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UNITED STATE SENATE
COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS

HEARING ON PLANT CLOSINGS, WORKERS' RIGHTS AND THE WARN ACT'S 20TH ANNIVERSARY

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I. INTRODUCTION.

Thank you Committee Chairman Hon. Edward M. Kennedy, Ranking Member Hon. Michael B. Enzi and all members of this Committee for convening this hearing and for allowing me the opportunity to testify on behalf of the Maurice and Jane Sugar Law Center for Economic and Social Justice (Sugar Law Center).

My name is John Philo and I am the Legal Director of the Maurice and Jane Sugar Law Center.[1] Our organization is a national nonprofit public interest law center located in Detroit, Michigan. Founded on the belief that economic and social rights are civil rights and ultimately human rights, we have focused our work on economic and social justice issues. One of our first acts when we opened our doors on February 1, 1991, was to establish a Plant Closing Project in support of workers and communities struggling to survive the effects of mass job loss during times of economic instabililty. A central focus of the project is to provide support to workers concerning their rights under the WARN Act.

Since establishing the Plant Closing Project, the Sugar Law Center has represented thousands of dislocated workers in WARN Act matters throughout the country. We provide information and advice to workers and their representatives and we litigate lawsuits on their behalf. The Center also provides technical assistance to lawyers and rapid response workers in state government and we publish the only comprehensive practitioner's manual exclusively focused on WARN Act issues.

As a result of these efforts, the Sugar Law Center has become the national clearinghouse and resource center for WARN Act related litigation. We have been able

[1] I would like to thank Tova Perlmutter, Executive Director of the Sugar Law Center and Tony Paris, a Staff Attorney at the Law Center, for their contributions and feedback in the preparation of this testimony.

to develop a practical ability to recognize fact patterns that give rise to WARN Act issues. Through such work, we have experience in analyzing fact patterns for their viability as legal cases under the Act and have experience in analyzing fact patterns to recognize those circumstances where the Act provides no protections to workers. Our experience provides us with a unique position to observe the devastating impact of gaps in protection, ambiguities, and loopholes within the current WARN Act statute.

The Sugar Law Center's experience with the WARN Act has been extensive and our commitment to protecting and assisting dislocated workers throughout the country runs deep. For these reasons, I am pleased to have the opportunity to provide our comments on how and why WARN Act reform is necessary to make the Act as effective as it can and should be.

On behalf of the Sugar Law Center and those dislocated workers whom we represent, I wish to thank all of you again for convening today's hearing.

II. ECONOMIC & SOCIAL CONCERNS AFFECTING LOCAL COMMUNITIES.

The impact of job loss is far reaching. Loss of employment from mass layoffs and worksite closings can have devastating impact not only on individual workers, but also their families and local communities. The most immediate impact is loss of income to the worker and family dependents. The loss of income and related financial and personal stress leads to very real increases in personal bankruptcies, declines of individual's and family members' physical and mental health, and the breakup of families. The impact also extends to businesses frequented by affected workers leading to a ripple effect of potential closings. Likewise, local communities face potentially

crippling reductions in their tax base at a time when government social services are most needed.

Over the past several years, our nation has seen increased economic instability. Unemployment rates are again reaching levels last seen during the economic recession of 2001 and 2002. Since 2004, we have seen well over eleven hundred mass layoff[2] events in nearly every quarter of the calendar year. In the last quarter of 2007, there were 1,814 mass layoff events. In the first quarter of 2008, the country experienced 1,111 mass layoff events resulting in job loss for approximately 190,000 workers.[3] On average, 170 workers lost their jobs in each of these layoffs and 12% of these events were attributed to the permanent closure of a worksite. Mass layoffs and worksite closures appear to have become a recurring institutional characteristic of the nation's economy.

Our economic system is structured to provide virtually unlimited flexibility to employers to plan for the future of their companies and to limit financial losses by laying off workers and closing worksites. The workers who have provided the foundation upon which such companies will reap benefits into the future and who suffer the most direct consequences of uncertain economic times deserve nothing less than a fair opportunity to plan a future for their families and to avoid catastrophic financial losses when faced with job loss. Under such circumstances, fair play for workers is not only good policy but is a moral imperative.

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[2] The U.S. Department of Labor defines 'mass layoffs events' as those involving 50 or more workers and includes both mass layoffs and worksite closures.

[3] USDOL, Bureau of Labor Statistics, *Extended Mass Layoffs in the First Quarter of 2008* (Released May 15, 2008).

III. THE WARN ACT'S GOALS & HISTORY.

The protections of the WARN Act find its roots in the fundamental human rights of all persons. In an effort to avoid the political, economic, and social instability that led to the devastation and destruction of two world wars, the United States and the world community founded the United Nations and other regional bodies to affirm and advance the basic human rights of all peoples. A worker's right to social security and protections in the event of unemployment is one such right recognized by all democratic societies.[4] Along with unemployment insurance and trade adjustment assistance, the WARN Act is one component of a web of measures through which workers have struggled to meaningfully realize their human rights within our legal system.

Advance notification for workers facing a permanent layoff had been sought for many years by workers and communities. Initiatives in the 1970s and early 1980s failed to pass Congress; however by the mid-1980s the effects of large scale worker dislocations could no longer be ignored. In 1985, after a hearing before the U.S. House of Representatives Education and Labor Committee, President Reagan's Labor Secretary William E. Brock established a task force to study worksite closings and worker dislocation.

The task force reviewed advance notification and worker readjustment programs in Europe and Canada and studied the issue of worker dislocation for approximately one year before issuing its report. The task force concluded that advance notice is an

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[4] See *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966 G.A. Res. 2200A (XXI), 21 U.N.GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3 (entered into force 3 January 1976) at Art. 9 and *American Declaration of the Rights and Duties of Man*, O.A.S. Res. XXX (adopted by the Ninth International Conference of American States 1948), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 (1992) at Art. XVI.

essential element of a meaningful adjustment program for dislocated workers.

In 1987, versions of the WARN Act were introduced before the U.S. House and Senate. The legislation was supported by many organizations including the National Conference of Mayors, the National League of Cities, the AFL-CIO, and individual labor unions.

The goals of the bills were articulated by Sen. Kennedy, during Senate debates:

> First, advance notice is essential to the successful adjustment of the workers to the job loss caused by changing economic conditions. Times have changed for American workers. The person who will stay with one employer for thirty years is becoming more the exception and less the rule. Frequent changes are becoming more common. An advance notice provision insures that large numbers of workers will not be displaced without warning and without planning. . . .
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> Second, advance notice saves the Government money. The Office of Technology Assessment estimated that advance notice could help save between $257 million and $386 million in unemployment compensation benefits each year. . . .
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> Third, advance notice makes each dollar that we appropriate for adjustment efforts to go further. We know that with advance notice, adjustment programs are more effective in getting employees back to work more quickly, and at better wages.
>
> Fourth, and perhaps most important, an advance notice requirement assures fair play for American workers.[5] (Emphasis Added).

The bills passed out of committee in both the House and Senate and provided for between 90 and 180 days advance notice of mass layoffs and worksite closings. In an effort to ensure passage, the notification period was shortened to 60 days and after an

[5] Remarks of Senator Kennedy, 134 Cong. Rec. S8376 (June 22, 1988), Legislative History, 184.

initial veto by the President, the WARN Act became law on August 4, 1988 and remains in its original form today.

By the early 1990s however, workers advocates and legislators were beginning to recognize that the goals of the WARN Act were not being fully realized by the existing statute. On February 23, 1993 and again on July 26, 1994, the Sugar Law Center appeared before this Committee, at the request of then Sen. Howard Metzenbaum, to discuss areas of the WARN Act that needed revision. Former Executive Directors Julie Hurwitz and Kary Moss, speaking on behalf of the Sugar Law Center both testified that while the passage of the WARN Act was a significant and laudable event for the nation's workers, the Act had fallen far short of its goals.

In February 1993, the United States General Accounting Office (GAO) published a report detailing its findings concerning the law's reach and limits.[6] The GAO found that as a result of the Act's passage, employers were more likely to give workers advance notice of mass layoffs and worksite closings.[7] The GAO however found that only about half of employers conducting a mass layoff or worksite closing were required to provide advance notice.[8] Of the closures where advance notice was required, advance notice was only provided 50% of time and when notice was provided, 25% of the notices were untimely.[9] Despite such stark findings, efforts to reform the Act stalled.

A decade later, the GAO reported further findings concerning the Act's limited

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[6] Dislocated Workers: Worker Adjustment and Retraining Notification Act Not Meeting Its Goals (GAO/HRD-93-18, February 23, 1993).

[7] Id. at 3.

[8] Id. at 4.

[9] Id.

coverage of our nation's workers and employers' compliance with the statute. The GAO's updated study suggests that coverage and compliance has worsened rather than improved in the intervening years. In 2003, the GAO reported that only 24% of all mass layoffs and worksite closures were subject to the WARN Acts advance notice requirements.[10] Furthermore, the report found that employers provided advance notice in only 26% of the mass layoffs and 46% of the worksite closures where WARN Act notification was required.[11] Even when advance notice was provided, 32% of the notices were untimely.[12]

As a result, timely advance notification is only being provided in 6% of all mass layoffs and worksite closures. In mass layoffs and worksite closures covered by the Act, timely advance notice is only provided to workers 25% of the time. These numbers reveal serious problems with the number of worksites covered by the Act's protections and with employers' compliance. Coverage and compliance can and must be improved by amendments to the statute.

As confirmed by the findings of the GAO reports, WARN Act reform is necessary and long overdue. Fundamentally, the WARN Act is about fair play for workers in an ever-changing economy. Opening our economy to global competition, inherent business cycles, periods of widespread corporate malfeasance, and other factors create on ongoing and semi-permanent risk of mass job loss at large worksites in all industries and in all regions of our country. A debt of fundamental fairness is long overdue to the workers, families, and communities who bear the risk and most directly suffer the devastating

[10] The Worker Adjustment and Retraining Notification Act (GAO-03-1003, September, 2003) at p. 7.

[11] Id. at p. 10.

[12] Id. at 11.

consequences of mass layoffs and worksite closures. WARN Act reform is one measure to begin to repay that debt.

IV. GAPS IN PROTECTION AND OVERDUE REFORM.

The WARN Act's advance notice requirements mitigate the effects of worker dislocation in three principal ways. First, advance notice gives workers time to financially plan for an impending job loss and gives workers time to learn of and pursue other job and retraining opportunities while still employed. Advance notice thereby minimizes the time workers are unemployed and not enrolled in educational and skills development programs. This reduces employers' unemployment insurance costs and eases the burden on government service providers who assist unemployed workers.

Second, advance notice allows social service providers time to prepare and implement effective services for displaced workers. Significant lead time is necessary for state rapid response workers and others to develop and implement informational outreach to workers regarding transition programs and benefits. The advance time also assists service providers in developing and structuring retraining services that are tailored to the needs of laid off workers and that are ready for worker enrollment at the time that layoffs occur.

Finally, advance notice gives local governments, communities, and workers representatives time to develop strategies in response to job losses and lost revenues. With advance notification, these groups can work cooperatively with employers to retain employment through incentives, new ownership and operating structures, and/or workplace concessions. Furthermore, if job and revenue loss is to occur, government and community groups can develop and implement economic and service plans that

minimize the adverse effects of mass job loss on local communities and affected neighborhoods.

Despite the significant strides made by the passage of the WARN Act, there are gaps in protection, ambiguities, and loopholes that prevent the Act from serving the intended purposes of advance notification. Reform now can close loopholes and clarify ambiguities to increase the number of worksites covered by the Act and to increase compliance by employers.

1. PROVIDE EARLIER NOTICE TO WORKERS.

Most experts agree that longer advance notice periods result in better outcomes for dislocated workers and the communities in which they live. The WARN Act's 60 day advance notice is important but far too short in time for workers to successfully transition to new employment and for communities to explore options for keeping a worksite open.

Longer advance notice provides greater opportunities for workers to avoid unemployment. The statute presently provides 8 weeks of advance notice. Eight weeks is an unduly short time frame given data showing steady historical increases in the time that it takes for workers to transition from one job to another and given data showing that it will take current workers over twice the time of the advance notice period to find new work.

When the WARN Act became law in the late 1980s, it took laid off workers an average of 12 weeks to secure new employment.[13] Over the past twenty years, the length of time required to locate new employment has steadily increased.[14] Since the turn of the

[13] See Toshihiko Mukoyama and Ayşegül Şahin, *Why Did the Average Duration of Unemployment Become So Much Longer,* Staff Report No. 194 (Federal Reserve Bank of New York, Sept. 2004) at 1-2.

[14] Id.

century, the average duration has ranged between approximately 14 and 18 weeks.[15] At present, the average duration is 18.3 weeks and it is not until 26 weeks have passed when 80% of workers will be reemployed.[16]

In other words, when the Act was initially passed the advance notice period provided continued employment during 66% of the time that it would take an average worker to find new work. Today, the advance notice period accounts for 44% of the time that an average worker will require to secure a new job. As a result, more workers are spending longer periods unemployed creating greater risks of catastrophic financial distress.

Longer advance notice also provides government officials and local communities meaningful opportunities to explore options for keeping a worksite open. Along with notification to workers, the WARN Act requires advance notice to union representatives and state and local officials. The purpose of such notification is to provide opportunities for cooperative initiatives to assist in a business turnaround, restructuring, or change in ownership of a facility to avert job loss. Initiatives to effect such outcomes include the provision of government grants and loans, tax and investment incentives, solicitation of new ownership groups, employee stock ownership plans, and stakeholder involvement in reorganizing operations.

To begin such processes however, a prefeasibility study is necessary. The prefeasibility study evaluates the likelihood of success of potential restructurings, buyouts and other initiatives. Experts generally find that once a decision is made to

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[15] Id.

[16] USDOL, Bureau of Labor Statistics, *The Employment Situation: April 2008* (USDL 08-0588) at Table A-9.

explore options for keeping a worksite open and funding is secured for a prefeasibility study, four to six weeks is necessary for the study to be completed.[17] If viable, six months or more is required to complete a restructuring or buyout. Where alternative plans for keeping a worksite open are not viable, communities require similar periods of time to develop plans to adjust to the loss of revenue and to develop strategies to stabilize the local economy.

To provide meaningful opportunities to attain such goals, advance notification periods must be extended. The experiences of other nations may provide a model for tiered notification periods to maximize opportunities to keep worksites open and develop stabilization plans.

Other nations with competitive market economies provide for significantly longer advance notification periods without unduly burdening business interests.[18] In Canada, federal law requires 16 weeks of advance notice and the establishment of a joint planning committee consisting of workers and employer representatives.[19] The joint planning committee's objectives are to examine strategies to avoid the layoffs, to plan the transition, and to assist in locating new employment for dislocated workers.

Canadian provinces also have advance notice laws that often provide tiered notification periods. Tiered notification periods typically provide advance notification periods ranging from 8 to 16 weeks, depending upon the particular circumstances of the

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[17] See Steel Valley Authority, Rapid Response: Layoff Aversion Guide (2006) at pp. 51-54.

18 See Geoffrey England, *Unjust Dismissal and Other Termination-Related Provisions: Report to the Task Force on Part 111 of the Canada Labour Code regarding the termination of employment provisions of the Canada Labour Code* (May 16, 2006) at p. 67-68 (noting the varying statutes providing up to 18 weeks advance notice within the federal and provincial laws of Canada).

[19] See Canada Labour Code, amended 1992 at § 212.

layoff. The United Kingdom also provides for tiered notification ranging from 4 to 12 weeks and provides for mandatory consultations between workers and employers before layoffs can occur.[20]

The tiered notification periods of other nations provide models for more effective WARN Act notification. To meaningfully explore opportunities for worksites to remain open and for communities to develop stabilization strategies, decision makers need longer notification periods. Longer notification periods may be impractical under certain conditions that result in mass layoffs and worksite closing. Where job loss occurs within the context of long planned business decisions such as relocating operations to new locations or as the result of a plant or product's obsolescence, longer notification periods are most appropriate.

The WARN Act should be amended to provide advance notice of 120 days to allow fair opportunities for workers to successfully plan for and transition to new employment and should provide longer tiered notification periods based on the underlying business reasons for the job losses to allow communities fair opportunities to keep worksites open and to develop stabilization strategies.

2. CLOSE COVERAGE GAPS BY REDUCING THE THRESHOLD FOR COVERED WORKSITES AND REDUCING THRESHOLDS THAT DETERMINE WHICH WORKERS ARE ENTITLED TO ADVANCE NOTICE.

In addition to expanding the notification period, the WARN Act's immediate goals are most effectively advanced by amending the Act to expand the pool of workers entitled to the Act's protections. The GAO's reports in 1993 and 2003 clearly find that

[20] See Trade Union and Labour Relations (Consolidation) Act, 1992 (TULRCA) at §§ 193 &1881.

the majority of our nation's workers do not receive advance notification when a worksite closing or mass layoff occurs.

The GAO's initial report found that 64% of mass layoffs and worksite closures were exempt from the WARN Act's advance notification requirements.[21] In its 2003 report, the GAO found that 76% of mass layoffs and worksite closures were exempted from the Act.[22]

The principal reason that workers do not receive advance notification is because the Act's thresholds too frequently exempt employers from the Acts requirements. The pool of covered workers can be readily expanded by lowering thresholds that determine which employers are required to give advance notice and that determine which workers are entitled to advance notice during a mass layoff or worksite closing.

Presently, the WARN Act only applies to businesses employing 100 or more *full time* workers. The WARN Act then sets additional thresholds. No advance notification is required if a worksite closing or mass layoff does not result in the loss of at least 50 full time workers at a single worksite. Moreover, if less than 500 full time workers are laid off and the worksite does not close, then the number of laid off employees must equal or exceed 33% of the total workforce at the site before advance notification is required.

These thresholds artificially exclude many workers and communities from receiving notice despite their suffering the effects of a large scale loss of employment at a single worksite. Worker and community need for advance notification under such circumstances however remains identical to those covered by the Act.

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[21] GAO/HRD-93-18 at 17, Fig. 2.1. (analyzing data from calendar year 1990).

[22] GAO-03-1003 at p. 8, Fig. 2 (analyzing data from calendar year 2001).

The thresholds are too often blind to the realities of the modern workplace where many large employers have sought the flexibility of creative governance structures and alternative staffing arrangements. The 100 full time employees, 50 affected workers, and 33% of the workforce requirements do not serve intended purposes to exempt small employers or exempt small workforce reductions. Corporate subsidiary and contracting structures, part-time staffing, contingent worker staffing, and other strategies allow multinational corporations and other large employers to avoid the requirements of the WARN Act.

The experience of workers at Raydon Corp. in Daytona Beach, Florida, at Bock USA in Connecticut, and at Mortgage IT locations in Ohio and Texas illustrate the injustices of the present thresholds.

Raydon Corporation provides simulation training products to private industry, governments, the United States military, and other employers throughout the country. In August 2007, the company began a restructuring program by suddenly and without notice calling employees into meetings. At the group meetings, workers were informed that they had a matter of hours to clear out their desks and vacate the property. Ninety-five employees lost their jobs in the mass layoff. The company however escaped WARN Act advance notification requirements by laying off approximately 32% of site's workforce and thereby did not meet the 33% threshold. Within two months of the layoffs, Raydon approached local government officials seeking tax abatements to construct a new facility in the city along with the uncertain promise of adding new jobs sometime in the future.

Bock USA is a subsidiary of a German multinational corporation that once operated a manufacturing facility in Monroe, Connecticut. In August 2007, Bock USA

finalized purchase of another company operating in Canada and made the decision to close the Monroe facility and relocate operations to Canada. Despite the company's purchase and relocation plans necessarily requiring substantial advance planning, 70 workers at the Monroe facility were given less than a month's notice of their facilities' closing and state officials may also have not received appropriate notice. Unfortunately, the subsidiary did not appear have 100 full time workers and even if threshold requirements could be met, a lawsuit by the workers would face substantial obstacles to obtaining representation from the private bar due the limited availability of potential damages.

Mortgage IT is a subsidiary of the multinational banking concern, Duestche Bank. At the beginning of October 2007, Mortgage IT operated from approximately 40 locations throughout the United States. On October 2, 2007, the company slashed approximately 580 jobs at locations across the country. In January 2008, the company continued to lay off workers and our Law Center was contacted by workers at locations in Ohio and Texas whose worksites had been closed. The worksites however employed less than 50 employees at each location and so while between 28 and 38 workers lost their employment at each site, the WARN Act did not provide any protection to these workers.

The Act's coverage deficiencies are reduced and the goals of the Act are better served by reform that would: 1) eliminate the 100 full time employee threshold, reduce the number to 50, or include part-time and contingent workers in the number of employees to be counted to meet the threshold; 2) reducing the number of affected employees threshold in mass layoffs and worksite closures to 25 workers; 3) aggregate

the number of affected employees to include not only those at the principal site but also those at other sites whose jobs are lost as a foreseeable result of downsizing at the principal site; 4) eliminate the mass layoff threshold requirement that the number of affected employees equal or exceed 33% of the full-time workforce at the site; 5) increase from 90 to 180 days the time period for aggregating the number of affected workers in a series of smaller layoffs; and 6) define loss of employment to have occurred after an employee has been laid off for over 2 months rather than the 6 months presently required by the statute.

3. CLOSE COMPLIANCE GAPS BY PROVIDING FAIR DAMAGE AWARDS TO WORKERS WHEN THEIR RIGHT TO NOTICE IS VIOLATED AND BY PERMITING ENFORCEMENT ACTIONS BY THE U.S. DEPARTMENT OF LABOR AND STATE OFFICIALS.

The WARN Act is enforced through private lawsuits brought by workers whose rights have been violated. A cardinal principle of effective regulation is that the person or group whose rights have been violated should have direct access to courts to obtain a remedy. While the WARN Act laudably vests workers with a right to a private lawsuit, the Act fails to provide effective remedies and further fails to provide an avenue for enforcement by other constituencies whose rights are violated when advance notification is not provided.

Tightly limited available damages under the WARN Act hinders courts' ability to provide an effective remedy to workers who do not receive advance notice. The Act provides for awards based on a calculation of the employees back pay and the value of any benefits for each day that the employer violated the Act.[23] At most, employers will

[23] In theory, the Act allows for awards of attorney's fees and for civil penalties of up to $500 per day that the employer is in violation of the Act. In practice, attorney's fees are at the discretion of the court and are

be liable in the amount of sixty days pay and benefits. Judicial decisions have struggled to determine whether back pay awards should be calculated on a calendar day basis or a work day basis.[24] The GAO notes that a work day calculation can reduce awards by 30 percent.[25] In addition, the Act allows courts further discretion to arbitrarily reduce any damage award for 'good faith' failures to provide advance notice to workers.

The value of potential awards under the statute is inadequate to effectively regulate the conduct of recalcitrant employers. Damage awards in private lawsuits serve the dual and equally important functions of compensating the injured party and deterring socially irresponsible conduct. Under the WARN Act, awards are limited to compensation for back pay and benefits. However, workers suffer additional injuries and damages as the result of violations of the Act and should be afforded a full range of 'make whole' remedies. In the absence of such remedies, the value of damages resulting from the employer's violation of the Act is shifted from the violator to the employee.

The chance of workers recovering damage awards are further undermined by corporate structures and bankruptcy procedures that insulate responsible parties from liability. When subsidiaries become insolvent and viable parent corporations remain, those corporations should bear liability for debts owed to workers. Likewise, corporate

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rarely awarded. Likewise, few if any suits by local governments have been initiated and result in an award of civil penalties. No civil penalties can be awarded if the employer mitigates damages within three weeks of the layoffs or worksite closure. The common practice of employers requiring employees to sign a generic waiver of all rights and claims against the employer at the time of discharge in exchange for a week or two of severance pay, a good job recommendation, or even quick release of final paychecks effectively preempts the likelihood of actions for civil penalties.

[24] See *Burns v. Stone Forest Industries, Inc.*, 147 F.3d 1182 (9th Cir. 1998) and *Ciarlante v. Brown & Williamson Tobacco Corp.*, 143 F.3d 139 (3d Cir. 1997).

[25] GAO-03-1003 at p. 17.

officers and managers who, in bad faith, have violated workers rights to advance notification should bear personal liability for such decisions.

Moreover, the value of potential awards under the statute is too low to deter future wrongdoing. Potential awards are essentially limited to an amount that the employer would otherwise have paid if the employer had complied with the statute. Bad-actor employers can fail to give notice knowing that the dollar value of their potential liability is very likely no more than if they had complied. Such employers can wait to see if any employees eventually file suit. The employer then gains a financial benefit from violating the act if less than all employees file suit. Such employers obtain a further financial benefit by delaying payment until the end of any employee lawsuits. These employers thus gain a financial advantage over good faith employers who comply with the Act.

While workers rights are most directly implicated, community rights are also violated when WARN Act notice is not provided. The Act requires notice to be provided not only to workers but also to state and local government officials. Developed in partnership with the United States Department of Labor, state rapid response programs are charged with assisting dislocated workers. Rapid response workers require advance notification to establish programs and outreach not only to individual workers but also to mitigate the effects of large scale job loss on the larger community.

Notice is often not provided to state and local government officials through loopholes in the Act which allow employers to simply provide workers with 60 days pay in lieu of notice and which allow employers to often compel workers to sign release forms at the time of discharge. When this occurs, state workers and local officials are

compromised in their ability to implement and provide effective transition strategies for the entire community of persons affected by a mass layoff or worksite closing. The Act should be strengthened by allowing the U.S. Department of Labor and state officials to bring suit on behalf of affected workers.

Permitting suit by federal and state attorneys on behalf of workers whose rights are violated serves a number of additional important functions. First, such suits send a strong message to recalcitrant employers that the government itself has an interest in and the will to act to protect workers rights. Second, government lawsuits attract heightened media exposure that is rarely duplicated by private lawsuits. Both functions create additional deterrent effects which private lawsuits alone have difficulty achieving.

Third, government attorneys can often bring lawsuits in cases where the economics of the case may prohibit obtaining representation through the private bar. In a WARN Act case, a private law firm must generate awards large enough to compensate the injured workers and pay for the attorney's costs and for their time spent prosecuting the case. Circumstances often prevent the involvement of private attorneys, even in cases where WARN Act rights have clearly been violated. A worksite closing in Georgia provides an example.

Late last year, our offices were contacted by workers from a health care facility in Macon, Georgia. The facility closed facilities affecting 180 workers; however approximately 30 workers received late notice, while the remaining workers received timely notice. Despite the violation of the 30 workers' right to advance notification, the potential damages award, reduced by the amount of notice the workers received, is unlikely to cover the time and expense of a private attorney and still result in a

meaningful award to the workers. Amendments to the WARN Act to provide increased damage awards and to provide for lawsuits by state officials could provide a remedy to future workers who find themselves in similar circumstances.

The WARN Act should be reformed to provide fair compensation to injured workers and to provide an effective deterrence to bad faith employers. In this way, the Act's compliance deficits can be addressed by amendments that: 1) permit a full range of compensatory damages to workers; 2) provide for parent corporation liability; 3) that provide personal liability for directors, officers, or corporate managers who acted intentionally or reckless disregard of employee's rights; 4) require violators to pay double back pay and benefits; 5) eliminate the discretion of courts to reduce awards for 'good faith' violations; 6) require that attorneys' fees shall be awarded to prevailing workers; 7) provide for punitive damages against employers who intentionally or recklessly violate the Act; 8) permit the U.S. Department of Labor and state officials to bring suit on behalf of affected workers; and 9) allow the U.S. Department of Labor and state and local officials to seek injunctive relief to prevent a mass layoff or worksite closure when advance notification was not provided and when the action will have significant detrimental impact on the local economy and the provision of government services.

4. ELIMINATE COMPELLED WAIVER OF EMPLOYER'S RIGHT TO ADVANCE NOTICE.

The compliance gap is further explained by employer practices such as requiring employees to sign waivers of claims forms at the time of job separation and by offsetting severance payments against potential damage awards.

Workers who did not receive advance notification and are facing a sudden loss of employment are often confronted with an employer's express or implied offer to immediately pay their last paycheck, promise to act as a reference on future job applications, and/or a small severance. In exchange, the worker is required to sign a release of claims forms at the time they are laid off or within a couple days thereafter. Our Law Center has received innumerable inquiries where employees have been informed of their layoff and, at the same meeting, are presented with and directed to sign a release of claims form.

Under such circumstances, the release is signed under the duress of sudden job loss and the need for immediate income and is signed long before workers become aware of their rights under the Act.

The Act should be amended to provide that: 1) workers' WARN Act rights cannot be waived before or during the advance notification period that was required unless they receive payment that meets or exceeds the amount of damages to which the worker was otherwise entitled; 2) a worker's acceptance of severance payments for less than the value of the employer's liability for violating the WARN Act cannot be used to offset any portion of a WARN Act damages award; 3) an employee's waiver of claims or acceptance of any severance payment does not absolve or mitigate an employer's obligation to provide notice to government officials; and 4) an employee's waiver of claims or acceptance of any severance payment does not absolve or mitigate an employer's liability in an action brought by government officials for injunctive relief or civil penalties.

5. ESTABLISH A UNIFORM STATUTES OF LIMITATIONS PERIOD.

Uncertainty also exists under the Act regarding the time limitations for workers to bring suit and regarding the calculation of damages. Presently, the Act does not contain a statute of limitations clause stating the time by which workers must bring suit. As a result of this omission, the Supreme Court in *North Star Steel v. Thomas,* 515 U.S. 29, 115 S. Ct. 1927 (1995) held that the applicable statutes of limitation in a WARN Act lawsuit is calculated on a case-by-case basis. In each case, the court where the case was filed determines applies the statute of limitations of the most closely analogous state law claims existing in the state where the lawsuit was filed. This results in significant uncertainty for workers in determining the time by which WARN Act rights must be asserted.

For example, workers asserting WARN Act claims in Vermont have been found subject to a six year statute of limitations period[26] and workers in Colorado have been found subject to a three year statute of limitation period[27] while workers in Mississippi have been found subject to a one year statute of limitation.[28] Notably, workers and advocates in most jurisdictions have no case law from which to determine a limitations period and as a result, must evaluate and assert claims uninformed what limitations period will apply. ***This uncertainty could be eliminated by a simple provision providing for a three year statute of limitations.***

[26] *United Paperworkers Intern. Union and Its Local 340 v. Specialty Paperboard, Inc.*, 999 F.2d 51 (1993)
[27] *Frymire v. Apex*, 61 F.3d 757 (1995).

[28] *Brewer v. American Power Source, Inc.,* 517 F. Supp.2d 881 (2007).

V. CONCLUSION.

Large scale job loss exacts potentially devastating effects upon workers, their families and their communities. Mass layoffs and worksite closings can result in lost income, incredible personal stress, and the breakup of families. The effects also extend beyond workers and their families and can lead to a ripple effect of business closings and deteriorating neighborhoods. Effective government regulation is needed to prevent these results. The WARN Act is one component of a web of protection guaranteeing our citizen's human right to social security and social protection when job loss occurs.

WARN Act reform however is long overdue. Gaps in protection, ambiguities in the statute's text, and sometimes massive loopholes result in too few workers being covered by the Act's protections and result in too little compliance by employers. Advance notification is not required in 75% the nation's annual mass layoffs and worksite closings and even when advance notification is required, 64% of employers do not provide such notice.

In the face of economic instability, workers deserve a fair opportunity to plan a future for their families and to avoid financial catastrophe. WARN Act coverage and compliance deficiencies can and must be improved by amendments to the statute. The Sugar Law Center recommends and proposes amendments that will close these deficiencies and that will further the intended goals of the statute. We recommend amendments to:

1) ***Provide advance notice of 120 days and to provide longer tiered notification periods when mass layoffs occur or worksites close as the***

result of worksite relocations and reasons related to facility or product obsolescence;

2) ***Eliminate the 100 full time employee threshold, reduce the number to 50, or include part-time and contingent workers in the number of employees to be counted to meet the threshold;***

3) ***Reducing the number of affected employees threshold to 25 workers for both mass layoffs and worksite closures;***

4) ***Aggregate the number of affected employees to include not only those at the principal site but also those at other sites whose jobs are lost as a foreseeable result of the downsizing at the principal site;***

5) ***Eliminate the mass layoff threshold requirement that the number of affected employees equal or exceed 33% of the full-time workforce at the site;***

6) ***Increase from 90 to 180 days the time period for aggregating the number of affected workers in a series of smaller layoffs;***

7) ***Define loss of employment to have occurred after an employee has been laid off for over 2 months rather than the 6 months presently required by the statute;***

8) ***Permit for a full range of compensatory damages to workers;***

9) ***Provide for parent corporation liability when subsidiaries become insolvent;***

10) ***Provide for personal liability of directors, officers, or corporate managers who are found to have acted intentionally or in reckless disregard of employee's rights;***

11) ***Require violators to pay double back pay and benefits;***

13) ***Eliminate the discretion of courts to reduce awards for 'good faith' violation of the Act;***

14) ***Require that attorneys' fees shall be awarded to prevailing workers;***

15) ***Provide for punitive damages against employers who intentionally or recklessly violate the Act;***

16) ***Permit the U.S. Department of Labor and state officials to bring suit on behalf of affected workers;***

17) ***Allow the U.S. Department of labor and state and local officials to seek injunctive relief to prevent a mass layoff or worksite closure when advance notification was not provided and when the action will have significant detrimental impact on the local economy and the provision of government services;***

18) ***State that WARN Act rights cannot be waived before or during the advance notification period that was required unless workers receive payment that meets or exceeds the amount of damages to which the worker was entitled under the Act;***

19) ***Provide that a workers acceptance of severance payments for less than the value of the employer's liability for violating the WARN Act cannot be used to offset any portion of a WARN Act damages award;***

20) Provide that an employee's waiver of claims or acceptance of any severance payment does not absolve or mitigate an employer's obligation to provide notice to government officials;

21) Provide that an employee's waiver of claims or acceptance of any severance payment does not absolve or mitigate an employer's liability in an action brought by government officials for injunctive relief or civil penalties; and

22) Provide a uniform three year statute of limitations for claims by workers and government officials.