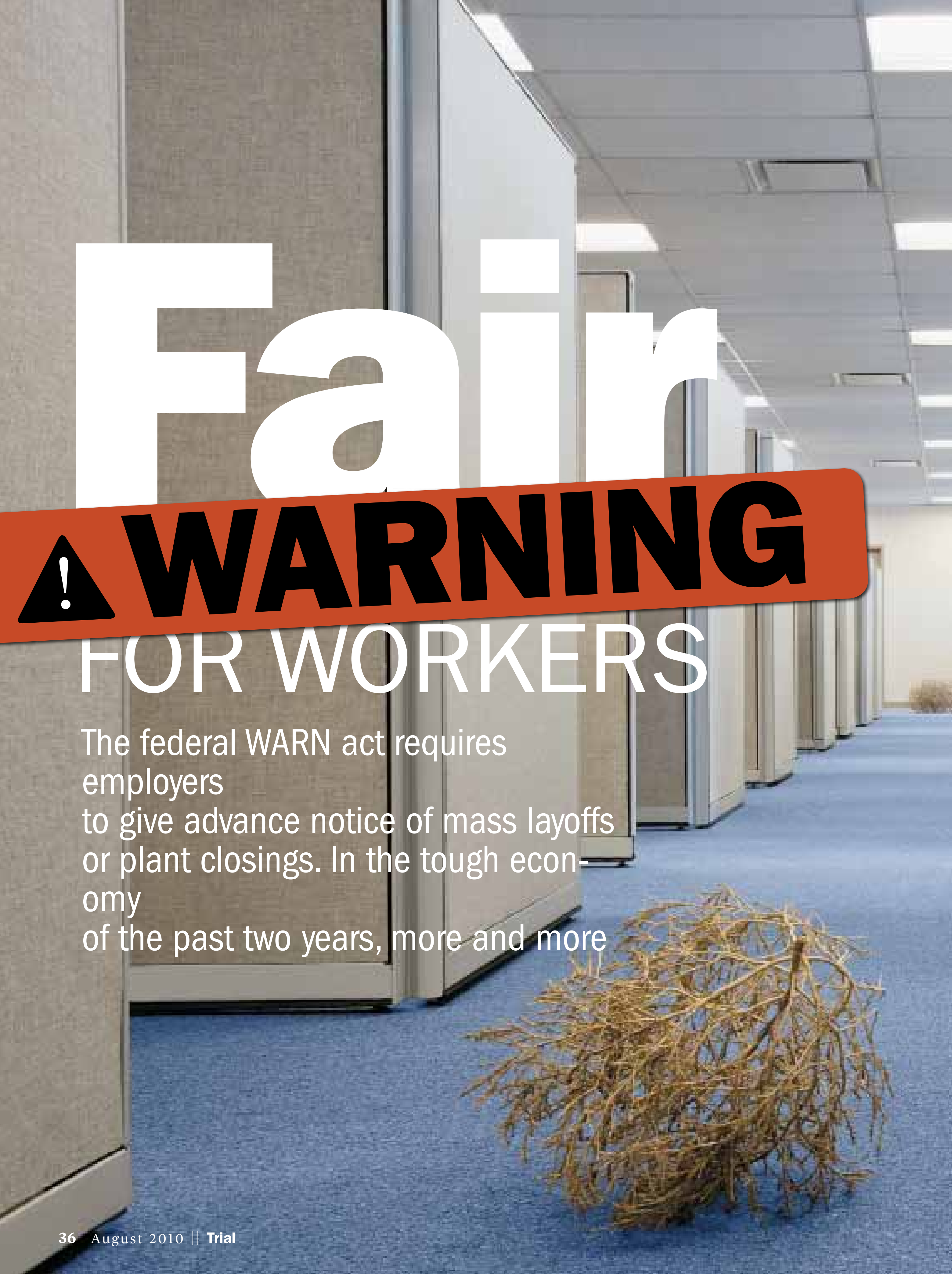
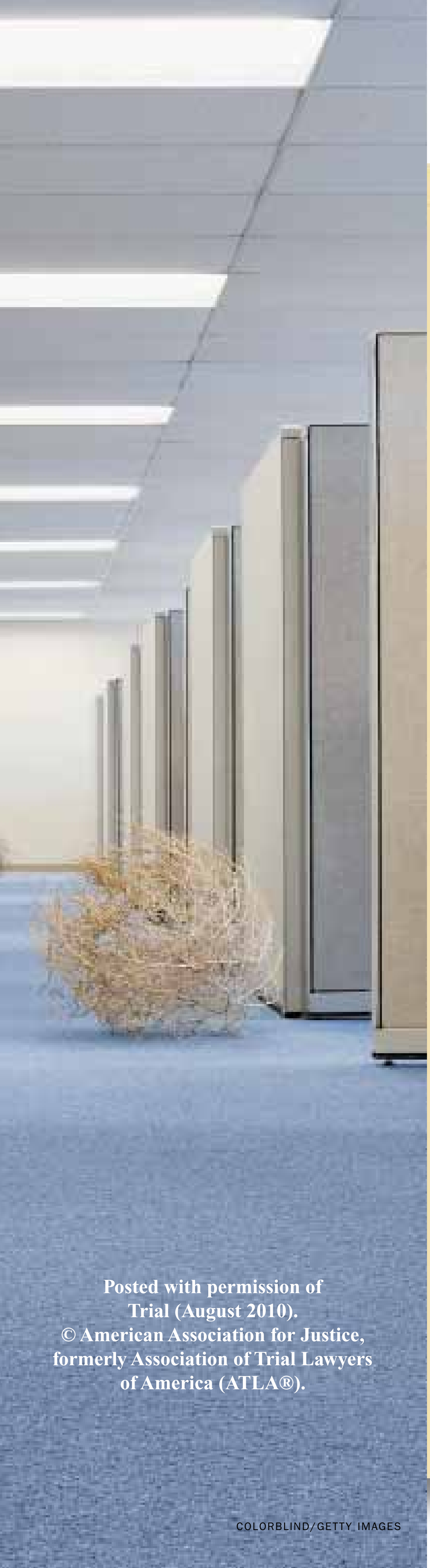


Fair WARNING FOR WORKERS

The federal WARN act requires employers to give advance notice of mass layoffs or plant closings. In the tough economy of the past two years, more and more



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By || Jack A. Raisner, René S. Roupinian, and Michael Scimone

FEW THINGS ARE MORE DEVASTATING THAN THE LOSS of a job. The person let go often suffers financial, emotional, and even physical pain. When an entire workplace is shut down, catastrophic effects can ripple through a whole community. And today, the effects of a mass layoff are magnified, as laid-off employees compete in a labor market flooded with hundreds or thousands of job seekers who have similar skills.

The stress is even greater when a layoff comes without warning, as recent examples have shown. In 2008, without any advance notice to workers, Archway & Mother's Cookie Co. closed its doors, cancelled its employees' health insurance, and filed for bankruptcy. One pregnant employee deliberately induced labor before her due date, hoping to deliver her baby before she lost medical coverage.[1] In 2009, over 2,000 employees of mortgage lender Taylor, Bean & Whitaker were told in the morning that their jobs were safe, but when they returned from lunch, they found their jobs gone. Ten days later, so was their health insurance.[2]

The federal Worker Adjustment and Retraining Notification (WARN) Act, was enacted in 1988 to protect workers from being laid off en masse without due notification.[3] It requires employers to issue written notice at least 60 days before a mass layoff or a plant closing to employees or their representatives, as well as to state entities that conduct rapid response activities.

An employer who fails to comply with WARN becomes liable to employees for 60 days' worth of pay and benefits. The statute authorizes a private right of action, with an award of reasonable attorney fees at the court's discretion. (These are the only damages available under the act.) WARN class action claims can help provide much-needed relief to individuals and communities dealing with the crisis of a mass job loss.

During the recent recession, with mass layoffs spiking, many workers have looked to the WARN Act for relief. What they've found is that WARN is a notoriously weak statute, with labyrinthine and confusing rules. Millions of employees work at sites that do not meet WARN's coverage thresholds, and the act's many exemptions and allowance for unsupervised releases provide employers with the means to toe the line or circumvent liability. The low damages amounts create the economic need to proceed as a class action, which may entail a separate set of hurdles—especially when the defendant is in bankruptcy, which is most often the case in WARN litigation. Congress is considering legislation to strengthen the act by doubling the amount of damages, expanding WARN's coverage to smaller sites, and tightening some of its loopholes. Until such legislation passes, plaintiff attorneys must pay meticulous attention to WARN's many—and sometimes confusing—details.

WARN is straightforward in its wording, but it can be complicated in practice. This complexity is mitigated somewhat by a doctrine of broad construction and by the fact that employers bear the burden of proof for any exceptions to its requirements.

Defining the law's scope of coverage is the first challenge. Under WARN, an "employer" is defined as a "business enterprise" that employs either 100 full-time employees or 100 employees who work an aggregate of 4,000 hours in a week. The relevant time period to use for this count is the date on which the 60-day notice is due, although "alternative methods" of determining size may be used if this "snapshot" is not representative.[4]

The next challenge is defining the employer's conduct. WARN requires that

> an employer shall not order a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice of such an order . . . to each representative of the affected employees as of the time of the notice or, if there is no such representative at that time, to each affected employee. . . .[5]

The act applies to plant closings or mass layoffs at a "single site of employment." This term is not defined in the statute and has been the subject of much litigation. Regulations issued by the U.S. Department of Labor (DOL) describe it as "either a single location or a group of contiguous locations."[6] Most of the examples the DOL gives are of work sites of an employer that are close to one another (such as buildings in an office park, or across the street from each other, that are owned by the same company), but the regulations also refer to locations within "reasonable geographic proximity" as a single site, as long as they are "used for the same purpose and share the same staff and equipment."[7]

A more complicated case is presented by employees—like sales representatives or transportation workers—who travel in the course of their work. WARN's regulations consider their site of employment as the place "to which they are assigned as their home base, from which their work is assigned, or to which they report."[8] Those three locations may not always be the same. Work assignments in today's workplace can be completed from multiple locations, using e-mail, personal digital assistants, or cell phones. Most courts have limited the scope of this provision, either by holding that an employee must be physically present at the location for at least part of their work time[9] or by limiting the regulation's application to "mobile workers."[10]

Another problematic term from the statute is "employment loss." It includes termination, but it can also refer to a temporary layoff that lasts longer than six months or to a reduction in work hours of more than 50 percent over a six-month period.[11] The statute specifically excludes situations where an employer offers to transfer the employee to another location within reasonable commuting distance or to a location regardless of distance if the employee agrees to transfer there.[12]

The provision for temporary layoffs can lead to some complicated situations. An employer may expect a layoff to last for less than six months, but as soon as it becomes reasonably foreseeable that it will last longer, the employer is obligated to give WARN notice.[13] Another murky question is determining who is entitled to receive notice. The law says it is any employee "who may reasonably be expected to experience an employment loss."

These provisions inevitably lead to situations where parties are forced to litigate whether a layoff's duration was foreseeable and whether individual employees could be "expected" to experience a long-term layoff.[14]

Employer Defenses

WARN allows an employer three defenses: faltering company, unforeseen business circumstances, and good faith.

Faltering company. This exception applies only to plant closings. It allows employers to escape WARN liability by demonstrating that

- they were actively seeking financing or business at the time that notice was required
- there was a realistic opportunity to obtain the financing or business
- the financing or business would have enabled the employer to avoid or postpone the closing
- the employer reasonably and in good faith believed that giving notice would have precluded receiving the financing or business.[15]

The employer claiming this exception

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must show it has taken concrete steps to secure the funds. The financial condition of the entire company is considered, not just the location that is under threat of closure. Sale of the employment site or of the company does not allow the employer to claim the exception.[16]

Unforeseen business circumstances. The second major exception to WARN liability is in some ways the flip side of the faltering company defense. The faltering company exception applies when employers see the economic writing on the wall; the unforeseen business circumstances defense applies when they do not. Employers who meet the exception's requirements can issue less than the full 60 days of notice for a mass layoff or plant closing.[17]

The statutory language is fairly broad. In response to comments, the DOL deleted from its regulations a reference to narrow construction, leaving this defense open to a great deal of litigation.[18] The two core requirements of the defense are causation and foreseeability; the latter is more commonly litigated.

DOL regulations give a few examples of circumstances that could meet the exception. In practice, the defense is highly fact-specific. The circumstances must be shown to have been "sudden, dramatic, . . . unexpected," and outside the employer's control. Examples include the termination of a major contract, a supplier's strike, an economic downturn, or a government-ordered closing.

Natural disasters are a type of unforeseen business circumstance under WARN. They excuse an employer completely from the obligation to provide notice.[19]

Good faith. Courts have discretion to reduce an employer's liability under WARN when the employer acts in good faith. This defense requires an employer to show both subjective good faith and an objectively reasonable belief that its conduct did not violate the statute.[20]

Good faith is an affirmative defense, and the employer bears a "substantial burden" of proving it.[21] Actions taken after the employer has committed the violation, including helping employees find new jobs, providing unemployment insurance payments, and continuing to provide fringe benefits, do not prove good faith.[22]

Not surprisingly, employers that are closing down plants and laying off employees frequently find themselves in bankruptcy court. The fact that an employer has filed for bankruptcy does not mean that a WARN claim cannot proceed, but you will need to make some strategic decisions. The first is determining the best way to obtain classwide relief in the bankruptcy forum. There are two vehicles for this: the proof of claim and the adversary proceeding.

The bankruptcy rules do not provide any explicit mechanism for filing a proof of claim on behalf of a class of creditors, such as a group of employees with a WARN claim. But several courts have held that a bankruptcy judge has discretion to apply the standards of Federal Rule of Civil Procedure 23 to allow a classwide filing.[23]

The adversary proceeding is a superior option, although one that is more difficult to pursue. Adversary proceedings are limited to certain types of actions.WARN defines an "employer" as a "business enterprise," providing a de facto defense in some bankruptcy proceedings. Some courts have interpreted this to mean that where an employer has entered bankruptcy and no longer operates an ongoing business, it is not subject to WARN requirements.[24]

Children (and Cousins) of WARN

WARN has spawned its own offspring, with several states enacting "mini" or "baby" WARN acts that provide additional protection. These statutes frequently cover small businesses or less expansive reductions in force and may require longer notice periods.

In addition to the baby WARNs, other bases of liability can crop up in a layoff, so be alert to opportunities for additional claims. Among these are claims of age discrimination or Title VII violations. Bear in mind, though, that recent Supreme Court decisions have made age discrimination more difficult for plaintiffs to prove.[25]

Employers that offer welfare benefit and pension plans governed by ERISA may be subject to its antidiscrimination provisions. ERISA prohibits "interfering with the attainment of any right" to which an employee is entitled by an ERISA plan.[26] Where an employer targets a reduction in force to eliminate

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workers entitled to more expensive benefits, this provision may be triggered.[27]

ERISA plans may also provide severance benefits to employees, so look into any claims that laid-off workers may have under these plans. Although challenging ERISA decisions is difficult, plans are subject to several requirements, and a participant may seek injunctive relief where a plan's administration conflicts with these provisions.[28]

A workforce that is represented by one or more unions may have contractual protections in a collective bargaining agreement that governs reductions in force. Even where there are no such provisions, an employer of an organized workforce may be obligated to bargain with its employees over plant closings and layoffs.[29] Note that there is no WARN violation where a closing or layoff occurs due to a strike or lockout, unless the purpose of the employer's action was to evade WARN liability.[30]

Deciphering the procedural and technical requirements of WARN and its local variants can be daunting. But pursuing these cases is like offering a lifeline to workers and their communities. WARN litigation can protect workers who are hurt by a struggling economy and ensure that employers will think twice before putting hundreds of their employees out on the street. These workers and their communities need relief, and by undertaking a WARN claim, you can help them get it.

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NOTES

1. Ianthe Jeanne Dugan, *For Workers, Medical Bills Add to Pain as Firms Fail*, Wall St. J. (Dec. 6, 2008).
2. *See* James R. Haggerty & Nick Timiraos, *With a Quick Rise, Hard Fall, Home Lender Marked an Era*, Wall St. J. (Sept. 17, 2009), http://online.wsj.com/article/SB125314650064418009.html; *see also* e-mail from Karey Holland, Taylor, Bean & Whitaker, to Taylor, Bean staff, *Benefits End for Taylor, Bean Employees* (Aug. 14, 2009, 12:21 p.m.), published in *Taylor Bean E-Mails*, Wall St. J. (Sept. 16, 2009), http://online.wsj.com/article/SB125244357953393589.html.
3. 29 U.S.C. §§2101–1209 (2006).
4. 20 C.F.R. §639.5(a)(2).
5. 29 U.S.C. §2102(a)(1).
6. 29 C.F.R. §639.3(i)(1).
7. 20 C.F.R. §639.3(i)(3) (2010).
8. 29 C.F.R. §639.3(i)(6).
9. *See e.g. Ciarlante v. Brown & Williamson Tobacco Corp.*, 143 F.3d 139, 146 (3d Cir. 1998).
10. *See e.g. Meson v. GATX Tech. Servs. Corp.*, 507 F.3d 803, 810 (4th Cir. 2007).
11. 29 U.S.C. §2101(a)(6).
12. 29 U.S.C. §2101(b)(2).
13. 29 U.S.C. §2102(c).
14. *See e.g. Kildea v. Electro-Wire Prods., Inc.*, 144 F.3d 400, 405 (6th Cir. 1998) (finding that temporarily laid-off employees were entitled to notice of plant closing where employer regularly laid off employees based on seasonal needs).
15. 29 U.S.C. §2102(b)(1); 29 C.F.R. §639.9(a).
16. *See e.g. Local 397, Intl. Union of Electronic, Elec., Salaried, Mach. & Furniture Workers v. Midwest Fasteners, Inc.*, 763 F. Supp. 78, 83 (D.N.J. 1990).
17. 29 U.S.C. §2102(b)(2).
18. U.S. Dept. Labor, *Supplementary Information to the Final Regulations of the Worker Adjustment and Retraining Notification Act*, 54 Fed. Reg. 16,042, 16,061 (Apr. 20, 1989).
19. 29 C.F.R. §639.9(c).
20. 29 U.S.C. §2104(a)(4); *see Frymire v. Ampex Corp.*, 61 F.3d 757, 767–68 (10th Cir. 1995).
21. *Bankston v. Ill.*, 60 F.3d 1249, 1254 (7th Cir. 1995) (Fair Labor Standards Act case).
22. *See Castro v. Chicago Hous. Auth.*, 360 F.3d 721, 733 (7th Cir. 2004).
23. *See e.g. In re Am. Reserve Corp.*, 840 F.2d 487 (7th Cir. 1988). The procedural route by which Rule 23 is read into the bankruptcy rules is somewhat byzantine. Part VII of the Federal Rules of Bankruptcy Procedure duplicates many sections of the Federal Rules of Civil Procedure, including Rule 23. Normally, Part VII applies only to adversary proceedings. But Bankruptcy Rule 9014(a) allows a bankruptcy judge to exercise discretion to apply any of the rules in Part VII to a "contested matter." A proof of claim becomes a contested matter when the debtor objects to it. Courts differ as to whether an objection by the debtor is required before moving for class certification. *Compare In re Charter Co.*, 876 F.2d 866, 874 (11th Cir. 1989), *with In re Ephedra Prods. Liab. Litig.*, 329 B.R. 1, 7 (S.D.N.Y. 2005).
24. *See e.g. In re United Healthcare*, 200 F.3d 170, 178 (3d Cir. 1999).
25. *See e.g. Gross v. FBL Fin. Servs.*, 129 S. Ct. 2343 (2009).
26. 29 U.S.C. §1140.
27. *See e.g. McLendon v. Cont. Can Co.*, 908 F.2d 1171 (3d Cir. 1990).