

THE WARN ACT AND ITS LEGAL HISTORY

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ABSTRACT

After a long period of period of sustained economic growth, the U.S. economy has experienced a recession and remains sluggish, and layoffs and plant closings are on the rise. Consequently, it is prudent to review the relevant plant-closing legislation (Worker's Adjustment and Retraining Act), attendant regulations, and subsequent court interpretations. Some seventy appeals court and Supreme Court cases were identified and reviewed. While there are several legal pitfalls firms must avoid to comply with the act, a variety of options are available to organizations that will not force them to meet the act's 60-days notice requirement.

After the longest growth period in American history, the U.S. economy went into recession in the third quarter of 2001 and then came the aftershocks of the attacks of September 11, and the Enron and WorldCom scandals. These events, among others, have led to layoffs in a host of industries. While the economy has shown some improvement, it remains sluggish and layoffs abound. Business bankruptcies are at an all-time high [1] and in the July of 2003 government report, unemployment was over 6% [2].

Interestingly, a seldom-studied federal statute, the Worker Adjustment and Retraining Notification Act (WARN), was enacted by Congress more than 10 years ago to address plant closings and mass layoffs in the United States. This

act covers nearly 100,000 employers, which employ over 60% of the nation's workforce [3].

Because layoffs have not played a prominent part in the industrial landscape over the last decade, many employers may not be fully aware of WARN's requirements. In fact, there is evidence that many covered firms are closing plants without providing the required notice to employees [4]. Moreover, the act contains little-known provisions that may hinder or even help a company in layoff situations. Consequently, it is appropriate to review WARN and its related court history. Pursuant to that end, a LEXIS NEXUS key word search on January 15, 2003 produced more than 70 appeals and Supreme Court cases. A review of the law, regulations, and pertinent court decisions are presented below.

WARN PROVISIONS AND COURT HISTORY

The main purpose of the WARN Act is to force businesses to provide 60 days advanced written notice to affected employees or their representative(s) in the event of a plant closing or mass layoff. Additionally, the state dislocated worker unit and the chief elected official of the unit of the local government to which the firm pays the highest taxes in the year preceding the determination, must also be notified [5]. This notice is required only of employers who have at least 100 employees excluding part-time employees (those who work an average of fewer than 20 hours per week); or have 100 or more employees, including part-timers, who work in aggregate 4000 hours or more per week, exclusive of overtime [5]. Workers on temporary layoff or on leave who have a reasonable expectation of recall are counted toward the 100-employee requirement [5]. Reasonable expectation of recall is generally interpreted to be less than a year [6].

Key Act Definitions

The act defines a plant closing as permanent or temporary shutdown of a single site or of one or more facilities at a single site that results in a mass layoff. A mass layoff, in turn, is defined as a reduction in force that results in an employment loss at a single site during any 30-day period for at least 33% of the active full-time employees and is equal to at least 50 full-time employees or at least 500 full-time employees regardless of the percentage of employees affected. Furthermore, an employment loss is defined as termination of employment, a layoff in duration of six months or more, or a reduction in work hours of more than 50% for a six-month period [7].

When fewer than the specified number of workers are terminated or laid off for two or more groups at a single site of employment in any 30-day period, their numbers are aggregated based on a rolling 90-day period, to ascertain whether or not the threshold has been met. However, if the employer can demonstrate that the

employment losses are a result of separate and distinct actions and causes and not an attempt to evade the act, then this provision is not applicable [7, at 2102].

In *Hollowell v. Orleans Regional Hospital*, the Fifth Circuit addressed a number of these issues [8]. This case involved a Medicaid-funded psychiatric hospital that primarily served adolescents and children. Due to changes in Medicaid funding policies, admissions and lengths of stays at Orleans Regional Hospital began to drop, causing financial difficulties. This led to a number of layoffs, eventually closing the facility. All of the layoffs were under the WARN 50-person lay-off minimum but within the rolling 90-day period described above. In its defense, the hospital argued that layoffs were for separate and distinct reasons that were separate from the decision to close the hospital. In fact, management had attempted to pursue new business opportunities but none had come to fruition. However, in its communications to employees, the hospital made it clear that all of its actions were in reaction to a decline in profitability because of changes in Medicare reimbursements. The appeals court, in ruling against the hospital, said that, “layoffs that are occasioned by a continuing and accelerating economic demise are not the result of separate and distinct causes” [8, at 383].

Additionally, Orleans Regional Hospital alleged that laying off fewer than the 50-employee minimum and in particular, that laying off individual employees (one at a time) does not constitute a group action under the act. Again the court disagreed, by pointing out that the use of the word “group” in this act refers to the entire number of employees let go in a 30-day period and the remaining persons are treated as a “group” because they are outside the 30-day period but within the 90-day period specified in the act [8].

Finally, the hospital claimed that it did not have the mandated 100 employees at the time of the announced closing. However, payroll records revealed that its employees (including part-timers) worked an average of 5564.25 hours (excluding overtime) per week [8].

Another definitional issue was addressed in *Barnes v. GenCorp* [9] and *Oil Chemical & Atomic Workers Internal Union et al. v. RMI Titanium Co.* [10]. The term “reduction in force” is not clearly defined in the WARN statute nor in the government regulations. However, the courts have defined a reduction in force as a situation where business considerations caused an employer to eliminate one or more positions within the company [9, 10]. Furthermore, “an employee is not eliminated as part of the work force reduction when replaced after discharge or otherwise leaving the company” [9, 10]. In *OCAW v. RMI*, the Sixth Circuit further included in the latter definition union workers who returned to layoff status after covering for more senior employees who were on voluntary layoff [10].

Notice

Regulations require that the notice include the name and address of plant closing location, the job(s) being terminated, the date of termination, any bumping rights

that might exist, a telephone contact number, and whether the action is permanent or temporary [5]. The courts do not require strict adherence to any set notice format as long as there is 60-days notice, and no harm was incurred.

For example, in *Marques v. Telles Ranch*, a case involving seasonal workers, the court found no violation despite the lack of termination date, bumping rights, and contact information on the termination notice [11]. The notice was sent between harvesting seasons, and the workers were clear on the management contact procedure. Furthermore, bumping rights were a moot point since the company was shutting down. Consequently, in the mind of the court, the omissions did not cause harm to the plaintiffs [11].

The courts require at least a 60-day notice to each worker affected before layoff or termination [12]. This notice must be submitted after each employment loss [13]. For example, a notice for a seasonal layoff notice is not sufficient if it is determined some time later that the enterprise will not be rehiring for the next season and the termination is earlier than the normal date the seasonal workers would expect to return to work [14]. Furthermore, the action must cause them to lose some additional tangible benefit [14]. Accordingly, the firm must issue another notice announcing that it will not be rehiring for the next season.

Similarly, Quebecor Printing issued notice of a mass layoff and temporary shutdown that was expected to last more than six months [13]. A few days after the mass layoff, Quebecor sent a follow-up letter notifying the union that WARN notification was being changed from a temporary to a permanent plant closure. Even though no employees were on the payroll at the time of the change, the Fourth Circuit stated that, “whether the Quebecor employees suffered an employment loss on December 11 is immaterial to whether the employees were entitled to notice of the permanent plant closing on December 16” [13, at 298]. The appeals court went on to say, “The WARN Act clearly contemplates that an employee may suffer multiple employment losses, necessitating separate notices” [13, at 298]. In this case, because the union employees would have been entitled to additional benefit coverages with a permanent shutdown, they did incur material harm. Consequently, firms must be sure to provide notice for each employment loss that would cause material harm to the affected employees.

No Need to Notify

There are a number of situations where an employer may avoid providing notice including:

Waivers

A waiver is the intentional relinquishment of a known right. For example, employees may waive their right to sue for perceived injustices or violations of the law. Usually these waivers provide employees with certain severance benefits in return for waiving their right to sue under a variety of laws, such as the

Age Discrimination Act. Increasingly, waiver language is encompassing WARN rights. Waivers of WARN rights are legal as long as consideration is provided beyond other legal and contractual obligations [15] and there is no evidence of fraud, duress, material mistake, or some other defense such as ambiguity in the wording of the agreement [16]. In union environments there is the additional stipulation that waiver discussions must specifically include the WARN Act [15].

Exemptions

The WARN Act allows for two blanket exemptions to its provisions. First, no notice is needed if the layoff results from closing a temporary facility or completing a particular project or undertaking, as long as the affected employees were hired with the understanding that their employment was limited to the duration of the facility or the project [7, at 2103]. Seasonal work often falls under this exemption [17].

Furthermore, notification is not needed when the plant closing or mass layoff results from a strike or a lockout that was not intended to evade the requirements of WARN. Employers are also not required to serve written notice when permanently replacing employees who are deemed to be economic strikers under the National Labor Relations Act [17]. For example, the Eighth Circuit upheld a ruling that the company did not need to notify employees before closing its trucking operations permanently because of a union strike [18]. The Supreme Court in *United Food v. Brown* ruled that unions can sue on behalf of their affected members under WARN (even on behalf of nonparticipating employees) [18]. In this case, the union contended that the company had planned all along to close the operation [19]. However, the courts ruled that the strike was the precipitating event that caused the company to cease operations because it had invested nearly \$2,000,000 in new equipment just before the strike, continued to solicit new business, and even entered into several long-range contracts. However, it was only during the course of the strike, the firm reassessed its position and concluded that it was unable to operate profitably [18].

Faltering Company

Faltering business enterprises acting in good faith when ordering the shutdown of a single site of employment may forgo the 60-day notice [7, at 2102]. But to qualify, the firm must have been actively seeking capital or business which, if obtained, would have enabled the employer to postpone or avoid the shutdown. Should its efforts fail, it must provide notice as soon as practical and a brief statement of the reason for reducing the notice period [7, at 2102].

In *Alarcon v. Keller Industries*, the Ninth Circuit upheld a shortened notice period (one-day) where Keller Industries had insufficient working capital and had acted in good faith when it fruitlessly pursued several options for securing working capital or selling the firm [20]. Keller's letter to the employees explained

that it had a lack of working capital and it had pursued several failed attempts at options for purchase and working capital, and cited the WARN faltering company exception as reasons for the shortened notice. The court stated, “the cumulative effect of this information was to provide a sufficiently specific statement of the basis for the shortened notice period . . . and workers would have understood from this statement why they had not been told of the closure sooner” [20, at 388].

The courts have also denied attempts at invoking this defense. In *Carpenters v. Dillard* [21], the employees of Holmes, a firm attempting to merge with a wholly-owned Dillard subsidiary, were provided only a few weeks notice of layoff. Holmes defended its actions in part based on its efforts to obtain an adequate line of credit and argued that it fell under the faltering-company exception. However, the Fifth Circuit disagreed because there was no causal connection between Holmes, securing a line of credit and the layoff [21]. The layoff was based on the announced merger, and Holmes had failed to provide the required explanatory statement. In another case, *United Health Care v. United Healthcare Systems*, the faltering business exception was denied because the firm’s financial problems were so severe that there was no reason to think that any new capital or business would keep it afloat [22].

Unforeseeable Business Circumstance

Notice requirements are waived when plant closings or mass layoffs are caused by business circumstances that are not reasonably foreseeable [7, at 2102]. Department of Labor (DOL) regulations define “not reasonably foreseeable” as “caused by some sudden, dramatic, and unexpected action or condition outside the employer’s control” [5, at 639.639.9 (b)]. However, once these conditions are met, the business must provide as much notice as is practical.

A number of unforeseeable business circumstances have been allowed by the courts. In *Burnsides v. MJ Optical*, the firm had agreed to sell its business to another optical company [23]. This sale would have prevented a layoff, but at the last minute the buyer decided to purchase only a portion of the assets [23]. MJ Optical immediately closed its doors and let its workforce go without notice. The court record indicates that the firm’s change of heart was a “sudden, dramatic, and unexpected event outside the employer’s control,” making it unforeseeable; the business, therefore, did not have to provide the statutory 60 days [23]. Nevertheless, as much notice as is practical, must be provided and unfortunately the court determined that because the firm could have provided a two-day warning, it thereby violated WARN [23]. Similarly, in *Hays v. Addington*, the Sixth Circuit ruled that shutting down a mining operation after a nonunion work stoppage caused it to lose its largest contract was unforeseeable and the company was not required to operate at a loss just to comply with the mandates of the WARN Act [24].

In another case, McDonnell Douglas had a government defense contract canceled as a result of poor quality, cost overruns, and production delays [25]. The appeals court decided the cancellation was unforeseeable despite McDonnell Douglas being aware of the government's displeasure, because up until that time, "the government had rarely canceled a contract for a program [for which] that the government had stated a need" [25, at 1064]. Moreover "Congress had also expressed support for the project, and the company had indicated that it was correcting the structural defects that were causing the problems" [25, at 1064].

There are other ways to employ this unforeseeable-circumstances exception. For example, a pending contract with Clinchfield Coal failed to materialize [26]. Despite a warning from the potential buyer that it wanted improved coal and a lower price, the exception was upheld on the grounds that the two parties had a longstanding, 30-year relationship that had always produced a contract. The inability to do so this time was sudden and unexpected in the mind of the court, even though the potential buyer had made a final offer to buy the coal and Clinchfield had determined that it would not be profitable [26].

In another unusual case, Atlantis Casino was exempted from WARN when the Casino Control Commission refused to renew its license [27]. The casino's owners were aware that the commission might not renew the license but the appeals court found that the commission had never before failed to renew a casino license. Besides, Atlantis had been in serious financial trouble for some years but its license had still been renewed [27].

In a different situation, a not-for-profit hospital ordered a review of its financial condition after it was forced to dip into its endowment fund [28]. The review discovered that the foundation's expenses were in excess of its earnings and the invasion of endowment principal would continue. After verifying that this would jeopardize the hospital's tax-exempt status, the board of trustees voted to close the hospital, and the employees were laid off with very little notice. The Seventh Court of Appeals held this to be unforeseeable. Even though the hospital had there were sufficient assets to allow for the notice period, it had no legal obligation to do so according to the court [28].

More recently, the courts have allowed the use of the "unforeseeable business circumstances" exception in situations in which a financially troubled company produces and ships goods to another firm that refuses to pay and terminates the contract without prior warning, causing the first company to close its plant and immediately layoff its employees [29].

Natural Disaster

According to federal regulations, notice is not necessary if the plant closing or mass layoff stems from a natural disaster, such as a flood, earthquake, or drought [5, 7, at 2102]. No court decisions covering this exception were available.

Independence of Operation

There are also many business situations where a business may or may not qualify as a WARN employer. In all cases, the central issue is whether the company or unit controls day-to-day operations.

In a lengthy opinion involving whether a secured lender was responsible for WARN notice after the company went defunct, the Third Circuit Court of Appeals upheld Department of Labor regulations on independence as it relates to WARN and extended those regulations to secured lender situations [30]. Independence here means the exercise of control over day-to-day operational decisions for the unit conducting a layoff. Federal regulations state that, in determining the degree of independence between an independent contractor or subsidiaries of a parent company, the following factors must be considered: common ownership, common directors and/or officers, de facto exercise of control, unity of personnel policies emanating from a common source, and the dependency of the operations [5].

In *Pearson*, a lender, General Electric Credit Corporation (GECC), had loaned large sums of money to CompTech [30]. When CompTech went into default, GECC was given stock and allowed to approve a number of CompTech's decisions on such topics as executive compensation and benefits and sale of equipment. The goal was to help CompTech restructure its obligations. When the business eventually failed, people were laid off, and GECC was sued as an owner under WARN. GECC was able to avoid liability under the tests of independence because GECC and CompTech did not share labor policies, or even coordinate their policies, and CompTech had its own personnel manager who had never received any direction from GECC. GECC's hiring and firing of a few-high level managers and unity of personnel policies was not enough to establish control. Furthermore, there was no evidence of interrelation of operations, such as sharing of administrative or purchasing services, interchanges of equipment, or commingled finances [30].

In *Adams v. Westinghouse*, the 8th Circuit Court of Appeals also denied a plaintiff's (former employees of Erwin Wheller Company) contention that Westinghouse was not independent from its secured borrower (Erwin Wheller Company) in that Westinghouse, the secured lender, knew that its refusal to lend additional funds to a borrower would cause it to fail and lay off its employees (without advance notice) [31]. In ruling that the defendant, Westinghouse Credit Corporation, was independent of its debtor, the court pointed out it was far more important for purposes of independence to consider whether the lender had assumed an employer-employee relationship by exercising control over the firm in terms of such actions as hiring, firing, paying, or supervising the borrower's employees [31]. In this case the lender's refusal to advance additional working capital did not make it an employer because it had not exercised any operational control of Westinghouse's operations. Besides, "refusing to loan additional working capital to an insolvent and delinquent borrower who cannot repay over

eighteen million dollars in secured debt does not make a lender an employer for WARN purposes” [31, at 272].

In other litigation involving independence, a management company (MHM), operated a hotel under a contractual agreement with the owner, Colonial (CCELP) [32]. MHM was forced to close the hotel at the owner’s direction and gave only three day’s notice to the employees. MHM argued that it was not the employer and in effect not independent because CCELP was the owner and MHM merely carried out CCELP’s orders [32]. The court disagreed. It held that while CCELP ordered the closing, its role in operating the business was limited. The court found that MHM had bargained with, hired, fired, supervised, paid, and carried out the layoffs of employees and had negotiated the collective bargaining agreement [32]. MHM further argued that it was powerless to control the timing or content of the owners’ actions because CCELP had the right under the contract to close the hotel at any time, even though it was operated by MHM. The court disagreed, holding that MHM could have insisted on a contract clause that would have charged a management fee for WARN liabilities in the event the owners wanted to close the hotel without notice [32].

On the other hand, when determining who was liable for failing to provide required notice in *Hollowell* (as discussed earlier *Hollowell v. Orleans Hospital*) [8] under WARN, the courts found that despite separate managers and lack of supervision by an administrator from the other corporate entity (North Louisiana Regional Hospital) which had a stake in Orleans, both corporations (North Louisiana Regional Hospital and Orleans Hospital) were a single employer under WARN. Evidence revealed a common ownership. Unlike other cases and in particular *Pearson* [30], the court pointed out that

Most telling is the fact that the owners themselves conceived of the entities as a single enterprise. When the owners decided to receive a cash distribution in October 1995, the assets and cash from all the entities were considered collectively. They listed the assets of each entity and added them together and then decided to distribute \$1.5 million to the owners [8, at 390].

There was also a unified employment policy. Employees in all entities were covered by the same benefits, and there was no change in coverage nor a waiting period when moving from one entity to another.

Sale of Business

According to the WARN Act, in the event of a sale of all or part of an employer’s business, the seller shall be responsible for providing notice for any plant closing or mass layoff, up to and including the date of the sale [7]. However, after the effective date of the sale of part or all of the employer’s business, the purchaser is responsible for providing notice for any plant closing or mass layoff. Employees come under the purchaser immediately after the effective date of the sale [7].

The Tenth Circuit has examined the issue on several occasions. In an unpublished opinion, the Tenth Circuit ruled that the company that is sold is not responsible for notice to employees in the event of a layoff or plant closing after the effective date of the sale, even if its name remains on a lease [33]. This notice is now the responsibility of the buyer. In a separate opinion, the same court also found that when workers retain their jobs by the buyer at no loss of salary or benefits, there is no legal compulsion to notify by the original owner because there is no employment loss [34].

WARN does not apply unless a true employment loss occurs. For example, in other litigation the Eighth Circuit has gone so far as to say, “the plain language does not permit an interpretation that employees who continue to work without interruption on comparable terms for the purchaser of their employer’s business have been ‘permanently’ terminated by the sale” [35, at 545]. In another case, the Ninth Circuit has even said that modification of employee salaries and benefits (but with no layoff or terminations) does not qualify as a WARN event [36].

Single Site Issues

This was the most litigated section of the act. A single site refers to either a single location or a group of contiguous locations. Separate buildings or areas that are not directly connected may be considered a single site of employment if they are reasonably close to one another, used for the same purpose, and share the same staff and equipment. Contiguous buildings owned by the same employer but which have separate management, produce different products, and have separate workforces are considered separate single sites of employment. Lastly, the single site for workers who travel from point to point, who are outstationed, or whose primary duties involve work outside any employer’s regular employment sites, is the place from which they receive their assignments, or to which they report [5].

In support of DOL regulations, the Fifth Circuit in *Williams v. Phillips* stated that the regulations indicate that two plants across town will rarely be considered a single site of employment and if the distance is greater the probability of being considered a single site is lower as the distance grows [37]. Other factors considered in this case were the employee rotation between sites and the sharing of staff and equipment. Another court came to the same conclusion in *May v. Shuttle*, where airport employees in different states were furloughed [38]. That court found that units located no more than 60 feet apart may not qualify as a single site of employment when they are under the direction of truly separate management teams and operated by separate workforces [39].

In a landmark case concerning truck drivers working out of 11 different terminals in various communities, the Sixth Circuit noted that the terminals where the truckers started and ended their work week were their “home base” rather than the regional transportation center [40]. The terminals did not share equipment or the services of the truckers, and the truckers were represented by different unions.

While there was some sharing of centralized payroll and other personnel functions, these were not enough to constitute operational control of the various terminals. WARN was not triggered in this case because fewer than 50 employees were involved at each site [40].

In two other cases involving a geographically dispersed workforce, two appeals courts (Third and Fifth Circuits) ruled that when a home base or central office has operational control (makes the day-to-day decisions), then all of the units that are under its direction are to be considered a single site for WARN purposes.

In the first case, *Wiltz v. M/G Transport*, which involved a sale of barges (all employees were terminated) to another barge company, the court overturned a district court's ruling and sided with the plaintiffs when it ruled that WARN should have been activated in part because the single site of employment for each of the boat crews was not the boat on which they had worked, but rather their base office in Paducah, Kentucky [41]. No tugboat had a crew that exceeded the 50 employees laid off as demanded by WARN. However, M/G Transport as a whole employed more than 100 workers—the minimum number of employees that are subject to WARN provisions. Eighty percent of the crews reported directly to the Paducah office, making it their “home base,” and all day-to-day control such as ordering, purchasing, delivery of supplies, and receiving operational instructions came from the Paducah office [41]. Accordingly, the court agreed that the Paducah office and all the boats reporting to it were a single site for WARN purposes [41].

However, M/G Transport was still able to avoid WARN liability, in that 160 of 187 affected employees were offered jobs with the new company. While 84 either did not apply or declined the offer, there was no “employment loss” under the act. As a result, the remaining 24 displaced employees fell below the WARN trigger of 50 employees laid off (three failed drug tests, but the court ruled this was termination for cause and could not be counted toward the 50-employee layoff minimum) [41].

In the other case, *Ciarlante v. Brown & Williamson*, the company laid off 1,200 sales representatives without 60 days notice [42]. However, it argued that there was no violation because the site of employment was the geographical district in which the sales representatives worked and none of the districts terminated 50 or more employees. Furthermore, it argued that the representatives took their orders from local district managers, rather than the regional office and there were no district office facilities because all representatives and managers worked out of their cars. In reversing the summary judgment and remanding the case, the Third Circuit stated there was reasonable evidence to suggest that the regional office was the single site because it was the origin of day-to-day instructions, assignments, and procedures; all reports and employment-related information was funneled to the regional office; and the district managers acted in a more secondary role of ensuring that its instructions were followed and reports completed and forwarded [42].

Bankruptcy

Companies that have filed for bankruptcy and are liquidating their business are not WARN employers, based on the Third Circuit of Appeals decision in *United HealthCare, Debtor v. United HealthCare Systems* [22]. In this case, United HealthCare Systems had been in an extreme financial crisis from which it was unable to extricate itself. United filed for bankruptcy and gave its 1,300 employees 44 days notice that they would be terminated, even though the business would actually be closed sometime later. In the court's judgment, United HealthCare Systems was no longer an employer at this time because it was not engaging in commercial activities, it was a business liquidating its affairs [22].

Bridge Banks

The second situation in determining who is the employer when a business fails involves bridge banks. A bridge bank is a temporary legal entity that allows the Federal Deposit Insurance Corporation (FDIC) to purchase the assets and assume liabilities for failed banks. It also allows the FDIC time to find a purchaser for failed banks. Bridge banks are not subject to WARN provisions.

In the often-quoted case on the subject, *Marjorie Buck v. FDIC*, the FDIC organized a bridge bank for several failed banks and then solicited bids for the business [43]. After accepting a bid, the purchaser offered jobs to 400 of the 626 employees of the bridge bank without giving the laid-off employees appropriate WARN notice. The court of appeals pointed out that in these situations the legislative record made clear that the FDIC was not subject to WARN. It stated:

we hold that government ordered closings are not generally exempted from the WARN Act. Such closings are only entirely exempt when they are "absolute," such as the closing of a bank by the Federal Home Loan Bank Board (FHLBB) where the previous ownership is ousted from control and the government assumes control of the enterprise such that there is not an employer to give notice. Other government ordered closings are to be treated under the unforeseeable business exception to the Act [43, at 1292].

Relatedly, the Eleventh Circuit has ruled that "FIRREA (Financial Institutions Reform, Recovery, and Enforcement Act) makes exhaustion of the FDIC's administrative complaint review process mandatory when the FDIC has been appointed receiver for a financial institution" [44, at 1043]. Accordingly the district court did not have jurisdiction with respect to the WARN claim because the plaintiff had failed to exhaust the administrative remedies as required by FIRREA.

Statute of Limitations

The WARN Act is silent as to time limitations for filing of litigation. In *North Star v. United Steel*, the company attempted to bar litigation by the union on the grounds that the National Labor Relations Act has only a six-month limitations

period for unfair labor practice claims, whereas the most analogous state laws allowed between two and six years [45]. However, the Supreme Court noted, that “since 1830, state statutes have repeatedly supplied the periods of limitations for federal causes of action when federal legislation made no provision . . . unless it frustrates or interferes with the implementation of national policies” [45, at 34]. The high court directed that when state law is used, it should be the most analogous law, and the same is true when federal law is employed. In this case, the petitioners could not show how the use of state law would interfere with national policy [45].

Penalties and Awards

Aggrieved workers are entitled up to 60-days damages in terms of back pay. This is based on workdays and not calendar days [46]. In addition, civil penalties up to \$500 a day may be imposed if the aggrieved employees do not receive entitled compensation for damages within three weeks of the ordered shutdown or layoff [7, at 2104].

CONCLUSIONS

While simple in purpose, WARN appears to be quite complex in application, particularly with respect to single-site issues and the specific actions necessary to qualify companies for the act’s exceptions. There are a number of legal pitfalls as well, but a varied array of legal alternatives are available to avoid its prescriptions. These issues call into question whether WARN fulfilling its intended purpose of providing workers a time to adjust to their prospective loss of employment, obtain alternative work, or seek retraining. In fact, there are state statistics that suggest that less than a quarter of dislocated workers receive WARN notice [47]. Even at the state level there is little or no protection. Only 10 states have plant-closing laws, and only two of those (Hawaii and Maine) are significantly more stringent than the federal law [48]. Most of the remaining statutes are more lenient [48].

Moreover, in several of the cases discussed above (*Hollowell*, *United HealthCare*, and *Jurcev*), where firms were able to evade liability by means of the act’s exceptions, even though their fundamental troubles resulted from a lack of planning, failure to reasonably foresee business problems, and what seems to be poor management. Legislators should consider ways of amending the act that would eliminate use of exceptions when the cause can be traced clearly back to bad management. Furthermore, since 97% of U.S. businesses (representing about 40% of the workforce) employ fewer than 100 workers [2], legislators might consider lowering this minimum as well, so the act might better fulfill its intended purpose.

Nevertheless, there is nothing to prevent organizations from taking a more progressive and more socially responsible stance by going beyond WARN provisions and exceptions. For instance, Commerce One [4] mindful of the disruption

and potential financial consequences to its employees and the community, provided severance in lieu of notice even though its situation was not covered by WARN. In an era where corporate morality and governance policies are increasingly being questioned and under closer investor and regulatory scrutiny, actions that demonstrate care and concern for employees can help a firm's bottom line through by its reputation in the eye of the public and of enforcement agencies. Moreover, such actions should have a positive effect on its ability to attract and retain talent.

ENDNOTES

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7. Worker Adjustment and Retraining Notification Act (WARN), 29 U.S.C. 23.2101.
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12. *United Mine Workers of America, International Union v. Matinka Coal Company*, 202 F.3d 717 (4th Cir. 2000).
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