988 Displaced Worker Survey, 45 INDUS. & LAB. REL. REV. 645 (1992); John T. Addison, The Impact of Advance Notice: A Comment on a Study by Nord and Ting, 45 INDUS. & LAB. REL. REV. 665 (1992); Stephen Nord & Yuan Ting, The Impact of Advance Notice: A Rejoinder, 45 INDUS. & LAB. REL. REV. 674 (1992); Christopher Ruhm, Advance Notice and Postdisplacement Joblessness, 10 J. OF LAB. ECON. 1 (1992); Stephen Nord & Yuan Ting, The Impact of Advance Notice of Plant Closings on Earnings and the Probability of Unemployment, 44 INDUS. & LAB. REL. REV. 681 (1991). These studies, however, find a weak or non-existent role for advance notice in shortening the duration of unemployment. One potential explanation for the lack of a strong measured effect on the duration of unemployment may be that longer periods of advance notice are associated with worker adjustment efforts which require a period of unemployment in order to complete the adjustment. As a result, workers may experience a longer period of unemployment in order to take training or engage in an extended job search for work in a more promising field.

overall unemployment in local areas impacted by the closings. Con-500 tradicting GAO's employer survey, labor economists have not found evi-
dence that advance notice causes more productive workers to leave, or reduces the productivity of remaining workers.501

In summary, labor economists have not yet closely studied the actual economic impact of WARN. Studies of displaced worker surveys, however, have shown that advance notice assists workers in finding new work before displacement.

VI
RECOMMENDED LEGISLATIVE CHANGES IN WARN

Based upon the survey of WARN cases, and studies concerning the operation of WARN, some legislative modifications deserve consideration. This article is limited to suggestions related to WARN as an advance notice and worker adjustment law. Broader legislative programs related to stopping or limiting plant closures are beyond the scope of this discussion.

Advocates of plant closing legislation have already made a number of proposed improvements of WARN. Professor Portz' survey found that the short period of advance notice, the lack of a WARN enforcement mechanism, and the low financial penalties were seen as significant problems by state dislocated worker units.502 He also received a number of specific comments from state dislocated worker units indicating that WARN penalties were inadequate to ensure compliance and that enforcement through private lawsuits was unsatisfactory.503 The Sugar Law Project likewise points to the lack of governmental enforcement as a significant limitation.504 The project proposes giving the Labor Department investigative, subpoena, and enforcement authority, and advocates the reduction of WARN thresholds to protect additional workers.505 Keeping these broad criticisms in mind, specific legislative recommendations follow.

A. Longer Advance Notice Period

Most worker advocates would like to see a longer period of advance

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502. Portz, supra note 494, at 15.
503. Id.; see also John Portz, Summary of Survey Results, Part V: Overall Assessment and Possible Changes (paper prepared for Northeastern University, Political Science Dep't, undated) (copy on file with the author). One commentator stated, “Most dislocated workers cannot afford the legal expenses involved in pursuing an action against an employer.” Id.
504. American Jobs Protection Act Hearings, supra note 483, at 111-12, 118 (statement of Julie H. Hurwitz, Executive Director of the Sugar Law Project).
505. Id.
notice. For example, the director of northern Indiana's Calumet Project for Industrial Jobs, has written:

[S]ixty days does not give enough lead time to do much of anything about a closure. At least six months advance warning would be needed for communities, union locals, or workers wishing to mount a counter strategy. And, finally, sixty days is not even enough time for most workers to find alternative employment or for communities to adjust their tax base and social service system.506

Even if some of these reasons for longer notice, namely those unrelated to worker adjustment, are politically unacceptable to some, a strong argument for a longer period of notice can be advanced. The Office of Technology Assessment, for example, found that two to four months advance notice was needed to provide full adjustment assistance to dislocated workers.507

Lengthening the advance notice period to at least 120 days (i.e., four months) would be advisable. Given the faltering business and unforeseeable business circumstances exceptions, shorter notice periods are permitted under WARN when employers must engage in mass layoffs or plant closings and cannot provide a longer period of advance notice. To date, WARN seems to have proven workable for many employers, and most advocates strongly believe that longer advance notice will prove more beneficial to workers. An alternative to extending WARN’s advance notice period for all employers is to require a longer notice period for larger employment losses, as originally proposed in S. 538 and H.R. 1122.508 Another alternative is making the advance notification period longer, but leaving intact the sixty-day limit on WARN’s financial penalties.

B. Expand WARN Coverage of Employers

The current WARN definition of an “employer,” which requires 100 full-time employees, excludes a great number of workplaces.509 Lowering the number of employees required for WARN coverage to fifty would increase the number of workers entitled to advance notice of dislocation. While adding further complexity to WARN, lower thresholds covering smaller employers might be coupled with a shorter notice period. For example, if WARN coverage were lowered to firms with fifty employees,

506. Feekin & Nissen, supra note 15, at 21; see also American Jobs Protection Act Hearings, supra note 483, at 10 (statement of Julie H. Hurwitz, Executive Director of the Sugar Law Project).
507. 1987 HOUSE REPORT, supra note 2, at 13, LEGISLATIVE HISTORY, supra note 2, at 597.
508. See supra notes 42-45 and accompanying text.
509. About 98% of companies employ less than 100 workers, with these workers comprising 55% of the overall workforce. GENERAL ACCOUNTING OFFICE, DISLOCATED WORKERS: IMPLEMENTATION OF THE WORKER ADJUSTMENT AND RETRAINING NOTIFICATION ACT 2 n.1 (Feb. 23, 1993) (statement of Linda G. Morra, Subcommittee on Labor, Committee on Labor and Human Resources, U.S. Senate).
advance notice of sixty or forty-five days could be permitted for these smaller employers, while longer advance notice periods would apply to larger employers.

**C. Modify Mass Layoff and Plant Closing Thresholds**

Most observers sympathetic to WARN, including the Sugar Law Project and some state dislocated worker units, believe that the one-third requirement for mass layoffs excludes a large number of potentially covered layoffs from WARN coverage. As noted earlier, the GAO found that 64% of the layoffs it surveyed were exempt from WARN. The one-third requirement of section 2(a)(3) provided about 76% of these exemptions. GAO also found that the one-third requirement provided most of the exemptions for those cases involving layoffs of 250 employees or more. In light of these findings, the repeal or reduction of the one-third requirement is warranted.

The cases surveyed and the comments of advocates indicate that some further modifications of WARN thresholds are in order. For instance, requiring that job losses all occur at a “single site of employment” creates a loophole. As the Sea-Land case indicates, an employer with workers at a number of single sites of employment can create a significant job loss without implicating WARN. A case reported on FIRR's “dirty dozen” list involving Emery Worldwide Delivery illustrates another result of the single site limits on WARN's definitions of plant closings and mass layoffs. In the case of Emery, over one thousand workers at a number of job sites around the country lost their jobs on the same day, without advance notice. WARN did not apply because no single site (except, perhaps Pittsburgh) had over fifty workers.

The Solberg case represents a related limitation on WARN coverage. In this case, over three hundred full-time employees were laid off without notice because they met section 2(a)(8)'s definition of part-time employees. Section 4(1) already excludes temporary workers and facilities from WARN’s protection. Thus, it is unnecessary to have a separate exclusion for “part-time” employees who have worked fewer than six out of the twelve preceding months.

Congress could partially address these threshold problems by requiring advance notice when the job loss for multi-site employer reaches a certain level. For example, Congress could declare that any layoff of 500 or more employees in a thirty-day period, 750 employees in a sixty-

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511. Id. at 22.
513. See FIRR, 2ND ANNUAL LIST, supra note 485, at 2.
514. Id.
day period, or 1000 or more employees in a ninety-day period was cov-
ered by WARN. This would create a third category of covered employ-
ment losses under WARN, in addition to plant closings and mass layoffs.
The current WARN exceptions and exemptions would apply to shorten or excuse the period of advance notice in these cases.

D. Department of Labor Enforcement Role

The Sugar Law Project, the Calumet Project, and Professor Portz’
survey all point to lack of governmental enforcement as a significant limi-
tation. The Fair Labor Standards Act (FLSA) enforcement system offers
a good model for congressional consideration. Under FLSA, aggrieved
workers can file wage and hour claims with the Labor Department. The
Department can pursue this administratively or through the federal
courts. In addition, individuals or groups also have a private right of
action to seek FLSA enforcement in the courts.

To date, no local government entity has sought to enforce the civil
penalty provision of section 5(a)(3). Apparently, most local governments
find WARN penalties politically unpalatable.515 Governmental enforce-
ment of WARN is an essential reform. The FLSA system preserves a
role for private litigation while giving workers unable to find or afford
counsel a way to vindicate their WARN rights.

Since in many cases workers or unions with a knowledge of WARN
are faced with ambiguous factual situations involving potential WARN
violations, the Labor Department and/or state dislocated worker units
should be authorized and funded to investigate potential WARN Act vio-
lations. If WARN violations are disclosed, the agency should attempt to
administratively collect the WARN penalty. Short of compliance, litiga-
tion would then be available, either by the workers or their unions, or, in
their absence, by the Labor Department or the state dislocated worker
unit.

E. Improve Section 3(d)

Section 3(d) of WARN516 was designed to prevent employers from
avoiding WARN notice by stretching out layoffs over a period longer
than thirty days.517 However, the courts in Jones v. Kayser-Roth Hosiery,
Inc.518 and United Electrical Workers v. Maxim, Inc.519 held that section
3(d) by its terms only permits the aggregation of employment losses
when “each . . . is less than the minimum number of employees” required

517. CONFERENCE REPORT, supra note 4, at 1050, LEGISLATIVE HISTORY, supra note 2, at 576.
by the WARN thresholds.\textsuperscript{520} In practice, this means that workers involved in a series of employment losses, any one of which meets the WARN threshold for a plant closing or mass layoff, are excluded from WARN's advance notice requirement, unless their job loss occurs as part of the event exceeding the WARN threshold. This defeats the purpose of section 3(d), which was to permit the aggregation of employment losses within a ninety-day period, "unless the employer demonstrates that the employment losses are the result of separate and distinct actions and causes."\textsuperscript{521} To address this defect, an amendment is needed to provide section 3(d) coverage for all employment losses within a ninety-day period, unless separate causation is shown.

\textbf{F. Repeal or Modify the Good-Faith Exception}

Another obvious candidate for legislative amendment, and preferably elimination, is section 5(a)(4). This section permits a court to reduce an employer's WARN liability upon a showing that the violation "was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation."\textsuperscript{522} The courts in \textit{American Home Products}\textsuperscript{523} and \textit{Shadyside Stamping},\textsuperscript{524} used findings of good faith, which are questionable in light of the legislative history, to relieve employers of liability for fairly evident, if technical, WARN violations.\textsuperscript{525}

Employers already have a number of limits on their potential WARN liability. These include exceptions and exemptions to notice, the sixty day limit on liability, the option to reduce the WARN penalty by voluntary severance or other payments to the employee (or on behalf of the employee to third parties), and the opportunity to avoid the local government civil penalty by paying the WARN penalty to employees within three weeks of the shutdown or layoff order.\textsuperscript{526} In addition, the final regulations furnish a fourteen-day flexibility in terms of the date of the announced employment loss,\textsuperscript{527} permit conditional notice in cases of uncertainty,\textsuperscript{528} and state that minor, inadvertent errors are not a basis for finding a WARN violation.\textsuperscript{529} Given all these provisions allowing emp-

\textsuperscript{520} \textit{Jones}, 748 F. Supp. at 1284; \textit{Maxim}, 5 Indiv. Empl. Rts. Cas. (BNA) at 631.
\textsuperscript{522} \textit{Id.} § 2104(a)(4).
\textsuperscript{526} 29 U.S.C. § 2104(a)(1), (2)(B), (2)(C), (3).
\textsuperscript{527} 20 C.F.R. § 639.7(b) (1992).
\textsuperscript{528} \textit{Id.} § 639.7(a)(3).
\textsuperscript{529} \textit{Id.} § 639.7(a)(4).
employers to avoid liability, the need for the good faith provision is highly questionable.

Moreover, in Portal-to-Portal cases, the good faith finding only permits an employer to avoid liquidated damages in addition to its back pay liability. In contrast, WARN's penalties are limited to back pay for sixty days and modest civil penalties, and a good faith determination results in complete relief from these penalties. Given the limited scope of WARN's penalties, the good faith provision should be repealed.

If Congress retains a good faith provision, it should clarify that a court can reach the good faith issue only after it has determined the WARN liability issues, and that any reduction must be based upon specific findings of good faith, as in the Portal-to-Portal Pay Act cases. In addition to specific findings of good faith, something more should be required before employers can completely escape WARN's penalties. For example, good faith could be combined with economic hardship on the part of the employer or unusual circumstances in order to justify a reduction in WARN penalties. Given the relatively low levels of existing WARN penalties, Congress should limit the scope of any good faith provision to no more than half the WARN penalty otherwise due. Alternatively, as in the Fair Labor Standards Act [FLSA] cases, the good faith determination under WARN could be relevant to avoiding an enhanced WARN penalty, such as double back pay, but not to avoiding financial liability entirely.

G. Enhance WARN Remedies

Under the FLSA, an employer is liable for double back pay, unless good faith and reasonableness are shown. Given the evidence that WARN is commonly disregarded, a similar enhancement of WARN's financial penalties should be considered.

Moreover, the United Magazine Co. case shows the need for Congress to adopt a statute of limitations. The FLSA statute of limitations is two years, with three years to file in the case of a willful violation. The most analogous state statutes of limitations are limitations periods for causes of action based on breaches of contracts, usually a period of a
few years in duration. In 1990, Congress established a uniform statute of limitations of four years for all statutory causes of action which were not specifically controlled by another statute. WARN suits should have adequate time in which to accrue, be investigated, and be filed. Both the analogous state statutes and the more recent uniform, federal limitations period indicate that a period of roughly four years should be provided for WARN suits.

A third shortcoming of WARN's remedies, the offset of WARN payments from unemployment compensation, likewise merits a legislative solution. Congress should amend WARN to provide that any WARN payment, voluntary or otherwise, does not offset other statutory benefits to which the affected workers are entitled.

**H. Increase Worker and Employer Information on WARN**

Employer compliance with WARN should improve with greater knowledge and acceptance of the statute. While the Labor Department advised GAO that it has attempted to provide information on WARN and respond to telephone inquiries, many employers told GAO they remained uninformed about WARN's provisions. In addition, state dislocated worker units have attempted to educate employers. In both cases, Congress did not fund these efforts by the Labor Department and state dislocated worker units. A modest appropriation to fund these federal and state activities is advisable. In addition, similar activities should be undertaken to better advise unions and workers about WARN.

**CONCLUSION**

Regardless of which school of thought regarding employer compliance with WARN is correct, the modest WARN changes recommended here should be adopted. If, as their supporters claim, employers are widely complying with WARN requirements, there is little to be lost by having WARN more vigorously enforced against those employers violat-

DelCostello v. International Bhd. of Teamsters, 462 U.S. 151 (1983), and applied the NLRA's six-month statute of limitations to suits under § 301 for breaches of the duty of fair representation. Id. at 169-72. In large measure, the result in DelCostello was premised upon the fact that a breach of the duty of fair representation was also an unfair labor practice under the NLRA. Id. Section 9 of WARN, however, explicitly states that giving a good faith notice under WARN is not a violation of the NLRA. 29 U.S.C. § 2108 (1988). Therefore, the adoption of the six-month NLRA statute of limitations under WARN is inadvisable, since the analogy between WARN cases and the NLRA is much weaker than in the case of the duty of fair representation.

535. See, e.g., CAL. CIV. PROC. CODE § 338.4.1 (West 1990) (four-year statute of limitations for actions based on contracts); MICH. COMP. LAWS § 600.5807 (six-year statute of limitations for breach of contract) (1990); TEX. REV. CIV. STAT. ANN. art. 16.004 (West 1986) (four-year period for breach of contract suits).


538. Id. at 31-32.
ing WARN. On the other hand, if the absence of WARN litigation is a result of a lack of knowledge about WARN and obstacles to enforcement, then a reasonable increase in resources devoted to enforcement may produce a substantial improvement in employer compliance, and some measure of compensation to employees deprived of advance notice.