RESPONDING TO ECONOMIC CRISES: COMPLYING WITH WARN ACT OBLIGATIONS

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The Federal Workers Adjustment and Retraining Notification Act ("WARN Act") requires that covered employers provide a specified notice of employment termination sixty (60) days prior to the date of a "plant closing" or "mass layoff" that results in an "employment loss" for a sufficient number of employees. In addition, states have enacted "mini-WARN" acts that impose similar, but sometimes more onerous obligations and penalties. WARN Acts can present a variety of issues for companies facing economic crises.

A. Is the Entity Facing an Economic Crisis an "Employer" under the Federal WARN Act?

The Federal WARN Act applies to any business enterprise that employs: 100 or more employees, excluding part-timers (i.e., who are employed for an average of fewer than 20 hours per week or have been employed for fewer that 6 of the 12 months preceding the date on which notice is required) or 100 or more employees who in the aggregate work at least 4,000 hours per week (exclusive of overtime). The relevant date on which employer status is determined and employees are to be counted is the date that the first notice should leave been given. However, many entities on paper do not have sufficient numbers of employees to be covered by federal or state WARN Acts. Nonetheless, WARN liability has also been found under theories of liability that have been traditionally utilized to impose joint employer status on related or affiliated entities that would not meet the WARN Act standards standing alone.

1. Is there Potential WARN Act Liability for Related or Affiliated Entities?

The courts have stated that entities which are not the employer of record of the affected employees may sometimes be liable under WARN Acts, but usually only when such entities act as an employer or assume control of the employer.

Related Companies: Under the Department of Labor’s regulations, affiliated companies can be liable under the federal WARN Act based on five factors: common ownership, common directors and/or officers, de facto control, unity of personnel policies emanating from a common source, and the dependency of operations. The Third Circuit has applied the DOL’s five-factor analysis to determine when related entities are a single business enterprise under the WARN Act

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6 20 C.F.R. Sec. 639(a)(2).
and has indicated that the "unity of personnel policies" prong requires employees to show that the separate corporations actually function as a single entity on a regular day-to-day basis.\(^7\)

Where two companies merged, but both continued in operation, with one acting as parent and the other as subsidiary, a federal district court in Louisiana held in 1992 that the parent was also liable as an “employer” under the WARN Act for terminations made by the subsidiary because of the high degree of control exercised by the parent over the subsidiary’s operations.\(^8\) In another case decided in 1995, three related companies were held to be a “single employer” under WARN where the holding company had control over the other two companies, the primary stockholders of the holding company were (with one exception) officers and directors of all three companies, the holding company secured financing for the other two companies, and holding company representatives attended meetings of the other companies’ suppliers.\(^9\) However, in a third case, a corporation was not a “single employer” with another company that employed the employees in question even though the first corporation shared common shareholders with the employing company and delivered the employees’ paychecks, where neither company owned an interest in the other, they had separate tax I.D. numbers, and separate payroll accounts.\(^10\)

In *Childress v. Darby Lumber, Inc.*, 357 F.3d 1000 (9th Cir. 2003), a lumber mill company and construction company were joint employers under DOL standards with respect to a inter-relationship plant closing where both companies’ employees worked because of common ownership, common directors, de facto control of one organization by the order, and of operation.

**Management Companies.** WARN liability has also been imposed where entities shared of management of employees who on paper were employed by otherwise unrelated companies. In one instance, a hotel management firm which ran a hotel owned by a partnership and was determined to be an “employer” under the WARN Act by virtue of the management firm’s involvement with employment matters at the hotel.\(^11\) In *Administaff Cos. v. N.Y. Joint Bd*, 357 F. 3d 454, 456 (5th Cir. 2003), Administaff was not liable for a decision by a plant owner to close a plant where Administaff employees worked because (1) Administaff had nothing to do with ordering or implementing the closing and (2) Administaff was not a joint employer under the DOL standards because the employees did not actually perform services for Administaff, there was no common ownership or shared management, and Administaff was not involved in the operations of the plant.

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8 Carpenters Dist. Counsel v. Dillard Dept. Stores, Inc., 790 F. Supp. 663 (E.D. La. 1992), aff’d and rev’d on other grounds, 15 F.3d 1275 (5th Cir. 1994) (the lower court found that no sites would have been closed or employees discharged but for the parent exercising its newly acquired powers under the merger agreement).
The bottom line for management companies and their clients is that where an entity subcontracts to perform some of the personnel functions for an employer, like administering payroll functions, but does not otherwise act as an employer, it typically will not incur WARN liability.12

**Creditors:** Secured lenders and other creditors of an economically struggling entity which layoffs workers without notice can become entangled in WARN Act litigation if they assume control of the employing entity.

The Eighth Circuit has said that a secured lender can become liable under the WARN Act when it "becomes so entangled with its borrower that it has assumed responsibility for the overall management of the borrower's business."13 The Ninth Circuit has applied the "single employer" test when deciding whether corporate affiliates will be liable under WARN, but has also held that "a secured lender can be liable under the WARN Act when it operates a business enterprise in the 'normal commercial sense,' but when the creditor ‘does no more than exercise that degree of control over the debtor’s collateral necessary to protect the security interest and acts only to preserve the business asset, the notice requirement of WARN will not apply.” 14

However, in Smith v. Ajax Magnethermic Corp., 144 Fed. Appx. 482 (6th Cir. 2005) (not selected for publication in Federal Reporter), the Sixth Circuit found lenders potentially liable under WARN there, Ajax was purchased by Citicorp Venture Capital, Ltd., which obtained bridge loans from ten banks to operate Ajax. A consultant Sutter Group was hired by the bank to investigate the viability of Ajax and was later chosen to manage the company, according to a WARN suit by former Ajax employees. In October 2001, the banks began looking for prospective buyers for Ajax but were unsuccessful and eventually the plant was shut down without any notice. A class action under WARN was brought against Ajax, its corporate owner Citicorp Venture Capital Ltd., and ten lending banks – all of whom allegedly controlled an Ajax plant. The Sixth Circuit found held that the lenders were potentially liable under the WARN Act and ordered discovery to determine the lenders’ possible liability.15

Likewise, In Coppola v. Bear Stearns & Co., 499 F. 3d 144 (2d Cir. 2007), the Second Circuit held that Bear Sterns, a creditor, was not an employer of the employees of a defunct business because it was not responsible for operating the business as a going concern, rather, it merely acted to protect its security interest and preserve the business assets for liquidation or sale.

**Other Theories of Liability.** The “alter ego” theory has also been recognized as potentially applying in WARN Act case. However, one court held that a railroad and its subsidiary did not constitute a “single employer” under WARN, despite common ownership, some overlap in management, and control of some of the subsidiary’s benefit programs by the

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12 Administaff Cos., 337 F.3d at 456 (the outside payroll administrator for a New Jersey factory was not liable for WARN violations when the factory closed down and only informed the payroll administrator after the fact).
13 Adams v. Erwin Weller Co., 87 F.3d 269 (8th Cir. 1996).
14 Teamsters Local 952 v. American Delivery Serv. Co., 50 F.3d 770 (9th Cir. 1995)(applying "single employer" test); Teamsters Local 572 v. Weslock Corp., 66 F.3d 241 (9th Cir. 1995).
15 On remand, the lenders settled. 2007 WL 3355080 (N.D. Ohio Nov. 7, 2007).
railroad, where the two entities operated independently, the labor-related functions at two companies were separate, and there was insufficient unity of interest between them for liability under “alter ego” theory.16

As noted above, parent corporations have been held liable under WARN for failure of their subsidiaries to notify employees of a plant closing during times of economic crises where the parent assumed control over the day-to-day operations of the subsidiary or they constituted a “single or joint employer.”17 However, where employees tried to hold a majority shareholding corporation of a bankrupt former employer liable for WARN violations, the federal district court dismissed the class action for lack of personal jurisdiction over the parent company because the employees could not pierce the corporate veil in the absence of evidence that the parent corporation exerted substantial control over the defunct employer.18

B. When does the Federal WARN Act Apply?

The federal WARN Act applies in two types of termination situations: a “plant closing” and “mass layoff.” However, the plant closing and mass layoff rules of the federal WARN Act do not apply: (1) When the government focus the layoff or (2) when there is a closure of temporary facilities or completion of an activity when the workers were hired only for the duration of an activity.19

The Plant Closing: The definition of “Plant Closing” is “the permanent or temporary shutdown of a single site of employment, or one or more facilities or operating units within a single site of employment, if the shutdown results in an employment loss during any 30-day period for 50 or more employees excluding any part-time employees.”20 The “effective cessation of production or work at a single site of employment may constitute a plant closing even if a few employees remain”21 The shut down of parts of a manufacturing department was a plant closing under WARN where the court found that the department had a distinct product, operation and work function at a single site of employment, so that the employer violated WARN by giving one day of notice or less of the shutdown that resulted in an employment loss for at least fifty employees, even though some of the department's work was picked up by other operating units.22

18 Caccamo v. Greenmarine Holdings LLC, 18 IER Cases (BNA) 1475 (N.D.Ill. July 3, 2002).
19 Deveratuda v. Globe Aviation Security Servs., 454 F. 3d 1043 (9th Cir. 2006) (No WARN notices required for workers laid off due to federal take-over).
**Mass Layoff:** The statutory definition of “Mass Layoff” is “a reduction in force which . . . results in an employment loss at the single site of employment during any 30-day period for (i)(I) at least 33 percent of the employees (excluding any part-time employees); and (II) at least 50 employees (excluding any part-time employees); or (ii) at least 500 employees (excluding any part-time employees).”23

**C. Is a “Single Employment Site” Involved?**

WARN Act notice requirements do not arise unless there is a mass layoff or plant closing at a “single site of employment,” but this element of the WARN Act can be a trap for the unwary. The Department of Labor's regulations define a “single site of employment” using a “geographical” test that looks at the workplace’s physical layout so that separate offices can be a single site if they are in “reasonable proximity” and share the same staff and equipment.24 One court held (prior to the DOL regulations) that even though salesmen worked in different districts, the company headquarters constituted a single employment site under the federal WARN Act because all assignments and orders emanated from headquarters, business cards listed the headquarters’ address, and voice mail messages were obtained by calling headquarters.25

However, in Bader v. Northern Line Layers, Inc., 503 F.3d 813 (9th Cir. Sept. 10, 2007), the Ninth Circuit reached a different conclusion regarding a construction company with outlying construction sites. Northern provided specialty construction services for telecommunications companies and was a wholly owned subsidiary of Quanta Services Inc. Due to an economic downturn, Quanta, merged Northern’s assets into another wholly owned subsidiary and laid off 185 employees before and after the merger without giving 60 days of advance notice as required under the WARN Act. While some of the laid-off employees worked at Northern’s headquarters in Billings, Montana, most of them worked at construction sites in a variety of other states. The Ninth Circuit affirmed summary judgment in favor of Northern because fewer than 50 workers were laid off from any single employment site and the remote construction sites did not qualify as a single employment site and the construction workers were not “outstationed” from the headquarters office: First the Ninth Circuit found that even though the administrative office and the maintenance shop in Billings were 20 contiguous buildings that they likely qualified as a single site of employment, the total number of employees never exceeded 33. No single construction site had more than 35 employees and that the construction sites could not be aggregated because they were not in reasonable geographic proximity to each other or in the same geographic area as the headquarter. The court also found:

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24 20 C.F.R. § 639.3(i)(3) (2000). See also United Food & Commercial Workers Union Local No. 72 v. Giant Market, 878 F. Supp. 700 (M.D. Pa. 1995) (noting that geographically separate buildings could constitute a single site of employment if they are in reasonably close geographic proximility, used for the same purposes, and share the same staff and equipment).
“[T]here is no evidence that [Northern] employees at remote construction projects physically reported to Billings during the course of the projects, that Billings originated work or was responsible for the day-to-day management of the majority of workers at the remote construction project locations, or that the workers directly reported their progress to Billings.”

Even though Northern paid vendors and subcontractors that supplied materials and services to the construction sites out of its headquarters in Billings, Montana and the project managers at the construction sites sent time sheets to headquarters for processing by a payroll services company, which sent the paychecks to Billings for delivery to the remote worksites, the remote sites could not be aggregated because personnel at field offices set up at each construction site had the authority to hire and fire construction employees as needed. Moreover, the Ninth Circuit refused to find that the laid-off workers were “outstationed” out of Billings to the various remote locations because the workers generally were not residents of Montana, did not consider Billings their home, and never “physically reported to Billings at all during a typical work period.” Rather, their work was assigned from each particular construction site, not from Billings, and day-to-day management of the workers occurred at each construction site “independent of any supervision from the Billings headquarters.”

D. Which Employees Are Counted?

Only the laid-off "full time" employees will be counted when determining whether a "plant closing" or "mass layoff" has occurred so as to trigger an employer's obligation to provide advance notice under the WARN Act.26 Employees who work less than 20 hours per week or who had not worked during six of the 12 months preceding the plant closing date are not "full time employees" under the Act, but are classified as "part-time employees “or” new employees," and are not counted for purposes of determining whether a "plant closing" or "mass layoff" occurred.27 However, such "part-time employees" and "new employees" are entitled to receive notice of plant closings and mass layoffs when WARN Act obligations are triggered.28

Because not every employee is covered by or counted under the WARN Act, it is important to keep in mind that the following other individuals are not considered "affected employees" and need not be given WARN Act notices: "temporary project" employees, business partners, consultants, contract employees of another employer who are paid by that employer, and self-employed individuals (i.e., independent contractors).29

29 20 C.F.R. § 639.3(e); see, e.g., Bradley, 847 F. Supp. at 867-68 (employee of temporary employment agency employed at uranium facility pursuant to transfer of services agreement and paid by employment agency was a contract employee not entitled to WARN notice).
Temporary project employees are individuals "hired with the understanding that their employment was limited to the duration of the facility or the project or undertaking." Seasonal workers may qualify as temporary project workers or part-time employees. The distinction is important because temporary project employees are not entitled to WARN Act notices while part-time employees are entitled to receive WARN Act notices.

The Aggregation Rule: When trying to determine whether there has been or will be a sufficient number of employees suffering an employment loss, entities facing economic crises must beware of the WARN Act 90-day “Aggregation Rule.” Under this Rule, during any 90-day period, if two or more groups of employees at a single site of employment suffer employment losses and the aggregate number of layoffs or terminations exceeds the minimum number required for a mass layoff or plant closing, even though each set of layoffs or terminations involve less than the minimum number when examined separately, a “mass layoff” or “plant closing” will be deemed to have occurred, unless the employer demonstrates that the

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30 29 U.S.C. § 2103(1); 20 C.F.R. § 639.5(c). See also 20 C.F.R. § 639.5(c)(3) (providing that "permanent employees who work on a variety of jobs and tasks continuously through most of the calendar year" are not "temporary project" employees even if they work on temporary projects).

31 20 C.F.R. § 639.5(c)(3) (providing that seasonal but recurring work falls under temporary project worker exemption "if the workers understood at the time they were hired that their work was temporary"); Marques v. Telles Ranch, Inc., 867 F. Supp. 1438 (N.D. Cal. 1994) holding that agricultural laborers who harvested lettuce for the seven months from May through November had an expectation of recall every spring and consequently were "permanent seasonal employees" entitled to WARN notice when the employer ceased harvesting operations. In Marques, the employees were given layoff slips each fall which always gave the date the employees were to call back for information regarding the start of the new season. At the beginning of each new season, the employees were not required to fill out a new Form I-9 each new season, and the employer provided handbooks that enumerated the employees' rights to seniority, incentive pay, medical coverage during the off season, vacation pay, and holiday pay. Nevertheless, the court found that the employer's notice on the last day of the season was timely, because no employment loss was suffered until the start of the next season, which was more than 60 days later.). In contrast, in Washington v. Aircap Indus., 831 F. Supp. 1292 (D.S.C. 1993), a federal district court in South Carolina held that employees of outdoor power equipment manufacturer were not "temporary" workers just because of "seasonal" layoffs. In Aircap, the employer had renewable contracts and employees were not hired for discrete projects. Also, the employee handbook referred to the employees as "permanent" if they worked longer than 90 days. Unlike Marques, providing notice near the end of the season in late spring was held to be inadequate, even though the employees would not normally be re-hired until the fall. 831 F. Supp 1297-98.

32 29 U.S.C. § 2102(d) provides:

"...in determining whether a plant closing or mass layoff has occurred or will occur, employment losses for [two] or more groups at a single site of employment, each of which is less than the minimum number of employees specified in [S]ection 2101(a)(2) or (3) ... but which in the aggregate exceed that minimum number, and which occur within any 90-day period shall be considered to be a plant closing or mass layoff unless the employer demonstrates that the employment losses are the result of separate and distinct actions and causes and are not an attempt by the employer to evade the requirements of this chapter." 290 U.S.C. §2102(1).

Employers trying to decide whether WARN Act notices are required must not only look at every 30-day period, but must also "[I]ook ahead 90 days and behind 90 days to determine whether employment actions both taken and planned each of which separately is not of sufficient size to trigger WARN coverage will, in the aggregate for any 90-day period, reach the minimum numbers for a plant closing or mass layoff and thus trigger the notice requirement." DOL regulations (20 C.F.R. § 639.5(a)(1)).
employment losses are the result of separate and distinct actions and are not an attempt to evade the requirements of the Act. Attempts to evade meeting the numerical prerequisites of a plan closing or mass layoff by laying off, rehiring and then “re-terminating” employees can bar an employer’s attempt to use the “separate and distinct action” defense.

In *Roquet v. Arthur Andersen LLP*, 2004 WL 442628 (N.D. Ill. March 3, 2004), a federal district court held that accounting firm Arthur Andersen LLP’s cumulative layoff of 635 employees from its Chicago office during a 90-day period in 2002 was sufficient to trigger the 60-day notice provision of the WARN Act. The court decided the company triggered the notice requirement under WARN Act Section 2102(d), which aggregates layoffs during any 90-day period. The judge court rejected Arthur Andersen's argument that the aggregate’s rule set forth in Section 2102(d) only applies if less than 50 employees were laid off during any 30-day period.

E. Will the Affected Employees Suffer “Employment Loss”?  

In order to have a cause of action under the WARN Act, the “affected employees” must also demonstrate that there was an “employment loss” that is defined as “(A) an employment termination, other than a discharge for cause, voluntary departure, or retirement, (B) a layoff exceeding 6 months, or (C) a reduction in hours of work of more than 50 percent during each month of any 6-month period.” An employee does not experience an “employment loss” if the plant closing or layoff is the result of the relocation or consolidation of part or all of the employer’s business and the employer offers to transfer the employee to a different site of employment within reasonable commuting distance with no more than a 6-month break in employment; or the employer offers to transfer the employee to any other site of employment regardless of distance with no more than a 6-month break in employment and the employee accepts within 30-days of the offer or of closing or layoff, whichever is later.

An employee who voluntarily quit his job and became an independent contractor for a company in the days before a mass layoff was announced was not entitled to back pay under WARN because he was not an “aggrieved employee” who suffered an “employment loss” on the day that WARN notices should have been given.

Most courts have taken a functional view of employment loss. In *Moore v. Warehouse Club, Inc.* the defendant announced the closing of one store and invited the employees to apply for employment at its other stores. In determining whether at least fifty employees had suffered

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35 2004 WL 442628, at *4-5. On appeal, the Seventh Circuit affirmed the dismissal of the employees’ WARN Act claims under the unforeseen business circumstances exception, finding that the criminal indictment of the firm justified the lack of advance notice. 398 F.3d 585 588-90 (7th Cir. 2005).
37 29 U.S.C. § 2101(b)(2); *Martin v. AMR Serv.. Corp.*, 877 F. Supp. 108 (E.D.N.Y. 1995) (employees terminated on June 4 and in new position with acquiring company by June 7 had no “employment loss”).
39 992 F.2d 27 (3d Cir. 1993).
an employment loss, the court considered two employees who had accepted positions with another of defendant's stores on the same day as the closing and "transferred to this store without a break in employment."\textsuperscript{40} Since the statute does not define "employment termination," the court in Moore took the dictionary definition, "[t]o discontinue the employment of," as the ordinary meaning of termination. Although the plaintiffs argued that the relocation exclusion required that the offer of transfer be made "prior to" the plant closing, not on the same day, the court held that the two transferred employees suffered no employment loss. "Rather, they continued to be employees of Warehouse Club, albeit in different positions at another location. The plant closing, therefore, had no effect on their employment status and WARN's notice provisions have no application as to them."\textsuperscript{41}

In Gonzalez v. AMR Services Corp.,\textsuperscript{42} the Second Circuit endorsed the district court's "practical, effects-driven analysis of whether a break in employment actually occurred" where the employer had eliminated a department and notified the employees that they had been "surplussed." The court found that the fifty employment losses threshold was not met (and hence no WARN notices were required) without the inclusion of eighteen employees who, the court found, had not experienced employment losses where they had been laid off as of May 31, paid through Friday, June 4, placed in other positions the following Monday, June 7 with no gap in pay pursuant to the employer's reduction in force policy.\textsuperscript{43}

In New Orleans Clerks Union Local No. 1497 v. Ryan-Walsh, Inc.,\textsuperscript{44} at issue was whether longshoremen who worked for various stevedores under a hiring hall arrangement suffered employment losses when one stevedore reduced its operations at the port. The court found that there was no WARN event because "[a]s a practical matter these workers suffered no loss of employment," where the longshoremen "pursue[d] short-lived opportunities to work for the various...stevedore-members[,] follow[ed] the work from one stevedore to the next," and even "regular" longshoremen "promptly" went to work for other stevedores at the port.\textsuperscript{45}

There is also an open issue about the effect of "bumping rights" on the "employment loss" provision of the WARN Act. In an early case, UMW v. Harman Mining Corp.,\textsuperscript{46} the district court in West Virginia considered whether employees who exercise bumping rights suffer an "employment loss." The employer had eliminated fifty-seven positions at one of its facilities. However, fourteen of those employees exercised bumping rights, resulting in the termination of fourteen bumpees at another facility. The court concluded that the WARN threshold of fifty employees had not been met at the first site because only forty-three workers at the first site were

\textsuperscript{40} Id. at 29.
\textsuperscript{41} Id. at 30.
\textsuperscript{43} 877 F. Supp. at 117.
\textsuperscript{44} 10 IER Cas. (BNA) 1061 (E.D. La. 1995).
\textsuperscript{45} 10 IER Cases (BNA) 1061.
terminated. The court found that the plain language of the statute indicated that the bumpers had suffered no employment loss. Thus, in the view of the Harman Mining court, bumping to another position within the employer's operation, even if as a result of a layoff or termination from an existing position, is not an employment loss.\footnote{Harman Mining, 780 F. Supp. As to the 14 bumpees at the second site, the court concluded that they were not to be counted in determining employment losses for the first site. The court referred to the definition of employment loss as well as an example given in the DOL discussion on whether notice to bumpees was required, which stated that if an employer closes an operating unit which employs 55 workers and, because of crossplant bumping rights, 6 workers at another site lose their jobs, the plant closing threshold will not be met at the first site. Supplementary Information to the Final Regulations of the Worker Adjustment and Retraining Notification Act, 54 Fed. Reg. 6,042, 16047 (1989). The DOL went on to note, however, that an action at one site may trigger a WARN event at another site. Id.}

\textbf{F. Will a "Sale of a Business" Affect WARN Act Liability?}

Often, entities facing economic crises look for buyers to acquire some or all of the selling entities’ assets or stock. If a plant closing or mass layoff takes place on or before the effective date of a sale of all or part of an employer’s business, the seller is responsible for providing WARN notices; and after the effective date of sale, the purchaser is responsible for providing notice of a plant closing or mass layoff.\footnote{29 U.S.C. § 2101(b)(1) (1994); Wilson v. Airtherm, 436 F.3d 906 (8th Cir. 2006) (subsequent employer responsible for WARN notice after sale of business, but notice not required because it hired all of former employer's employees).} The regulations state that if the seller is made aware of any definite plans on the part of the purchaser to carry out a plant closing or mass layoff within 60 days of purchase, the seller may give notice to affected employees as an agent of the purchaser, if so empowered; but if the seller gives WARN notices as the purchaser's agent, the responsibility for the notices will still remain with the purchaser; and if the seller does not give WARN notices, the purchaser will, nevertheless, be responsible for giving the notices.\footnote{20 C.F.R. § 639.4(c)(1).}

Employees who are technically terminated by a selling entity, but who immediately go to work for an acquiring or successor entity will not usually be found to have suffered an "employment loss," so they will not have to be counted for WARN Act purposes.\footnote{Wiltz v. M/G Transport Services, Inc., 128 F.3d 957 (6th Cir. 1997)(employees who continued or had opportunity to continue working for entity to which former employer sold its business did not suffer "employment loss" for WARN purposes, even though they were "terminated" by former employer on date of sale); Rifkin v. McDonnell Douglas Corp., 78 F.3d 1277, 1282 (8th Cir. 1996); Dingle v. Union City Chair Co., 134 F. Supp. 2d 441, 443 (W.D.Pa. 2000)(following termination of more than 100 employees of furniture company resulting from sale of company's assets, where all but 22 were rehired by purchaser of assets, rehired employees could not be counted toward "employment loss" required to trigger WARN notice requirements); Martin v. AMR Servs. Corp., 877 F. Supp. 108 (E.D.N.Y. 1995) (employees terminated on June 4 and in new position with acquiring company by June 7 had no "employment loss"). See also, International Oil, Chemical & Atomic Workers, Local 7-517 v. Uno-Ven Co., 170 F.3d 779 (7th Cir. 1999)(operating agreement in which refining company handed over operation of plant to other corporation was equivalent of "sale" in which no employment loss occurs under WARN, and no duty of notice of mass layoff arises where sale of business results in only a technical termination of employment).}

According to the preamble to the final WARN Act regulations, "[i]f a plant closing occurred as a result of the buyer's decision not to rehire the seller's workers, and the closing occurred after the effective time of the sale, the buyer is responsible for giving notice."\footnote{Martin v. AMR Servs. Corp., 877 F. Supp. 108 (E.D.N.Y. 1995) (employees terminated on June 4 and in new position with acquiring company by June 7 had no "employment loss"). See also, International Oil, Chemical & Atomic Workers, Local 7-517 v. Uno-Ven Co., 170 F.3d 779 (7th Cir. 1999)(operating agreement in which refining company handed over operation of plant to other corporation was equivalent of "sale" in which no employment loss occurs under WARN, and no duty of notice of mass layoff arises where sale of business results in only a technical termination of employment).}
Courts have held that stock sales or transactions where the entity is transferred as "a going concern" are analyzed differently from asset sales under the WARN Act. In one recent case, the seller of a manufacturing business had no duty to give employees the 60-day notice of termination required under the WARN Act when it sold the plant as a going concern.\(^{52}\)

One court has held that an asset-only sale does not fall within the “sale of business” exclusion set forth in § 2101(b)(1) of the WARN Act, and that the exclusion only applies if the seller's employees are also transferred along with the purchased assets.\(^{53}\) However, other courts have noted that no such limiting language is found in the WARN Act’s “sale of business” exclusion provision, and have been broadly applied that provision in a number of different sales scenarios, including asset sales.\(^{54}\) Additionally, the narrow construction of the “sale of business” provision to exclude assets only transactions has been specifically rejected by a number of courts.\(^{55}\)

A federal district court in New York held in 1995 in Martin v. AMR Serv. Corp., 877 F. Supp. 108 (S. D.N.Y. 1995) that employees who were terminated on June 4 and employed by an acquiring company on June 7 suffered no employment loss.

However, the Seventh Circuit has held that a gap of as little as eight days between when employees stopped working for a selling entity and began work for an acquiring company resulted in WARN Act liability for the selling entity, even though the purchaser then hired most of the seller's employees (so that less than 50 employees ended up with no job), the negotiations were well publicized, and the employees knew that the sale was imminent and that they were likely to be hired by the purchaser.\(^{56}\)

There is also an open question about whether post-transaction changes to compensation and benefits of employees affected by the sale of a business will impact on the applicability of the WARN exclusion. One negative case to keep in mind is Local 819, Int'l Brotherhood of Teamsters, AFL-CIO v. Textile Deliveries, Inc.,\(^{57}\) where the union alleged that 25 employees hired by acquiring company lost benefits such as seniority, health, pension, and vacation benefits and were not placed in substantially equivalent positions, and the district court held that "[i]t cannot be said as a matter of law that these employees did not suffer an employment loss." However, the Compact Video Services decision by the Ninth Circuit goes the opposite way and

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55 E.g., International Alliance of Theatrical and Stage Employees v. Compact Video Services, Inc., 50 F.3d 1464 (9th Cir.), cert. denied, 516 U.S. 987, (1995) (rejecting argument that a sale of assets is not a sale of a business); Headrick v. Rockwell International Corp., 24 F.3d 1272 (10th Cir. 1994) (transfer of responsibilities to new contractor was a "sale" within meaning of WARN).
56 Phason v. Meridian Rail Corp., 479 F.3d 527, 529-30 (7th Cir. 2007).
suggests that if a new employing entity reduces the salary and benefits of the newly transferred/hired employees, the new employing entity, not the previous employer, would incur any potential WARN. 58

Thus, parties to a merger or acquisition involving an employing entity in economic distress need to look beyond labels and outward appearances and, instead, examine the actual effect of the transaction before concluding that the WARN Act does or does not apply.

1. Can Acquiring Companies Incur Successor Liability under the Federal WARN Act

A purchasing company can be liable for the WARN violations of its predecessor or selling company in certain situations. 59 In determining whether a purchasing company can incur WARN liability for the acts of a selling entity, courts have looked at the doctrines of "successor liability," "alter ego," federal cases involving the "single employer" doctrine, and other factors that have been considered by courts and governmental agencies (such as the DOL, EEOC, and others) in other contexts. 60

In McCaffrey, the Morgan Lewis law firm claimed it did not buy the Brobeck law firm's business, but only extended offers of partnership to some former Brobeck employees and purchased a "small quantity of tangible assets." However, the judge held that Morgan Lewis could be liable as Brobeck's successor for violating the WARN Act where:

- There is an agreement of assumption;
- The transaction amounts to a consolidation of the two corporations;
- The purchaser was simply a continuation of the seller; or
- The purpose of the transfer of assets was for the fraudulent purpose of escaping liability for the seller's debts.

In denying Morgan Lewis’ motion to dismiss, the court found that, although Morgan Lewis did not assume Brobeck's liabilities or acquire its accounts receivable, it did create a series of transactions that allowed many of the same attorneys to practice law with much of the same support "with the explicit hope that this would allow it to acquire Brobeck's clients." Therefore, there was a question concerning whether the alleged purchase resulted in what was essentially a continuation of the former business.

58 International Alliance of Theatrical and Stage Employees v. Compact Video Services, Inc., 50 F.3d 1464 (9th Cir. 1995), cert. denied, 516 U.S. 987, (1995)
However, in a subsequent decision, the court granted Morgan Lewis' later motion for summary judgment, finding that even if there was a "sale of all or part of an employer's business" for purposes of the WARN Act, Morgan Lewis was not responsible for giving WARN notices because the employees were terminated on the effective date of the transaction, not afterward.61

A significant factor in determining whether a purchasing entity will incur successor liability is its role of the purchaser in the decision by the selling company to effectuate a plant closing or mass layoff.62

2. Any Exceptions to the WARN Act?

Sixty-days notice generally must be provided under the federal Worker Adjustment and Retraining Act (WARN).63 However, there are three statutory exceptions to the 60 day notification requirement for: (1) “a faltering company,” (2) “unforeseeable business circumstances,” or (3) “a natural disaster.”64 Even if an exception applies, the notification must be “adequate” to inform the employees about the factual events that led to reduced notice period and the employer’s basis for reducing the period.65

a. When Does the “Faltering Company” Exception Apply?

This exception only applies if the employer was actively seeking capital or business which, if obtained, would have enabled the employer to avoid or postpone the shutdown and the employer reasonably and in good faith believed that giving the notice would preclude the employer from obtaining the needed capital or business.66 The regulations impose many restrictions on the use of this narrow exception, including that the employer must be able to identify specific actions to obtain the capital or business, that there must have been a “realistic opportunity” to obtain the capital or business, the capital or business sought must have been enough to avoid the plant closing for a “reasonable period of time,” and that the employer must have “reasonably and in good faith” believed that the required notice would preclude the employer from obtaining the capital or business sought.

b. Does the “Unforeseeable Business Circumstances” Exception Apply?

The test to determine when business circumstances are not reasonably foreseeable focuses on whether the shutdown was caused by some drastic, unexpected action outside the control of the employer, such as the unexpected termination of a contract with the employer; the

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64 29 U.S.C. § 2102(b); Alarcon v. Keller Indus. 27 F.3d 386, 388 (9th Cir. 1994).
65 See generally Alarcon, 27 F.3d at 386.
strike at a supplier or government ordered closing. Conversely, a company closing to end a bad union relationship or to move its manufacturing to another country, does not fit within this exception. “Case law reveals that WARN Act defendants need not show that the circumstances which caused a plant closing or mass layoff arose from out of the blue to qualify for the exception. In Roquet v. Arthur Andersen LLP, 398 F.3d 585 (7th Cir. 2005), the Seventh Circuit affirmed the dismissal of a federal WARN Act claim against Arthur Anderson in the fallout from the Enron scandal under the WARN Act's "unforeseen business circumstances" exception. The Seventh Circuit en banc found that the criminal indictment of Arthur Andersen by the U.S. Department of Justice was an "unforeseen business circumstance under WARN Act, even though the firm knew that the DOJ was investigating and that an indictment was possible, where the firm continued to negotiate with the DOJ and made the layoffs only after the indictment became public and the firm suffered massive revenue losses."

G. Is There Individual Liability Under the WARN Act?

The courts have consistently held that offices, directors, supervisors, and other individual associated with an employing entity may not be held directly liable for WARN violations based on the statutory language of the WARN Act, its legislative history, and the case law unless there is some basis to “pierce the corporate veil” of the employing entity.

H. What are the Penalties for Failure to Comply with the WARN Act?

Failure to provide employees with the required notice can expose a liable entity to fines and civil liability consisting of back pay and benefits for the period of violation and a civil penalty of up to $500 per day for failure to give sixty-60 days notice to the local government (but

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69 Roquet, 398 F.3d at 590; Jurcev v. Centennial Community Hospital, 7 F.3d 618, 626 (7th Cir. 1993) (hospital entitled to the exemption despite awareness of precarious financial condition and potential loss of funding which ultimately led to its closing); Hotel Employees & Rest. Employees Int’l Union Local 54 v. Elsinore Shore Assocs., 173 F.3d 175, 186 (3rd Cir.1999) (casino owner entitled to exception where it could not be sure if or when gaming commission would revoke its license).
70 398 F.3d at 588-89.
71 Hollowell v. Orleans Regional Hospital, 1998 WL 283 298 (E.D. La. May 29, 1998, affirmed, 217 F.3d. 379 (5th Cir. 2000) (table); Lewis v. Textron Automotive Co., 935 F.Supp. 68, 71 (D.N.H. 1996); Wallace v. Detroit Coke Corp., 818 F.Supp. 192, 195 (E.D. Mich. 1993)(basing decision to dismiss on holding that the WARN Act does not impose individual liability and on plaintiffs’ failure to present evidence that the defendant’s “corporate veil” should be “pierced”); Cruz v. Robert Abbey, Inc., 778 F.Supp. 605 (E.D.N.Y. 1991)(holding that “employer” under WARN did not include individual persons, despite allegations that individuals were the alter-ego and joint employer of the defendant companies); Carpenter’s Dist. Counsel v. Dillard Department Stores, 778 F.Supp. 297, 315-16 (E.D. La. 1991)(basing decision to dismiss on text of Section 2101 (a)(1) and accompanying legislative history), affirmed in part and reversed in part on other grounds, 15 F.3d. 1275 (5th Cir. 1995), cert. denied, 513 U.S. 1126 (1995); see also Williams v. Phillips Petroleum Corp., 23 F.3d 930, 933 n. 1 (5th Cir. 1994)(declining to address the issue whether individuals may be held liable for WARN Act violations, but noting that individuals are excluded by WARN’s plain terms, as WARN covers only an “employer,” defined as a “business enterprise” that employs “100 or more employees”).
there is no such penalty if, within three weeks of the termination, the employer pays the affected employees the amounts due to them under WARN).\textsuperscript{72} The back pay liability is usually limited to payment only for what would have been work days during the 60 day period, but a few courts have held that liability should be measured by each calendar day of violation.\textsuperscript{73} The statute spells out the calculation for the rate of pay and benefits and further provides that the amount of the employer’s liability is reduced by any wages paid to employees during the violation period, any voluntary payments and any payments to third parties on behalf of the employees.\textsuperscript{74}

I. What State WARN Acts Apply?

If the federal WARN Act does not apply, parties and their legal counsel need to check to see whether they are operating in one of the states that has a “mini-WARN” Act.

California’s plant closing law affects “covered establishments” (defined as an industrial or commercial facility or part thereof that employees or has employed with 75 or more employees); and has a “mass layoff” of 50 or more employees in a 30-day period.\textsuperscript{75}

Connecticut has its own state WARN Act requiring workplaces with 100 employees to continue terminated employees’ existing health benefits for 120 days following a relocation or closing.\textsuperscript{76}

Hawaii requires employers with 50 or more employees to provide 60-days' notice to state agencies and employees and provide severance pay equal to the difference between the employees weekly wage and 4 weeks dislocated worker allowance.\textsuperscript{77}

Illinois has its own mini-WARN Act which covers employers with 75 full-time employees (in contrast to 100 under federal law) who terminate 50 or more full-timers in a plant closing (same as the federal law) or a mass layoff of either (a) 25 full-time employees (compared to 50 under the federal law) if they constitute 33% of the full-time workforce or (b) 250 full-time workers (in contrast to 500 under the federal law).\textsuperscript{78} A prior Illinois law requires private firms which have received state or local economic development incentives for doing business or continuing to conduct business in Illinois to provide advance notices of plant closings or mass layoffs pursuant to the federal Worker Adjustment and Retraining Notification Act (WARN) to the Governor, the Speaker and Minority Leader of the Illinois House, the President and Minority

\textsuperscript{72} 29 U.S.C. § 2104. However, there is no penalty if the employer pays the affected employees the amounts due them within three weeks of the termination. \textit{Id.}


\textsuperscript{75} Calif. Labor Code §1400 et seq.

\textsuperscript{76} 820 ILCS 65/1 et seq.

Leader of the Illinois Senate, and the Mayor of each municipality in which the firm is located within the state. Companies failing to provide the required notices may have all or some of their incentive payments terminated and the due date of all or part of any indebtedness to the state or local government may be accelerated by notice given to the defaulting firm.79

Kansas requires employers in food production, clothes manufacturing, fuel mining, transportation and public utilities to provide notice to its secretary of human services regarding cessation of operations.80

Maine requires companies with 100 employees to give 60 days' notice for plant closings, and severance pay of one week per year of employment.81

Maryland encourages, but does not require employers with 50 employees to provide 90 days' voluntary notice for plant closings and relocations.82

Massachusetts encourages employers that receive state funds to give reasonable notice of plant closing and to provide 90 days' salary and health insurance, but it is a voluntary provision.83

The Michigan Department of Labor encourages business establishments considering a closing of operations or a relocation of operations (when there are 25 or more employees) to give notice to the Michigan DOL and to the employees.84

Minnesota requires employees to notify employers immediately in the event of petition for bankruptcy.85 Minnesota had a prior statute that required notification as early as possible of plant closing, substantial layoff or relocation with employment loss for (i) 50 full time workers, or (ii) 500 workers working an aggregate of 20,000 hours per week, but this law was repealed in 2001.86

New Jersey requires notice on a mass separation of 25 or more employees to the state unemployment office and delivery to employees of Form BC-10 instructions for claiming N.J. unemployment benefits.87 On Dec. 20, 2007, New Jersey enacted its own WARN Act that applies to employers who have been in operation for more than three years and have 100 or more full-time employees. New Jersey’s WARN law, like the federal act, requires 60 days' advance written notice prior to a "mass layoff," "transfers of operations" or "termination of operations." New Jersey’s WARN law is generally more restrictive than its federal counterpart and contains far fewer exceptions to its requirements. In addition, New Jersey WARN's notification requirements are far more stringent than those contained in WARN, requiring more information.

80 Kansas Stat. § 44-616.
81 Maine Rev. Stat. T. 26 § 625-B.
82 Maryland Labor & Emply. § § 11-301 to 11-304.
83 Mass. Gen. Laws Ch. 151A § 71A to G and Ch. 149 § 182.
84 Michigan Complied Laws § § 450.731 to 450.737.
86 Minn. Stat. § § 268-975 to 268.98 (repealed).
to be contained in each notice and the notices to be sent to greater groups of recipients. Finally, the penalties imposed by the New Jersey WARN Act are far more severe than those contained in the federal WARN Act. A violation of New Jersey’s WARN Act requires an employer to pay every affected employee one week of back pay for each full year of service, as compared with WARN, which imposes lost wages only for up to 60 days.88

New York has a labor law added in 1989 that requires employers to provide certain notification within 5 working days to terminated employees regarding cancellation of their employee benefits.89

South Carolina has a statute that governs employers who require notice of resignation from employees and requires such employees to post notices of a plant shut down at least two weeks in advance or provide the same amount of notice they require from their employees.90

Tennessee has a state “mini-WARN Act” for employers with at least 50 and no more than 99 employees requiring advance notice of workforce reductions of 50 or more employees.91

Wisconsin’s state WARN Act requires employers with 50 employees to provide 60 days advance notice of “business closing” (shutdown affecting 25 or more employees or 25% of the employer’s workforce, whichever is greater).92

J. Are There Ways for Struggling Entities to Avoid WARN Act Liability?

Offer to Pay in Lien of Notice. One court found no WARN Act violation where a company that shut down a South Carolina manufacturing plan without warning, but offered to pay the affected employees for a period of 60 days or until they accepted jobs with a successor firm which intended to operate the plant at a reduced capacity. The same court also ruled that no constructive discharge or employment loss occurred when the company gave notice to employees that their jobs would end in 60 days would end in 60 days and offered to continue to pay them for this period, but they left to take other jobs.93

Waivers and releases of the WARN notice in exchange for severance payments have been upheld.94

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94 See, e.g., Williams v. Phillips Petroleum Co., 23 F.3d 930 (5th Cir. 1994), cert. denied, 513 U.S. 1019 (1994)(releases signed in connection with layoffs that in return for severance benefits release employer from all claims were valid and enforceable to preclude workers from bringing any WARN Act claims); International Association of Machinists and Aerospace Workers, AFL-CIO v. Compania Mexicana de Aviacion, S.A. de C.V., 199 F.3d 796 (5th Cir. 2000) (union employees’ acceptance of separation package in exchange for their rights under the collective bargaining agreements and in connection with negotiations constituted valid release and waiver under WARN); Local Union No. 1992, of the International Brotherhood of Electrical Workers v. Okonite Co., 189 F.3d 339 (3d Cir. 1999) (general waiver of rights in exchange for severance benefits would release any claims under WARN unless it were determined that employees were entitled to their severance benefits even if they did not waive their rights as employees).