U.S. House of Representatives
Committee on Education and the Workforce
Subcommittee on Workforce Protections
Testimony of Ross Eisenbrey,
Vice President, Economic Policy Institute
Regarding the Worker Adjustment and Retraining Notification Act
February 14, 2013

Thank you for inviting me to testify about the WARN Act. I was the legislative director for the bill's House author, Congressman William D. Ford of Michigan, and I worked on the legislation from 1979 until its passage in October 1988. I helped negotiate the final conference report with staff of the Senate Labor and Human Resources Committee, and helped draft two rounds of regulatory comments submitted by Representative Ford, Representative Bill Clay, Representative Jim Jeffords, and Senator Howard Metzenbaum.

I have three points to convey today:

1. The Department of Labor's guidance letter was appropriate and correctly characterized the law and its requirements
2. If federal contractors had given notice 60 days before the expected sequester on January 2, 2013 it would have been counterproductive and needlessly disruptive.
3. The issues of potential mass layoffs and WARN guidance are only before us because Congress has been unable to undo the misguided sequestration it set up to spur budget negotiations. Undoing sequestration should be Congress's focus.

The Department of Labor's guidance was appropriate

The guidance letter accurately sets out the purposes and requirements of the statute. In particular, it accurately describes the balance the WARN Act struck between general notice, which can sometimes be helpful, and the specific notice of job loss that covered employers must give employees under the Act. Representative Ford and the other authors of the bill were determined to prevent unhelpful blanket or rolling notice of the type that might say: "If the economy doesn't improve, we might have to close our factory." Or, "We might have to lay you off in 60 days, but we can't say it's more likely than not." Rep. Ford and his colleagues sent two sets of comments informing DOL as it prepared the implementing regulations that only specific notice could satisfy the Act's requirements. Those letters can be found in this committee's print of the legislative history of WARN, Serial No. 101-K, published February 6, 1990.

The WARN Act is intended to do three things:

1. To give employees of large and medium-sized businesses at least 60 days advance notice of and an opportunity to prepare themselves for the potentially devastating impact of corporate decisions to shut down a facility or to lay off substantial numbers of workers. It gives workers a chance to prepare their individual finances for a shock and to begin searching for new employment, with enough lead time to minimize their losses. Before the WARN Act it was routine for employees to report for work and be told that their factory, store or office was closing, their jobs were eliminated, they needed to clean out their lockers or desks, and that they were unemployed along with hundreds of their fellow workers.
2. To give mayors and community leaders a chance to prepare for large layoffs or closings that would impact local services and revenues. A sudden shutdown of a major employer could wreck a local budget and overwhelm local support agencies.

3. To give the employment services, job training system, and other helping agencies enough time to prepare and deliver adjustment services to the unemployed in a timely way.

Not one of these three interests is served by a blanket notice to employees. Only when a corporation has actually decided to conduct a mass layoff, or is reasonably certain that it will, is it required to deliver notice. Only then does it make sense to tell individual employees that their jobs are being eliminated.

The WARN Act provides in section 3(b)(2)(A) that "An employer may order a plant closing or mass layoff before the conclusion of the 60-day period if the closing or mass layoff is caused by business circumstances that were not reasonably foreseeable as of the time that notice would have been required." The case law regarding "reasonable foreseeability" makes clear that an employer is not required to give a WARN notice until a closing or mass layoff is a probability, rather than a mere possibility. *Halkias v. General Dynamics Corporation,* 137 F.3d 333 (5th Cir. 1998) is the leading case:

> "We must determine whether the evidence before the district court supported a finding, as a matter of law, that 60-days before the layoffs in this case General Dynamics could not reasonably have foreseen the cancellation of the A-12 contract which precipitated these layoffs. **Yet, the question of reasonable foreseeability begs another question: by adopting "reasonable foreseeability" as a standard, does the WARN Act envision the probability of an unforeseen business circumstance (i.e. the contract cancellation) or instead the mere possibility of such a circumstance? We can only conclude that it is the probability of occurrence that makes a business circumstance "reasonably foreseeable" and thereby forecloses use of the § 2102(b)(2)(A) exception to the notice requirement. A lesser standard would be impracticable.** Since cancellation is a possibility every time there is a cost overrun, defense contractors like General Dynamics would be put to the needless task of notifying employees of possible contract cancellation and concomitant lay-offs every time there is a cost overrun, and experience teaches us that there are invariably cost overruns, which most often do not lead to contract cancellation."

The Department of Labor's July 30 advisory carefully says that in the wake of specific contract terminations caused by sequestration or cutbacks in federal spending that require job loss in less than 60 days, the obligation to give notice will still be triggered, "but employers will not have to provide the full period of notice":

> "In such instances, contractors' obligation to provide notices under the WARN Act would not be triggered until the specific closings or mass layoffs are reasonably foreseeable…"

If the job losses will occur in 60 days or longer after the sequestration takes effect, employers will not be excused from giving the full notice. The letter that Chairmen Wahlberg, Kline and Roe sent to Secretary of Labor Solis, which asserted that the DOL "does not clearly state that WARN notices *must still be issued*," is in error.

Moreover, the argument that because DOL has no enforcement authority it should give no guidance is belied by Congress's assignment of regulatory authority to DOL in section 8 of the Act and the fact that the original regulations addressed the issues of blanket notice and notice in the context of government contract renewal. Section 8 reads, in part: "(a) The Secretary of Labor ***shall*** prescribe such regulations as may be necessary to carry out this Act." (Emphasis added)

<u>It would have been counterproductive to issue WARN notices in November</u>

Subsequent events show the wisdom of DOL's guidance. Sequestration did not occur on January 2, 2013. It was possible, but widely considered improbable. The *Halkias* court would have found no notice to be required.

And if contractors had sent WARN notices to their employees, mayors and state rapid response offices, what would they have done? Communities might have held useless meetings, workers and their spouses would have suffered anxiety during the holidays, and states would have directed resources to the wrong places or spun their wheels, distracting them from serving the real plant closings that happen for reasons unrelated to sequestration. How wasteful would it have been for the affected employees to have begun searching for and taking other employment, leaving work to interview with other employers, or using the job search and resume writing training provided by the Workforce Investment Act One-Stop centers?

Apart from stress and disruption to the contractors' workforce, premature notice would have deprived contractors of countless valued employees, workers effectively pressured to leave their positions in search of job stability, when most observers believed that sequestration was unlikely (it was, after all, designed not to occur).

Even now, while it is becoming more probable that sequestration might happen, the effects on any particular contractor are unknowable. Post-sequestration, each affected agency will have to allocate the cuts among its programs, grantees, contractors, etc. Only then will any business be certain whether and how many of its employees will be laid off because of sequestration.

I am confident that the *Halkias* court and other federal courts (see e.g., *Loehrer v. McDonnell Douglas Corp.*, 98 F.3d 1056 (8th Cir. 1996)) would note the predisposition of Congress to wait until the last minute—or even later—to act on any important matter and would consider sequestration and any subsequent contract cancellations unforeseeable until they actually occurred.

<u>Congress should focus on preventing sequestration</u>

My colleagues at EPI estimate that sequestration would cost the economy 660,000 jobs. This would be a catastrophe with 7.9% unemployment and a jobs deficit of 9 million jobs. Every member of Congress wants to put people back to work, not destroy their jobs.

We believe that now is not the time to reduce federal spending. As the recent 4th quarter 2012 decline in economic activity shows, falling federal spending is a recipe for higher unemployment, not recovery. It is virtually unimaginable that the economy will ever recover if we continue to doom almost 23 million people to unemployment, underemployment, or hardship, let alone if we add to their number implementing sequestration.

We can look to the experiences of Greece, Spain, and Ireland, which have had austerity chosen for them, and the United Kingdom, which made the unfortunate choice of imposing austerity on itself. The result in each case has been economic misery and an even worse fiscal outlook. There is no reason to think that the United States will have better luck cutting its way to prosperity.

A brighter future requires investment, building, educating and doing the research that will fuel future innovation. It requires more federal spending on these initiatives, not less. I hope this committee's members will take whatever steps are necessary to prevent the sequestration and further damage to the recovery and our future.