Statement of

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Sequestration: Examining Employers' WARN Act Responsibilities

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Good morning Chairman Walberg, Ranking Member Courtney and distinguished members of the subcommittee. Thank you for the invitation to be here before you. My name is Kerry Notestine, and I am pleased to provide this testimony to address the issues surrounding the effects of sequestration on American workers and employers. Specifically, I will address issues related to the WARN Act and other legal obligations associated with reducing a company's workforce because of contract cancellation. I am a Shareholder/Partner with Littler Mendelson, P.C., the world's largest labor and employment law firm representing management. With over 950 attorneys and 56 offices nation and world-wide, Littler attorneys provide advice, counsel and litigation defense representation in connection with a wide variety of issues affecting the employee-employer relationship. Additionally, through its Workplace Policy Institute, Littler attorneys remain on the forefront of political and legislative developments affecting labor, employment and benefits policy and participate in hearings such as this in order to give a voice to employer concerns regarding critical workplace issues. Nevertheless, the comments I provide today are my own, and I am not speaking for the firm or the firm's clients.[1]

I. Executive Summary

With the January 1, 2013 passage of the American Taxpayer Relief Act of 2012, Congress addressed the expiration of the Bush-era tax cuts, but delayed resolution of the automatic spending cuts known as "sequestration." Defense and other federal contractors stand to be significantly impacted by massive budget cuts that, by virtue of the new law, are now scheduled to begin on March 1, 2013, unless Congress acts before then. If the sequestration of federal funds occurs, affected employers face potentially dramatic cuts in federal contracts and, as a possible result, may need to implement significant furloughs or layoffs, or even close some facilities. The prospect of sudden and dramatic downsizing raises important employment law

[1] I thank Sarah Morton of Littler Mendelson, PC for her preparation of this statement, and to Michael Lotito and Ilyse Schuman of Littler Mendelson for their comments on prior drafts of this statement.

concerns, including the requirement under the Worker Adjustment and Retraining Notification (WARN) Act that employers provide employees 60 days' advance notice of certain mass layoffs and plant closings, or face significant penalties.

On July 30, 2012, the U.S. Department of Labor (DOL) issued Training and Employment Guidance Letter No. 3-12, which offered guidance on the applicability of WARN to potential layoffs by federal contractors in the wake of sequestration. The DOL guidance letter concluded that, given the federal WARN unforeseeable business circumstances exception, employers would not be required to provide the Act's full 60-day notice period and the obligation to provide notice would not be triggered until specific layoffs or facility closures became reasonably foreseeable. In addition to the DOL's guidance letter, the President's Office of Management and Budget (OMB) issued a memo on September 28, 2012, stating that compensation, litigation and other costs resulting from federal WARN Act liability for those employers who followed the DOL guidance letter would qualify as allowable costs and be covered by the contracting agency.

While these statements would appear to benefit employers by potentially relieving them of obligations under WARN, lawmakers and commentators have rightfully expressed concern and skepticism about the DOL's legal conclusions (as it is not clear what degree of deference courts will give the DOL's guidance letter) and about the authority of the OMB to cover resulting litigation costs. In addition, these statements undermine retraining and advance notice benefits that workers would receive if employers provided 60-day WARN notice. My testimony addresses those concerns in additional detail.

II. Introduction

I am a member of the Texas state bar and board certified by the Texas Board of Legal Specialization in labor and employment law. In my practice, which is based in Houston, Texas, I have represented employers across the country in all aspects of employment matters, including litigation under federal, state, and local statutes and common law; administrative proceedings before various federal and state government agencies; and counseling employers regarding employment issues, particularly issues related to business restructuring and reductions-in-force (RIF). I am the Co-Chair of Littler's national practice group on business restructuring, and have advised clients on hundreds of RIF's including assisting employers with compliance issues under WARN, the Older Worker Benefit Protection Act, and the many federal, state, and local anti-discrimination laws. I also have represented clients in litigation resulting from RIF's, including acting as lead defense counsel in a class action alleging WARN Act violations as a result of a client's 1,800-person mass layoff. Together with other attorneys from Littler, I have drafted a 50-state survey of release requirements by which employers must abide when conducting layoffs. My experience in advising clients with respect to RIF's and alternative cost-cutting measures gives me considerable insight into the legal challenges defense and other government contractors face because of the looming sequestration.

III. Sequestration

The Balanced Budget and Emergency Deficit Control Act of 1985 (BBEDCA), as amended by the Budget Control Act of 2011 (BCA), 2 U.S.C. 901a(7)(A) and (8), required that, in the event

the Joint Select Committee on Deficit Reduction (*i.e.*, Super Committee) failed to produce deficit reduction legislation with at least $1.2 trillion in cuts, then Congress could grant a $1.2 trillion increase in the debt ceiling, but this would trigger across-the-board cuts in both mandatory and discretionary spending by reducing both non-exempt defense accounts and non-exempt non-defense accounts by a uniform percentage. Following the Super Committee's announcement on November 21, 2011 that it had failed to reach bipartisan agreement on deficit reduction legislation, sequestration became an apparent inevitability—set to automatically occur on January 2, 2013, unless Congress took action to avoid its effects. This deadline and the negotiations leading up to it became commonly referred to as the "fiscal cliff." However, with only one day remaining before reaching the fiscal cliff, Congress passed the American Taxpayer Relief Act of 2012. Seen as a temporary resolution to the fiscal cliff, the act delayed the effects of sequestration until March 1, 2013.

IV. The WARN Act

Leading up to the January 2013 fiscal cliff deadline, several U.S. employers with large federal contracts began publically questioning whether and to what extent they would be required to comply with the Worker Adjustment and Retraining Act (WARN), 29 U.S.C. §§ 2101-2109, a federal law requiring employers to provide employees with advance notice of mass layoffs and plant closings. In a nutshell, WARN requires employers with 100 or more employees to give at least 60 days' advance notice of either a plant closing or mass layoff (*i.e.*, a "WARN Event"). The Act defines a plant closing as the termination of 50 or more employees at a single site, and defines a mass layoff as a layoff involving either 500 employment terminations at a single site of employment, or, if fewer, 50 or more employment terminations that constitute 33% of those working at a single site of employment.

The purpose of WARN is to provide advance notice of potential job losses to workers and their families, in order to allow them some transition time to adjust to the prospective loss of employment, to seek and obtain alternative jobs and, if necessary, to enter skill training or retraining that will allow these workers to successfully compete in the job market. WARN also provides for notice to State dislocated worker units so that dislocated worker assistance can be promptly provided.

Where there will be a WARN Event, there are very technical requirements for both the notice which must be given, how it is delivered, and to whom it is given. The Act requires an employer to notify several different entities or individuals. *See* 20 CFR § 639.7. If the facility is unionized, the employer must give written notice to the chief elected officer of the exclusive representative or bargaining agent of the affected employees.[2] Notice for unionized employees must include: (a) the name and address of the affected employment site and the name and telephone number of a company official to contact for further information; (b) a statement indicating whether the shutdown or layoff is expected to be permanent or temporary and, if the entire plant is to be closed, a statement to that effect; (c) the expected date of the first separation

[2] This notice should be provided to all entities identified in the collective bargaining agreement as representatives of the bargaining unit employees. Many labor agreements are signed by a union local and the international union; notice should be provided to both. Failure to send notice to the international union could result in a ruling that notice was ineffective and the employer is liable for full penalties for non-compliance with the Act.

and schedule of anticipated separations; and (d) the job titles of positions to be affected and the names of workers currently in those positions. 20 CFR § 639.7(c).

In non-union facilities or departments, and with respect to employees not represented by a union, an employer must provide written notice individually to each employee who reasonably may be expected to lose employment.[3] Written notice to each affected, non-unionized employee must include: (a) a statement indicating whether the shutdown or layoff is expected to be permanent or temporary and, if the entire plant is to be closed, a statement to that effect; (b) the expected dates when the individual employee will be terminated or laid off and when mass layoffs or the plant closing will commence; (c) an indication of whether bumping rights exist; and (d) the name and telephone number of a company official to contact for further information. 20 CFR § 639.7(d).

An employer must also notify the state dislocated worker unit and the chief elected official of the local government where the closing or layoff will occur. 29 U.S.C. § 2102(a)(2). This written notice to the government must contain: (a) the name and address of the affected employment site and the name and telephone number of a company official to contact for further information; (b) a statement indicating whether the shutdown or layoff is expected to be temporary or permanent and, if the entire plant is to be closed, a statement to that effect; (c) a schedule of layoffs or terminations; (d) the job classifications of affected positions and the number of employees in each such position; (e) an indication of whether bumping rights exist; and (f) the name and address of each union and chief elected officer representing affected employees. 20 CFR § 639.7(e).[4]

WARN subjects employers who fail to abide by the Act's requirements to significant penalties, including 60-days' back pay plus benefits for all affected employees, $500 a day to the local government where the reduction in force occurred ,and attorneys' fees in litigation.

Accordingly, in the summer of 2012, defense industry and other government contractors and subcontractors began considering their obligations under WARN when anticipating the effects the automatic sequestration cuts would have on their government contracts and, by extension, their workforces.

V. DOL Guidance and the Unforeseeable Business Circumstances Exception

In response to these concerns, on July 30, 2012, the Department of Labor (DOL) issued its Training and Employment Guidance Letter No. 3-12, addressing the WARN Act's requirements in the event of sequestration.[5] The DOL concluded that federal contractors were not required to

[3] This includes managerial and non-managerial employees alike. It also includes part-time employees who may be affected, even though such employees are not considered in determining whether the plant closing or mass layoff thresholds are reached.

[4] A shortened version of this notice can be given, and if the shortened notice includes the first day of layoff and the total number of employees to be laid off, the detailed schedule of layoffs and the details of the job classifications and number of occupants of each can be maintained at the site for governmental inspection. 20 CFR § 639.7(f).

[5] Although the Guidance addresses the effects of sequestration as it was originally set to occur on January 2, 2013, Congress voted on January 1, 2013 to extend sequestration until March 1, 2013.

provide WARN Act notices to potentially thousands of employees 60 days in advance of sequestration (which would have been on or about November 2, 2012) because of uncertainty about whether Congress would act to avoid sequestration and if they did not act, what effect the sequestration would have on particular governmental contacts.

A. Unforeseeable Business Circumstances

In advising employers not to provide advance notice of potential layoffs, the DOL relied on the "unforeseeable business circumstances" exception to the WARN Act. This exception allows an employer to provide fewer than 60 days' notice if a plant closing or mass layoff was caused by business circumstances not reasonably foreseeable at the time that a 60-day notice would have been required. 29 U.S.C. § 2102(b)(2)(A). The Code of Federal Regulations provides that an important indicator of a business circumstance that is not reasonably foreseeable is that the circumstance is caused by "some sudden, dramatic, and unexpected action or condition outside the employer's control." 20 CFR § 639.9(b)(1). Examples of such circumstances include a client's sudden and unexpected termination of a contract, a strike at a major supplier, unanticipated and dramatic economic downturn, or a government-ordered closing of an employment site that occurs without prior notice. *Id.*

It is an employer's reasonable business judgment, rather than hindsight, which dictates the scope of the unforeseeable business circumstances exception. *Loehrer v. McDonnell Douglas Corp*., 98 F.3d 1056, 1061 (8th Cir. 1996). As such, courts evaluate whether a "similarly situated employer in the exercise of commercially reasonable business judgment would have foreseen the closing" when determining whether a closing was caused by unforeseeable business circumstances. *Hotel Employees Int'l Union Local 54 v. Elsinore Shore Assocs*., 173 F.3d 175, 186 (3d Cir. 1999). Thus, the WARN Act provides flexibility for predictions about ultimate consequences that, though objectively reasonable, may prove to be wrong. *See Halkias v. General Dynamics Corp.*, 137 F.3d 333, 336 (5th Cir. 1998), *cert. denied*, 525 U.S. 872 (1998) (observing that the "reasonable foreseeability" standard envisions the *probability*, not the mere *possibility*, of an unforeseen business circumstance).

In the context of defense contracts, several courts have found that the unforeseeable business circumstances exception exempted an employer from providing notice. *International Ass'n of Machinists & Aerospace Workers v. General Dynamics Corp.*, 821 F. Supp. 1306 (E.D. Mo. 1993) (Within the unique context of defense contracting it is rare for the government to cancel contracts despite delays and cost overruns. Therefore, it was a commercially reasonable business judgment to conclude that the contract would not be canceled, and the subsequent cancellation qualified as an unforeseeable business circumstance.). Nevertheless, even under this exception, notification is required as soon as practicable along with a brief statement of the basis for reducing the notification period. 29 U.S.C. § 2102(b)(3).

VI. What the DOL Guidance Doesn't Tell Employers

A. Additional Notice Requirements under the Unforeseeable Business Circumstances Exception

The statutory section of WARN that makes the unforeseeable business circumstances exception available to employers has an additional notice requirement when the exception is to be invoked: An employer relying on this subsection shall give as much notice as is practicable and at that time shall give a brief statement of the basis for reducing the notification period. 29 U.S.C. §2102(b)(3). The DOL Guidance fails to mention that employers are still required to provide *some* advance notice upon the employer's realization of a WARN Event (even if the exception allows for less than 60 days' notice) and that the notice must specify why the employer reduced the notification period.

Importantly, failure to give this required brief statement in the written notice has very severe consequences: The statutory exception becomes unavailable. *Childress v. Darby Lumber Co*., 126 F. Supp. 2d 1310, 1318 (D. Mont. 2001), aff'd, 357 F.3d 1000 (9th Cir. 2004); *Grimmer v. Lord Day & Lord*, 937 F. Supp. 255, 257-58 (S.D.N.Y. 1996); *see also, Alarcon v. Keller Industs., Inc*., 27 F.3d 386, 389-90 (9th Cir. 1994). Thus, employers relying solely on the DOL's Guidance may not provide written notice at all, or may provide notice lacking the brief statement, in which case the exception is no longer available.

B. Authority of DOL to Issue Its Guidance

It is highly questionable whether the DOL even has authority to issue its Guidance in this instance. Indeed, the WARN regulations specifically provide that "[t]he Department of Labor has no legal standing in any enforcement action and, therefore, will not be in a position to issue advisory opinions of specific cases." 20 CFR § 639.1(d) (emphasis added). On the contrary, the regulations provide that the federal courts are the sole arbiters of WARN compliance and thus, the DOL's opinion is not binding on these courts. As a result, it is unclear what amount of deference, if any, a court would apply to such an opinion.

Indeed, in the past when the DOL has tried to issue specific guidance with respect to WARN requirements, the Department has made it clear in the guidance that its answers were not binding on courts. For example, in a Fact Sheet issued by the DOL following Hurricane Katrina, the Department specifically warned that its Fact Sheet responses "represent the U.S. Department of Labor's best reading of the WARN Act and regulations," and "employers should be aware that the U.S. Federal Court solely enforces the Act and these answers are not binding on the courts." Notably, the DOL provided no such disclaimer in the guidance regarding sequestration.

VII. Why Courts May Independently Determine that the Unforeseeable Business Circumstances Exception Does Not Apply to Sequestration.

While the Department of Labor has no enforcement responsibility, the agency did promulgate regulations regarding WARN. *See* 20 CFR § 639. These regulations indicate that employers are encouraged, even when not required, to provide advance notice to employees about proposals to close a plant or significantly reduce a workforce. 20 CFR § 639.1. Furthermore, in its

regulations, the Department of Labor concedes that the statute can be very vague when an attempt is made to apply WARN to a specific situation. The regulations read in part:

> In practical terms, there are some questions and ambiguities of interpretation inherent in the application of WARN to business practices in the market economy that cannot be addressed in these regulations. It is therefore prudent for employers to weigh the desirability of advance notice against the possibility of expensive and time-consuming litigation to resolve disputes where notice has not been given. The Department encourages employers to give notice in all circumstances.

20 CFR § 639.1(e) (emphasis added). Moreover, in the Fact Sheet the DOL issued following Hurricane Katrina, the Department advised employers to provide "as much notice as possible," even in situations where the hurricane had destroyed the employer's plant and all employment records were gone. According to the DOL, providing some form of notice (even by posting in a public place, publishing in a newspaper, or mailing to the employees' last known addresses) showed the employer's good faith compliance with WARN.[6]

Thus the recent DOL Guidance on sequestration strangely contravenes the Department's own past advice, as well as the express purposes of the WARN Act. Again, according to the Department's own regulations:

> Advance notice provides workers and their families some transition time to adjust to the prospective loss of employment, to seek and obtain alternative jobs and, if necessary, to enter skill training or retraining that will allow these workers to successfully compete in the job market. WARN also provides for notice to State dislocated worker units so that dislocated worker assistance can be promptly provided.

29 CFR § 639.1(a). The current DOL Guidance, meanwhile, advocates providing no notice, stating that providing notice to workers who may not ultimately suffer an employment loss, "both wastes the state's resources in providing rapid response activities where none are needed and creates unnecessary uncertainty and anxiety in workers," both of which the DOL now claims "are inconsistent with the WARN Act's intent and purpose."

Indeed, the DOL Guidance appears to even contravene President Obama's assessment of what protections WARN should provide. On May 20, 2008, the Senate Committee on Health, Education, Labor and Pensions held a hearing examining plant closings and focusing on workers' rights and the WARN Act's 20th anniversary. During the hearing, a then-Senator Obama remarked on his days as a community organizer working on the south side of Chicago helping people in communities affected by steel plant closings get back on their feet. According

[6] The good faith defense referred to there by the DOL is found in 29 U.S.C. § 2104(a)(4). Specifically, it provides that if an employer "proves to the satisfaction of the court" that the act or omission which violated WARN was done in good faith and with reasonable grounds for believing that its act or omission was not a violation, "the court may, in its discretion, reduce the amount of the liability or penalty." However, this defense is far from absolute and may only *reduce* the amount of liability—not eliminate it entirely.

to Senator Obama, one of the things he learned early on, and saw over and over again, was that "American workers who have committed themselves to their employers expect in return to be treated with a modicum of respect and fairness." He therefore reasoned that "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."[7] Furthermore, in his closing remarks, Senator Obama reasoned:

> 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 scenario, help workers and communities prepare for the difficult transition to come.

Clearly, President Obama felt that workers facing potential separation from employment deserved advance notice, regardless of whether the WARN Act required such notice. The DOL now appears to take an about-face to this position, encouraging employers to withhold advance notice, even where the notice may be able to assist the workers (and their communities) to prepare for the potential transition to come. While the DOL is understandably concerned that some employees may suffer unnecessary anxiety by receiving a notice and then not suffering an employment loss, such concern fails to protect those employees who actually *do* suffer an employment loss.

Furthermore, the DOL's new position seems to conflict with its own past advice that providing *some* notice, even conditional notice, is better than providing no notice at all. Indeed, the DOL's regulations specifically allow employers to issue conditional notice:

> Notice may be conditioned on the occurrence or non-occurrence of an event, such as the renewal of a major contract, only when the event is definite and the consequences of its occurrence or nonoccurrence will necessarily, in the normal course of business, lead to a covered plant closing or mass layoff less than 60 days after the event. For example, if the non-renewal of a major contract will lead to the closing of the plant that produces the articles supplied under the contract 30 days after the contract expires, the employer may give notice at least 60 days in advance of the projected closing date which states that if the contract is not renewed, the plant closing will occur on the projected date.

20 CFR § 639.7(a)(3). Similarly, courts reviewing this issue may ultimately determine that employers should have provided 60 days' conditional notice to employees in advance of the sequestration, stating that, in the event sequestration occurs and funding to a particular project is cut, the plant closing or mass layoff will occur on a projected date. Although the regulations state that the notice must be specific, they also provide that the notices must be based on the best

[7] Senator Obama used the hearing to promote the FOREWARN Act, legislation he co-sponsored with Senator Sherrod Brown and then-Senator Hillary Clinton. The purpose of the FOREWARN Act he stated was to enhance WARN protections to ensure that "workers are not chewed up and spit out without a job or a paycheck" and to close loopholes in the act allowing "employers to disregard the WARN Act without penalty." Notably, the proposed FOREWARN legislation aimed to provide the Department of Labor with enforcement authority over WARN violations, thus recognizing that the current state of the law does not provide the DOL with such authority.

information available at the time notice is given. 20 CFR § 639.7(a)(4). Thus, a court will look to the individual circumstances and what information the employer had available at the time to determine whether a "similarly situated employer in the exercise of commercially reasonable business judgment would have foreseen the closing." *See Hotel Employees Int'l Union Local 54,* 173 F.3d at 186 (3d Cir. 1999).

Finally, courts may find it hard to agree with the DOL's six-month-old advice that sequestration is an unforeseeable business circumstance. Specifically, the Guidance states that "even the occurrence of sequestration is not necessarily foreseeable" and "Federal agencies, including DOD, have not announced which contracts will be affected by sequestration were it to occur." While that may have been true with respect to the January 2 deadline, as the new March 1 deadline looms closer, it appears far more likely that the cuts will actually go into effect this time around. Indeed, even House Budget Committee Chairman Paul Ryan has publically stated his belief that "the sequester is going to happen."[8] Likewise, additional information is being released every day with respect to where the cuts will likely take place. For example, just last week, our nation's military branches released documents outlining their proposals for complying with the sequestration. As more information becomes available, courts are more and more likely to find that employers who fail to provide advance notice of resulting plant closures and layoffs are in violation of WARN and less likely to apply the unforeseeable business circumstances exception.

VIII. The OMB Guidance Only Raises Additional Questions

Further confusing the issue for employers, on September 28, 2012, the President's Office of Management and Budget (OMB) issued its "Guidance on Allowable Contracting Costs Associated with the Worker Adjustment and Retraining Notification (WARN) Act" to address whether federal contracting agencies would cover WARN Act-related liability and litigation costs. The OMB stated in its Guidance that:

> If (1) sequestration occurs and an agency terminates or modifies a contract that necessitates that the contractor order a plant closing or mass layoff of a type subject to WARN Act requirements, and (2) that contractor has followed a course of action consistent with DOL guidance, then any resulting employee compensation costs for WARN Act liability as determined by a court, as well as attorneys' fees and other litigation costs (irrespective of litigation outcome) would qualify as allowable costs and be covered by the contracting agency, if otherwise reasonable and allocable.

While the OMB Guidance appears to be aimed at reassuring employers by promising them indemnification against potential WARN-related liability, attorneys' fees and litigation costs in the event they follow the DOL Guidance by failing to issue WARN notices, the OMB Guidance may unintentionally be providing employers *false assurances* that all liability and litigation costs will be covered. Specifically, Federal WARN is only one avenue amongst several that employees may take to challenge the results of a reduction-in-force and seek damages for failure to provide advance notice. Other areas of potential liability include state Mini-WARN laws and

[8] Interview with Paul Ryan, *Meet the Press* (January 27, 2013).

laws requiring advance notice of changes to employee pay and/or hours worked, as well as contractual obligations found in collective bargaining agreements and individual employment agreements. It is not clear whether and to what extent the OMB Guidance provides for indemnification of these potential liability areas.

A. State Mini-WARN Acts and Other State Law

Approximately twelve states have "mini-WARN" acts that provide additional requirements beyond what Federal WARN requires. California, for example, applies different threshold requirements under its state law—requiring notice from facilities employing 75 or more individuals within the preceding 12 months (rather than 100 individuals under Federal WARN). CAL. LAB. CODE §§1400 – 1408. Additionally under California law, a layoff of 50 or more employees within any 30 day period (regardless of percentage at the facility) is a mass layoff, and any shutdown of a covered facility is a plant closing, regardless of the number of employment losses. *Id.* As a result, employees whose jobs are eliminated in California may qualify for protection under the state's mini-WARN act but not qualify for protection under Federal WARN. Other states such as Illinois, Iowa, New Hampshire, and Wisconsin require 60 days' advance notice for layoffs involving as few as 25 employees. 820 Ill. Comp. Stat. 65/1-99 (2008); Ill. Admin. Code tit. 56, § 230 (2008); Iowa Code §§ 84C.1-84C.5 (2011); N.H. Rev. Stat. Ann., Chapter 275-F; Wis. Stat. § 109.07(1)(b). Other states require more notice than the Federal WARN's 60-days. New York, for example, requires 90 days advance notice of WARN Events and applies to companies with as few as 50 employees. NY LAB. LAW §860 McKinney (2008). New Jersey WARN, meanwhile, provides an additional penalty for noncompliance in addition to the 60 days' back pay—employers are required to provide one week's pay for each full year of an employee's service. This is significantly greater than the federal WARN Act's remedy of paying lost wages (back pay) for a maximum of 60 days.

In addition to Mini-WARN laws, many states impose additional severance obligations on employers undertaking layoffs, outside the context of WARN. Connecticut, for example, has an statute requiring that for certain closings, the employer must pay for 100% of health care coverage for employees and dependents, to the extent that they are covered, for up to 120 days. CONN. GEN. STAT. §§ 31-51(n), 31-51(o), 31-51(s) (2008). Maine employers, meanwhile, must provide employees 60 days' notice in advance of a cessation of operations and severance pay computed at one week per year of service, payable to employees who have been employed at least three years. ME. REV. STAT. ANN. tit. 26, § 625-B.

Finally, where sequestration results in employee furloughs or reductions in employee hours and/or pay, there are other legal issues that an employer must consider. In furlough cases, it is advisable to provide advance notice to employees and have employees sign an agreement regarding the terms of the furlough. If the employer wishes the time to be unpaid, it should expressly inform employees, preferably in writing, not to do work while on the furlough.[9] Some

[9] Making or answering calls or email, checking voicemail, drafting documents, and similar tasks typically are considered work and non-exempt and exempt employees must be compensated for the time spent in such activities. Non-exempt employees may be compensated in hourly or less increments depending on the employer's policy, while exempt employees generally must be paid their full salary for the entire workweek if they perform work at any time during the workweek.

state laws require advance notice of changes in pay (the longest being a 30-day advance notice obligation in Missouri), and it is unresolved whether placing employees on an unpaid furlough may trigger those notice obligations. Employers arguably may have an excuse for failing to provide required notice for reasons similar to those addressed above related to WARN obligations, but employers are advised to provide as much notice as possible to maintain defenses to these notice obligations.

The DOL does not purport to address such state laws in its Guidance (and, indeed, the DOL Guidance would do very little to protect employers in states like California or New Jersey where there is no comparable state-based exception for unforeseeable business circumstances). However, it is disconcerting that the DOL fails *to even mention* in its Guidance that failing to comply with the notice requirements under Federal WARN may subject employers to additional liability under state law. Such omission may leave some employers with the mistaken belief that, by following the DOL's Guidance, they are absolved of any potential liability—a belief which those same employers may believe is supported by the OMB Guidance.

In fact, it is entirely unclear from the language of the OMB Guidance whether contracting agencies would indemnify employers of this additional state-based liability. Specifically, the OMB states that its guidance "does not alter existing rights, responsibilities, obligations, or limitations under *individual contract provisions* or the governing cost principles set forth in the Federal Acquisition Regulation (FAR) and *other applicable law*.

B. Collective Bargaining and Contractual Agreements

In addition to state requirements, the National Labor Relations Act and collective bargaining agreements may require advance notification to unions representing employees and bargaining about the effects of a layoff due to sequestration. Additionally, employers may have entered employment agreements with certain employees, providing advance notice of separation. In both cases, compliance with the DOL Guidance would not necessarily address these additional contractual obligations. In the case of furloughed employees, employers may have obligations to bargain with unions representing furloughed employees or may have obligations under existing individual employment agreements that should be considered. In the event a grievance is filed by a union representative receiving only 5 days' notice of a plant closing, will contracting agencies indemnify employers for that? Will they indemnify for any breach of contract issues arising from an individual's employment agreement? Although the answer is likely no, often such claims are brought in conjunction with claims under the WARN Act. If an employee brings a lawsuit to assert both a contractual claim and a WARN Act claim, how will the contracting agency go about indemnifying the employer for litigation costs surrounding one cause of action and not the other?

C. How Will the Litigation Costs be Covered?

Other than stating that employee compensation costs, attorneys' fees and other litigation costs "would be covered by the contracting agency," the OMB Guidance provides very little actual guidance to employers regarding how the indemnification process will actually work. For instance, will the contracting agency be covering the costs of litigation from its inception? Or will it wait until the case is resolved and reimburse costs at that time? The former option raises

questions regarding what level of input or oversight the contracting agency will have over the selection of legal counsel. For instance, will government attorneys be required, or will the employers be allowed to select their own outside counsel? Will the contracting agency pay whatever hourly rates legal counsel is charging or will the employer/attorneys be provided guidelines regarding what is "otherwise reasonable and allocable?" Additional questions are also raised regarding the level of input and oversight into the overall litigation strategy. For instance, will the contracting agency have any input into whether the employer seeks an early settlement or sees the litigation through to trial?

On the other hand, the latter option (waiting until resolution of the action to indemnify the employer), creates its own issues. For instance, waiting until the end of the case to cover costs makes the promise of indemnification illusory for smaller employers who likely will be unable to afford paying the up-front costs of hiring a law firm and covering litigation expenses and attorneys' fees through the resolution of the case. Indeed, for those contractors or subcontractors whose entire business relies on federal contracts, their inability to pay such extraneous expenses up front is likely increased due to reduced revenue from cancelled or modified government contracts.

IX. Conclusion

The guidances issued to employers by the DOL and OMB regarding WARN compliance have done little to reassure this employment lawyer. Indeed, I cannot understand why the DOL would issue a guidance advising employers to provide less notice rather than more when sequestration is the current law of the land. The OMB Guidance further complicates matters by suggesting that employers will have blanket immunity from liability in the event they follow the DOL Guidance—a proposition that may not ultimately be the case.

Chairman Walberg, Ranking Member Courtney, I thank you again for inviting me to testify.

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