Comments

JUDICIAL INTERPRETATION OF THE WARN ACT EXCEPTIONS AND THEIR IMPLICATIONS IN THE HEALTH CARE INDUSTRY

Meredith Klapholzt†

I. INTRODUCTION TO THE WARN ACT

The Worker Adjustment and Retraining Notification ("WARN") Act was passed by Congress on August 4, 1988. Under the Act, employers are required to provide affected employees, unions, and the government with advance notice of any long-term worker dislocations, layoffs, or plant closings.1 If the required notice is not given, the employer is liable to employees for any back pay and benefits that accrue for each day of the violation.2

The social history and political climate surrounding the passage of the WARN Act was one of increasing national worker dislocations as many American companies either eliminated or downsized their number of employees.3 Such massive employment cutbacks had profound effects on communities, individuals, and states. In addition to sometimes lengthy unemployment and reduced income, displaced workers often experienced a


2. See 29 U.S.C. § 2104(a)(1)(A) (1994). There is a conflict between the Third Circuit Court of Appeals and the Sixth Circuit Court of Appeals as to whether back pay must be paid according to calendar days or work days. Compare United Steelworkers of Am. v. North Star Steel Co., 5 F.3d 39 (3d Cir. 1993) (suggesting that calendar days are the appropriate measurement), with Saxion v. Titan-C Mfg., Inc., 86 F.3d 553, 560 (6th Cir. 1996) (indicating that work days are the appropriate measurement).

3. See Paul O. Flaim & Ellen Sehgal, Displaced Workers of 1979-93: How Well Have They Fared?, MONTHLY LAB. REV., June 1985, at 3 (indicating that 11.5 million workers lost their jobs as a result of plant closings and mass layoffs between 1979 and 1983).
multitude of physical and emotional problems. These negative effects on public health, and the financial burdens imposed on states as a result of increasing unemployment levels, were exacerbated because "very few employers disclosed their decision to significantly reduce or cease operations in advance, thus leaving workers and communities without an opportunity to adjust and plan for the impending dislocation."

Beginning in 1973, as a result of public pressure by civil rights organizations and overwhelming support from the public and newspaper endorsements, bills suggesting advance notice of plant closings were brought before Congress in an attempt to redress these problems. Unlike some of the earlier bills sponsored between the 1970s and mid 1980s, two proposals brought before the 100th Congress in 1987 focused solely on the problem of plant closings and the need for advance notice remedies. However, these mandatory advance notice proposals were not without their critics, and with the proposals came strong opposition from industry groups and business organizations that objected to the requirement of discussing a decision to close a plant with the state government. Some raised arguments that mandatory plant closing legislation gives rise to economic inefficiency due to possible loss of customers, credit, and valued employees. Critics also raised concerns about increased friction in labor management relations, on the grounds that such legislation limits the free

5. See Jessica L. Stein, Comment, The Worker Adjustment and Retraining Notification Act (WARN): What Is The Meaning Behind the Language?, 19 SETON HALL LEGIS. J. 648, 653 (1995) (citing M. Harvey Brenner, Economy, Society, and Health, Paper prepared for the Conference on Society and Health, New England Medical Center, Boston, MA (Oct. 16, 1992) (finding a connection between increased unemployment and total number of deaths, arrests, prison sentences, and admissions into psychiatric hospitals)); see also Mary Merva & Richard Fowles, Effects of Diminished Economic Opportunities on Social Stress: Heart Attacks, Strokes, and Crime, Paper Prepared for the Economic Policy Institute, Washington, D.C., 1-2 (Oct. 16, 1992) (finding that a 1% increase in unemployment rates causes a 5.6% rise in deaths due to heart attack, a 6.7% increase in deaths due to murder, and a 3.4% increase in the number of violent crimes committed).
6. See Yost, supra note 4, at 653.
7. Id. at 676.
8. See Stein, supra note 5, at 654 (citing 134 CONG. REC. S8375 (daily ed. June 22, 1988) (Senator Howard H. Metzenbaum) (describing the tremendous support for advance notice legislation)); see also Yost, supra note 4, at 682 (explaining that while many believed that organized labor was the sole motivating force, polls indicated that eighty-six percent of the American people supported such a measure).
9. See Stein, supra note 5, at 656 (citing H.R. REP. No. 100-285 (1987)). House Bill 1122 required that employers notify state and local governments of an order to close a plant or order a mass layoff at least 90 days in advance to assist in devising worker dislocation services. Moreover, it compelled employers to provide employees with 90 to 180 days advance notice before closing a plant or ordering a mass layoff.
10. See Stein, supra note 5, at 656 n.28.
flow of economic resources and corporate mobility, both of which are essential to private economic growth.\footnote{11}

The bill, which had evolved into a subtitle of the Omnibus Trade and Competitiveness Act of 1988, was ultimately defeated. Nevertheless, efforts to enact a mandatory advance notice legislation continued.\footnote{12} On June 16, 1988, Senator Howard Metzenbaum introduced S. 2527, which, many argued, mirrored the prior proposal. The Senate began to review the bill and considered over seventy-five amendments and substitutions.\footnote{13}

The Senate Committee on Labor and Human Resources stated four broad purposes of the WARN Act:\footnote{14} (1) advance notice of worker dislocation was essential for workers to successfully adjust to job loss; (2) advance notice would save the government between $257 million and $386 million in unemployment compensation benefits each year; (3) advance notice would make adjustment efforts more efficient by allowing employees to return to work quickly and at better wages; and (4) advance notice is a matter of "fair play" for workers and their families.\footnote{15}

The Senate approved Senate Bill 2527 on July 6, 1988 and the House of Representatives approved it one week later.\footnote{16} WARN was enacted on August 4, 1988, overriding President Reagan's veto. The enactment of the WARN Act ended a fifteen-year struggle to provide workers with advance notice of a plant closing or mass layoff. Although the legislative political battle resulted in more moderate language, the Act's original mission was retained intact.\footnote{17}

Supporters of the WARN Act defended it on equity grounds and on the results of empirical studies. The studies demonstrate the positive effects of voluntary notice on post-displacement outcomes for employees and greater reductions in joblessness among workers who were provided advanced notice versus those who were not.\footnote{18} Generally, the purpose of the WARN Act is to provide:

\begin{itemize}
  \item\footnote{11} See id. at 679 n.41.
  \item\footnote{12} See id. at 657.
  \item\footnote{13} See id.
  \item\footnote{14} See, e.g., 134 CONG. REC. S8376 (June 22, 1988) (statement of Sen. Kennedy); Richard W. McHugh, Comment, Fair Warning or Foul? An Analysis of The Worker Adjustment and Retraining Notification (WARN) Act in Practice, 14 BERKELEY J. EMP. & LAB. L. 1, 11-12 (1993).
  \item\footnote{15} See McHugh, supra note 14, at 12.
  \item\footnote{17} See Yost, supra note 4, at 692.
  \item\footnote{18} See John T. Addison & McKinley L. Blackburn, Comment, The Worker Adjustment and Retraining Notification Act: Effect on Notice Provision, 47 INDUS. & LAB. REL. REV. 650, 650 (1994) (noting that opponents of the legislation saw it as adding significantly to employment-adjustment costs, adversely affecting employment, job creation, and harming international competitiveness of the United States industry).
\end{itemize}
protection to workers, their families and communities by requiring employers to provide notification 60 calendar days in advance of plant closings and mass layoffs. 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.19

The WARN Act survived a Constitutional challenge as the Fifth Circuit found that the statute was rationally related to Congressional concern over the economic harms caused by plant closings, and did not involve a prohibited governmental invasion of an employer's property.20

Given the political climate and strong opposition surrounding the enactment of WARN, it is surprising that implementation has not played a dramatic role in labor law litigation.21 In attempting to identify all reported and unreported WARN cases filed between WARN's enactment in 1988 and 1992, the General Accounting Office (G.A.O.) found that only sixty-six such cases were filed.22 Evaluating the "success" of the WARN Act must therefore involve more than an analysis of judicial interpretation of the statute.

In 1993 the G.A.O. completed an overall study and evaluation of the WARN Act.23 Although the G.A.O. was unable to evaluate layoffs for employer compliance with WARN due to data limitations, it did find that in fifty-four percent of the closures which appeared to meet WARN criteria, no WARN notice was given to the dislocated worker units. The G.A.O. further found that sixty-four percent of layoffs occurring at firms with 100 or more employees were exempt from WARN due to statutory definitional requirements of a "mass layoff."24 Moreover, ninety-eight percent of the total events analyzed by G.A.O. were found to be exempt from WARN.25 The adequacy of WARN Act enforcement was also questioned by the

20. See Carpenters Dist. Council of New Orleans v. Dillard Dept Stores, 15 F.3d 1275, 1280 (5th Cir. 1994) (concerning an employer who asserted that the WARN Act was unconstitutionally vague and violated the takings and due process clauses of the Fifth Amendment).
21. See McHugh, supra note 14, at 59 (noting that during the first four years of its enactment only 23 cases involving WARN Act provisions were reported, and thus the predicted flood of litigation concerning the WARN Act legislation has not occurred).
22. See id. at 59 n.475.
23. See id. at 59 (citing GENERAL ACCOUNTING OFFICE, DISLOCATED WORKERS: WORKER ADJUSTMENT AND RETRAINING NOTIFICATION ACT NOT MEETING ITS GOALS, H.R. Doc. No. 18, 102d Cong., 2d Sess. (1993)).
24. Id. at 60.
25. See id.
Various reasons for the lack of WARN Act litigation have been suggested. Some commentators believe that "the lack of WARN litigation is due to a lack of effective enforcement, rather than widespread employer compliance with WARN." Others argue that a lack of resources to pursue WARN Act litigation is responsible for the low number of cases, as well as the fact that this is a newer area of the law that is unfamiliar to many lawyers. Finally, some believe that the lack of WARN cases is a result of the fact that employers are generally complying with the Act and possibly even over-complying with the Act because of confusion as to its requirements. Whatever the reason for the low volume of WARN cases, it is clear that the sole enforcement mechanism lies within the federal courts, and judicial interpretation of the statute and its exceptions is therefore extremely important.

II. SUMMARY OF THE WARN ACT AND ITS EXCEPTIONS

The WARN Act is codified in nine relatively modest sections. The statute requires employers to give sixty days advance notice of plant closings or mass layoffs to employees, state dislocated worker units, and local governments. An employer may not order a plant closing or mass layoff until the end of a sixty-day period that commences after the employer serves written notice of such an order.

The statute defines a "plant closing" as 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 or employment during any 30-day period."
period for 50 or more employees excluding any part-time employees.” The term "mass layoff" is defined by the statute as a "reduction in force which is not the result of a plant closing and results in an employment loss at [a] single site of employment during any 30-day period for at least 33 percent of the employees (excluding any part-time employees) and at least 50 employees (excluding any part-time employees) or at least 500 employees (excluding any part-time employees)."

The statute specifies to whom notice must be given, when notice must be given, and what damages can be sought and obtained for a violation of the advance notice requirement. In accordance with the statute, written notice must be given by the employer to affected employees, state dislocated worker units, and local governments at least sixty days before a plant closing or mass layoff occurs. If an employer does not give the required advance notice to affected employees, the employer is made subject to a civil action suit seeking up to sixty days back pay for each day of violation that has occurred.

The WARN Act reflects the tension between an underlying worker-protective purpose and competing concerns for business. Therefore, the statute also contains several exceptions or exemptions from its notice requirements. These exceptions and exemptions primarily concern business circumstances which were not reasonably foreseeable to an employer as of the time that notice would have been required. Moreover, reduction of the notification period is allowed in cases of a faltering business when notice would have precluded efforts to gain new capital or customers, and in cases where closings are due to natural disasters. Exemption from the notification requirement is also allowed in situations where a plant closing or mass layoff is due to a strike or lockout. Finally,

33. Id. at § 2102(a)(2). "An employment action that results in the effective cessation of production or the work performed by a unit, even if a few employees remain, is a shutdown. A 'temporary shutdown' triggers the notice requirement only if there are a sufficient number of terminations, layoffs exceeding 6 months, or reductions in hours of work as specified under the definition of employment loss." 20 C.F.R. §639.3(b)(1999).

34. 29 U.S.C. § 2101(a)(3) (1994). "Where 500 or more employees (excluding part-time employees) are affected, the 33 percent requirement does not apply and notice is required if the other criteria are met." 20 C.F.R. §639.3(c) (1999).


37. See Sandra J. Mullings, Comment, WARN: Judicial Treatment of Exemptions, Exclusions, and Excuses, 39 Ariz. L. Rev. 1209, 1212 (1997) (indicating that strong concerns were expressed about the effects of imposing notice requirements and liability on employers where a sudden event made it impossible for an employer to give the required notice).


39. See id. at § 2102(b)(1).

40. See id. at § 2102(b)(2)(B).

41. See id. at § 2103(2).
the WARN Act contains a "good faith" provision that allows a court in its discretion to reduce the amount of an employer's liability, if that employer can prove to the satisfaction of the court that the violation was in good faith and that he had reasonable grounds for believing that the act or omission was not a violation.\(^{42}\)

### III. Judicial Interpretation of Major WARN Act Exceptions and Exemptions

Although WARN's basic purpose is to protect employees by providing them with sixty days notice in advance of a plant closing or mass layoff, the federal statute was nonetheless controversial. Employers feared that they would be unfairly penalized by the notice requirements in the event of a sudden and unexpected event or in their efforts to save a failing business.\(^{43}\) Although the statute itself attempts to speak to these concerns directly,\(^{44}\) judicial interpretation of WARN, and specifically the WARN Act exceptions and exemptions, has proven to be a major component to the effectiveness of the statute.\(^{45}\) Although there have been splits between the courts of appeals concerning whether to construe a particular exception narrowly or broadly, it has been generally found that the lower courts "have been mindful of the statute's remedial purpose and have construed these exceptions in a manner consistent with the presumption that notice should be the norm, not the exception."\(^{46}\)

#### A. The Faltering Company Defense

The WARN Act provides for a shortened notice period in three distinct situations. First, the statute permits a "faltering company" exception whereby an employer is permitted to give less than the required sixty-day notice.\(^{47}\) An employer relying on this subsection must show that at the time WARN notice would have been required (1) he was actively seeking capital or business; (2) the capital or business, if obtained, would have enabled him to avoid or postpone the closing; and (3) he reasonably and in good faith believed that giving the sixty-day WARN notice would have precluded him from obtaining that capital or business.\(^{48}\) However, even if the employer can show that he was actively seeking capital or

\(^{42}\) See id. at § 2104(a)(4).

\(^{43}\) See Mullings, supra note 37, at 1209.

\(^{44}\) See Yost, supra note 4, at 704 (noting that "the statutory language reflects a balance between the competing interests of business and labor").

\(^{45}\) See id.

\(^{46}\) Id.


\(^{48}\) See id.
business which would have otherwise enabled him to avoid or postpone the shutdown, he still must give as much notice as is practicable.\textsuperscript{49}

The Regulations suggest that the "faltering company" exception should be narrowly construed. In order to qualify for reduced notice under the exception:

[T]he employer must have been seeking financing or refinancing though the arrangement of loans, the issuance of stocks, bonds, or other methods of internally generated financing; or the employer must have been seeking additional money, credit or business through any other commercially reasonable method. The employer must be able to identify specific actions taken to obtain capital or business.\textsuperscript{50}

Moreover, the Regulations state that an employer must be able to objectively demonstrate that he reasonably thought that a potential customer or source of financing would not have been available if notice of a closing had been given.\textsuperscript{51} Because the actions of an employer are to be viewed in a company-wide context, a company may not exempt itself under this exception by looking solely at the financial condition of the facility, operating unit, or site to be closed.\textsuperscript{52}

The faltering company provision is responsible for a considerable percentage of WARN Act litigation. The defense, however, has been successful in few cases.\textsuperscript{53} In Local 397, International Union of Electrical Workers \textit{v.} Midwest Fasteners,\textsuperscript{54} union employees brought an action against their employer for violation of the WARN Act and sought a preliminary injunction to prevent the employer from dissipating assets that might be available to satisfy a potential final judgment in the union's WARN action.\textsuperscript{55} The union was the exclusive bargaining agent for all production and maintenance employees at the Moorestown, New Jersey plant of defendant Midwest Fasteners, Inc. (which conducted business as Erico Fastening Systems ("EFS")).\textsuperscript{56} EFS's fiscal health was in a precarious state, and as a result EFS initiated efforts to sell its Moorestown facility.

\textsuperscript{49} See 29 U.S.C. § 2102(b)(3) (2000) (stating that "[a]n 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").
\textsuperscript{50} 20 C.F.R. § 629.9(a)(1) (1998).
\textsuperscript{51} See 20 C.F.R. § 629.9(a)(4) (1998) (stating that “[t]his condition may be satisfied if the employer can show that the financing or business source would not choose to do business with a troubled company or with a company whose workforce would be looking for other jobs").
\textsuperscript{52} See id.
\textsuperscript{53} See Mullings, \textit{supra} note 37, at 1239.
\textsuperscript{54} 763 F. Supp. 78 (D.N.J. 1990).
\textsuperscript{55} See id.
\textsuperscript{56} See id. at 79.
Although one company initially expressed interest in acquiring EFS, it later notified EFS that it decided not to do so. EFS closed its Moorestown plant three days later, terminating all employees without giving them prior notice of the closing. Because the union had to show that it was likely to prevail on the merits of its WARN claim in order to obtain a preliminary injunction, the court addressed EFS's defense that it was exempt from WARN Act requirements under the faltering company exception. The court found that EFS did not meet the requirements of this exception because coordinating a sale of a facility did not qualify as "actively seeking capital or business." Although the court concluded that the union was likely to prevail on the merits, it denied a preliminary injunction because the union could not demonstrate that EFS would be unable to satisfy a potential damage award. In addition, the public interest required that EFS's assets be made available to other creditors.

In Alarcon v. Keller Industries, the Ninth Circuit considered the "faltering company" defense and upheld the district court's grant of summary judgment for the defendants. In this case, employees brought an action against their employer claiming that their one-day notice of the plant's closure was inadequate and constituted a violation of the WARN Act. The defendant, Keller Industries, had an outdoor aluminum lawn furniture division which had been losing money for several years. Keller had unsuccessfully attempted to increase its number of retail accounts or to find buyers for the Division. However, when Continental Bank notified Keller that it was withdrawing its funding, this necessitated the immediate closure of the plant where the plaintiffs worked. Keller sent a letter to the plaintiffs' bargaining representatives notifying them that their jobs were being terminated because of the precarious financial condition of the business, including "its substandard working capital and its inability to find a qualified buyer." Because the plaintiffs stipulated that the faltering company defense applied in this case, and because they only objected to the substance of the notice that was actually given, the court did not address the merits of the faltering company defense. The court did note, that "it is not enough for an employer simply to cite a statutory exception, stating, for

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57. See id. at 80.
58. Id. at 83 (reasoning that Congress did not intend a sale to relieve an employer from its obligation to notify employees because if Congress had so intended it would have expressed such an intent explicitly).
59. See id. at 85.
60. 27 F.3d 386 (9th Cir. 1994).
61. See id. at 388.
62. See id.
63. Id. at 391.
64. See id. at 389.
example, 'the notice is short because we are a faltering company.' In keeping with the narrow construction specified by the Regulations, the court nevertheless found that the reasons provided by the defendant adequately explained the factual circumstances underlying the plant closure and the shortened notice.

In *Carpenters District Council v. Dillard Department Stores*, the affected employees were discharged following a reverse triangular merger and sought damages under WARN. Although the employees were informed of their layoff a few weeks in advance, they did not receive the full sixty-day notice from their employer. The defendant claimed that it was exempt from WARN Act requirements under the "faltering company" exception because it was actively searching for a new line of credit when it was forced to reduce its workforce. However, the court found that the credit was sought by the company seeking the merger and "the actual cause of the mass layoff was not a failure to obtain an adequate line of credit; instead the cause of the layoff was the merger between Holmes and Dillard." The court therefore found that the faltering company exception did not apply to exempt the defendant from liability for failing to give notice of the layoff.

B. Unforeseeable Business Circumstance

The second circumstance in which a shortened notice period is permitted is when there are "unforeseeable business circumstances." The statute does not specify which events constitute business circumstances that are not reasonably foreseeable as of the notice. The Department of Labor indicated that the propriety of utilizing the business circumstance exception involves a highly factual inquiry to be assessed on a case-by-case basis. Nevertheless, the regulations provide some specific examples of incidents which may invoke this exception:

65. *Id.* at 390 (explaining that the company must give some indication of the factual circumstances that made an exception to the statutory notice requirement applicable, providing an adequate, specific explanation to affected workers).
66. *See id.* at 392.
67. 15 F.3d 1275 (5th Cir. 1994).
68. *See id.* at 1281.
69. *Id.* (holding that because there was no causal relationship between Holmes's search for additional capital and the reduction in its workforce, the "faltering company" exception does not apply).
70. *See id.*
73. *See 20 C.F.R. § 639.9(b)(1) (1998) (noting 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).*
A principal client's sudden and unexpected termination of a major contract with the employer, a strike at a major supplier of the employer, and an unanticipated and dramatic major economic downturn might each be considered a business circumstance that is not reasonably foreseeable. A government ordered closing of an employment site that occurs without prior notice also may be an unforeseeable business circumstance.\textsuperscript{74}

Moreover, an employer must exercise "such commercially reasonable business judgment as would a similarly situated employer in predicting the demands of its particular market."\textsuperscript{75} An employer is not required to accurately predict the general economic conditions that may affect its demand for its products or services.\textsuperscript{76} Despite guidance offered by the Regulations, courts differ on whether this exception is to be broadly or narrowly construed.

In \textit{Bradley v. Sequoyah Fuels Corp.},\textsuperscript{77} employees brought an action against their former employer under WARN when the employer closed down all uranium processing operations at its plant. The court held that the "business circumstance" exception applied. According to the court, the employer did not have to provide the sixty-day notice of the plant closing because the release of nitrogen dioxide was a sudden and unforeseeable event which ultimately triggered the exhaustion of SFC's capital and mandated the shutdown.\textsuperscript{78} The court found that "WARN is a remedial statute and must be construed broadly."\textsuperscript{79}

In \textit{Loehrer v. McDonnell Douglas},\textsuperscript{80} former employees sued a defense contractor for violation of the WARN Act after the company instituted mass layoffs following the government's cancellation of a fighter-bomber contract. Despite the fact that there were prior scheduling delays, severe budgetary overruns, and the government demonstrated its general unhappiness with the co-contractor's performance (which would arguably have put the business on notice that the contract might be canceled), the court held that an employer's commercially reasonable business judgment, not hindsight, dictates the scope of the unforeseeable business circumstance exception.\textsuperscript{81} According to the court, even the most conscientious employers should be allowed flexibility regarding predictions about ultimate consequences which, though objectively reasonable, proved

\textsuperscript{74} 20 C.F.R. § 639.9(b)(1) (1998).
\textsuperscript{75} 20 C.F.R. § 639.9(b)(2) (1998).
\textsuperscript{76} \textit{See id.}
\textsuperscript{77} 847 F. Supp. 863 (E.D. Okla. 1994).
\textsuperscript{78} \textit{See id. at 869.}
\textsuperscript{79} \textit{Id. at 866.}
\textsuperscript{80} 98 F.3d 1056 (8th Cir. 1996).
\textsuperscript{81} \textit{See id. at 1061.}
wrong.\textsuperscript{82} The \textit{Loehrer} court rejected an interpretation of the business circumstance exception which would require an employer to establish that it would not have been economically feasible to wait sixty days before instituting a plant closing or mass layoff.\textsuperscript{83} Therefore, the court opined that in this rather unique, politically charged area of defense contracts, McDonnell Douglas' conduct was a reasonable response to the Government's relatively sudden, dramatic, and unexpected cancellation of the contract. The \textit{Loehrer} court, like the \textit{Bradley} court, suggested that broad latitude must be given in interpreting the business circumstance exception.

On the other hand, the Fifth Circuit Court of Appeals and the Fourth Circuit Court of Appeals suggest that a narrow construction of the business circumstance exception is appropriate. In \textit{Carpenters District Council of New Orleans v. Dillard Department Stores, Inc.},\textsuperscript{84} employees who were discharged as a result of a reverse triangular merger sued their employer under \textit{WARN}.\textsuperscript{85} The court held that the unforeseen business circumstance exception was not applicable, and the employer was held accountable for his failure to give notice of the layoff.\textsuperscript{86} Because both companies actively promoted the merger and had been negotiating an agreement which would allow the two companies to merge, "it [was] difficult to see how two companies that were busy promoting their merger can now argue that the resulting merger was unforeseeable."\textsuperscript{87} The court opined that "[a]s with the 'faltering company' exception, this exception to the general rule is to be narrowly construed."\textsuperscript{88}

In \textit{Local Union 7108 v. Clinchfield Coal Co.}, an employer closed a coal mine without providing sixty days notice as required by the \textit{WARN} Act.\textsuperscript{89} In deciding whether Clinchfield's decision to close the mine was a "commercially reasonable business judgment" which resulted from a "sudden and unexpected" failure to obtain an adequate contract with Dofasco, Inc., the court examined the factual events surrounding the incident. The court upheld the district court's findings that the two companies had a long-standing business relationship and negotiators

\textsuperscript{82} See id.
\textsuperscript{83} See, e.g., Jurcev v. Central Comm. Hosp., 7 F.3d 618, 624-25 (7th Cir. 1993); Teamsters Nat'l Freight Indus. Negotiating Comm. v. Churchill Truck Lines, Inc., 935 F. Supp. 1021, 1025-26 (W.D. Mo. 1996) (holding that "[t]he 'business circumstance' exception ... does not impose upon an employer a requirement to provide sixty days notice or continue in business to its detriment for the sixty-day notice period, simply because it is economically feasible or possible to do so").
\textsuperscript{84} 15 F.3d 1275 (5th Cir. 1994).
\textsuperscript{85} See id.
\textsuperscript{86} See id. at 1281.
\textsuperscript{87} Id. at 1282.
\textsuperscript{88} Id.
\textsuperscript{89} 124 F.3d 639 (4th Cir. 1997).
between the parties could not reasonably have foreseen that Clinchfield would be unable to accept an offer to buy coal. The employer bears the burden of persuasion in showing that the failure to obtain an acceptable contract for coal was sudden and unexpected enough to entitle him to give only one day's notice to miners of the mine's closure. The court noted, however, that "[b]ecause the WARN Act is remedial legislation, its exceptions are construed narrowly."

Judge Collings of the District Court of Massachusetts likewise suggested that a narrow interpretation of the unforeseeable business circumstance exception was warranted in a case where employers could have anticipated that by the end of the year their plant would be forced to close and therefore could have given the proper notification required by the WARN Act.

The caselaw does not offer a clear analysis of the components of a successful defense under the "business circumstance" exception. It is possible that § 2102(b)(3), which requires employers who rely on the "unforeseeable business circumstance exception" to give as much notice as practicable, tempers the need for a bright line rule.

For example, in Jones v. Kayser-Roth Hosiery, former hosiery manufacturing plan employees brought a class action suit against their employer for a violation of WARN notice requirements. The employer argued that the closing of the plant was caused by the sudden, dramatic, and unexpected, irrevocable loss of a J.C. Penney account, the plant's largest and most profitable customer. The court, however, held that although the plant closing was not foreseeable sixty days in advance, it was "reasonably practicable [for employer Kayser-Roth] to issue notice of the mass layoff or plant closure within two working days.... and thus plaintiffs are entitled to be compensated [during the period when defendant

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90. See 20 C.F.R. § 639.9 (1998); International Ass'n of Machinists v. General Dynamics Corp., 821 F. Supp. 1306, 1311-12 (E.D. Mo. 1993) (holding that an employer relying on this exception bears the burden of persuasion).
91. See id. at 1312-13.
92. Clinchfield Coal Co., 124 F.3d at 640 (citing Carpenters, 15 F.3d at 1282).
94. See 29 U.S.C. § 2102(b)(3) (1999) ("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.").
96. See id.
was in violation of the WARN Act." The fact-driven nature of the inquiry works in concert with § 2102(b)(3) to assure that an employer may only have a successful defense under the "unforeseeable business circumstance" when an employer gives as much notice as is practicable under the circumstances.

C. The Strike Exemption

WARN Act regulations do not apply to employers where a plant closing or mass layoff results from a strike or a lockout. Although the regulations clearly define a "lockout," they do not define a "strike." Neither does the scarce case law shed any light on the matter. The only two federal district courts to interpret this exemption have reached conflicting results.

In Teamsters National Freight Industries Negotiating Committee v. Churchill Truck Lines, Inc., a union brought a class action suit alleging that their employer pre-planned a closing, using the strike as a pretext to avoid the sixty-day notice requirement mandated by the WARN Act. The defendant claimed that it was exempt from WARN notice requirements because the closing was "related to" a strike under § 2103, and additionally because the closing fell within the "business circumstance exception" of § 2102(b)(2)(A). The court averred that the "strike exemption' appears to place a less onerous burden upon the employer who need only prove that the closing 'related' to the strike, to be exempted from the sixty-day notice requirement." The court determined that the defendant had met his burden of proof on the strike exemption because union employees knew or had reason to know that a strike "could break the strong bonds and sense of loyalty which had permitted [the] company to thrive in the past." In addition, the employer had a history of working with the union, had

97. Id. at 1288.
98. See 29 U.S.C. § 2103(2) (1994) ("(2) This chapter shall not apply to a plant closing or mass layoff if—the closing or layoff constitutes a strike or constitutes a lockout not intended to evade the requirements of this chapter.").
99. See 20 C.F.R. §639.5(d) (1999):
A lockout occurs when, for tactical or defensive reasons during the course of collective bargaining or during a labor dispute, an employer lawfully refuses to utilize some or all of its employees for the performance of available work. A lockout not related to collective bargaining which is intended as a subterfuge to evade the Act does not qualify for this exemption.
101. See id.
102. Id. at 1026 (explaining that striking employees are shouldered with some of the responsibility for their decision to strike).
103. Id.
WARN ACT EXCEPTIONS

expended a substantial amount of training, and had purchased expensive equipment prior to the strike. The court also held that "[t]he strike was a business circumstance which would potentially, realistically, significantly and detrimentally impact the operations of the company." Thus the strike offered the defendant shelter from the WARN Act notice requirement under both the "strike exemption" and the "unforeseeable business circumstance exception."

The only other case examining the "strike exemption" involved a labor dispute in a nursing home in which 160 union employees became unemployed. The plaintiff union alleged that the defendant Fall River Nursing Home ("FRNH") failed to provide a sixty-day advance notice of its intention to close the nursing home in accordance with the WARN Act. FRNH defended that it was exempt from WARN Act requirements in accordance with the "strike exemption" because the union's belated rescission of its strike notice "constituted a strike" for purposes of exemption from WARN Act liability. The union contended that the "strike exemption" did not apply because no strike actually occurred at the Fall River Nursing Home. The court denied summary judgment on this issue because of genuine issues of material fact regarding the timeliness of the rescission of the strike notice.

Additionally, FRNH argued that it was exempt from WARN Act requirements under the "business circumstance exception" because the belated rescission of the strike notice was a "sudden, dramatic, and unexpected action or condition outside of the employer's control." The court found that

[t]o the extent the plant closing was related to an imminent strike because of an untimely rescission of the strike notice, the strike exemption is the controlling provision . . . . If, however, the strike exemption is inapplicable because the rescission was timely, the employer bears the burden of proving that it gave as much notice as was practicable once it had made the business judgment to close the plant.

104. See id. at 1027.
105. Id.
107. See id. at *1.
108. See id. at *6.
109. See id. at *7.
110. See id.
111. Id. at *7.
112. Id. at *7-*8 (citing Varity Corp. v. Howe, 516 U.S. 489, 511 (1996) (holding that a canon of statutory construction is that a specific subsection makes a more general subsection inapplicable, thus if the belated rescission of the strike notice "constitutes a strike," it cannot
Because the Churchill court and the Fall River court are at odds as to whether the "business circumstance exception" should be read broadly enough to encompass strikes and other concerted activities which might satisfy an alternative exemption, we are left without much guidance in interpreting the WARN Act exceptions. This gap is at least partly due to the fact that the court's holding in Fall River concerns a threatened strike at a health care institution, which poses additional concerns not present in other industries.

D. The Good-Faith Exception

An employer who has violated the WARN Act may have his penalty reduced at the discretion of the court if the employer can show that his act or omission that constituted the violation was in good faith and that he had reasonable grounds for believing that the act or omission was not a violation.\(^{113}\)

In Local 1239, International Brotherhood of Boilermakers v. Allsteel,\(^ {114}\) the employer closed its production and distribution facility in Aurora, Illinois. The court found that Allsteel did not provide adequate notice of the plant closing to employees until two days before the plant closed.\(^ {115}\) The court further found that "Allsteel's failure to give proper WARN Act notice of the final closing date to Local 1239 as soon as possible was unreasonable, and as such, precludes a 'good faith' defense."\(^ {116}\)

Other courts have also placed limits on an employer's ability to seek refuge in the "good faith" defense. In Jones v. Kayser-Roth Hosiery, Inc.,\(^ {117}\) the employer sought to have his liability reduced because it provided some notice of the plant closing by keeping the plant open for several months, making United Way contributions, and giving severance pay to employees.\(^ {118}\) The court found that "the defendant's conduct after the violation is not relevant to the determination of good faith contemplated by the statute. The pertinent inquiry . . . is the defendant's conduct prior to the notice . . . ."\(^ {119}\)

The court's unwillingness to expand the scope of the


\(^{115}\) See id. at *1.

\(^{116}\) Id. at *7 n.4 (finding that Allsteel's attempt for reconsideration based on an alleged "expanded record" must fail because Allsteel fails to explain how this new information would change the fact that Allsteel failed to give notice until at least ten days after the date on which it could have given notice).

\(^{117}\) 748 F. Supp. 1276 (E.D. Tenn. 1990). See also supra note 95 and accompanying text.

\(^{118}\) See id. at 1291.

\(^{119}\) Id. (finding that the defendant could have given conditional notice within a
good faith defense to encompass defendant's actions which took place after the WARN violation occurred suggests a narrow construction of the provision.

Nevertheless, other courts have been more lenient and have permitted employers a complete good faith defense, thus allowing them to escape WARN liability. In United Automobile Aerospace & Agricultural Implement of America, Local 1077 v. Shadyside Stamping Corp., the employer advised the union that it expected layoffs to occur in the near future due to the cancellation of a large contract with Navistar. After the employer sent a confirmation letter to the union employees informing them that the layoffs would occur, the employer laid off thirty-one employees, and later terminated an additional sixty-six employees. The union argued that the employer violated the WARN Act because not all affected employees were provided with the full sixty-day notice, and that the notice issued to the employees did not communicate the necessary information as required by the Act. In evaluating the employer's good faith defense the court found that:

Here, the employer notified the employees' representative five months in advance of the expected mass layoff and provided a subsequent reminder notice. There can be no question that the employer proceeded in good faith in its attempt to properly notify the employees of future layoffs. Indeed, the Company unquestionably complied with the spirit of the WARN Act.

Because of the uncertainty of the language in the statute and in the regulations, the court found that the employer was entitled to a complete good faith defense to WARN liability.

reasonable time after the termination of a major customer's contract, but it chose not to do so).

121. See id. at *1.
122. See id. at *1-*2.
123. See id. at *3.
124. Id. at *9.
125. See McHugh, supra note 14, at 50 (discussing the similarities of the holding in Shadyside with that of Oil, Chemical, & Atomic Workers International Union, Local 7-515 v. American Home Products Corp., 790 F. Supp. 1441, 1452 (N.D. Ind. 1992), where the court found that because "the closing of the plant was announced a year in advance, and some workers learned of the quarter in which they would lose their jobs much more than sixty days in advance . . .," the employer was clearly not intending to evade the requirements of the Act, and was therefore entitled to the good faith defense).
IV. RECENT IMPLICATIONS OF WARN ACT EXCEPTIONS IN THE HEALTH CARE CONTEXT

The two courts that have examined the WARN Act within health care settings seem to suggest that broad construction of the exceptions is appropriate in order to advance the objectives and preserve the integrity of health care institutions and their patients.

In *Jurcev v. Central Community Hospital*, employees who lost their jobs when a hospital closed brought a class action suit alleging that their employer violated the WARN Act by not giving sixty days advance notice of the closing. The hospital board voted to close the hospital and provide notice to employees the day after the foundation (which had managed the hospital's financial affairs) decided to cease making subventions to the hospital. The employees maintained that "the Foundation's decision to cease making subventions did not 'cause' the hospital to close... because the hospital's Board of Trustees should have realized the Foundation's conclusion that it could not invade the principal of the endowment fund to make the subventions was based on erroneous legal and tax advice..." Moreover, the class argued that the hospital had sufficient funds to stay open for sixty days even without the subventions.

Nevertheless, the Seventh Circuit Court of Appeals held that the Foundation's decision to stop making subventions to the hospital caused the hospital to close and that this decision was an unforeseen business circumstance within the meaning of the exception. The court found that the decision to cease making subventions to the hospital was not reasonably foreseeable but was sudden, dramatic, and unexpected. No one on the hospital's board was aware of the circumstances surrounding the cessation of the subventions including the Foundation's invasion of the hospital's principal and risk of the Hospital's tax exempt status. The Hospital depended on the subventions to remain afloat and "neither the regulations nor the WARN Act articulate as one of the conditions that the employer be able to demonstrate that it has insufficient assets to remain open for 60 days." Broad construction of the "business circumstance exception" applies when an employer is not compelled to search for ways to stay open if confronted with a loss of its principal source of income.

As mentioned earlier, in *New England Health Care Employee's Union*

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126. 7 F.3d 618, 620-21 (7th Cir. 1993).
127. *See id.* at 622.
128. *Id.* at 623-24.
129. *See id.* at 624.
130. *See id.* at 625-27.
131. *See id.* at 627.
132. *See id.*
133. *Id.* at 625.
v. Fall River Nursing Home, Inc. the union issued a strike notice which it later rescinded, and Fall River Nursing Home argued that it did not have to provide sixty-day notice in accordance with WARN because it was exempt under both the "strike exemption" and the "unforeseen business circumstance exception." Although the court denied summary judgment due to genuine issues of fact, it noted that "[i]n the context of the health care industry, a strike or a threatened strike 'can if permitted to occur or continue, substantially interrupt the delivery of health care. . .".

The WARN Act does not address the special considerations that exist when a strike or threatened strike results in a mass layoff at a health care institution. The National Labor Relations Act section 8(g), however, strictly requires that a labor organization notify a health care institution and the Federal Mediation and Conciliation Service of an intention to strike ten days before such action is taken. The Federal Mediation and Conciliation Service is required to meet with the parties to aid in the settlement of the dispute. Congress was concerned that a sudden and massive strike at a health care institution could endanger the health and well-being of patients. This concern seemed to prompt the court in Fall River to expansively interpret the "strike exemption" to potentially include the belated rescission of a strike notice. "Because of the practical necessity that health care facilities execute patient care contingency plans in advance of an actual strike, this court holds that a shutdown of a health care facility reasonably resulting from a strike notice 'constitutes a strike' for purposes of exempting an employer from WARN liability. . .".

Furthermore, the court indicated that the belated rescission of a strike notice could trigger the "unforeseen business circumstance exception" if the closure of the nursing home turned on issues of patient health and safety that might be compromised as a result of the strike notice.

V. CONCLUSION

In the context of regular businesses, a factual inquiry is appropriate in determining whether one of the WARN exceptions can be invoked to relieve an employer from liability. The regulations and the case law also provide guidance. In the context of the health care industry, however, where an employer's decision to close a plant is at least partly due to a fear

135. Id. at *5.
139. See id. at *8.
of compromising patient health and safety, no bright line rules exist.

Some have argued that even in the context of regular businesses a longer advance notice period of at least 120 days (four months) is advisable, as this would be more beneficial to workers. Commentator Richard McHugh argues that given the "faltering business" and "unforeseeable business circumstance" exceptions, a shorter notice period is permitted under WARN when it is not possible for the employer to give notice any earlier. Ideally, in the context of the health care industry, a lengthened notice period would be desirable and would comport with the purpose of the Act in allowing both employees and patients some extra transition time to adjust to a possible loss of employment or a change in staffing. This, however, ignores the factual reality that in the context of labor negotiations, where threatened strikes and threatened closures are often used as tools to gain leverage in reaching collective bargaining agreements, it might prove extremely difficult to provide greater notice than currently mandated by the statute. Furthermore, making a distinction between an employer's genuine concern for patient safety and an employer's pretextual motive for closing a health care facility without adequate warning is not always easy to do. When concerns for patient health and safety are intertwined with an employer's decision to close a facility, the lines are further blurred. A better solution would be for the courts to more strictly scrutinize an employer's use of the "good faith" defense in order to ensure that a concern for patient well-being is not mere pretext for evading the requirements of the Act.

140. See McHugh, supra note 14, at 65.
141. See id.