The Worker Adjustment and Retraining Notification Act of 1988: Advance Notice Required?

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RETRAINING NOTIFICATION ACT OF
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Millions of American workers became unemployed as a result of plant
closings and permanent mass layoffs in the past decade. Employees and
communities experienced difficulty in adjusting to these losses. Regardless
of the cause, such massive employment cutbacks profoundly affected indi-
viduals, communities, and states. In addition to severe emotional and phys-
ical problems, displaced workers often experienced lengthy unemployment
and reduced income. Communities realized the effects of employer shut-
downs through decreased revenues. States confronted with increased un-
employment levels also assumed additional financial burdens. The situation

1. Eleven and one-half million workers lost their jobs due to plant closings and mass
layoffs between 1979 and 1983. See Flaim & Sehgal, Displaced Workers of 1979-83: How Well
Have They Fared?, MONTHLY LAB. REV., June 1985, at 3. More recent estimates indicate
that from 1981 to 1985, an additional 2.2 million workers lost their jobs annually. See
REV., June 1987, at 3; see also OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS,
PLANT CLOSINGS: ADVANCE NOTICE AND RAPID RESPONSE 5 (Dec. 1986) [hereinafter OTA
SPECIAL REPORT].

2. See Kay & Griffin, Plant Closures: Assessing the Victims’ Remedies, 19 WILLAMETTE
L. REV. 199, 201-04 (1983) (illustrating a brief summary of the social and economic conse-
quences of increasing capital divestment).

3. See Note, Advance Notice of Plant Closings: Toward National Legislation, 14 U. MICH.
J.L. REF. 283, 285-88 (1981) (provides a thorough accounting of the effects of plant closings on
workers, communities, and states).

4. Of the workers dislocated between 1979 and 1984, one-fourth remained unemployed
for a year or more. See OTA SPECIAL REPORT, supra note 1, at 5 (citing OFFICE OF TECH-
NOLOGY ASSESSMENT, U.S. CONGRESS, TECHNOLOGY AND STRUCTURAL UNEMPLOYMENT:
REEMPLOYING DISPLACED ADULTS (Feb. 1986)). These economic stresses consequently af-
fect the mental and physical health of workers. Id.

5. See Bartholomew, Joray & Kochanowski, Corporate Relocation Impact: South Bend,
IND. BUS. REV., Jan.-Feb. 1977, at 2, 6-7 (examines the economic impact (reduced food and
rental expenditures, reduced sale of consumer durables, and reduced purchase and financing of
new homes) on a community resulting from a shutdown of a 500-worker plant).

6. States realize additional financial burdens in terms of increased unemployment com-
was exacerbated because very few employers disclosed their decision to significantly reduce or cease operations in advance, thus leaving workers and communities without an opportunity to adjust and plan for the impending dislocation. The unmitigated transitional effects on the economy and the workforce drew increased public attention to the problem.

The concept of providing workers and their communities with advance notification of an employer's decision to withdraw or scale back operations appeared simple enough. Virtually every sector of society recognized the benefits of advance notice. Although it became apparent that advance notice constituted a critical element in structuring an effective and comprehensive national policy to foster acceptance and adjustment to changing economic conditions, unions, states, and the federal government struggled with attempts to mandate it.

Workers and communities lacked protection against such dislocations at the state and local levels and in the collective bargaining context. At the federal level, Congress only succeeded in strongly encouraging the use of advance notification. Clearly, employers responded to the concept unfavorably.

An extensive fifteen year legislative history reflected congressional efforts to mandate advance notice of plant closings or mass layoffs.

Increased public pressure and support contributed significantly to the enactment of the Worker Adjustment and Retraining Notification Act (the

See Note, supra note 3, at 287-88 & nn.25-27 (citing R. Aronson & R. McKersie, Economic Consequences of Plant Shutdowns in New York State 140 (1980)).


12. See infra notes 32-33 and accompanying text.


14. See OTA Special Report, supra note 1, at 41 (noting that advance notice legislation has been introduced in every Congress since 1973).
WARN Act or Act).\textsuperscript{15} The decreased intrusiveness of the Act’s language, however, also played an important role in its passage.\textsuperscript{16} Substantially modified from earlier proposals, the Act represents a compromise in political ideologies.\textsuperscript{17} The final language clearly reflects the influence of business, industry, and labor groups.\textsuperscript{18} Ironically, Congress spent minimal time forming the basic provision of sixty days’ advance notice compared with the time it devoted to excluding employers from mandatory compliance.\textsuperscript{19}

This Note first explores the historical foundation of the concept of advance notification and its use in the United States. Next, it discusses the theory supporting advance notice and the need to mandate it through federal legislation. Following an overview of the Act, this Note analyzes provisions which limit its coverage. Further, this Note recognizes several interpretive difficulties inherent in the Act’s provisions, and the resulting potential for litigation. Finally, this Note concludes that, in light of language reducing employee protection, the courts should rely on the original legislative intent driving enactment of the WARN Act: that workers should possess the right to advance notice of a plant closing or permanent mass layoff.

I. ADVANCE NOTICE: BEFORE THE WARN ACT

A. The Need for Mandatory Advance Notice Legislation

Plant closings and mass layoffs constituted an integral part of the rapidly changing American labor economy.\textsuperscript{20} As a result, the concept of advance notification quickly developed in America.\textsuperscript{21} Government agencies, legal scholars, business associations, economic think tanks, and organized labor


\textsuperscript{16} For example, one Congressman who previously opposed advance notice legislation with comprehensive employer disclosure requirements supported the Act because of its more moderate provisions. See 134 CONG. REC. H5516-17 (daily ed. July 13, 1988) (statement of Rep. Bereuter).

\textsuperscript{17} Id. at H5509 (statement of Rep. Ford indicating the Act’s accommodation of employer interests).

\textsuperscript{18} Id.

\textsuperscript{19} Congressional debate seldom focused on the basic notion of 60 days’ advance notice, but rather concentrated on exceptions, exclusions, and reductions in coverage. See e.g., 134 CONG. REC. S8855-57 (daily ed. July 6, 1988) (debate over Sen. Wilson’s amendment to provide an exception from the notice requirements for employers unable to obtain necessary materials).

\textsuperscript{20} Worker dislocations result from the everyday business operations of companies responding to market forces, including new technology, increase and decline in demand and production capacity. See OTA SPECIAL REPORT, supra note 1, at 1.

\textsuperscript{21} As early as 1973, legislation requiring advance notice was introduced in Congress. See infra note 113 and accompanying text.
groups developed a wealth of information devoted to this subject during the past decade. Until very recently, however, no formal statistics indicated the magnitude of the dislocation problem.

In the five year period covering 1979-1983, over eleven million workers lost their jobs due to plant closings and relocations. The Bureau of Labor Statistics (BLS) reported no significant decrease in recent years; over two million workers continued to lose their jobs annually. Within this context, the manufacturing sector accounted for sixty percent of the dislocations at establishments employing 100 or more workers. Plant closings and permanent mass layoffs occurred in thirteen percent of the nation's larger manufacturing establishments. Moreover, the problem, once regionally based, now extends across the entire nation.

Further examination of the characteristics of plant closings and mass layoffs reveals that over fifty percent of the employers experiencing a closure or mass layoff in 1983 or 1984 were at their sites fifteen years or more. In fact, only six percent were in business four years or less. Thus, reduced employment levels reflected long term trends in certain industrial sectors, rather than the instability and inexperience of young companies.

22. See OTA SPECIAL REPORT, supra note 1 (providing an in-depth examination, supplemented by specific case studies, of advance notice issues, including the costs and benefits associated with employer advance notification); see also GAO REPORT, supra note 7 (detailed accounting of the extent of closures and layoffs and the amount of notice provided to those workers affected); TASK FORCE REPORT, supra note 10 (a comprehensive report on the overall system of employee and community adjustment to plant closings and mass layoffs).

23. See OTA SPECIAL REPORT, supra note 1, at 1 (citing a General Accounting Office survey of employers nationwide as the first statistically reliable information on advance notice practices).

24. See Flaim & Sehgal, supra note 1. Also cited as reasons for the dislocations were increased productivity levels and declining output. Id. at 16. Ironically, a substantial number of employees lost their jobs during a period of economic growth. See OTA SPECIAL REPORT, supra note 1, at 5.

25. See Horvath, supra note 1.

26. In 1983 and 1984, one out of eight of the nation's 35,000 larger manufacturing establishments experienced a plant closing or mass layoff. See GAO REPORT, supra note 7, at 21. This represented employment losses for 688,000 workers. Id.

27. Id. at 22.

28. Id. at 18. The tendency to associate plant closings and mass layoffs with the traditionally industrial sectors of the nation (the Midwest and North) is not supported by current data. Id. In fact, the West South-Central region accounted for the highest percentage of closings and layoffs during that period. Id.

29. See U.S. GENERAL ACCOUNTING OFFICE, PLANT CLOSINGS: INFORMATION ON ADVANCE NOTICE AND ASSISTANCE TO DISLOCATED WORKERS 5 (table 2) (Apr. 1987) [hereinafter GAO BRIEFING REPORT].

30. Id.

31. Id.
In the Trade Act of 1974, Congress strongly encouraged employers to provide at least sixty days' advance notice of a facility closing or relocation. However, the provision's non-mandatory nature rendered it ineffective.

Statistics on the amount of advance notice given voluntarily or in compliance with a collective bargaining agreement revealed the inadequacy of the previous system. Employers provided no notice in over thirty percent of the mass dislocation events. Of those employers who did announce their decision to reduce or cease operations, the median notice period was seven days, and fewer than twenty percent provided more than thirty days' notice. Clearly, most employers about to shut down or transfer operations did not view the concept of advance notice as a priority.

Business, industry, labor, and government all agreed on the potential benefits of providing advance notice to workers prior to their dislocation. However, mandatory imposition of advance notice still caused vigorous objections. Critics raised arguments of economic inefficiency; cost; possible loss of customers, credit and valued employees; as well as increased friction in labor-management relations. Proponents countered with equally com-

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33. Id. § 2394(1). The section specifically provides that employers relocating abroad should notify affected employees at least 60 days prior to the move, and similarly notify the Departments of Labor and Commerce. Id. § 2394(1)-(2).
34. See OTA SPECIAL REPORT, supra note 1, at 42. The Department of Labor informed the Office of Technology Assessment that it was unaware of any firms providing formal notice to the Department of their plans to relocate as encouraged in the Trade Act of 1974. Id.
35. See GAO REPORT, supra note 7, at 34-39.
36. Id. at 34.
37. Id. Effective worker adjustment assistance programs require a lengthier notice period. Apart from the effect on employees of such an abrupt change, government assistance programs generally do not become operational for weeks, if not months. Id. Delays of three or more months are not uncommon. Id. (citing U.S. GENERAL ACCOUNTING OFFICE, DISLOCATED WORKERS: LOCAL PROGRAMS AND OUTCOMES UNDER THE JOBS TRAINING PARTNERSHIP ACT (Mar. 1987)).
38. Id. Clearly, this figure does not meaningfully reflect the 60 days' advance notice recommended in the Trade Act of 1974. Id.
39. Id. at 30-32. The Conference Board, Business Roundtable, AFL-CIO, Committee for Economic Development, National Association of Manufacturers, and National Center on Occupational Readjustment all recognized that advance notice provides a significant opportunity for employees to adjust, thus maximizing their employment potential and permitting employers to implement the closing or layoff with minimal negative consequences. Id. at 31 (table 3.1).
40. See id. at 30. It appears that the “mandatory” nature of such a provision is more repugnant to employers than the general concept of providing employees advance notice. Id.
41. See McKenzie, The Case for Plant Closures, 15 POL’Y REV. 119 (1981) (arguing that corporate mobility is essential to private economic growth and proponents of mandatory plant closing legislation fail to realize the beneficial aspects of the free flow of economic resources).
pelling arguments. At the same time, the General Accounting Office and the Office of Technology Assessment formulated reports on the subject in response to congressional inquiry. These agencies documented the impact on workers and communities receiving little or no advance notice. Studies showed the profound economic, psychological, and physical effects on workers. A profile of the average dislocated worker in this context reflected older, less educated, high-seniority employees with skills not easily transferable to positions with comparable compensation. As a result, most workers experienced difficulty adjusting to the sudden loss of earnings and often lengthy unemployment.

Communities underwent severe losses as well. Plant closings dramatically reduced municipal tax bases and local businesses experienced the effects through decreased demand for products and services. This subsequently resulted in additional employment cutbacks.

Most authorities contend that advance notice plays only a partial role in successfully offsetting the effects of plant closings and mass layoffs. Effective adjustment assistance programs become a necessary supplement to advance notice in an efficient transition. The Secretary of Labor's Task Force on Economic Adjustment and Worker Dislocation in a Competitive Society (Secretary of Labor's Task Force) emphasized the importance of ad-

43. The General Accounting Office identified the scope of the worker dislocation problem in the United States and found that the amount of advance notice being provided at that time was insufficient to implement effective employee adjustment assistance. See GAO REPORT, supra note 7, at 34. The Office of Technology Assessment further examined the benefits and costs associated with providing advance notice of a plant closing or mass layoff and concluded that even though the arguments supporting and objecting to advance notice persist, it does facilitate effective displaced worker programs and it is a humane thing to do. See OTA SPECIAL REPORT, supra note 1, at 1-4.
44. See OTA SPECIAL REPORT, supra note 1, at 5.
45. The abrupt halt in the flow of earnings, subsequent lapse of time before the worker gains reemployment, and ultimately reduced income level all create depression, domestic turmoil, and a host of medical problems for workers. See Kay & Griffin, supra note 2, at 202-04; Note, supra note 3, at 285-86.
46. NATIONAL ALLIANCE OF BUSINESS, WORKER ADJUSTMENT TO PLANT SHUTTINGS AND MASS LAYOFFS: AN ANALYSIS OF PROGRAM EXPERIENCE AND POLICY OPTIONS ch. 2, at 15-18 (Aug. 1981); see also Note, supra note 3, at 285-86.
47. See GAO REPORT, supra note 7, at 38.
48. Lost profits of local businesses, declining property values, and diminished tax revenues reflect some of the negative effects on communities. See Note, supra note 3, at 287-88.
49. Id.
50. Id.
51. See, e.g., TASK FORCE REPORT, supra note 10, at 22-23.
52. Consequently, the concept of advance notice becomes necessary to a comprehensive program meant to address mass dislocations. Id.
vance notice as a prerequisite to successful adjustment programs.\textsuperscript{53} Even some employers recognized the benefits associated with early notification.\textsuperscript{54}

Timing is a critical factor in the coordination of a large displacement. When an employer provides significant advance notice, the employer, labor representative, community, and employees have an opportunity to plan their adjustment.\textsuperscript{55} This increases worker participation in assistance programs and lessens the psychological impact on individual workers.\textsuperscript{56} A recent study concluded that eight weeks of advance notice may decrease unemployment for each employee by 2.9 weeks.\textsuperscript{57} Notification may also allow the union and local officials to meet with the employer to work out possible alternatives to the measure proposed.\textsuperscript{58} Various other benefits of advance notification have received commentary and support.\textsuperscript{59}

Those opposing advance notice object to the economic inefficiency resulting from a strain on capital mobility as the concept's main defect.\textsuperscript{60} In the

\textsuperscript{53} Id.

\textsuperscript{54} BERENBEIM, CONFERENCE BOARD, REP. NO. 878, COMPANY PROGRAMS TO EASE THE IMPACT OF SHUTDOWNS 7-8 (1986) (improved productivity reflected the positive aspects of advance notice, including higher participation in worker adjustment programs, increased cooperation between labor and management, and reduced psychological anxiety among employees).

\textsuperscript{55} See TASK FORCE REPORT, supra note 10, at 22; see also GAO REPORT, supra note 7, at 30.

\textsuperscript{56} See Note, supra note 3, at 293.

\textsuperscript{57} SWAIM & PODGURSKY, ADVANCE NOTICE AND JOB SEARCH: THE VALUE OF AN EARLY START 16 (Feb. 1989) (presentation at Eastern Economic Association Meetings) (providing a statistical analysis of the effect that pre-displacement notification may have in accelerating reemployment).

\textsuperscript{58} See Note, supra note 3, at 291-92. Within this framework, employee wage and benefit concessions and municipal tax incentives might be explored, as well as assisting the employee in identifying potential buyers or even formulating an employee buy-out plan. Id.

\textsuperscript{59} For additional arguments in favor of requiring advance notice of plant closings or mass layoffs, see B. BLUESTONE & B. HARRISON, supra note 42 (identifying federal plant closing legislation as crucial to domestic reindustrialization); Klare, Workplace Democracy & Market Reconstruction: An Agenda for Legal Reform, 38 CATH. U.L. REV. 1, 55-56 (1988) (advance notice is an essential element in enhancing an employee's confidence and trust in his employer, thus fostering job and income security necessary to a "democracy-enhancing labor law"); Note, supra note 11, at 371-72 (1984) (employers should assume greater social and economic responsibility for plant closings); Note, supra note 3, at 291-94 (1981) (citing the extensive planning opportunities for workers, communities, and businesses from advance notification; the ability of employees to seek other employment; and arguments of economic efficiency and fairness).

\textsuperscript{60} This argument contends that the inefficient allocation of resources caused by advance notice requirements will ultimately result in companies relocating in foreign countries. See Note, supra note 3, at 294-96. One commentator argues that mandatory employee benefits, such as advance notice, create a disproportionate allocation of resources within labor markets, thereby stunting employment growth rather than enhancing job security. See Kosters, Mandated Benefits - On the Agenda, REGULATION No. 3, 1988, at 21, 24.
absence of experience under prior mandatory federal advance notice laws, such predictions remain speculative. However, comprehensive adjustment assistance programs exist in other countries, such as Canada, Japan, and West Germany. Foreign experience shows that advance notification constitutes an essential element of the successful reemployment of dislocated workers and facilitates industry and community acceptance of the transition. As a result, the Secretary of Labor's Task Force concluded that existing labor notification practices did not substantiate employer's fears regarding advance notification.

Another recently conducted study concluded that extensive costs will accompany a mandatory advance notice statute. It estimated a 3.6 billion dollar increase in employer costs over a two-year period from such a requirement. However, the General Accounting Office recently evaluated the methodology and conclusions reached in this report and found them largely without merit.

In light of inadequate protection at the federal and state levels, as well as in the collective bargaining arena, pressure began to mount for Congress to enact mandatory advance notice legislation. While many believe that organized labor composed the sole motivating force, polls indicated that eighty-six percent of the American people supported such a measure.

B. Advance Notice in a Collective Bargaining Context

Collective bargaining negotiations may have represented the most accessible method for employees and unions to exercise input on future employer

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61. The Secretary of Labor's Task Force examined these policies in some detail. See TASK FORCE REPORT, supra note 10, at 20-22.
62. Id. at 20.
63. Id. at 23.
64. ROBERT R. NATHAN ASSOC., INC., THE PRIVATE AND PUBLIC SECTOR COSTS OF PROPOSED MANDATORY ADVANCE NOTIFICATION LEGISLATION 2-3 (1988). This study bases its findings on the added administrative costs of the employer, the potential employer penalties, and the resulting talent drain caused by a mandatory advance notice law. Id. at 3. The study also cites indirect employer costs incurred from legal expenses and the potential negative impact on productivity, sales, and future financial leverage. Id. Further, it contains a comparative analysis of the overall economic effects of mandatory advance notice and concludes that the resulting decreased employer mobility will cause slower employment growth and higher unemployment. Id. at 29-33.
65. Id. at 18-28.
decisions to close a plant or relocate work. As of 1986, however, organized labor represented only eighteen to twenty percent of the private American workforce. While some agreements negotiated on behalf of employees contained provisions calling for advance notice of such employer action, a recent study indicates that only thirteen percent of the collective bargaining agreements analyzed provide for plant closing notification. Further, the recent decline of union bargaining leverage in traditionally management controlled issues decreases their ability to obtain adequate protection.

The National Labor Relations Act (NLRA) governs collective bargaining over plant closings, relocations, and mass layoffs by creating a duty to bargain over "wages, hours, and other terms and conditions of employment." When a plant operates under a collective bargaining agreement, courts consistently hold that a decision to cease business operations is within the employer's discretion. However, partial closings require a slightly different analysis. The terms of the NLRA may be interpreted to impose on employers the duty to consult unions and bargain over the partial closing decision.

The substantive terms to be discussed during bargaining further define the extent of the duty to bargain. Regardless of whether partially or com-

69. See Note, supra note 11, at 350-53. Because 15 years of federal legislation had not resulted in mandatory advance notice and very few states were successful in enacting such a policy, collective bargaining became attractive to those attempting to obtain such protection. Id. at 350-55.
71. Id.
72. [BASIC PATTERNS] COLLECTIVE BARGAINING NEGOT. & CONT. (BNA) § 65:3, at 37 (Mar. 9, 1989). BNA maintains files consisting of more than 3000 collective bargaining agreements out of which a sample of 400 were drawn for this analysis. Id. § 32:21, at 79 (Sept. 11, 1986). In addition, the analysis indicated that less than five percent of the agreements contained provisions for employee job placement and training. Id. § 65:3, at 37 (Mar. 9, 1989).
75. 29 U.S.C. § 158(d). Generally, an employer may not unilaterally institute changes regarding such mandatory subjects of bargaining before good faith bargaining with the union results in an impasse. See NLRB v. Katz, 369 U.S. 736 (1962).
77. See, e.g., Otis Elevator Co., 269 N.L.R.B. at 893-94 (the Board noted that the critical factor in determining whether a partial closing decision is subject to the duty to bargain is whether the decision is based on traditional business interests or solely on labor costs).
78. The Supreme Court's analysis of the employer's duty to bargain distinguishes "deci-
pletely ceasing operations, the employer has a duty to bargain over the effects of the change. On the other hand, no such duty attaches to the employer's decision to change business operations.

In *Arrow Automotive Industries v. NLRB*, the United States Court of Appeals for the Fourth Circuit stated that "bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business." The court emphasized protection of managerial decision-making, thereby narrowing the meaning of "other terms and conditions of employment." The effects of an employer's decision to significantly change operations remain the sole class of issues subject to consistently enforceable mandatory bargaining.

Mandatory bargaining over the effects of a closing or relocation requires prior notification to the union. Because the courts declined to mandate a specific time in advance of the change by which notice must be given, the doors may conceivably close the following day. This fails to accomplish

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79. *First Nat'l Maintenance*, 452 U.S. at 681 ("There is no dispute that the union must be given a significant opportunity to bargain about these matters of job security as part of the "effects" bargaining mandated by § 8(A)(5) [of the NLRA]."); see also Note, *supra* note 78, at 413.

80. See Note, *supra* note 78, at 410-12. In *Fibreboard Paper Prods. Corp.*, 379 U.S. 203, the Court stated that its decision should not be understood as imposing a duty to bargain collectively regarding such managerial decisions, which lie at the core of entrepreneurial control. Decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment.

Id. at 223 (Stewart, J., concurring).

81. 853 F.2d 223 (4th Cir. 1988).

82. Id. at 226 (quoting *First Nat'l Maintenance*, 452 U.S. at 679).

83. Id. at 225-28.

84. Logically, an employer must give the union actual notice of the change in operations for the union to enjoy the prescribed "significant opportunity to bargain." *First Nat'l Maintenance v. NLRB*, 452 U.S. 666, 681 (1981).

the objective of advance notice, namely, to minimize disruption by providing workers a period of adjustment. A recent study of 100 major collective bargaining agreements by the Industrial Union Department of the AFL-CIO reflects organized labor's inability to provide workers with substantive protection in this area. Thus, collective bargaining also has proved inadequate to ensure that employees receive advance notice of their impending dislocation. This condition results from the judicial interpretation of the employer's duty to bargain in the NLRA as well as the union's decrease in negotiating leverage.

C. State Responses to Plant Closings and Relocations

Previous failures to enact plant closing notice legislation at the federal level forced advocates to redirect their focus toward state legislatures. Although many states considered legislation governing notification of plant closings and relocations, only a few enacted such provisions. Most state bills focused on the employer's decision to shut down or relocate, or suggested alternatives to offset the effects of the closing. Consequently, state plant closing statutes imposed minimal notification requirements on employers under narrow circumstances, and state authorities unenthusiastically enforced even these provisions. A South Carolina law represents the more lenient end of the notification spectrum, simply requiring employers to post in the workplace at least two weeks' advance notice of a shutdown, but only

86. INDUSTRIAL UNION DEP'T, AFL-CIO, COMPARATIVE SURVEY OF MAJOR COLLECTIVE BARGAINING AGREEMENTS - MANUFACTURING AND NON-MANUFACTURING 162-75 (Nov. 1984). Specifically, only 15% of the contracts contained a provision requiring advance notice of a plant closing to the union, and 31% required notification of a permanent layoff. Id. In addition, just three percent of the collective bargaining agreements surveyed contained a provision which allows the formation of a special co-union committee in the event of a future plant closing. Id.

87. See Lynch, supra note 70, at 232.
88. See Millspaugh, supra note 8, at 617.
89. As of July 1984, nearly 40 state legislatures had introduced advance notice legislation. See Butterfield, Law on Plant Closings is Signed in Massachusetts, N.Y. Times, July 12, 1984, at A21, col. 4. More recently, 18 states focused attention on the issue of plant closings and relocations in their 1988 legislative sessions. See BUREAU OF NATIONAL AFFAIRS, PLANT CLOSINGS: THE COMPLETE RESOURCE GUIDE 41 (1988) [hereinafter BNA SPECIAL REPORT]. For an example of the politics involved in motivating enactment of mandatory state advance notice legislation, see Kay & Griffin, supra note 2, at 212-15 (discussing the history of Oregon's attempt to enact a plant closing measure in 1981).
90. Connecticut, Hawaii, Maine, Maryland, Massachusetts, Michigan, South Carolina, Tennessee, and Wisconsin currently comprise the list of states with some form of advance notice statute. See BNA SPECIAL REPORT, supra note 89, at 35-41.
91. See Millspaugh, supra note 8, at 618-21.
92. See Hofstetter & Klubeck, supra note 73, at 470-72 (providing a thorough discussion of impact of state legislation on this issue).
if the employer requires the employees to give notice of their intention to quit. In addition, the statute does not apply to closings that result from unforeseeable accidents or natural disasters. Violators face a maximum penalty of $5,000 and damages to each aggrieved employee.

Maine's statute represents the other end of the spectrum, requiring that employers of 100 or more employees give sixty days' notice of plant relocations to employees and community officials. Mandatory employee severance pay benefits supplement the notice provision. The Maine statute also imposes civil violations and fines of $500 for noncompliance with the dislocation provisions. But, like the South Carolina statute, the Maine law exempts the employer if an unforeseen circumstance or a natural disaster precipitates the closing. Although the Maine Supreme Court upheld the notice provision, it loosely interprets the law. A comparable Wisconsin statute further exemplifies the current implementation of state plant closing laws. Along with an arguably negligible enforcement mechanism, a federal court recently ruled that the language of the Wisconsin act did not create a private cause of action.

Other responses include state or local attempts to guarantee their invest-

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94. Id.
95. Id.
96. ME. REV. STAT. ANN. tit. 26, § 625-B(6-A) (1988); see also WIS. STAT. ANN. § 109.07 (West 1988). The Wisconsin provision also requires employers to provide 60 days' advance notice to local officials and employees in the event of a business decision to terminate operations. Id. § 109.07(1).
97. ME. REV. STAT. ANN. tit. 26, § 625-B(2) (1988). Recently, the United States Supreme Court upheld the validity of the Maine severance pay statute in Fort Halifax Packing Co. v. Coyne, 482 U.S. 1 (1987). The Court found the law a valid exercise of the state's police power and not preempted by federal law. Id. at 19.
98. Title 26, § 625-B(6-A).
99. Id. "[N]o forfeiture may be adjudged if the relocation is necessitated by a physical calamity, or if the failure to give notice is due to unforeseen circumstances." Id.
100. Shapiro Bros. Shoe Co. v. Lewiston-Auburn Shoeworkers Protective Ass'n, 320 A.2d 247 (Me. 1974). The Maine Supreme Court similarly found the advance notice statute a constitutional exercise of the state's police power. Id. at 254-55. The court held that the statute did not constitute a taking of property without just compensation or an exercise in invidious discrimination against employers who voluntarily cease business operations. Id. at 254-57.
101. See, e.g., Curtis v. Lehigh Footwear, Inc., 516 A.2d 558 (Me. 1986) (no legislative intent found to extend liability for violation to shareholders of parent company). This notion might also be inferred from the historically dismal employer compliance with the Maine statute. See Hofstetter & Klubeck, supra note 73, at 471-72.
102. WIS. STAT. ANN. § 109-07 (West 1988). The provision is enforced through imposition of a misdemeanor and fine of $50 per affected employee. Id. § 109.07(2). Subsequently, employers have little incentive to comply with the terms of the provision. See Hofstetter & Klubeck, supra note 73, at 472; Note, supra note 3, at 289 n.37.
ment in employers through penalties for improper plant closings or removals. Also, state laws exist that mandate continuance of health benefits to certain employees.

Because of the significant community disruption accompanying a closing or mass layoff, efforts to regulate notification also appeared at the local level. A Pennsylvania court recently struck down the forerunner of local advance notice regulations, Pittsburgh Ordinance 21, as a violation of Pennsylvania's home rule statute.

State and local action regulating advance notice of plant closings and mass layoffs might be impeded for a variety of reasons. Scholars advance constitutional arguments, based on the commerce and contract clauses, as well as economic arguments based on state policy to attract and retain business. Others argue that the NLRA should preempt certain state and local plant closing legislation. To date, efforts to inject a mandatory advance

104. See, e.g., Mich. Comp. Laws Ann. § 445.601 (West 1967) (imposes sanctions on employers who cease business within the state "without repaying and restoring any and all money, bonds, lands and other property, which have been or shall hereafter be given or granted as a consideration or inducement for the location . . . [of the establishment]"). A variety of other state laws exist that regulate plant closings and permanent layoffs. For example, in Massachusetts, the definition of advance notification encourages employers to voluntarily provide workers and unions notice of their decisions to cease operations. Mass. Gen. Laws Ann. ch. 151A, § 71A (West 1989). However, it also mandates employer notification to the designated state agency of a closing or partial closing, and upon certification as such, creates state reemployment assistance for affected employees. Id. § 71D. Tennessee also recently enacted a provision requiring notification to employees and the state of any workforce reduction of 50 or more employees within a three-month period, excluding those reductions at a temporary facility or those resulting from a labor dispute or seasonal factors. Tenn. Code Ann. §§ 50-1-601 to 604 (1989). Although the Tennessee law is comprehensive, it fails to specify exactly how much notice is required. Id. Finally, Hawaii inserted a 45-day mandatory notification requirement in its Dislocated Workers Act with violations punishable by payments of up to three months' wages and benefits per affected employee. Haw. Rev. Stat. Ann. §§ 9, 394B-9, 394B-12 (Michie 1988).


108. See Millsapugh, supra note 8, at 625-32 (an analysis of the potential constitutional issues); Note, supra note 11, at 353-55 (commerce and contract clause arguments examined).

109. See Note, supra note 11, at 353 (a brief discussion of the pressure on states to abstain from imposing any measures not conducive to business' interests).

110. See generally Note, supra note 78 (concluding that states mandating advance notice
notice provision into the mainstream of state labor policy have been largely unsuccessful. Minimal employer incentives and the noted reluctance of courts to strictly enforce these laws make them ineffective.

II. HISTORY SHAPES THE FINAL PRODUCT

A. Federal Proposals Prior to the 100th Congress

As a result of the economic recession in the early 1980's, the federal government increasingly recognized the seriousness of the plant closing and mass layoff situation in the United States. Legislators introduced bills to address the problem in every Congress since 1973. However, until recently, none reached the floor of either House. Then-Senator Walter Mondale first introduced legislation in the 93rd Congress that required creation of a National Employment Relocation Administration to regulate plant closings and relocations. The bill required two years' advance notice of any decisions that would dislocate as little as fifteen percent of the employer's workforce. Although quickly abandoned, the bill's basic intent often appeared in future legislative proposals.

In 1979, Representative William Ford introduced the National Employment Priorities Act, which also imposed mandatory notification requirements on employers. The bill proposed substantial protection for employees and communities faced with a pending mass dislocation deci-

111. The substantial number of government reports dedicated to the subject of plant closings and mass layoffs provides evidence of this concern. See, e.g., OTA SPECIAL REPORT, supra note 1; GAO REPORT, supra note 7; TASK FORCE REPORT, supra note 10.
112. See OTA SPECIAL REPORT, supra note 1, at 41.
114. S. 2809, 93rd Cong., 1st Sess. It also imposed serious criminal and civil sanctions on employers for noncompliance. Id.
115. 2 Cong. Index (CCH) 5016 (Jan. 8, 1975).
This legislation suffered defeat in the House Education and Labor Committee. More recently, Congress devoted closer attention to more moderate approaches addressing the problem. Representative Ford persisted in his struggle to mandate advance notice by introducing H.R. 2847 in 1983. This bill generated a significant amount of debate when it emerged out of subcommittee without amendment. It required a lengthy advance notice period of six months to one year, depending on the number of employees affected. It mandated several employee benefits, including severance pay and transfer rights. The provisions also imposed employer liability for a community’s tax losses resulting from the dislocation. Similar to previous proposals, the bill subjected employers to possible criminal and civil penalties.

During the same legislative session, the House Committee on Education and Labor took a different approach to the plant closing issue and reported out the Labor-Management Notification and Consultation Act. While requiring a significantly shorter period of advance notice, the bill focused on employer disclosure and consultation pending the closing or relocation. It also provided unions with the ability to obtain injunctions in federal

117. Id. §§ 18-22.
118. 2 Cong. Index (CCH) 34,507 (Nov. 29, 1978).
121. National Employment Priorities Act, supra note 119, § 301(b)(3)(A)(i)-(ii). A loss of employment equal to the lesser of 100 employees or 15% of the workforce within an 18-month period triggered the notice requirements. Id. § 301(a).
122. Id. §§ 402-404.
123. Id. § 407.
124. Id. §§ 501-502. Violations could have resulted in fines of not more than $1,000 and imprisonment for not more than one year. The bill also imposed a comprehensive system of civil penalties in which employers who violated the terms of the provision would lose tax deductions, credits, and depreciation allowances. Id. § 502.
126. Id. § 4. As stated in the terms of the bill, the employer was foreclosed from instituting a plant closing or mass layoff until meeting and conferring with the employees’ representative “for the purpose of agreeing to a mutually satisfactory alternative to or modification of such proposal.” Id. § 4(A)(2). In addition, the employer was required to provide the employees’ representative with relevant information necessary to a comprehensive assessment of the proposal. Id. § 5.
courts to stay the proposed closing or layoff. The intrusive nature of the measure on employer autonomy caused its ultimate defeat. However, the true intent of the legislation, advance notice, garnered increased congressional support and became an increasingly important objective.

B. Advance Notice Legislation in the 100th Congress

Responding to the Secretary of Labor's Task Force Report on Economic Adjustment and Worker Retraining in a Competitive Society, Senator Howard Metzenbaum introduced a much more moderate bill, The Economic Dislocation and Worker Adjustment Assistance Act, as an amendment to the Jobs Training Partnership Act (JTPA). Senator Metzenbaum's bill also proposed a variable timetable for advance notice, depending on the number of the employees affected by the closing or layoff. The bill included several exclusions from coverage and reduced the amount of notice required under certain unforeseeable business circumstances. This legislation retained the employer's consultation and disclosure requirements, but eliminated the earlier proposed criminal sanctions. As a result, it imposed employer liability for back pay to workers for each day of the violation and fines payable to the appropriate unit of local government. Unlike the 1983 legislation, the bill eliminated all of the mandated employee and municipality benefits.

The Senate incorporated virtually the same provisions of Senator Metzenbaum's bill into the Omnibus Trade and Competitiveness Act of 1987 (Omnibus Trade Act). Passage of this legislation appeared to indicate success in providing mandatory advance notice. However, while supporting the Omnibus Trade Act as a whole, President Reagan vigorously opposed the

127. Id. § 6(b).
128. 2 Cong. Index (CCH) 35,016 (Jan. 24, 1986).
130. See TASK FORCE REPORT, supra note 10.
133. Adjustment Assistance Act, supra note 131, § 202(b).
134. Id. § 202(c).
135. Id. §§ 203-204.
136. Id. § 205.
137. See supra note 122 and accompanying text.
mandatory advance notification provision, and vetoed the entire bill. He objected to the concept of charging employers with mandatory foreseeability of business conditions. The House overrode the veto. The Senate, however, sustained it by a close margin. In order to force the President to act on the advance notice provision alone, House Speaker Jim Wright conceived separating it from the Omnibus Trade Act, and thereby facilitated its introduction again in 1988.

C. Enactment of the WARN Act

Upon introduction, S. 2527 mirrored the previous proposal. However, the debate in the Senate continued, and several amendments and substitutions were defeated. Although ultimately modified before passage, the amendments to the bill did not significantly affect the main provisions, but instead clarified and altered its technical application. The House limited debate on its consideration, and passed the bill without amendment. When the legislation was delivered again to the President for signature, different political circumstances than those circumstances surrounding the original rejection governed his decision. His decision now included considerations of the pending presidential election and the overwhelming level of public support for enactment. A veto at this juncture likely would have

140. Id.
141. On May 24, 1988, the same day as President Reagan's veto, the House overrode the veto by a margin of 308-113. 134 CONG. REC. H3553 (daily ed. May 24, 1988).
142. The Senate sustained the veto on June 8, 1988, by a margin of 61-37. Id. at S7385 (daily ed. June 8, 1988).
144. 100th Cong., 2d Sess., 134 CONG. REC. S8869-70 (daily ed. July 6, 1988). According to Senator Metzenbaum, sponsor of the bill, S. 2527, as introduced, "is identical, word-for-word, comma-for-comma, to the plant-closing provision we passed in the omnibus trade bill." Id. at S8375 (daily ed. June 22, 1988).
146. For example, Senator Dole's amendment simply removed the natural disaster exception from within the unforeseeable business circumstances exception, providing an express exception for it. Amend. No. 2485, 134 CONG. REC. S8686-89 (daily ed. June 28, 1988). See infra note 211 and accompanying text.
149. Id.
damaged his party's candidate, and forestalled congressional action on the politically important trade bill.150 As a result, President Reagan let S. 2527 become law without his signature.151

The enactment of the Worker Adjustment and Retraining Notification Act152 signaled the end of a fifteen year struggle to provide workers with advance notice of a plant closing or mass layoff. The political battle over the legislation resulted in more moderate language, but the Act still retained the original legislative intent of advance notice.153 In fact, Congress indicated154 that the committee reports155 accompanying earlier versions of the legislation reflect actual legislative intent. As enacted, the Act stands separate from the JTPA.156

During congressional debate, advocates noted the simplicity of its original provisions.157 But, as a result of extensive and politically necessary modification, the final language became more technical and complex than originally intended.158

III. THE WORKER ADJUSTMENT AND RETRAINING NOTIFICATION ACT

A. The Notice Requirements

The WARN Act159 requires employers to provide sixty days' advance notice to affected employees, state dislocated worker units, and local governments of a plant closing or mass layoff.160 The Act's final version limited

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150. Id.
151. The President exercised his option under U.S. CONST. art. I, § 7. In his announcement, President Reagan said he acted in order "to end these political shenanigans and get on with the business of the Nation." Statement on the Worker Adjustment and Retraining Notification Act, 24 WEEKLY COMP. PRES. DOC. 990 (Aug. 8, 1988).
153. The preamble of the statute states its unrefined purpose: "[T]o require advance notification of plant closings and mass layoffs, and for other purposes." Id.
156. Conference Agreement, supra note 155, at 1045, reprinted in 1988 U.S. CODE CONG. & ADMIN. NEWS at 2078. As a result, the statute operates independently from all other federal labor laws.
158. See 134 CONG. REC. S8867 (daily ed. July 6, 1988) (statement of Sen. Matsunaga). Senator Matsunaga stated: "The irony is that what complexity there is has largely resulted from dilution of the original legislation, by creation of loopholes and qualifications, to make it acceptable to opponents." Id.
160. Id. § 2102(a). The Department of Labor (DOL) published its final regulations imple-
coverage to those employers with 100 or more employees, effectively excluding a substantial number of small employers from its requirements. Despite extensive opposition to any inclusion of layoffs within its coverage, the sponsors of the Act retained mass layoffs in the final language. As a result, however, the final version does distinguish between these two forms of dislocation. The magnitude of employment separations remains the focus in either case. In the plant closing context, any shutdown of an operating unit resulting in the dislocation of fifty or more workers at a single site of employment within thirty days activates the notice requirement. The mass layoff definition sets the threshold of employment losses at thirty-three percent of the workforce and at least fifty employees at a single site of employment within thirty days activates the notice requirement.

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161. 29 U.S.C.A. § 2101(a)(1). “Employer” means any business enterprise or nonprofit organization, except for certain government public service agencies. 54 Fed. Reg. 16,065 (1989) (to be codified at 20 C.F.R. § 639.3(a)(1)). Partially or wholly-owned subsidiaries and independent contractors may also satisfy the definition of employer. Id. (to be codified at § 639.3(a)(2)). Such a determination will be based on several factors, including the existence of common control, ownership, and operations. Id. Employees temporarily laid off or on leave who have a “reasonable expectation of recall” are counted in determining whether an enterprise employs the requisite number of employees. Id. (to be codified at § 639.3(a)(1)). In addition, the regulations clarified that workers exempt from receiving notice under the temporary facility/project or strike/lockout exemptions are still counted in this determination. Id. (to be codified at § 639.3(a)(3)).

162. 29 U.S.C.A. § 2101(a)(2). An “operating unit” is defined as “an organizationally or operationally distinct product, operation, or specific work function.” 54 Fed. Reg. 16,066 (1989) (to be codified at 20 C.F.R. § 639.3(c)(1)). In contrast, a “plant closing” involves employment losses specifically resulting from the shutdown of any distinct operating unit. Id. In either situation, the requisite number of employment losses resulting from employer action may be sufficient to trigger the notice obligation under WARN. In determining coverage as either a mass layoff or plant closing, full-time employees not entitled to receive notice because they fall under the temporary facility/project or strike/lockout exemptions are not counted. Id. (to be codified at § 639.3(c)(2)).

163. Id. § 2101(a)(2)-a(3). A “mass layoff” determination is based solely on the number of employees suffering an employment loss at a single site of employment, regardless of whether the employer closes one or more lines or facilities within that site. 54 Fed. Reg. 16,065 (1989) (to be codified at 20 C.F.R. § 639.3(c)(1)). In contrast, a “plant closing” involves employment losses specifically resulting from the shutdown of any distinct operating unit. Id. In either situation, the requisite number of employment losses resulting from employer action may be sufficient to trigger the notice obligation under WARN.

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164. 29 U.S.C.A. § 2101(a)(2). An “operating unit” is defined as “an organizationally or operationally distinct product, operation, or specific work function.” 54 Fed. Reg. 16,066 (1989) (to be codified at 20 C.F.R. § 639.3(j)). Only those employees experiencing an employment loss as a direct result of the shutdown of an operating unit are to be counted for purposes of determining whether WARN Act obligations are triggered by the particular closing. Id. at 16,045 (explains final rule to be codified at 20 C.F.R. § 639.3(b)).

In defining “single site of employment,” DOL relied upon such factors as whether the plants have interchangeable operational purposes and their geographical proximity. Id. at 16,066 (to be codified at § 639.3(i)).
ployment within a thirty day period. A layoff of 500 or more employees triggers the notice requirement regardless of whether it meets the thirty-three percent requirement. In determining if the requisite number of employees have been dislocated, the statute aggregates all separations within a ninety day period unless the employer demonstrates that the termination events resulted from separate and distinct causes.

The Act provides employees, unions, and local governments with civil actions in the United States District Courts against employers for alleged violations of the notice requirement. The employer's potential liability to employees includes wages and benefits for each day of the violation, with a sixty-day ceiling. Local governments may recover $500 for each day of the notice violation.

Congress also afforded courts broad discretion in fashioning this relief. Specifically, the courts possess discretion to reduce the judgment if satisfied that the employer who violated the Act did so with the reasonable and good

166. Id. § 2101(a)(3)(ii).
167. Id. § 2102(d); see also 134 CONG. REC. H5507 (daily ed. July 13, 1988) (statement of Rep. Conte that clarifies separate action aggregation). An employer's duty to provide 60 days' notice of a plant closing or mass layoff begins on the date of the first dislocation within the 30-day period, providing that the requisite number of employees will be terminated within that period. 54 Fed. Reg. 16,067 (1989) (to be codified at 20 C.F.R. § 639.5(a)). Thus, to protect against any violations of the Act, employers should be cognizant of the number of workers dislocated in the previous 30 days as well as the number expected to be relieved in the next 30 days. Id. (to be codified at § 639.5(a)(1)(i)).

In addition, the provision for aggregation of dislocated employees may require employers to look 90 days forward and backward. Id. (to be codified at § 639.5(a)(1)(ii)). In this context, DOL further explained that the 90-day aggregation factor only comprises those employer actions "each of which" resulted in dislocation levels insufficient to meet the coverage threshold. Id. at 16,053.

168. 29 U.S.C.A. § 2104(a)(5). It should be noted that these are exclusive remedies for a violation of the Act's notice requirements. Id. Although the courts retain exclusive jurisdiction, the Act also authorized the Secretary of Labor to issue interpretive regulations to assist in interpreting its provisions. Id. § 2107(a).

169. Id. § 2104(a)(1). The violation period refers to the period of time following a shutdown or layoff where notice was required but not provided. See Conference Agreement, supra note 155, at 1052, reprinted in 1988 U.S. CODE CONG. & ADMIN. NEWS at 2085.

170. 29 U.S.C.A. § 2104(a)(3). The 60-day ceiling operates in this instance to limit employer liability to local governments to $30,000. See Conference Agreement, supra note 155, at 1053, reprinted in 1988 U.S. CODE CONG. & ADMIN. NEWS at 2086. The Conference Agreement expresses the intention that courts may utilize factors such as the severity of the violation, the employer's size, and the employer's financial ability to satisfy the judgment in determining the amount of penalty. Id. Employer liability to local governments may also be relieved if the employer fully satisfies its liability to employees within three weeks from the date of shutdown or layoff. Id.

faith belief that their act or omission would not constitute a violation.\(^{172}\)
The Act also contains language that expressly denies courts' authority to enjoin a plant closing or mass layoff.\(^{173}\)

In addition, the sponsors included a provision dictating that the WARN Act supplements the rights of employees covered by similar law at the state level or in their collective bargaining agreements.\(^{174}\) The Act explicitly states that all the required notice periods run concurrently, not consecutively.\(^{175}\)

On its face, the Act appears simple and comprehensive. A close examination of the Act, however, reveals that its numerous exceptions and exclusions dramatically diminish its utility.\(^{176}\)

### B. Exclusions, Exceptions, and Reductions

On first impression, major provisions of the WARN Act appear to substantially limit an employer's ability to cease or relocate operations without notice. However, provisions that exclude and except employers from the notice requirements, or reduce the amount of notice required, drastically reduce the Act's application. The clearest exemption, for example, limits coverage of the Act to employers with 100 or more employees.\(^{177}\) A recent General Accounting Office study of plant closings and mass layoffs reported that less than half of all such events were attributable to employers with 100 or more employees.\(^{178}\) Thus, without structural changes in dislocation trends, the Act excludes a substantial number of employers. To this end, Congress encouraged employers with less than 100 employees to abide by

\(^{172}\) *Id.* Attorney's fees may also be awarded as part of the costs to the prevailing party. *Id.* § 2104(a)(6). This provision reflects Congress' intent to discourage frivolous lawsuits. *Id.*


\(^{173}\) 29 U.S.C.A. § 2104(b).

\(^{174}\) *Id.* § 2105. The Conference Agreement expresses the intent that other state laws and collective bargaining provisions should not be disturbed by the provisions of the WARN Act. See Conference Agreement, *supra* note 155, at 1054, *reprinted in* 1988 U.S. CODE CONG. & ADMIN. NEWS at 2087. The conferees expressly cited Fort Halifax Packing Co. v. Coyne, 482 U.S. 1 (1987) (state severance pay statute not preempted by ERISA) as indicative of the desired outcome when presented with a state law confronting the WARN Act. Conference Agreement, *supra* note 155, at 1054, *reprinted in* 1988 U.S. CODE CONG. & ADMIN. NEWS at 2087. However, the Conference Agreement also states that with respect to the length of notice, any other provisions run concurrently with the 60-day provision in the Act. *Id.*

\(^{175}\) 29 U.S.C.A. § 2105.


\(^{178}\) See GAO BRIEFING REPORT, *supra* note 29, at 5 (table 1).
the mandatory procedures set forth. However, several other provisions diminish the number of employers required to provide notice.

1. Exclusions and Exceptions: No Notice Required

First, the Act requires notice only in the event of an employment loss, as defined therein. Generally, an employment loss includes involuntary employment terminations (other than for cause or retirement), a layoff exceeding six months, or a fifty percent reduction in hours during each of six consecutive months. A subsection of the Act excludes circumstances where technically no employment loss results from the change in business operations. This includes situations where the employer sells all or part of the business and the employees retain future employment rights in the terms of the contract for sale. Also, an employer who relocates or consolidates need not provide notice if the employees are offered a comparable position at a site within a reasonable commuting distance, or at any site if the employee accepts the offer within thirty days. The BLS Survey of Permanent Mass Layoffs and Plant Closings in 1987 (BLS Survey) indicates that this provision would apply to over six percent of the dislocation events that occurred during that year. Therefore, if the employer engages in a

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180. Id. § 2101(a)(6).
181. Id. According to DOL, an employment loss does not result when an employee is transferred or reassigned to an employer sponsored retraining or job search program. 54 Fed. Reg. 16,066 (1989) (to be codified at 20 C.F.R. § 639.3(f)(2)).
183. 29 U.S.C.A. § 2101(b)(1); see also Conference Agreement, supra note 155, at 1047, reprinted in 1988 U.S. CODE CONG. & ADMIN. NEWS at 2080. In the absence of such employment rights, this provision places the burden of providing notice to the employee on the seller up to and including the date of sale, and on the buyer after that date. 134 CONG. REC. S8670 (daily ed. June 28, 1988) (statement of Sen. Hatch); 54 Fed. Reg. 16,067 (1989) (to be codified at 20 C.F.R. § 639.4(c)). Because the obligation to provide notice always remains with the employer, DOL encourages a pre-sale agreement between buyer and seller to provide advance notice to those workers who may be dislocated as a result of the sale. Id. (to be codified at § 639.4(c)(2)).
184. 29 U.S.C.A. § 2101(b)(2); see also 54 Fed. Reg. 16,066 (1989) (to be codified at 20 C.F.R. § 639.3(f)(3)). Because the employer may be subject to liability if the employee does not accept the offer within 30 days, DOL advises employers to include language providing 60-days' advance notice within the transfer offer. Id. at 16,067 (to be codified at § 639.5(b)(4)).
185. This figure represents those businesses which underwent an ownership change or domestic relocation. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, PERMANENT MASS LAYOFFS AND PLANT CLOSINGS IN 1987, 5 (table 3) (July 1988) [hereinafter BLS SURVEY]. The BLS Survey is a product of a JTPA statutory provision which requires the Secretary of Labor to maintain statistical information on plant closings and permanent mass layoffs. 29 U.S.C. § 1752(e) (1982). To accomplish this, the BLS developed the permanent mass layoff and plant closing (PMLPC) program to coordinate data collection and publish a yearly report.
sale or relocation and provides potentially affected employees with reasonable employment opportunities in the future, then the dislocations do not fall within the definition of employment loss.\footnote{186}

Second, the statute exempts employers from the notice requirement when closing a temporary facility or upon completion of a specific project, if the employees accepted their positions with knowledge of the limited duration of their employment.\footnote{187} The conference agreement accompanying the Omnibus Trade Act further defines this provision by requiring two findings before it exempts employers from providing the requisite notice: that the employees clearly understood that their jobs terminated upon completion of a particular activity, and that the project truly must be limited or temporary.\footnote{188} The BLS Survey indicates that temporary business activity accounted for over fifty-nine percent of employer-instituted dislocation events in 1987.\footnote{189} This figure reflects plant closings or mass layoffs that resulted from contract completion, seasonal work and “slack work.”\footnote{190} While the survey defines slack work as that which results from a nonseasonal decline in demand for products and services resulting in a layoff,\footnote{191} the employer retains its exemption if the employees knew of the contingent nature of their employment. In the alternative, any unforeseeable circumstances leading to a mass layoff or closure may permit the employer to reduce the notice period as provided elsewhere in the Act.\footnote{192}

Third, the Act does not require notice when an economic strike or lockout causes the closing or layoff.\footnote{193} It is Congress’ intent that the legislation not

\begin{itemize}
  \item See BLS Survey, supra, at 90. The PMLPC survey is based on unemployment insurance information received from state agencies that monitor the number of claims filed against businesses during a three-week period. When 50 or more employees of a particular establishment file unemployment claims, the agency surveys that business by telephone to determine if a plant closing or permanent mass layoff has occurred. \textit{Id.}
  \item 29 U.S.C.A. § 2101(b)(2).
  \item \textit{Id.} § 2103(1).
  \item See Conference Agreement, supra note 155, at 1051, reprinted in 1988 U.S. CODE CONG. & ADMIN. NEWS at 2084. Whether the employee understood the temporary nature of his employment relationship may be derived from the relevant “employment contracts, collective bargaining agreements, or employment practices of an industry.” 54 Fed. Reg. 16,067 (1989) (to be codified at 20 C.F.R. § 639.5(c)(2)). However, the employer bears the burden of proof to establish that the temporary nature of the project or facility was communicated clearly to the employee at the outset or at some point before the 60-day notice period. \textit{Id.}
  When it is unclear whether such an understanding exists, DOL advises the employer to clarify the status of the employee in writing. \textit{Id.} (to be codified at § 639.5(c)(3)).
  \item 29 U.S.C.A. § 2102(b)(2)(A) (West Supp. 1988); see also infra note 204 and accompanying text.
\end{itemize}
usurp NLRA provisions governing replacement of strikers. \(^{194}\) The Act’s sponsors advanced the notion that the provision does not grant additional rights to strikers whom the NLRA considers legally replaced. \(^{195}\) On the other hand, illegal replacement of the workers could subject the employer to liability for violating the notice requirements. \(^{196}\) Congress specifically included a proviso that the Act will not affect judicial or administrative rulings based on the NLRA. \(^{197}\) The BLS Survey found that two percent of businesses cited labor disputes as the reason for mass layoffs or closures. \(^{198}\)

2. Reduced Notice: Original Intent Narrowed Further

In addition to the exemptions and exclusions discussed previously, employers may legally reduce the notification period under the “faltering company”\(^{199}\) or the “unforeseeable business circumstances” exceptions.\(^{200}\) The faltering company exception applies to plant closings that are uncertain at the outset of the normally required notice period based on the employer’s potential ability to obtain needed capital or business to sustain operations. \(^{201}\) To rely on this provision, the employer must prove that it diligently pursued the means to avoid or delay the closing, and that it reasonably and in good faith believed that giving notice would have precluded efforts to obtain the necessary capital or business. \(^{202}\) The conference agreement expressed that this constitutes a narrow defense, and placed the burden stating that employers may not rely on this exemption if their “lockout” is in effect a closing for the purpose of circumventing the Act’s requirements. See Conference Agreement, supra note 155, at 1051, reprinted in 1988 U.S. CODE CONG. & ADMIN. NEWS at 2084. A lockout occurs when an employer, as part of his collective bargaining strategy, refuses to use all or some employees for performance of available work. \textit{Id.}


\(^{195}\) See 134 CONG. REC. S8665 (daily ed. June 28, 1988) (clarifying discussion over Amend. No. 2439 relating to the notice requirement’s applicability to lawfully replaced economic strikers).

\(^{196}\) See \textit{id.} at S8663-64 (qualifying interpretation by Sen. Hatch).

\(^{197}\) 29 U.S.C.A. § 2103(2).

\(^{198}\) See BLS SURVEY, supra note 185, at 5 (table 3).


\(^{201}\) \textit{Id.} § 2102(b)(1). DOL provides a four-part test that employers must satisfy in order to rely on this exception. 54 Fed. Reg. 16,069 (1989) (to be codified at 20 C.F.R. § 639.9(a)). In addition, it states that this exception does not apply to mass layoffs and that the closing must be assessed with regard to the entire business’ financial status, not just the facility or site. \textit{Id.}

of proof on the employer to satisfy these requirements.203

Unforeseeable business circumstances may also except the employer from providing the full notification period otherwise required, but the statutory language is not self-defining.204 The major ambiguity in this provision concerns the definition of an "unforeseeable business circumstance."205 The conference agreement uses the terms "sudden, unexpected and dramatic" to provide some guidelines in interpreting the term unforeseeable.206 Extensive floor debate addressed this issue and offered specific circumstances as clarifying examples of unforeseeable business circumstances.207 Congress, however, never articulated what would not constitute an unforeseeable business circumstance.

Also, the terms of this section apply to situations where the layoff period extends beyond the minimum six months.208 This excepts those layoffs initially announced as less than six months, although circumstances later dictate an extension of the layoff period.209 Such an action falls within the coverage of the Act unless the employer qualifies for the unforeseeable business circumstances exception.210

An amendment also removed the exception for businesses closing or laying off employees due to a natural disaster from the definition of unforeseeable business circumstances, and expressly stated that such conditions require no notice.211 However, in all provisions allowing the employer to

203. See Conference Agreement, supra note 155, at 1048-49, reprinted in 1988 U.S. Code Cong. & Admin. News at 2081-82. The report specifies that factors critical to the employer's success are whether the employer was "actively seeking capital or business;" that the capital or business "would have enabled the employer" to prevent the dislocation; and the employer "reasonably and in good faith believed" that complying with the Act's requirements would have precluded these efforts. Id. at 1048.

204. 29 U.S.C.A. § 2102(b)(2)(A). Examples of what might be considered "unforeseeable" circumstances are the sudden loss of supplies from a major source, the termination of a principal client's contract, and an abrupt, disastrous economic collapse in the market for the product or service. 54 Fed. Reg. 16,069-70 (1989) (to be codified at 20 C.F.R. § 639.9(b)(1)).

205. See 134 Cong. Rec. S8855-56 (daily ed. July 6, 1988) (remarks of Sen. Wilson). Senator Wilson questioned the ambiguity in the phrase unforeseeable business circumstances: "My quarrel with it is that it is not sufficiently precise. It leaves to someone a question of judgment as to whether or not the circumstances that are raised by an employer as a defense against the provisions of required notice were reasonably foreseeable." Id.


208. To trigger an employment loss within the Act's definition, a layoff must extend beyond six months. See 29 U.S.C.A. § 2102(c).

209. Id.

210. Id. § 2102(c)(1).

211. Id. § 2102(b)(2)(B).
reduce the notification period, the employer must provide the maximum amount of notice feasible and supply a brief statement of reasons for the reduction.\textsuperscript{212}

The BLS Survey indicates that dislocations resulting from contract cancellations, energy and weather-related disruptions, material shortages, plant or machine repairs, and natural disasters account for over four percent of the total layoffs or closures.\textsuperscript{213} An additional two percent of surveyed employers cited reasons that would fall within the faltering company exception.\textsuperscript{214}

\textbf{C. An Intersection with the NLRA}

Aside from provisions limiting coverage of the Act, employers' use of the Act as a defense to violations of other federal labor laws presents further interpretive questions.\textsuperscript{215} Specifically, the Act states that no violation of the NLRA or Railway Labor Act (RLA) occurs when an employer provides the required notice to employees.\textsuperscript{216} Under this provision, a duty of good faith accompanies the employer's action in complying with the Act's requirements.\textsuperscript{217} It appears that an employer could use notice of a closing or layoff to threaten employees during a period of union organization or a representation election.\textsuperscript{218} Floor debate on this issue dealt solely with whether an employer required to give notice under the WARN Act would violate its duty to bargain collectively under the NLRA or RLA by doing so.\textsuperscript{219} Good faith compliance with the Act's requirements in these circumstances would not constitute any violation.\textsuperscript{220} Although Congress attempted to keep the Act separate and distinct from other federal labor laws, some intersections will probably occur. In this respect, courts will assume necessarily the task of weaving some uniformity into national labor policy as a whole.\textsuperscript{221}

\textsuperscript{212} Id. \S 2102(b)(3).
\textsuperscript{213} See BLS Survey, supra note 185, at 5 (table 3).
\textsuperscript{214} Id.
\textsuperscript{216} 29 U.S.C.A. \S 2108.
\textsuperscript{217} Id.
\textsuperscript{218} Currently, such threats to employees in an attempt to coerce them to reject union representation, if proven, constitute unfair labor practices under \S 8(a)(1) of the NLRA. NLRA, 29 U.S.C. \S 158(a)(1) (1982); see, e.g., NLRB v. Riley-Beaird, Inc., 681 F.2d 1083 (5th Cir. 1982).
\textsuperscript{219} See 134 Cong. Rec. S8613-14 (daily ed. June 27, 1988); id. at S8865-66 (daily ed. June 28, 1988). Under the NLRA, the employer's duty to bargain extends to issues concerning wages, hours, and other terms and conditions of employment. 29 U.S.C. \S 158(d). For a review of this duty, see supra notes 69-87 and accompanying text.
\textsuperscript{220} 29 U.S.C.A. \S 2108.
IV. Implementation of the WARN Act: Will the Exceptions Swallow the Rule?

A. Effective Scope of Coverage

When the data from the BLS Survey are aggregated, it appears that sixty-seven percent of the businesses implementing plant closings and mass layoffs in 1987 cited reasons that would have excluded them completely from coverage of the Act. Arguably, an additional six percent could have reduced the notice period. In all of these situations, the employer seeking an exclusion or reduction would have borne the burden of verifying its reasons for the closing or layoff, if challenged. However, if the employer satisfied the exclusion or reduction requirements of the Act, only twenty-seven percent of the plant closings and mass layoff events would have required the full sixty days' advance notice. Whether this figure will remain constant depends largely upon future litigation.

B. Mandatory Advance Notice: Is It an Illusory Concept Under the WARN Act?

Initially, the number of exclusions and exceptions available to employers under the WARN Act severely limits its application. Because many of these provisions contain open-ended language, however, the opportunity exists to manipulate further the intended coverage of the Act. Certainly, the exception for unforeseeable business circumstances provides a notable example of this ambiguity. Initial examination of this provision and the accompanying legislative history evidences the unclear extent of its

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222. This figure reflects the 59% who would be able to apply for the exclusion under the temporary facility/completion of project exception, the 6% in the sale or relocation exception, and the 2% who closed or permanently laid off employees as a result of a strike or lockout. See supra notes 185, 189, 198 and accompanying text.

223. This figure reflects those employers who could qualify for the faltering company exception and those with unforeseeable business circumstances. See supra notes 213-14 and accompanying text.

224. Id. This figure represents the employers remaining after subtracting the 73% with arguable cases for exclusion or reduction. Id.

225. See supra note 222 and accompanying text.


227. See supra notes 204-07 and accompanying text.
Also, based on the large number of employers citing the temporary projects and facilities exemption as the reason for their closing or layoff, it appears that the exemption will be the subject of a significant amount of future litigation. Here, the operative inquiries of whether the employees had knowledge of their temporary employment, and whether the project or facility is in fact temporary, require factual determinations. Thus, both factors are open to expansive interpretation.

The faltering company exception provides a complex test that may or may not be easily interpreted. Thus, the degree of the burden on employers to satisfy the exception’s requirements remains speculative. In fact, it becomes difficult to fathom a situation in which an employer who closes a plant or reduces employment levels without providing notice does not have an arguable case for an exclusion, exemption, or reduction of the amount of notice required.

The utility of the Act becomes further diminished when combining the above-mentioned limitations on coverage with the sanctions that may be imposed for violations of the Act. When an employer balances the potential losses from maintaining operations at current levels against the potential costs of litigation, the employer’s decision to provide notice may be based simply on cost-effectiveness. If the employer ultimately discovers that the latter course of action is more beneficial, the employer’s incentive to comply with the Act is reduced substantially or even eliminated.

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228. Id. The Conference Agreement suggested that determinations with respect to this provision require a focus on the employer’s business judgment. See Conference Agreement, supra note 155, at 1049, reprinted in 1988 U.S. CODE CONG. & ADMIN. NEWS at 2082. DOL expanded the Conference Agreement language by concluding that “[t]he employer must exercise such commercially reasonable business judgment as would a similarly situated employer in predicting the demands of its particular market.” 54 Fed. Reg. 16,070 (1989) (to be codified at 20 C.F.R. § 639.9(b)(2)).

229. Recall that 59% of the employers surveyed by the BLS cited this as the reason for their closing or layoff. See supra note 189 and accompanying text.

230. See supra notes 187-88 and accompanying text.

231. See supra note 201 and accompanying text.

232. 29 U.S.C.A. § 2104 (West Supp. 1988). An employer’s liability for daily wages and benefits to employees not receiving the required notice is reduced by payments made to such employee or to a third party. Id. § 2104(a)(2). Courts also have authority to limit employer liability. Id. § 2104(a)(4).


234. Id.
C. Judicial Interpretation: The Final Mark-Up Session

Because the sole enforcement mechanism lies within the federal courts, they will assume a position of importance in interpreting the provisions of the Act comparable to that of Congress in legislating it. When confronted with the question of whether an employer effectively removed itself from the requirements of the Act or lawfully reduced the amount of notice it provided, the courts will be allowed a significant opportunity to inject policy considerations into their decisions. These policy judgments will likely affect the balance struck in the Act between the rival interests of business and labor. To this extent, it is imperative that the courts rely on the principle objectives Congress sought to achieve in enacting the WARN Act. Although these objectives are expressed in its language, they may also be found in the extensive legislative history accompanying the Act.

A broad reading of the already extensive exclusions and exceptions of the Act’s coverage would clearly frustrate the primary purpose of the Act—mandatory notice. A narrow construction would further the congressional intent to provide workers and communities with advance notice of plant closings and mass layoffs.

V. Conclusion

Plant closings and permanent mass layoffs reflect a common characteristic of the turbulent American economy. Employees and communities traditionally negotiated these abrupt transitions without a significant opportunity to adjust. As a result of these negative experiences, many became unwilling and unable to accept and cope with the changes.

The WARN Act attempts to alleviate the negative consequences of plant

237. In Wirtz v. Bottle Blowers Ass’n, 389 U.S. 463 (1968), the United States Supreme Court found extrinsic factors particularly useful when construing congressional labor legislation. Justice Brennan stated: “[S]uch legislation is often the product of conflict and compromise between strongly held and opposed views, and its proper construction frequently requires consideration of its wording against the background of its legislative history and in the light of the general objectives Congress sought to achieve.” Id. at 468.
238. Id.
239. See Conference Agreement, supra note 155, at 1048, reprinted in 1988 U.S. CODE CONG. & ADMIN. NEWS at 2081. The Conference Agreement language regarding the faltering company exception provides an example of express congressional intent to narrowly construe the scope of the exceptions. Id.
240. Id.
closings and mass layoffs by mandating advance notice of such a decision. Clearly, that represents the original intent of its sponsors. However, provisions that exclude or exempt employers from coverage, or reduce their notification period, severely diminish the mandatory nature of the Act. Moreover, because of the unclear language defining these exceptions, the scope of the Act's coverage remains open to interpretation.

The WARN Act's sole enforcement mechanism — resort to a civil suit — guarantees that the federal courts will ultimately define the reach of mandatory advance notification. In doing so, the courts should take into account the tremendous benefits that could be realized by such protection. They should also consider the commitment that Congress displayed in finally enacting the legislation over a presidential veto.

More important, the courts should recognize that the statutory language reflects a balance between the competing interests of business and labor. Pragmatically, Congress realized the potential burden on employers resulting from unqualified mandatory advance notice, and yet remained committed to mandatory notice. Congress therefore focused on those situations where notice is, in some way, possible. The compromise, crafted after more than a decade of political debate, should not be disturbed by the courts. Rather, the courts should enforce that compromise by narrowly interpreting the exceptions to the mandatory notice provisions of the WARN Act.

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