The WARN ACT

David A. Santacroce
University of Michigan Law School

Available at: https://repository.law.umich.edu/book_chapters/308

Publication Information & Recommended Citation
Employee and Union Member Guide to Labor Law

A Manual for Attorneys Representing the Labor Movement

by the National Labor and Employment Committee of the National Lawyers Guild

Elise Gautier and Henry Willis
Editors

Volume 2

THOMSON WEST

For Customer Assistance Call 1-800-328-4880
West, a Thomson business, has created this publication to provide you with accurate and authoritative information concerning the subject matter covered. However, this publication was not necessarily prepared by persons licensed to practice law in a particular jurisdiction. West is not engaged in rendering legal or other professional advice, and this publication is not a substitute for the advice of an attorney. If you require legal or other expert advice, you should seek the services of a competent attorney or other professional.

For authorization to photocopy, please contact the Copyright Clearance Center at 222 Rosewood Drive, Danvers, MA 01923, USA (978) 750-8400; fax (978) 646-8700 or West's Copyright Services at 610 Opperman Drive, Eagan, MN 55123, fax (651) 687-7551. Please outline the specific material involved, the number of copies you wish to distribute and the purpose or format of the use.
Contributors

This treatise has been extensively reworked and revised since it first appeared in 1981. More than a hundred Guild members and supporters have helped create and update the chapters over the years. The following is only a partial, and necessarily incomplete, list of those contributors.

Those initially involved in the organization of the manual included Neil Herring, Martin Eichner, Ken Cloke, and Warren Adler, all from California. Subsequently, Dan Siegel of Oakland and Robert Gibbs of Seattle took over the responsibility for bringing the manual to completion, which included finishing a number of chapters and making final editorial decisions about chapters that had been revised. Paul Alan Levy of the Public Citizen Litigation Group of Washington, D.C., prepared most and edited all of the releases from 1986 through 1994. Elise Gautier of Portland, Oregon, and Henry Willis of Los Angeles have edited all of the releases since 1995.

Chapter 1, "Organizing the Unorganized," was originally written by members of the Guild's District of Columbia chapter and its Chicago chapter labor committees, including Carolyn Cairns, now of Seattle, and Robert Hodge, Roberta Brown, and Jim Fennerty, all of Chicago. These drafts were reviewed and revised by Robert Gibbs and Chris Mrak of Seattle and John McTernan of Los Angeles. The 1996 release was prepared by Ira Jay Katz of New York City, with assistance from Robert Gibbs of Seattle. The 1998 release was prepared by Henry Willis of Los Angeles.

Chapter 2, "Opposing Discriminatory Discharges," was originally prepared by Jonathan Siegel of the National Labor Law Center, with contributions from Amy Gladstein of New York City and Neil Herring of Los Angeles. Spencer Clapp of Hartford, Connecticut, prepared the materials on employment at will, while Paul Alan Levy of Washington, D.C., wrote the section on preemption of wrongful discharge claims. David Kern and Michael Wyatt of El Paso rewrote former Sections 2.01 and 2.04 in 1995; Robert Handelman and Jon Wentz of Columbus, Ohio, revised former Section

Chapter 3, "The Duty To Bargain Collectively" (formerly Chapter 5), was prepared by Nola Hitchcock Cross of Milwaukee and Robert Gibbs of Seattle, with assistance from Chris Linder. The 1997 release was prepared by Martin Eichner of Palo Alto. The chapter was reorganized and revised by Henry Willis in 2003. Shannon McDonald of Milwaukee prepared the update for the May 2004 release.

Chapter 4, "The Right To Strike and Other Forms of Economic Action" (formerly Chapter 3), was originally written in large part by Mike Healey of Pittsburgh with the assistance of Grant Crandall of West Virginia, Allen Vomacka of Houston and Dan Siegel of Oakland. Laura Rasset and Chris Mrak of Seattle wrote the section on secondary boycotts, while John McTernan of Los Angeles contributed the section on political strikes. Henry Willis of Los Angeles expanded and reorganized the chapter in 1996 and updated it in 1997.

Chapter 5, "The Rights of Construction Workers" (formerly Chapter 14), was initially prepared by Cheryl Beckett of Anchorage (Sections 5:1 to 5:34), Will Schendel of Fairbanks (Sections 5:35 to 5:62), and Steve Goldberg of Portland, Oregon (Sections 5:63 to 5:77). Mr. Schendel updated Sections 5:35 to 5:62 until 1998. Matthew Glasson of Cedar Rapids, Iowa, rewrote Section 5:9 for the 1996 release. Jonathan D. Newman, Nora H. Leyland, Martin J. Crane, and Richard M. Resnick, all of Washington, D.C., substantially revised the chapter for the 1997 release, rewriting many sections and adding new ones. Mr. Newman has prepared the subsequent releases for all sections except Sections 5:35 to 5:62.

Chapter 6, "Employment Discrimination Law" (formerly Chapter 15), was written in 1996 by Anne K. Richardson of Pasadena, California. Sandra C. Munoz of Los Angeles provided research assistance. Ms. Richardson has updated the subsequent releases, with assistance from Christine

Chapter 7, "Workers with Disabilities: The ADA and Other Laws" (formerly Chapter 11), was written in late 1995. Chapter authors are Brian East of Austin, Texas, and Cordelia Martinez of Santa Ana, California. Section authors are Brian East, Liz Joffe of Portland, Oregon, Cordelia Martinez, Larry Minsky of Long Beach, California, and Marilynn Mika Spencer of San Diego, California. Mr. East and Ms. Martinez prepared the releases until 2001, and Mr. East has prepared the subsequent releases.

Chapter 8, "The Fair Labor Standards Act" (formerly Chapter 13), was written in 1997 by Michael Feinberg of Los Angeles.

Chapter 9, "Pensions and Other Employee Benefits" (formerly Chapter 10), was written by Jim Klimaski, Bill Anspach and Kathryn Marks of Washington, D.C. It was substantially expanded in 1995 and updated in 1996 by William T. Payne of Pittsburgh and Dennis J. Murphy and Henry Willis of Los Angeles. Mr. Payne prepared the 1997 release.

Chapter 10, "The WARN Act" was written by David Santacroce of Ann Arbor and edited by Henry Willis of Los Angeles. Professor Santacroce keeps it up-to-date.

Chapter 11, "The Duty of Fair Representation" (formerly Chapter 7), was written in 1997 by Henry Willis of Los Angeles.

Chapter 12, "The Rights of Union Members Within Their Unions" (formerly Chapter 8), was written by Paul Alan Levy of Washington, D.C., who also prepared the subsequent releases. The rewritten chapter replaced a chapter written by Roy Otis and Suzanne Sherbell of San Francisco and Dan Siegel of Oakland.

Chapter 13, "Internal Union Elections" (formerly Chapter 9), was written by Paul Alan Levy of Washington, D.C., who also prepared the subsequent releases. The rewritten chapter replaced a chapter that was written by Dan Siegel, Larry Norton, Robert Gibbs, Bruce Bentley and Diane Dickstein. Jerry Hochzstein of St. Louis provided assistance on the 1996 release.

Chapter 14, "Representing Unions and Employees in Bankruptcy Cases" (formerly Chapter 12), was written by
Brad Pyles of West Virginia and Linda Stanch and Herb Eisenberg of New York. Chapter 12 was substantially revised in 1995 by Babette Ceccotti of New York City, who also prepared the subsequent releases.

On behalf of the National Lawyers Guild’s Labor and Employment Committee, we thank all of those who have worked on this project over the years, and we extend particular thanks to Paul Alan Levy of Washington, D.C., for all the work he has put into this project over many years.

Elise Gautier
Henry Willis
Chapter 10

The WARN Act

KeyCite*: Cases and other legal materials listed in KeyCite Scope can be researched through West's KeyCite service on Westlaw®. Use KeyCite to check citations for form, parallel references, prior and later history, and comprehensive citator information, including citations to other decisions and secondary materials.

§ 10:1 Introduction
§ 10:2 Administration and enforcement, in general
§ 10:3 Definition of employer under WARN: The "business enterprise"
§ 10:4 —Number of employees
§ 10:5 Plant closing or mass layoff defined: Number of affected employees
§ 10:6 —The single site requirement
§ 10:7 Requirement of employment loss
§ 10:8 Notice requirements
§ 10:9 —When less than 60 days' notice is permitted
§ 10:10 —When no notice is required
§ 10:11 When and where to sue
§ 10:12 Remedies
§ 10:13 Reduction of employer liability
§ 10:14 WARN claims in bankruptcy
§ 10:15 Federal laws providing benefits for dislocated workers

§ 10:1 Introduction

Plant closings are devastating for workers, their families and the communities in which they live.1 The Worker Adjust-

[Section 10:1]

1Loss of work may take a variety of forms, including subcontracting, sales of businesses, plant closings, and runaway shops (plants that relocate to other sites). We address the union’s right to bargain over these decisions and their effects in Ch 3.

© West, a Thomson business, 6/2003 10-1
ment and Retraining Notification Act\(^2\) ("the WARN Act" or "WARN") requires some employers to give their workers sixty days’ notice before a plant closing or mass layoff. The purpose of the WARN Act is to provide workers with time to seek alternative employment or retraining and to plan for the transition phase after the layoff.

The WARN Act does not prevent employers from closing a plant;\(^3\) instead it only requires larger employers to give notice, subject to a number of exceptions and exemptions. It is, however, the primary piece of federal legislation\(^4\) addressing the problem of plant closings and mass layoffs and, in some instances, the only source of rights that dislocated workers have.\(^5\)

\(^2\)29 U.S.C.A. §§ 2101 et seq.

\(^3\)Section 2104(b), in fact, specifically deprives the federal courts of power to enjoin a plant closing or mass layoff "[u]nder this chapter." See § 10:12.

\(^4\)Several states, including Connecticut, Hawaii, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Oregon, South Carolina, Tennessee, Washington and Wisconsin, have enacted some form of plant closing and/or mass layoff law. This manual does not address those state statutes in any detail.

\(^5\)This chapter also addresses employees’ rights under the Trade Act of 1974, 19 U.S.C.A. §§ 2271 et seq., and the North American Free Trade Agreement Transitional Adjustment Assistance Program, 19 U.S.C.A. § 2331, in § 10:15. This Guide also deals with unions' ability to prevent or bargain over the employer's decision to close a plant or relocate work in Ch 3.


Some communities have explored the use of their eminent domain powers to prevent industries from fleeing the area. Steel Valley Authority v. Union Switch and Signal Div., 809 F.2d 1006, 6 Fed. R. Serv. 3d 1104 (3d Cir. 1987); and see Hornack and Lynd, The Steel Valley Authority, 15
§ 10:2 Administration and enforcement, in general

Although Congress gave the Department of Labor ("DOL") authority to promulgate rules and regulations concerning

NYU Rev L & Soc Change 1 (1986–1987) at 113–135. Workers and communities have also relied on the contractual obligations that some employers have undertaken when accepting public funds to prevent that employer from subsequently relocating its operations. In re Indenture of Trust dated as of March 1, 1982, 437 N.W.2d 430 (Minn. Ct. App. 1989); but see CharterTp. of Ypsilanti v. General Motors Corp., 201 Mich. App. 128, 506 N.W.2d 556, 8 I.E.R. Cas. (BNA) 1165 (1993) (rejecting promissory estoppel claims by city, finding GM's promises to continue work at plant in return for tax abatements to be mere puffery).

Finally, unionized workers have brought breach-of-contract and related common law tort and contract claims founded on either the collective bargaining agreement or the collective bargaining relationship. United Steel Workers of America, Local No. 1330 v. U.S. Steel Corp., 492 F. Supp. 1, 103 L.R.R.M. (BNA) 2925 (N.D. Ohio 1980) (promissory estoppel); Abbingtont v. Dayton Malleable, Inc., 561 F. Supp. 1290, 1296, 100 Lab. Cas. (CCH) ¶ 10894 (S.D. Ohio 1983), aff'd mem 738 F.2d 438 (6th Cir. 1984) (same); Atari, Inc. v. Superior Court, 166 Cal. App. 3d 867, 212 Cal. Rptr. 773 (6th Dist. 1985) (fraud, deceit and violation of California law requiring notice for termination of at-will relationship). The federal courts have often, although not always, found these claims to be preempted. Milne Employees Ass'n v. Sun Carriers, 960 F.2d 1401, 143 L.R.R.M. (BNA) 2663, 120 Lab. Cas. (CCH) ¶ 11016 (9th Cir. 1991) (Section 301 preempts claims for breach of implied covenant of good faith and fair dealing and for interference with prospective economic advantage); Serrano v. Jones & Laughlin Steel Co., 790 F.2d 686, 688–689, 2 I.E.R. Cas. (BNA) 473, 121 L.R.R.M. (BNA) 2626, 104 Lab. Cas. (CCH) ¶ 11781 (7th Cir. 1986) (NLRA preempts state fraud claims); Marine Transport Lines, Inc. v. International Organization of Masters, Mates & Pilots, 609 F. Supp. 282, 286–287 (S.D. N.Y. 1985) (federal labor law preempts tortious interference with union-member relationship claim); but see Machinists Automotive Trades Dist. Lodge No. 190 of Northern California v. Peterbilt Motors Co., 666 F. Supp. 1352, 1354–1358, 2 I.E.R. Cas. (BNA) 884, 126 L.R.R.M. (BNA) 2107, 109 Lab. Cas. (CCH) ¶ 10713 (N.D. Cal. 1987) (state action was improvidently removed to federal court because state-law contract and tort claims have no analogues under federal law). We address preemption under both the NLRA and Section 301 in more detail in §§ 2:40 to 2:41, 2:42, while discussing enforcement of contractual restrictions on an employer's right to relocate unit work in § 3:15.
WARN, it did not give the agency any enforcement powers. Instead, Congress provided for enforcement of WARN rights through private lawsuits, which may be filed in federal court in the district where the violation occurred or where the employer transacts business.

Either individual employees or their representatives may bring suit to enforce WARN. However, a union must still satisfy the minimal requirements for constitutional standing.

Federal courts initially struggled with the issue of a union's standing to sue on behalf of the workers it represents. The conventional three-prong test for associational standing requires proof that (1) the organization's members would otherwise have standing to sue on their own behalf, (2) the interests which the organization seeks to protect are germane to the organization's purpose, and (3) neither the claim asserted nor the relief requested requires the participation of individual members. Because WARN claims are for monetary relief that may vary from individual to individual, some courts held that unions did not have standing because they could not satisfy the third prong.

The Supreme Court resolved the dispute by holding that a union may assert associational standing under WARN by

---

[Section 10:2]

1 The DOL regulations are found at 20 C.F.R. §§ 639.1 et seq. They have been held to have the force and effect of law. Washington v. Aircap Industries Corp., 831 F. Supp. 1292, 8 I.E.R. Cas. (BNA) 1290 (D.S.C. 1993); In re Mr. Goodbuys of New York Corp., Inc., 164 B.R. 24, 30 Collier Bankr. Cas. 2d (MB) 1487, 9 I.E.R. Cas. (BNA) 394, 128 Lab. Cas. (CCH) ¶ 11171 (Bankr. E.D. N.Y. 1994).

When evaluating a plant closing or mass layoff under WARN, it is often essential to consult the legislative history of the Act. The National Lawyers Guild Maurice and Jane Sugar Law Center for Economic and Social Justice has prepared a digest of the legislative history as well as a number of publications addressing the WARN Act, corporate welfare and environmental justice. More information can be obtained from the Center at http://www.sugarlaw.org or at Guild Law Center, 733 St. Antoine, 3rd Floor, Detroit, Michigan 48226, (313) 962-6540 (telephone), (313) 962-4492 (fax).


3 29 U.S.C.A. § 2104(a)(5). Local governmental units may also sue to enforce their rights to notice.

satisfying the first two prongs alone.\textsuperscript{5} It held that the third prong was a judicially fashioned limitation, rather than a constitutional requirement, and that Congress could abrogate it, as it did in WARN.\textsuperscript{6}

The rights that WARN creates are in addition to those contractual and statutory rights that workers, their unions, and local governments enjoy.\textsuperscript{7} Thus, for instance, the violation of a longer notification period contained in a collective bargaining agreement is not affected by WARN. In fact, the statute and the DOL's regulations provide that the WARN notice period runs concurrently with the longer notice period provided in the collective bargaining agreement.\textsuperscript{8}

\section*{§ 10:3 Definition of employer under WARN: The “business enterprise”}

WARN defines an “employer” as a “business enterprise.”\textsuperscript{1}


\footnotesize\textsuperscript{6}The Court noted that “the third prong of the associational standing test is best seen as focusing on . . . matters of administrative convenience and efficiency, not on elements of a case or controversy within the meaning of the Constitution.” United Food and Commercial Workers Union Local 751 v. Brown Group, Inc., 517 U.S. 544, 116 S. Ct. 1529, 134 L. Ed. 2d 758, 11 I.E.R. Cas. (BNA) 1057, 152 L.R.R.M. (BNA) 2193, 131 Lab. Cas. (CCH) ¶ 11556 (1996).

\footnotesize\textsuperscript{7}29 U.S.C.A. § 2105.

\footnotesize\textsuperscript{8}29 U.S.C.A. § 2105; 20 C.F.R. § 639.1(g).

[Section 10:3]

\footnotesize1Generally, federal, state and local governments, along with federally recognized Indian tribe governments, are exempt from WARN coverage. 20 C.F.R. § 639.3(a). The regulation goes on to provide, however, that “the term ‘employer’ includes public and quasi-public entities which engage in business (i.e., take part in a commercial or industrial enterprise, supply a service or good on a mercantile basis, or provide independent management of public assets, raising revenue and making desired investments), and which are separately organized from the regular government, which have their own governing bodies, and which have independent authority to manage their personnel and assets.” These regulations can be found at http://www.access.gpo.gov/nara/cfrwaisidx_0220cfr639_02.html. See also Hotel Employees Restaurant Employees Intern. Union Local 54 v. Elsinore Shore Associates, 724 F. Supp. 333, 5 I.E.R. Cas. (BNA) 958, 132 L.R.R.M. (BNA) 3025, 114 Lab. Cas. (CCH) ¶ 11867 (D.N.J. 1989).
The statute's use of the phrase "business enterprise" has led some courts to preclude direct liability for individuals who are owners or officers of a company and, in one instance, to exclude a bankrupt debtor in possession who is liquidating its business from coverage under the Act. On the other hand, sole proprietors and partners in a partnership are covered.

Alter ego corporations and individuals should also be covered. The DOL's regulations likewise provide for multiple-defendant liability when the nature of the relationship between entities is such that the legal fiction of inde-

---


3In re United Healthcare System, Inc., 200 F.3d 170, 15, 35 Bankr. Ct. Dec. (CRR) 105, 15 I.E.R. Cas. (BNA) 1470, 140 Lab. Cas. (CCH) ¶ 10628 (3d Cir. 1999). At least one other court has held, however, that the issue of liquidation for a debtor in possession is irrelevant and may not be used to escape WARN liability. In re Reilly, 235 B.R. 239 (Bankr. D. Conn. 1999). This analysis is sounder because there is no statutory support for an additional exemption from WARN for bankrupt employers.


pendence may properly be disregarded.\footnote{7} The regulations provide that:

[S]ome 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.

In essence, the DOL has codified some of the many factors employed by courts in traditional “alter ego” and “single employer” analyses. This parity has caused some courts to apply multifaceted and often complex and overlapping tests to determine whether a parent is liable for the WARN Act violations of its subsidiary.\footnote{8} At least one court, however, rejected traditional single-employer analyses because of the overlap, and instead adopted a unified approach that focuses on the existence or absence of an arm’s length relationship found among unintegrated companies.\footnote{9}

Similarly, in imposing liability on the parent in Local 397, IUE v. Midwest Fasteners, the court focused primarily on the parent’s de facto control over its subsidiary and, in particular, the fact that it was the parent’s decision to close the subsidiary.\footnote{10} Thus, even though the corporate parties strictly adhered to the corporate formalities, “the true wrongdoer...
(the parent) should not escape liability.”

“Single employer” liability may also extend beyond the traditional parent-subsidiary relationship. One court has held that a corporate partner of an employer who closes a plant may also be liable as the employer under WARN. Similarly, when a secured lender exerts significant control over the borrower, it may be held liable to the borrower’s employees under WARN.

When a trustee or conservator is appointed to run a business, the business owners remain the “employer” for the purposes of complying with WARN. It appears, however, that a conservator may be held liable if he or she takes over the day-to-day operations of the facility, although the conservator may be covered by the exception for governmental action.

In the event of a sale of a business, the seller has a legal obligation to give notice if the closing or layoff occurs anytime

---

788, 7 I.E.R. Cas. (BNA) 65, 121 Lab. Cas. (CCH) ¶ 10125 (D.N.J. 1992). See also Gates v. Victor Fine Foods, 54 F.3d 1457 (9th Cir. 1995), cert. den. 516 U.S. 869 (1995) (fact that parent does not actually hire employees or participate in purchasing services or merchandise for subsidiary may not negate question of centralized control if parent forms decision to close plant).


up to and including the moment of sale.\textsuperscript{16} Thereafter, the buyer is responsible for providing notice.\textsuperscript{17} This language does not, however, require the buyer to actually hire the seller’s employees.\textsuperscript{18}

This provision has been interpreted to exempt employers from notice responsibilities when the employees have continued to work for the buyer without an interruption in employment. In Headrick v. Rockwell International Corp., the transferee of assets agreed to assume the transferor’s liability, with the expectation that the facility would be operated with the former employees.\textsuperscript{19} Nonetheless, the court held that no employment loss occurred because neither the sale of a business nor wage or benefit reductions imposed thereafter are WARN events. Thus, while the court agreed that the WARN Act assigns liability for providing notice of a closing or mass layoff after the sale to the purchaser, it found that Congress’ intention was that a sale itself should not trigger the Act.\textsuperscript{20} In the context of an acquisition, the acquiring corporation and the acquired corporation may both be treated as an employer.\textsuperscript{21}

\textsuperscript{16}29 U.S.C.A. § 2101(b).

\textsuperscript{17}29 U.S.C.A. § 2101(b). Accordingly, unless the buyer and seller arrange for jointly authorized presale notice, the buyer must wait 60 days to shut down.

\textsuperscript{18}See 20 C.F.R. § 639.4(c).

\textsuperscript{19}Headrick v. Rockwell Intern. Corp., 24 F.3d 1272, 18 Employee Benefits Cas. (BNA) 1522, 9 I.E.R. Cas. (BNA) 865, 2 Wage & Hour Cas. 2d (BNA) 57, 128 Lab. Cas. (CCH) ¶ 11149 (10th Cir. 1994).

\textsuperscript{20}See also International Alliance of Theatrical and Stage Employees and Moving Picture Mach. Operators, AFL-CIO v. Compact Video Services, Inc., 50 F.3d 1464, 10 I.E.R. Cas. (BNA) 612, 129 Lab. Cas. (CCH) ¶ 11296 (9th Cir. 1995) (denying recovery where employees were rehired by purchasing company but suffered pay cuts and loss of benefits). The court’s conclusion regarding Congressional intention appears misguided when one considers that changes in wages and benefits implemented by the new employer may have, in fact, constituted a constructive discharge.

§ 10:4 — Number of employees

To be covered by WARN, the employer must employ either (1) 100 or more employees, not counting part-time employees,¹ or (2) 100 or more employees who work, in the aggregate, 4,000 hours per week exclusive of overtime.² To satisfy the 100-employee threshold requirement, one may look at the entire corporate family. Employees at parent, sibling, subsidiary, and other affiliated companies may be counted toward meeting this threshold number.³ Employees of an independent contractor are not counted.⁴

Workers on temporary layoff or leave who have a reasonable expectation of recall as of the date of the plant closing are counted as employees.⁵ The test for determining whether employees have a reasonable expectation of recall is whether they understand through notification or industry practice that their employment has only been temporarily interrupted.⁶ In Damron v. Rob Fork Mining,⁷ the court ruled that plaintiffs who were on layoff for eight to ten years had no reasonable expectation of recall. Courts have also required that the expectation must be that the employee would be

[Section 10:4]

¹ 29 U.S.C.A. § 2101(a)(1)(A). The exclusion of part-time employees, for purposes of counting employees under this section, eliminates both employees who are "employed for an average of fewer than 20 hours per week" and those who have "been employed for fewer than 6 of the 12 months preceding the date on which notice is required." 29 U.S.C.A. § 2101(a)(8).

The regulations provide that the period to be used for calculating whether a worker has worked "an average of fewer than 20 hours per week" is the shorter of the actual time the worker has been employed or the most recent 90 days. Obviously an employee who has worked less than 90 days in total will be excluded by the second prong of the definition of "part-time employee."

² 29 U.S.C.A. § 2101(a)(1)(B). Employees who average less than 20 hours a week and recent hires, who would not be counted under Section 2101(a)(1)(A), are counted under Section 29 U.S.C.A. § 2101(a)(1)(B).

³ 20 C.F.R. § 639.3(a)(3)–(4) and (e).

⁴ 20 C.F.R. § 639.3(a)(2).


⁶ 20 C.F.R. § 639.3(a).

recalled to the same or a similar job. ⑧

§ 10:5 Plant closing or mass layoff defined: Number of affected employees

Once the 100-employee requirement has been met, the next question is whether a covered "plant closing" or "mass layoff" has occurred. A plant closing is defined as "the permanent or temporary 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 . . . for 50 or more employees." A "mass layoff" occurs when, at a single site of employment (1) 50 or more employees suffer an employment loss and (2) these discharged employees either constitute 33 percent or more of all full-time employees at the single site, or number 500 or more. ②

All employees terminated after the shutdown is ordered are entitled to notice, irrespective of whether they are terminated immediately and others work for some portion of the 60-day notice period. ③ Only plant closings that result in an employment loss for 50 or more full-time workers at the single site of employment during any 30-day period are actionable. ④

Part-time employees are not counted in meeting any of these threshold numbers of affected employees. ⑤ The definition of a part-time employee has produced anomalous and anomalous and anomalous results.


⑤29 U.S.C.A. § 2101(a)(2); 29 U.S.C.A. § 2101(a)(3)(B)(i)(I), (II), and (ii). A part-time employee is considered one "employed for an average of fewer than 20 hours per week or who has been employed for fewer than 6 of the ⑦

© West, a Thomson business, 6/2003
unfair results by excluding recent permanent hires in meeting the threshold requirements for either a plant closing or mass layoff.\(^6\)

Special attention should be paid to plant closings and mass layoffs involving bumping rights, which may cause an otherwise unlawful plant closing to be exempt under WARN. For example, in Harman Mining\(^7\) the defendant eliminated 57 positions at one of its mines. Fourteen of these terminated employees exercised their bumping rights under a collective bargaining agreement, bumping fourteen employees at the defendant's second mine. The court held that there was no WARN violation, because only 43 employees experienced an employment loss at the first mine.

Employment losses in a 30-day period are always added together in determining whether either a "plant closing" or "mass layoff" has occurred. As the DOL's regulations explain, the employer must consider employment losses in both a 30-day and a 90-day period to determine whether a 60-day notice is required.\(^8\) Aggregation of "groups" of layoffs is not necessary when each layoff exceeds threshold numbers or when a plant closing takes place in stages, each one of which involves the termination of over 50 employees.\(^9\)

12 months preceding the date on which notice is required." 29 U.S.C.A. § 2101(a)(8). This calculation is determined by the actual time of employment or the most recent 90 days, whichever is shorter. 20 C.F.R. § 639.3(h).

\(^6\)Solberg v. Inline Corp., 740 F. Supp. 680, 5 I.E.R. Cas. (BNA) 809, 118 Lab. Cas. (CCH) ¶ 10649 (D. Minn. 1990), the defendant hired over 300 workers between January and May of 1989, after receiving a contract from Kodak. When the contract was subsequently canceled in May, the defendant laid off these new employees with no WARN notice. Since they had only been employed for less than five months, the court held that no WARN violation existed.


\(^8\)20 C.F.R. § 639.5.

When two or more small groups\textsuperscript{10} of employment losses occur over a 90-day period at the same site, neither of which alone amounts to a plant closing or mass layoff, WARN allows for aggregation to meet the threshold numbers.\textsuperscript{11} An employer can escape application of this provision by proving that the employment losses sought to be aggregated have separate and distinct causes, and were not an attempt to evade WARN.\textsuperscript{12} One cannot aggregate separate groups of layoffs when at least one group meets the requirements for a plant closing or mass layoff.\textsuperscript{13}

If enough employees have been terminated to constitute a WARN violation, recall by the employer of a sufficient number of employees within six months of termination can undo the violation. In Electro Wire Products,\textsuperscript{14} for example, the court held that even though the defendant’s layoff of 53 of its 153 employees was a mass layoff under WARN, the

\textsuperscript{10}"Groups" means every employee who lost his or her job within the 90-day period. Hollowell v. Orleans Regional Hosp. LLC, 217 F.3d 379, 16 I.E.R. Cas. (BNA) 833, 141 Lab. Cas. (CCH) ¶ 10765 (5th Cir. 2000).


\textsuperscript{12}20 C.F.R. § 639.5(a)(10) (ii); see, e.g., Hollowell v. Orleans Regional Hosp. LLC, 217 F.3d 379, 16 I.E.R. Cas. (BNA) 833, 141 Lab. Cas. (CCH) ¶ 10765 (5th Cir. 2000) (defendant could not prove “separate and distinct” causes when it could not demonstrate that separate rounds of layoffs were “wholly unrelated” to an ensuing plant shutdown).


recall of six of the 53 employees within six months negated any WARN violation because the layoff then totaled less than the requisite threshold of at least 50 employees who constitute at least one-third of the full-time workforce.\textsuperscript{15} However, in Cruz v. Robert Abbey,\textsuperscript{16} the court held that material questions were raised about whether the employer was trying to evade the numerical predicates of WARN in a case in which the defendant, within a 90-day period, laid off employees, recalled them after the suit was filed, then laid them off again.

An extension of layoffs originally announced to last six months or less is considered an employment loss, except in one instance.\textsuperscript{17} An extension beyond six months that is caused by business circumstances unforeseeable at the time of the initial layoff is not treated as an employment loss, as long as notice is given when it does become reasonably foreseeable that an extension beyond six months is required.\textsuperscript{18}

In certain circumstances, an employee transfer is not treated as an employment loss.\textsuperscript{19} This occurs if, prior to a closing or layoff resulting from a company’s relocation or consolidation\textsuperscript{20} of part or all of its business, (1) the employee is offered a transfer to another site of employment\textsuperscript{21} owned by the employer that is within a reasonable commuting distance,\textsuperscript{22} with no more than a six-month break in employ-

\begin{itemize}
\item \textsuperscript{17}29 U.S.C.A. § 2102(c).
\item \textsuperscript{18}29 U.S.C.A. § 2102(c)(1), (2).
\item \textsuperscript{19}29 U.S.C.A. § 2101(b)(2)(A) and (B).
\item \textsuperscript{20}The consolidation or relocation must be the cause of the plant closing or mass layoff, not the result. Johnson v. TeleSpectrum Worldwide, Inc., 61 F. Supp. 2d 116, 15 I.E.R. Cas. (BNA) 750 (D. Del. 1999).
\item \textsuperscript{21}The employer bears the burden of proof on this affirmative defense and must show, inter alia, that a bona fide offer of guaranteed further employment was made. Johnson v. TeleSpectrum Worldwide, Inc., 61 F. Supp. 2d 116, 15 I.E.R. Cas. (BNA) 750 (D. Del. 1999).
\item \textsuperscript{22}The DOL has adopted the IRS definition of reasonable commuting distance, ruling that its meaning will vary according to local and industry conditions. The several factors to be considered in determining whether
\end{itemize}
ment; or (2) an employee accepts, within 30 days, an offer of transfer to another site of employment, regardless of the commuting distance, with no more than a six-month break in employment.

Employees who voluntarily quit prior to actual termination are not counted in determining whether the threshold number is met unless there is evidence of coercion, a hostile or intolerable work environment, undue pressure by the employer, or similar circumstances.

§ 10:6 — The single site requirement

Geographic connection or proximity is generally required for a finding of a “single site” of employment. However, unconnected and only reasonably proximate facilities should be considered a single site if they make similar products, share a workforce, or otherwise share the same operational purpose.

The commuting distance is reasonable: (1) usual travel time, (2) customarily available transportation, (3) quality of roads, and (4) geographic accessibility of place of work. 20 C.F.R. § 639.5(3). At least one court has held that the reasonable commuting distance is to be measured from employees’ homes, not where the plant is located. Johnson v. TeleSpectrum Worldwide, Inc., 61 F. Supp. 2d 116, 15 I.E.R. Cas. (BNA) 750 (D. Del. 1999).

The employee must accept the offer either within 30 days of receiving it, or within 30 days of the layoff or closing, whichever is later. 29 U.S.C.A. § 2101(b)(2)(B).

24 29 U.S.C.A. § 2101(b)(2)(A) and (B).


[Section 10:6]

"A single site of employment can refer to either a single location or a group of contiguous locations. Groups or structures which form a campus or industrial park, or separate facilities across the street from one another, may be considered a single site of employment.” 20 C.F.R. § 639.30(i)(l).

20 C.F.R. § 639.3(i)(3). See, e.g., Carpenters Dist. Council of New Orleans & Vicinity v. Dillard Dept. Stores, Inc., 15 F.3d 1275, 9 I.E.R. Cas. (BNA) 289, 127 Lab. Cas. (CCH) ¶ 11024 (5th Cir. 1994) (two plants in different locations deemed “inextricably connected” because workers had been moved from one to another due to overcrowding and continued to perform the same jobs); Hooper v. Polychrome, Inc., 916 F. Supp. 1111,
The DOL intended this provision to be construed narrowly. The courts have complied, a few relying on a judicially created presumption against a single-site finding in cases of noncontiguous facilities. Thus, geographical proximity is almost always the touchstone, particularly when the distance between the two sites is somewhat significant. Moreover, “same operational purpose” has been interpreted by a few courts more broadly than simply meaning the production of the same product; other criteria showing integration of operations have been required as well.

The DOL has likewise adopted a “common sense” definition of the terms “facility or operating unit” used to define a

11 I.E.R. Cas. (BNA) 746, 131 Lab. Cas. (CCH) ¶ 11550 (D. Kan. 1996) (intermittent migration of workforce from one site to another is not sufficient to meet “same operational purpose” requirements if different duties are performed at each site).


Williams v. Phillips Petroleum Co., 23 F.3d 930, 9 I.E.R. Cas. (BNA) 1103, 128 Lab. Cas. (CCH) ¶ 11150, 29 Fed. R. Serv. 3d 812 (5th Cir. 1994) (sites across town); Hooper v. Polychrome, Inc., 916 F. Supp. 1111, 11 I.E.R. Cas. (BNA) 746, 131 Lab. Cas. (CCH) ¶ 11550 (D. Kan. 1996) (sites 27 miles apart); Moore v. On-Line Software Intern. Inc., 8 I.E.R. Cas. (BNA) 1089, 1993 WL 189753 (N.D. Ill. 1993) (several different sites at different locations, owned by same purchasing company). At least one court has been particularly hostile toward this concept. International Union, United Mine Workers v. Jim Walter Resources, Inc., 6 F.3d 722, 8 I.E.R. Cas. (BNA) 1601, 126 Lab. Cas. (CCH) ¶ 10915 (11th Cir. 1993) (finding that none of defendant’s four mine sites could be considered together as “single site” despite fact that three of four were geographically contiguous, two mines were connected underground, and employer’s central office exercised some control over each site, because each mine has its own complement of employees, there was generally no rotation among sites, and each mine’s management team has operational responsibility).

“plant closing.” Plant closures may also occur in entities that do not operate within structures or buildings, e.g., farming/harvesting operations, even though a plot of land may not be a plant in the literal sense of the word. For employees who are “out-stationed,” i.e., required to travel from point to point, or whose duties regularly take them outside the employer’s facilities, “the single site of employment to which they are assigned as their home base, from which their work is assigned, or to which they report will be the single site in which they are covered for WARN purposes.” When none of the aforementioned single-site criteria apply, a single site of employment may be found to exist in “truly unusual organizational situations.”

“Affected employees” may be found beyond the single site of employment. In Kirkvold v. Dakota Pork Industries, the court held that employees of related and geographically proximate corporations were “affected” for the purposes of WARN if they reasonably could be expected to experience an employment loss as a result of the plant closing. They also must be identifiable at the time of the closing. The court was not persuaded by the defendants’ argument that only the employees at the single site that triggered WARN were affected, finding that the “determination of what constitutes a ‘single site of employment’ is pertinent only to calculating whether a sufficient number of employees suffered an employment loss.”

The defense that no single site of employment exists may be waived by a defendant. In Castro v. Chicago Housing Authority, the court held that defense counsel’s letter stating that the defendant “will not be proceeding with the single site defense” barred the defendant from later raising the is-

---

7 The term ‘facility’ refers to a building or buildings. The term ‘operating unit’ refers to an organizationally or operationally distinct product, operation, or specific work function within or across facilities at the single site.” 20 C.F.R. § 639.3(j).
8 20 C.F.R. § 639.3(i)(6).
§ 10:6 Employee and Union Member Guide to Labor Law

sue at trial.

§ 10:7 Requirement of employment loss

WARN does not apply to all employment losses that occur as a result of a covered mass layoff or plant closing. Instead, it defines an actionable employment loss as "an employment termination, other than a discharge for cause, voluntary departure, or retirement; a layoff exceeding 6 months; or a reduction in hours of work of more than 50 percent during each month of any six-month period." This definition is subject to several exceptions and qualifications.

In Dillard Department Stores,² for example, the defendant argued that because one terminated class member refused the continued employment offered her, she did not suffer an "employment loss." The employee maintained that the employment offered her was substantially different from her former work in pay and function, thus amounting to a constructive discharge. The DOL regulations specifically allow a constructive discharge to be treated as an "employment loss," although they do not define the term "constructive discharge."³ The court rejected the plaintiff's argument and found that a reasonable person would not find the new job offer "so difficult or unpleasant as to feel compelled to resign,"⁴ even though it carried more responsibility and different functions, required twenty more hours a week, and had the same pay as the former position.

Whether an employee finds subsequent employment elsewhere is irrelevant in determining whether he or she

[Section 10:7]

¹29 U.S.C.A. § 2101(a)(6); 20 C.F.R. § 639.3(f).
³20 C.F.R. § 639.5(b)(2).

10-18
suffered an "employment loss. "

§ 10:8 Notice requirements

Once a WARN "event" is established, notice is to be given to representatives of the "affected employees," the "affected employees" themselves if no representative exists, the "chief elected official of the unit of local government," and the state dislocated workers unit. Each of these persons or entities, except for the state dislocated worker unit, has a statutory remedy if the employer fails to provide proper notice.

The content, form and method of delivery differ slightly according to which of the three receives notice. Notice to the employee representative must identify the site involved and the company official who can be contacted, say whether the action is permanent or temporary, provide a schedule of separations, and identify the affected workers.

If the affected employees are unrepresented, then notice must be given to individual workers. WARN provides that

---


[Section 10:8]

1 WARN defines a "representative" as an exclusive representative of employees within the meaning of section 9(a) or 8(f) of the National Labor Relations Act, 29 U.S.C.A. § 159(a), 158(f), or section 2 of the Railway Labor Act, 45 U.S.C.A. § 152. The regulations specify that the representatives of "affected employees" who are entitled to notice are "the chief elected officer of the exclusive representative(s) or bargaining agent(s) of affected employees." 20 C.F.R. § 639.6(a). The regulations go on to recommend that notice also be given to local union officials if the chief elected officer of the exclusive representative is someone other than the officer of the local union representing the affected employees.

2 WARN defines a "unit of local government" as "any general purpose political subdivision of a State which has the power to levy taxes, and spend funds, as well as general corporate and police powers." 29 U.S.C.A. § 2101(a)(7). Exactly who is the "chief elected official of the unit of local government" is not readily discernible from this definition, since a business could be located in more than one "unit of local government." The DOL has resolved this by requiring that notice be given to the "unit" to which the employer has directly paid the most taxes. 20 C.F.R. § 639.3(g).


4 29 U.S.C.A. § 2104(a)(1) and (4).

5 20 C.F.R. § 639.7; 20 C.F.R. § 639.8.

6 20 C.F.R. § 639.7(c).
“affected employees” are those “employees who may reasonably be expected to experience an employment loss as a consequence of a proposed plant closing or mass layoff by their employer.” The employer must give notice to both full- and part-time incumbent employees who might be affected, and to laid-off employees with a reasonable expectation of recall whose recall rights would be limited or eliminated. Bumpees, even at separate work sites, are considered “affected employees” entitled to notice to the extent that they can reasonably be identified at the time notice is required.

The state dislocated workers unit and chief elected official must receive essentially all of the information provided to workers and their representatives. However, the employer has the option of providing them with an abbreviated notice if it keeps complete information on-site. Failure to make this information readily accessible and available upon request is treated as a failure to give notice.

Managerial and supervisory employees are entitled to notice; business partners are not. Consultants and contract employees who have a separate employment relationship with another employer from whom they receive their pay, or who are self-employed, are not “affected employees.”

8 20 C.F.R. 639.6(b) provides: “While part-time employees are not counted in determining whether plant closing or mass layoff thresholds are reached, such workers are due notice.”
10 20 C.F.R. § 639.3(e).
11 29 U.S.C.A. § 2101(a); 20 C.F.R. § 639.7(e).
12 20 C.F.R. § 639.7(f).
13 20 C.F.R. § 639.7(f).
14 20 C.F.R. § 639.3(e).
15 20 C.F.R. § 639.3(e).
Notice must be in writing. The DOL has prescribed by regulation the form, content, and method of delivery.

An employer is only required to provide notice based on the best information available at the time notice is given. Minor or inadvertent inaccuracies or errors resulting from subsequent changes in circumstances will not violate WARN.

A number of courts have, however, found that the defects in the employer's notice were serious enough to render it legally tantamount to no notice at all. Although an

---

17 20 C.F.R. § 639.7, 639.8.
18 20 C.F.R. § 639.7(4).
19 20 C.F.R. § 639.7(4).

employer is allowed to give incomplete notice more than 60 days in advance of a covered plant closing or mass layoff, adequate and complete notice must be given at least 60 days in advance of the action. The method of delivery is also a proper consideration when assessing sufficiency.

Once an employer has given notice under WARN, it may postpone the action announced by giving additional notice. The requirements for additional notice are as follows:

1. The postponement must be less than 60 days, or else new notice is required.
2. The additional notice must be provided 'as soon as possible.'
3. The notice must be given to all of the parties who are regularly supposed to receive notice under WARN.
4. The notice must contain the date to which the action has been postponed and the reasons for the postponement.
5. The notice must be given in a manner which will provide the notice to all affected employees.

The requirement that the additional notice must be provided “as soon as possible” has been interpreted as meaning when the events that determine the timing of the relocation become foreseeable, not when they are absolute certainties. Failure to timely provide the additional notice may result in WARN Act liability.

Conditional notice is permitted, but not mandatory. Conditional notice is encouraged when an event is definite and the consequence of its occurrence or nonoccurrence will necessarily result, “in the normal course of business,” in a

9 I.E.R. Cas. (BNA) 1798, 131 Lab. Cas. (CCH) ¶ 11528 (N.D. Cal. 1994), judgment aff’d, 131 F.3d 1331, 13 I.E.R. Cas. (BNA) 975 (9th Cir. 1997) and aff’d in part, 133 F.3d 927 (9th Cir. 1997) (notice letting employees know that they would not be rehired, that there were no issues of bumping rights, and how to contact employer for more information constituted adequate notice despite minor deviations from prescribed contents).

2120 C.F.R. § 639.7(2).


2320 C.F.R. § 639.10.

2420 C.F.R. § 639.10.


2620 C.F.R. § 639.7(3).
covered plant closing or mass layoff.\footnote{27}

Delivery of notice may be in any reasonable method designed to ensure receipt of the notice sixty days before separation.\footnote{28} Both the statute and the DOL deem several methods of delivery, such as inclusion in paycheck, mailing to last known address, and personal delivery, to be appropriate. However, ticketed or preprinted notices regularly included in paychecks or envelopes are not allowed.\footnote{29}

\section*{§ 10:9 —When less than 60 days' notice is permitted}

There are three exceptions to the requirement that a full sixty days' notice be given,\footnote{1} all of which must be construed narrowly.\footnote{2} Under each exception, the employer is required to provide notice as soon as is practicable and to include therein a brief explanation for the shortened notice period.\footnote{3} Failure to meet these requirements negates the notice.\footnote{4} Under each of the three exceptions, the employer bears the burden of

\footnote{27}20 C.F.R. § 639.7(3). The DOL's regulations give, as an example of a situation in which conditional notice is appropriate, the uncertainty over the renewal of a major contract.

\footnote{28}20 C.F.R. § 639.8.

\footnote{29}29 U.S.C.A. § 2107(b); 20 C.F.R. § 639.8.


\footnote{2}20 C.F.R. § 639.9(a) (“faltering business” exception). Although the regulations do not specifically provide that the other two exceptions for unforeseeable business circumstances and natural disasters must be read narrowly, they put the burden on the employer to prove that all of the conditions are met.

\footnote{3}29 U.S.C.A. § 2102(b)(3). As soon as “practicable” may, in some circumstances, be notice after the fact, 20 C.F.R. § 639.9, and failure to give such notice should trigger liability for the full statutory period.

showing that it meets the requirements for the particular exception it wishes to rely upon.⁵

First, WARN provides that:

An employer may order the shutdown of a single site of employment before the conclusion of the 60-day period if as of the time that notice would have been required the employer was actively seeking capital or business which, if obtained, would have enabled the employer to avoid or postpone the shutdown and the employer reasonably and in good faith believed that giving the notice required would have precluded the employer from obtaining the needed capital or business.⁶

By its plain language this exception applies only to plant closings.

To rely on this defense, the employer must: (1) be able to identify specific actions taken to obtain capital or business at the time notice would have been required;⁶ (2) demonstrate that it exercised "commercially reasonable business judgment in its actions;"⁷ (3) demonstrate that there was a realistic opportunity to obtain the financing or business sought, which if obtained, would have been sufficient to avoid or indefinitely postpone the shutdown;⁸ and (4) objectively demonstrate that it reasonably and in good faith believed that a potential customer or source of financing would have been unwilling to provide the new business or capital if notice was given.⁹ The defense does not apply if the employer is

---

⁵20 C.F.R. § 639.9.
⁷20 C.F.R. § 639.9(a)(1). See, e.g., Burnsides v. MJ Optical, Inc., 128 F.3d 700, 13 I.E.R. Cas. (BNA) 717, 13 I.E.R. Cas. (BNA) 1024, 136 Lab. Cas. (CCH) ¶ 10303 (8th Cir. 1997) (defense unavailable because employer did not search for capital or financing at time notice was required).
seeking to sell or liquidate its business operations,\(^{10}\) or when there is no causal relationship between its search for capital and the ultimate reduction in workforce.\(^{11}\)

The actions of an employer relying on this defense must be viewed in a "company-wide context."\(^{12}\) Thus, a company with access to capital markets or with cash reserves may not take advantage of this defense by looking solely at the financial condition of the branch, operating unit, facility, or site to be closed.\(^{13}\)

The second exception to the 60-day notice period applies when the closing or mass layoff is caused by business circumstances that were not reasonably foreseeable by the employer at the time that notice would have been required.\(^{14}\) Facts that support such a finding are most often characterized by an occurrence that is caused by a sudden, dramatic, and unexpected action or condition outside of the employer's control.\(^{15}\) By their very nature, such circumstances must necessitate or impel the covered employment action.\(^{16}\) As with the faltering-business defense, to successfully rely on the unforeseeable-business-circumstances defense an em-

---


\(^{12}\) 20 C.F.R. § 639.9(a)(4).

\(^{13}\) 20 C.F.R. § 639.9(a)(4).


\(^{15}\) See, e.g., Pena v. American Meat Pacldng Corp., 258 F. Supp. 2d 864, 19 I.E.R. Cas. (BNA) 1862 (N.D. Ill. 2003); Jurcev v. Central Community Hosp., 7 F.3d 618, 8 I.E.R. Cas. (BNA) 1505, 126 Lab. Cas. (CCH) ¶ 10908, 27 Fed. R. Serv. 3d 760 (7th Cir. 1993); Bradley v. Sequoyah Fuels Corp., 847 F. Supp. 863, 9 I.E.R. Cas. (BNA) 449 (E.D. Okla. 1994). In its regulations, the DOL cites three examples of unforeseeable business circumstances: (1) a principal client of the employer suddenly and unexpectedly terminates a major contract with the employer; (2) a strike at a major supplier of the employer; and (3) an unanticipated and dramatic major economic downturn. 20 C.F.R. § 639.9(b)(2).

employer must give notice "as soon as is practicable."\textsuperscript{17}

When a contract with a customer did not include a provision requiring any notice of cancellation, a cancellation by the customer was insufficient to support this defense.\textsuperscript{18} Moreover, although an employer must exercise commercially reasonable business judgment in predicting market demands, it is not required to accurately predict general economic conditions that may affect demand for its products.\textsuperscript{19} Finally, one court has held that, given the absence of clear statutory or regulatory language to the contrary, WARN does not require an employer to demonstrate that it is financially incapable of remaining open for sixty days for the defense to apply.\textsuperscript{20}

The third exception excuses the 60-day notice requirement in the event of a natural disaster.\textsuperscript{21} To qualify for this exception, the employer must be able to prove that the plant closing or mass layoff was a direct result of a natural disaster.\textsuperscript{22} The DOL regulations also provide that when the plant clos-

\textsuperscript{17}In Jones v. Kayser-Roth Hosiery, Inc., 748 F. Supp. 1276, 6 I.E.R. Cas. (BNA) 732, 118 Lab. Cas. (CCH) \textsuperscript{¶} 10559 (E.D. Tenn. 1990), the employer gave no notice of a plant closing that occurred as a result of the loss of a large contract with a principal customer. The court held that while the employer could not have reasonably foreseen the loss of its customer 60 days before the closing, it became reasonably practical to notify the employees up to 30 days before the closing. Therefore, although the employer was able to avail itself of the unforeseeable-business-circumstances defense for part of the notice period, it was still deemed liable under WARN for the 30-day balance of the violation period.

See also Wholesale and Retail Food Distribution Local 63 v. Santa Fe Terminal Services, Inc., 826 F. Supp. 326, 8 I.E.R. Cas. (BNA) 778, 126 Lab. Cas. (CCH) \textsuperscript{¶} 10860 (C.D. Cal. 1993) (delaying seven days violated "as soon as practicable" requirement).

\textsuperscript{18}International Broth. of Teamsters, Chauffeurs, Warehousemen & Helpers, General Truck Drivers, Office Food & Warehouse Local 952 v. American Delivery Service Co., Inc., 50 F.3d 770, 10 I.E.R. Cas. (BNA) 801, 148 L.R.R.M. (BNA) 2841, 129 Lab. Cas. (CCH) \textsuperscript{¶} 11299 (9th Cir. 1995).


\textsuperscript{20}Jurcev v. Central Community Hosp., 7 F.3d 618, 8 I.E.R. Cas. (BNA) 1505, 126 Lab. Cas. (CCH) \textsuperscript{¶} 10908, 27 Fed. R. Serv. 3d 760 (7th Cir. 1993).

\textsuperscript{21}29 U.S.C.A. \textsuperscript{§} 2102(b)(2)(B).

\textsuperscript{22}20 C.F.R. \textsuperscript{§} 639.9(c)(2). Examples of such disasters provided in the regulations include floods, earthquakes, tidal waves or tsunamis, droughts and similar effects of nature. 20 C.F.R. \textsuperscript{§} 639.9(c)(1).
§ 10:10 —When no notice is required

In some cases no WARN notice is required. The closing of a temporary facility does not require advance notice. Notice is also not required when the jobs being eliminated are of a temporary nature. In either case, however, the affected employees must understand at the time of hire that their employment is temporary, and the employer has the burden of proving that the temporary nature of the work was communicated to the employees. The employer may rely on local or industrial employment practices, collective bargaining agreements, or employment contracts to attempt to prove that such an understanding existed.

If the work is otherwise permanent, providing written notice that it is temporary will not make it so. If the employment is related to a specific order or contract, as in the defense industry, deciding whether the work is temporary or permanent depends on whether the order or contract is part of a long-term relationship. Thus, to use an example drawn from the DOL's regulations, if an employer who had a contract to provide the government with a fleet of ships or planes expected that the contract would be renewed, then the employees hired under that contract would be permanent, not temporary.

---

23 20 C.F.R. § 639.9(c)(4).
24 20 C.F.R. § 639.9(c)(3).

[Section 10:10]
1 29 U.S.C.A. § 2103(1).
3 20 C.F.R. § 639.5(c)(1), (2).
4 20 C.F.R. § 639.5(c)(1), (2).
5 20 C.F.R. § 639.5(c)(3).
6 20 C.F.R. § 639.5(c)(4).
Employment losses resulting from strikes or lockouts\(^7\) are not actionable under WARN-unless they are intended to evade WARN's requirements.\(^8\) Employers are not required to give notice to economic strikers under the NLRA; however, nonstriking employees at the same site may be entitled to notice if WARN's notice requirements are not met.\(^9\)

§ 10:11  When and where to sue

Because WARN does not provide an express statute of limitations period, courts have applied the traditional rule for borrowing the most closely analogous statute of limitations. For years after WARN's enactment, courts were split on whether to apply the federal limitations period of six months under the NLRA,\(^1\) or applicable state periods.

The Supreme Court resolved this uncertainty in 1995 in North Star Steel.\(^2\) The court held that WARN cases fall squarely inside the general rule of borrowing from analogous state statutes of limitations, not within the exception that looks to federal law. A number of cases decided since North Star Steel have applied state statute of limitations periods for contract claims.\(^3\) Other courts have borrowed state limi-

\(^7\)According to the DOL, a lockout occurs when "for tactical or defensive reasons during the course of collective bargaining or during a labor dispute, an employer lawfully refuses to utilize some or all of its employees for the performance of available work." 20 C.F.R. § 639.5(d).

\(^8\)20 C.F.R. § 639.5(d).

\(^9\)20 C.F.R. § 639.5(d).

[Section 10:11]

\(^1\)Although federal courts usually look to the law of the forum state to determine what statute of limitations to apply, a narrow exception to that rule allows borrowing from elsewhere in federal law when the arguably relevant state limitations period would frustrate or interfere with the implementation of national policies or is at odds with the purpose or operation of federal substantive law. See, e.g., DelCostello v. International Broth. of Teamsters, 462 U.S. 151, 161, 172, 103 S. Ct. 2281, 76 L. Ed. 2d 476, 113 L.R.R.M. (BNA) 2737, 97 Lab. Cas. (CCH) ¶ 10156 (1983).


\(^3\)See, e.g., Aaron v. Brown Group, Inc., 80 F.3d 1220, 11 I.E.R. Cas. (BNA) 910, 131 Lab. Cas. (CCH) ¶ 11567 (8th Cir. 1996) (rejecting equal pay statute's six-month period and FLSA's two-year period, concluding that five-year limitations period for all "Actions upon contracts, obligations or liabilities, express or implied," should govern WARN claims);
tations for the collection of a debt\textsuperscript{4} and wrongful discharge.\textsuperscript{5} Given the range of results, it is wise for the practitioner in an "undecided" jurisdiction to make the worst-case analogy to state law and file within that limitations period.

Plaintiffs must file their action in federal court, either in the district where the violation occurred or where the employer transacts business.\textsuperscript{6} Because the damages sought under WARN are set forth in the Act and are legal in nature, employees and their representatives have the right to trial by jury on the issue of liability.\textsuperscript{7}

\section*{\textsection{10:12} Remedies}

Remedies under WARN depend on who brings the action.\textsuperscript{1} Employees bringing suit under WARN can recover up to 60

\begin{itemize}
  \item 29 U.S.C.A. § 2104(a)(5).
\end{itemize}

[\textsection{10:12}]

\textsuperscript{1}Under WARN, governmental units can receive civil penalties of not more than $500 a day for each day of violation. However, this penalty does not apply if the employer pays its employees WARN damages within three weeks of the plant closing or layoff. 29 U.S.C.A. § 2104(a)(3).
days' back pay, as well as the benefits to which they would have been entitled under their employee benefit plan, including medical expenses incurred during the employment loss that would have been covered under the plan had no employment loss occurred. There are two conflicting methods of calculating WARN damages. Under the calendar-day approach, each aggrieved employee is entitled to back pay and benefits for each calendar day of the violation. Under the work-day approach, the aggrieved employee is entitled to damages for each day of the violation on which he or she would have worked.

The Third Circuit stands alone in adopting the calendar-day interpretation. In North Star Steel, the court noted the lack of statutory or regulatory reference to “work days,” found that a work-day interpretation would render the offset provisions of 29 U.S.C.A. § 2104(a)(2) superfluous, and relied on the plain language of the statute in holding that WARN “uses the term ‘back pay’ simply as a label to describe the daily rate of the damages payable.”

The Fifth, Sixth, Eighth, Ninth and Tenth Circuits have all upheld the work-day computation, relying on nearly identical rationales. Each of these courts found that the use of the work-day approach is obviously far less favorable for employees: given a full 60-day violation period, and barring any unpaid holidays, the employee who had a five-day workweek would be entitled to only 41 days of damages, while employees who worked fewer days would recover even less.

29 U.S.C.A. § 2104(a)(1)(B). Employees are also entitled to recover the tips they would have received from third parties as part of the backpay owed them under WARN. Local Joint Executive Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc., 244 F.3d 1152, 17 I.E.R. Cas. (BNA) 796, 143 Lab. Cas. (CCH) ¶ 10958, 50 Fed. R. Serv. 3d 511 (9th Cir. 2001).

3The work-day approach is obviously far less favorable for employees: given a full 60-day violation period, and barring any unpaid holidays, the employee who had a five-day workweek would be entitled to only 41 days of damages, while employees who worked fewer days would recover even less.


of the term "back pay" in WARN creates a textual ambiguity because of its compensatory connotation in other legislative contexts. Given the ambiguity, each court then turned to the legislative history, finding support there for the work-day approach.

The calendar-day reading best serves the plain language of WARN and its purpose: requiring advance notification of plant closings and mass layoffs to provide "workers and their families some transition time to adjust to the prospective loss of employment, to seek and obtain alternative jobs and, if necessary, to enter skill training or retraining that will allow . . . workers to successfully compete in the job market." The work-day approach undermines this purpose by removing most of the incentive to comply with WARN: employers, if held fully liable under this approach, must pay damages equal to what they would have paid in wages had they complied with WARN in the first instance. Conversely, a calendar-day interpretation makes the employer liable for an amount potentially greater than the cost of the initial compliance, thus providing an incentive to comply.

Although WARN does not specifically address the award of prejudgment interest, it is routinely awarded. WARN does not authorize a court to enjoin a plant closure

---


The court also held that award of prejudgment interest furthers congressional policy under WARN. Specifically, "[a]warding prejudgment interest serves the dual purpose of making an employee whole by allowing for an adjustment in the value of the money that an employee was supposed to receive in the past . . . and by providing an incentive to employers to promptly comply with their obligations under the Act." Id.

See also United Steelworkers of America, AFL-CIO-CLC v. North Star Steel Co., Inc., 809 F. Supp. 5, 9, 8 I.E.R. Cas. (BNA) 129, 125 Lab. Cas. (CCH) ¶ 10686 (M.D. Pa. 1992), aff'd in part, vacated in part on other grounds, 5 F.3d 39, 8 I.E.R. Cas. (BNA) 1281, 126 Lab. Cas. (CCH)
or layoff. It also does not, on the other hand, preempt any claims for injunctive relief that employees might have under other federal laws or state law.

Under WARN a court may, at its discretion, award attorneys' fees to the prevailing party as part of the costs. As with other civil rights statutes that provide for attorneys' fees, prevailing plaintiffs under WARN should ordinarily recover their attorneys' fees unless special circumstances exist.

\[\text{[Footnotes]}\]

\(\text{¶ 10851 (3d Cir. 1993); Cruz v. Local Union No. 3 of Intern. Broth. of Elec. Workers, 150 F.R.D. 29, 125 Lab. Cas. (CCH) ¶ 10790 (E.D. N.Y. 1993), aff'd in part, rev'd in part on other grounds, 34 F.3d 1148, 147 L.R.R.M. (BNA) 2176, 128 Lab. Cas. (CCH) ¶ 11167, 30 Fed. R. Serv. 3d 79 (2d Cir. 1994).}\)

\(\text{[Footnotes]}\)

\(\text{[Footnotes]}\)

\(\text{¶ 10851 (3d Cir. 1993); Cruz v. Local Union No. 3 of Intern. Broth. of Elec. Workers, 150 F.R.D. 29, 125 Lab. Cas. (CCH) ¶ 10790 (E.D. N.Y. 1993), aff'd in part, rev'd in part on other grounds, 34 F.3d 1148, 147 L.R.R.M. (BNA) 2176, 128 Lab. Cas. (CCH) ¶ 11167, 30 Fed. R. Serv. 3d 79 (2d Cir. 1994).}\)


\(\text{29 U.S.C.A. § 2104. Local 217, Hotel & Restaurant Employees Union v. MHM, Inc., 976 F.2d 805, 7 I.E.R. Cas. (BNA) 1313, 123 Lab. Cas. (CCH) ¶ 10415, 123 Lab. Cas. (CCH) ¶ 10465 (2d Cir. 1992) held that Section 2104, which declares backpay to be the exclusive remedy, also barred an injunction requiring the employer to maintain employees' medical benefits. Plaintiffs might, on the other hand, be entitled to an injunction preventing an employer from dissipating its assets on a sufficient showing of fraudulent conveyance or concealment. Local 397, Intern. Union of Electronic, Elec., Salaried, Mach. and Furniture Workers, AFL-CIO v. Midwest Fasteners, Inc., 763 F. Supp. 78, 6 I.E.R. Cas. (BNA) 39, 119 Lab. Cas. (CCH) ¶ 10827 (D.N.J. 1990).}\)

\(\text{29 U.S.C.A. § 2105. We address unions' ability to rely on the provisions of a collective bargaining agreement to enjoin employers from closing a plant or relocating work in § 3:15.}\)

Employees cannot, on the other hand, use state collection procedures to add to or circumvent the WARN Act's exclusive remedies. In re Bluffton Casting Corp., 186 F.3d 857, 34 Bankr. Ct. Dec. (CRR) 1136, 15 I.E.R. Cas. (BNA) 786, 162 L.R.R.M. (BNA) 2096, 139 Lab. Cas. (CCH) ¶ 10515 (7th Cir. 1999), overruled on other grounds by, In re Bentz Metal Products Co., Inc., 253 F.3d 283, 37 Bankr. Ct. Dec. (CRR) 277, 167 L.R.R.M. (BNA) 2344, 143 Lab. Cas. (CCH) ¶ 11015 (7th Cir. 2001) (employees may not use Indiana's mechanics' lien law to collect backpay they claimed they were owed under WARN).
that would render such an award unjust.\textsuperscript{12}

A prevailing defendant in a WARN action is not entitled to attorneys' fees unless the action was frivolous, unreasonable, or without foundation.\textsuperscript{13} Moreover, success on one of several WARN claims is sufficient to deem the plaintiffs "prevailing parties" for an award of attorneys' fees.\textsuperscript{14}

Workers are increasingly being presented with waivers and small severance packages as inducements to waive any and all rights against their employers. Facing imminent job loss and the economic insecurity it brings, the pressure to sign a waiver is often intense. Addressing the issue, the court in DePalma v. Reality IQ Corp.\textsuperscript{15} held that federal law controlled whether the releases were valid, and that a federal "totality of the circumstances" test should be applied. Factors relevant to this inquiry included: "(1) the plaintiff's education and business experience, (2) the amount of time the plaintiff had possession of or access to the agreement before signing it, (3) the role of plaintiff in deciding the terms of the agreement, (4) the clarity of the agreement, (5) whether the plaintiff was represented by or consulted with an attorney, (6) whether the consideration given in exchange for the waiver exceeds employee benefits to which the employee was already entitled by contract law."\textsuperscript{16} Moreover, the court noted that other courts have considered a seventh factor—whether an employer encouraged an employee to consult an attorney and whether the employee had a fair opportunity to do so.

\section*{§ 10:13 Reduction of employer liability}

The maximum liability of the employer is reduced for every


\textsuperscript{14}Hollowell v. Orleans Regional Hosp. LLC, 217 F.3d 379, 16 I.E.R. Cas. (BNA) 833, 141 Lab. Cas. (CCH) ¶ 10765 (5th Cir. 2000).

\textsuperscript{15}DePalma v. Realty IQ Corp., 2002 WL 461647 (S.D. N.Y. 2002).

day of notice actually provided. Liability may also be reduced by any “voluntary and unconditional payment” made by the employer to the employee for the period of the violation that is “not required by any legal obligation.” Liability will also be reduced by “any payment by the employer to a third party or trustee (such as premiums for health benefits or payments to a defined contribution pension plan) on behalf of and attributable to the employee for the period of the violation.”

WARN provides that a court may reduce the liability of “an employer in violation, who proves that the act or omission was done in good faith and the employer had reasonable grounds for believing that the act or omission was not a violation of WARN.” The employer bears the burden of proof in establishing this defense, which should be construed narrowly because WARN is a remedial statute.

To receive a “good faith” reduction, the employer must prove that it either believed at the time notice was required to be given that it was providing 60 days’ notice or that it fit

[Section 10:13]

329 U.S.C.A. § 2104(a)(2)(C). The court in Ciarlante v. Brown & Williamson Tobacco Corp., 143 F.3d 139, 13 I.E.R. Cas. (BNA) 1569, 135 Lab. Cas. (CCH) ¶ 10150 (3d Cir. 1998) refused, on the other hand, to use employees’ severance pay as an offset against the WARN backpay they were owed, reasoning that these payments did not represent pay for work performed during the notice period.

Courts have also given close scrutiny to waivers obtained by employers in return for severance benefits. The court in DePalma v. Realty IQ Corp., 2002 WL 461647 (S.D. N.Y. 2002), held that a federal “totality of the circumstances” test should be applied to judge whether this waiver was, in fact, knowing and voluntary. See § 10:12. DePalma v. Realty IQ Corp., 2002 WL 461647 (S.D. N.Y. 2002), held that a federal “totality of the circumstances” test should be applied to judge whether this waiver was, in fact, knowing and voluntary. See § 10:12.


within one of the defenses allowing shortened or no notice.\textsuperscript{6} Good faith is subject to an objective, not a subjective, standard.\textsuperscript{7} Evidence of an employer’s acts after the violation is irrelevant.\textsuperscript{8}

An employer’s subjective belief that the law is not what it is, or that an adverse business circumstance may change, does not operate to exempt the employer from liability under WARN.\textsuperscript{9} To the extent that an employer relies on the advice of counsel to establish this defense, it must waive the attorney-client privilege.\textsuperscript{10}

The employer’s conduct need not be “callous” to negate this defense.\textsuperscript{11} Nonetheless, some courts have accepted the defense where employees learned of a definite impending closing well in advance of the actual closing and have general ideas of when they would be permanently laid off.\textsuperscript{12} However, failure to give notice as soon as possible will often


\textsuperscript{12}Oil, Chemical and Atomic Workers Intern. Union, Local 7-515, AFL-CIO v. American Home Products Corp., 790 F. Supp. 1441, 7 I.E.R. Cas. (BNA) 673, 125 Lab. Cas. (CCH) ¶ 10653 (N.D. Ind. 1992) (employees learned they would be laid off over year in advance and some knew the quarter in which they would lose their jobs, all much more than 60 days in advance); United Auto. Aerospace & Agr. Implement of America, Local
undermine this defense. Finally, at least one court has held that failure to give conditional notice may evidence a lack of good faith.

§ 10:14 WARN claims in bankruptcy

Faltering employers are increasingly relying on the protections of the Bankruptcy Code. Thus, it is no surprise that many WARN Act claims wind up before a bankruptcy judge. Because WARN claims are treated as claims for wages earned within 90 days of the cessation of the debtor's business, the first $4,650 of such claims receive priority treatment under Bankruptcy Code § 507(a)(3). Moreover, to the extent that the violation occurs postpetition, such claims should be given administrative priority.

The success of WARN claims in bankruptcy depends, of course, on whether the employing entity is considered an


[Section 10:14]


"employer" for the purposes of WARN.\(^3\) One court has held that, under certain circumstances, a jury trial may be implicitly waived by commencing a WARN action in bankruptcy court.\(^4\) Finally, when a prepetition summary judgment motion is pending in a district court, the bankruptcy court may allow the district court to decide the motion.\(^5\)

§ 10:15 Federal laws providing benefits for dislocated workers

The Trade Act of 1974\(^1\) provides for Trade Adjustment Assistance benefits, commonly known as Trade Readjustment Allowances, for workers who have lost their jobs or suffered a reduced work schedule as a result of increased imports. The DOL can provide job placement, counseling and testing, job search allowances, relocation allowances, payment for cost of training, and cash payments after unemployment insurance is exhausted.

A union or any group of three workers can petition for these benefits. Individual employees must, however, apply in a timely fashion for the particular benefits that the DOL provides.\(^2\)

Any relief depends on certification by the DOL that (1) workers have been totally or partially laid off, (2) sales or productions have declined, and (3) increased imports have contributed importantly to worker layoffs. If the DOL rules against them, then the petitioners can file either a request for reconsideration with the DOL or a judicial appeal with


[Section 10:15]


\(^2\)The Department of Labor's regulations set out the procedures for applying for these benefits at 20 C.F.R. § 617.10. Those regulations can be found at http://www.access.gpo.gov/nara/cfr/waisidx_0220cfr617_02.html.
the U.S. Court of International Trade.

Although the court has upheld the DOL’s denial of certification in cases in which the DOL made no attempt to verify the employer’s claims, it has remanded cases for further investigation when the DOL’s own investigation should have alerted it to the possibility that the employer was lying. The court will also order a claim certified if it concludes that the Department of Labor is unable or unwilling to conduct an adequate investigation.

---


4 Callebaut v. Herman, 177 F. Supp. 2d 1304, 23 Int’l Trade Re. (BNA) 2184 (Ct. Int’l Trade 2001).