Advance Notice of Plant Closings: Toward National Legislation

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Nearly 6500 plants with over one hundred workers closed between 1969 and 1976.¹ This statistic highlights the crisis posed by plant closings throughout the United States. Plant closings cause hardship at many levels: workers suddenly become unemployed, communities face lower revenues, and the state incurs substantial costs in unemployment benefits. Overall, workers and their communities may suffer a debilitating loss of spirit. Legislators, consequently, have introduced plant closing bills in many state legislatures and the United States Congress.²

One reform often mentioned would require businesses to give notice in advance of a plant closing. Indeed, some authors call these “advance notice” provisions the key to all other plant clos-

¹ D. BIRCH, THE JOB GENERATION PROCESS 12 (1979). This figure comes from a calculation based on plant “deaths”: [(total percent of firms that “died,” which employed 101-500 workers) multiplied by (total number of firms with 101-500 workers)] plus [(total percent of firms that died, which employed 501 or more workers) multiplied by (total number of firms with 501 or more workers)]. The total number of firms that have less than 100 workers and that died between 1969 and 1976 is approximately 1,062,130. However, there is much discussion and controversy over figures concerning plant closings. See note 5 infra.

² Plant closing research is continually growing. I thank Dr. Jeanne Gordus at the Institute of Labor and Industrial Relations, University of Michigan and Wayne State University, and Mrs. JoAnn Sokkar and Mrs. Mabel Webb at the Industrial Relations Library, University of Michigan Graduate School of Business, for keeping me informed.


⁴ The following plant closing bills were pending in state legislatures as of September 8, 1980:
This article advocates the adoption of national legislation requiring advance notice for plants closed or relocated for ostensibly economic reasons. Part I discusses the magnitude of the plant closing problem, focusing upon the costs associated with such closings, the types of assistance available for terminated workers, and the inadequacies of current relief efforts. Parts II and III examine the arguments for and against requiring advance notice of plant closings, and conclude that such a requirement represents sound public policy. Part IV proposes a complete model advance notice statute. The model statute establishes minimum requirements for a viable advance notice system, takes account of the different levels of hardship caused by these closings, and does not require advance notice when it would excessively harm the employer. The adoption of this article's model statute would mitigate substantially the crisis posed by the numerous plant closings across the United States.

Alaska  H.B. 274  
Calif.  S.B. 1494;  AJR-70  
Conn.  S. 334  
Del.  H. 305;  H. 887  
Ill.  H.B. 2768;  H.B. 3567  
Iowa  H.B. 365;  S. 2160  
Maine  L.D. 1333  
Mass.  H. 6791;  S.B. 96  
Mich.  H.B. 5104;  S. 868  
N.J.  A. 1054;  S. 1135  
N.Y.  S.B. 5927  
Ohio  H.B. 968;  S.B. 188  
Ore.  S.B. 729  
Penn.  H.B. 2267;  H.B. 1251  
R.I.  H. 7796;  S. 2248  
S.D.  S. 40  
W. Va.  S. 344  


* See, e.g., B. Bluestone & B. Harrison, Capital and Communities: The Consequences of Private Disinvestment 266 (1980) [hereinafter cited as Bluestone & Harrison].

* The National Labor Relations Act covers the "runaway shop" problem (i.e., plants being relocated because of anti-union animus) and closings due to lockouts or strikes. Hence, this article will not discuss union-related plant closings. See generally R. Smith, L. Merrifield & T. St. Antoine, Labor Relations Law: Cases and Materials 161-90, 574-75 (6th ed. 1979) [hereinafter cited as Smith et. al.].
I. THE MAGNITUDE OF THE PLANT CLOSING PROBLEM

Only two out of every three firms that in 1969 employed between one hundred and five hundred workers remained in existence by 1976. Similarly, only three out of every four firms which in 1969 employed over five hundred workers persisted in 1976. In human terms, these plant closings may have resulted in over 2.5 million lost jobs per year during this period.

Plants close for many reasons. The entire company may be failing, a certain product may no longer be in demand, or the plant and its machinery may have become obsolete. The money made from the plant’s output may not reach the company’s desired profit level. Finally, plants may close because of a troublesome workforce or anti-union hostility.

A. The Costs Associated With Plant Closings

Whatever their cause, plant closings invariably result in hard-
ship to workers, the community, and the state. Studies have shown that many workers face immediate loss in income, prolonged unemployment, lower earnings in their next job, poorer health, a higher rate of suicide, increased alcoholism, and mental depression. The typical worker in a plant shutdown is in his late forties with high seniority, relatively high earnings, specialized skills, and strong ties to family and community—factors that constrain mobility, make it hard to find a job, and cause greater loss from a plant closing.

* See U.S. DEP'T OF LABOR, EMPLOYMENT AND TRAINING REPORT OF THE PRESIDENT 372 (1979). According to the Report, state unemployment benefits average $78.60 per week across the U.S. This sum is meager, especially for those workers with families.

* See, e.g., R. ARONSON & R. MCKERSIE, ECONOMIC CONSEQUENCES OF PLANT SHUTDOWNS IN NEW YORK STATE 140 (1980) [hereinafter cited as ARONSON & McKERSIE] (study of three shutdowns in New York; almost 60% of the terminated workers were unemployed over six months after the shutdowns); T. BAROCCI, DISINVESTMENT IN MASSACHUSETTS (1979), cited in BLUESTONE & HARRISON, supra note 3, at 65, 291 (average duration of unemployment after shutdown was 60 weeks).

10 See, e.g., hammerman, Five Case Studies of Displaced Workers, 87 MONTHLY LAB. REV. 663, 669 (1964) (in each of the five cases, more than half of the reemployed workers had lower earnings); ARONSON & McKERSIE, supra note 9, at 142 (more than one-third of the workers experienced a drop in income of over 20% in their next job).

11 See S. COBB & S. KASL, TERMINATION: THE CONSEQUENCES OF JOB LOSS 175-79 (U.S. Dep't of Health, Education, and Welfare Pub. No. 77-224, 1977) [hereinafter cited as COBB & KASL] (job loss leads to increased likelihood of coronary disease, diabetes, peptic ulcer, gout, arthritis, and hypertension; longitudinal study of two plant closings which occurred in the mid-1960's); Parnes & King, Middle-Aged Job Losers, 4 INDUS. GERONTOLOGY 77, 91 (1977) (health deterioration among workers was greater than among control group; national longitudinal study spanning seven years).

12 See Stillman, The Devastating Impact of Plant Relocations, in PLANT CLOSINGS: RESOURCES FOR PUBLIC OFFICIALS, TRADE UNIONISTS & COMMUNITY LEADERS 32, 33 (E. Kelly & L. Webb eds. 1979) [hereinafter cited as Kelly & Webb] (eight workers out of nearly 2000 workers terminated from a plant closing committed suicide); COBB & KASL, supra note 11, at 134-35 (out of 208 terminated employees, two committed suicide, one attempted suicide and one seriously threatened suicide; the suicide rate was 30 times that normally expected in this population).

13 COBB & KASL, supra note 11, at 145.

14 See, e.g., Maruso, Coping With Job Abolishment, 19 J. OCCUPATIONAL MED. 598, 598 (1977); R. Wilcock & W. Franke, UNWANTED WORKERS: PERMANENT LAYOFFS AND LONG-TERM UNEMPLOYMENT 166 (1963) (termination leads to loss of confidence and loss of social ties).

Plant closings may also lead to marital problems, child abuse, and abuse of women. See Moberg, Shutdown: Shattered Factories, Shattered Communities, In These Times, June 27-July 3, 1979, at 12 [hereinafter cited as Moberg]. (In Youngstown, Ohio, the Help Hotline had three times as many calls about battered women, abused children, and marital problems after the steel plants shut down.).

15 Kochan, supra note 6, at 11.


17 See ARONSON & McKERSIE, supra note 9, at 140 (experience not marketable in other jobs contributed to difficulty in finding jobs); Lipsky, Interplant Transfer and Termi-
The community suffers, too. Local businesses lose profits because they depend on the plant or its workers to buy their goods and services. Their lost profits in turn cause more lost jobs. As people leave to find work elsewhere, property values decline. All of these events—workers being laid off, the plant closing, the local businesses losing profits, the property values declining—cause the community's tax revenues to decline. The lost revenues, plus the increased public expenditures for terminated workers, lead to increased tax rates or reduced public services for all community residents. Moreover, the community may lose the spirit that holds it together.

Revenues decrease at the state level because workers and local businesses have lower taxable incomes while the closed business
pays no taxes whatsoever. Concurrently, the state increases expenditures for unemployment compensation and public assistance. Though the effect on the average state citizen in no way compares to the effect on the plant workers and their community, some citizens outside the community also suffer from the cutback of many worthwhile services.

B. Forms of Relief for Terminated Workers

Current methods for easing the adjustment to plant closings vary, though providing financial assistance to the worker represents the most common source of relief. All states provide unemployment compensation and public assistance. Most states also have job retraining programs. Only one state, Maine, requires payment of severance benefits.

In addition to state benefits, the federal government compensates workers who lose their jobs because of specific causes such as import competition or airline deregulation. Federal assistance may include other benefits. A finding of job loss from import competition, for example, also entitles workers to retraining, relocation allowances, and job search money. Moreover, the National Labor Relations Act requires employers to bargain over the effects of a closing and, in some instances, over the decision to close. Finally, the federal government may help work-

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28 See, e.g., Moberg, supra note 14, at 12 (Policy Management Associates' forecast that in the first 39 months after the steel plant closing in Youngstown, the state of Ohio would lose up to $8 million in tax revenues.).

26 For example, if a plant closing terminates 500 workers, the average length of unemployment for each worker is six months, see note 9 supra, and the average state unemployment compensation benefits equal $78.60 per week, see note 8 supra, the amount of state funds that go to unemployment compensation would increase by more than a million dollars.

27 A good example of this occurrence is the state of Michigan. Because layoffs in the auto industry have caused an increase in the amount of state funds that go to paying unemployment compensation and public assistance, the state has had to make drastic cuts in all state services. As Governor Milliken said, "the cuts slice beyond fat and into bone." Detroit News, Nov. 13, 1980, at 1A, col. 5 (many drastic cuts made because of declining revenues and increased welfare costs); Detroit News, Nov. 14, 1980, at 2B, col. 1 (workers running out of unemployment compensation are increasing welfare rolls); Detroit Free Press, Nov. 14, 1980, at 10A, col. 1 (editorial; the cuts will hurt state citizens).


29 Compensation is also provided to workers who lose jobs because of railroad or mass transit reorganization, or the expansion of Redwood National Park. See generally Mil len, Providing Assistance to Displaced Workers, MONTHLY LAB. REV., May, 1979, at 17, 19-22.

30 Id. at 21.

31 See generally SMITH ET. AL., supra note 4, at 574-75; Levin & Brossman, The Employer's Duty to Bargain Over a Decision to Close Down, The Nat'l Law J., Nov. 17,
ers and communities through business redevelopment loans and grants from the Economic Development Administration (EDA).\textsuperscript{33}

The business closing the plant may also aid its workers. Some collective bargaining agreements guarantee severance pay, supplemental unemployment benefits (SUB), relocation allowances, preferential hiring rights, and/or interplant transfers.\textsuperscript{33} Indeed, some firms provide the above assistance to workers even though their union contract does not require them to do so.\textsuperscript{34}

Businesses have voluntarily given advance notice of plant closings as well.\textsuperscript{35} Moreover, approximately ten percent of major collective bargaining agreements stipulate that workers be given advance notice of plant closings.\textsuperscript{36} Only Maine and Wisconsin require businesses to give notice of plant closings, though the Wisconsin law is not being enforced.\textsuperscript{37} Federal law merely re-

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Agreements & Workers  \\
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SUB & 220 (14.3\%) & 1,947,400 (27.6\%)  \\
Severance Pay & 500 (32.5\%) & 2,840,700 (40.3\%)  \\
Transfer Rights & 456 (29.7\%) & 3,297,100 (46.7\%)  \\
Preferential & 175 (11.4\%) & 1,905,150 (27.0\%)  \\
Hiring Rights &  &  \\
Relocation & 201 (13.1\%) & 1,989,800 (28.2\%)  \\
Allowance &  &  \\
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\textsuperscript{32} U.S. EMPLOYMENT AND TRAINING ADMINISTRATION, DEP'T OF LABOR, A GUIDE FOR COMMUNITIES FACING MAJOR LAYOFFS OR PLANT SHUTDOWNS 13, 27 (1980) [hereinafter cited as ETA GUIDE].
\textsuperscript{33} See U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, BULL. NO. 2065, CHARACTERISTICS OF MAJOR COLLECTIVE BARGAINING AGREEMENTS, JANUARY 1, 1978, at 96, 98 (1980) [hereinafter cited as BLS]:

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<td>Allowance</td>
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Total Number of workers = 7,054,550
Total Number of Agreements = 1536 (covering 1000 or more employees)

\textsuperscript{34} See, e.g., Wong, Out of Business—A Plant Shutdown Is Always Painful But It Need Not Be Merciless, Wall St. J., Feb. 28, 1972, at 1, col. 6 [hereinafter cited as Wong] (The American Oil Co. provided relocation allowances, training, and transfer rights to employees before shutting down its Arkansas plant); Daily Lab. Rep't, Oct. 2, 1980, at D-1 [hereinafter cited as Brown & Williamson Tobacco] (Brown & Williamson Tobacco Corp. provided relocation allowances, severance pay, transfer rights, and a concerted effort to find employment for all workers affected by its 1980 closing of a Louisville plant.).

\textsuperscript{35} E.g., McKersie, Advance Notice, Wall St. J., Feb. 25, 1980, at 20, col. 3 [hereinafter cited as McKersie] (Sperry Rand gave one year advance notice before closing its Library Furniture Division in New York as did GAF Corp. when it terminated its involvement in Vermont Asbestos).

\textsuperscript{36} BLS, supra note 33, at 100 (The 10\% of major collective bargaining agreements with advance notice provisions affects 710,800 workers or 10\% of the workers covered by agreements including 1000 or more employees.).

\textsuperscript{37} ME. REV. STAT., tit. 26, § 625-B(6) (Supp. 1980-81) (60 days advance notice required); Wis. STAT. ANN. § 109-07(1) (West Supp. 1980) (60 days advance notice required). The Wisconsin law has not been enforced because (a) the legislators did not define "cessation of business" and (b) the law was intended to guarantee payment of all wages but does not—a business can be out of business before it can be determined
quires employers to provide enough notice so that the union has an opportunity to bargain over rights of employees whose employment status will be altered.86

C. The Inadequacies of the Current Relief System

Despite these efforts, grave inadequacies remain in the response to plant closings. Only a small minority of workers receive advance notice of plant closings.89 Federal programs only apply to workers in special types of plant closings.40 State unemployment benefits run out before many workers get a new job.41 Retraining programs have proved ineffective in many instances.42 Medical benefits cease when the plant closes even though workers need them most when they lose their job.43 Only a minority of firms protect workers against the financial and psychological effects of plant closings.44 Community problems

whether it will meet its last payroll. The law only covers employers with over 100 employees, while businesses that do not pay all wages usually have less than 100 employees. See Letter from James L. Stelsel, Director of Labor Standards Bureau, Wisconsin Dep't of Industry, Labor and Human Relations, to Joseph A. Cipparone (Nov. 26, 1980) (on file at the University of Michigan Journal of Law Reform).

86 See 2 LAB. L. REP. (CCH) ¶ 3170.72. The National Labor Relations Board has never stipulated the length of notice required. As long as the union has a meaningful opportunity to bargain over the closing or its effects, the employer may provide notice to the union any time before the closing. See, e.g., Farm Crest Bakeries Local 51, 241 N.L.R.B. No. 195 (1979) (two-day notice sufficient); ABC Trans-national Transport, Inc. Local 100, 247 N.L.R.B. No. 25 (1980) (one-week notice not sufficient; employer firmly made his decision to close before giving notice and, hence, the union had no meaningful opportunity to bargain over the closing; union could have changed decision if it had meaningful opportunity to bargain).

89 Only 10% of the workers covered by major collective bargaining agreements receive advance notice of plant closings. The percentage of workers not covered by major agreements or not unionized that receive advance notice is probably even less because these workers have even less bargaining power. There is no reason to believe that most firms provide more than a few days advance notice voluntarily.

40 Only workers in the transportation industry and the Redwood National Park have any assurance of federal aid. The U.S. Dep't of Labor rejects many more applications for Trade Readjustment Assistance (aid for jobs lost through import competition) than it accepts. See, e.g., Daily Lab. Rep't, May 22, 1980, at A-2.

41 Most state unemployment compensation programs provide benefits up to an amount sufficient to last approximately six months. See 1 COLLECTIVE BARGAINING NEGOTIATIONS & CONT. (BNA) § 16 at 831. Since many workers may be unemployed for over six months (see note 9 supra), benefits run out before workers find jobs.

42 See Jarley, supra note 7, at 10-11.

43 ARONSON & MCKERSIE, supra note 9, at 142-43; Kelly & Webb, supra note 12, at 37 (fewer than 30% of the unemployed have any health insurance; those who do have insurance spend 20-25% of their unemployment benefits to continue their former coverage).

44 Less than a majority of workers covered by major collective bargaining agreements receive plant closing assistance from firms. See note 33 supra. Workers that are not unionized or not covered by a major collective bargaining agreement probably receive even
are virtually ignored. Finally, and most importantly, terminated workers receive no assurance they will get what they need most—a job. Consequently, workers and communities have called for comprehensive legislation to deal with their plant closing problems.

Legislative proposals to date have ranged from providing loans to employees and communities for buying plants that are closing, to requiring businesses to contribute to a community readjustment fund, to creating a federal agency with powers to penalize businesses for “unjustified” relocations. The most popular legislative proposal, however, has been advance notice of plant closings. The next two parts of this article examine the arguments for and against requiring advance notice of plant closings.

II. ARGUMENTS FOR REQUIRING ADVANCE NOTICE OF PLANT CLOSINGS

Advance notice alleviates the suffering that accompanies plant closings by providing time to: (a) explore ways to keep the plant open; (b) plan and implement job search strategies to keep workers employed; (c) plan for the decrease in tax revenues and the increase in public expenditures; (d) plan for disruption of the local economy; (e) obtain government aid before the plant closes; and (f) cushion the psychological blow from a plant closing.

The plant would remain open in many instances if the employer could cut operating costs or find a buyer for the plant. Advance notice gives workers and community leaders a chance to sit down with the company’s management and figure out how to keep the plant from closing. For example, workers may be willing to forego certain benefits until the plant gets on its feet, less aid. Though employers must bargain with a union over the effects of a closing, they do not have to agree to provide any assistance.
and community leaders may be able to lower the business' tax rate. If cutting costs fails to keep the plant open workers and community leaders could help seek plant buyers or consider buying the plant themselves. Without advance notice, such alternatives could not be fully explored.

While efforts are being made to save the plant, employees can look for other work. Moreover, a committee of workers, community leaders, state and local employment officials, and the plant personnel director could set up job counseling programs, talk to area employers, explore the possibility of Comprehensive Employment and Training Act (CETA) jobs with CETA prime sponsors, and retrain workers for the available jobs. All of this could be accomplished before any worker suffers unemployment.

At the state and local level, advance notice would enable government officials to plan both for lower revenues and the increased expenditures resulting from a plant closing. Health facilities could prepare for the increased demand for medical care that occurs when workers lose their jobs. Community leaders could take action to bring more businesses to town and to obtain

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49 See, e.g., McKersie, supra note 35, at 20 (workers at the U.S. Steel Ambridge Works sacrificed certain compensation improvements, in exchange for the company's agreement to keep the plant running); DEP'T OF CITY AND REGIONAL PLANNING, supra note 22, at A-53 (to save the National Tanning and Trading Co., the town provided tax abatements and the state provided a $500 tax credit for each unemployed worker that was rehired).

50 E.g., Raskin, One That Was Saved, ACROSS THE BOARD, August 1980, at 19-22. The Sperry Rand Corp. sold their Library Furniture Division to the Mohawk Valley Community Corp.—a corporation started by the workers to buy the plant—after Sperry announced the closing one year before the expected closing date.

51 See, e.g., Meyerson, The Trade Expansion Act: An Untapped Resource for the Middle-Aged and Older Worker (pt. 2), INDUS. GERONTOLOGY, Spring 1972, at 36, 41 (755 displaced Uniroyal Tire employees had counseling interviews with Rhode Island Dep't of Employment Security officers; the interviews led to placing 105 persons and retraining 313 persons.).

52 See ETA GUIDE, supra note 32, at 10, 28.

53 A good example of how a committee of city, state, and plant representatives can work together to help displaced workers is the Armour Coordinating Team set up in the early 1960's to deal with the closing of a meatpacking plant in Omaha, Nebraska. See Stern, Evolution of Private Manpower Planning in Armour's Plant Closings, MONTHLY LAB. REV., Dec. 1969, at 21.

Studies of retraining programs instituted in the U.S. following a plant closing, however, have concluded that the programs were largely ineffective. Ineffectiveness was blamed on insufficient time to design a program targeted to known employment opportunities and to workers' educational level. Thus, advance notice would help retraining efforts by providing that time. See, e.g., Young, The Armour Experience, in ADJUSTING TO TECHNOLOGICAL CHANGE 157-58 (G. Somers, E. Cushman & N. Weinberg ed. 1963); Jarley, supra note 7, at 74.

54 See notes 22-26 and accompanying text supra.

55 See note 23 supra.
assistance for developing current businesses. Advance notice would also allow local businesses and their employees to plan for the inevitable drop in demand for their goods and services. Businesses could adjust inventory levels; their employees could look for work before being laid off.

Advance notice would allow government aid to reach workers, the community, and the dislocating business earlier. Workers could apply for food stamps, public assistance, and unemployment compensation before the closing so that benefits start flowing as soon as they become unemployed. The community could seek EDA loans and grants to bolster the local economy before the plant closes. Further, a business closing a plant due to import competition could obtain the technical or financial assistance in time to save the plant.

Advance notice would cushion the psychological blow of a plant closing. Loss of a job resembles the loss of a loved one—when it occurs without warning, its impact is more severe than when one can mentally prepare for the tragedy and plan for the future. Indeed, if employees felt that they had control over their own futures because of a sound reemployment program and constant information about the options and benefits available to them, the mental distress caused by a plant closing might be less severe.

Finally, arguments stressing economic efficiency and equitable considerations support advance notice. Imposing the costs of advance notice on businesses benefits society by making the company's decision to close reflect the social as well as private costs of closing. Businesses, moreover, have a greater capacity to

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56 As an example, workers terminated because of import competition would get their Trade Readjustment Assistance (TRA) sooner, if advance notice were provided. See McCarthy, supra note 18, at 82.
58 Id. at 17 (Under the Trade Act of 1974, businesses affected by import competition can receive loans, grants, and technical assistance).
61 For a good discussion of this issue, see Hekman & Strong, Is There A Case For Plant Closing Laws?, NEW ENGLAND ECON. REV., July/August 1980, at 35-37 [hereinafter cited as Hekman & Strong]. One might argue that if the social costs of a closing should be considered in the business' decision to close, then the social benefits of closings should also be considered in that decision. Relocation does provide jobs for workers, increased revenues for the community, and increased profits for local businesses in the new location. However, relocating businesses usually leave a depressed area (i.e., the Northeast)
bear the costs than do the workers, and plant closings usually cause greater hardship for workers than owners. In most closings, workers lose their livelihood; owners simply lose their investment. The plant closing is no more the workers' and the community's fault than it is the management's fault—it only seems fair that businesses share in the burden the plant closing will bring.

III. Arguments Against Requiring Advance Notice of Plant Closings

A. Harm to the Economy: Inefficient Allocation of Resources and Firms Locating Abroad

Opponents contend that advance notice will hurt the national economy by inefficiently allocating resources and encouraging firms to leave the country. When businesses fail to foresee the need to shutdown, the argument goes, advance notice restrains capital mobility and results in an inefficient allocation of resources. This argument, though internally consistent, ignores the following: first, advance notice creates efficiencies in the labor market, the local economy, and the expenditure of tax dollars; and second, many businesses can foresee the need to close their plants.

During the notice period, plant workers and workers in affected local businesses can seek new employment, thus avoiding inefficient unemployment lines after the plant closes. If a business announced that it was relocating, workers from across the nation could make plans to move to the new location. The larger and more skilled pool of workers that the business would be able to pick from should result in greater efficiency at the new plant.

and move to a growing area (i.e., the South and West). Since jobs are usually scarce in depressed areas and plentiful in growing areas, the social costs of the closing will likely exceed the social benefits of location in the new area. Of course, where a business is just closing the plant and not relocating it, there are no social benefits to a new community.

* This rationale for businesses bearing the cost pervades our whole idea of products liability. Since a business can bear the cost of an injury to a customer by raising its price, they are held strictly liable for any malfunctioning of their products. Likewise, a business can raise its price to pay for advance notice.

* This disparity is especially great where the owners are not personally liable for any business loss (e.g., corporations) or where the owners will actually gain from the closing because the plant is relocating for greater profit.

Within local businesses, advance notice would allow efficient planning of inventory reductions, production output, and labor needs. State and local governments could also devise an efficient scheme for reducing tax expenditures or obtaining extra funds before the fiscal crunch occurs. Hence, the greater efficiencies created by advance notice could well offset any inefficiencies created.

If businesses can anticipate the closing of their plants, advance notice will certainly allocate resources efficiently. Long-range planning will prevent any restraint on capital. Many businesses have the ability to foresee the need to close plants: American companies in this country and abroad have provided advance notice for years. In the case of relocations, it takes time to find a new plant site and construct the new plant. Moreover, enactment of an advance notice law will create an incentive to improve the forecasting of plant closings.

Advance notice, nevertheless, may cause some businesses to locate in foreign countries. At the margin, any increase in production costs in the United States encourages some businesses to produce abroad. Since an advance notice law may increase production costs in the United States, some businesses might decide to locate in other countries. Increased cost from advance notice, however, will probably not have a dramatic effect on foreign investment. The avoided costs of advance notice do not compare with the savings from lower wage rates, less expensive resources, and greater access to foreign markets that presently lure businesses abroad. Moreover, legislators can minimize the

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67 The Altman Z-score and “the gamblers ruin prediction of bankruptcy” formula already provide good predictions on business failures up to two years in advance. See generally Hershman, How to Figure Who's Going Bankrupt, Dun's Review, October 1975, at 63.

An advance notice law will create an incentive to refine prediction techniques because if a business can foresee a shutdown, there will be no restraint on its capital and the costs of providing notice will be lower. See text accompanying notes 67-83 infra.

68 The cost of advance notice is a “one shot deal” when the plant closes. Wage rates, resources, and access to markets, however, are ongoing, bringing continual savings. Since wage rates in some countries may be as low as one-third of the U.S. wage rate, this savings is enormous. See, e.g., Price Waterhouse, Doing Business in Mexico 65 (1979)
effect of advance notice on foreign investment by shortening the notice period and exempting newer businesses from the notice requirement. The former will keep the costs of advance notice down; the latter will erase some of the disincentive for new investments in the United States.

B. Harm to Businesses Resulting From Required Advance Notice

1. Decline in productivity— The most common criticism of advance notice is that it causes productivity decline. Critics say that once a business notifies the workers of the plant closing, workers lose morale, have lower pride in their work, and become increasingly absent. In addition, “key” employees supposedly leave to seek other employment. Yet, several factors can prevent productivity from declining after a plant closing announcement: a viable reemployment program, an incentive pay system, severance pay and transfer rights conditioned on working at the plant until it closes, worker vacations or other compensated time off deferred until after the plant closes, temporary employees hired to fill in for absent workers. A depressed local labor market (Mexico’s minimum wage is $1.06 per hour which is one-third of the U.S. minimum wage).

See notes 112-13 and accompanying text infra.

Since exempting new businesses from the advance notice requirement diminishes the adverse consequences of a new venture that goes sour, the cost of advance notice will probably be less of a factor in a business’ new investment decisions. Cf. Kelly, Plant Closing Legislation: The Ohio Experience, in PLANT CLOSINGS: ISSUES, POLITICS, AND LEGISLATION 35, 36 (W. Schweke ed. 1980) [hereinafter cited as Schweke] (no corporation will make a major new investment in a state with a concern for how to close its plant many years later).


See Weber & Taylor, supra note 65, at 312.

See G. Shultz & A. Weber, STRATEGIES FOR THE DISPLACED WORKER 19 (1966) [hereinafter cited as Shultz & Weber]. Only one study has found that worker morale decreased, absenteeism increased, and departure of key employees increased after advance notice was given. The employees in that study, though, had nothing to do during the notice period. With nothing to do, it is no wonder that employee morale and productivity declined. See F. Foltman, The Advance Notice of Closing Policy—CSEA-AFSCME New York State April 1976 through March 31, 1977—An Assessment 47-48 (March 7, 1977) (unpublished paper available from the New York State School of Industrial and Labor Relations) [hereinafter cited as Foltman I]; F. Foltman, New York State Advance Notice of Closing Policy: A Follow-Up Study in Two Affected Locations 20 (January 6, 1978) (unpublished paper available from New York State School of Industrial and Labor Relations) [hereinafter cited as Foltman II] (admission that employees had nothing to do during the notice period).
A constructive, well-organized reemployment program demonstrates to employees that the company cares about their welfare. This show of concern may boost morale and stabilize productivity. Where an incentive pay system exists, employees seeking the largest possible earnings before the shutdown will put in a lot of overtime. The extra hours worked by these employees makes up for the hours missed by absent or departing workers. Conditioning severance pay and transfer rights on staying until the plant closes should have a marked effect on holding “key” employees, because severance pay and transfer rights are based on seniority and “key” employees usually have high seniority. Unfortunately, conditioning these benefits on working until the actual closing may discourage some workers from seeking reemployment during the notice period. This danger can be minimized, however, if the union and the employer constantly remind workers that their employment and financial well-being after the shutdown depend upon their seeking reemployment during the notice period.

Deferring vacations and other compensated time off maximizes the number of hours employees work during the notice period. Hiring temporary employees can help fill the hours that absent or departing employees have not worked. Finally, a depressed local labor market will provide workers remaining in the area with an incentive to work as many hours as possible until the plant closes.

Thus, if all of these conditions exist during the closing, productivity should not decline. Management, however, must devote time and energy to develop and maintain a successful reemployment program. Employers have to pay more money for

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73 See Shultz & Weber, supra note 72, at 18-19.
74 Id. at 19.
75 See Weber & Taylor, supra note 65, at 313.
76 Id.
77 Id. at 312-13 (no productivity decline found in 32 plant closings studied; employers usually provided severance pay and transfer rights conditioned on working at plant until closing); B. Portis & M. Suys, Effect of Advance Notice in a Plant Shutdown 8, 27 (1970) (available in the Industrial Relations Library, University of Michigan Graduate School of Business) [hereinafter cited as Portis & Suys] (the Kelvinator plant was owned by an American company; over 500 employees given five and one-half months advance notice of shutdown; plant managers say morale remained good and productivity did not decline during notice period; severance pay conditioned on staying until closing).

All of the conditions stated in the text may not have to exist to prevent productivity decline. Yet, no study delineates which of those conditions must exist and which of those conditions do not have to exist to prevent that decline. More empirical research is needed here.
overtime work than regular work. Providing severance pay adds even more to these expenses.\textsuperscript{78} Hence, these costs must be balanced against the benefits of advance notice.\textsuperscript{78}

2. \textit{Cancellation of orders for the employer's goods}—Cancellation of orders may also constitute a cost of requiring advance notice.\textsuperscript{80} Customers concerned about the availability of spare parts may only buy from a supplier that is not closing down.\textsuperscript{81} A company that relocates and continues producing the same product, however, can always fill orders from the new location. A company also may engender ill will among its customers by cutting off their supply without advance warning,\textsuperscript{82} thereby precluding future sales to those customers. Hence, companies concerned about future sales may want to provide advance notice anyway. Further, if the company discontinues a product line but alternative suppliers are not readily available, customers will probably not cancel their orders during a short notice period.\textsuperscript{83}

A problem with cancellation of orders occurs, though, when a company discontinues a product line and alternative suppliers are readily available. If spare parts for the closing company's product are not produced by other companies, customers may cancel their orders and buy from another company they know will not be discontinuing its product line. Thus, in the limited situation where the production of a particular product is ceasing, alternative suppliers are readily available, other companies do not make spare parts for the ceasing product line, and future sales to present customers do not concern the business closing the plant, cancellation of orders may constitute a cost of advance notice.

3. \textit{Intrusion upon management's right to close shop}—Advance notice will also intrude upon management's prerogative to

\textsuperscript{78} For those firms that already provide severance benefits because of their union contract, providing severance benefits will not be an extra expense of requiring advance notice. For the percentage of major collective bargaining agreements requiring payment of severance benefits, see note 33 supra.

\textsuperscript{79} Unfortunately, there is no way to test whether the cost of avoiding productivity decline is less than the cost of productivity decline and, if they are less, by how much. It is assumed here that the cost of avoiding productivity decline is less than the cost of productivity decline. Thus, employers would take measures to avoid productivity decline.

\textsuperscript{80} See McKersie, supra note 35, at 20; Casner-Lotto, supra note 70, at 93.

\textsuperscript{81} No study has ever shown a cancellation of order to occur, but no study has ever investigated this possibility either.

\textsuperscript{82} See Weber & Taylor, supra note 65, at 308.

\textsuperscript{83} A notice period of less than a year should not result in a significant number of cancellations where alternative suppliers are not readily available since it will take time for alternative suppliers to move into the area or for the customer to find an alternative supplier.
close shop whenever it pleases. Requiring advance notice, however, will not deny management the freedom to close the plant, the freedom to locate a plant wherever it pleases, or the freedom to maximize profits—it only imposes a reasonable restraint on the exercise of these freedoms. Even if management can be said to have the prerogative to close shop whenever it pleases, this constitutes only a minor cost of advance notice.

4. Inability to obtain credit— Critics often cite the closing business’ inability to obtain credit as another cost of advance notice. Yet most banks will be reluctant to offer credit to a business losing money regardless of a plant closing announcement. A sound business can obtain the money needed to relocate from a bank in either the present location or the new location. In terms of supplier credit, though, a business may encounter resistance in delaying payment once it makes the plant closing announcement. Suppliers, unlike banks, do not have employees checking whether a business has sufficient assets to repay its debts. An agreement giving the supplier a security

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84 See McKenzie, The Right To Close Shop, N.Y. Times, Aug. 26, 1980, at A19, col. 1. One author has even argued that requiring advance notice results in a “taking” without just compensation. See Arnold, Existing and Proposed Regulation of Business Dislocations, 57 U. Det. J. Urb. L. 209, 247-51 (1980) [hereinafter cited as Arnold]. Professor Arnold essentially relies on Brooks-Scanlon Co. v. Railroad Comm’n of La., 251 U.S. 396 (1920) and People ex. rel. Lewis v. Safeco Ins. Co., 98 Misc. 2d 856, 414 N.Y.S.2d 823 (1978). Brooks-Scanlon involved a railroad company that wanted to abandon its operations, but was ordered to continue providing service. The Court held that requiring the railroad company to continue operating would constitute a compensable taking. The courts, however, have recently ruled that a railroad company may suffer temporary losses without violating the Fifth Amendment taking clause. See New Haven Inclusion Cases, 99 U.S. 392, 491-92 (railroad required to continue operating for six years; no compensable taking); Lehigh & New England Ry. Co. v. I.C.C., 540 F.2d 71 (3d Cir. 1976)(“a railroad . . . may be made to suffer interim reasonable losses, without compensation, for a reasonable period of time during which solutions accommodating the public and the private interests can be devised”). People ex. rel. Lewis, supra, involved an insurance company that wanted to leave the state because it was losing money. The court denied an injunction sought by the New York Superintendent of Insurance on the grounds that it would violate the Fifth Amendment taking and due process clauses. Yet, this case does not involve a state interest that compares with the state interest in easing the effects of plant closings. The customers in People ex. rel. Lewis would not have lost their insurance claims; the insurance company said it would honor all existing policies.

If the business can foresee the closing before the notice period begins, moreover, no restraint on its property use will occur. Finally, the government may utilize reasonable police powers to regulate property use. See G. GUNTHER, CONSTITUTIONAL LAW 596-603 (9th ed. 1975). Given the state’s legitimate interest in protecting the health and well-being of its citizens via advance notice, see notes 8-27 and accompanying text supra, the requirement of advance notice would represent a reasonable use of its police powers.

85 See Casner-Lotto, supra note 70, at 93.

86 Interview with William Spokes, loan officer at Ann Arbor Bank & Trust Co., Ann Arbor, Michigan (Dec. 11, 1980).

87 Id.
interest in some assets of the plant, however, could assure the supplier of the business' intention to repay the debt. Where a sound business simply relocates its plant, advance notice should not even affect supplier credit because the supplier knows that the business has assets to repay its debt. Thus, advance notice should not lead to an inability to obtain credit.

5. Drop in a corporation's stock price — A drop in a corporation's stock price is another supposed cost of advance notice. Those who level this criticism, however, would have a hard time proving it. Many factors influence stock prices; to say that any one factor affects stock price seems suspect. Moreover, even if a closing announcement represented an important factor in investors' decisions, advance notice would still benefit investors and financial markets. A possible drop in a corporation's stock price should consequently not be considered a cost of advance notice.

6. Increased opportunity for worker-management disputes — Many employers worry that advance notice will increase worker-management disputes. Advance notice, however, actually represents an opportunity to prevent these labor-management conflicts. Major conflicts will probably not occur if employers make a concerted effort to listen to workers, explore alternatives for keeping the plant open, and cooperate in efforts to create a sound adjustment program. The payoff in conflict-free closings

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88 See Aronson & McKersie, supra note 9, at 17. No study has ever shown a plant closing announcement to affect stock price, but no study has ever investigated it either.

89 The state of the economy, the health of the plant's industry, the political climate, the financial history of the corporation and the rate of dividends paid by the company all affect a stock price.

90 The more information investors have, the more rational their decision will be on stock ownership. The more rational their decisions on what stock to purchase, the more that efficient businesses will be rewarded with new investors and the less that inefficient, unproductive businesses will be rewarded. Further, the more information investors have, the lower their risk in investing and greater their chance of gaining from their investment.

91 See Shultz & Weber, supra note 73, at 18.

92 See McNeff, McNeff, O'Connell & O'Connell, Alternatives to Employee Layoffs: Work Sharing and Prelayoff Consultation, 55 Personnel 60, 63 (1978) (pre-layoff consultation can play an important role in labor-management conflict resolution).

93 Where management has not cooperated with the workers some pilferage and destruction of property has occurred. See Portis & Suys, supra note 78, at 8, 28 (management did not become involved in programs to assist its production workers); Foltman I, supra note 72, at 46-47, 50 (management made unilateral decision to rescind vacation time owed to workers; union not consulted about decision to close). However, where management has cooperated with the workers the closing was orderly and without incident. See, e.g., Brown & Williamson Tobacco, supra note 34. The company provided 18 months advance notice and a plethora of worker benefits. One of its Vice-Presidents testified: "What could have resulted in sabotage, wildcat strikes or slowdowns became an
will be well worth the time spent in helping workers adjust to the plant closing.

7. Increased union wage and benefit demands—A related argument is that advance notice may increase union wage and benefit demands. Unions might increase their demands because the employer's inability to close or relocate during the notice period lowers the risk of job loss. This possibility, however, does not square with reality. When a business announces a plant closing, unions usually try to convince the business to keep the plant open. Therefore, the union will want to decrease rather than increase its demands, in order to lower operation costs.

8. Inability to sell the plant—Management may worry that advance notice will make it impossible to sell the plant. A buyer may balk at buying a plant that must stay open for the notice period, because the buyer may want to take over the plant immediately. Any buyer who plans to keep the plant running, however, has no reason to worry about having to wait—if the plant stays open the seller does not have to give notice to its workers. Moreover, there is no reason to think that buyers not wanting to keep the plant open only arrive when the notice period begins. Some buyers want to buy today; others want to buy tomorrow. Hence, advance notice should not lead to an inability to sell the plant.

9. A conflict with SEC regulations—Finally, an advance notice law might conflict with Securities and Exchange (SEC) regulations. SEC Rule 10b-5 requires a business to make complete and accurate disclosure of pertinent information (i.e., that its plant is closing). If a business fails to close its plant after giving advance notice, however, investors who detrimentally relied on the plant closing announcement might sue under Rule 10b-5 for misleading disclosure. The business can avoid this malady, though, by couching the plant closing announcement in conditional terms. For instance, the business could say that it will close its plant unless unforeseen circumstances change its mind.

orderly procedure with . . . employees continuing to work regularly and diligently.” Id. at D-1.


A good example of unions trying to keep the business open is the recent vote by Chrysler employees to make large wage and benefit concessions. See Detroit News, Feb. 3, 1981, at 5C, col. 2.

See, e.g., notes 49 & 95 supra.

Thus, no conflict with SEC regulations should occur.

To summarize, requiring advance notice provides time to search for jobs, explore ways to keep the plant open, adjust public expenditures, obtain government aid, reduce mental distress, and plan for the disruption of the local economy. Like any reform proposal, though, requiring advance notice would also entail some costs, including: (a) encouraging some businesses to produce abroad, (b) avoiding a decline in productivity, (c) possible cancellation of orders under certain circumstances, and (d) intruding on management's prerogative to close whenever it pleases. These costs are a small price to pay for keeping people employed and running local government and local business efficiently. On balance, legislators should enact an advance notice statute.

IV. A Model Advance Notice Statute

Advance notice legislation must satisfy three goals. First, the legislation must establish minimum requirements for a viable advance notice system. This will allow for the variation between industries and between firms in the time needed to close a plant. This feature, moreover, will keep the cost of advance notice down, and encourage creativity between workers and management in designing adjustment programs requiring more advance notice than minimally necessary. Second, the legislation must take account of different levels of hardship caused by a plant closing. Such recognition assures fairness between groups affected differently by plant closings. Third, legislation must not require advance notice when it would be extremely burdensome to the employer. This feature makes the legislation more fair, fosters its passage, and aids in its eventual implementation.

The following model statute, which attempts to meet these goals, will be discussed in terms of each substantive section and its accompanying definitions. The entire statute appears in the Appendix.

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** Some critics object to a fixed notice period because the time required to relocate or shut down a facility will vary widely from case to case. See Shultz & Weber, supra note 72, at 18. Consequently, an advance notice law would place a lesser burden on those industries in which plants normally take a long time to close or relocate than on industries in which plants normally take a short period of time to close or relocate. Though this inequity does exist, keeping the notice period relatively short will minimize it.
A. The Notice Requirement

Section 1: Definitions

As used in this Act:

(1) "Business" means any commercial or industrial enterprise having an establishment within a community for more than five years.

(2) "Close" or "Closing" means a permanent reduction of not less than 90% of the highest number of employees working at an establishment during the last twelve months.

(3) "Community" means the lowest level of general local government jurisdiction in which the establishment is located.

(4) "Employee" means anyone employed within an establishment for at least thirty hours per week.

(5) "Establishment" means all factories, plants, business offices, or other working places at one location or several locations within a single community.

(9) "Termination" means the discharge of an employee due to the closing of an establishment.

Section 2: Notice Requirement

(a) Except as provided in (b), a business that intends to close an establishment at which have been employed at least 100 but not more than 499 employees at some time during the last twelve months, shall provide the notices prescribed by subsections (c) and (d) at least ninety days before the termination of any employee.

(b) A business that intends to close an establishment at which have been employed:

(1) at least 500 employees at some time during the last twelve months; or

(2) at least 100 employees at some time during the last twelve months and that number of employees is
larger than the number of employees working in any other commercial or industrial establishment within the community on the date that the business had its largest number of employees in the last twelve months, shall provide the notices prescribed by subsections (c) and (d) at least 180 days before the termination of any employee.

(c) Written notice shall be given to: (1) each employee, (2) the chief executive officer or elected body governing the community, and (3) the State [Department of Labor]. Notice may be given by first class mail or personally delivered.

(d) The notice to an employee shall contain the expected date of the employee's termination, the benefits and services provided to employees by the business, and a description of the plans for closing the establishment. The notice to the chief executive officer or elected body governing the community and the notice to the State [Department of Labor] shall contain the name of the business, the location of the establishment, the expected termination date of the employees, the reasons for the closing, the number of employees that will be terminated because of the closing, a general description of the soon-to-be terminated employees' skills, and a description of the plans for closing the establishment.

Subsection (a) and (b) of the notice requirement contain the essence of all advance notice legislation: who must give notice when. Consequently, many aspects of these subsections deserve special attention.

1. **Explanations of key terms**— The definition of the word "business" includes the phrase "for more than five years" because a plant closing has a greater psychological and financial effect on workers and communities when expectations exist that the plant will continue running. Workers, for example, buy homes instead of apartments, local businesses develop new product lines, and governments start new programs. Moreover, restricting the application of this law to older businesses means the legislation will not discourage the creation of new businesses. This consideration is important because the best way for a com-
Community to replace lost jobs is by attracting new ones.99

The word "close" raises two other important considerations. Requiring businesses to give notice only when they shut down completely excludes situations where a significant number of workers lose their jobs for other reasons, such as only one part of a plant closing down or management bringing in new labor-saving machinery. Legislators, nevertheless, should seriously study and consider requiring notice in situations of partial closing and technological change100—problems outside the scope of this article. European advance notice legislation covers partial closings and technological change by requiring notice when the employer terminates a specific number of workers instead of when the plant shuts down.101 If desired, legislators can easily change the proposed statute to take account of partial closings and technological change.102

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The choice of five years is admittedly arbitrary and based solely on the assumption that a five year exemption would be sufficient to keep from discouraging new investment.

100 Some questions that need study are: Will requiring notice before partial closing or technological change within the plant cause constant disruption of the production process? Do partial closings and technological change within the plant cause less hardship than permanent closings and, if so, is there still a case for requiring advance notice in these situations? Will requiring notice before technological change within the plant produce a disincentive to modernize production processes? What effect does giving advance notice to some workers have on those workers that are not involved in the terminations—does their productivity decline?

101 For example, Sweden requires advance notice of six months when 100 workers are terminated whether or not the entire plant is closing. See note 107 infra. H.R. 565, in the current Congress and S. 1609 in the last Congress, see note 99 supra, do not key notice on the number of layoffs but instead on the termination or transfer of the business operation. Thus, they do not cover partial closings or technological changes within the plant.

102 If legislators desire advance notice for partial closings and technological change within the plant as well as for permanent closings, all they would have to do is adopt the following notice requirement:

Section 2: Notice Requirement

(a) Except as provided in (b), a business that intends to terminate at least 100 but not more than 499 employees at some time during the next 12 months shall provide the notices prescribed by subsections (c) and (d) at least 90 days before the termination of any employee.

(b) A business that intends to terminate:

(1) at least 500 employees at some time during the next 12 months; or
(2) at least 100 employees at some time during the next 12 months and the number of employees working at the establishment is larger than the number of employees working at any other commercial or industrial establishment within the community on the date that the business had its largest number of employees in the last 12 months,

shall provide the notice prescribed by subsections (c) and (d) at least 180 days
Defining "close" or "closing" in terms of a percentage reduction in the plant workforce envisions management retaining a skeleton crew to disassemble equipment and clean up the plant. A business could easily avoid a notice requirement that did not take into account the skeleton crew situation.

The proposed law, which defines "employees" as anyone working more than thirty hours per week, excludes franchise operations that hire teenagers part-time. Teenagers working part-time do not require the protection of advance notice because they are not major breadwinners in most families. Further, the notice requirement, by including the phrase "at some time during the last twelve months," prevents employers from evading the statute by decreasing their workforce to less than one hundred workers just before the notice period begins.

The word "establishment" raises another issue. The phrase "at one location or at several locations within a single community" in the definition of establishment means a business employing a total of one hundred workers in two separate plants will not escape the notice requirement if it decides to close both plants. This provision seems fair because the termination of one hundred employees will have the same effect on the workers and the community whether the employees were working at one plant or several plants.108

2. Justifications for the notice requirement in subsections (a) and (b)— As the number of terminated workers increases, more workers look for employment in the local labor market, more workers need retraining, and more tax and sales revenues decline. Thus, the notice period accounts for these escalating demands by increasing between zero and one hundred workers (from zero to ninety days) and increasing again between one

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108 This provision will also have the added advantage of including smaller plants in the advance notice requirement. Since smaller plants close more often than larger plants, more workers will be protected by advance notice.
hundred and 500 workers (from ninety days to 180 days).\textsuperscript{104}

Besides the number of workers affected by the closing, the percentage of the local workforce affected by the closing partially determines the amount of hardship caused by the closing. Increases in the percentage of the local workforce terminated by the closing exacerbates the inability to find a job, the tax deficit, and the sales loss. Consequently, the law should require earlier notice when a large percentage of the local workforce is affected. Unfortunately, one cannot easily measure the local workforce.\textsuperscript{105} The model statute, therefore, assumes that when the largest employer in town closes its plant a relatively large percentage of the local workforce becomes unemployed. Accordingly, subsection (b)(2) increases the notice period to 180 days when an employer with over one hundred workers is the largest employer in the community.\textsuperscript{106}

The most controversial issue in any advance notice legislation concerns the length of the notice period. Employees want a longer notice period; employers want a shorter notice period. These desires reflect that the longer the notice period, the higher the costs to the employer and the greater the benefits to the terminated employees. Ideally, the notice period should be short enough so that employers do not have to bear excessive costs but long enough so that workers can find a job. Legislators cannot determine an ideal notice period, however, because the optimal length of the notice period varies with each closing. Under these circumstances, legislators should enact a minimum notice period that keeps employers’ costs down and gives workers a fighting chance of finding a job after the plant closing.

The suggested three and six month notice periods should pro-

\textsuperscript{104} Admittedly, there is no magic in using 100 workers and 500 workers as the points for increasing the notice period. These points merely reflect the assumptions that at 100 workers the community will be affected by the closing as well as the plant workers and that at 500 workers the loss to employees and the community are sufficiently greater than at 100 workers to increase the notice period. Though most plant closings occur in plants with less than 100 workers, see note 1 supra, the effect of closing one plant with less than 100 workers is not large enough to justify requiring advance notice. However, the definition of establishment should make the notice requirement apply to at least some of the plants with less than 100 workers. See note 103 supra.

\textsuperscript{105} Local, state and federal governments do not keep unemployment statistics for a single community nor is there a record of the number of people employed within each community.

\textsuperscript{106} One might legitimately ask why more notice than 180 days is not required when over 500 employees are terminated and the plant is the largest employer in town. The reason is twofold: first, termination of over 500 workers will have a disastrous effect on the local labor force whether or not the closing business is the largest employer, and second, the legislated notice period should be kept to a minimum.
vide that minimum standard of employability and feasibility. Those respective time periods were chosen because: first, other countries have had favorable experiences with notice periods between three and six months long\textsuperscript{107} and second, those who have studied plant closings in the United States suggest notice periods between three and six months long.\textsuperscript{108}

\textsuperscript{107} In Canada, employers must give four months notice if over 300 employees will be dismissed, three months notice if 100-300 employees will be dismissed, and two months notice if 50-100 will be dismissed. See \textit{Eileen & Bernardine, supra} note 66, at 85. Portis & Suys' study on the effect of advance notice on the closing of a London, Ontario, plant showed that as many as 42\% of the terminated workers may have found new jobs by the time the plant closed. Management remarked that production and morale remained good during the notice period. See Portis & Suys, \textit{supra} note 77, at 18, 27.

Swedish employers planning reductions in force must give to the labor market board:

- two months prior notice if 5-25 employees will be terminated,
- four months prior notice if 26-100 employees will be terminated, and
- six months prior notice if over 100 employees will be terminated.

Less notice is permitted if the employer could not foresee the needed reductions in time to meet statutory minimums, although such non-compliance must be justified. See \textit{C & R Associates, Plant Closing Legislation and Regulation in the United States and Western Europe: A Survey} 42-43 (January 1979) (unpublished paper prepared for the Federal Trade Commission).

During the notice period, the county labor market board seeks alternatives to closing the plant, conducts retraining programs, promotes relocation of workers, seeks new businesses for the community, and provides extensive job search assistance. See \textit{C & R Associates, Studies of W. European Legislation, supra} note 59, at 26-27; Hekman & Strong, \textit{supra} note 61, at 34, 47-51.

\textsuperscript{108} In the United States, the Armour Automation Fund Committee proposed a 90-day notice period during the closing of meatpacking plants in the early 1960's. See \textit{Shultz \& Weber, supra} note 73, at 19, 190 (The Committee made this recommendation to employers during the closing of the meatpacking plants; 90-day notice helped make closings in Fort Worth, Sioux City, and Kansas City successful.). The American Oil Company, which successfully used advance notice before relocating one of its plants in the early 1970's, suggested a three or four month notice period. See \textit{Coon \& Kast, supra} note 11, at 181. See \textit{generally} Wong, \textit{supra} note 34, at 1; American Oil Co., Closing A Big Industry In A Small Town (1972) (paper presented to the Public Relations Society of America as a Silver Anvil Entry for the 28th Annual Competition).

McKersie has also recommended three months advance notice. See \textit{Daily Lab. Rep't, Sept. 18, 1980, at E-6} (Prof. McKersie's statement in the hearing before the Senate Committee on Labor \& Human Resources, Sept. 18, 1980). He supports his recommendation by pointing to the Continuity of Employment Committee which reviewed the operation
Most state and federal legislation pending in 1980 required businesses to give notice one or two years in advance.109 These notice periods are too long. First, Sweden has the longest advance notice period in the world (six months) during which they carry out an aggressive reemployment program.110 American law need not require a longer notice period to do the same. Second, fewer businesses can foresee a closing two years in advance than six months in advance. A two year advance notice period, therefore, would increase the restraint on capital and thereby decrease the chance that advance notice will cause net efficiencies.111 Third, a one or two year notice period will increase the cost of avoiding productivity decline,112 the number of cancelled orders for the employer’s goods,113 and the likelihood that businesses will move abroad.114 Finally, a long notice period exacer-
bates the inequity in the costs of advance notice between firms and increases the likelihood of constitutional battles. If workers want a notice period as long as one or two years, they should go to the bargaining table to get it.

The combination of the final phrase "before the termination of any employee" with the definition of termination—"a discharge due to the closing of the establishment"—ensures that every employee will get the full benefit of the notice period. A notice period based on the expected closing date, rather than the first day the employer terminates employees, would enable employers to terminate employees with impunity immediately before the notice period begins.

3. Manner of giving notice—Subsections (c) and (d) of the notice requirement explain who should receive the notice, how they should receive it, and what it should contain. The general feeling is "the more the merrier." Complete and continuous information about the closing will help workers psychologically adjust to the closing and will encourage constructive planning by the workers, the community, and the state at the earliest possible date.

B. Exclusions to the Notice Requirement

Section 1: Definitions (cont.)

111 The likelihood of constitutional battles will increase because a greater restraint on capital occurs and the cost of closing is higher at two years as opposed to six months. This increased burden on employers gives them a greater incentive to sue and would make their case more sympathetic in court. See note 84 supra & note 127 infra.

112 The virtue of using the collective bargaining process is that the employer can trade job security for greater productivity from workers. This tradeoff causes more efficiency in the plant than if job security is just legislated. Thus, we ought to encourage collective bargaining wherever possible. As long as workers receive enough notice to at least ensure a chance of finding a job, an advance notice law should not preempt any ground that collective bargaining can cover. See Kochan, supra note 6, at 10. For an example of collective bargaining leading to a two year advance notice requirement, see BLUESTONE & HARRISON, supra note 3, at 250.

113 To see how this works, assume that the law requires an employer to give three months notice before closing. If the employer terminates 80% of his/her workers four months before the closing, he/she would not have to give notice to those 80% because the employer only has to give notice three months before the closing. Now, if the law said the employer must give three months notice before any terminations due to the closing, then the employer would have to give notice to those 80% three months before any one of them were terminated. Unfortunately, S. 1609, supra note 99, keys the notice period on the "termination or transfer of the operation" not on the termination of the worker.

114 See Weber & Taylor, supra note 65, at 310-11 (give complete information on the closing and tell all concerned parties).
As used in this Act:

(6) "Intermittent Employment" means employment that is not customarily carried on continuously throughout the year.

(7) "Involuntary Closing" means (1) any closing pursuant to a court order or (2) any closing caused by fire, flood or natural disaster, a national emergency, acts of war, civil disorder, industrial sabotage, termination of lease, or proceedings in bankruptcy.

(8) "Short-term Layoff" means the cessation of employment for reasons other than the closing of the establishment.

Section 3: Exclusions

(a) This Act does not apply to:
   (1) an involuntary closing of an establishment;
   (2) intermittent employment, short-term layoffs, or the discharge of employees due to strikes or lockouts; and
   (3) a business that moves its operations to another establishment within fifteen miles of the original establishment and provides terminated employees work at the other establishment within thirty days after the closing.

(b) This Act does not affect the right of employees to longer notice as specified in a collective bargaining agreement.

This statute section delineates those situations where requiring advance notice would be infeasible or unwise. The definition of "involuntary closing" summarizes those situations in which businesses could not feasibly give advance notice. If a court closes a plant for health or safety reasons or because a mortgagee wants to foreclose on the business' plant, a business will be unable to stay open for the notice period. Likewise, if fire, flood, natural disaster, national emergency, acts of war, industrial sabotage, or civil disorder make it impossible to continue production, a business should not have to give notice. If a lessor de-
cides to terminate a business’ long-term lease tomorrow, that business could also not give notice to the workers. Finally, a business in bankruptcy would not have the money to stay open during the notice period. Excluding businesses in these situations prevents the advance notice statute from placing an extreme burden on business.120

Advance notice is also unnecessary in some instances. Intermittently employed workers do not need notice because they can plan for being laid off. Moreover, short-term layoffs usually cause less hardship than permanent termination; workers still have a good chance of getting their old jobs back, the community tax base does not leave, and local businesses continue to supply goods to the plant and many of its workers. Further, because the National Labor Relations Board has the authority to resolve strike and lockout disputes, their efforts need not be preempted with an advance notice law. Finally, a business which relocates its plant within fifteen miles from the original location should not have to give notice. No harm will occur if workers are assured a job at the new location. Ideally, this exemption will encourage businesses to relocate nearby.121

Subsection (b) makes it clear that this Act will not preclude workers and management from setting up a more far-reaching advance notice system than that required by law. With this reassurance, only the workers and the management’s lack of creativity could stand in the way of an optimal adjustment program.

C. Remedies for Violation of the Notice Requirements

Section 4: Remedies

(a) A business that did not give notice to a terminated employee as required under Section 2 of this Act shall be liable to that employee in the amount of fifty cents for each day that the business was required to give notice

the military may force a business to close and move elsewhere even though the Congress has not declared a war. “Industrial sabotage” includes the case where the workers ruin the business’ machinery so that production ceases.

120 Both federal bills previously mentioned, H.R. 565 and S. 1609, supra note 99, do not explicitly state under what conditions a business does not have to give notice. Instead, they delegate the authority of making exclusions to a new bureaucracy created within the legislation. Employing a bureaucracy to determine exclusions would only add to the cost of requiring advance notice.

121 Unfortunately, H.R. 565, supra note 99, does not provide for this exclusion. However, the Employee Protection and Community Stabilization Act, supra note 99, does include this provision.
but for which the business did not give notice, times one-twelfth the number of months the employee has worked at the establishment.

(b) A business that did not give notice to the chief executive officer or elected body governing the community as required under Section 2 of this Act shall be liable to the community in the amount of $100 for every day the business was required to give notice but failed to give notice.

(c) A business that did not give notice to the State [Department of Labor] as required under Section 2 of this Act shall be liable to the state government in the amount of $100 for every day the business was required to give notice but failed to give notice.

(d) An action to recover the liability under this section may be brought in any appropriate state or federal court.

(e) The court may award a prevailing plaintiff reasonable attorney's fees and the costs of the action in addition to any judgment.

The remedies section discourages complete violation of the law, provides some incentive for giving at least partial notice, increases the likelihood of enforcement, and allows direct compensation to victims of a violation. Since a business which gives absolutely no notice may pay up to a million dollars in damages, the remedy discourages complete violation of the legislation. If a business decides to give notice sometime during the required period, the legislation rewards this effort to comply. The delinquent business can save around $5000 a day because of its sudden enlightenment.

This section also increases the likelihood of enforcement by letting victims bring suit. Justice might come slower and with less certainty with the government as enforcer. Finally, a remedy should compensate the victims for the hardship caused by a violation of the advance notice law. Workers can use the money to pay suddenly burdensome bills, local government can use it to

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123 This figure assumes the business is closing a plant of 1000 workers and the average seniority among those workers is 10 years.
124 See note 122 supra.
125 For example, in Britain and France, the agency delegated to enforce advance notice has not always lived up to its duty. See C & R Assoc. Studies of W. European Legislation, supra note 59, at 6, 24.
continue worthwhile programs, and the state can use it to pay overtime to employees who administered job assistance and unemployment compensation programs.128

D. Passage of the Model Statute

The proposed statute is an effort to integrate the concerns of management, employees, and the community. Legislators could consider it alone or incorporate it into a more comprehensive plant closing bill. On its own, the statute would have a better chance at passage since more controversial plant closing reforms would not impede its legislative progress.126 Incorporated into a plant closing bill, the statute would play an essential role in easing the hardship of plant closings.

Only legislators in the United States Congress should consider passing this statute. At the state level, legal battles may develop over the interstate commerce question, thereby delaying its enforcement.127 Even worse, businesses in states that pass this law may flee to non-advance notice states.128 Such an event would

128 Neither of the major federal bills, National Employment Priorities Act, and Employee Protection and Community Stabilization Act, supra note 99, compensates the victims of a violation.
126 See Freedman, supra note 20, at 18.
127 Critics argue that the inability to relocate during the notice period, which restrains capital mobility, constitutes an interference with interstate commerce, violating the "dormant" commerce clause of the federal Constitution. See, e.g., Cook, Laws to Curb Plant Closings?, Indus. Week, Feb. 4, 1980, at 35, 36; Gunther, supra note 85, at 291-93. Advance notice, however, will only restrain capital if a business cannot foresee the need to close and relocate its plant. See notes 65 & 66 and accompanying text supra. Since decisions where to relocate and to construct the new facility take time, a business relocating its plant must anticipate the closing of the old plant.

Moreover, a violation of the interstate commerce clause occurs only when either the impact of the state law on interstate commerce is disproportionate to the expected benefits, or when the local interest could be protected with less impairment of interstate commerce. See Arnold, supra note 84, at 251. An advance notice law should not have more than a minimal effect on interstate commerce given the time it takes to relocate. How minimal an effect advance notice will have on interstate commerce will of course depend on how long legislators make the notice period. A two year notice period might cause a lot of disruption of capital movement because some businesses will not know two years in advance that they want to relocate. A notice period of less than a year, however, would probably not cause disruption of interstate commerce because it takes time to find a new location and build a new plant.

Advance notice also has many expected benefits. See notes 49-60 and accompanying text supra. The state, moreover, cannot protect its interest with less impairment of interstate commerce because only with advance notice can alternatives to the plant closing be explored and a sound reemployment program developed. Consequently, state advance notice laws should not violate the interstate commerce clause.

128 At the margin, any increase in costs of production within one state results in some businesses moving to states without those costs. Because an advance notice increases the
create the very situation the law seeks to prevent—employment loss.

Finally, advance notice legislation is not a panacea for the plant closing problem. It does provide the opportunity to implement sound adjustment programs, but such legislation cannot provide the dedication, sensitivity, and spirit of cooperation needed to reemploy workers. Unless workers, management, and government officials work together to assure that the workers remain employed, advance notice may never bring about the benefits it promises.¹²⁹

CONCLUSION

Plant closings have a devastating effect on workers and the community. Advance notice would help ease the attendant hardships of a closing by providing time to explore alternatives. The statute proposed in this article preserves the benefits of advance notice while minimizing its costs.

The recent debate over plant closing reform has pitted region against region, union against management. This seems unfortunate. Closings occur all over the nation.¹³⁰ Whether the closing is caused by a business' desire to relocate or by its failure to make a profit, the suffering incurred by workers and their community

¹²⁹ See generally ETA GUIDE, supra note 32 (explains all the things employers, local government, unions, and employment service managers can do to help ease the effect of a plant closing from the time advance notice is given.). In addition to what is mentioned in the ETA Guide, employers should set up a network to exchange ideas on smooth shutdown procedures and create industry job listings and industry arranged hiring. The federal government should: (a) generate data on the number of plant closings, their causes, the number of jobs lost because of closings, and the costs and benefits of various adjustment programs, (b) coordinate committees within each industry to determine the optimal advance notice period, severance pay scheme, training programs, and other adjustment strategies for that industry, (c) provide incentives for relocating plants within the same area, and (d) provide funds to employees and communities to buy plants that can make a profit but which are closing. These measures should substantially improve America's response to plant closings.

¹³⁰ See, e.g., BLUESTONE & HARRISON, supra note 3, at 49 (manufacturing plants with over 100 employees closed in every region of the country; surprisingly, the highest probability of closing was reported in the South).
is equally catastrophic. Regionalism, therefore, serves no useful purpose in this debate.

Union versus management squabbles over plant closing reform seem equally useless. If America hopes to revitalize its production capabilities to compete with Japan and West Germany, workers must obtain the emotional security of plant closing adjustment programs.¹³¹ Unless workers receive the emotional security from such programs, they will seek security in protectionism and opposition to technological improvement.¹³² In the long run, protectionism and technological obsolescence will only lead to fewer jobs and fewer profits.

Management, labor, and communities from all regions must work together to achieve a rational, fair policy to deal with the effects of plant closings. National legislation requiring advance notice is a good way to begin the effort.

—Joseph A. Cipparone

¹³¹ See Drucker, supra note 46, at 28; McKersie, 'Plant Closed—No Jobs' (Continued), Across the Board, November 1980, at 12, 15.
¹³² See Kochan, supra note 6, at 10.
APPENDIX

Section 1: Definitions

As used in this Act:

(1) “Business” means any commercial or industrial enterprise having an establishment within a community for more than five years.

(2) “Close” or “Closing” means a permanent reduction of not less than 90% of the highest number of employees working at an establishment during the last twelve months.

(3) “Community” means the lowest level of general local government jurisdiction in which the establishment is located.

(4) “Employee” means anyone employed within an establishment for at least thirty hours per week.

(5) “Establishment” means all factories, plants, business offices, or other working places at one location or several locations within a single community.

(6) “Intermittent Employment” means employment that is not customarily carried on continuously throughout the year.

(7) “Involuntary Closing” means (1) any closing pursuant to a court order or (2) any closing caused by fire, flood or natural disaster, a national emergency, acts of war, civil disorder, industrial sabotage, termination of lease, or proceedings in bankruptcy.

(8) “Short-term Layoff” means the cessation of employment for reasons other than the closing of the establishment.

(9) “Termination” means the discharge of an employee due to the closing of an establishment.

Section 2: Notice Requirement

(a) Except as provided in (b), a business that intends to close an establishment at which have been employed at least 100 but not more than 499 employees at some time during the last
twelve months, shall provide the notices prescribed by subsections (c) and (d) at least ninety days before the termination of any employee.

(b) A business that intends to close an establishment at which have been employed:

(1) at least 500 employees at some time during the last twelve months;

(2) at least 100 employees at some time during the last twelve months and that number of employees is larger than the number of employees working in any other commercial or industrial establishment within the community on the date that the business had its largest number of employees in the last twelve months,

shall provide the notices prescribed by subsections (c) and (d) at least 180 days before the termination of any employee.

(c) Written notice shall be given to: (1) each employee, (2) the chief executive officer or elected body governing the community, and (3) the State [Department of Labor]. Notice may be given by first class mail or personally delivered.

(d) The notice to an employee shall contain the expected date of the employee’s termination, the reasons for the closing, the benefits and services provided to employees by the business, and a description of the plans for closing the establishment. The notice to the chief executive officer or elected body governing the community and the notice to the State [Department of Labor] shall contain the name of the business, the location of the establishment, the expected termination date of the employees, the reasons for the closing, the number of employees that will be terminated because of the closing, a general description of the soon-to-be terminated employees’ skills, and a description of the plans for closing the establishment.

Section 3: Exclusions

(a) This Act does not apply to:

(1) an involuntary closing of an establishment;

(2) intermittent employment, short-term layoffs, or the discharge of employees due to strikes or lockouts; and

(3) a business that moves its operations to another es-
establishment within fifteen miles of the original establish­ment and provides terminated employees work at the other establishment within thirty days after the closing.

(b) This Act does not affect the right of employees to longer notice as specified in a collective bargaining agreement.

Section 4: Remedies

(a) A business that did not give notice to a terminated employee as required under Section 2 of this Act shall be liable to that employee in the amount of fifty cents for each day that the business was required to give notice but for which the business did not give notice, times one-twelfth the number of months the employee has worked at the establishment.

(b) A business that did not give notice to the chief executive officer or elected body governing the community as required under Section 2 of this Act shall be liable to the community in the amount of $100 for every day the business was required to give notice but failed to give notice.

(c) A business that did not give notice to the State [Department of Labor] as required under Section 2 of this Act shall be liable to the state government in the amount of $100 for every day the business was required to give notice but failed to give notice.

(d) An action to recover the liability under this section may be brought in any appropriate state or federal court.

(e) The court may award a prevailing plaintiff reasonable attorney's fees and the costs of the action in addition to any judgment.