WARN Reform

Why the law is failing: shutdown and mass layoff rights— from the litigation frontlines

A report prepared by

Outten & Golden LLP,

Advocates for Workplace Fairness

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"...if the federal government is going to embrace those [national trade] policies, it needs to ensure that cities like Fall River aren't left behind."

Mayor Edward M. Lambert, Jr.
on the Quaker Fabric shutdown

WHY WARN ENFORCEMENT HAS FAILED

In 1989, Congress placed the onus of enforcing WARN exclusively on the plaintiffs' bar and local officials. By 1993, however, the GAO recognized WARN was not meeting its goals. Despite rampant violations of WARN, the GAO found "few lawsuits have been filed since the law was enacted." Only *66* cases had been filed over the first three years (none by local officials). The main roadblocks the GAO uncovered were: 1) WARN's "one-third" exemption, which drastically limited its application to mass layoffs, and 2) the federal litigation enforcement scheme was not working, specifically:

- The cost of hiring an attorney
- Limited incentives
- Uncertain outcomes

Non-enforcement leads to non-compliance and, ten years later, no adjustments have been made. The number of reported cases remained scarce; the litigation activity and successes remained anemic. The GAO counted *only 68* reported decisions in the *five* year period between 1998-2002. Again, the GAO identified the need for Congress to clarify areas of confusion. Instead, these same issues are being plowed and replowed with burdensome litigation, weakening enforcement schemes even further.

Clearly, barriers present in WARN are undermining its federal court enforcement. These barriers, we believe, depress the number of lawyers willing to prosecute a WARN case. The paucity of experienced lawyers, has made it difficult for workers to find effective counsel even when their WARN claims are sizeable and grievous, signaling to emboldened employers that they can act with impunity. In short, the absence of a sizeable plaintiffs' WARN bar means nothing less than the collapse of the enforcement scheme on which Congress relied when designing the act and, by extension, the Act itself.

The remedy is not complex. It is to simply bolster the enforcement of WARN by making certain adjustments to WARN. These small changes will allow the private bar to do its job.

That Outten & Golden LLP, the country's largest employee-plaintiffs' law firm, advocates the strengthening of WARN is not simply self-serving or unusual. Commonly, the passage of remedial employment legislation is followed by a period of low- or non-enforcement. This is due to unintended consequences that may be revealed only "in the wash" of litigation practice. The landmark legislation of the 20th century, the Civil Rights Act of 1964, laid basically dormant for years until Congress made adjustments that activated its enforcement. Like other worker protection laws, WARN's protections should be broad enough and strong enough to withstand withering litigation. Imbalances in the Act that are stifling litigation should be righted. No one seeks bonanzas, just fair outcomes that foster a sustainable bar. Only in the face of a realistic threat of enforcement will employers comply with WARN as Congress intended.

We start, then, with a recent illustration of how difficult it has become for victims of even the most blatant, conspicuous and highly publicized shutdown to obtain a lawyer to file a WARN case. Then we will outline several adjustments to WARN that will promote greater enforcement in both federal district and bankruptcy courts. We end with a glimpse into today's most pressing mass layoff/shut down crisis: the subprime meltdown. Hundreds of thousands of employees are facing the consequences of sudden job loss, but only a miniscule fraction will find assistance in WARN. Having been tasked by Congress to enforce WARN, we in the plaintiffs' bar ask Congress to fix WARN so its goals can finally be met.

July 2, 2007

While all 900 employees were away on vacation...

Their plant shut down.

And they were fired.

Where was the WARN enforcement?

Q U A K E R F A B R I C

Fall River, Mass.

- Once the city's largest employer.
- One of the largest producers of Jacquard upholstery fabric in the world, reportedly began reducing its workforce as it outsourced to China.
- Fired its last 900+ workers while they were away, without prior notice.
- Only from the media do workers find out they are jobless.
- Most workers are older, and worked for as many as 15-38 years there.
- Elected officials, including U.S. Senator John Kerry, sought and obtained TAA and other state assistance for them. But for help with WARN, none was found … until much later on.

WARN Act Help?

The Herald News JULY 2007

July 2
While employees are away over the July 4th holiday, company shuts down.

The Boston Globe

July 3
Local newspaper reports company shutdown. "It's a sad day for the Employees" states Mayor Lambert. Employees first learn they are fired from the article. They receive a mailed notice only days later.

July 4
Gov. Deval Patrick offers state assistance.
Mass. aide officials call the crisis "emotional and "extraordinary."
Mass. State Worker Development official begin investigating WARN liability.

July 23
Sens. John Kerry and Edward Kennedy and U.S. Rep. James McGovern send a letter to U.S. Secretary of Labor Elaine Chow asking to investigate whether Quaker Fabric violated WARN.
They find out the US DOL has no jurisdiction and cannot help with WARN.

Workers begin to receive TAA benefits for dislocated workers affected by globalization

Larry A. Liebenow, CEO, Quaker Fabric, and current Board Member and past-President, U.S. Chamber of Commerce.

July 17
"I also want to apologize for the manner in which many of you learned of our closing, which, while out of my control, was simply awful." Larry A. Liebenow, President and CEO.

Hard to Find

Not until months later did the workers find WARN counsel to retain

AUGUST | SEPTEMBER | OCTOBER

Oct. 9
More than 600 Quaker employees meet *en masse* with lawyers for first time.

Sen. Kerry: I remain concerned about the company's decision not to give employees advance notice — let alone the 60 days required under law — before closing its plant.

The lives of nearly 1,000 people were turned upside down as a result of the company's careless planning,"

"It is my hope that Quaker Fabric will recognize the pain that was inflicted on its employees and their families."

Sept. 26
WARN lawsuit filed by New York law firm.

"These employees almost lost hope in finding a lawyer that would file suit over their WARN claims." René S. Roupinian, Outten & Golden LLP.

CURRENT PROPOSED WARN REFORM LEGISLATION

(some key provisions of H.R. 3920 and S. 1792)

Current Bill: Problem 1	**Increase WARN notice period and penalties**	From 60 to 90 days
	The purpose of WARN notice is to allow time for affected workers to locate new jobs or decide upon retraining options, as well as time for planning and gathering of community resources. Sixty days is simply not long enough. Extending the notice and concomitant penalty period to 90 days will incentivize employers to comply with the notice requirement and employees to enforce the law when it is violated.	
Current Bill: Problem 2	**Calendar vs. working days**	Use Calendar days (i.e.,60 not 44 paid) days
	Under the current Act, it is unclear whether the appropriate calculation of the maximum period of liability is 60 calendar days or the number of working days in 60 days. The Third Circuit, in *North Star Steel*, holds the minority view that the liability period is 60 calendar days. *United Steelworkers of America, AFL-CIO-CLC v. North Star Steel Company, Inc.*, 5 F.3d 39, 43 (3d Cir. 1993). In reaching its holding, the Third Circuit relied on the language of 20 C.F.R. § 639.1(a), which states in relevant part that the WARN Act "provides protection to workers, their families and communities by requiring employers to provide notification 60 *calendar* days in advance of plant closings and mass layoffs."	
Current Bill: Problem 3	**Increase WARN damages**	Double daily pay damages
	Increasing employer damages to two days' pay for each day no notice was given will incentivize employers to send WARN notices and will ease economic barriers to enforcement by injured workers. Both will result in greater compliance with WARN.	
Current Bill: Problem 4	**Deter WARN waivers and releases**	Non-waiver provision
	Any WARN settlement that gives the employee less than the statutory minimum under WARN would frustrate Congress' objective of imposing uniform minimum pay requirements in the event of a WARN occurrence, and would nullify Congress' purpose. Allowing settlement discounts would permit an employer to evade WARN. Thus, WARN waivers should be unenforceable unless supervised by a court, the Dept. of Labor, or at least a private attorney. Nor should WARN payments reduce unemployment benefits.	
Current Bill: Problem 5	**Reduce 50 employee minimum for single site coverage**	Lower minimum to 25 employees
	WARN currently provides protection to only those employees who are terminated without notice at a facility which employs at least 50 full-time employees. In reality, however, when an employer orders a plant shutdown or mass layoff, the impact is felt company-wide. Employees at smaller facilities, sometimes within the same geographic area, are impacted in the same manner as their large facility counterparts, but are denied protection. It is difficult to explain to an employee that he is entitled to nothing under the Act in the wake of a company-wide shutdown simply because his office housed less than 50 full-time employees.	

CURRENT PROPOSED LEGISLATION

Current Bill: Problem 6	**Reduce 50 employee minimum for mass layoff**	Lower minimum to 25 employees
	A layoff of 25-49 employees may have just as substantial an impact on one community as a 50-person layoff, depending on the relative size of the community. The lowering of the minimum says nothing about the relative ability of the employer to provide notice and pay penalties.	
Current Bill: Problem 7	**"Good Faith" defense should not reduce damages**	Reduces only penalties and interest
	Currently WARN permits employers who have violated WARN to successfully reduce or completely eliminate damages to its employees despite a finding of liability. The mere threat of reliance on this defense in the face of a trial may compel a substantially reduced settlement, particularly since the cost of litigation can be significant vis a vis full recovery for lower-paid workers. In addition, discovery on the issue of an employer's alleged good faith can often be substantial, necessitating depositions of the employer's legal counsel who may have advised the employer on its WARN obligations.	
Current Bill: Problem 8	**Uniform Statute of Limitations**	Two years statute of limitations
	Fixing a two year statute of limitations will help employers and employees avoid continued litigation over this issue.	
Current Bill: Problem 9	**Eliminate the 33% mass layoff rule and exception to 90-day aggregation rule.**	Repeal rules
	Repealing this exemption will have a more positive impact on WARN protection and enforcement potential than perhaps any other. According to the 1993 GAO report "Dislocated Workers: WARN Act Not Meeting Its Goals," over 75% mass layoffs affecting 50 or more workers were exempt from coverage because they did not affect at least one-third of the work force. The one-third rule exempted 100% of layoffs in the finance, insurance and real estate sector, according to the GAO. Also, the rule preventing aggregation of mass layoffs that exceed the minimum threshold over a 90-day period should be repealed, when, within the 90 days, the threshold is met for a 30-period.	
Current Bill: Problem 10	**Government enforcement**	Authorize DOL to investigate and bring an action on behalf of affected employees, using the FLSA enforcement model
	Given the ineffectual enforcement of WARN by the private plaintiffs' bar, governmental enforcement of WARN is warranted. However, government resources may prove to be limited, thus this option does not relieve the need to bolster private enforcement by strengthening the law.	

Additional Enforcement

Recommendations for WARN

Coverage and General Litigation Not Included in Current Proposed Legislation

Problem 1: Litigation	**Prevailing plaintiff entitled to attorney's fees**	Fees should not shift to defendants in a remedial statute
	The fee shifting provision of 29 USC § 2104(a)(6) should be revised to entitle the prevailing *plaintiff* to an award of reasonable attorney's fees, not the prevailing *party* as the law presently states. *See* § 1404 of the California Labor Code, which permits a court to award reasonable attorney's fees to any *plaintiff* who prevails in a civil action. WARN currently provides attorneys' fees for the prevailing *party*, not the prevailing *plaintiff*. Thus, a prospective plaintiff must be warned by his or her attorney of the possibility, however remote, that he or she faces the risk of financial ruin in bringing a WARN claim. The chilling effect of this necessary advisement conflicts with the remedial purpose of WARN and undermines its enforcement.	
Problem 2: Scope of Protection	**Protect off-site workers**	Define "home base" and related terms connecting workers to their site
	WARN currently provides protection for workers who are outstationed, or whose primary duty requires travel or outside work, such as railroad workers, bus drivers, salespersons. Nevertheless, such off-site workers are often denied WARN protection when they are terminated without proper notice. The Regulations state that an employee will be associated with the single site for WARN purposes to which they have been assigned, or from which their work is assigned, or to which they report. But neither the Act, nor its Regulations, define any of these key terms. Unfortunately the courts have construed them narrowly, precluding protection to numerous categories of workers, including sales representatives, bus and truck drivers and construction workers.	
Problem 3: Litigation	**Close joint-employer loophole**	Deem staffing agencies and offsite HR depts. "employers"
	WARN has been interpreted to insulate staffing agencies or off-site human resources departments from WARN liability despite responsibility for the payment of salaries, wages and employment benefits, and the reservation of right to make hiring and firing decisions. Unless the employee can show that the agency or department "ordered" the mass layoff or plant closing, the agency is absolved of liability. Importing FLSA's "joint employer" liability standards would prevent companies from easily evading WARN duties.	

Problem 4: Litigation	**Parent liability**	Define "parent" in the Act
	Currently, the Act does not expressly provide for parent liability. The Department of Labor's five factor test for determining parent or contracting company liability, 20 CFR § 639.3(a)(2), is inconsistently applied and has given rise to protracted litigation. The five factors are: 1) common ownership, 2) common directors and/or officers, 3) de facto exercise of control, 4) unity of personnel policies emanating from a common source, and 5) dependency of operations. The WARN Regulations Preamble state that this "regulatory provision … is intended only to summarize existing law that has developed under State Corporations laws and such statutes as the NLRA, Fair Labor Standards Act (FLSA) and the Employee Retirement Income Security Act (ERISA)" adding to further confusion among the courts as to the appropriate analysis. Suggested Fix: Adopt the language of § 2104(b) of the California Labor Code which states in relevant part that, "[a] parent corporation is an employer as to any covered establishment directly owned and operated by its corporate subsidiary."	
Problem 5: Scope of Protection	**"Voluntary separations" are not voluntary if they are in anticipation of shutdowns/mass layoffs**	Count employees separated within the notice period toward the minimum thresholds
	An employer can subvert WARN by inducing voluntary dismissals within the WARN notice period using inducements such as real or sham job offers, or cash buy-outs. In fairness, it may be argued that the resigning employee should lose any WARN claim, but the loss of the employee should not permit the employer to reduce the total employee headcount for the purposes of establishing the WARN minimum threshold, thereby extinguishing others' WARN claims. Example: Mortgage lender "H" permitted lender "C" to come on site two days before the shutdown (about the time the company stopped funding loans) and meet with its employees for the purpose of offering them jobs. The operations and salespeople were told by "C" that they would all be offered jobs. The day before the shutdown many of the salespeople were offered jobs and the operations people were instructed to fill out online job applications. Counsel has stated that sufficient numbers of employees voluntarily quit (by accepting jobs with "C"), so that at an otherwise covered facility, the number of people who suffered an "employment loss" was below the threshold. Also, many employees around the country are reporting "for cause" dismissals just prior to layoffs which bring the site under WARN's minimum. Many of these were highly rated, top performing employees.	

Enforcement Recommendations – Bankruptcy

Bankruptcy-related Recommendations - Not Included in Current Proposed Legislation

Often an employer files for bankruptcy protection contemporaneous to a mass layoff or shut-down. More than one-half of the WARN suits our office files are filed in bankruptcy court as adversary proceedings.

Bankruptcy Problem 1	**Liquidating fiduciary**	Eliminate the defense or define the "winding up" activities that may trigger it
	An employer that implements a plant shutdown contemporaneous to a bankruptcy filing may escape WARN liability by asserting that it was not acting as an "employer" at the time it ordered the shutdown, but rather a *liquidating fiduciary.* This "defense" is not found in WARN or its Regulations. Rather, it arises from the DOL's comment to WARN's Preamble. Nevertheless, the Third Circuit has turned the comment into major obstacle barring plaintiffs' claims in bankruptcy, many of which are litigated in Delaware within the Third Circuit. In short, upon filing for bankruptcy an employer often attains the debtor-in-possession status of a fiduciary. If it chooses to then terminate its workforce, it may use the *liquidating fiduciary* defense shield against WARN liability, unless the plaintiffs can prove that the employer is still operating its business in the normal course. This will likely entail discovery, imposing a significant burden in the prosecution of an otherwise non-complex meritorious claim, even if the defense is not a complete bar.	
Bankruptcy Problem 2	**WARN damages entitled to administrative priority status**	Accord administrative expense status to WARN penalties
	The Bankruptcy Abuse and Consumer Protection Act of 2005 (BAPCA) provides support for the treatment of WARN Act back-pay awards as first priority administrative expense claims. 11 USC § 503(b)(1)(A)(ii). However, given that the legislative history of this new subsection is sparse, that WARN Act back-pay is not specifically mentioned, and that it has yet to be tested in a WARN case, it is anyone's guess whether it will provide the protection sorely needed for affected employees. To eliminate the tactical maneuver by debtors, in terms of the timing of a plant closing or mass layoff in relation to a bankruptcy filing, and to protect employee's right of recovery for WARN violations, we propose that WARN explicitly state that any back-pay award in bankruptcy be entitled to first priority administrative expense status.	

Caught in the Subprime Mortgage Collapse

Only a tiny fraction of loan sales staff and processors work in offices with more than 50 affected employees.

When Countrywide shuts down a branch, employees must leave the premises within 15 minutes of the announcement.

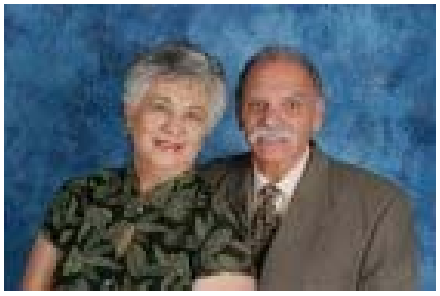
"—Faces homelessness December 1, 2007."

GINA P., American Home Mortgage, Irvine, CA

- She has been without health insurance since August.
- She is unable to find a job in Orange County, CA (for every opening she says there is a slew of applications).
- Her fiancé left her due to their lack of funds.
- She faces homelessness on Dec 1, 2007.

"—One paycheck away from being homeless."

- Did not receive last two weeks' pay, accrued vacation pay.
- Did not receive 60 days pay/benefits pursuant to WARN.
- Her insurance was cancelled.
- She requires 6 prescription medications for diabetes, thyroid disease, and high blood pressure.
- Must pick and choose which bills to pay and hope there is enough for groceries.
- Falling into debt for lab costs, credit is ruined.
- "This is one of the richest nations in the world, and look at the mess we are in."



LINDA C., First Magnus Document Technician, Rancho Cucamonga, CA

People who need greater WARN

Caught in the Subprime Mortgage Meltdown

Large loan centers are laying off 100's of employees at once.

But few fall within WARN , due to the 1/3 exemption.

RASHEEN K., First Magnus
Operations Manager, Atlanta, GA

"—You're fired as of yesterday."

- She learned of the shutdown when she arrived at work.
- With approximately $300 in her pocket, she began passing out $20 bills to straitened employees for food and gas.
- Employees never received their last two weeks' pay.
- The company filed for bankruptcy on August 21st.

"—Returning from the delivery room, found his health insurance cancelled as of the day before."

- His first child was born the day after his employer cancelled his insurance.
- He then learned his $12,000 bill for delivery would not be covered.

JASON L., First Magnus
Regional Sales Manager, Mobile, AL

enforcement today

Caught in the Subprime Mortgage Meltdown

Companies are surgically laying off 1,000's in waves.

They are avoiding WARN consequences by doing so.

LURENDA A., First Magnus
Compliance Officer, Chandler, AZ

"I got an email at 9:00 p.m. the night before—"

- Checks bounced and the last two weeks were never paid.
- Unemployed with no health insurance.
- Suffers from a ruptured disc that cannot be treated without insurance.
- Supports disabled husband and 16 year-old son.

"—Single mother and son cannot afford ongoing medical costs."

- She was terminated without any notice.
- A single mother, she and her son both have medical problems.
- She must pay $150 month for her own medication.
- Her son, born premature, has chronic asthma and needs emergency room treatment periodically.
- She cannot afford health insurance for herself and her son, nor to pay recurring bills.
- Her unemployment insurance precludes qualification for state health care insurance assistance.

SARA W., Countrywide Financial
Loan Specialist, Danbury, CT

Advocates for Workplace Fairness

Outten & Golden LLP is the nation's largest law firm devoted exclusively to advocacy on behalf of employees. It has offices in New York, NY and Stamford, CT.

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