A Practitioner's Overview of the Deficiencies of the Worker Adjustment and Retraining Notification Act Twenty Years Following its Enactment

This year marks the twentieth anniversary of the Worker Adjustment and Retraining Notification (WARN) Act, 29 U.S.C. §2101 et. seq., a law which was intended to provide workers and their families with sufficient time to adjust to impending layoffs, to obtain retraining and to look for other employment.[1] Unfortunately, only 8% of employers actually comply with the 60 day advance written notice requirements of WARN.[2]

On May 20, 2008, the Senate's Health, Education, Labor and Pension Committee held its hearing on the deficiencies of the Act, the potential impact of proposed reform legislation extending the notice period, increasing the penalty period and closing various loopholes. The hearing was chaired by Senator Sherrod Brown (OH), a strong advocate for WARN reform who introduced S. 1792 (known as "FOREWARN") on July 16, 2007, which was co-sponsored by Senators Obama and Clinton and has the support of , among others, Senators Kennedy and Kerry.

Outten & Golden, LLP submitted written testimony regarding its experience in litigating WARN cases, and Joe Aguiar, a class representative in one of Outten & Golden's pending WARN cases, *Aguiar, et al. v. Quaker Fabric Corporation, et al*., Adv. Pro. No. 07-51716 (Bankr. DE), testified about the personal hardship of being terminated from Quaker Fabric Corporation in Fall River, Massachusetts, where he and his wife worked for the past 27 and 18 years respectively, until their terminations (along with 900 others) with no notice over the July 4th holiday. The testimony coming out of the hearing underscored the fact that WARN is not meeting its intended goals and that reform is long overdue.

Following is an overview from a litigator's perspective of the main deficiencies in the WARN Act, including hurdles not contemplated by Congress that have made WARN Act litigation difficult and often nearly impossible in ways not envisioned by Congress twenty years ago. Some of these deficiencies have been addressed by the current proposed legislation, namely S. 1792 and H.R. 3920 (which the House approved in October 2007), others have not, but should be considered as critical to making WARN a viable tool for achieving Congress' purpose of providing advance notice to terminated employees.

The WARN Act requires "employers", as that term is defined by the Act, to provide 60 days advance written notice of a "mass layoff" or "plant closing" to each affected

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1 See 20 C.F.R. § 639.1. The Department of Labor published final regulations on April 20, 1989. The Regulations appear at 20 CFR Part 639.

2 May 20, 2008 press release by U.S. Senator Sherrod Brown; *Brown Hosts Senate Hearing As WARN Act's 20th Anniversary Nears*, "The WARN Act requires certain employers to provide workers 60 days notification in advance of plant closings and mass layoffs. According to estimates by the Government Accountability Office, just 24 percent of all layoffs are subject to WARN requirements. In only about one third of those cases are WARN notices actually issued."

employee.[3] Absent such notice and subject to certain exceptions, employers are required to pay 60 days wages and benefits to each affected employee.[4]

Although deceptively simple, the Act is actually rife with statutory and court interpreted exceptions, making it difficult for an employment law practitioner to assess whether the Act has been violated and to evaluate the likelihood of recovery on behalf of affected employees. These issues are further compounded by the number of employers who file for bankruptcy contemporaneous to implementing a layoff or shutdown, requiring plaintiff's counsel to file and litigate in bankruptcy court with the concomitant obstacles. Unfortunately, the proposed legislation does not address this bankruptcy component.

A. Current legislation does address the following problems in the WARN Act.

1. Increase the WARN notice period and penalties for failure to give advance notice.

   The purpose of WARN notice is to allow time for affected workers to locate new jobs or decide upon retraining options, as well as time for planning and gathering of community resources. Sixty days is simply not long enough. Extending the notice and concomitant penalty period to 90 days will incentivize employers to comply with the notice requirement and employees to enforce the law when it is violated.[5]

2. Base the number of days for which back pay is owed using ccalendar days not working days.

   Under the current WARN Act, it is unclear whether the appropriate calculation of the maximum period of liability is 60 calendar days or the number of working days in 60 days. In other words, if the employer fails to provide WARN notice and is found liable for 60 days of back pay, does the court multiply the amount of the employee's back pay on a given day times 60 days, or does the court multiply the amount of a day's back pay times the number of working days that would have fallen in the 60 day period – usually about 42-44 days only? The United States Court of Appeals for the Third Circuit, in *North Star Steel*,[6] holds the minority view that the liability period is 60 calendar days. In reaching its holding, the Third Circuit relied on the language of 20 C.F.R. § 639.1(a), which states in relevant part that the WARN Act "provides protection to workers, their families and communities by requiring employers to provide notification 60 *calendar* days in advance of plant closings and mass layoffs." The majority view is that the court need only award the amount of pay the employee would have earned during the 60 day period.[7]

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[3] 29 U.S.C. § 2101(a).
[4] 29 U.S.C. § 2104(a)(1).
[5] 29 U.S.C. § 2102(a) (WARN Act); Proposed Legislation: H.R. 3920, 110th Cong., 1st Sess. § 602(1) (2007); S. 1796, 110th Cong., 1st Sess. § 2(b)(1) (2007) (Brown Bill – Reported); H.R. 3796, 110th Cong., 1st Sess. § 2(b)(1) (2007) (Miller Bill – Unreported).
[6] *United Steelworkers of America, AFL-CIO-CLC v. North Star Steel Co., Inc.*, 5 F.3d 39, 43 (3rd Cir. 1993).
[7] 29 U.S.C. § 2104(a)(1) (WARN Act); Proposed Legislation: H.R. 3920, 110th Cong., 1st Sess. § 602(c)(1) (2007); S. 1792, 110th Cong., 1st Sess. § 2(c)(1) (2007) (Brown Bill – Reported).

3. Increase WARN damages.

Increasing employer damages to two days' pay for each day no notice was given will incentivize employers to send WARN notices and will ease economic barriers to enforcement by injured workers. Both will result in greater compliance with WARN. Double damages are the default remedy in federal wage legislation. Indeed, double, or liquidated, damages are mandatory under the Fair Labor Standard Act ("FLSA"), in the absence of pleading and proof of a good faith defense.[8] WARN, which is codified in the same title as the FLSA, contains a much more defendant-friendly "good faith" defense which can act as complete offset to a damages recovery unlike under the FLSA.[9] Accordingly, WARN plaintiffs who survive the WARN Act's good faith defense and are entitled to a damages award should automatically qualify for liquidated damages. Otherwise, there is little reason why an employer should not violate WARN and litigate when necessary – if, at worse, it will have to pay only what it was required to pay in the first place. Hence, any WARN litigant entitled to damages currently has to overcome the type of "good faith" defense that would make double liquidated damages mandatory under the FLSA.[10]

4. "Good Faith Defense" should not reduce damages.

As mentioned above, the WARN Act currently permits employers who have violated WARN to successfully reduce or completely eliminate damages to its employees despite a finding of liability.[11] The mere threat of reliance on this defense in the face of a trial may compel a substantially reduced settlement, particularly since the cost of litigation can be significant vis-à-vis full recovery for lower-paid workers. In addition, discovery on the issue of an employer's alleged good faith can often be substantial, necessitating depositions of the employer's legal counsel who may have advised the employer on its WARN obligations. The defense of good faith should be pled and proved by the employer to offset or negate penalties and interest, as under the Fair Labor Standards Act, where it can negate liquidated double damages that are otherwise mandatory.[12]

5. Reduce 50 employee minimum for single site coverage.

WARN currently provides protection to only those employees who are terminated without notice at a facility which employs at least 50 full-time employees. Employees at smaller facilities, sometimes within the same geographic area, are impacted in the

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[8] 29 U.S.C. § 216(b).
[9] 29 U.S.C. § 2104(a)(4).
[10] 29 U.S.C. § 2104(a)(1) (WARN Act); Proposed Legislation: H.R. 3920, 110th Cong., 1st Sess. §602(c)(1)(A) (2007); H.R. 3796, 110th Cong., 1st Sess. § 2(c)(1)(A) (2007) (Miller Bill – Unreported); S. 1792, 110th Cong., 1st Sess. § 2(d)(1)(2007)(Brown Bill – Reported).
[11] *Kildea v. Electro Wire Products, Inc.*, 60 F. Supp. 2d 710, 712 (E.D. Mich. 1999)(holding employer was entitled to a complete reduction in damages); *Watts v. Marco Holdings, L.P.*, 1998 WL 211770 (N.D. Miss. 1998)(without discussion court reduced plaintiffs' damages by 50% finding good faith).
[12] 29 U.S.C. § 2104(a)(4) (WARN Act); Proposed Legislation: H.R. 3920, 110th Cong., 1st Sess. §602(d)(12) (2007);H.R. 3796, 110th Cong., 1st Sess. § 2(c)(2) (2007) (Senate Bill – Reported); H.R. 3796, 110th Cong., 1st Sess. § 2(c)(2) (2007) (Miller Bill – Unreported).

same manner as their large facility counterparts, but are denied protection. Even if the smaller facility is isolated in a smaller city or town, the impact of the facility's closure may be as significant. Note, the reduction of the single site minimum does not sweep smaller companies into WARN Act coverage. Only employers who employ 100 or more employees are covered, thus small employers who comprise an enormous sector of the economy remain unregulated by WARN.[13]

It is difficult to explain to an employee that he is entitled to nothing under the Act in the wake of a company-wide shutdown simply because his office housed less than 50 full-time employees.

6. Reduce 50 employee minimum for mass layoff.

A layoff of 25-49 employees may have just as substantial an impact on one community as a 50-person layoff, depending on the relative size of the community. The lowering of the minimum says nothing about the relative ability of the employer to provide notice and pay penalties. Again, as in the lowering of the single-site threshold above, the lowering of the layoff minimum does not spread the coverage of the WARN Act to small employers. It merely makes it more difficult for employers to circumvent the law by "toeing-the-line" and ordering 49 person-layoffs, often on a rolling basis, to avoid hitting the 50 person minimum.[14]

7. Eliminate the 33% mass layoff rule.

Repealing this exemption will have a more positive impact on WARN protection and enforcement potential than perhaps any other.[15] This rule allows any savvy employer to order a mass layoff of hundreds, if not thousands of employees, simply by laying of one person short of one-third of the site. Thus, an employer with a factory of 999 employees will not be subject to WARN if it lays off 332 employees, not 333. According to the 1993 GAO report "Dislocated Workers: WARN Act Not Meeting Its Goals," over 75% of mass layoffs affecting 50 or more workers were exempt from coverage because they did not affect at least one-third of the work force.[16] The one-third rule exempted 100% of layoffs in the finance, insurance and real estate sector, according to the GAO.[17]

8. Eliminate the exception to 90-day aggregation rule.

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[13] 29 U.S.C. § 2101(a)(1)(A) (WARN Act); Proposed Legislation: H.R. 3796, 110th Cong., 1st Sess. § 2(a)(2) (2007) (Senate Bill – Reported); S. 1792, 110th Cong., 1st Sess. § 2(a)(2) (2007) (Brown Bill – Reported).
[14] 29 U.S.C. § 2104(a)(3)) (WARN Act); Proposed Legislation: H.R. 3796, 110th Cong., 1st Sess. § 2(a)(3) (2007) (Senate Bill – Reported); S. 1792, 110th Cong., 1st Sess. § 2(a)(2) (2007) (Brown Bill – Reported).
[15] 29 U.S.C. § 2101(a)(3)(B)(i)(I); 2102(d) (WARN Act); Proposed legislation: H.R. 3920, 110th Cong., 1st Sess. §602(a)(3) (2007).
[16] *Dislocated Workers: WARN Act Not Meetings Its Goals*, GAO/HRD 93-18 (Washington, D.C.: Feb. 23, 1993), at 21.
[17] *Id*. at 22, Figure 2.2.

Currently, WARN allows plaintiffs to aggregate small mass layoffs that take place over a 90-day period, as to permit the plaintiffs to claim that the sum total exceed the 50 person and 33% minimum.[18] However, an illogical result occurs under this rule whenever one of the smaller layoffs, itself meets these thresholds. The presence of the one threshold-meeting layoff, effectively negates the coverage for the others that occurred over the 90-day period and would have otherwise been added together to meet the aggregate and therefore be protected. The rule of mass layoffs should be changed so that all layoffs that occur over a 90-day period are deemed covered WARN events so long as the minimum threshold is met in the aggregate when they are added together.

9. Uniform statute of limitations.

It is important that WARN fix a uniform statute of limitations which will help employers and employees avoid continued litigation over this issue.[19]

10. Government enforcement.

The U.S. Department of Labor has no enforcement power. Given the ineffectual enforcement of WARN by the private plaintiffs' bar, governmental enforcement of WARN is warranted. However, government resources may prove to be limited, thus this option does not relieve the need to bolster private enforcement by strengthening the law. Under the FLSA, the DOL has the authority to investigate and prosecute violations of the Act but shares enforcement responsibility with the private bar.[20]

B. Problems with the WARN Act not addressed in the current proposed legislation.

1. Protect off-site workers.

WARN currently provides protection for workers who are out-stationed, or whose primary duty requires travel or outside work, such as railroad workers, bus drivers, and salespersons.[21] Nevertheless, such off-site workers are often denied WARN protection when they are terminated without proper notice. The Regulations state that an employee will be associated for WARN purposes with the single site to which he/she has been assigned, or from which his/her work is assigned, or to which he/she reports. But neither the Act, nor its Regulations define any of these key terms. Unfortunately the courts have construed them narrowly, precluding protection to

[18] 29 U.S.C. § 2102(d).
[19] Proposed Legislation: H.R. 3920, 110th Cong., 1st Sess. § 602(c)(4) (2007); H.R. 3796, 110th Cong., 1st Sess. § 2(c)(5) (2007) (House Bill – Reported); H.R. 3796, 110th Cong., 1st Sess. § 2(c)(5) (2007) (Miller Bill – Unreported).
[20] 29 U.S.C. §216(c) (Fair Labor Standards Act); Proposed Legislation: H.R. 3920, 110th Cong., 1st Sess. §602(c)(4) (2007); S. 1792, 110th Cong., 1st Sess. § 2(c)(4) (2007) (Brown Bill – Reported); H.R. 3796, 110th Cong., 1st Sess. § 2(c)(4) (2007) (Miller Bill – Unreported).
[21] 20 C.F.R. § 639.3(i)(6).

numerous categories of workers, including sales representatives[22], bus and truck drivers[23] and construction workers[24].

2. Close the "joint-employer" loophole.

WARN has been interpreted to insulate staffing agencies or off-site human resources departments from WARN liability despite responsibility for the payment of salaries, wages and employment benefits, and the reservation of right to make hiring and firing decisions. Unless the employee can show that the agency or department "ordered" the mass layoff or plant closing, the agency is absolved of liability.[25]

Importing FLSA's "joint employer" liability standards would prevent companies from easily evading WARN duties.

3. Parent liability

Currently, the Act does not expressly provide for parent liability. The Department of Labor's five factor test for determining parent or contracting company liability,[26] is inconsistently applied and has given rise to protracted litigation. The five factors are: 1) common ownership, 2) common directors and/or officers, 3) de facto exercise of control, 4) unity of personnel policies emanating from a common source, and 5) dependency of operations.

The WARN Regulations Preamble[27] state that this "regulatory provision … is intended only to summarize existing law that has developed under State Corporations laws and such statutes as the NLRA, Fair Labor Standards Act (FLSA) and the

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[22] In the context of the most common category of off-site employee, sales representatives, courts have held that the location where salespeople 'reported' is the location of the personnel who were "primarily responsible for reviewing sales reports and other information sent by the sales representatives, in order to record sales, assess employee performance, develop new sales strategies and the like." *Ciarlante v Brown & Williamson Tobacco Corp.*, 143 F.3d 139, 148 (3rd Cir. 1998). As the dissent noted in *Ciarlante*, the application of 20 CFR § 639.3(i)(6), has been overly restrictive. "In the next decade, technology will permit workers of all types, not just salespeople or other mobile workers, to escape the physical confines of traditional offices . . . The tenor of the majority opinion, and its refusal to affirm the grant of summary judgment for plaintiffs on what I believe to be an unequivocal record, sends the opposite (and wrong) message and, I think, establishes bad precedent." *Id*. at 156-57.

[23] *Teamsters Local Union 413 v. Driver's, Inc.*, 101 F.3d 1107 (6th Cir. 1996) (85 truck drivers terminated without warning were assigned to separate terminals rather than where the company's management functions were located and where route assignments were made); *Wiltz v. M/G Transport Services, Inc.*, 128 F.3d 957, 961-62 (6th Cir. 1997)(court noted in *dicta* that employer's home office was towboat crewmen's "home base" because it was the location where crewmen received their route assignments before embarking on 30 day voyages).

[24] *Bader v. Northern Line Layers*, 503 F.3d 813 (9th Cir. 2007)(162 construction workers' site of employment held to be the workers' actual work site, not the company's headquarters, despite evidence that employees reported to headquarters for payroll and administrative functions and that project managers reported to headquarters. Accordingly, employees were not entitled to notice of their layoffs).

[25] *See Administaff Companies v. New York Joint Board, Shirt & Leisurewear Division*, 337 F.3d 454 (5th Cir. 2003).

[26] 20 CFR § 639.3(a)(2).

[27] 20 CFR Part 639.

Employee Retirement Income Security Act (ERISA)" adding to further confusion among the courts as to the appropriate analysis.[28]

4. <u>"Voluntary separations" are not voluntary if they are in anticipation of shutdowns/mass layoffs</u>.

An employer can subvert WARN by inducing voluntary dismissals within the WARN notice period using inducements such as real or sham job offers, or cash buy-outs. In fairness, it may be argued that the resigning employee should lose any WARN claim, but the loss of the employee should not permit the employer to reduce the total employee headcount for the purposes of establishing the WARN minimum threshold, thereby extinguishing others' WARN claims.

Example: Mortgage lender "H" permitted lender "C" to come on site two days before the shutdown (about the time the company stopped funding loans) and meet with its employees for the purpose of offering them jobs. The operations and salespeople were told by "C" that they would all be offered jobs. The day before the shutdown many of the salespeople were offered jobs and the operations people were instructed to fill out online job applications. Counsel has stated that sufficient numbers of employees voluntarily quit (by accepting jobs with "C"), so that at an otherwise covered facility, the number of people who suffered an "employment loss" was below the threshold. Also, many employees around the country are reporting "for cause" dismissals just prior to layoffs which bring the site under WARN's minimum. Many of these were highly rated, top performing employees.

C. Bankruptcy-related Recommendations - Not Included in Current Proposed Legislation

Often an employer files for bankruptcy protection contemporaneous to a mass layoff or shutdown. Currently all WARN suits our office has filed are in bankruptcy court as adversary proceedings. The ability of plaintiffs to file an adversary proceeding in bankruptcy court is not clearly defined, the right to a class claim, and the treatment of WARN wages (back pay) compared to other creditor claims are all issues that are frequently litigated and therefore ripe for review and clarification. Other, WARN Act specific fixes are as follows.

1. <u>Eliminate the "liquidating fiduciary" defense</u>.

An employer that implements a plant shutdown contemporaneous to a bankruptcy filing may escape WARN liability by asserting that it was not acting as an "employer" at the time it ordered the shutdown, but rather a *liquidating fiduciary*.[29]

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[28] But see, § 2104(b) of the California Labor Code which states in relevant part that, "[a] parent corporation is an employer as to any covered establishment directly owned and operated by its corporate subsidiary."

[29] In re United Healthcare Systems., Inc., 200 F.3d 170 (3d Cir. 1999).

This “defense” is not found in WARN or its Regulations. Rather, it arises from the DOL’s comment to WARN’s Preamble.[30] Nevertheless, the Third Circuit has turned the comment into an obstacle barring plaintiffs’ claims in bankruptcy, many of which are litigated in Delaware, within the Third Circuit.

In short, upon filing for bankruptcy an employer often attains the debtor-in-possession status of a fiduciary. If it chooses to then terminate its workforce, it may use the *liquidating fiduciary* defense shield against WARN liability, unless the plaintiffs can prove that the employer is still operating its business in the normal course. This will likely entail discovery, imposing a significant burden in the prosecution of an otherwise non-complex meritorious claim, even if the defense is not a complete bar.

2. WARN damages should be entitled to administrative priority status.

The Bankruptcy Abuse and Consumer Protection Act of 2005 (BAPCA) provides support for the treatment of WARN Act back-pay awards as first priority administrative expense claims.[31] However, given that the legislative history of this new subsection is sparse, that WARN Act back-pay is not specifically mentioned, and that it has yet to be tested in a WARN case, it is unclear whether it will provide the protection sorely needed for affected employees.

To eliminate the tactical maneuver by debtors, in terms of the timing of a plant closing or mass layoff in relation to a bankruptcy filing, and to protect employee’s right of recovery for WARN violations, reform legislation should explicitly state that any back-pay award in bankruptcy be entitled to first priority administrative expense status.

D. Conclusion

The above proposed modifications to the WARN Act, together with others, such as: 1) eliminating waivers; 2) permitting only the prevailing plaintiff to recover attorneys’ fees; and 3) imposing individual liability, will ensure that the goals of the Act, set twenty years ago, will ultimately be met.

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[30] 54 Fed. Reg. 16042 at 16045 (1989).
[31] 11 USC § 503(b)(1)(A)(ii).