Failure to WARN: A Proposal that the WARN Act Provide a Compensatory, Make-Whole Remedy for UnWARNed Employees*

TABLE OF CONTENTS

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I. INTRODUCTION

The headline in the local newspaper exemplifies the state of the nation's economy: "Safire Mountain community devastated by the announcement that its largest employer, DeShai Manufacturing, will lay off over one-third of its workforce." DeShai Manufacturing's (DeShai)[1] operations, located in the small backcountry community of Safire Mountain,[2] have been a staple of the community's economy for over seventy-five years. Not only is DeShai the largest employer in the community, it also pays the highest wages of any company within a one hundred mile radius. For that reason, DeShai employs the breadwinner of nearly every household in the Safire Mountain community. Safire Mountain is a close-knit community consisting of approximately six small country towns, all located within approximately fifty miles of DeShai, with a combined population of approximately fifteen thousand.

It is no secret that the nation's economy has been hit hard by the fallout of the dot com failures, corporate scandals, and terrorist attacks. In this economy, mass layoffs have become commonplace as companies strive to keep respectable bottom lines or, worse yet, to stay out of bankruptcy. DeShai, not immune from the effects of an economic downturn, is struggling itself. Notably, the health of the economy on both national and community levels depends on the ability of pivotal companies like DeShai to stay afloat in these turbulent times. With these concerns in mind, a new, aggressive chief executive officer (CEO) has been brought in to secure the future of DeShai. The end of the fiscal year is looming and the CEO will be giving an all-important pitch to potential investors next month using the year-end numbers and profit projections for the coming fiscal year. However, the CEO is concerned that DeShai's profit margin is not sufficient to secure the much-needed financing required for the desired growth of the company. Seeking a

1. DeShai Manufacturing is a fictional company.
2. Safire Mountain is a fictional community.

quick fix for the company's bottom line, the CEO meets with the Vice President of Human Resources (VP HR) and directs her to reduce payroll overhead going into the next fiscal year by implementing an immediate reduction in force (RIF).[3] The VP HR's marching orders are to reduce the current workforce of one thousand workers by one-third within the next two weeks.

The VP HR knows a large RIF at DeShai will have a far-reaching impact in the Safire Mountain community. The economy of Safire Mountain is completely dependent upon the ongoing success of DeShai, and any economic distress felt by DeShai will have a ripple effect on the Safire Mountain economy and, ultimately, on the national economy. The retail, services, and restaurant businesses within the community are dependent upon DeShai to supply customers. What starts as a ripple will swell into a tidal wave as DeShai workers become unemployed and stop spending money and patronizing businesses within the community, leading to the demise of Safire Mountain's fragile economy. The effects do not stop there; the RIF wave will impact the state and national economies as well. The state's economy will be impacted as a flood of unemployment claims and state assistance claims are filed. Likewise, an increase in demand for federal assistance will adversely impact the nation's overall economy.

In addition to the business and human aspects of conducting a large RIF, the VP HR must also analyze the RIF's legal implications. The pain in the VP HR's stomach intensifies when she discovers that this will not be an ordinary layoff; she is contemplating a RIF that may trigger requirements under the Federal Worker Adjustment and

3. DeShai is not alone in its decision to conduct a RIF. In fact, many of America's mega-companies, such as Kmart, Sprint PCS, Boeing (and related entities), United Airlines, and Xerox, to name a few companies doing business in California, opted to conduct mass layoffs in 2002. Employment Development Department, *Worker Adjustment and Retraining Notification (WARN) Act Notices*, *at* http://www.edd.ca.gov/eddwarncn02.pdf (last visited Feb. 3, 2003). In 2002, the number of employees in California laid off by these companies is as follows: Kmart—1654; Sprint PCS—1180; Boeing—3629 (plus an additional 43 in January 2003); United Airlines—801 (plus an additional 612 in January 2003); Xerox—335. *Id.* This information only pertains to mass layoffs and plant closures affecting employees in California that triggered Federal Worker Adjustment Retraining and Notification Act obligations. The U.S. Department of Labor (DOL) reports that between January 2002 and May 2002 there were 8222 mass layoffs resulting in 910,009 claims for unemployment insurance benefits. *Mass Layoffs in May 2002*, NEWS: U.S. DEP'T OF LAB. (Bureau of Labor Statistics), June 27, 2002, at 1, *at* http://www.bls.gov/news.release/archives/mmls_06272002.pdf. This is an increase from 7434 mass layoffs and 880,347 claims during the same period in 2001. *Id.*

Retraining Notification Act (WARN Act or Act).[4] The mere utterance of the words "WARN Act" is enough to send shivers up the spine of any human resources professional.

Recognizing the dramatic economic effects that a layoff can have on a community and its workers, Congress enacted the WARN Act to provide protection to workers, their families, and the communities in which they live in the event of a mass layoff or plant closing.[5] The WARN Act mandates that employers who meet specific requirements provide to employees advance notice of planned mass layoffs or plant closings.[6] Conducting a layoff is never easy, but now that DeShai must comply with the WARN Act, the ordeal becomes even more difficult because the company's discretion and flexibility in conducting the RIF is greatly hampered by its legal obligations under the Act.[7]

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4. Worker Adjustment and Retraining Notification Act, 29 U.S.C. §§ 2101–2109 (2000). The WARN Act authorizes the Secretary of Labor to prescribe regulations necessary to implement and carry out the WARN Act. *Id.* § 2107(a). The WARN Act regulations, issued by the U.S. Department of Labor, are published in title 20 of the Code of Federal Regulations at part 639. 20 C.F.R. §§ 639.1–639.10 (2002). As this Comment will explain, a WARN Act RIF is vastly more complicated to administer and may expose a company to more legal actions than a non-WARN Act RIF. Absent state laws, collective bargaining, or policy obligations, an employer conducting a RIF that is not covered by the WARN Act has greater discretion with regard to how much notice to provide, what type of notice to give, who should receive notice, and how much severance, if any, to pay the laid off employees.

5. 20 C.F.R. § 639.1. At the time the WARN Act was implemented in 1988, workers were all too familiar with the term "layoff." There was evidence that layoffs were having negative public health effects and that advance notice of layoffs would promote positive adjustment by workers. Richard W. McHugh, *Fair Warning or Foul? An Analysis of the Worker Adjustment and Retraining Notification (WARN) Act in Practice*, 14 BERKELEY J. EMP. & LAB. L. 1, 5 & nn.13–14 (1993). Regardless of the cause of the layoff, communities feel the effects through decreased revenues and states are impacted through increased unemployment levels. These effects drew significant attention from Congress, and mandatory notice for plant closings and mass layoffs was presumed to be the answer. *See* Christopher P. Yost, *The Worker Adjustment and Retraining Notification Act of 1988: Advance Notice Required?*, 38 CATH. U. L. REV. 675, 675–76 (1989). The Safire Mountain community seems to be just the type of community the WARN Act was enacted to protect, given that its economy depends heavily on the health of a single employer.

6. 20 C.F.R. §§ 639.1–639.3. The notice, in theory, is to provide workers with the time to find other employment or, if necessary, the time to obtain new skills or training in order to successfully compete in the job market. *Id.* § 639.1(a).

7. It is worth noting that at least twenty-three states have implemented counterpart statutes to the WARN Act that require advance notice to laid off employees, and at least four states mandate severance pay in certain situations. ETHAN LIPSIG & MARY C. DOLLARHIDE, DOWNSIZING: LAW AND PRACTICE 220 (Supp. 1999). Presumably due to the current state of the economy, more states are becoming interested in adopting their own versions of the WARN Act. California jumped on that bandwagon in September 2002 when Governor Gray Davis signed Assembly Bill 2957. *See* A.B. 2957, 2001–02 Leg., Reg. Sess. (Cal. 2002). On January 1, 2003, California's mass layoff, relocation, and termination law went into effect. CAL. LAB. CODE §§ 1400–1408 (West 1989 & Supp. 2003). California's "Baby WARN," as it has been dubbed, has a broader scope

This Comment examines the WARN Act from DeShai's perspective as the company prepares to conduct a WARN Act RIF, providing a firsthand look at the real-world difficulties that DeShai experiences as it attempts to decipher the language of the WARN Act to determine the actions it must take to comply with the Act's requirements. The Comment focuses on how particular ambiguities in the statutory language of the WARN Act present for employers compliance problems that result in severe economic inefficiencies and discusses the disagreement among the circuit courts as to how such ambiguities should be resolved. In an effort to make the WARN Act more user-friendly for employers, this Comment also proposes practical amendments that should be implemented immediately. Specifically, Congress should amend the WARN Act in three ways: (1) by designating the remedy afforded to employees as a compensatory, make-whole remedy, (2) by including a definition of back pay that will serve to make an employee whole, and (3) by declaring that the calculation of back pay will be based on the number of working days that occur during the violation period. These proposed amendments are not drastic. Rather, they strike a proper balance between promoting the purpose of the WARN Act and providing statutory language that will serve to assist, rather than hinder, an employer in its WARN Act compliance.

II. OVERVIEW OF THE WARN ACT

To fully understand the difficulties that DeShai faces upon discovering that its planned RIF is covered by the WARN Act, the Act and its requirements must first be examined. The WARN Act requires that an "employer"[8] planning a "plant closing"[9] or "mass layoff"[10] must provide

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and effect than the Federal WARN Act and compliance promises to be even more burdensome. *California Adopts Plant Closing Law*, LAB. L. EXTRA (Cal. Chamber of Commerce), Oct. 17, 2002, *at* http://www.hrcalifornia.com/News_Services/Labor_Law_Extra/View_Past_Issues/2002_Issues/October_17_2002/ (last visited Apr. 22, 2003). A state counterpart statute may not necessarily be consistent with the Federal WARN Act, and an employer is legally obligated to comply with both state and federal law. Sometimes a state counterpart statute may apply even if the WARN Act does not. Therefore, employers must carefully review all applicable laws before conducting a layoff. This, of course, serves to further complicate a RIF.

8. An employer must first determine whether it is covered by the WARN Act. Such a determination is based on the number of the employer's employees. A company that meets the WARN Act's definition of "employer" is deemed a covered employer for purposes of the WARN Act. The WARN Act defines an employer as "any business enterprise that employs (A) 100 or more employees, excluding part-time employees; or

the "affected employees"[11] (or their representatives)[12] with at least sixty days' notice of the planned employment action.[13] In addition to providing notice of the layoff to affected employees, an employer must also give notice to the state dislocated worker unit[14] and the chief elected

(B) 100 or more employees [including part-time employees] who in the aggregate work at least 4,000 hours per week (exclusive of hours of overtime)." 29 U.S.C. § 2101(a)(1); *see also* 20 C.F.R. § 639.3(a)(1). It is important to note that although part-time employees are not counted for purposes of determining whether a layoff constitutes a "mass layoff" under the WARN Act, such employees are entitled to receive WARN Act notice in the event of a mass layoff or plant closing. 20 C.F.R. § 639.6(b). This is one of the few relatively clear areas of the WARN Act. Yet, Arthur Anderson is currently being sued by two part-time employees who claim that the company failed to provide them with WARN Act notice when their employment was terminated in connection with a mass layoff on April 8, 2002. Roquet v. Arthur Anderson L.L.P., 9 Lab. Rel. Rep. (BNA) (19 Indiv. Empl. Rts. Cas.) 670 (N.D. Ill. Aug. 14, 2002).

9. The WARN Act 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 of employment during any 30-day period for 50 or more employees excluding any part-time employees.

29 U.S.C. § 2101(a)(2); *see also* 20 C.F.R. § 639.3(b).

10. The WARN Act defines a "mass layoff" as:

> 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 percent 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).

29 U.S.C. § 2101(a)(3); *see also* 20 C.F.R. § 639.3(c).

11. The WARN Act defines "affected employees" as employees "who may reasonably be expected to experience an employment loss as a consequence of a proposed plant closing or mass layoff by their employer." 29 U.S.C. § 2101(a)(5); *see also* 20 C.F.R. § 639.3(e). In addition, any employee who reasonably may be bumped from his position by someone on the RIF list, due to bumping rights under the employer's policy or under a collective bargaining agreement, is also covered as an affected employee. *See* 20 C.F.R. §§ 639.3(e), 639.6(b). Accordingly, employers must look beyond the RIF list to the workforce as a whole in determining which employees are entitled to notice under the WARN Act, which makes the RIF process further complicated.

12. For purposes of the WARN Act, an employee "representative" means "an exclusive representative of employees within the meaning of section 9(a) or 8(f) of the National Labor Relations Act or section 2 of the Railway Labor Act." 20 C.F.R. § 639.3(d). For all practical purposes, a representative generally will be the affected employee's collective bargaining agent or chief elected union official. It is important to note that in some instances in which a collective bargaining agreement recognizes both the national and local entities of a union, the employer is required to provide notice to both the local and national union entities via their respective chief elected officers. Worker Adjustment and Retraining Notification, 54 Fed. Reg. 16,042, 16,058 (Apr. 20, 1989) (providing supplementary information to the final WARN Act regulations).

13. 29 U.S.C. § 2102(a).

14. Pursuant to title 3 of the Job Training Partnership Act, each state established or created a dislocated worker unit. *See* 20 C.F.R. § 639.3(k). Each state has published information on where an employer may serve WARN Act notice. Usually this information can be obtained from a state's official website. *See, e.g.*, Employment

official of the unit of local government[15] where the plant closing or mass layoff will occur.[16] DeShai has well over one hundred employees and, therefore, is a covered employer for purposes of the WARN Act.[17] As a covered employer, DeShai must comply with the WARN Act in the event that any RIF triggers the Act's provisions. Because DeShai is planning to reduce its workforce by one-third[18] and at least fifty employees will be affected, the RIF qualifies as a mass layoff that triggers DeShai's obligation to comply with the WARN Act.[19]

A. WARN Act Notice

To comply with the WARN Act, DeShai's notice to its affected employees must contain certain specific information, as detailed in the WARN Act regulations.[20] Along with notice to the affected employees,

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Development Department, *Worker Adjustment and Retraining Notification (WARN) Act: How to Notify the State of a Plant Closing or Mass Layoff*, *at* http://www.edd.ca.gov/jtpawarntx.htm (last visited Feb. 22, 2003). For a state-by-state listing of dislocated worker units, see 9A Indiv. Empl. Rts. Manual (BNA) 595:911–16 (May 14, 2002).

15. 29 U.S.C. § 2102(a)(2). For purposes of the WARN Act, a "unit of local government" is "any general purpose political subdivision of a State which has the power to levy taxes and spend funds, as well as general corporate and police powers." *Id.* § 2101(a)(7); *see also* 20 C.F.R. § 639.3(g). In practice, the chief elected official of the unit of local government where the mass layoff or plant closing is conducted is usually the mayor. However, it is probably best to contact the office of the local government to verify the appropriate official to receive notice. If an employment site where a mass layoff or plant closing will take place is located in more than one unit of local government, the employer must give notice to the unit to which it paid the highest taxes in the preceding year. *See id.* § 639.3(g).

16. 29 U.S.C. § 2102(a)(2); *see also* 20 C.F.R. § 639.6.

17. *See* discussion *supra* note 8.

18. DeShai has 1000 employees. Thus, a one-third reduction in force will result in 334 employees losing their jobs.

19. *See* discussion *supra* note 10.

20. *See* Worker Adjustment and Retraining Notification, 54 Fed. Reg. 16,042, 16,059 (Apr. 20, 1989) (providing supplementary information to the final WARN Act regulations). WARN Act notice to affected employees must be written in language understandable to the employees and must set forth, at a minimum, the following information: (1) whether the employment action is expected to be permanent or temporary, and in the case of a plant closing, a statement that the entire plant will be closed, (2) the anticipated date of the mass layoff or plant closings and the anticipated separation date of the individual affected employee, (3) whether bumping rights exist, and (4) the name and telephone number of a company official who may be contacted to obtain further information. An employer may also include in the notices any additional information that may be helpful to the affected employee. 20 C.F.R. § 639.7(d). Such additional information may include information regarding dislocated worker assistance and, where the planned action is temporary, information as to the estimated duration of the planned action. *Id.* If an affected employee has a representative, the notice to the

DeShai must also provide separate WARN notices to the state dislocated worker unit and the local chief elected official.[21]

After digesting the WARN Act requirements, the VP HR is alarmed to discover that DeShai's obligations under the WARN Act conflict with the CEO's demand for immediate reduction in payroll overhead. In order to comply with the WARN Act, DeShai must give sixty days' notice to employees selected for layoff.[22] Therefore, the CEO's deadline to reduce payroll overhead by the close of the fiscal year, which ends this month, cannot be met if DeShai is to comply with its legal obligations under the WARN Act. Not wanting to give the CEO this bad news, the VP HR frantically scours the WARN Act in search of any loophole or exemption that will excuse DeShai of its legal obligations for compliance.

B. WARN Act Notice Exemptions

Like many laws, the WARN Act provides for exemptions. However, exemptions to the WARN Act are few in number and generally narrow in scope.[23] There are two types of exemptions to the WARN Act: complete exemptions and partial exemptions.[24]

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representative must set forth (1) the name and address of the employment site where the mass layoff or plant closing will take place, (2) the name and telephone number of a company official who may be contacted to obtain further information, (3) whether the employment action is expected to be permanent or temporary and, in the case of a plant closing, a statement that the entire plant will be closed, (4) the date of the first employee separation and the anticipated schedule of employee separations, and (5) a listing of the job titles of the positions affected and the names of the workers in those jobs. *Id.* § 639.7(c).

21. *See* 29 U.S.C. § 2102(a); 20 C.F.R. § 639.6. The purpose behind requiring the company to send notice to the government is to allow the state dislocated worker unit to promptly provide the affected employee with assistance. *Id.* § 639.1(a). At a minimum, the government notices must include (1) the name and address of the employment site where the mass layoff or plant closing will take place, (2) the name and telephone number of a company official who may be contacted to obtain further information, (3) the anticipated date of the first employee separation, and (4) the number of affected employees. *Id.* § 639.7(f). The regulations provide for an optional, lengthier notice that must include all of the information outlined in 20 C.F.R. § 639.7(f), plus information regarding (1) whether the employment action is expected to be permanent or temporary and, in the case of a plant closing, a statement that the entire plant will be closed, (2) the anticipated schedule of employee separations, (3) the job titles of the affected positions and the number of affected employees in each job classification, (4) whether bumping rights exist, and (5) the name of each union representing the affected employees and the name and address of the chief elected officer of each union. *Id.* § 639.7(e). However, as an alternative, employers may provide the abbreviated government notice detailed in 20 C.F.R. § 639.7(f), provided the additional information required by 20 C.F.R. § 639.7(e) is maintained by the employer and made available to the government upon request. *Id.* § 639.7(f).

22. *See* 29 U.S.C. § 2102(a).

23. Washington v. Aircap Indus. Corp., 831 F. Supp. 1292, 1295–96 (D.S.C. 1993) (finding that the WARN Act must be construed broadly and its exceptions construed narrowly). For statutory exemptions to the WARN Act, see 29 U.S.C. §§ 2102(b), 2103.

24. A complete analysis of these exemptions is beyond the scope of this Comment.

1. Complete Exemptions

There are only two instances in which an employer is wholly exempt from complying with the WARN Act: (1) a situation in which the employer closes a temporary facility or conducts a plant closing or mass layoff due to completion of a project or undertaking,[25] or (2) a situation in which the employer conducts a plant closing or mass layoff that constitutes a strike or lockout and that is not intended to evade WARN requirements.[26] The rationale for these complete exemptions is grounded in whether the employee has a reasonable expectation of continuing employment. In both complete exemption situations, the employee has no reasonable basis for an expectation of continued employment.[27] Therefore, these are not situations for which the WARN Act was enacted to afford worker protection.

Unfortunately for DeShai, the cost-cutting motives driving its RIF do not provide a complete exemption from the WARN Act. The RIF is not the result of a temporary facility closure or project completion and does not arise out of a strike or lockout. Thus, DeShai's hopes for any relief from WARN Act compliance must be based on a partial exemption.

2. Partial Exemptions

In addition to the complete exemptions, the WARN Act offers partial exemptions, provided certain requirements are met. If an employer qualifies for one of the three partial exemptions, the employer may conduct a plant closing or mass layoff with a reduced notice period without incurring WARN Act liability.[28] The first partial exemption is

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See generally Sandra J. Mullings, *WARN: Judicial Treatment of Exemptions, Exclusions, and Excuses*, 39 ARIZ. L. REV. 1209 (1997) (providing a detailed, although dated, analysis of these exemptions).

25. 29 U.S.C. § 2103(1). No WARN Act notice will be required if the plant closing or mass layoff is due to the closing of a temporary facility or the completion of a temporary project and the affected employee clearly understood at the time of hire that the employment was temporary and limited to the duration of the project. 20 C.F.R. § 639.5(c). Allowing this exemption makes sense because when employees know their employment is temporary, they should not be surprised to find that they are suddenly without jobs. In contrast, longer-term employees are more likely to be surprised if they suddenly lose their jobs. Thus, the warning required by the WARN Act is more essential to the longer-term employees' ability to prepare for the impending job loss.

26. 29 U.S.C. § 2103(2); *see also* 20 C.F.R. § 639.5(d).

27. *See* Mullings, *supra* note 24, at 1213–19.

28. 29 U.S.C. § 2102(b).

the "faltering company" exemption.[29] The faltering company exemption applies only to plant closings, not to mass layoffs, and the regulations provide that this exemption should be construed narrowly.[30] DeShai is conducting a mass layoff, not a plant closing. Therefore, because the faltering company exemption does not apply to mass layoffs, DeShai cannot avail itself of this partial exemption.

The second partial exemption is the "unforeseen business circumstances" exemption.[31] This exemption applies when "the closing or mass layoff is caused by business circumstances that were not reasonably foreseeable as of the time that notice would have been required."[32] A principal indicator that an event qualifies as an unforeseen business circumstance is whether the circumstance is caused by "some sudden, dramatic, and unexpected action or condition outside the employer's control."[33] The unforeseen business circumstances exemption is interpreted more broadly than the faltering company exemption.[34] However, DeShai's goal in conducting the RIF is to make the company more attractive to potential investors. Thus, the CEO's plan to institute cost-cutting measures cannot qualify as a "sudden, dramatic, and unexpected action or condition outside the employer's control." Accordingly, DeShai cannot take advantage of the unforeseen business circumstances partial exemption.

The third exemption is the "natural disaster" exemption.[35] When a plant closing or mass layoff is the direct result of a natural disaster, such as a flood, earthquake, drought, or storm, no advance WARN Act notice

29. *Id.* § 2102(b)(1); *see also* 20 C.F.R. § 639.9.

30. 29 U.S.C. § 2102(b)(1); 20 C.F.R. § 639.9(a). In order to invoke the faltering company exemption, an employer must satisfy a four-prong test establishing that at the time notice was to be given (1) the employer was actively seeking capital or business, (2) there was a realistic opportunity that the employer could secure the sought business or capital, (3) such capital or business, if obtained, would have allowed the employer to either avoid or postpone the closing, and (4) the employer reasonably believed in good faith that providing sixty days' WARN Act notice would have precluded the company from securing the needed capital or business. *Id.*

31. 29 U.S.C. § 2102(b)(2)(A); 20 C.F.R. § 639.9(b).

32. 29 U.S.C. § 2102(b)(2)(A).

33. 20 C.F.R. § 639.9(b)(1). Examples of situations in which the unforeseen business circumstances exemption may apply include "[a] principal client's sudden and unexpected termination of a major contract with the employer, a strike at a major supplier of the employer, . . . an unanticipated and dramatic major economic downturn[,] . . . [and a] government ordered closing of an employment site." *Id.* An employer is not expected to accurately predict the economic conditions that would affect demand for its products or services, but it must exercise the same commercially reasonable business judgment as would a similarly situated employer in the same market. *Id.* § 639.9(b)(2).

34. *See* Worker Adjustment and Retraining Notification, 54 Fed. Reg. 16,042, 16,061 (Apr. 20, 1989) (providing supplementary information to the final WARN Act regulations).

35. 29 U.S.C. § 2102(b)(2)(B); 20 C.F.R. § 639.9(c).

is required.[36] The Department of Labor has concluded that it may not be appropriate to narrowly construe the natural disaster exemption.[37] However, because DeShai's RIF is not triggered by a natural disaster, this exemption does not apply.

Assuming DeShai had been able to qualify for one of the three partial exemptions, DeShai would be required to provide "as much notice as is practicable" to the affected employees in order to avoid liability under the WARN Act.[38] This notice requirement applies even in the case where notice can only be given after the RIF has taken place.[39]

C. Remedies for an Employer's Violation

When an employer violates the WARN Act by failing to give the required notice and does not qualify for an exemption, the company is liable to the aggrieved employees for (1) "back pay for each day of violation"[40] and (2) benefits under any employee benefit plan,[41] such as Employee Retirement Income Security Act (ERISA) health benefit plans.[42] An employer's liability for each may extend up to a maximum of

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36. 29 U.S.C. § 2102(b)(2)(B); 20 C.F.R. § 639.9(c)(1)–(2). If an employer does not qualify for the natural disaster exemption because the closing or mass layoff was not a direct result of the natural disaster, the employer may qualify for the unforeseen business circumstances exemption. *Id.* § 639.9(c)(4). This is because the natural disaster could be construed as a "sudden, dramatic, and unexpected action or condition outside the employer's control," which is a requirement of the unforeseen business circumstances exception. *Id.* § 639.9(b)(1). Although advance WARN notice is not required when a plant closing or mass layoff is a direct result of a natural disaster, the employer must still provide some notice to the affected employees that the employment loss was caused by the natural disaster. Such notice should include as much of the information required by 20 C.F.R. § 639.7 as is available to the employer. *Id*. § 639.9(c)(3).

37. Worker Adjustment and Retraining Notification, 54 Fed. Reg., at 16,061.

38. 20 C.F.R. § 639.9.

39. *Id*. When the employer provides reduced notice, the notice provided must include a statement of the reason for which reduced notice was given in addition to the notice elements delineated in 20 C.F.R. § 639.7. 29 U.S.C. § 2102(b)(3); 20 C.F.R. § 639.9.

40. 29 U.S.C. § 2104(a)(1)(A). As discussed in Part V, *infra*, exactly what "back pay" and "each day of violation" mean are areas of contention between the circuit courts. However, this Comment proposes that back pay includes all pay and non-ERISA benefits the employee would have earned during the violation period had he continued to work, *see infra* Part V.A.2, and that "each day of violation" should be interpreted to mean back pay for each *working day* that the employer failed to provide notice. *See infra* Part V.B.2.

41. 29 U.S.C. § 2104(a)(1).

42. *Id.* § 1002(1).

sixty days.[43] However, an employer's liability for a WARN Act violation shall be reduced by (1) any wages paid by the employer to the employee during the violation period, (2) any voluntary and unconditional payment to the employee by the employer that is not made pursuant to a legal obligation,[44] and (3) any payment the employer makes to a third party "on behalf of and attributable to the employee for the period of the violation."[45]

In addition, an employer is liable to the government for civil penalties of up to $500 for each day of a WARN Act violation.[46] However, the penalty does not apply if the employer pays each aggrieved employee the amount for which the employer is liable to the employee within three weeks after the closing or mass layoff.[47] An employer's liability to an aggrieved employee for a WARN Act violation may also be reduced if the employer is able to convince a court that the act or omission constituting the violation was made in good faith and that the employer had reasonable grounds to believe that the action taken was not a WARN Act violation.[48]

The back pay, benefits, and civil penalties provided for by section 2104 of the WARN Act are the exclusive remedies for an employer's violation of the Act.[49] This means that courts do not have the authority to issue injunctions to prevent plant closings or mass layoffs.[50] Although punitive damages for a violation of the WARN Act are not available,[51] a court may award reasonable attorneys' fees to the prevailing party in a WARN Act lawsuit.[52]

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43. *Id.* § 2104(a)(1).

44. Severance payments made in exchange for an employee's release of claims cannot be offset against an employer's WARN Act liability because the payment is not unconditional. *See* Local Joint Executive Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc., 244 F.3d 1152, 1159–60 (9th Cir. 2001), *cert. denied*, 534 U.S. 973 (2001) (holding that Sands could not reduce its WARN Act liability by severance payments made to employees because the severance payments were conditioned on the employees' agreement to continue working until a date certain). Likewise, severance payments made pursuant to an established severance plan also are ineligible for offset because the employee is entitled to such payment regardless of whether proper WARN Act notice was provided. *See* Tobin v. Ravenswood Aluminum Corp., 838 F. Supp. 262, 273 n.17 (S.D.W. Va. 1993).

45. 29 U.S.C. § 2104(a)(2)(A)–(C).

46. *Id.* § 2104(a)(3).

47. *Id.*

48. *Id.* § 2104(a)(4). Application of this "good faith" exception is often litigated. *See* Ethan Lipsig & Keith R. Fentonmiller, *A WARN Act Road Map*, 11 LAB. LAW. 273, 310 (1996).

49. 29 U.S.C. § 2104(b).

50. *Id.*

51. *See* Finnan v. L.F. Rothschild & Co., 726 F. Supp. 460, 464–65 (S.D.N.Y. 1989) (finding that the exclusive remedy provision of the WARN Act "unmistakably conveys that an additional remedy of punitive damages is not available to plaintiffs under WARN").

52. 29 U.S.C. § 2104(a)(6).

The civil penalties imposed by the WARN Act and the potential for an adverse award of attorneys' fees provide an attractive economic incentive for employers like DeShai to promptly compensate aggrieved employees upon violation of the WARN Act. However, before the benefit of this compliance incentive can be fully realized, employers need clear guidance regarding the manner in which to calculate their potential liability to aggrieved employees. Without such clarification, the attractiveness of the compliance incentive is diminished. This is because despite paying an aggrieved employee what the employer deems to be its entire liability under the WARN Act, the employer remains subject to the possibility that a court may find such payment insufficient, thereby exposing the employer to liability for the civil penalties and an adverse award of attorneys' fees.

This uncertainty with respect to the calculation of an employer's liability actually creates a perverse incentive for an employer to play the odds in the event the employer violates the WARN Act. For example, instead of proactively attempting to satisfy liability for a violation on the front end, an employer may decide that it makes better economic sense to avoid paying aggrieved employees damages unless and until the aggrieved employees come forward to challenge the employer's failure to provide proper notice. Playing the odds is attractive to employers for several reasons: (1) where the employer gives only partial notice (notice less than the full sixty days), the employees may not challenge the failure to provide full notice, in which case the employer potentially may escape any WARN Act liability,[53] (2) an employer with a cash flow problem may find the ability to delay payment of its liability to some unknown point in the future to be attractive, in the hopes that when the time arrives to actually pay the damages, the cash flow problem will have been resolved, thereby making payment of the damages to aggrieved employees easier,[54] and (3) the employer may wish to take advantage of time value of money principles.[55] When employers play

53. This assumes that the government has not sought recovery from the employer for the government penalties.

54. This assumes that the employer finds that the benefits of delaying damages payments outweigh the additional government penalties that will be assessed against the company for not paying aggrieved employees damages within three weeks after the violation.

55. The time value of money principle basically provides that a dollar received or spent today is worth more than that same dollar received or spent in the future. Dustin K. Palmer, Comment, *Should Prejudgment Interest Be a Matter of Procedural or*

these odds, it is clear that the purpose of the WARN Act is not being served because aggrieved employees are not provided with the intended economic protections in the event of a mass layoff or plant closing. Thus, implementing clarification amendments that clearly define how damages for violation of the WARN Act are to be calculated will both eliminate some of these perverse noncompliance incentives and provide employers with the certainty needed to serve as incentive for taking preemptive action in the event of WARN Act violation.

III. COMPLIANCE WITH THE WARN ACT

Now that DeShai's VP HR has determined that the planned RIF triggers application of the WARN Act and has discovered that DeShai does not qualify for an exemption, the VP HR must attempt to decipher the ambiguous language of the WARN Act. After factoring in the civil penalties and the potential for adverse awards of attorneys' fees, the VP HR determines that DeShai's liability for failing to comply with the WARN Act will exceed the amount that DeShai would pay in providing the proper sixty days' notice. In the current tight economy, or in any economy for that matter, it makes good business sense to avoid any additional exposure to liability whenever possible.

Given the CEO's concern with the bottom line, the VP HR knows she must ensure that the steps taken to comply with the WARN Act will eliminate any liability. Balancing the company's economic objectives and legal obligations will not be an easy task. Even an employer with the best intentions (and best employment counsel) may find that determining the steps necessary to comply with the WARN Act is a difficult task, at best. This is especially true in light of the broad application of the WARN Act.

A. Broad Application of an Ambiguous Statute

The WARN Act cannot be described as well-drafted legislation. It has been criticized as a "clumsily drafted and unduly confusing statute"[56] that is "imprecise, vague, [and] difficult to interpret."[57] Even the Department of Labor has recognized that the WARN Act's language is

Substantive Law in Choice-of-Law Disputes?, 69 U. CHI. L. REV. 705, 707 n.15 (2002). Thus, by not immediately paying damages to aggrieved employees, the employer realizes an economic benefit because it can use that money to pay other debts or invest the money to earn interest until it is required to pay damages to aggrieved employees. Again, this rationale assumes that the benefit realized from the time value of money is greater than the detriment the company will experience by the assessment of government penalties.

56. Wilson McLeod, *Judicial Devitalization of the WARN Act?*, 44 LAB. L.J. 220, 220 (1993).

57. Lipsig & Fentonmiller, *supra* note 48, at 273.

ambiguous and promotes broad application in order to afford the greatest protection to employees.[58] The broad application philosophy adopted by the government further exacerbates the problems associated with an employer's attempts at compliance. For this reason, the adoption of the WARN Act amendments proposed in this Comment is vital to widespread employer compliance with the Act.

Moreover, the WARN Act regulations recognize that employers may face uncertainty in applying the WARN Act. When an employer is uncertain as to its obligations, the WARN Act encourages the provision of advance notice in all such circumstances.[59] Further, the WARN Act and its regulations suggest that employers should provide notice even when the notice is clearly not required by the WARN Act.[60] Ultimately, the ambiguity of the WARN Act causes more compliance problems for employers than protection for employees.[61] The regulations, supplemental information to the final rule contained in the Federal Register, and case law only serve to further confuse the issue.[62] Thus, in order to make the WARN Act more workable and to promote compliance, amendments that provide employers definitive guidance are desperately needed. Guidance will be especially helpful in instances where an employer opts to use an alternative means of WARN Act compliance. One such alternative means of compliance, the "pay-in-lieu-of-notice" approach, may be a viable option for DeShai.

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58. *See* 20 C.F.R. § 639.1(e) (2002). "[T]here 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. . . . The Department encourages employers to give notice in all circumstances." *Id.*

59. *Id.* § 639.1(e).

60. 29 U.S.C. § 2106 (2000); 20 C.F.R. § 639.1(c).

61. *See infra* Parts IV, V (discussing the debate among the circuit courts regarding whether the WARN Act provides remedies that are remedial or punitive in nature and the method by which damages to an employee should be calculated).

62. The proposal in the WARN Act and supporting regulations that employers should simply provide notice in all ambiguous situations is neither helpful nor practical because it will very often place an unnecessary burden on an employer that could result in devastating financial consequences if the company pays employees sixty days' worth of pay and benefits when it was not otherwise required to do so. Economically, it would not be in the company's best interests for the company to voluntarily subject itself to the requirements of the WARN Act. Providing such notice could cost the company hundreds of thousands of dollars, depending upon the wages of the workers. To ask a company to voluntarily assume such an expense in a tumultuous economic climate is beyond reason. In a community like Safire Mountain, that which is in DeShai's best interests is also in the best interests of the community because if DeShai suffers economically, then the community similarly feels DeShai's economic pain through falling revenues.

B. Pay-in-Lieu-of-Notice as an Alternative Means of WARN Act Compliance

Postponing the RIF in order to give the required sixty days' WARN Act notice would frustrate the CEO's objective of entering the new fiscal year with reduced payroll overhead.[63] As an alternative to strict compliance with the WARN Act, DeShai may consider providing pay-in-lieu-of-notice to the affected employees.[64] Under the pay-in-lieu-of-notice approach, DeShai would pay the affected employees upfront the statutory WARN Act damages resulting from its failure to provide sixty days' advance notice. By choosing this approach, DeShai, in effect, acknowledges its technical violation of the WARN Act and preemptively pays to employees the full remedy available to them under the Act. As noted above, if DeShai were to provide employees with the appropriate pay-in-lieu-of-notice within three weeks of the violation, DeShai would be relieved of liability for the civil penalties imposed for violation of the WARN Act.[65] In addition, because the remedies provided to employees by the WARN Act (namely, back pay and benefits) are the employees' exclusive remedies, DeShai's provision of properly calculated pay-in-lieu-of-notice would relieve the company of all WARN Act liability to the aggrieved employees.[66]

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63. Timing problems are common when dealing with RIFs, and often the organizational goals will conflict with an employer's WARN Act obligations. Many employers are reluctant to implement a RIF and will refrain from taking such action until it becomes absolutely necessary. Therefore, once an employer decides that a RIF is necessary, the decision must often be acted upon quickly to meet organizational goals. This presents a huge problem when sixty days' notice of the RIF must be given in order to comply with the WARN Act. Thus, the pay-in-lieu-of-notice approach is attractive as an alternative means of compliance with the WARN Act.

64. Lipsig & Fentonmiller, *supra* note 48, at 311–12. Other employers have used the strategy of placing the affected employees on a paid leave of absence during the notice period. This approach is often favorable when an employer does not wish to make a lump sum damages payment to aggrieved employees and is concerned that employees will engage in sabotage during the notice period if allowed to remain on the job. *Id.* This approach may also be a good option when an employer cannot calculate with certainty its WARN Act damages due to lack of case law interpreting the ambiguities in the WARN Act as to such damages calculations. Under the paid leave of absence approach, employees stay on the payroll and continue to receive their usual pay and benefits but are relieved of their duties. Although this approach does not guarantee that a court will find full WARN Act compliance, the Fifth Circuit has determined that an employer who places affected employees on a fully paid, excused leave of absence during the sixty day notice period has complied with the underlying purpose of the WARN Act. Williams v. Phillips Petroleum Co., 23 F.3d 930, 935 (5th Cir. 1994) ("WARN was intended to provide employees with notice so that they could adjust to the layoff and locate other work. Fully-paid excused leave complies with these purposes.").

65. 29 U.S.C. § 2104(a)(3); *see also* Lipsig & Fentonmiller, *supra* note 48, at 311–12.

66. *See* Ass'n of W. Pulp & Paper Workers v. Grays Harbor Paper Co., No. C93-5226B, 1994 U.S. Dist. LEXIS 13094, at *26 (W.D. Wash. Mar. 14, 1994) (allowing an employer to offset its WARN Act liability with the voluntary and unconditional

The pay-in-lieu-of-notice approach may prove to be an attractive alternative for DeShai because it would allow the company to terminate the employees immediately and pay damages during the current fiscal year, thereby allowing projections for the next fiscal year to be based on the reduced payroll overhead figure that the CEO is seeking. However, the disadvantage of this approach is that it is nearly impossible for employers to calculate the proper pay-in-lieu-of-notice. The reason for this difficulty is threefold: (1) there is ambiguity regarding whether the WARN Act provides for a compensatory "make-whole" remedy[67] or a punitive remedy,[68] (2) there is disagreement among the circuit courts as to what is included in "back pay" for purposes of calculating WARN Act damages,[69] and (3) the circuit courts are split with regard to whether the calculation of damages is based on the number of calendar or working days during the violation period.[70] Thus, until either the U.S. Supreme Court resolves the split between the circuits, which is unlikely to happen anytime soon,[71] or Congress amends the WARN Act to clarify the

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payments consisting of full compensation and benefits for the sixty day notice period that the employer has made to affected employees); *see also* Lipsig & Fentonmiller, *supra* note 48, at 311 ("The WARN Act does not explicitly state that an employer may give employees pay-in-lieu-of-notice, but voluntarily doing so can totally eliminate any WARN Act liability the employer may have.").

67. The terms "remedial" and "make-whole" will be used interchangeably in this Comment, in a way that is consistent with the terminology used by the courts. *See* Local Joint Executive Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc., 244 F.3d 1152, 1159 (9th Cir. 2001) (noting "the primary purpose of the Act is remedial" and that "'back pay' under the WARN Act is a make-whole compensatory remedy"), *cert. denied*, 534 U.S. 973 (2001)

68. *See infra* Part IV.

69. *See infra* Part V.A.

70. *See infra* Part V.B; *see also* Lipsig & Fentonmiller, *supra* note 48, at 311–12; Jeffrey J. Turner, Comment, *Damages Under the Workers Adjustment and Retraining Act (WARN): Why Damages Cannot be Based on Calendar Days*, 12 T.M. COOLEY L. REV. 197, 203–08 (1995).

71. The U.S. Supreme Court has repeatedly passed on the opportunity to resolve the split in the circuit courts. *See, e.g.*, *Las Vegas Sands*, 244 F.3d at 1158–59, *cert. denied*, 534 U.S. 973 (2001); Burns v. Stone Forest Indus., 147 F.3d 1182, 1185 (9th Cir.1998), *cert. denied*, 525 U.S. 1040 (1998); Breedlove v. Earthgrains Baking Cos., 140 F.3d 797, 801 (8th Cir. 1998), *cert. denied*, 525 U.S. 921 (1998); Carpenters Dist. Council v. Dillard Dep't Stores, Inc., 15 F.3d 1275, 1283–86 (5th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995); United Steelworkers of America v. North Star Steel Co., 5 F.3d 39, 42–43 (3d Cir. 1993), *cert. denied*, 510 U.S. 1114 (1994). There are many reasons that could be behind the U.S. Supreme Court's denials of certiorari. For example, the Court may find the issue relatively unimportant or may want the issue and analysis to develop further among the circuit courts before weighing in on the matter. Whatever the reason for the Court's continual denials to resolve this issue, the

definition of back pay and whether the calculation of such damages is based on the number of working days or calendar days that fall within the violation period, an employer cannot be sure that adopting the pay-in-lieu-of-notice approach will completely extinguish its WARN Act liability.

IV. THE WARN ACT PROVIDES FOR A COMPENSATORY, "MAKE-WHOLE" REMEDY

A core problematic area of ambiguity in the WARN Act is its provision for an employee's remedy of back pay and benefits in the event of an employer's WARN Act violation.[72] At the core of the debate over the method of calculating back pay for the period of the WARN Act violation is the issue of whether the remedy provided by the WARN Act is compensatory, make-whole, or punitive in nature. Unfortunately, courts are not in agreement over this issue.[73]

A. The Majority View

The majority of the circuit courts that have considered the type of remedies afforded by the WARN Act subscribe to the theory that the WARN Act provides employees with a compensatory, make-whole remedy.[74] Recently, in *Local Joint Executive Board of Culinary/ Bartender Trust Fund v. Las Vegas Sands, Inc.*, the Ninth Circuit Court of Appeals declared that "the primary purpose of the [WARN] Act is remedial" as opposed to punitive.[75] There, the Las Vegas Sands hotel and casino ordered a closure and provided employees with only forty-five days' notice, rather than the sixty days' notice required under the

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ambiguous language of the WARN Act will continue to cause interpretative problems until either Congress amends the Act or the U.S. Supreme Court grants certiorari.

72. The WARN Act provides that any employer who conducts a mass layoff or plant closing in violation of the Act shall be liable to aggrieved employees for "back pay for each day of violation" and "benefits under an employee benefit plan." 29 U.S.C. § 2104(a)(1) (2002).

73. The Fifth, Sixth, and Ninth Circuits all agree that the WARN Act provides for a compensatory, make-whole remedy for aggrieved employees. Under such a theory, the workers are provided with the amount of pay and benefits that they would have earned during the violation period. *See Las Vegas Sands*, 244 F.3d. at 1158–59; Saxion v. Titan-C-Mfg., Inc., 86 F.3d 553, 560–61 (6th Cir. 1996); *Dillard*, 15 F.3d at 1283–86. *But see United Steelworkers*, 5 F.3d at 42–43 (concluding that "back pay" is merely a label and the calculation of damages is to be based on calendar days, as opposed to working days, during the violation period, resulting in a punitive remedy).

74. *See Las Vegas Sands*, 244 F.3d at 1159 ("'[B]ack pay' under the WARN Act is a make-whole compensatory remedy . . . ."); *Dillard*, 15 F.3d at 1284 & n.14; Shannon v. Computer Assocs. Int'l, Inc., 45 P.3d 345, 350 (Ariz. Ct. App. 2002) ("The primary purpose of the WARN Act is remedial.").

75. *Las Vegas Sands*, 244 F.3d at 1159.

WARN Act.[76] The court found that, given the make-whole remedy provided for by the WARN Act, the employees should be compensated for the money that they would have earned "but for the premature closure in violation of the WARN Act."[77] In an earlier case, *Burns v. Stone Forest Industries, Inc.,* the Ninth Circuit Court of Appeals had likened the remedy provided to employees under the WARN Act to business interruption insurance that protects employees' income stream in the event they are told on payday that the plant is closing that afternoon.[78] Building on its prior analysis in *Burns*, the Ninth Circuit in *Las Vegas Sands* further explained that in enacting the WARN Act, Congress had been concerned with insuring an employee's income stream,[79] as evidenced by a Senate report that explicitly stated the WARN Act's purpose to "eas[e] the personal and financial difficulties for workers who must make these transitions."[80]

Support for the majority interpretation of the WARN Act is intensifying. In *United Mine Workers v. Midwest Coal Co.*, the Indiana District Court found the *Las Vegas Sands* analysis persuasive and concluded that the WARN Act provides for a make-whole remedy and is remedial in nature.[81] The *Midwest Coal* court recognized that the primary purpose of the WARN Act is to provide advance notice of plant closings and mass layoffs.[82] However, the court further recognized that the WARN Act clearly has another purpose: "to provide the effected [sic] employees as close as possible with the pay they would have otherwise earned but for the plant closing and WARN Act violation."[83]

76. *Id.* at 1156.
77. *Id.* at 1159.
78. Burns v. Stone Forest Indus., 147 F.3d 1182, 1184 (9th Cir. 1998).
79. *Las Vegas Sands*, 244 F.3d at 1159.
80. *Id.* (quoting S. REP. NO. 100-62, at 3 (1987)). The Senate report analyzed the Economic Dislocation and Worker Adjustment Assistance Act, from which the provisions of the WARN Act were eventually severed and enacted as separate legislation. *Id.*; S. REP. NO. 100-62 (1987).
81. United Mine Workers v. Midwest Coal Co., No. TH 99-C-141-T/H, 2001 WL 1385893, at *4–6 (S.D. Ind. Aug. 31, 2001). The court found *Las Vegas Sands* persuasive for two reasons: (1) it is in accord with the majority of other courts in concluding that damages provided by the WARN Act are intended to make the aggrieved employee whole, and (2) legislative history of the WARN Act "supports the conclusion that the Act is remedial." *Id.* at *5–6.
82. *Id.* at *6.
83. *Id.*

B. The Minority View

A small minority of courts cling to the theory that the WARN Act is a punitive statute.[84] In *Joshlin v. Gannett River States Publishing Corp.*, the District Court for the Eastern District of Arkansas grounded its conclusion that the WARN Act provides for a punitive remedy in the fact that an employer may not offset its WARN Act violation liability with wages received by the employee from other sources during the violation period.[85] The *Joshlin* court interpreted the disallowance of an offset as evidence of congressional intent to maximize the punitive effect of the damages allowable under the WARN Act.[86]

That the employee remedies under the WARN Act are not purely remedial in nature does not jeopardize the basic remedial nature of the employee's remedy. In *Carpenters District Council v. Dillard Department Stores*, the Fifth Circuit found the remedy provided to employees to be compensatory and make-whole in nature and suggested that Congress may have intended to not make the remedy purely remedial.[87] For example, Congress, in choosing to not make the remedy available to aggrieved employees purely remedial, avoided placing on employees the burden of immediately seeking other employment in order to mitigate damages.[88] One purpose of the WARN Act is to "provid[e] workers and their families some transition time to adjust to the . . . loss of employment."[89] Requiring an employee to mitigate his damages would frustrate this underlying purpose;[90] therefore, a purely remedial scheme would not serve the purpose of the WARN Act. However, the fact that the remedy available to employees under the WARN Act is not purely remedial does not prevent it from being

84. *See* United Steelworkers of America v. North Star Steel Co., 5 F.3d 39, 42–43 (3d Cir. 1993) (adopting a calculation of damages based on calendar days that occur during the violation period). The *North Star Steel* approach has been construed as affording a punitive remedy. *See* Joshlin v. Gannett River States Publ'g Corp., 840 F. Supp. 660, 663 (E.D. Ark. 1993) ("This is a punitive statute, not a 'make-whole' statute.").

85. *Joshlin*, 840 F. Supp. at 663. The court determined that the plain meaning of the statute subjects the violating employer to payment for each day of violation and that a day of violation "may be a work day, a non-work day, a holiday, a weekend day, or any day." *Id.* Thus, the damages are not compensatory, but punitive in nature. *Id.*

86. *Id.* ("Congress sought to maximize the punitive effect of the liability provision [of the WARN Act] by prohibiting employees [sic] from offsetting the back pay remedy with any pay that its former employees receive from a subsequent employer.").

87. Carpenters Dist. Council v. Dillard Dep't Stores, Inc., 15 F.3d 1275, 1284 n.14 (5th Cir. 1994).

88. *Id.*

89. 20 C.F.R. § 639.1(a) (2002).

90. *See Dillard*, 15 F.3d at 1284 n.14.

"*generally* remedial."[91] Thus, as the *Dillard* court concluded, the basic compensatory nature of the WARN Act's remedy remains intact.[92]

In *Local 1239, International Brotherhood of Boilermakers v. Allsteel, Inc.*,[93] the District Court for the Northern District of Illinois found unpersuasive the employee's argument that the WARN Act provides for a punitive remedy, thus requiring an employer to provide "penalties" to its aggrieved employees just as it requires "civil penalties" to the government.[94] While the WARN Act does provide a punitive remedy to the government by imposing the (up to) $500 per day civil penalty for violation, the fact that one remedy under the WARN Act is punitive in nature does not logically lead to the conclusion that all remedies under the WARN Act, including the employee's remedy, are punitive in nature. Indeed, the WARN Act's textual description of the employer's liability to the government as a "civil penalty" and to employees as "back pay" is instructive. Nowhere in the WARN Act is the term "penalty" used to describe the remedy afforded to employees.[95] Thus, Congress, in denoting the remedy for the government as a "penalty" and the remedy for the employee as "back pay," has distinguished the two remedies. Such differentiation supports the proposition that employer damages to employees under the WARN Act are not penalties.[96]

The last bit of hope for the minority's interpretation of the WARN Act remedies as punitive lies in the fact that the Act's legislative history at times refers to the statutory damages afforded by the WARN Act as a penalty.[97] Because the WARN Act requires an employer to provide back pay and benefits to an aggrieved employee who is no longer providing services, the Act, in a sense, penalizes the employer.[98] However, simply because the damages provided to the employee may be

91. *Id.*
92. *See id.*
93. 9 F. Supp. 2d 901 (N.D. Ill. 1998).
94. *Id.* at 903–05.
95. *Id.*
96. *Id.*
97. *See* Shannon v. Computer Assocs. Int'l, Inc., 45 P.3d 345, 350–51 (Ariz. Ct. App. 2002) (quoting S. REP. NO. 100-62, at 24 (1987)). Although Senate Report 100-62 provided that the employees' remedy under the WARN Act "is in effect a liquidated damages provisions [sic], designed to penalize the wrongdoing employer, deter future violations, and facilitate simplified damages proceedings," S. REP. NO. 100-62, at 24 (1987), the *Shannon* court concluded that it did not "believe Congress intended the WARN Act to be used to punish an employer." *Shannon*, 45 P.3d at 351.
98. Breedlove v. Earthgrains Baking Cos., 140 F.3d 797, 801 (8th Cir. 1998).

viewed as punitive on one level does not change the fact that the damages are aimed at making the employee whole for the employer's violation. The payments to the employee can be characterized as "both 'damages' to the employer and 'back pay' to the employee."[99] Such dual characterization does not change the overriding purpose of the remedy: to make the employee whole.[100]

C. Amendment to Proclaim the Remedy as Compensatory and Make-Whole

To effectively resolve the disagreement among the courts, the WARN Act should be amended to clarify that the remedy afforded to aggrieved employees is a compensatory, make-whole remedy.[101] This amendment will assist employers, like DeShai, in assessing their liability and in ensuring that damages paid to employees in the event of a violation are sufficient to extinguish the employer's liability.[102] A legislative resolution to the split in the circuit courts is preferable to a judicial resolution because Congress is able to address all of the ambiguities surrounding the damages provisions of the WARN Act, whereas the U.S. Supreme Court would be confined to resolving the issue in the case before it. Thus, a statutory amendment would be the most effective approach to setting out a clear rule with respect to WARN Act damages. In light of, and in conjunction with the statutory amendment, the WARN Act regulations should be amended to provide guidance with regard to the calculation of damages.

V. CALCULATION OF DAMAGES FOR VIOLATION OF THE WARN ACT

An employer who violates the WARN Act is liable to the aggrieved

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99. Fegatelli v. Ohio Bureau of Employment Servs., 765 N.E.2d 961, 964 (Ohio Ct. App. 2001).

100. *See* Local Joint Executive Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc., 244 F.3d 1152, 1159 (9th Cir. 2001), *cert. denied*, 534 U.S. 973 (2001).

101. Suggested language for the amendment may include an addition to 29 U.S.C. § 2104(a)(1) that provides: "The remedy afforded to aggrieved employees for an employer's violation of the WARN Act is a compensatory, make-whole remedy." A similar amendment to the WARN Act regulations should also be made.

102. Specifically, declaring the employee's remedy as a compensatory, make-whole remedy will assist in the resolution of the debate over whether the calculation of back pay should be based on the number of calendar or working days that occur during the violation period. As discussed, *infra* Part IV, accepting the majority view that the employee's remedy is compensatory and make-whole leads to the logical conclusion that the calculation of back pay must be based on the number of working days that occur during the sixty day notice period and must include any payment for wages and benefits that the employee would have received had he continued to work during that period.

employees for "back pay for each day of violation."[103] The problem with this statutory provision is two-fold: (1) the WARN Act and its regulations do not define "back pay,"[104] and (2) the WARN Act and its regulations do not specify whether the calculation of back pay is to be based on the number of calendar or working days that fall within the violation period. Unfortunately, circuit courts have been unable to agree on an interpretation of the WARN Act remedy provisions[105] and the U.S. Supreme Court has repeatedly refused to grant certiorari to resolve the interpretive issues.[106] Without clear guidance on these two points, employers like DeShai that wish to adopt the pay-in-lieu-of-notice approach cannot be assured of full WARN Act compliance.[107]

As a solution, Congress should amend the WARN Act to include a definition of "back pay" as well as a designation that the calculation of damages is to be based on the number of working days during the violation period. Such amendments would both make the WARN Act easier for employers like DeShai to apply and quiet much of the litigation surrounding these hotly debated issues.

A. The "Back Pay" Ambiguity

Under the theory that the WARN Act provides a compensatory, make-whole remedy for aggrieved employees, the WARN Act should be amended to define back pay as compensation for any pay and non-ERISA benefits that would have been earned by employees if the

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103. 29 U.S.C. § 2104(a)(1)(A). The rate of pay at which back pay shall be calculated shall be the higher of (1) an average of the employee's regular rate over the previous three years of employment or (2) the employee's final rate of pay. *Id.*

104. *See* United Mine Workers v. Midwest Coal Co., No. TH 99-C-141-T/H, 2001 WL 1385893, at *6 (S.D. Ind. Aug. 31, 2001) ("What forms of compensation constitute 'back pay' is left unanswered by the text of the statute.").

105. Turner, *supra* note 70, at 199.

106. *See, e.g.*, cases cited *supra* note 71.

107. An employer electing to use the pay-in-lieu-of-notice approach is no doubt taking a risk that the amount paid to employees may not fully cover its WARN Act liability, depending on the current state of the law in the circuit in which the employee is employed. It is important to note that when an employee is employed in a state covered by a circuit court that has not yet decided the issue of which method should be used to calculated back pay, the employer is left with little guidance on how to calculate such payment to the employees. The employer is, in a sense, taking a leap of faith that the amount paid to the employees is sufficient to extinguish liability. However, there is always a possibility of a lawsuit by terminated employees that could cost the employer large sums of money, especially if the terminated employees were to initiate a class action lawsuit.

employees had been given the required notice and if they had continued working during the notice period. Under such a definition, the employer would take a snapshot view of the amount that the employee would have earned during the violation period; that amount would constitute the amount of back pay owed as damages. Adopting this "snapshot" approach would greatly assist employers like DeShai in determining their WARN Act liability because it gives employers a concise test to apply when the question arises as to whether a certain form of compensation should be included in the back pay calculation. The employer would simply ask one question: "Would the employee have earned this compensation but for the failure to provide proper WARN Act notice?" If the answer is in the affirmative, the compensation would be included in the back pay calculation.

1. What Constitutes "Back Pay"?

For years the circuit courts have struggled with the question of just what should be included in back pay for purposes of determining an employer's WARN Act liability. In interpreting what is meant by back pay for purposes of the WARN Act, courts have turned to the definition of back pay used in other federal statutes.[108] As used in various federal statutes, including the WARN Act, back pay has been interpreted in the normal sense to include the following: payment for work performed on holidays,[109] tips,[110] overtime,[111] fringe benefits such as vacation and sick pay,[112] and shift differentials.[113] In addition, courts interpreting the

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108. *See, e.g.*, Joint Local Executive Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc., 244 F.3d 1152, 1157 (9th Cir. 2001) (citing, among others, Pettway v. Am. Cast Iron Pipe Co., 494 F.2d 211, 263 (5th Cir. 1974) (finding that back pay under Title VII includes salary as well as "[i]nterest, overtime, shift differentials, and fringe benefits such as vacation and sick pay")), *cert. denied*, 534 U.S. 973 (2001); *see also infra* notes 110–113.

109. *Las Vegas Sands*, 244 F.3d at 1156 (finding that "employees who can prove that they would have worked on a holiday are entitled to back pay at the rate they would have been paid for that holiday").

110. *Id.* (finding that back pay includes tip income).

111. *See* Kossman v. Calumet County, 849 F.2d 1027, 1032–33 (7th Cir. 1988) (including overtime pay in back pay calculation under the Age Discrimination in Employment Act). In the WARN Act arena, the U.S. District Court for the Northern District of West Virginia recently concluded that the inclusion of overtime in the back pay calculation for a WARN Act violation is appropriate. United Mine Workers v. Martinka Coal Co., 45 F. Supp. 2d 521, 527 (N.D.W. Va. 1999), *aff'd*, 202 F.3d 717 (4th Cir. 2000).

112. *See* Cox v. Am. Cast Iron Pipe Co., 784 F.2d 1546, 1549, 1562 (11th Cir. 1986) (finding that vacation and sick pay are included in back pay under Title VII); Meadows v. Ford Motor Co., 510 F.2d 939, 940, 947–48 (6th Cir. 1975) (finding that fringe benefits including vacation and sick pay are included in back pay under Title VII); Pettway v. Am. Cast Iron Pipe Co., 494 F.2d 211, 263 (5th Cir. 1974) (finding that vacation and sick pay are ingredients of back pay in a Title VII suit).

WARN Act have recently moved toward the adoption of a broad view of back pay, according to which back pay includes non-ERISA fringe benefits such as vacation, graduated vacation, floating vacation, and personal days on the basis that they are "contractual days."[114] Given the compensatory, make-whole remedy provided by the WARN Act, this broad view of back pay is most consistent with the intended purpose of the WARN Act.

However, William Cowen recently wrote an article advocating that the WARN Act does not allow for the recovery of non-ERISA benefits.[115] To support his argument that the definition of back pay has become too broad and that a narrow reading to exclude non-ERISA fringe benefits is the only reasonable interpretation,[116] Cowen relies on three district court cases: *Ciarlante v. Brown & Williamson Tobacco Corp.*,[117] *Carpenters District Council v. Dillard Department Stores, Inc.*,[118] and *Jones v. Kayser-Roth Hosiery, Inc.*[119] However, these cases do not represent the

113. Nichols v. Frank, 771 F. Supp. 1075, 1079 (D. Or. 1991) (finding that night and weekend shift differentials are included in back pay calculations under Title VII), *aff'd*, 42 F.3d 503 (9th Cir. 1994).

114. *See, e.g.*, United Mine Workers v. Midwest Coal Co., No. TH 99-C-141-T/H, 2001 WL 1385893, at *7 (S.D. Ind. Aug. 31, 2001) (finding that aggrieved employees are entitled to be paid for non-ERISA contractual days under the WARN Act); *Martinka Coal Co.*, 45 F. Supp. 2d at 530 (finding that aggrieved employees are entitled to recover non-ERISA fringe benefits that would have accrued during the violation period).

115. William B. Cowen et al., *An Argument that the WARN Act Does Not Allow Plaintiffs to Recover Non-ERISA Benefits*, 16 LAB. LAW. 269 (2000). Cowen, a member of the National Labor Relations Board (NLRB), served as an attorney for the NLRB from 1979 to 1985 and was in private practice until his appointment as an NLRB member in January 2002. United States National Labor Relations Board, *William B. Cowen*, *at* http://www.nlrb.gov/cowen.html (last updated Mar. 13, 2002). The NLRB was created by Congress to administer the National Labor Relations Act, a statute that "guarantees the right of employees to organize and to bargain collectively with their employers or to refrain from all such activity." United States National Labor Relations Board, *Fact Sheet on the National Labor Relations Board*, *at* http://www.nlrb.gov/facts.html (last updated Dec. 4, 2002). The NLRB has two major functions: (1) to determine whether employees desire union representation and (2) to prevent and remedy unfair labor practices of employers and unions. *Id.* In essence, the NLRB serves to protect employees. Thus, it is somewhat puzzling that Cowen is advocating a narrow interpretation of the WARN Act damages provisions that would exclude non-ERISA benefits, thereby affording laid-off employees less protection.

116. Cowen et. al., *supra* note 115, at 273, 278–80.

117. No. 95-4646, 1996 WL 741973 (E.D. Pa. Dec. 18, 1996), *rev'd*, 143 F.3d 139 (3d Cir. 1998).

118. 778 F. Supp. 297 (E.D. La. 1991), *aff'd in part, rev'd in part*, 15 F.3d 1275 (5th Cir. 1994).

119. 748 F. Supp. 1292 (E.D. Tenn. 1990), *amended by* 753 F. Supp. 218 (E.D. Tenn. 1990).

current majority view and reliance on them is misplaced.

In *Ciarlante*, the court determined that the inclusion of fringe benefits in back pay under the WARN Act was limited to ERISA benefits only.[120] The *Ciarlante* court, a district court within the Third Circuit, did not subscribe to the majority view that the WARN Act provides for a compensatory, make-whole remedy. Instead, the court premised its interpretation of the remedy provision on the minority view, as expressed by the Third Circuit in *United Steelworkers of America v. North Star Steel Co.*,[121] that the WARN Act remedy is not compensatory in nature. The *Ciarlante* court accepted the Third Circuit's interpretation as binding but admitted that the interpretation "has not been universally accepted."[122] This begs the question whether *Ciarlante* would have been decided differently had the district court not been bound by *North Star Steel*.

The district court in *Dillard* disallowed a credit against an employer's WARN Act liability for accrued vacation paid to employees, a non-ERISA benefit.[123] In dicta, the court implied that a credit may have been allowed had state law not imposed on the employer a legal obligation to pay accrued vacation.[124] In his article, Cowen claims that this dicta "can be logically extended to imply that any [non-ERISA] benefit paid to employees . . . [is] not a benefit recoverable under the WARN Act."[125] The primary weakness of Cowen's "logically extended" implication is its basis in district court dicta. Further, this *Dillard* opinion was issued in 1991. Since that time, many other courts have weighed in on the issue and have allowed recovery of non-ERISA benefits under the WARN Act.[126]

Similarly, in 1990 the district court in *Jones*[127] found that employers were not required to pay employees for vacation benefits that would have accrued had the employees worked during the sixty day violation period.[128] Because this decision was handed down well before the current trend toward inclusion of non-ERISA benefits in WARN Act damages, its value as support for Cowen's argument is questionable.

In addition to his reliance on the above district court cases, Cowen also points to the WARN Act's express terms, which provide that aggrieved employees are entitled to benefits that they would have received under an ERISA benefits plan. These benefits include the cost

120. *Ciarlante*, 1996 WL 741973, at *3.
121. 5 F.3d 39, 43 (3d Cir. 1993).
122. *Ciarlante*, 1996 WL 741973, at *2.
123. *Dillard*, 778 F. Supp. at 311.
124. *Id.*
125. Cowen et. al., *supra* note 115, at 279–80.
126. *See infra* notes 134–137 and accompanying text.
127. 748 F. Supp. 1292 (E.D. Tenn. 1990), *amended by* 753 F. Supp. 218 (E.D. Tenn. 1990).
128. *Id.* at 1301.

of any medical expenses incurred during the violation period that would have been covered by the benefit plan had the employer not violated the WARN Act.[129] Cowen argues that if back pay were interpreted to include non-ERISA fringe benefits, section 2104(a)(1)(B) of the WARN Act, which entitles aggrieved employees to ERISA benefits, would be devoid of meaning and thus superfluous.[130] Therefore, he concludes, "'[b]ack pay,' as used in the WARN Act, must describe something less than all pay and all benefits."[131]

This narrow interpretation of back pay is inconsistent with both the purpose of the WARN Act and the compensatory, make-whole remedy provided for by the Act. As previously established, the majority view is that the WARN act provides for a compensatory, make-whole remedy that includes the pay and benefits that the employee would have received during the violation period.[132] If an employer provides the sixty days' notice as required by the WARN Act, employees who accrue non-ERISA benefits, such as holiday and vacation pay, will continue to accrue them during the sixty days. An employer who violates the WARN Act notice requirement, thereby preventing employees from working during the sixty day notice period,[133] should not then be excused from compensating employees for the holiday and vacation pay that would have accrued had the employer not violated the Act. If employees are not entitled to recover for the holiday and vacation pay that they would have accrued during the violation period, they are certainly not made whole by the employer's payment of damages. Moreover, the violating employer will benefit from its own violation. Such a result is inequitable and frustrates the purpose of the WARN Act.

The trend of recent WARN Act case law is toward an interpretation that includes non-ERISA benefits in the definition of back pay. In 2001, the Ninth Circuit proclaimed in *Las Vegas Sands* that tip income and pay for work on holidays are deemed to be included in the definition of back

129. *See* Cowen et al., *supra* note 115, at 273; *see also* 29 U.S.C. § 2104(a)(1)(B) (2000).
130. Cowen et al., *supra* note 115, at 273. The rule of statutory interpretation provides that a reading of the statute that would make another provision of the same statute superfluous should be avoided. United States v. Nordic Village, Inc., 503 U.S. 30, 36 (1992).
131. Cowen et. al., *supra* note 115, at 273.
132. *See supra* Part III.A.
133. *See* Local Joint Executive Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc., 244 F.3d 1152, 1160 (9th Cir. 2001) ("[T]he employer's obligation to pay was triggered[] by the fact that [the employer] prevented the employees' performance by closing their workplace."), *cert. denied*, 534 U.S. 973 (2001).

pay.[134] The Ninth Circuit based its interpretation of back pay on the premise that employees should be compensated for the money that they would have earned during the notice period had the employer given proper notice.[135] Also in 2001, the U.S. District Court for the Southern District of Indiana, in *United Mine Workers v. Midwest Coal Co*.,[136] found the reasoning of the Ninth Circuit in *Las Vegas Sands* to be persuasive and adopted a broad view of back pay that included non-ERISA benefits.[137] This trend in decisions is due to wide acceptance of the underlying principle that the WARN Act provides employees a compensatory, make-whole remedy. To make employees whole, all benefits that would have been earned during the violation period, including non-ERISA benefits, should be included in the damages payment.

2. A Resolution to the "Back Pay" Ambiguity

The WARN Act should be amended to define back pay as any pay and non-ERISA benefits that the employee would have earned had he been allowed to continue working during the violation period. Under this definition, employers would take a snapshot of that amount that the employee would have earned during this period and would then pay the employee the full amount of these earnings. The proposed amendment and snapshot test are consistent with the normal meaning of back pay and serve the overall purpose of the WARN Act[138] by putting the employee in the same position he would have been in had his employment not been prematurely terminated in violation of the WARN Act. In addition, including a definition of back pay in the WARN Act will serve to put to rest much of the litigation surrounding the current remedy ambiguity of the Act.[139] Further, the adoption of the snapshot test provides employers with clear guidance in calculating back pay. The back pay definition and snapshot test in turn assist employers like

134. *Id.* at 1156.

135. *Id*. at 1159. The court adopts "the normal meaning of back pay" and finds this meaning "consistent with the overall purpose of the WARN Act." *Id.* at 1158.

136. No. TH 99-C-141-T/H, 2001 WL 1385893 (S.D. Ind. Aug. 31, 2001).

137. *Id*. at *7 (holding that, under the WARN Act, plaintiffs are entitled to be paid for non-ERISA contractual paid days off, including "vacation, graduated vacation, floating vacation and personal days"); *see also* United Mine Workers v. Martinka Coal. Co., 45 F. Supp. 2d 521, 530 (N.D.W. Va. 1999) ("[T]he concept of back pay includes not only wages, but also all the fringe benefits the employee would have earned had the violation not occurred.").

138. *Las Vegas Sands*, 244 F.3d at 1158.

139. Reducing litigation will ease the cost of litigation burden not only on employers, but also on the taxpayers whose tax dollars fund the judicial system tasked with resolving these disputes.

DeShai in heading off potential litigation by giving them the necessary tools and guidance to calculate WARN Act liability with certainty, thereby removing the risk from the pay-in-lieu-of-notice approach.[140] Lastly, a back pay definition will prove especially helpful for multistate employers whose employees are dispersed over a large area and are thus governed by circuit courts that may subscribe to different interpretations of the WARN Act remedy provisions.[141]

B. Calendar Days Versus Working Days

Once an employer knows what constitutes back pay, the question arises as to whether the back pay must be provided for the number of calendar days or working days during the period of the employer's violation. The WARN Act should be amended to make clear that an employee's WARN Act damages must be provided for the total number of *working days* that fall within the violation period. Not only would such an amendment be consistent with the snapshot test discussed above, it would also put to rest the current split between the circuit courts on the issue. Because the U.S. Supreme Court has declined to settle the issue of whether the calculation of damages is based on the number of calendar or working days,[142] employers have been forced to deal with the unresolved split between the circuits for nearly a decade.[143] An amendment to the WARN Act is long overdue.

An amendment establishing that the calculation of WARN Act damages is based on the number of working days rather than calendar days is supported by the majority of the circuit courts that have

140. Included in the risks an employer analyzes when faced with a RIF is the likelihood of a lawsuit resulting from the RIF. Unless the employer is willing to provide consideration in addition to the statutory remedy, the employer will not be able to obtain a release of claims from employees. Thus, when the employer makes the decision to pay damages in lieu of notice, it obviously would like to ensure, to the greatest extent possible, that the amount paid will extinguish any liability it may have for violating the WARN Act.

141. Employers in this situation are uncertain as to which circuit to follow if the circuit in which the employees are located has not decided the issue. This situation also raises the issue of how to treat employees working in states in which the courts have employed diverging interpretations of the WARN Act remedy provisions.

142. *See* cases cited *supra* note 71.

143. *See* Carpenters Dist. Council v. Dillard Dep't Stores, Inc., 15 F.3d 1275, 1283–86 (5th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995); United Steelworkers of America v. North Star Steel Co., 5 F.3d 39, 42–43 (3d Cir. 1993), *cert. denied*, 510 U.S. 1114 (1994).

addressed the issue.[144] Basing damages on working days compensates employees for the income and benefits they would have received had the employer not prematurely terminated their employment in violation of the WARN Act.[145] This approach fulfills the purpose of the WARN Act by making the employees whole.[146] Moreover, legislative history supports this interpretation. The Senate Labor Committee stated in 1987 that damages for a violation of the WARN Act "are to be measured by the wages . . . the employee would have received had the plant remained open or the layoff been deferred until the conclusion of the notice period."[147] Therefore, because damages are measured by "the wages the employee would have received," the working days method is the appropriate basis for calculating damages.[148]

1. The Third Circuit's "Unique" View

Of the circuits that have ruled on the calendar versus working days debate, only one circuit continues to cling to the calendar day calculation approach. The Third Circuit, in *United Steelworkers of America v. North Star Steel Co.*,[149] found that the language of the WARN Act unambiguously points to a plain meaning interpretation that an employer who violates the WARN Act is liable for back pay for each calendar day of the violation period.[150] In *North Star Steel*, the defendant did not contest its liability for failure to give the required notice. Rather, the disputed issue was whether the calculation of damages for back pay and benefits should be based on the number of calendar or working days during the violation period.[151] The Third Circuit rejected the argument

144. See Local 1239, Int'l Bhd. of Boilermakers v. Allsteel, Inc., 9 F. Supp. 2d 901, 903 (N.D. Ill. 1998) ("[T]he majority rule is that the employer is liable only for work days within the period of the violation.") and cases cited therein.

145. *See* Saxion v. Titan-C-Mfg., Inc., 86 F.3d 553, 560–61 (6th Cir. 1996) (citing Carpenters Dist. Council v. Dillard Dep't Stores, 15 F.3d 1275, 1283–86 (5th Cir. 1994)); *Local 1239, Int'l Bhd. of Boilermakers*, 9 F. Supp. 2d at 904.

146. *See* Local Joint Executive Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc., 244 F.3d 1152, 1159 (9th Cir. 2001) (concluding that back pay under the WARN Act is a make-whole remedy allowing damages to compensate the employee for the lack of notice by the employer), *cert. denied*, 534 U.S. 973 (2001).

147. S. REP. NO. 100-62, at 24 (1987); *see also* Breedlove v. Earthgrains Baking Cos., 140 F.3d 797, 801 (8th Cir. 1998) (quoting S. REP. NO. 100-62, at 24 (1987)); *Saxion*, 86 F.3d at 559 (quoting S. REP. NO. 100-62, at 24 (1987)).

148. *See Breedlove*, 140 F.3d at 801 (quoting S. REP. NO. 100-62, at 24 (1987)).

149. 5 F.3d 39 (3d Cir. 1993).

150. *Id.* at 42.

151. *Id.* at 41. At the time the Third Circuit was presented with this issue, no other circuit court had issued an opinion on the issue. *See id.* However, by the time the Third Circuit issued its ruling, the Fifth Circuit had pending before it the very same issue in *Carpenters District Council v. Dillard Dep't Stores, Inc.*, *see id.*, but the matter was not decided by the Fifth Circuit until five months after *North Star Steel* was decided. *See*

that back pay was intended to mean lost earnings during the violation period and instead interpreted back pay as merely "a label used to describe the amount of damages for which an employer is liable for each day of the violation,"[152] which should then be multiplied by the number of calendar days of violation.[153]

The Third Circuit's rationale for this interpretation was threefold. First, the court applied the statutory interpretation maxim that an interpretation that renders other provisions of a statute superfluous should be avoided.[154] The Third Circuit reasoned that if back pay meant lost earnings, subsection 2104(a)(2) of the WARN Act, which allows employer offsets for wages already paid,[155] would be superfluous because a "lost earnings calculation would automatically exclude the reductions" for wages paid.[156]

The Third Circuit's interpretation of back pay commits the same sin of statutory interpretation that the court sought to avoid. Subsection 2104(a)(1)(A) clearly sets forth the rate of compensation upon which to base WARN Act damages.[157] Thus, the Third Circuit's position that "each day of the violation" is intended to refer to calendar days and that back pay refers to the individual's pay rate, which is to be multiplied by the number of calendar days, violates fundamental statutory interpretation rules by rendering subsections 2104(a)(1)(A)(i) and (ii) superfluous.[158] This is because if back pay is merely a label for the rate of compensation of WARN Act damages, as suggested by the Third Circuit, there would be no need for yet another definition of the rate of damages in subsections 2104(a)(1)(A)(i) and (ii).

Carpenters Dist. Council v. Dillard Dep't Stores, Inc., 15 F.3d 1275, 1275 (5th Cir. 1995). The Fifth Circuit, in issuing its decision in *Dillard*, kicked off the circuit split when it held that the calculation of damages was to be based on the number of working days that fall within the violation period. *See id.* at 1283–86.

152. *North Star Steel*, 5 F.3d at 42.

153. *Id.*

154. *Id.*

155. *Id.* Subsection 2104(a)(2) allows an employer to offset its WARN Act damages by "any wages paid by the employer to the employee for the period of the violation." 29 U.S.C. § 2104(a)(2) (2000).

156. *North Star Steel*, 5 F.3d at 42.

157. 29 U.S.C. § 2104(a)(1)(A). This section provides that back pay shall be awarded "at a rate of compensation not less than the higher of (i) the average regular rate received by such employee during the last 3 years of the employee's employment; or (ii) the final regular rate received by such employee." *Id.*

158. Turner, *supra* note 70, at 221.

Second, the Third Circuit reasoned that interpreting back pay to mean lost earnings would lead to "absurd or unreasonable results."[159] According to the Third Circuit's reasoning, if subsection 2104(a)(2) were not superfluous, an employer would receive double credit for the wage payments to the employee.[160] An employer would be able to subtract the wage payments the first time in conjunction with the calculation of back pay under subsection 2104(a)(1) and then a second time pursuant to subsection 2104(a)(2). Because such a result would be unreasonable, the Third Circuit argued, the working days approach should not be adopted.[161]

While giving an employer double credit for the wages paid to an employee would be unreasonable, the terms of subsection 2104(a)(2) prevent such double counting.[162] The Fifth Circuit, in *Carpenters District Council v. Dillard Department Stores, Inc.*, pointed out the flaw in the Third Circuit's reading of subsection 2104(a)(2).[163] Subsection 2104(a)(2) allows an employer to deduct from its WARN Act liability the wages earned for work performed *during* the violation period.[164] This provision generally applies to circumstances in which the employer has substantially reduced an employee's hours without giving the employee the required sixty days' notice[165] but has not yet terminated the employee.[166] Because a terminated employee, by definition, will not perform services during the violation period, such an employee will not receive any wages during the violation period. Therefore, subsection 2104(a)(2) will not apply because there will be no "wages paid" for the employer to deduct.[167] Unless an employer pays statutory damages to a

159. *North Star Steel*, 5 F.3d at 42 (quoting Robert T. Winzinger, Inc. v. Mgmt. Recruiters, Inc., 841 F.2d 497, 500 (3d Cir. 1988)).

160. *Id.* at 42–43.

161. *Id.* at 43.

162. *See* Saxion v. Titan-C-Mfg., Inc., 86 F.3d 553, 559–60 (6th Cir. 1996).

163. Carpenters Dist. Council v. Dillard Dep't Stores, Inc., 15 F.3d 1275, 1284 n.14 (5th Cir. 1994).

164. 29 U.S.C. § 2104(a)(2) (2000). This section provides in part: "The amount for which an employer is liable . . . shall be reduced by any wages paid by the employer to the employee for the period of the violation . . . ." *Id.*; *see also Dillard*, 15 F.3d at 1284 n.14.

165. *See* 29 U.S.C. § 2101(a)(6)(C).

166. *Dillard*, 15 F.3d at 1284 n.14. Subsection 2104(a)(2) would also apply when an employer places an employee on a paid leave of absence during the violation period or when an employer pays statutory damages in lieu of notice. *See supra* Part III.B.

167. *Dillard*, 15 F.3d at 1284 n.14. In fact, as argued by the defendant in *North Star Steel Co.*, the Third Circuit's own interpretation may produce anomalous results. *See Saxion*, 86 F.3d at 560.

> If each aggrieved employee were entitled to damages in the amount of a normal day's pay multiplied by 60, a hypothetical part-time employee who worked just one ten-hour shift each Saturday would recover substantially higher damages than a full-time employee, paid at the same hourly rate, who worked eight hours per day, five days per week. Such a result would obviously be absurd.

terminated employee during the violation period under the pay-in-lieu-of-notice approach, the employer will not be allowed a deduction under subsection 2104(a)(2) for a terminated employee.[168]

Lastly, the Third Circuit determined that interpreting back pay to mean lost earnings would render subsection 2104(a)(1) inconsistent with other provisions of the WARN Act.[169] The Third Circuit reasoned that if back pay is interpreted to mean lost earnings, an employer should be allowed to offset its WARN Act obligations with any earnings received by an employee during the violation period, including wages received from a different employer.[170] Therefore, because subsection 2104(a)(2)(A) only allows a deduction for wages paid by the violating employer, subsection 2104(a)(2) is inconsistent with a lost earnings interpretation of back pay under subsection 2104(a)(1).[171]

Both the Fifth and Sixth Circuits have found such reasoning to be unpersuasive.[172] While it is true that the WARN Act does not include a provision that would allow an employer to deduct the wages that its employee earns from other employers, the Fifth Circuit persuasively provides plausible reasons for the WARN Act's departure from a purely remedial damage award: "the desire to avoid placing a burden on a terminated employee to mitigate damages by taking any job offered, the desire to give a terminated employee a window of time to readjust without immediately having to search for a job, [and] the desire for simplicity in the statutory scheme."[173]

Although the Third Circuit's adoption of a calendar day interpretation has found little following,[174] it nonetheless remains the current law of

Id.

168. Lipsig & Fentonmiller, *supra* note 48, at 311. It should be noted that while the pay-in-lieu-of-notice approach may be a technical violation of the WARN Act, if proper pay is provided, no damages will be owed to the employee because the employee's exclusive remedy would be satisfied by the pay-in-lieu-of-notice payment. *Id.*; *see also supra* Part III.B.

169. United Steelworkers of America v. North Star Steel Co., 5 F.3d 39, 43 (3d Cir. 1993).

170. *Id.*

171. *Id.*

172. *Saxion*, 86 F.3d at 558–61; *Dillard*, 15 F.3d at 1284 n.14.

173. *Dillard*, 15 F.3d at 1284 n.14.

174. *See* Johnson v. Telespectrum Worldwide, Inc., 61 F. Supp. 2d 116, 127 (D. Del. 1999) (noting that every other circuit to decide the calendar versus working day issue has held working days to be the proper measure of damages); *infra* note 179 and accompanying text.

the Third Circuit.[175] Thus, an employer that has employees in multiple states will likely find itself stymied by these differing interpretations with no way to comply with all applicable laws. Take, for example, the employer that has employees in Pennsylvania (within the Third Circuit, which has adopted the calendar days approach), Ohio (within the Sixth Circuit, which has adopted the working days approach), and Indiana (within the Seventh Circuit, which has yet to rule on the issue of whether the calendar or working days approach should be adopted). If this employer violates the WARN Act by failing to provide proper notice and seeks to satisfy its liability through the pay-in-lieu-of-notice approach, it will be required to calculate the employees' pay using a separate formula for each state. The employer will likely use the working days method to determine liability to the Indian employees because there is no guidance on this point from the Seventh Circuit and the working days approach is more favorable to the employer. Under the separate calculations approach, the Pennsylvania employees will receive a windfall due to the calendar day calculation, while the Ohio and Indiana employees will not receive this windfall under the working days calculation. Although utilizing the separate calculations approach affords the employer a good chance of avoiding WARN Act liability, the employer subjects itself to potential liability for discrimination claims from the Ohio and Indiana employees. Thus, this hypothetical employer faces a Hobson's choice between liability for its WARN Act violation and liability for employee discrimination.[176] Problems like this are very real. To avoid imposing such undue economic hardship on employers, a change to the WARN Act is necessary.

2. A Resolution to the Calendar Days Versus Working Days Debate: The Working Days Approach Should Be Adopted

The WARN Act should be amended to reflect that the calculation of back pay is based on the number of working days during the violation period. As previously discussed, a statutory amendment is the most effective means for resolving the debate because the issue can be wholly

175. *See Johnson*, 61 F. Supp. 2d at 127. The Third Circuit is comprised of Pennsylvania, Delaware, New Jersey, and the U.S. Virgin Islands. *See* 28 U.S.C. § 41 (2000).

176. Of course, the employer could take the ultraconservative approach of providing the Ohio and Indiana employees with the same windfall provided to the Pennsylvania employees by paying Ohio and Indiana employees based on the calendar day approach. However, such an approach would impose an additional financial burden on the employer that could be quite substantial, depending on the amount of additional back pay required by the calendar day approach.

addressed in the amendment.[177] Such an amendment is supported by a majority of the circuit courts, legislative history, and long-standing principles of statutory interpretation. As discussed above, in the event of an employer violation, the WARN Act provides for a "make-whole" remedy for employees, whereby the employer must pay damages equal to the money and benefits the employees would have earned had proper notice been given.[178] To date, six circuits have addressed the issue of whether the calculation of back pay is based on the number of calendar or on the number of working days. All of these circuits, with the exception of the Third Circuit, have concluded that the calculation is based on the number of working days.[179] In addition, although the Seventh Circuit has not yet ruled on the matter, a district court within the Seventh Circuit has adopted the working day calculation approach.[180]

Compensating employees only for the number of working days during the violation period makes the most sense and is consistent with the purpose of the WARN Act.[181] If the measure of damages were based on the number of calendar days, employees would receive back pay for days that they would not have worked had they been given the proper notice. Thus, aggrieved employees would receive a windfall, which would put them in a better position than they would have enjoyed absent the WARN Act violation.[182] If the goal of the WARN Act is to make employees whole, a working days approach achieves this end.[183] In contrast, a calendar day interpretation goes beyond the intent of the Act and results in an employee windfall at the expense of the employer.[184]

177. *See* discussion *supra* Part IV.C (regarding the advantages of a statutory resolution over a judicial resolution).

178. *See* Local Joint Executive Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc., 244 F.3d 1152, 1159 (9th Cir. 2001), *cert. denied*, 534 U.S. 973 (2001).

179. *See* Joe v. First Bank Sys., Inc., 202 F.3d 1067, 1072 (8th Cir. 2000); Burns v. Stone Forest Indus., Inc., 147 F.3d 1182, 1182–85 (9th Cir. 1998); Saxion v. Titan-C-Mfg., Inc., 86 F.3d 553, 558–61 (6th Cir. 1996); Frymire v. Ampex Corp., 61 F.3d 757, 771–72 (10th Cir. 1995); Carpenters Dist. Council v. Dillard Dep't Stores, Inc., 15 F.3d 1275, 1282–86 (5th Cir. 1994); United Steelworkers v. North Star Steel Co., 5 F.3d 39, 41–44 (3d Cir. 1993).

180. Local 1239, Int'l Bhd. of Boilermakers v. Allsteel, Inc., 9 F. Supp. 2d 901, 903, 906 (N.D. Ill. 1998).

181. *See* United Mine Workers v. Midwest Coal Co., No. TH 99-C-141-T/H, 2001 WL 1385893, at *8 (S.D. Ind. Aug. 31, 2001).

182. *Id.*

183. *See id.*

184. The windfall at the employer's expense has a punitive effect. Requiring employers to pay a windfall to employees upon violation of WARN Act would have detrimental corporate economic effects in that it would further damage a company's

In addition, such a result would be directly contrary to congressional intent. The Senate has stated that the WARN Act was not intended as a means "to place an additional financial burden on the employers of this country."[185] Thus, because the calendar day interpretation would impose additional financial burdens on employers by requiring them to pay employees for days the employees would not have otherwise worked, such an interpretation is inconsistent with the purpose of the WARN Act and should be rejected.[186] Although the working day approach would theoretically allow employees a windfall if they were immediately able to secure reemployment with another employer, such a windfall is acceptable because the violating employer does not bear its expense and it does not frustrate the purpose of the WARN Act.[187]

In addition, the calendar day interpretation is inconsistent with the concept of back pay and congressional intent to maintain the employee's income stream during the violation period. As proposed by this Comment, back pay consists of any payments the employee would have received during the violation period had the employee continued to work. The calendar day approach flies in the face of the concept of back pay in that it compensates employees for days that they did not work.[188] It allows damages to employees beyond that which they could have reasonably expected to have earned during the violation period.[189] Further, calculating back pay based on the number of calendar days rather than on the number of working days arbitrarily causes some employees to receive greater damage payments than others.[190] For example, an employee who works four ten-hour shifts per week would receive more back pay than an employee who works five eight-hour shifts per week.[191] Because both workers normally work forty hours per

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bottom line, which is clearly already suffering as evidenced by the need to conduct the mass layoff or plant closing. Pushing a company unnecessarily closer to failure only serves to further perpetuate the ripple effect felt by companies and citizens in poor economic times.

185. Breedlove v. Earthgrains Baking Cos., 140 F.3d 797, 801 n.4 (8th Cir. 1998) (quoting 134 CONG. REC. 15,928 (1988) (statement of Sen. Metzenbaum)).

186. The additional cost to an employer in paying damages that are based on the number of calendar days instead of working days is startling. Jeffrey J. Turner proposes that the additional cost of the calendar day approach is roughly thirty percent. To take the theory out of the abstract and into the present, Turner took the facts of the *North Star Steel* case and applied a hypothetical calculation associated with laying off 270 employees without proper WARN Act notice. Under the calendar day approach, the employer's liability was $1,373,760, whereas under the workday approach, the employer's liability was $1,007,424—a $360,000 difference. Turner, *supra* note 70, at 200.

187. *See* Turner, *supra* note 70, at 221.

188. *See Breedlove*, 140 F.3d at 800.

189. *See* Turner, *supra* note 70, at 218.

190. Burns v. Stone Forest Indus., Inc., 147 F.3d 1182, 1184 (9th Cir. 1998).

191. *Id.* In this example, the employee who worked eight hours a day would

week and the only difference between the two workers is the number of hours per day that they work, allowing one worker to receive more back pay than the other is "arbitrary and serves no useful purpose."[192] Therefore, the only reasonable interpretation of the back pay provision of the WARN Act is that the calculation of back pay is to be based on the number of working days that fall within the violation period.

Obviously both DeShai and its employees have an economic stake in the manner in which the calendar versus working days debate is settled: they both stand to either gain or lose money.[193] DeShai wishes to minimize damages owed, while the employees wish to maximize such damages. However, the working days approach best serves the purpose of the WARN Act by preventing windfall payments to the employees at the employer's expense and by avoiding any unintended punitive effect on the employer. Amending the WARN Act to clarify that the calculation of back pay is to be based on the number of working days would further the purpose of the Act and would put employees in the same position they would have been absent the employer's violation.[194]

VI. CONCLUSION

The intent behind the WARN Act is a noble one: to protect the income stream of American workers in the event of mass layoffs and plant closures by requiring advance notice to affected employees. However, unless employers, such as DeShai, are able to understand their obligations and potential liability under the WARN Act, workers will not fully realize the protections that the WARN Act seeks to provide. It is imperative that an employer attempting to comply with the WARN Act be able to determine with relative certainty the actions that it must take to relieve itself of liability under the Act. Certainty with respect to damages is vital because it gives employers incentives to preempt damages awards by immediately paying aggrieved employees WARN Act damages in order to avoid the assessment of government penalties.

receive 480 hours worth of back pay for a sixty day violation period, whereas the employee who worked ten hours a day would receive 600 hours worth of back pay for a sixty day violation period. This difference is true despite the fact that both employees work the same forty hours per week. *Id.*; Carpenters Dist. Council v. Dillard Dep't Stores, Inc., 15 F.3d 1275, 1285 n.16 (5th Cir. 1994).

192. United Mine Workers v. Midwest Coal Co., No. TH 99-C-141-T/H, 2001 WL 1385893, at *8 (S.D. Ind. Aug. 31, 2001).

193. *See* Turner, *supra* note 70, at 200.

194. *See id.* at 218.

Unfortunately, the WARN Act's ambiguity and the splits between the circuit courts in interpreting such ambiguities have created a situation in which no employer can be assured that its compliance actions are sufficient to relieve it of liability. Without the certainty that the preemptive payment of damages will relieve an employer of its liability for a WARN Act violation, voluntary payment of damages by employers will not be the norm and employees will be forced to fight for their entitlements under the WARN Act. When employees are forced to take on their employers, no one wins because the litigation costs are felt by the employee, the employer, and society as a whole, in the form of increased court costs to process the employee claims.

Because the U.S. Supreme Court has repeatedly refused over the last decade to resolve the splits between the circuit courts regarding interpretation of an employee's remedy under the Act, Congress has no choice but to step in and resolve the problem. In order to make the WARN Act more effective in carrying out its goal, Congress should amend the WARN Act in three ways: (1) by designating the remedy afforded to employees as a compensatory, make-whole remedy that allows the employee to recover damages equal to the pay and benefits that the employee would have earned absent the employer's violation of the WARN Act, (2) by including a broad definition of back pay that includes all pay and non-ERISA benefits the employee would have earned during the violation period and adopting the snapshot test to assist employers in determining whether particular compensation or benefits are included as back pay, and (3) by declaring that the calculation of back pay will be based on the number of working days during the violation period.

In passing the WARN Act, Congress enacted an ambiguous statute that has caused employers unnecessary litigation expense; it is therefore up to Congress to endorse the interpretations adopted by the majority of circuits by amending the WARN Act. Until the proposed amendments are enacted, all employers, including DeShai, will continue to suffer the consequences of the statutory ambiguities of the WARN Act. These consequences will no doubt continue to have serious and detrimental impacts on local economies, impacts that will in turn impact the national economy, thus leaving no company immune from the effects of the WARN Act.

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