TESTIMONY OF STEFAN JAN MARCULEWICZ BEFORE THE U.S. SENATE COMMITTEE ON HEALTH, EDUCATION, LABOR AND PENSIONS

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

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 FOREWARN 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 fifty 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 reenter 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 perusal 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 fifty 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.