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

HEARING

OF THE

COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS

UNITED STATES SENATE

ONE HUNDRED TENTH CONGRESS

SECOND SESSION

ON

EXAMINING PLANT CLOSINGS, FOCUSING ON WORKERS' RIGHTS AND THE WORKER ADJUSTMENT AND RETRAINING NOTIFICATION (WARN) (PUBLIC LAW 100–379) ACT'S 20TH ANNIVERSARY

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C O N T E N T S

STATEMENTS

TUESDAY, MAY 20, 2008

ADDITIONAL MATERIAL

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

TUESDAY, MAY 20, 2008

U.S. SENATE,
COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS,
Washington, DC.

The committee met, pursuant to notice, at 10:06 a.m. in room SDC–430, Dirksen Senate Office Building, Hon. Sherrod Brown, presiding.

Present: Senator Brown.

OPENING STATEMENT OF SENATOR BROWN

Senator BROWN. The Health, Education, Labor, and Pensions Committee will come to order. Thank you very much for joining us today.

I want to thank Senator Kennedy for holding this important and timely hearing. The Chairman is in our thoughts. I hope he will soon be back wielding this gavel.

I would add that I did my part after Senator Kennedy went to the hospital. My Cleveland Cavaliers laid down for the Celtics in game seven so that Senator Kennedy could enjoy that his first evening in the hospital. Then he got to watch a no-hitter last night. So I think he is doing OK.

I want to thank all four of our witnesses for coming this morning and sharing your experience and expertise on this very important issue of plant closings and the success and the failures of the WARN Act, which Congress saw fit to pass some 20 years ago. The WARN statute, as we know, was a product of compromise. The origins of this law go back to the 1970s and the 1980s with the closings of several large steel mills and the stress that followed in communities like Youngstown, Toledo and Pittsburgh.

Residents of these communities began to explore ideas about how to deal with the human and social consequences of these employer decisions. It gave way to a debate about the relationship between a company and its community.

Lawmakers proposed bills to address these issues. Along with Senator Kennedy, Senator Howard Metzenbaum of Ohio, in whose seat I sit, raised the issue and fought tirelessly for a Federal response. He and his colleagues had broader ambitions for what eventually became the WARN Act.

Earlier proposals required businesses to give notice up to 180 days before a plant closing or mass layoff, depending on the number of employees affected and to consult with employee representa-

tives and local officials about ways to prevent the loss of jobs. Senator Metzenbaum and other proponents conceded much of what they sought in order to get some protections on the books.

WARN then became part of the Omnibus Trade and Competitiveness Act of 1988. As revised, the bill required 60 days' advance notice of plant closings or mass layoffs. Employers with 100 or more employees were covered. Most employee losses affecting 50 or more employees were subject to the notice requirement. There were exemptions and exceptions for sales of businesses, for unforeseen business circumstances, for faltering businesses seeking capital or new customers.

The trade bill was then vetoed by President Reagan because of the plant closings provisions. Anti-WARN lobbyists argued that advance notice could increase economic inefficiency due to possible loss of customers, credit, and employees as well as to increase friction in labor and management relations.

Two decades of experience with WARN, however, have not produced the devastating results that industry and business feared. In addition, WARN has not played a significant role in labor law litigation and has survived a constitutional challenge when the 5th Circuit held that WARN was rationally related to congressional concern over the economic harm caused by plant closings.

Shortly after the veto, Senator Metzenbaum introduced the measure on its own. He said that this is an indication of the American people's fairness and their concern and their compassion and their willingness to treat workers, who have given of their bodies and themselves over a period of years, to at least give them notice when the plant is closing. After several days of debate, the Senate approved the bill on July 6—20 years ago—1988. The House passed it a week later. The WARN Act became law on August 4, 1988, without the President's signature.

Over the past two decades, we have seen evidence that WARN does not cover enough layoffs as intended and that due to the enforcement only by the courts, employers have too often failed to provide notice. Rather than the employers' fear of too much, we have seen too little.

The Government Accountability Office found that less than one-third of mass layoffs are even covered by the WARN Act because of the act's many loopholes. Most employers who are covered fail to comply with the law either out of ignorance or because the penalties and enforcement are so weak that they can, in fact, be ignored.

With these shortfalls in the plant closings law, we have also seen our manufacturing base decline in the last 20 years. With the passage of NAFTA and other trade deals and an increase in the number of jobs off-shored, there is now hardly any sector of the economy immune from the effects of globalization. With these realities, I have seen inadequacies of WARN play out in Ohio and elsewhere over the past 20 years.

About 15 years ago, a sheet metal manufacturer in Delphos, OH, gave workers 30-minute notice. Many of these workers had been with the company for more than 10 years. Workers at National Machinery in Tiffin, also in northwest Ohio, filed a WARN lawsuit after employers announced mass layoffs with no notice. The com-

pany claimed it was seeking new financing when it laid off hundreds of workers.

Workers filed a lawsuit. Eventually, a judge approved a settlement that paid $375 to each worker for the violation. That kind of settlement hardly deters that kind of corporate behavior.

The Toledo Blade examined some 226 WARN lawsuits filed since 1989 by workers and found Federal judges dismissed 118 of the cases because of loopholes. This is a disturbing trend that illustrates problems with the law and suggests that it needs a fix. Employers simply choose not to comply with the law, and the majority of violations go unenforced. I look forward to hearing discussion about these inadequacies of the WARN Act.

Last July, along with Senator Obama and Senator Clinton, I introduced the Forewarn Act, which makes modest adjustments to the existing statute. Forewarn lengthens the notification period from 60 to 90 days. It covers plant closings affecting 25 workers and mass layoffs of 100 workers or more. Finally, it authorizes the Labor Department and the State attorneys general to investigate violations and file WARN cases on behalf of workers in those jurisdictions.

Even since last July, downward trends in the economy have accelerated. Most recent Labor Department figures show 20,000 more jobs eliminated in April, 260,000 this year already. With major changes in the U.S. economy over the last two decades, sudden plant closings and major layoffs have spread from manufacturing and factories to office parks and service sector jobs.

I am hopeful this discussion today will serve as a springboard for action on WARN and other policies. The public demands it.

Again, I want to thank all four of our witnesses for joining us. I will introduce each of you before you speak and look forward to your testimony. Keep your statements within 5 to 7 minutes, if you can.

Mr. Aguiar, Senator Kerry was going to be here to introduce you but got stuck back in Boston today. So he isn't going to make it but sends his regards and wanted to be here with you.

I will start with Richard Trumka, who was elected to a fourth term as secretary-treasurer of the AFL–CIO in July 2005. First elected in 1995, he was the youngest secretary-treasurer in AFL history. He served three terms as president of the Mine Workers, of which he has been a member since he was 19 years old. He is a graduate of Penn State University, holds a law degree from Villa Nova law school.

Mr. Trumka.

STATEMENT OF RICHARD L. TRUMKA, SECRETARY-TREASURER, AFL–CIO, WASHINGTON, DC

Mr. TRUMKA. Thanks, Senator. Thank you for inviting me to testify this morning on behalf of the 10 million working men and women of the AFL–CIO. I also want to thank you personally for your deep commitment to the issues that are important to America's working families.

A little more than 2 months from now, on August 4, 2008, we will celebrate the 20th anniversary of the WARN Act. So this is a very appropriate time to reflect on its successes and failures in

dealing with the human tragedy of plant closures and mass layoffs and, specifically, the issue of advance notice for workers.

As you have noted, the WARN Act was born out of the cataclysmic loss of manufacturing jobs in the 1980s. Since then, the wave of plant closings and off-shoring buffeting our economy has not subsided but has only gotten worse. Now the plague of mass layoffs has spread to the service sector as well.

Unless you have lived through one of these experiences, you really can't understand how traumatic and how often life-changing they can be for working families and their communities. As I have testified previously, the AFL–CIO believes a fundamental rethinking of our economic policies is essential to create an environment where fewer plant closures and mass layoffs occur.

With regard to the WARN Act, there is no question that it has resulted in more workers getting advance notice before losing their jobs. In addition, I think we can all agree that WARN has not had the dire consequences predicted by its opponents in 1988 and has not resulted in a flood of litigation.

But by any fair assessment, WARN has not lived up to its promises. It has certainly not lived up to the hopes of those of us in the labor movement who, beginning in the 1970s, fought to develop a more comprehensive and coherent strategy for dealing with plant closings and mass layoffs.

The compromise legislation passed by Congress in 1988 was by no means a comprehensive strategy. It was a relatively modest measure, requiring certain employers to give only 2 months' notice before plant closings and mass layoffs. Many of the WARN Act's flaws were readily apparent on its day of enactment, as you noted, since they were the result of numerous concessions necessary to get it passed.

Mr. Chairman, the shortcomings of WARN can boil down to this. The act requires too few employers to give too little notice to too few workers, and it allows too many employers to flout the law with impunity. While WARN has not been substantively amended in 20 years, several bills have been introduced by Congress to correct some of the most widely recognized defects.

One of those you mentioned just now, the Forewarn Act by yourself, Senator Obama, and Senator Clinton. Another is the Early Warning and Healthcare for Workers Affected by Globalization Act, introduced last October by Representative George Miller and approved by the House on October 31, 2007.

The AFL–CIO strongly supports both of those bills. Both bills would do the following. They would require businesses to provide 3 months' advance notice instead of 2, subject more businesses to WARN Act notice requirements, subject more mass layoffs to WARN notice requirements, subject more plant closings to the notice requirements, increase penalties to deter employer noncompliance with the notice requirements, authorize the Department of Labor to bring enforcement suits on behalf of workers, and close various loopholes that allow employers to avoid giving advance notice.

Now, while these bills represent tremendous progress, we truly believe that they could be improved by requiring 6 months of advance notice instead of 3. You see, the AFL–CIO has long believed

that a longer notice period would better serve the purposes of the act. One purpose of the advance notice is to give State and local governments time to prepare effective services for displaced workers and to develop strategies for responding to sudden loss of jobs and tax revenue.

Another purpose of early warning is to give workers time to prepare themselves financially, to pursue education and retraining opportunity, and to search for other employment.

The third purpose of early warning is to give workers and local governments an opportunity to actually avoid job losses in situations where they can be avoided.

While WARN Act reform is urgently needed, it should be accompanied by a greater commitment at the State and Federal level to taking advantage of the advance notice period to organize early intervention and job loss avoidance initiatives. Several States have already implemented effective early warning and early intervention programs that have saved thousands of jobs and helped maintain employment at manufacturing firms. The leadership by the Federal Government is desperately needed to support and encourage these programs.

Advance notice and early intervention are ultimately about maintaining the living standards of America's middle class. Despite large numbers of laid-off workers—dumping large numbers of laid-off workers into flooded job markets without any warning is a recipe for declining living standards and desperate workers to compete to secure bad-paying jobs.

Advance notice, on the other hand, can allow governments to put in place effective assistance programs that make it more likely that workers will find relatively good-paying jobs more quickly without suffering unemployment. In some instances, advance notice may allow enough time for workers and their communities to actually develop strategies to avoid the loss of good-paying jobs in the first place.

We see advance notice and early intervention programs as complementary parts of a much-needed comprehensive strategy to save good jobs and maintain the living standards of the American middle class.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Trumka follows:]

PREPARED STATEMENT OF RICHARD L. TRUMKA

Thank you, Senator Brown and members of the committee, for inviting me to testify this morning on "Plant Closings, Workers' Rights, and the 20th Anniversary of the Worker Adjustment and Retraining Notification (WARN) Act of 1988."

On behalf of the 10 million working men and women of the AFL–CIO, I also want to thank you personally, Senator Brown, for your deep commitment to this and many other issues important to America's working families.

A little more than 2 months from now—on August 4, 2008—we will celebrate the 20th anniversary of the WARN Act. This is an appropriate time to reflect on our successes and failures in dealing with the human tragedy of plant closures and mass layoffs, and specifically the issue of advance notification for workers.

The WARN Act was born out of the cataclysmic loss of manufacturing jobs in the 1980s. Since then, the wave of plant closings and off-shoring buffeting our economy has not subsided, but has only gotten worse. Since 1998, America has lost 3.6 million manufacturing jobs, and since 2000 more than 40,000 manufacturing establishments have closed their doors. Now the plague of mass layoffs has spread to the service sector as well.

Mass layoffs continue at a pace of a million-and-a-half impacted workers every year, and almost half a million workers have been idled by mass layoffs already in the first 3 months of 2008. Long-term unemployment is far higher today than at the beginning of previous recessions, and has persisted at high levels throughout the most recent economic recovery. And we know that displaced workers suffer an average income loss of about 16 percent when they find a new job.

Unless you have lived through one of these experiences, you really cannot understand how traumatic—and often life-changing—they can be for working families and their communities. As I have testified previously, the AFL–CIO believes a fundamental rethinking of our economic policies is essential to create an environment where fewer plant closures and mass layoffs occur.

With regard to the WARN Act, there is no question that it has resulted in more workers getting advance notice before losing their jobs. In addition, I think we can all agree that WARN has not had the dire consequences predicted by its opponents in 1988, and has not resulted in a flood of litigation.

But by any fair assessment, WARN has not lived up to its promise. It has certainly not lived up to the hopes of those of us in the labor movement who, beginning in the 1970s, fought to develop a more comprehensive and coherent strategy for dealing with plant closings and mass layoffs.

The compromise legislation passed by Congress in 1988 was by no means a comprehensive strategy. It was a relatively modest measure requiring certain employers to give only 2 months' notice before plant closings and mass layoffs. Many of the WARN Act's flaws were readily apparent on the day of its enactment, since they were the result of concessions necessary to secure its enactment.

Those flaws were recognized in reports issued by the General Accounting Office (GAO) in 1993 and 2003, and they were detailed by the AFL–CIO in testimony to Congress in March 2003. The shortcomings of WARN boil down to this: the act requires too few employers to give too little notice to too few workers, and it allows too many employers to flout the law with impunity.

In its first appraisal of the new law in 1993, GAO concluded that workers were more likely to get advance notice of plant closings and mass layoffs thanks to passage of the WARN Act. About half of all covered businesses that shut down plants or had mass layoffs were not required to give WARN notices, however, and only about half of those required to give notice actually did so.

On March 5, 1993, the AFL–CIO took note of GAO's findings in a statement submitted to the Senate Labor Subcommittee. The AFL–CIO proposed lengthening the WARN Act's advance notification period; subjecting more mass layoffs to WARN Act notice requirements; subjecting more employers to notice requirements; strengthening penalties to discourage employer non-compliance; giving the Department of Labor (DOL) an enforcement role similar to its authority under the Fair Labor Standards Act; and closing various loopholes.

In 2003, GAO issued a second report further documenting the shortcomings of WARN. GAO found that only about a quarter of plant closures and layoffs were subject to WARN Act notice requirements in 2001, leaving over a million laid-off workers unprotected by the statute, and employers gave notice for only about a third of the plant closures and mass layoffs subject to WARN.

Then in July 2007, the Toledo Blade newspaper published a four-part investigation into the WARN Act, and concluded:

> A Federal law that requires companies to give notice to workers losing their jobs is so full of loopholes and flaws that employers repeatedly skirt it with little or no penalty, a Blade investigation has found.

The Blade reviewed all of the lawsuits filed under the WARN Act since 1989, and concluded:

> A Blade analysis of 226 lawsuits filed in Federal courts across the country since 1989 revealed that judges threw out more than half the cases. In the majority of those decisions, judges cited loopholes in the law, ranging from companies that said they tried their best to give notice to employees to firms that claimed they could not predict bad financial times. In 108 cases, WARN Act lawsuits resulted in settlements or with the courts siding with the displaced workers. But in dozens of those cases, workers received only pennies on the dollar of what they felt they were owed.

While the WARN Act has not been substantively amended in 20 years, several bills have been introduced in this Congress to correct some of its most widely recognized defects. One of those bills is the FOREWARN Act (S. 1792), introduced last July by Senators Brown, Obama, and Clinton. Another is the "Early Warning and Health Care for Workers Affected by Globalization Act" (H.R. 3796), introduced last

October by Rep. George Miller and approved by the House of Representatives on October 31, 2007. The AFL–CIO strongly supports both bills.

The Brown and Miller bills would both do the following: (1) require businesses to provide 3 months' advance notice instead of 2; (2) subject more businesses to WARN Act notice requirements; (3) subject more mass layoffs to WARN Act notice requirements; (4) subject more plant closings to the notice requirements; (5) increase penalties to deter employer non-compliance with the notice requirements; (6) authorize the Labor Department to bring enforcement suits on behalf of workers; and (7) close various loopholes that allow employers to avoid giving advance notice.

While both these bills represent tremendous progress, we believe they could be improved by requiring 6 months of advance notice instead of 3. At minimum, a 6-month notice period should be required for plant closures and mass layoffs that affect larger numbers of workers.

The AFL–CIO has long believed that a longer notice period would better serve the purposes of the act. One of the principal purposes of early warning is to give State and local governments time to prepare effective services for displaced workers and develop strategies for responding to the sudden loss of jobs and tax revenue. The earlier that notice is given, the more effective assistance programs can be in getting workers back to work more quickly at better wages.

Another purpose of early warning is to give workers time to prepare themselves financially, to pursue education and retraining opportunities, and to search for other employment. Dislocated workers who receive advance notice and early adjustment assistance are more likely to be successfully retrained, and they get new jobs sooner and earn more than they would have without early intervention. Early warning increases the likelihood that employees can find work prior to being laid off, thus avoiding unemployment spells.

The legislative compromise that resulted in only 2 months' advance notice detracted from the purposes of early warning. Two months is generally not enough time to ensure that government assistance and resources are available to workers before they lose their jobs. Two months is often not enough time for workers to make the preparations necessary to be successfully retrained, or find good jobs quickly and avoid unemployment. Two months is definitely not enough time to serve the third purpose of early warning: to give workers and local governments an opportunity to avoid job losses in situations where they can be avoided.

We should remember that early plant closure legislation prescribed more comprehensive strategies that gave workers and communities an opportunity to avoid job loss in the first place. These early proposals required employers to consult in advance with local governments and employee representatives. They required employers to provide relevant financial information (such as financial statements and relocation plans) to local governments and employee representatives seeking alternatives to plant closures and layoffs. They provided for technical and financial assistance to troubled firms and affected communities. They required 6 months' (or more) advance notice so that these efforts would have time to bear fruit.

While extending the WARN Act's notice requirement to 6 months would allow the necessary time for early intervention and job loss avoidance initiatives, reform of the WARN Act should also be accompanied by a greater commitment at the State and Federal level to taking advantage of the advance notice period to organize these initiatives.

Several States have already implemented effective early warning and early intervention programs that have saved thousands of jobs and helped maintain employment at manufacturing firms. In Pennsylvania, for example, the Strategic Early Warning Network of the Steel Valley Authority has worked with more than 450 companies to save millions of dollars in wages and taxes that otherwise would have been lost to plant closings.

Leadership by the Federal Government is desperately needed to support early warning and early intervention programs. The dire fiscal situation of many States precludes adequate funding on the necessary scale at the State level. We believe the Federal Government could play a critical role in coordinating and encouraging these programs.

Advance notice and early intervention are ultimately about maintaining the living standards of the American middle class. Dumping large numbers of laid-off workers into flooded job markets without any warning is a recipe for declining living standards, as desperate workers compete to secure bad-paying jobs that may actually harm their long-term earnings potential.

Advance notice, on the other hand, can allow governments to put in place effective assistance programs that make it more likely that workers will find relatively good-paying jobs more quickly without suffering unemployment. In some instances, ad-

vance notice may allow enough time for workers and their communities to develop strategies to avoid the loss of good jobs in the first place.

Obviously, good jobs cannot be saved in every instance. But in those instances where they can be saved, it can hardly be argued that the Federal Government is doing everything it can to save them.

We see advance notice and early intervention programs as complementary parts of a much-needed comprehensive strategy to save good jobs and maintain the living standards of the American middle class. I thank you for your attention, and I look forward to your questions.

Senator BROWN. Thank you, Mr. Trumka.

Joe Aguiar is from Fall River, MA. He worked in the fabrics and textile industry for nearly 30 years. His first job was cutting fabrics for a curtain manufacturer. In 1980, he went to work for Quaker Fabrics, at that time the largest employer in Fall River and one of the largest fabric manufacturers in the world.

Mr. Aguiar began as a production worker and eventually worked in maintenance. He met his first wife at Quaker Fabrics, and they have a 25-year-old son. He and his second wife have three more sons, age 18, 14, and 8. Mr. Aguiar became a U.S. citizen in 1986, owns his home, and is the youngest of five siblings all living in Fall River.

After almost 27 years of employment with Quaker, the company without notice terminated Mr. Aguiar and all 900 of his fellow employees on July 2, 2007.

Mr. Aguiar, welcome and thank you for being here.

STATEMENT OF JOE AGUIAR, LAID-OFF WORKER, FALL RIVER, MA

Mr. AGUIAR. Thank you very much, and I want to thank you and all the members for inviting me to be here today.

That is all true what you just said and—OK, I am sorry. I am not used to these things. All right? Now you can hear me. All right, I will start all over again.

When I was 17 years old, I came to this country. Three years later, I start working for Quaker Fabrics, one of the biggest companies in Fall River, MA, and worked there for 27 years. Like you said, I married first time, met my wife there, second wife there. I have got three kids now. One of them is here, the 18-year-old back here.

What happened is that on June 29, we went on shutdown. The company shut down, and everybody goes on shutdown, but us maintenance work those 2 weeks. What happened is, I went to work that Monday morning, worked all day, went home at 3 o'clock. At a quarter of six, I get a phone call from my supervisor telling me, "Joe, don't come back to work tomorrow."

That is what happened to me and about 900 other employees. At that time, the company used to—about 3,000 people used to work for that company. Through all these years, that number started coming down, down, down. At that time, there was about 900 people there.

I am a little bit nervous, but I will be all right. This is my first time doing these things. So, to tell you the truth, most of those people that went on shutdown, some of them went to Portugal. Some of them went to Florida, Canada, or wherever, and they didn't know anything until they came back.

The other ones that were here heard on the radio or newspaper and some of them I called because my boss told me to. If I knew any phone numbers, yes, I called some of them.

Like I said, they didn't tell us anything about that they were going to close. We noticed that they were not doing too good. They keep saying that we lost so much this quarter, that quarter. But especially me, I never thought that place was going to close, and I was shocked. It was a big shock for me.

Here I am now, almost 1 year later, still without a job. Good thing that we have this company over there that is called TRA that gave us some training, that we can go to school for like 1 year, and we get pay and get free insurance. But when that is done, we have got to find a job.

I will tell you right now, the school that I am at, we have over 300 people and all the same way as I am, you know? After this is over, we don't know what is going to happen.

I think that we deserve to get something from the company or whoever owns that, the bankruptcy or whatever, because they were supposed to give us at least 60 days' notice before they were going to do anything like that, and nothing like that happened.

Right now, I am collecting some money, not much. But I have got this part-time job at that company. Because some company in Massachusetts bought all the junk, steel, all the machines, and is making money out of that. We are working there part-time. When I got there the first day, like 4 weeks ago, that I know how that place was and I look at that, it is like a dump.

All the machinery is all in skids, most of them have already been shipped to China, India, South Carolina, you name it. They are shipping everything overseas, and it is bad.

Me and my wife, who used to work there, my wife worked there for 18 years. I worked there for 27. Now my wife is sick. She has filed a disability. She has got problems with her back. Here I am living on 300-some dollars a week. Me and her, we used to make around $65,000 annually. I will be making around $18,000 now. How can you live with something like that?

I go everywhere. I put applications everywhere in Massachusetts. There is not much jobs over there. So it is very bad. So I am just hoping that at least we get some help, me and all the other 900 co-workers, see what they can do to help us.

Thank you very much.

[The prepared statement of Mr. Aguiar follows:]

PREPARED STATEMENT OF JOE AGUIAR

Chairman Brown and members of the committee, thank you for this opportunity to testify today about the shutdown of what was once the largest employer in Fall River, MA, Quaker Fabric. I worked for the company for nearly 27 years. Last year, over the July 4 holiday, Quaker Fabric shut its doors, terminating me and my 900 fellow employees without giving us any prior notice.

My name is Joe Aguiar and I was born in 1960 in the Azores islands of Portugal to a family of farmers. I remained in school through the fifth grade and came to the United States at the age of 17 to live with my older sister in Fall River, MA, where I still reside today. My first job in Fall River was cutting fabric for a curtain manufacturer. In 1980, I went to work for Quaker Fabric Corporation. At one time, Quaker Fabric was one of the largest manufacturers of Jacquard upholstery fabric in the world. I began at Quaker as a production worker and eventually moved to the maintenance department, where I worked until I was let go last year.

I met my first wife at Quaker Fabric and we have a son who is now 25 years old. I re-married and am raising three more sons, ages 18, 14 and 8, all of whom are students and live at home. My 18-year-old son is here with me today.

I am the youngest of five siblings. We all live in Fall River. My wife and I own our own home. I became a U.S. citizen in 1986.

When I began working for Quaker Fabric in 1980 the company had only a few hundred employees. I met my wife at the factory, and she worked there for nearly 18 years. In many other families, both the husband and wife met at Quaker Fabric and worked there for many years. Many Quaker employees worked there more than 20 years, like I did.

When I went to work on Monday, July 2, 2007, I had no idea it was to be my final day at work. I was one of the few on site that day. Quaker always closed the first 2 weeks of July for vacation. Most of my fellow co-workers were away in Portugal, Florida, Canada and elsewhere. Because my job was maintenance, I worked through the vacation period. That Monday, I worked my regular shift from 7 a.m. to 3 p.m., then went home. That evening, I received a call from my supervisor. He told me not to return to work the next day; the company had closed. I was shocked. My supervisor asked if I had the phone numbers of other maintenance employees and if so, would I contact them that evening and tell them the company had closed and that they should not report to work the next day. I phoned several of my co-workers and told them what little I knew. They were in disbelief, as was I. Of course, I could not tell them why the company had closed because I did not know myself, nor apparently did my supervisor. Many of the employees who were in Fall River learned of the shutdown from the television and local AM radio station the next day, or from word of mouth from family or friends. But most of my co-workers, who were away, first found out days later when they came back from their vacations that they had no job.

When I woke up the next day, on July 3, I still could not believe what I had heard. I had to see it with my own eyes. I thought someone would reopen the company. I drove to the building where I worked and saw the factory gates were padlocked with chains. Still, I did not give up hope.

About a week after the company closed, my former co-workers and I received a letter in the mail telling us what we already knew, that we had been terminated effective the prior week. The Worker Adjustment and Retraining Act, the WARN Act, was mentioned in that letter, but I had never heard of the law and was unaware that there was any law that protected employees like me who are terminated as part of a mass layoff or plant closing. Certainly, had I known 60 days prior that I would lose my job, I would have prepared myself for both the financial and emotional impact. I would have had a head start looking for a new job. I could have applied for the jobs that were advertised during those 60 days. I would have set money aside for my and my wife's unemployment. I would imagine most of my co-workers would have appreciated knowing before they spent lots of money visiting Portugal and other places for the holiday that their jobs were gone.

After the company closed, I spent the next several weeks firmly believing that it would re-open and I would be called back to work. I drove past the plant where I had reported for the last 17 of my 27 years at Quaker, looking for some signs of activity, but saw only the padlocked gate.

As my hopes vanished, I began actively looking for other employment. I have submitted applications to various factories in Fall River, but because so many of us are competing for the few jobs available I have not received a single job offer. Presently, I receive extended unemployment benefits and attend pre-GED classes provided by the Trade Adjustment Assistance program for dislocated workers. My wife attended these classes as well and received these benefits. Unfortunately, she suffered injuries while working at Quaker as an equipment operator lifting and carrying 15 lb. spools of yarn. She can not sit in class for the 5 hours a day required. She had to stop attending class and thereby lost her unemployment check and health benefits—extended unemployment income and medical coverage are tied to class attendance. Now she has mounting medical bills, and has applied for disability, but we are told the process is a long one.

What does a sudden job loss do to a family like mine? At this time last year, my family of five enjoyed a combined annual household income of $65,000. Now we are living on my check of $344 per week, less than $18,000 a year. My 18-year-old son works part-time while going to school, and contributes to the household expenses. We are just getting by.

I work a few hours a week to earn an additional $100 at the old Quaker Fabric factory buildings. I heard the company was sold for about $27 million and is now owned by a Canadian company called Victor Innovatex, Inc. Many of the factory buildings were sold and are still closed. I throw out the junk and debris left in build-

ings where I spent 27 years working. Not long ago, I saw that several older looms had been packed up and were being shipped out to a buyer in India. Recently, I saw many of the newer looms packed up and also being shipped away, perhaps to foreign countries, as well. Over the last few years that Quaker was in business, it imported a lot of the fabric it sold from China. The Chinese fabric came in through receiving and went out through shipping. We did not have to manufacture it. Roughly at the same time, Quaker Fabrics reduced the number of workers it employed from 3,000 to 900 mostly through layoffs. Then, on July 3, it went to zero.

Shortly after Quaker closed down, the employees were called to a meeting with a company official. She did not tell us why the company closed and did not say why we were provided no notice. We were told that our health insurance had been cancelled as of July 5, the day after the company shut down. And, because the company was no longer operating, we had to find medical insurance on our own. Without government retraining benefits I receive, my family and I would have no medical coverage. I expect my benefits will expire this October.

I reluctantly took on the role of the lead plaintiff, and later class representative, in a WARN Act lawsuit filed in the Delaware bankruptcy court on behalf of myself and the other former employees of Quaker Fabric. Our lawsuit was filed against the Quaker Fabric estate in September of last year. It took me a long time to find out anything about the WARN Act. I was not given any guidance about the WARN Act by the company or governmental officials. Months after the company closed, I learned that there is such a law that should have provided us advance notice of our job loss. I learned that in order to pursue my WARN rights I had to retain a private attorney, that there was no government agency that would enforce those rights on behalf of the employees. The law firm I retained is Outten & Golden in New York City. After the lawsuit was filed, members of the Outten & Golden firm came to Fall River. We held a meeting in a banquet hall. Almost 700 of the 900 terminated employees attended and learned about their rights under the WARN Act. Of course, all of us are most concerned about whether we will get any money from the company now that it is bankrupt.

At the meeting, my former co-workers expressed their gratitude to me for stepping forward and starting the lawsuit. Still, it has been a slow process and the outcome remains uncertain. In the end, the most we can hope to recover is 60 days wages and benefits. For many of us who spent 20 or more years of dedicated service to Quaker Fabrics, that is not much but it is something that will help us to live until we find jobs and can support ourselves again.

I, and many of the Quaker workers in Fall River, are unfamiliar with the laws such as the WARN Act. We now know that there are laws that can protect us. But the problem is who is going to explain them to us and fight for us? It is hard to find anyone. If the WARN Act were stronger, I think it would protect us better. There would be more help. And employers would know they have to give employees notice. So I am here today to tell you how much we appreciate the work that you are doing in the Congress to make the WARN Act stronger. We hope you succeed, so that we, and others like us, will be given more time to prepare before we lose our jobs. Employees should not be treated like the trash that I take from the empty Quaker factories and put out on the street.

Again, I, along with the 900 men and women who lost their jobs at Quaker Fabric, thank you for your interest in this issue.

Senator BROWN. I appreciate very much your being here, Mr. Aguiar, and speaking out. Thank you.

You didn't seem nervous. Thanks.

Mr. AGUIAR. I am nervous. You don't know me.

Senator BROWN. John Philo is an attorney with over 15 years' experience representing and advocating for workers and disenfranchised people. He has counseled and represented hundreds of workers in WARN Act matters and litigated in courts throughout the country on behalf of injured persons in employment, personal injury, and product liability matters.

Mr. Philo is also a former deputy director of Detroit city council's legal and policy staff, a graduate of St. Louis University School of Law and the McGill University Faculty of Law.

Mr. Philo, welcome.

STATEMENT OF JOHN C. PHILO, ESQ., LEGAL DIRECTOR, SUGAR LAW CENTER FOR ECONOMIC AND SOCIAL JUSTICE, DETROIT, MI

Mr. PHILO. Thank you.

I want to thank Chairman Kennedy, all the members of the committee, for convening this hearing and particularly thank you, Senator Sherrod Brown, and your office for inviting us to speak and being at the forefront of this issue.

I almost feel as though anything I am going to say pales in comparison to the real-world experience of workers like Mr. Aguiar. We see them too often, and we hope and trust that the work of the committee here can give some meaning to what we say here today.

I am the legal director of the Maurice and Jane Sugar Law Center for Economic and Social Justice. Sugar Law Center is a national nonprofit in Detroit. The central focus of our work is to provide support to workers concerning their WARN Act rights.

Through that work, our center has become a national clearinghouse and resource center on WARN Act issues. We believe that WARN Act reform is long overdue as a faltering economy results in mass job loss in more and more communities.

Our economic system provides virtually unlimited flexibility for employers to increase profits, limit losses, and plan a future for their companies by laying off workers. Our Government has structured this economic system to enhance this flexibility through trade laws that allow employers to relocate worksites with unprecedented global mobility, through tax systems that permit very tough competition for jobs among our Nation's States and cities, and through deregulation that has permitted business creativity but also allowed rampant corporate opportunism, and through a host of other measures.

While such measures have benefited some in our Nation, there are many others who directly bear the burden. There are hundreds of thousands of workers who are laid off each year in mass layoffs and worksite closings. Over the past year, our Nation has seen severely increased economic instability. In the first quarter of 2008, there were over 1,100 extended mass layoffs that resulted in job loss for approximately 190,000 workers.

Mass layoffs and worksite closures, however, are not a phenomena occurring only during recessions, but rather have become an inherent characteristic of our economy. Since 1996, we have seen well over 1,100 extended mass layoff events in nearly every quarter of every year. To ensure a fair future for our Nation's workers, we recommend the following actions.

First, the WARN Act should be amended to provide earlier notice to workers and State and local officials. Longer advance notice provides greater opportunities for workers to avoid unemployment and for government officials in local communities to explore opportunities for keeping worksites open and for developing stabilization plans.

When the WARN Act became law in the late 1980s, it took laid-off workers an average of 12 weeks to find a new job. At present, finding new employment takes approximately 5 months. So more advance notice is needed to prevent the consequences of sudden and devastating job loss.

The act should be amended to provide a minimum notification period of 16 weeks, but it should also be amended to further provide tiered notification that we see in other countries of up to 6 months, particularly when job losses result from long-planned business decisions such as the relocation of worksites.

In addition to expanding the notification period, the WARN Act's immediate goals are most effectively advanced by expanding the pool of workers entitled to the act's protections. In its 2003 report, the GAO found that over three quarters of mass layoffs and worksite closures were exempted from the act's notice requirements. The GAO statistics ultimately showed that more than 90 percent of America's workers who experience a mass layoff or worksite closing are unlikely to receive WARN Act notice for their job loss. This defeats the purpose of the existing legislation.

The pool of covered workers can be expanded by reform to reduce various thresholds that exist in the act. Most notably, the 100 full-time employee threshold should be reduced to 50 or amended to include part-time and contingent workers, which have become prevalent in American society and American business.

An advance notice should be required whenever a layoff of 25 or more workers occurs at a single site. The threshold issue is a critical issue for expanding coverage, and there are other important threshold reforms that we have detailed further in our written statement.

In addition to increasing the notification time and expanding coverage to more workers, the act should be reformed to close compliance gaps. The GAO's report found that employers only provided advance notice in approximately one-third of mass layoffs and worksite closings where notice was required. Even when advance notice was provided, many notices are untimely.

In workers' private lawsuits, very low allowable damages hinder courts' ability to provide an effective remedy to workers and to provide effective deterrence to bad faith employers. Compliance gaps can be closed by permitting recovery of a full range of compensatory damages or requiring violators to pay double back pay and benefits and to allow punitive damages against employers who intentionally violate the act or recklessly disregard the workers' rights under the act.

To protect the interests of both affected workers and larger communities, the act should be strengthened to allow the Department of Labor and State officials to bring suit on behalf of workers, to enforce civil penalties, and to seek injunctive relief to prevent a mass layoff or worksite closing when advance notice was not provided and has particularly devastating effects on that local community.

The act should be further amended to close massive loopholes that permit employers to compel employees to sign blanket release forms at the time of their job loss in exchange for a nominal severance package. These employer practices are unconscionable, and we see them regularly in our work. The act should be amended to render such releases void and without legal effect.

Other reform measures no less important than the ones I have spoken of are set forth further in our written statement.

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In closing, on behalf of the Sugar Law Center and the workers we represent, I would again like to thank the committee and you, Senator Brown, for the opportunity to speak. 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 wrongdoing, and other factors create an ongoing risk of mass job loss at worksites in every industry and in all regions of the country. A debt of fundamental fairness is long overdue to these workers who bear that risk, and WARN Act reform is one measure to begin to repay that debt.

Thank you.

[The prepared statement of Mr. Philo follows:]

PREPARED STATEMENT OF JOHN C. PHILO, ESQ.

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, MI. 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 instability. 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 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

[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.

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 1,100 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 percent 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.

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 1 year before issuing its report. The task force concluded that advance notice is an 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 30 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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[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).

[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.

> 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*. . . .
>
> 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 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 U.S. 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 percent of the time and when notice was provided, 25 percent 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 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 percent 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 percent of the mass layoffs and 46 percent of the worksite closures where WARN Act notification was required.[11] Even when advance notice was provided, 32 percent of the notices were untimely.[12]

As a result, timely advance notification is only being provided in 6 percent 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 percent 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 an 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 consequences of mass layoffs and worksite closures. WARN Act reform is one measure to begin to repay that debt.

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[5] Remarks of Senator Kennedy, 134 Cong. Rec. S. 8376 (June 22, 1988), *Legislative History*, 184.

[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.

*ERR14**ERR14*[9] Id.

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

[11] Id. at p. 10.

[12] Id. at p. 11.

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 timeframe 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 20 years, the length of time required to locate new employment has steadily increased.[14] Since the turn of the 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 percent of workers will be re-employed.[16]

In other words, when the act was initially passed the advance notice period provided continued employment during 66 percent of the time that it would take an average worker to find new work. Today, the advance notice period accounts for 44 percent 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

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[13] See Toshihiko Mukoyama and Ayşeül Sahin, *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.

[15] Id.

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

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 pre-feasibility study is necessary. The pre-feasibility study evaluates the likelihood of success of potential restructurings, buyouts and other initiatives. Experts generally find that once a decision is made to explore options for keeping a worksite open and funding is secured for a pre-feasibility study, 4 to 6 weeks is necessary for the study to be completed.[17] If viable, 6 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 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, decisionmakers 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 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 percent 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 percent 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

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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.

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

[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).

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 percent 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 and 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.

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 percent 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 Corporation in Daytona Beach, FL, 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 U.S. 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 percent of the site's workforce and thereby did not meet the 33 percent threshold. Within 2 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, CT. 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 to 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 percent 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 Permitting 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 be liable in the amount of 60 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 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 U.S. 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.

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[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 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 3 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 pre-empts 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.

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, GA. 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 in 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 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 6-year statute of limitations period[26] and workers in Colorado have been found subject to a 3-year statute of limitation period[27] while workers in Mississippi have been found subject to a 1-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 3-year statute of limitations.*

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 percent of the Nation's annual mass layoffs and worksite closings and even when advance notification is required, 64 percent 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 percent 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;

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[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).

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;
12. Eliminate the discretion of courts to reduce awards for "good faith" violation of the act;
13. Require that attorneys' fees shall be awarded to prevailing workers;
14. Provide for punitive damages against employers who intentionally or recklessly violate the act;
15. Permit the U.S. Department of Labor and State officials to bring suit on behalf of affected workers;
16. 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;
17. 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;
18. 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;
19. 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;
20. 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
21. Provide a uniform 3-year statute of limitations for claims by workers and government officials.

Senator BROWN. Thank you very much, Mr. Philo.

Stefan Jan Marculewicz is a principal in the firm's Baltimore office. Mr. Marculewicz's experience covers the representation of management and employers in all areas of labor and employment law.

Through his national and international practice, he helps large and small businesses resolve employment issues ranging from traditional labor law and collective bargaining, employee benefits litigation, international labor law, and labor and employment litigation, including claims currently resulting from the cessation of operations which arise under the WARN Act.

Mr. Marculewicz is currently a co-chair of the U.S. Chamber of Commerce International Labor Law Policy Subcommittee and an active member of the U.S. Council for International Business's Labor Policy Committee.

Welcome, Mr. Marculewicz.

STATEMENT OF STEFAN JAN MARCULEWICZ, ESQ., PRINCIPAL, MILES & STOCKBRIDGE, P.C., BALTIMORE, MD

Mr. MARCULEWICZ. Thank you, Senator.

On behalf of the employer community, I truly appreciate having this opportunity to testify before you on this important piece of legislation.

As you indicated, I am a principal in the law firm of Miles & Stockbridge in Baltimore, MD. We have offices throughout the State of Maryland as well as in Virginia. I represent a client base that is diverse. It is diverse both in industry, by size, and for many

of these clients that operate in different geographic parts of the country as well as internationally.

In addition to large multinational companies, I represent many small and mid-sized employers. The companies in these latter sectors serve important roles in the economy and provide a lot of jobs to a lot of people.

Over the nearly 15 years that I have practiced law, I have frequently been called upon to advise my clients about their obligations and responsibilities when they have had to reduce the size of their workforce, have made decisions to relocate a facility, or have been forced to cease operations altogether. Many of these situations require notification of workers, labor organizations, and government officials under the Worker Adjustment Retraining and Notification Act, the statute that is the subject of the proposed amendments you are considering today.

During the years of my practice of law, I have advised employers on virtually every aspect of the WARN Act and have represented companies in litigation when they have been sued for allegedly violating the statute as well. Throughout my representation of these companies, I have observed several common and recurring themes that appear when an employer confronts a situation that will result in the layoff of a large number of employees or facility closure.

These themes are as follows. First, no employer genuinely wants to have to lay off a large number of employees or close down facilities. Employers and employees make significant investments in the success of their place of employment. No one likes to see that investment lost, which is the inevitable result of a closure or significant downsizing. In short, it is a sign of failure because an employer cannot continue to operate at its present level or at its present location.

To enhance the punitive aspects of the WARN Act will more likely serve to add insult to injury than it will serve to meaningfully help those who are dislocated by the closure or the downsizing or to prevent job loss in the first place.

Second, employers want to comply with the WARN Act. It has been my experience that unless circumstances exist that are beyond control, employers want to provide their employees as much notification as is practicable prior to a layoff or facility closure. They want to do this not just because it is the law, but because it is right and fair.

The proposed amendments to the WARN Act would appear to seek to remedy a problem that, if it exists, does so only in the exception and the rare exception at that, at least in my personal experience.

Third, employers would benefit from having additional resources available to them to assist those who are soon to lose their jobs transition to new opportunities. Under the present scheme, there appears to be little in the way of a consistent availability of information or resources for employers to use that would assist their employees' transition to new opportunities.

Even more importantly, there seems to be little available to other employers in the community to enable them to readily take on the challenge and additional costs of hiring and retaining the dislocated workers. Even where such information and resources are

available, in my experience, rarely are they taken advantage of, as most employers don't know where to look for them.

Fourth, both the WARN and the proposed amendments from the Forewarn Act focus on the effects of plant closing and relocations, but not on their root causes. There are many root causes of plant closings and relocations. They include tax structure, energy and transportation costs, the structure of State and local corporate employment laws, the availability of a skilled and educated labor pool, and other costs of doing business.

The United States in general has high labor costs when compared with other parts of the world. That said, employers typically maintain their competitive position in the market because of innovation, efficiencies, and their skilled workforce.

To keep companies from closing plants and relocating operations, the atmosphere where they exist must promote that innovation, efficiency, and the creation of that skilled workforce. In short, the atmosphere must be conducive to sustainability and growth. Ultimately, these employers are who create and maintain jobs in this country.

If it were to truly fulfill its mission, the WARN Act would take a proactive approach to preventing the job loss in the first place. The proposed amendments don't do that.

Finally, expansion of the WARN Act as proposed would place a significant hardship on small and mid-sized businesses that often do not have control over the decision to reduce their workforce or curtail their operations. The WARN Act was designed in part to soften the impact of a calculated decision to close or downsize a facility in one place and move that work elsewhere.

In fact, there are many aspects of WARN that do not neatly fit into the realities of what happens when an employer is forced to cut costs quickly or to close down an operation. Small businesses, which are a cornerstone of the American economy, confront many obstacles to their success and longevity. Yet small businesses are less likely to have available to them the cash reserves or other resources to sustain a workforce even for the 60 days when business conditions sour.

The practical impact of the proposed amendments to the WARN Act creates an obligation that has the potential to be very harmful to small businesses. In addition to imposing the complexities of the statute on small businesses that may not necessarily be equipped with the expertise to comply with its nuances, the proposed amendments risk the creation of a punitive legislative scheme for businesses that are often precariously positioned in the first place.

Not only are they more likely to fail because of their size, but they are also less likely to have any control over the timing or the manner of that failure. To impose WARN Act notification obligations on these small entities while at the same time increasing the notification period and decreasing the size of the qualifying event for which notice is required further punishes failure.

When combined with the double back pay and benefits as damages, the punishment comes in the form of a costly civil litigation frequently. In short, the proposed amendments create the potential for a perfect storm of factors that could serve to kick a small busi-

ness when it is down instead of helping those who are displaced by that business's failure.

The proposed amendments to the WARN Act serve to refocus the law's original mission from one that strived to help people adjust to the inevitable realities of our global economy to one that punishes those employers that are similarly victims of it.

The WARN Act should never be considered a punitive statute. For anyone who has had to go through the difficulties of having to close or significantly downsize a facility, the ordeal is punishment enough. WARN should be about the future and about how those who are affected by these unfortunate events can adjust and retrain to move on to new opportunities.

Again, I want to thank you for this opportunity.

[The prepared statement of Mr. Marculewicz follows:]

PREPARED STATEMENT OF STEFAN JAN MARCULEWICZ, ESQ.

INTRODUCTION AND BACKGROUND

On behalf of the employer community, I appreciate having this opportunity to testify before you on this important piece of legislation. My name is Stefan Marculewicz. I am a labor attorney with the law firm of Miles & Stockbridge P.C. based in Baltimore, Maryland. We have offices throughout the State of Maryland and in Virginia. I am a member of my firm's labor and employment practice group where I concentrate my law practice on representing employers in their efforts to comply with the laws and regulations that govern the U.S. workplace.

Given the client base of my firm and its geographic location, I represent clients in many different industries, of many different sizes, and that operate in many different geographic regions. In addition to large multi-national companies, I represent many small and mid-sized employers. The companies in these latter sectors serve important roles in the economy and provide a lot of jobs to a lot of people.

Over the nearly 15 years that I have practiced labor law, I have frequently been called upon to advise my clients about their obligations and responsibilities when they have had to reduce the size of their workforce, have made a decision to relocate a facility, or have been forced to cease operations altogether. Many of these situations require notification of workers, labor organizations and government officials under the Worker Adjustment Retraining and Notification Act (§ "WARN Act")(29 U.S.C. § 2101 et seq.), the statute that is the subject of the proposed amendments you are considering today. During the years of my practice of law, I have advised employers on virtually every aspect of the WARN Act, and have represented companies that have been sued for allegedly violating the WARN Act.

Throughout my representation of these companies, I have observed several common and recurring themes that appear when an employer confronts a situation that will result in the layoff of a large number of employees or facility closure.

These themes are as follows:

• **First, no employer genuinely wants to have to lay off large numbers of employees or close down facilities.** Employers and employees make significant investments in the success of their place of employment. No one likes to see that investment lost, which is the inevitable result of a closure or significant downsizing. In short, it is a sign of failure because the employer cannot continue to operate at its present level or at its present location. To enhance the punitive aspects of the WARN Act will more likely serve to add insult to injury, than it will serve to meaningfully help those who are dislocated by the closure or downsizing, or to prevent the job loss in the first place.

• **Second, employers want to comply with the WARN Act.** It has been my experience, that unless circumstances exist that are beyond control, employers want to provide their employees as much notification as is practicable prior to a layoff or facility closure. They want to do this, not just because it is the law, but because it is right and fair. The proposed amendments to the WARN Act would appear to seek to remedy a problem that, if it exists, does so only in the exception, and a rare exception at that.

• **Third, employers would benefit from having additional resources available to them to assist those who are soon to lose their jobs transition to other opportunities.** Under the present scheme, there appears to be little in the way of a consistent availability of information or resources for employers to use that

would assist their employees transition to new opportunities. Even more importantly, there seems to be little available to other employers in the community to enable them to readily take on the challenge and additional costs of hiring and retraining the dislocated workers. Even where such information and resources are available, in my experience, rarely are they taken advantage of, as most employers don't know where to look.

• **Fourth, both WARN and the proposed amendments from the FORE-WARN ACT focus on the effects of plant closing and relocations, and not on their root causes.** There are many root causes of plant closings and relocations. They include tax structure, energy and transportation costs, the structure of State and local corporate and employment laws, the availability of a skilled and educated labor pool, and other costs of doing business. The United States in general has high labor costs when compared to other parts of the world. That said, employer's typically maintain their competitive position in the market because of innovation, efficiencies and their skilled workforce. To keep companies from closing plants and relocating operations, the atmosphere where they exist must promote that innovation, efficiency and the creation of a skilled workforce. In short, the atmosphere must be conducive to sustainability and growth. Ultimately, these employers are who create and maintain jobs. If it were to truly fulfill its mission, the WARN Act would take a proactive approach to preventing the job loss in the first place. The proposed amendments do not do that.

• **Finally, expansion of the WARN Act as proposed will place a significant hardship on small and mid-sized businesses that often do not have control over a decision to reduce their workforce or curtail operations.** The WARN Act, was designed in part to soften the impact of a calculated decision to close or downsize a facility in one place and move the work elsewhere. While this may be an option for larger employers, it is rarely so for smaller ones. In fact, there are many aspects of WARN that do not neatly fit into the realities of what happens when an employer is forced to cut costs quickly or close down an operation. Small businesses, which are a cornerstone of the American economy, confront many obstacles to their success and longevity. Yet small businesses are less likely to have available cash reserves or other resources to sustain a workforce, even for 60 days, when business conditions sour.

The practical impact of the proposed amendments to the WARN Act creates an obligation that has the potential to be very harmful to small businesses. In addition, to imposing the complexities of this statute on small businesses that may not necessarily be equipped with the expertise to comply with its nuances, the proposed amendments risk the creation of a punitive legislative scheme for businesses that are often precariously positioned in the first place. Not only are they more likely to fail, but because of their size, they are less likely to have any control over the timing and manner of that failure. To impose WARN Act notification obligations on these small entities, while at the same time increasing the notification period and decreasing the size of the qualifying event for which notice is required, further punishes failure. When combined with double back pay and benefits as damages, the punishment comes in the form of costly civil litigation. In short, the proposed amendments create the potential for a perfect storm of factors that could serve to kick a small business when it is down instead of helping those who are displaced by that business' failure.

The proposed amendments to the WARN Act serve to refocus the law's original mission from one that strived to help people adjust to the inevitable realities of our global economy to one that punishes those employers that are similarly victims of it. The WARN Act should never be considered a punitive statute. For anyone who has had to go through the difficulties of having to close or significantly downsize a facility, the ordeal is punishment enough. WARN should be about the future and how those who are affected by these unfortunate events can adjust and retrain to move on to new opportunities.

We would therefore respectfully request that the WARN Act not be amended as proposed.

Again, I would like to thank you again for this opportunity.

COMMENTS TO PROPOSED AMENDMENTS

Sec. 2. Amendments to the Worker Adjustment and Retraining Act.

(a) Definitions.—Reducing the definition of "employer" from 100 employees to 50 employees.

Inclusion of this amendment will impact small to mid-sized employers in a negative way. Many of the clients I consider to be small to mid-sized businesses are

under 100 employees. Fifty employees is not a difficult number to reach for many small companies these days. Yet an employer with a mere 50 employees is still very vulnerable to the economic forces that determine its future. In many of those cases, they have not attained a sufficient size to even warrant having a dedicated human resources function.

One reality of the WARN Act is that once an employer gives notice, often times employees flee when they learn that the facility is closing, or that they will be laid off. It is usually the best and most skilled of the workforce who flee first because they can readily obtain employment elsewhere. In a situation where a small company is in a precarious financial position, it does not truly know whether it will or will not close in 60 days. It will know even less its fate in 90 days.

If a small company is to survive, it needs to retain its best skilled employees to help it turn the corner and avoid the closure or layoff at all. True, there are defenses that permit reductions of the notification period, including the faltering company defense and the unforeseen business circumstances defense. However, in every situation I have encountered under the WARN Act where an employer seeks to resort to either of these defenses, it has had to do so in the courts. This litigation is usually unnecessary, because the defenses were sound, but always costly. Small companies should not reasonably be expected to make such a choice. The law should not prevent employers from trying to make things work, particularly in the case of small employers. Yet reducing the jurisdictional size of the employer and what constitutes a plant closing serves to do just that, and creates the potential for a vicious downward spiral that could ultimately facilitate the company's closure, which no legislative scheme should endorse.

Reducing the size of a "plant closing" as defined in the WARN Act from 50 employees to 25

Reducing the size of a plant closing to 25 will negatively impact small to mid-sized employers for the very same reason that cutting the jurisdictional size of an employer in half for coverage of the statute will negatively impact small to mid-sized employers. Twenty-five employees is not a difficult number to employ in a facility.

One cannot lose sight of the original legislative purpose behind the WARN Act which was not only to lend retraining and assistance to the dislocated workers, but also to assist the communities in which they lived. That is why WARN Notice goes to more than just the employees and their labor organization, but it also goes to State and municipal government officials.

Congress originally concluded that a community was impacted by a job loss of 50 employees. A job loss of half that size, while still significant, has half the impact on the community. In a large community, it might go unnoticed to those not directly affected. While no one should lightly consider the impact of any job loss on a community, regardless of its size, the impact of a job loss on a community is necessarily relative to the size of that job loss. To reduce the size of a plant closing to 25 employees loses sight of the community-based mission of the statute.

This same reasoning applies to the proposed reduction in the number of laid off employees that constitutes a "mass layoff."

(b) The Expansion of the WARN Notice Period from 60 to 90 Days.

From a practical standpoint, it is often very difficult for an employer to predict exactly when it is going to cease operations. This is true even with a 60-day notice period. To expand the notification period to 90 days augments that uncertainty. WARN should exist to encourage the issuance of notice so that the affected individuals have the opportunity to adjust and, if necessary, retrain to re-enter the workforce with relative ease. The shorter notice period provides that encouragement because it is consistent with the economic realities that employers face in their commercial relationships.

The service contractor sector presents a very good example of how the current notification period already creates significant uncertainties, and how extending that time period to 90 days would serve to make things worse.

In our current economy, there are many businesses that provide services to other businesses pursuant to service contracts. Examples of such contractors include information technology, transportation, hospitality, and the like. They have become a very significant sector of the economy and employ a lot of people at all socio-economic levels. This sector is also very fertile ground for the development of small and mid-sized businesses because it is a relatively easy sector to enter, often requiring limited overhead to get started. However, these contractors, and in particular, those that one would categorize as small to mid-sized businesses, frequently find themselves at a significant negotiating disadvantage with their customer when they prepare the contract for services. They have little leverage, and often have to agree to

contract terms presented to them. In so many of these contracts, the customer retains the right to terminate the contract with little or no notice, and for any reason. Such a right is usually a term of the contract.

Through my work in this sector, I have experienced a number of situations where a contractor has lost its contract with little or no notice, and the loss of that contract has forced the employer to drastically reduce its workforce, or cease operations altogether. There are few mechanisms within WARN to address this reality so that an employer can reduce the notification period when it truly does not know it will cease operations. This problem would be significantly compounded if an employer were required to give an additional 30 days notice.

Sections of the statute that permit a reduction of the notice period are very narrow on their face, and have been construed very narrowly by the courts. They include the "faltering company" basis to reduce the notification period [29 U.S.C. § 2102(b)(1)]; the "unforeseen business circumstances" basis [29 U.S.C. § 2102(b)(2)(A)]; and the "natural disaster" basis [29 U.S.C. § 2101(b)(2)(B)]. Indeed, even when one of these bases is clearly available to an employer, that employer faces the uncertainties of litigation and its enormous expense. On more than one occasion, I have been involved in cases where in my personal opinion, the employer presented facts that squarely permitted the employer to reduce the notification period using the faltering company or unforeseen business circumstances basis. Yet in each of these situations, the employer was sued, and confronted costs and attorneys fees that equaled or exceeded the underlying penalty. That problem is only compounded when the statute is expanded to include smaller employers, smaller groups of employees to require WARN notice and longer notification periods.

For the contractors in the business sector I referred to above, the available bases to reduce the notice period provide hollow security. The abrupt cancellation of a contract by a customer is often used as an example of the typical "unforeseen business circumstance," justifying a reduction in the notification period. Yet, when there is a term in the contract that states the contract can be terminated on no notice, or on notice that is less than 60 days, termination of the contract on less than 60 days can hardly be considered unforeseen. Similarly, when an employer has an operating line of credit and the lender concludes that it is going to cease taking further risk and chooses not to extend any further credit, the lender's contractual right to cease to extend credit without notice is often pointed to as a basis for the argument that the credit cut off was in fact foreseen. Finally, in another example, I have confronted cases where an employer that is in trouble is trying to sell itself to a prospective buyer to preserve jobs and that portion of a distressed business which can be salvaged. Unfortunately, there is case law in which courts have concluded that the attempted sale of a distressed business that ultimately ceases operations does not fit into the definition of a faltering company. 29 U.S.C. § 2102(b)(2)(A).

Reference to Calendar Days

A clarification of the term "days" to be deemed to mean "calendar days" is a welcome addition to the statute. Although the debate in the courts on the meaning of the term day has effectively concluded with the same result as the proposed amendment, the statutory clarification is important.

(c) Notice to Other Parties and Secretary of Labor.

While the current scheme for notification of persons other than the affected employees and their representatives would appear to be sufficiently effective, there is no reason why notification should not extend to the Secretary of Labor. Such notification may in fact enhance the ability of displaced workers to take advantage of available funding for retraining that may not be known to a municipality or state-dislocated workers unit. The administrative burden imposed upon employers by the additional notice to the Secretary of Labor is minimal when compared to the potential benefit of the notification to the dislocated workers.

While there exists the potential for a significant upside to the additional notice, the contents of that notice are best left to the administrative expertise of the Secretary of Labor under 29 U.S.C. § 2107, and should be identical to the contents presently required for the notice to the state-dislocated workers unit and highest elected municipal official.

(d) Penalty—To expand the penalty to double back pay.

Expansion of the WARN penalty converts the statute from its original intent into one that is punitive. As described above, employers comply with WARN. Those that do not are the rare exception, and not the rule. For every case that is published there are many that are never filed because the notice has been issued in accordance with the law.

Employers comply with the statute because it is the right thing to do. Compliance does not occur just because there is a penalty associated with non-compliance. A pe-

rusal of the available State databases of WARN notices reflects that there is a lot of compliance with this law. Moreover, I have yet to encounter a situation in my law practice in which an employer that failed to give the full 60 days notice did so to intentionally evade their obligations under the statute. As described above, most of the time the full notice is not given, it is not given because of circumstances that are out of the control of the employer.

Closure of an operation or a significant layoff of employees is not something any employer desires to do. Not only has the employer invested heavily in the workforce that is to be affected, an investment that is likely to be lost, but for entities that tout their successes and hide their failures, it is simply distasteful.

To place an additional layer of punishment upon an employer that has had to go through the turmoil of ceasing operations or having a mass layoff would seem to add insult to injury, without any need to do so.

Enforcement by Secretary of Labor or State Attorney General

Conferring enforcement authority upon the Secretary of Labor under WARN in general, is not objectionable, particularly as it has been outlined in the proposed amendment. However, it would appear unnecessary for several reasons. First, the Department of Labor's resources are limited for enforcement of the laws it is currently charged with enforcing. The authority might not have any true meaning as the private right of action under WARN would probably result in few if any enforcement actions by the Department of Labor. Second, the current enforcement scheme through the private right of action does not appear to be underutilized or out of the reach of the typical affected employee. The plaintiffs' employment bar is active and WARN Act cases are not uncommon when the requirements of the statute are not followed. It would therefore seem unnecessary to expand the authority of the Federal and State Governments under WARN because under the present enforcement mechanism, it is adequately enforced.

There are also significant concerns about conferring enforcement authority to State attorneys general. WARN is a Federal statutory scheme that should be enforced in a manner that is uniform and consistent nationwide. To centralize enforcement within the U.S. Department of Labor under a single Secretary of Labor furthers that goal.

However, it is a far different story to confer such authority upon 50 State Attorneys General. To disperse enforcement among 50 different attorneys general creates a recipe for an inconsistent and disparate government enforcement of a single law. Not only is there a potential for disparity that would result from where such cases might fall in the order of prosecutorial priorities, but disparity in enforcement might also occur as the result of budgetary restraints that may differ from State to State. Moreover, there may be a question of the constitutional authority of the States Attorneys General to prosecute violations of Federal statutes. Accordingly, it would not appear to be prudent to confer enforcement authority upon anyone other than the U.S. Secretary of Labor.

(e) Sec. 11. Educational Materials.

The directive to the Secretary of Labor to make educational materials concerning employee rights and employer responsibilities under WARN is not objectionable. However, rights and responsibilities are not the only things on which the Secretary of Labor should focus attention in terms of providing educational materials. "Adjustment" and "retraining" were key concepts to be promoted by the original WARN Act. Those aspects of the statute should be promoted in the same way as the punitive aspects of the statute.

Senator BROWN. Let me start with you, Mr. Aguiar. The day you got the call from your supervisor and you were told not to come back to work, did you get any notification or any advice? Did they tell you anything about the WARN Act at the time?

Mr. AGUIAR. No, sir. At that time, me and everybody else didn't know anything about it. Like I said, I went to work that morning, worked regular, came back at 3 o'clock, no problem. I got that call a quarter to six, telling me not to come back. I thought he was joking. I said, "Oh, I will just go by there tomorrow and chill." He said, "Joe, don't go by because they closed the doors."

I did run by the next day, and they had this big chain on the gate with a padlock, and that was it.

Senator BROWN. And your wife was notified the same way, or was she still working there at the time?

Mr. AGUIAR. My wife was home, and she was on vacation like everybody else. Only the maintenance people were working those 2 weeks.

Senator BROWN. During that 2-week period?

Mr. AGUIAR. Yes, and I was one of them. We didn't know anything. Like I said, everybody else went on vacation on Friday, some of them went to Portugal. They went everywhere. Some of them didn't know this when they came back. I guess the families didn't want to tell them what was going on so they could have a good vacation, because if they knew that a week before, maybe they would have cancelled their plans.

Because these are—where I live, there is about 80 percent immigration from Portugal—a lot of people from Portugal, the islands. These people don't have much money, and if they knew that was going to happen, a lot of them would not have gone anywhere.

Senator BROWN. If you had been given 60 days' or 90 days' or 120 days' notice, if the company had said we are going to close the plant 3 months from now, for instance, what would that have mattered? How would that have mattered to you?

Mr. AGUIAR. I would start looking, while still there, to find another job. This way, I would have an opportunity to go everywhere to look for a job. I think that is what he should have done, give us 60 days' notice or a week or 2 weeks or whatever. Just let us know that you are going to close the doors, not the way they did it. I don't think that is right.

Senator BROWN. Tell me about some of your fellow workers. Do you know roughly maybe the average age? Or what have you seen happen to them, or are they finding jobs? Have they left town? Have they tried to move on? Are most of them unemployed, or are they earning anything close to what they were earning?

Mr. AGUIAR. Yes, the ages are between 20 and 50, and some of them are 60 years old. Those young ones probably—there is a lot of work in construction, and that is where all those young people are. They go to Boston, Cape, wherever, work on construction.

The other ones, most of them are in school right now. This school that I am at, it has got about 300 people. Some 50-year-olds, 55, 60s, and they are there because they want to earn that check. When it stops, some of them are going to go off and retire, and some of them just going to stick around, I guess.

At that age, believe me, I am over there, and it is very hard at that age to learn to get a GED or whatever. There are people there that are just there for the money while they give them the check. Once the check is given, it'll be like, "Have a good day," "See you later." I know that is going to happen. They told me.

Before I came down yesterday, they said, "Joe, take a big case and bring back the money." All they want is for me to bring back the money. I will ask the Senator to give me the money, but he'll say no.

Senator BROWN. Mr. Liebenow, the CEO, did he ever meet with the workers or talk to the workers or make statements, convened any meeting of workers or talked individually to supervisors or workers that you know of?

Mr. AGUIAR. For the past 2, 3 years, I never saw that man come around. He did come around every day when the union was trying to get into the place, and he was coming by so the union couldn't get in. He was coming by everybody saying, "Hi, Hi, Hi." "Don't get the union in here." The union came in, we never saw him again. He never came to see us to say anything.

Senator BROWN. Your 18-year-old son, you did him proud today. So, thank you.

Mr. Marculewicz, how should Mr. Liebenow have done that differently?

Mr. MARCULEWICZ. Well, I don't know the specific facts of the circumstances——

Senator BROWN. Put your microphone on, please, sir.

Mr. MARCULEWICZ. Sorry, Senator. I don't know the specifics of the circumstances under which this occurred, but I would—if I recall from Mr. Aguiar's testimony, this was a 900-person facility? My understanding is, that under those sets of circumstances, WARN notice should have been given prior to a layoff, and 60 days' notice should have been given.

My position on that is that this is essentially one of the exceptions that I occasionally see in the cases and rarely confront in my day-to-day practice, where somebody actually did not comply with the notice obligations. As I testified earlier, I spend a vast majority of my time on this statute, advising employers on how to comply with the statute and how to do so in a way that is fair and reasonable to the employees. In the vast majority of those circumstances, even if there is a question as to whether the WARN Act applies, the employers are willing to provide that notice.

Senator BROWN. If the penalty was double, would that make people like Mr. Liebenow more likely to comply, or those exceptions that you cite?

Mr. MARCULEWICZ. I don't think so. Because if somebody is not willing to comply with the law on the basis of simply a flagrant violation, then they are not going to comply with it whether the penalties are doubled or tripled.

In fact, the responsible employer, which makes up the vast majority of the companies and the employers in this country, the 60-day notice and the alternative penalty is certainly sufficient to ensure compliance, and I don't believe that a statute should be amended to react to the rare exception.

Senator BROWN. Have you ever represented a company that violated the WARN Act?

Mr. MARCULEWICZ. I have represented companies that have been accused of violating the WARN Act, yes. But I have not represented a company that, in my opinion, in fact, violated the WARN Act.

Senator BROWN. Did a court decide that it had?

Mr. MARCULEWICZ. No.

Senator BROWN. Are there specific reforms you would support in this bill and amendments to the statute now that would make this law work better? That would mean more compliance and more assistance for workers but not be unduly difficult for employers?

Mr. MARCULEWICZ. I think I mentioned in a couple of the themes that I stated to you earlier, Senator, with respect to retraining and

opportunities for the future. One of the things that I run into when I am confronted with this phone call—you know, the bank has cut us off. We only have so much time left. We are going to close. What do we do? We have to give the notice, and then what can we do for our workers?

Because, again, this is a devastating event for everybody. This is not something that the big, bad employer is saying, "Hey, let us lay all these poor workers off." It is a devastating event for everybody because the employer lives in those communities as well.

One of the things that strikes me as odd in this, in my day-to-day practice is how little information there is with respect to availability of resources for retraining. I also find that it is unusual, and I have yet to run into this.

I had an example in a situation where I remember speaking to the client and saying, "You need to reach out to the State Dislocated Workers Unit." Gave them the number. They reached out to them. Unemployment was basically the only option in terms of the retraining and such, and I feel that they didn't know where to go and what else they could do to assist their workers in addition to giving the notice, the 60-day notice.

Now, one other point that I want to raise is that on the other end, where you have an employer that is in that community where there is a group of dislocated workers, there doesn't appear to be a lot of resources available to those employers to take on the challenge of retraining someone.

I mean, so much of, Mr. Aguiar mentioned earlier, the difficulties of a senior employee going and getting a GED, that is true. But there is so much on-the-job training and things of that nature that could be facilitated by a statute like the WARN Act that, if you would, if there was an availability of resources to help employers in the surrounding communities retrain those people, I think that would be one way to improve the WARN Act.

Senator BROWN. You made two comments. One in your opening testimony where you used the word "failure," that if a company were to close, there is sort of implicit failure somewhere, understandably. Then you said it is a devastating, I believe you used the adjective, I think you said "matter," devastating matter to everyone when a plant closes.

Are those the right words to label a decision—in my old congressional district in Elyria, OH, where York Manufacturing, an air conditioning assembly company, the most productive company in the entire York corporation—they acknowledged—shut down its plant in Elyria, moved some of its production to Wichita and some of its production to Mexico.

I don't think management probably would have called that a failure or called it devastating for everyone, management, when they make a decision like that. Is that a different matter?

Mr. MARCULEWICZ. Again, I don't know the specifics of that.

Senator BROWN. Trust me on what I said.

Mr. MARCULEWICZ. I believe you, Senator.

Senator BROWN. OK.

Mr. MARCULEWICZ. So I can't speak specifically to that. I can say this. That it is—perhaps "failure" is too strong a term for that par-

ticular situation, but certainly devastating to the community is an appropriate adjective for it.

Senator BROWN. To the community.

Mr. MARCULEWICZ. It is because—but think about the communities in which these facilities operate. I mean, everybody is a member of that community—the employer, the supervisors, the managers, the decisionmakers or the people who are affected by those decisions—and I think that is devastating. I think it is the reality of that.

Senator BROWN. Mr. Trumka, your thoughts on my conversation just now with Mr. Marculewicz and the questions of particularly employer major layoffs or plant shutdowns when they seem to be related to trade policy.

Mr. TRUMKA. It is very, very difficult for us to call it a failure for them. It is a major success for them. They end up frequently getting major bonuses, things of that sort. It is the workers and, he is right, the community that is left behind.

He and I do agree on one thing at the very least, about the need for a proactive approach, and that is why we have called for an extension, a lengthening of time of the notice so that people actually have time. People like Joe Aguiar have a chance to spend more time training and looking for a job, but the community—the State and the local community has more time to plan for the layoff, and then they have more time to work to prevent the layoff. That is what we think this should be all about, preventing it.

I found it somewhat amusing when Stefan portrayed some of these companies as victims of globalization. The one that you just talked about, there are literally thousands, hundreds of thousands of others. We have closed 40,000 manufacturing plants in this country since the year 2000, many of which have been relocated in China and other places. I don't think they have been victims. I think they are the person that creates the victims.

Senator BROWN. Yes, I talk to several, in my old congressional district, manufacturers who would say that they are just playing under the rules of globalization. They have no choice. But some of those same CEOs were walking the halls of Congress, lobbying for PNTR when it passed and other trade agreements that would write these rules under which they had to live. An interesting thought that way.

Mr. TRUMKA. Senator, there is a twofold approach there, just as it is here. First, the trade laws are also weak, but then our country doesn't enforce those trade laws either. So, countries like China get to walk away with currency manipulation and all kinds of other advantages that close plants here.

The same thing with the WARN Act. It is a weak law that has no enforcement mechanism. It can't be enforced hardly because how could Joe Aguiar go out and go after that company when all he stands to get back is maybe $300, $400?

I also take real issue with my friend Stefan there when he says that these employers really do want to comply. GAO found that only 25 percent of the plant closings and mass layoffs were subject to WARN. Of those, only one-third actually did comply. That means less than 8 percent of the closures and mass layoffs in the country actually comply.

If he really believes, and I hope he does, that they want to comply, we can put a new provision in this act to give some education to those employers and that gives them a little bit of advance notice on what they have to do as well. We could work together on things like that.

Senator BROWN. Mr. Philo, do you think that employers generally know enough about the WARN Act, or do they, as Mr. Trumka may have suggested—may not, I am not sure—want to evade the WARN Act? Is the education solid enough? Is the notification—is the awareness of the law strong enough?

Mr. PHILO. That varies. To be honest with you, I mean, I don't represent employers, and so I am trying to read tea leaves many times in these cases. I can divide it up. It reflects society. There is about a third of the people who don't know and would have done it if they could have, there is a third that didn't care to know, and there is a third who were going to do what they were going to do anyway.

We literally have seen cases—what sticks in my mind, a case we saw last year. Where the employer, when he had fired the employee on the day without notice, and that person said, "What about my notice?" He said, "I will give notice to who I want, when I want. It is my damn business."

I don't mean to suggest that all employers out there are like that, but there are employers out there like that. I take issue with the idea that somehow increasing penalties will not change behavior. It is a fundamental precept of our law, of the way we regulate, of the way we have criminal law.

Right now, the penalties are roughly the same or cheaper to not comply. You get back pay and benefits in the law. That is it. So for the bad faith employer, there is no disincentive to just not give notice. It defies rational economics. It defies law. You have to make it more expensive to do the wrong thing, and that would be not giving notice. Right now, that doesn't exist.

Senator BROWN. The back pay is 60 days?

Mr. PHILO. Limited to 60 days, and then if it is calculated on—the courts have struggled with this idea of calendar days and work days, with a majority finding that it is work day damages. So that reduces that 60 days by roughly 30 percent in most cases. So it is just—I mean, it is an incredibly low level of recovery. You need masses of people to be able to financially undertake a case.

You know, one thing that is controversial in our society to talk about punitive damages. But punitive damages are awarded for bad behavior, for intentionally knowing and doing the wrong thing. I think they should be added to the act. I don't think that is unjust or unfair in any sense.

Senator BROWN. Why is he wrong, Mr. Marculewicz, in your mind?

Mr. MARCULEWICZ. Senator, he is wrong because the individual claimant by themselves bringing the claim under WARN is rare. Typically, when you have these flagrant violations of WARN Act, where you have mass layoffs of 900—facilities of 900 employees who were given no WARN notice—the plaintiff's employment bar is very effective and assisted by organizations similar to Mr. Philo's

organization are very capable of advocating on behalf of the dislocated workers.

Typically, these cases come in the form of class actions or multiple plaintiffs in these cases where it is, in fact, a deterrent because not only is it the deterrent of the penalty, but it is the deterrent of defending the case.

Senator BROWN. Why is there only 8 percent compliance then?

Mr. MARCULEWICZ. Why is there 8?

Senator BROWN. Why is it only 8, if compliance is the—citing Mr. Trumka's figures that 25 percent under the WARN Act and only 8 percent, one-third of those are won, why is that number so small if the penalties or the threat of penalty is great enough to the employer potentially?

Mr. MARCULEWICZ. Because there are certain exceptions to the WARN Act that reduce the amount of time that notice needs to be given. There is the faltering company defense. There is the unforeseen business circumstance defense. Those were designed to account for the uncontrollable cessation of operations where the bank cuts off the pay, cuts off the line of credit, a contractor terminates a contract, or things of that nature.

Those cases often still get litigated, notwithstanding the fact that the defenses are sound and the positions behind—the position of the employer in those situations are sound. And for that reason, that may be why that percentage is what it is. Again, I haven't studied those numbers. I don't know specifically. But that is why I would have reason to believe that that would be the case.

Senator BROWN. So those three exceptions—some would say loopholes, some would say exceptions—that you cited account for 92 percent of the cases?

Mr. MARCULEWICZ. I wouldn't say that because I don't know the statistics.

Senator BROWN. Mr. Philo, your thoughts?

Mr. PHILO. I would find that incredible if they do. First of all, what they do is they allow them to give late notice or a complete defense if they do find out at the last minute. In the unforeseeable business circumstances, that is not an immediate event. I mean, that does excuse—and what I have seen in practice, it excuses the employer from giving the full 60 days. Typically, in those situations where they do prevail, they have given notice, but it is 37 days. It is 20 days.

Faltering company, the same deal. It is not an excuse to give no notice in most circumstances. It is an excuse that allows them to give late notice. I couldn't imagine it accounting for 92 percent of the noncompliance that we are seeing.

Senator BROWN. Mr. Philo, you believe this bill should have exemptions and exceptions for some of the provisions Mr. Marculewicz talked about?

Mr. PHILO. I wouldn't object to it. I mean, there is the purist in me that says no. But on the other hand, the faltering company exception is a fair exception to employers. We have seen circumstances where that has appeared to be legitimate to us.

The unforeseeable business circumstances, I think that is gamed more by employers certainly than the faltering company exception.

As far as the natural disaster exception, I don't think anyone would have an issue with that.

Senator BROWN. Mr. Aguiar, when Quaker Fabrics closed, did they move operations elsewhere in the United States or overseas? Did your jobs directly go somewhere that you are aware of?

Mr. AGUIAR. There is a company called Victor Textiles from Canada that bought, I heard, $27 million worth of machinery and moved about 6 miles away from the old factory, and it is doing production right there. I believe over 150 people already from the old Quaker Fabrics are working there already at this new place.

All the other machinery are, like I said, in skids ready to be shipped to China, India, and everywhere else. But, yes, there is a factory that bought some of that stuff and is using the old machines. It is called Airport Road, the place that they built. There is a big building, 600,000 square feet building, and they are renting that, this company from Canada.

Senator BROWN. Mr. Philo and Mr. Trumka—Mr. Philo, you have made some reference to laws in other countries. Can both of you—if you know, if you don't, that is fine—give me some sort of best practices that comparable industrial democracies like ours do in plant closing, facing plant closing issues like this and their impact on communities and workers?

Mr. Trumka, do you want to take——

Mr. TRUMKA. First of all, you don't have to go internationally. There are several States that have already adopted better and more effective plant closing laws in the United States that eliminate some of the exceptions. I would like to just comment on for a second. Those exceptions should be truly exceptions, narrowly defined, not the rule itself. Actually, getting WARN notice has become the exception in this country. So we need to be careful about that.

But we have several States that have done that—Illinois, California, and two others have reduced the number of people there. They have lengthened out the time that you get. They also became more proactive. They have State teams in place that move into action as soon as there is a WARN or they get anything, any kind of indication, and they move in to do a couple of things.

One, to set up a safety net to help the workers and then, two, to actually move in to try to save the plant. Either to get a buyer or financing or some other mechanism to see if that plant can be stopped from closing so that the tax base can be saved. Other countries do the same thing.

Senator BROWN. Mr. Philo, your thoughts on that?

Mr. PHILO. I would agree with what Mr. Trumka said. I would add it is a little difficult comparing other countries, and this is a new area for a lot of jurisdictions. So I think the best practice is to look at what they are doing and take the better portions of it.

Something that is interesting, which we see in Canada and we see in the United Kingdom, which are closer in comparison to the United States, they have mandatory committees that are required to be set up as soon as that is announced, that there is going to be a mass layoff or worksite closing at some point in the future.

That committee is made up of all the stakeholders—government officials, workers, and the employers' representatives. It is manda-

tory that they negotiate and see ways to avoid the layoffs if possible. If it can't happen, then to bring State workers into the plant and to help people transition.

Particularly in the United Kingdom, you can't do the mass layoff unless you go through that procedure. Canada has government officials monitor the process to see that it is in good faith. I think those are important things. I don't know if that is within the reach at this point in the United States, but it is critically important to workers to get that sort of help if the layoff is going to occur.

I think Illinois, New Jersey, they have done a good job of putting that right into their legislation, a much more proactive effort to help workers transition.

Senator BROWN. Mr. Trumka, you had one more comment?

Mr. TRUMKA. Yes. New York is actually considering such a bill this week. They will vote on it this week. That will be the fifth State.

Senator BROWN. Thank you all very much. Mr. Trumka, thank you. Mr. Aguiar, thank you very much for coming from Massachusetts. Mr. Philo, thank you, and Mr. Marculewicz, thank you very much.

Your comments are, of course, on the record and will be used accordingly, and we hope to move forward on legislation quickly.

So the committee is adjourned. Thank you.

[Additional material follows.]

ADDITIONAL MATERIAL

PREPARED STATEMENT OF SENATOR CLINTON

I would like to thank Senator Brown for his leadership on the WARN Act and for holding this hearing, as well as our witnesses for joining the committee today to share their insights into this critical issue.

The WARN Act requires employers to provide 60 days of advance notice to employees and State and local officials in the event of a mass layoff or a plant closure. When it was passed 20 years ago, the act was premised on the idea that advance notice is essential to providing workers and their families time to adjust to a loss of employment and seek alternative jobs and training. By giving workers an opportunity to plan for a layoff, the act not only promotes fundamental fairness to U.S. workers, but it also represents smart governance, reducing the need for unemployment benefits and enhancing the effectiveness of training programs.

While the WARN Act sought to achieve a laudable goal, the last two decades have made clear that the statute is in need of reform. The act fails to cover most layoffs, and the enforcement provisions are so weak that those employers it does cover are free to ignore the act with near impunity. The most recent GAO report found that 24 percent of companies were subject to the WARN Act at all, and even those companies only provided notice to their workers in 36 percent of mass layoffs and plant closures. In 2007, the Toledo Blade published a four-part investigation into the WARN Act concluding that the WARN Act "is so full of loopholes and flaws that employers repeatedly skirt it with little or no penalty."

That is why I am proud to have been an original co-sponsor of the FOREWARN Act, legislation introduced by Senator Brown to expand and modernize the WARN Act. The act would lengthen the notification period from 60 to 90 days, lower the threshold for plant closings to 25 employees and for mass layoffs to 100 employees, allow the DOL and State Attorneys General to investigate violations and file WARN Act cases on behalf of workers, increase the penalties for violations of the WARN Act from back pay to double back pay for each day of notice that is not provided, and require employers to provide written notification to the Department of Labor.

Our Nation's economic downturn has taken an enormous toll on our workers. Since 2000, more than 40,000 manufacturing facilities have shut down. Almost half a million workers have been idled by mass lay-offs in the first 3 months of 2008 alone. The losses have spread beyond the manufacturing sector to the service sector. Now is the time for us to renew our commitment to the workers struggling with the consequences of this economic downturn by restoring the promise of this important legislation.

PREPARED STATEMENT OF SENATOR OBAMA

Mr. Chairman, I started my career on the south side of Chicago trying to help people in communities devastated by steel plant closings get back on their feet. One of the things I learned early on, and have seen over and over again, is that American workers who

have committed themselves to their employers expect in return to be treated with a modicum of respect and fairness. Failing to give workers fair warning of an upcoming plant closing ignores their need to prepare for the transition and deprives their community of the opportunity to help prevent the closing.

I know that you have heard the frustration of workers who are let go by e-mail the day before a plant closes or are told when they come to work that their services are no longer necessary. Many of these workers support families that are living from pay check to pay check, squeezed by the demands of rising health care costs, the declining value of their homes, and wages that have been stagnant for decades. It adds insult to injury to close a plant without warning employees.

There may be no stronger advocate for these workers than Senator Brown, and I thank you for holding this hearing and authoring legislation to strengthen the Worker Adjustment and Retraining and Notification Act (WARN). I fully support your efforts and look forward to helping you move the legislation through the process. We must give the WARN Act teeth to ensure that workers are not chewed up and spit out without a job or a paycheck.

When I was a member of the Illinois Senate, I worked to strengthen enforcement of the existing WARN Act by requiring the Illinois Department of Employment Security to annually notify employers of their responsibilities under the WARN Act. But we must act at the Federal level to close the loophole that allows employers to disregard the WARN Act without penalty.

Congress passed the WARN Act in 1988 to give workers and communities 2 months' advance notice to adjust to an impending plant closing or layoff. And where employers have complied with the law, retraining and other readjustment efforts have a much greater chance to succeed than when such programs are rushed into place because there was no advance notice of a plant closing. But despite the WARN Act, employers have all too often failed to provide workers with that vital notice. The GAO has found recently that 24 percent of all lay-offs are subject to WARN requirements, yet employers provided notice in approximately one-third of these situations. And courts have increasingly dismissed lawsuits brought by workers who have been unfairly denied notice.

Senator Brown's FOREWARN Act would modernize and enhance the WARN Act's protections. I am proud to be a co-sponsor of this important legislation. It would reduce the mass layoff figure from 50 to 25 employees, and reduce the threshold for coverage of firms from 100 to 50 employees. The FOREWARN Act would also lengthen the notification period from 60 to 90 days, require employers to provide written notification to the Labor Secretary, and increase penalties for violations of the WARN Act from back pay to double back pay. Finally, the bill authorizes the Labor Department to enforce the law, and permits State attorneys general to pursue claims if the Labor Secretary fails to act within 6 months.

These are long overdue improvements in the law. Workers and their communities have a right to know when they are facing a serious risk of a plant closing. Making that information available before the plant closes can, in the best case scenario, help communities come together to prevent the loss and, in the worst case sce-

nario, help workers and communities prepare for the difficult transition to come. Basic fairness and respect for working men and women require that we pass the FOREWARN Act.

[Whereupon, at 11:07 a.m., the hearing was adjourned.]

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