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Suzanne Richey Fitz

J. Benjamin Tyler

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Plant Closing Notification: Dividing the Costs of Closures Through Federal Regulation

I. INTRODUCTION

The Worker Adjustment and Retraining Notification Act¹ (hereinafter WARN Act) was one of the most controversial provisions of the recently enacted Omnibus Trade and Competitiveness Act of 1988² (hereinafter Trade Bill). President Ronald Reagan originally vetoed the entire Trade Bill because of the inclusion of the WARN Act, which requires employers to give sixty-days advance notice of a plant closing or mass layoff.³ The Trade Bill passed easily once the plant closing provision was removed. President Reagan later allowed the WARN Act to become law, but he continued to show his displeasure by refusing to sign it.⁴

At the center of the WARN Act controversy are the strong competing interests of economic efficiency in business, and fairness to the labor force. The opponents of plant closing legislation contend that requiring corporations to give advance notice would hinder their ability to respond to changing business conditions and reduce the overall efficiency of American business.⁵ Proponents counter that giving advance notice is simply a matter of fairness because requiring businesses to share the social costs of plant closures, results in a more even distribution of these costs.⁶ The WARN Act attempts to strike a balance be-

1. 29 U.S.C. §§ 2100-2110 (1988).

2. Pub. L. No. 100-418, 1988 U.S. CODE CONG. & ADMIN. NEWS 102 Stat. 1107 (1988).

3. President's Message to the House of Representatives Returning Without Approval the Omnibus Trade and Competitiveness Act of 1988 (May 24, 1988) (statement of President Ronald Reagan): "It is with sincere regret that today I must disapprove and return H.R. 3, the Omnibus Trade and Competitiveness Act of 1988 [because the plant closing] provisions were included that simply make this bill, on balance, bad. . . ."

4. L.A. Times, Aug. 2, 1988, at 1, col. 6.

President Reagan . . . denounced the new law and lashed Democrats for using the issue to punish Vice President George Bush in the 1988 presidential campaign. "In order to end these political shenanigans and to get on with the business of the nation," Reagan said, "I have decided to allow the plant-closing bill to become law but without my signature."

Id.

5. See R. MCKENZIE, RESTRICTION ON BUSINESS MOBILITY (1979).

6. Staughton Lynd, critical law theorist, argues that the employer's unilateral ability

tween these two competing interests by limiting the notice requirement to sixty-days and by allowing exemptions to employers from the notice requirement.⁷

This comment will begin by describing some of the problems associated with plant closures which led Congress to promulgate the WARN Act. A discussion of the specific provisions of the Act will follow. The final section is an analysis of whether advance notification is the proper solution for the problems of plant closures, and whether the WARN Act will be an effective means of implementing that solution. This comment concludes that while plant closing legislation will impair the ability of management to react as quickly to changing business circumstances, equity seems to dictate that workers deserve at least some prior notification before they are fired or laid-off due to corporate restructuring. The WARN Act certainly provides notice, but because of the ambiguous and overinclusive provisions, it is doubtful the Act will function as smoothly or as equitably as its proponents anticipate.

II. PROBLEMS OF PLANT CLOSINGS: NEED FOR REMEDIAL LEGISLATION

In order to maintain the United States' position in the forefront of world industrial production, the American employer must become increasingly competitive in the global economy. In recent years,⁸ shifting markets, foreign competition, and advancing technology have mandated that American employers readjust to maintain this competitive edge. Such adjustments have included mass employee layoffs, the closing of inefficient plants, and the relocation, consolidation, or sale of entire operations.⁹

These unilateral decisions by employers often have disastrous effects on displaced workers and the communities in which they live. The most obvious effect of plant closings is the wide-

to determine whether to close or relocate a plant manifests an inherent inequality in American labor relations. Lynd, *Investment Decisions and the Quid Pro Quo Myth*, 29 CASE W. RES. 396, 410 (1979).

7. 29 U.S.C. §§ 2103-2104(a)(1988).

8. "[Plant closings] would probably have been considered somewhat recondite and not very interesting prior to the mid-1970's; it is, unhappily, a sign of our current economic plight that the problem of plant closings, including partial shutdowns and relocations, is now high on the list of national concerns." Aaron, *Plant Closings: American and Comparative Perspectives*, 59 CHI.-KENT L. REV. 941 (1983).

9. See McDonald, *State Plant Closing Laws: Preempted by the NLRA?*, 10 EMPLOYEE REL. L.J. 241 (1984-85).

spread employment loss.¹⁰ Displaced workers often suffer an immediate loss of income and benefits.¹¹ Economic studies indicate that many displaced workers face

prolonged unemployment and lower earnings on their next job, should they be fortunate enough to find other jobs. The economic impacts are better understood when one takes into account that the typical worker in a plant shutdown is in his late 40's, with high seniority, relatively high earnings, specialized skills, and has strong ties to family and community.¹²

Beyond the immediate economic losses, workers often suffer serious health effects as a result of their displacement. Among these are an increased likelihood of coronary disease, respiratory disease, diabetes, ulcers, gout, arthritis and hypertension.¹³ The mental health effects can be even worse. Depression, despair and anxiety lead to broken marriages, substance abuse, child and spouse abuse, and rampant alcoholism.¹⁴

The displaced worker, however, is not the only victim of changing economic conditions. Entire communities also feel the

10. The Department of Labor report on mass layoffs and plant closings in 1987 surveyed 29 States, affecting 55% of the United States workforce. Two thousand and twenty layoff events were reported in 1,678 establishments, affecting 406,887 workers who lost their jobs because of these events. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, BULLETIN 2310, *Permanent Mass Layoffs and Plant Closings, 1987*; see also Matlack, *Forewarning*, NAT'L J., June 11, 1988, at 1535. ("2.2 million workers, nearly two-thirds of them in manufacturing, lost their jobs each year from 1981-86 because of plant closings or permanent layoffs."); Cline, *A Legal, Economic, and Normative Analysis of National Plant Closing Legislation*, 11 J. LEGIS. 348 (1984) [hereinafter Cline] ("Plant closings and private disinvestment cost 38 million American workers their jobs during the 1970's").

11.

Workers generally lose health benefits when they lose their jobs. Fewer than 30% of the unemployed have any health insurance at all. Those who do have to spend 20-35% of their unemployment benefits merely to continue their former coverage, in the infrequent cases where continuation is possible. . . . When the displaced worker has the greatest need for health insurance, coverage most often is out of reach.

Stillman, *The Devastating Impact of Plant Relocation*, in THE BIG BUSINESS READER: ESSAYS ON CORPORATE AMERICA 73, 81 (M. Green & R. Massie Jr. ed. 1980).

12. Kay & Griffen, *Plant Closures: Assessing the Victims' Remedies*, 19 WILLAMETTE L. REV. 199, 202-03 (1983) (citation and footnotes omitted).

13. See Comment, *Plant Closure Legislation in the United States: Insights from Great Britain*, 8 LOY. L.A. INT'L & COMP. L.J. 277, 279 n.7 (1986) [hereinafter *Insights from Great Britain*].

14. Ford, *Plant Closing Legislation*, 4 DET. C.L. REV. 1219, 1221 (1983). For a more detailed discussion of the social costs of plant closings, see B. BLUESTONE & B. HARRISON, CAPITAL AND COMMUNITY: THE CAUSES AND CONSEQUENCES OF PRIVATE DISINVESTMENT 62-83 (1980) [hereinafter CAPITAL AND COMMUNITY].

devastating effects of plant closures and mass layoffs.¹⁵ Following a shutdown, the local community experiences a rise in unemployment due to the multiplier effect produced by the loss of markets to those businesses directly supporting the plant and the loss to local businesses whose vitality depends on a thriving local economy.¹⁶ Out-migration and the consequent reduction of real estate values erodes an already skinking local tax base and threatens the ability of local governments to continue to provide essential services to the community.¹⁷ Thus, the community is often least able to provide readjustment assistance when the displaced worker needs it most.

The ability of employers to shutdown plants or to layoff employees without warning has led to labor and the community bearing much of the burden of industrial relocation and consolidation.¹⁸ Neither the financial nor the social costs to employees or communities is reflected in private industry's cost-benefit analysis.¹⁹ The federal government has attempted to balance this inequity through the WARN Act by requiring corporations to either give their employees advance notice, or to pay the sala-

15. The case of U.S. Steel's closing of the Ohio Steel Works and McDonald Mills in Youngstown, Ohio provides a dramatic example of the devastating effects of a plant closing on a community. In the Youngstown scenario, the permanent layoff of 4,100 workers meant:

1,650-3,600 additional jobs lost, retail sales drop of \$12.2 to \$23 million each year, and total sales lost in the range of \$66 to \$102 million. [Other costs included] a loss of \$7.8 million in local taxes, a county tax loss of \$1.1 million, a state tax loss of \$8 million, a federal tax loss of up to \$15.1 million—in all, between \$26.8 to \$32 million in lost tax revenues. With Trade Readjustment Assistance of \$34.2 million to \$37.9, a conservative estimate is a \$70 million loss over 8 years.

Douglas, *State and Local Plant Closing Laws: The Case Against Preemption*, 21 *Gonz. L. Rev.* 603, 604 n.2 (1985-86) (citing B. Baugh, *Shutdown: Mill Closures and Woodworkers*, reprinted in *Hearings on Plant Closing Problems: Hearing on H.R. 5040 Before the Subcomm. on Labor-Management Relations of the House Comm. on Educ. and Labor, Missoula, Montana, and Eugene, Oregon*, 96th Cong., 2d Sess. 218 (1980)).

16. In a two-year period in California, for example, 1,484 plant closings cost nearly 166,000 jobs. For every job directly lost due to a plant closing, 1.6 jobs were lost indirectly because of the loss of those additional wages to the local economy. Thus, the actual total jobs lost due to plant closings was roughly 430,000. For the automobile industry, the figures are even more discouraging. For every direct job lost, there are from 2.4 to 3.0 indirect jobs lost. See *Insights from Great Britain*, *supra* note 13, at 279 n.10; see also Millspaugh, *Plant Closings and the Prospects for a Judicial Response*, 8 *J. CORP. L.* 483, 484 (1983).

17. Ford, *supra* note 14, at 1221.

18. See generally, B. BLUESTONE & B. HARRISON, *THE DEINDUSTRIALIZATION OF AMERICA* (1982) [hereinafter *DEINDUSTRIALIZATION OF AMERICA*].

19. *Id.* at 49-81.

ries of those employees during the notice period. The WARN Act, which is the culmination of fifteen years of legislative activity,²⁰ will shift part of the relocation burden back to the employer and will allow employees a grace period in which they may prepare for a second job or for unemployment.

III. THE WORKER ADJUSTMENT AND RETRAINING NOTIFICATION ACT

A. Notice Requirement

The central provision of the WARN Act is the requirement that an employer shall not "order a plant closing or mass layoff"²¹ until the end of a 60-day period after the employer serves written notice of such an order."²² Employers affected by the Act are those who employ 100 or more full-time employees, or 100 or more employees who together work at least 4,000 hours per week.²³ Written notice must be given to an employee representa-

20. The first attempt to create a national plant closing policy was through a bill introduced in 1974, the National Employment Priorities Act, H.R. 13541, 93d Cong., 2d Sess., (1974). The essential provisions of the bill were comprehensive federal assistance to workers and communities along with a two year notification provision. The bill fell under criticism, however, for being "administratively impractical," and was never reported out of committee. Revised versions of the original bill were later presented in 1979 (H.R. 5040) and 1984 (H.R. 2847), but were both rejected. For a more detailed discussion of proposed federal legislation, see Arnold, *Existing and Proposed Regulation of Business Dislocations*, 57 U. DET. J. URB. L. 209 (1980).

21. 29 U.S.C. § 2101(a)(2) & (3) (1988):

(2) the term "plant closing" means 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 at the single site of employment during any 30-day period for 50 or more employees excluding any part-time employees;

(3) the term "mass layoff" means a reduction in force which—

(A) is not the result of a plant closing; and

(B) results in an employment loss at the single site of employment during any 30-day period for—

(i)(I) at least 33% 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).

22. *Id.* § 2102(a).

23. *Id.* § 2101(a)(1). A "part time" employee is a person employed for an average of fewer than 20 hours per week or who has been employed for fewer than six of the 12 months preceding the date on which notice is required. *Id.* at § 2101(a)(8).

tive, to the state dislocated worker unit, and to the chief elected official of the local government where the closing will occur.²⁴

The Act defines both plant closings and mass layoffs in terms of an "employment loss." An employee termination, other than a discharge for cause, a voluntary termination, or retirement, is an employment loss if the termination is a reduction in hours of work of more than fifty percent during each month of any six-month period, or a layoff of over six months.²⁵ A layoff or closure which is the result of a relocation or consolidation is not an employment loss if the employer offers to transfer the employee to another site of employment.²⁶ In addition, employers who sell their businesses are only responsible for closures which occur up to and including the effective date of the sale. After the effective date, the purchaser assumes responsibility for notice.²⁷

B. Exemptions and Reduction of Notice Requirement

The WARN Act provides both exemptions from the notice requirement and reductions of the sixty-day notice period. Reduction of the notice period is available in two instances. First, an employer seeking capital or other business during the time that notice would have been required, and who believed in good faith that giving notice would have precluded obtaining the capital or business, need not give the full sixty-days notice.²⁸ Second, less than sixty-days notice may be given if the closing or layoff was due to business circumstances which were unforeseeable at the time notice would have been required. Employers relying on this section are required merely to give "as much notice as is practicable."²⁹

Certain types of closings and layoffs are exempt from any notice requirement whatsoever. No notice is required for closures or layoffs due to natural disasters.³⁰ When the employment loss results from the completion of a particular project and the affected employees knew that their employment was limited to the duration of that project, employers are exempted from pro-

24. *Id.* § 2102(a)(1) & (2).

25. *Id.* § 2101(a)(6).

26. *Id.* § 2101(b)(2).

27. *Id.* § 2101(b)(1).

28. *Id.* § 2102(b).

29. *Id.* § 2102(b)(3).

30. *Id.* § 2102(b)(2)(B).

viding notice. Also, no notice is required when the closing or lay-off constitutes a strike or a lockout.³¹

C. *Enforcement and Penalties*

Any employer found in violation of the Act is liable to each affected employee for backpay and benefits for each day of the violation up to a maximum of sixty days.³² The amount payable to each employee may be reduced, however, by the amount of wages and benefits paid by the employer to the employee during the sixty-day period following a plant closing in violation of the Act and by any other voluntary and unconditional payment by the employer to the employees during that same period.³³ Any employer who fails to give notice to a local governmental unit, as required, is also subject to a penalty of \$500 per day up to a maximum of sixty days.³⁴ This penalty may be avoided if the employer pays to each aggrieved employee the amount for which the employer is liable within three weeks from the date the employer orders the shutdown or layoff.³⁵

The Act provides that a court may reduce the amount of liability or penalty if the employer proves that the act or omission which violated the Act was in "good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of this Act. . . ."³⁶ The Act expressly denies federal courts the authority to enjoin plant closings or mass layoffs,³⁷ and contains no express statute of limitation. The WARN Act directs the Comptroller General, within two years of enactment to submit a report to Congress on the Act's costs and benefits to employers, the economy, and employees.³⁸

IV. ASSESSMENT OF FEDERAL PLANT CLOSING LEGISLATION

Any assessment of plant closing legislation ultimately results in a balancing of the economic costs borne by industry against the benefits which employees may gain through advance notice. What seems to tip the scales in favor of notification is

31. *Id.* § 2103.

32. *Id.* § 2104(a)(1).

33. *Id.* § 2104(a)(2).

34. *Id.* § 2104(a)(3).

35. *Id.*

36. *Id.* § 2104(a)(4).

37. *Id.* § 2104(b).

38. *Id.* § 2109.

the fact that employers who close without notice enjoy all of the benefits of restructuring, while employees and their communities are left behind to bear the costs. Requiring employers to give advance notice attempts to create a more equitable situation by diminishing the disparity between the costs of plant closings to industry and the costs to society as a whole.

A. *Potential Benefits of Federal Plant Closing Notification*

The first and most obvious benefit of plant closing notification is that it will give workers time to adjust to the prospect of job termination. Job losses due to plant closures are compounded by the abruptness of such closures.³⁹ An employee may go to work in the morning and find by the end of the day that she is no longer employed.⁴⁰ Requiring employers to give advance notice seems to be a simple solution, and will give employees room to adjust to such a drastic change in circumstance.⁴¹ Advance notice not only provides time for adjustment but it also contributes to increased participation in various worker adjustment programs.⁴²

39. *Insights from Great Britain*, *supra* note 13, at 280.

40. 134 CONG. REC. H5510 (daily ed. July 13, 1988) (statement by Rep. Ford). On the abruptness of plant closings without notice, Representative Ford stated:

[I]n 1986, a Government survey of dislocated workers, conducted by the non-partisan Bureau of Labor Statistics . . . showed that more than 2 million Americans lose their jobs in plant closings and permanent layoffs each year, and that more than half of them lost their job with no warning or notice.

Even those who do receive notice often receive notice that is totally inadequate. Among large employers, more than half of those who do provide notice give only 1 to 14 days, according to a study by the GAO.

Overall, the median notice provided to American white and blue collar workers is only 7 days. The median notice given to nonunion blue collar employees is only 2 days.

Id.

41. Folbre, Leighton & Roderick, *Plant Closings and Their Regulation in Maine, 1971-1982*, 37 INDUS. & LAB. REL. REV. 185, 195 (1984) (The effects of plant closings on local unemployment rates and on the size of the local labor force strongly suggest that Maine workers significantly benefited from advance notice of job loss.); *see also* 134 CONG. REC. S8454 (daily ed. June 23, 1988) (statement by Sen. Metzenbaum). Quoting the National Assembly of Sciences, Senator Metzenbaum emphasized the essential component time plays in the readjustment process of a displaced worker of a plant closing:

When workers receive sufficient advance notice, the evidence suggests that they adjust more rapidly and more successfully to job loss, which reduces the costs of displacement to them and to the public sector. We believe that the benefits of advance notice more than outweigh the costs of such a policy.

Id.

42. 134 CONG. REC. S8543 (daily ed. June 24, 1988) (statement by Sen. Metzen-

When companies shift resources from plant to plant, business to business, and even nation to nation, they may actually be contributing to the deterioration of American economic productivity.⁴³ Such a policy wastes both human and financial resources. The prevalence of long-term unemployment in many communities indicates that plant closings and relocations result in large segments of our economic resources going unused.⁴⁴ In seeking to compel corporations to absorb some of the external costs of plant closings, federal plant closing legislation may actually contribute to long term economic productivity by giving displaced workers and their communities a greater ability to rebound.

Overall economic productivity, however, is not the only measure of the benefits of plant closing legislation.⁴⁵ Perhaps even more compelling is the argument that providing advance notice is an equitable standard in the global marketplace.⁴⁶ Prior to the passage of the WARN Act, the U.S. was the only industri-

baum). Senator Metzenbaum quoted a General Motors executive who was describing General Motors' successful worker retraining program: "If we can get to people early we will involve about 85% of them in our retraining program, but once they are laid off, we only get 10 to 15%." *Id.*

43. Ford, *supra* note 14, at 1226. Urban planner Robert Goodman explained the costliness of the unimpeded capital mobility system:

As more loser regions are created, more welfare costs are necessary to maintain them. The more that cities and regions compete with each other, the more they duplicate each other's infrastructure facilities. As winner cities and regions build new roads, schools, and sewers, the losers must still maintain the debt and upkeep costs of the ones they already have. Maintaining underused facilities and services in loser cities and regions, while creating similar ones in the winner, adds to the financial burden of the entire nation.

R. GOODMAN, *THE LAST ENTREPRENEURS* 84 (1979).

44. CAPITAL AND COMMUNITY, *supra* note 14, at 65, 291 (average duration of unemployment after shutdown was 60 weeks); DEINDUSTRIALIZATION OF AMERICA, *supra* note 18, at 51 (at least one third of the displaced workers due to plant closings suffer long-term unemployment).

45. Cline, *supra* note 10, at 370:

Economic analysis does not itself measure what is in society's best interest or what is ethical; it merely examines how to allocate goods so as to maximize utility. Economic efficiency can only be a measure of justice if utility is a measure of justice. In view of the competing value systems, a public policy encouraging plant closings might not be desirable even if . . . they enhance economic efficiency.

46. For a list of other industrialized countries and the specific requirements of their plant closing policies, see Ognibene, *Plant Closings and the Duty to Consult Under Britain's Employment Protection Act of 1975: Lessons for the United States*, 5 B.C. INT'L & COMP. L. REV. 195 (1982); MacNeil, *Plant Closings & Workers' Rights*, 14 OTTAWA L. REV. 1 (1982); Aaron, *supra* note 8.

alized nation in which a corporation could close a plant without any prior notice and for any reason whatsoever.⁴⁷

The blame for the recent plant closing epidemic has been placed on the fact that employers are able to enjoy the benefits of the great speed with which capital is allowed to move around the world, while ignoring the full costs of such capital mobility.⁴⁸ Because American employers were not accountable for the social costs following capital disinvestment, "private investment decisions [were] increasingly made without recognition of their devastating economic and social consequences."⁴⁹ Employers, in refusing to negotiate on plant closure issues, in effect ignored any social responsibility by externalizing a business cost and forcing the public sector to absorb it.⁵⁰ Plant closing legislation attempts to alleviate these problems by compelling companies to internalize all of the costs of closures.

B. *Potential Costs of Federal Plant Closing Notification*

The opponents of notification argue that implementation of the plant closing legislation will be a monumental administrative task⁵¹ as well as an expensive one.⁵² Plant closing legislation may

47. See *Textiles Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263, 268 (1965) ("[A]n employer has the absolute right to terminate his entire business no matter what the reasons."). The Supreme Court reaffirmed this view in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981).

48. See CAPITAL AND COMMUNITY, *supra* note 14 at ii (The authors are alarmed at the currently "accelerating and often heedless speed of capital mobility in today's economy.").

49. Kay & Griffen, *supra* note 12, at 205.

50. See *Insights from Great Britain*, *supra* note 13, at 296 n.124.

An example of externalizing a business cost would be where a company might use machinery at a job site, then abandon the machinery at the site after completing the particular task, thereby forcing the local government to shoulder the costs of removing the machinery. By analogy, employers utilize the services of their employees, then leave them to the community after a plant closure, often necessitating public assistance to help the displaced workers.

51. Comment, *An Analysis Of Plant Closing Law: How To Protect Workers From The Effects Of Cessation In Business While Preserving Employer Rights*, 21 J. MARSHALL L. REV. 565, 584 (1988) [hereinafter *Analysis of Plant Closing Law*] (The complexities involved in administering the Bill are staggering and the expense of its administration will be placed on the worker). See also Wall St. J., Feb. 16, 1988, at 36, col. 1. (Plant closing legislation "will be expensive laws, and ultimately their costs won't be borne entirely by executives or shareholders. They will fall on consumers and workers, in higher prices or fewer jobs.").

52. 134 CONG. REC. S8470 (daily ed. June 23, 1988) (statement by Sen. Hatch). West Germany spends approximately \$4.5 billion a year in a lengthy and costly process to close any German company with more than twenty workers. One prominent German company, Krupp Steel Company, has expended three years and \$800 million trying to

also create inefficiency in the economy by restricting capital mobility. One outspoken critic of such legislation argues that a plant closing notification law would "slow the growth of national income, reduce the rise in real wages rates, contribute to inflation, increase unemployment, and reduce the social mobility of workers—while at the same time reducing business profits and the efficiency of the U.S. economy."⁵³

Plant closing notification would impair the efficient allocation of resources and deter the growth of new development. Restricting the flow of resources, including capital, prevents each region from developing its "comparative advantage."⁵⁴ This restriction results in higher production costs and lower national income.⁵⁵ The free flow of capital, on the other hand, allows for a more efficient use of resources which, in turn, provides a net economic benefit even for those regions losing industry, since goods and services will be available to them at a lower price.⁵⁶

Such conclusions, however, do not tell the full story. The economic analysis normally done by opponents of plant closing legislation is limited only to those financial costs borne by employers. Conspicuously absent from such an analyses are all the financial and social costs which are direct byproducts of plant closings.⁵⁷ Notification legislation becomes necessary in order to distribute the costs of plant closings more evenly. The question then is whether the WARN Act can achieve this without incurring a disproportionate amount of adverse effects of governmental regulation on industry.

C. *The Effectiveness of the WARN Act*

The WARN Act attempts to strike a balance between the advantages of notification regulation and the disadvantages of restriction by limiting the notice requirement to sixty-days.

close one antiquated steel plant. They expect to spend over \$1.2 billion before the process is completed. Aaron, *supra* note 8, at 953. The Swedish government spends about 2.5 percent of its GNP on its plant closing program. An equivalent rate in the United States would be roughly \$200 billion, or nearly half of our current defense budget.

53. R. MCKENZIE, *supra* note 5, at 5.

54. *Id.* at 54.

55. *But see* 134 CONG. REC. S8866 (daily ed. July 6, 1988) (statement by Sen. Matsunaga). Senator Matsunaga argues that what is needed to bolster U.S. productivity are improvements in technological innovation and human resource utilization and not the cutting of capacity to get back to profitability. *Id.*

56. R. MCKENZIE, *supra* note 5, at 53.

57. Cline, *supra* note 10, at 368.

Previous bills had contained provisions requiring up to two years advance notice before companies could close their plants.⁵⁸ The WARN Act as introduced by Senator Howard Metzenbaum required 180-days notice before a plant could be closed.⁵⁹ Sixty days is a compromise between the original bill and those who oppose notice. However, it still remains to be seen whether sixty days notice will best serve the interests of both sides of the issue. The study mandated under the WARN Act⁶⁰ may well show that competing interests may be better weighed by either thirty or ninety days notice. This leaves Congress with the option of either amending the WARN Act or passing entirely new legislation.

The WARN Act also balances the competing interests of labor and business by providing exemptions from the requirement. Faltering companies, for example, are exempt from the notice requirement so that they may retain the ability to raise capital and obtain additional business.⁶¹ Within these exemptions, however, lie the potential defects of the Act. The subjective terms of the exemptions will likely lead to a tremendous amount of litigation.⁶² When confronted with unforeseeable business circumstances, the burden of proof will probably lie with the employer to prove that these circumstances indeed existed and were reason enough not to have provided the full 60-day notice. Moreover, once an employer is exempted from the notice requirement, the beneficial effects of the statute are lost and the displaced worker faces all of the devastating effects of plant closings.

An additional concern is the enormous cost to administer the Act. Some estimates of the implementation of the WARN Act have placed the cost at one to two billion dollars.⁶³ When

58. See *supra* note 20.

59. See 134 CONG. REC. S8454 (daily ed. June 23, 1988) (statement by Sen. Metzenbaum).

60. 29 U.S.C. § 2109 (1988).

61. *Id.* § 2102(b).

62. *Analysis of Plant Closing Law, supra* note 51, at 584.

63. See 134 CONG. REC. S8850-8851 (daily ed. July 6, 1988) (statement by Sen. Hatch):

The Nathan study finds that the plant closing bill will cost at least \$1 to \$2 billion per year. These costs included administrative cost of \$962 million per year, an average of \$6 million per year in loss of trained staff, and an average of \$850 million per year in penalties.

The Nathan estimates were based on U.S. General Accounting Office data describing notification procedures at worksites of over 100 employees.

compared with the experience of other industrialized nations, the cost of implementation could well exceed these estimates.⁶⁴

The chief concern over the effectiveness of the WARN Act is the scope of its implementation.⁶⁵ The federal statute will regulate not only plant closings but mass layoffs as well.⁶⁶ While the term "mass layoffs" implies a layoff of a substantial percentage of an employer's workforce, the effect will be to regulate what may be deemed insignificant layoffs. The statute, for example, provides that an employer is required to give sixty-days advance notice whenever fifty or more employees are laid off at a single site during any thirty-day period.⁶⁷ At a large assembly plant which employs 5,000 employees, if just one percent of the workforce, fifty workers, were laid off, notification would be required. Such a regulation holds the company of 100,000 employees to the same managerial restriction as the company with 100. For the large plant, the cost of notification for what is certainly anything but a "mass layoff" might well outweigh the potential benefits to workers and their communities.⁶⁸

V. CONCLUSION

Plant closing legislation is essential in order to guarantee an equitable distribution of the costs of capital mobility. However, the United States economy must also maintain a labor force that can quickly adapt to the competitiveness of the global market. The WARN Act tries to balance these two competing interests by requiring advance notice of plant closings to enable both business and the workforce to make the necessary changes as rapidly and effectively as possible. While the WARN Act will alleviate many of the problems of readjustment for displaced workers, the inclusion of some layoffs in the coverage of the Act may lead to some circumstances in which the costs of notification out-

64. See *supra* notes 51-52 and accompanying text.

65. Several unsuccessful attempts were made to exclude the layoff provision and limit the plant closing statute to actual plant closings, including an amendment by Nancy Kassenbaum, U.S. Senator from Kansas. The amendment, however, was defeated.

66. 29 U.S.C. § 2101(a)(2) & (3) (1988).

67. *Id.* § 2101(a)(3)(B)(i)(II).

68. The WARN Act is overbroad in its inclusion of layoffs as compared with existing state legislation. Three states, Maine (ME. REV. STAT. ANN. tit. 26, § 625-B(6-A)(1986)), South Carolina (S.C. CODE ANN. § 41-1-40 (Law. Co-op. 1977)), and Wisconsin (Wis. STAT. ANN. § 109.07 (West 1986)) exclude notice for layoffs entirely, while a fourth, Massachusetts, advises notice to be given only when 90% of the employees have been laid off. (MASS. ANN. LAWS ch. 151A, § 71A (West 1989)).

weigh the benefits. The subjective terms outlining the exemptions from coverage threaten to eliminate the benefits entirely. Congressional activity in this area is both necessary and welcome. The WARN Act, however, should be interim legislation to be replaced in the future by a statute which is more specific in its terminology and less comprehensive in its coverage.

Suzanne Richey Fitts
J. Benjamin Tyler