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SEQUESTRATION: EXAMINING EMPLOYERS' WARN ACT RESPONSIBILITIES

HEARING

BEFORE THE

SUBCOMMITTEE ON WORKFORCE PROTECTIONS

COMMITTEE ON EDUCATION AND THE WORKFORCE

U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRTEENTH CONGRESS

FIRST SESSION

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SEQUESTRATION: EXAMINING EMPLOYERS' WARN ACT RESPONSIBILITIES

Thursday, February 14, 2013
U.S. House of Representatives
Subcommittee on Workforce Protections
Committee on Education and the Workforce
Washington, DC

The subcommittee met, pursuant to call, at 10:02 a.m., in room 2175, Rayburn House Office Building, Hon. Tim Walberg [chairman of the subcommittee] presiding.

Present: Representatives Walberg, Kline, DesJarlais, Bucshon, Hudson, Courtney, Andrews, Bishop, Fudge. Also present: Davis.

Staff present: Owen Caine, Legislative Assistant; Molly Conway, Professional Staff Member; Ed Gilroy, Director of Workforce Policy; Benjamin Hoog, Legislative Assistant; Marvin Kaplan, Workforce Policy Counsel; Nancy Locke, Chief Clerk/Assistant to the General Counsel; Donald McIntosh, Professional Staff Member; Brian Newell, Deputy Communications Director; Molly McLaughlin Salmi, Deputy Director of Workforce Policy; Alexa Turner, Staff Assistant; Joseph Wheeler, Professional Staff Member; Mary Alfred, Minority Fellow, Labor; Tylease Alli, Clerk/Intern and Fellow Coordinator; Jody Calemine, Minority Staff Director; John D'Elia, Minority Labor Policy Associate; Daniel Foster, Minority Fellow, Labor; Brian Levin, Minority Deputy Press Secretary/New Media Coordinator; Celine McNicholas, Minority Senior Labor Counsel; Richard Miller, Minority Senior Labor Policy Advisor; Megan O'Reilly, Minority General Counsel; Michele Varnhagen, Minority Chief Policy Advisor/Labor Policy Director; and Michael Zola, Minority Senior Counsel.

Chairman WALBERG. A quorum being present the subcommittee will come to order. Good morning, and welcome to the first hearing of the Workforce Protection Subcommittee of the 113th Congress. I would like to welcome our members and thank our witnesses for being with us today. I would like to extend a special good morning to Assistant Secretary Oates. Thank you for participating with us this morning.

Finally, I would like to recognize our colleague from Connecticut, the man who is willing to make sure history is accurate. Lincoln is upheld as well as his state of Connecticut and the efforts they had on emancipation. And thanks for giving some notoriety to our subcommittee by just being here as well. Joe Courtney has taken on the role as senior Democratic member for the 113th Congress.

I look forward to working together over the next 2 years and I will try to make sure my facts are accurate as well.

As part of the Budget Control Act of 2011 President Obama insisted on a process known as sequestration, a series of across-the-board spending cuts that will impact most defense and domestic programs. Sequestration is not how Washington should conduct the people's business. It has created even more uncertainty in an already difficult environment.

Twice House Republicans have taken action to replace sequestration with common sense cuts and reforms. Unfortunately, the president has failed to offer his own proposal that will help control runaway spending and get this economy moving again. With our nation fast approaching $17 trillion in debt and more than 12 million Americans searching for work, the time for leadership is now.

As we eagerly await the president's plan, we have a responsibility to examine the impact of sequestration on policies within our jurisdiction. The committee's continued oversight of the Worker Adjustment and Retraining Notification or WARN Act is part of that effort.

Congress approved the WARN Act to help workers plan for possible job losses, as well as allow them time to assess various employment services provided by the states and federal government. The law requires employers with more than 100 employees to give workers 60 days notice of mass layoffs or plant closings. A legal notice must include specific details, including the expected date of the first layoffs and the job titles that will be affected.

The law also includes provisions for conditional notices, as well as exceptional circumstances when an employer wouldn't be required to issue a 60-day notice. Employers who fail to provide proper notices can be sued in federal court, liable for back wages and benefits, and be forced to pay monetary penalties.

Numerous federal contractors have advised Congress that sequestration may lead to layoffs in their workplaces. As job losses become more eminent, employers have legal responsibilities they must follow. While there are longstanding concerns with the act, it is a law, a law of the land. Political shenanigans should not interfere with an employer's obligation to follow the law or the Labor Department's role in administering the law.

However, last summer the Obama administration managed to inject even more uncertainty into sequestration. On July 30, the department released guidance that states the WARN Act does not apply to sequestration and instructed employers not to issue notices. The department's guidance raises a number of concerns.

First, the guidance contradicts current regulations that encourage employers to provide as much notice as possible, even when they are uncertain which jobs will be cut and when. And while the law creates an exemption for unexpected circumstances, to be legally protected employers must still issue notices as soon as layoffs are reasonably foreseeable.

Additionally, the department has no enforcement authority over the WARN Act. Federal judges are responsible for enforcing the law and they ultimately decide through costly litigation whether an employer complied with the law.

Finally, the guidance creates the impression that employers who follow the administration's opinion will be immune from future litigation. Nothing could be further from the truth. If a worker feels they have been denied proper notice, they have every right to take their employer to court.

Perhaps this explains why the Office of Management and Budget explicitly promised to use taxpayer's dollars to cover the legal expenses an employer might face for failing to warn workers of future layoffs. That is right, the Obama administration is telling employers to ignore the law and forcing taxpayers to pick up the tab.

Assistant Secretary Oates, these are important concerns, and I am sure you feel the same way, concerns that require a serious response. I am disappointed. The administration has refused to cooperate in good faith with this committee's oversight investigation into this matter.

Providing over 400 pages of materials that were slipped under a door in the middle of the night, last night, before a congressional hearing, when those materials were first requested 6 months ago is really an insult to this committee. Congress deserves better. Americans, America's workers, employers, and taxpayers deserve better. It is time we got answers to the questions we have been asking, and I hope today will be that opportunity.

Again, I would like to thank our witnesses for joining us. And I will now recognize my distinguished colleague Joe Courtney, the senior Democratic member of the subcommittee, for his opening remarks.

[The statement of Chairman Walberg follows:]

Prepared Statement of Hon. Tim Walberg, Chairman, Subcommittee on Workforce Protections

Good morning and welcome to the first hearing of the Workforce Protections Subcommittee in the 113th Congress. I'd like to welcome our members and thank our witnesses for being with us today. I'd like to extend a special good morning to Assistant Secretary Oates. Thank you for participating in today's hearing.

Finally, I would like to recognize our colleague from Connecticut, Joe Courtney, who has taken on the role as senior Democratic member for the 113th Congress. I look forward to working together over the next two years.

As part of the Budget Control Act of 2011, President Obama insisted on a process known as sequestration, a series of across the board spending cuts that will impact most defense and domestic programs. Sequestration is not how Washington should conduct the people's business. It has created even more uncertainty in an already difficult environment.

Twice House Republicans have taken action to replace sequestration with commonsense cuts and reforms. Unfortunately, the president has failed to offer his own proposal that will help control runaway spending and get this economy moving again. With our nation fast approaching $17 trillion in debt and more than 12 million Americans searching for work, the time for leadership is now.

As we eagerly await the president's plan, we have a responsibility to examine the impact of sequestration on policies within our jurisdiction. The committee's continued oversight of the Worker Adjustment and Retraining Notification (WARN) Act is part of that effort.

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ployers who fail to provide proper notices can be sued in federal court, liable for back wages and benefits, and be forced to pay monetary penalties.

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However, last summer the Obama administration managed to inject even more uncertainty into sequestration. On July 30, the department released guidance that states the WARN Act does not apply to sequestration and instructed employers not to issue notices. The department's guidance raises a number of concerns.

First, the guidance contradicts current regulations that encourage employers to provide as much notice as possible, even when they are uncertain which jobs will be cut and when. And while the law creates an exemption for unexpected circumstances, to be legally protected employers must still issue notices as soon as layoffs are reasonably foreseeable.

Additionally, the department has no enforcement authority over the WARN Act. Federal judges are responsible for enforcing the law and they ultimately decide through costly litigation whether an employer complied with the law.

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Perhaps this explains why the Office of Management and Budget explicitly promised to use taxpayer dollars to cover the legal expenses an employer might face for failing to warn workers of future layoffs. That's right: the Obama administration is telling employers to ignore the law and forcing taxpayers to pick up the tab.

Assistant Secretary Oates, these are important concerns that require a serious response. I am disappointed the administration has refused to cooperate in good faith with this committee's oversight investigation into this matter. Providing over 400 pages of materials that were slipped under a door in the middle of the night before a congressional hearing—when those materials were first requested six months ago—is an insult to this committee. Congress deserves better. America's workers, employers, and taxpayers deserve better. It is time we got answers to the questions we've been asking.

Again, I'd like to thank our witnesses for joining us, and I will now recognize my distinguished colleague Joe Courtney, the senior Democratic member of the subcommittee, for his opening remarks.

Mr. COURTNEY. Well, first of all, thank you, Chairman Walberg, for convening this hearing. Thank you for your kind words this morning.

The two of us entered Congress together in 2006, and who knew that a short time later we would again be able to help lead one of, in my opinion, the most important subcommittees in Congress, which is about making sure that people who get up to work every day come home safe and sound and are able to actually support their families. And again, I look forward to working with you.

We had a good meeting this morning to talk about our mutual end goal here, our mutual mission, which is to actually make this subcommittee produce real results and hopefully not just degenerate into a debate club. So again, thank you again, for your nice words. And I look forward to working with you.

And I want to thank the panel for coming here this morning as well; again, just a stellar background and credentials to have this important discussion here. And again, I think this topic of sequestration is probably the most critical facing our country in the near term.

Yesterday my other committee, the House Armed Services Committee, held a hearing with the Joint Chiefs, the general who is in

charge of the National Guard. There were 27 stars on the witnesses that were there. So, you know that is tough to match.

However, I am sure you are going to be just as informative today as they—as these amazing individuals who serve our country. And frankly the message they conveyed in terms of sequestration is impact, aside from the issue that we are talking about today. I mean we are talking about an immediate damage to the military readiness of this country.

The Navy cancelled an aircraft carrier mission to the Middle East, which is going to provide critical support for our troops in terms of air cover. Making sure that the Strait of Hormuz is kept clear for, again, 20 percent of the world's oil supply.

This is an issue which we must deal with immediately. And frankly, I am quite disappointed that we are not in session next week. Our work schedule, frankly, does not match the gravity of the challenge that our country faces right now. And again, hopefully maybe this hearing will help the cause in terms of trying to get really what I think is the real solution to this problem, which is to make sure that we come up with a deficit reduction plan that hits the target of the Budget Control Act.

I would like to point out that when the Budget Control Act was passed in August of 2011 it was negotiated between the White House and the Republican House leadership and the Senate Democratic leadership. Speaker Boehner, after the vote, said that he got 98 percent of what he was looking for; not 50 percent, not just the part beside sequestration, but 98 percent of what his caucus and what his party was looking for.

So, the fact of the matter is sequestration is something that both sides have their skin in the game, and frankly both sides need to solve. And I think if you look at the true legislative history, as long as we are talking about history this morning, of sequestration, what we actually did in August of 2011 was incorporate the 1985 sequestration statute, Gramm-Rudman, and just basically update the measure to this era that we are living in right now.

The structure of sequestration is identical to the one that was passed in 1985 by—led by Gramm and Rudman. And I think if you go back and read Senator Gramm's comments about what the legislative intent of sequestration was when they passed it, he says it is very clear. It was never the objective of Gramm-Rudman to trigger sequester. The objective of Gramm-Rudman was to have the threat of sequester force compromise and action.

So, again, the—and if you look at what happened in the wake of 1985, again very difficult moments occurred in terms of coming up right to the edge of having that chainsaw go through the government. But cooler heads prevailed. People did their job. They sat down and negotiated and compromised, and they came up with a result.

And if you look at, again, at the fiscal cliff bill that passed on January 1st, just a few days ago, we delayed sequester by 2 months. And how did we do it? We paid for it with a mixture of revenue that was 50 percent of the pay for and 50 percent were cuts. And that in fact is precisely the same Da Vinci Code, the same formula that was used by the Congress, by our predecessors

to avoid having, again, a devastating impact on our national security and on domestic priorities that are so critical to our country.

Sequestration would be a disaster for this country in terms of having, again, an indiscriminate mechanism go through the domestic budgets and national security budgets of this country. And again, that should be our priority here today.

Lastly, I would just say coming from a district where the largest manufacturer is Electric Boat, 9,000 employees. They have one customer, the U.S. Navy. And sitting on the Seapower Subcommittee we were following this WARN notice issue like a box score because it affected, again, thousands of people who live in southeastern Connecticut.

And I would just say this. I think the undersecretary got it right. The fact of the matter is, is that procurement for programs like submarines, which take 5 years to build, or aircraft carriers, which from start to finish are 10 to 15 years. The fact of the matter is the funding supply is procured over a period of years.

So, even if sequestration did go into effect on January 1st, but it did not thank God, the fact of the matter is, is that the obligation of funds, procurement of funds for programs like the Virginia-class submarine program or the Ohio replacement program or the carrier program that is being built in Virginia. Those funds are already well into the system so that the contracting officers who have to deal with these defense venders—I mean they are not going to turn the switch off on day one. It does not happen all on one day all at once.

Again, I don't want to minimize the damage it would do in terms of having a real horizon down the road. But the idea that it would trigger something as immediate as a WARN Act notice, frankly is a notion completely divorced from the reality of how contracting actually takes place with defense contractors.

And this is right in my wheelhouse. My nickname in Congress is "Two-Subs Joe" because we got the shipbuilding program enlarged over the last 2 years to get to two subs a year.

So, I mean we follow this thing not just like a box score, but really microscopically. And the notion that that employer was obligated to have a mass blanket WARN notice, frankly, is just completely disconnected from the reality of how they hire and how they build programs that take years to complete from start to finish.

So, again, I am looking forward to having this hearing today flush out some of these issues in terms of the real mechanics of what triggers a human resource officer to comply with the WARN notice. And again I look forward to your testimony and your answers to our questions.

Thank you, Mr. Chairman. I yield back.

[The statement of Mr. Courtney follows:]

Prepared Statement of Hon. Joe Courtney, Ranking Member, Subcommittee on Workforce Protections

I want to thank all of our witnesses for coming to share their experience and expertise on the Worker Adjustment Retraining Notification Act (WARN) and, in particular, the responsibilities of our nation's employers under this law in the context of sequestration.

Since 1988, the WARN Act has ensured the protection of our workers by requiring covered employers to provide affected workers with notices of impending plant closings and mass layoffs 60 days before they occur. The law ensures that employees

are given a sufficient amount of time to seek and obtain alternative employment. Issuing a WARN notice also triggers rapid response from state departments of labor and unlocks worker retraining funds and other resources.

Last summer, the applicability of WARN Act requirements relative to the impacts of sequestration become a hot topic ahead of the then-looming trigger date of January 2, 2013. To clarify the WARN obligations of employers in anticipation of sequestration, the Department of Labor issued guidance indicating that such notifications were not required under the law and, in many ways, contrary to the law's intent to provide specific, detailed and accurate information to affected employees. The Department's guidance—issued under their longstanding practice to provide information guidance on laws and regulations under the department's purview—concluded that the law's unforeseeable business circumstance exemption applied in the case of sequestration.

Much has been said about this guidance, and no doubt we will hear from some of our witnesses today why they believe the Department's guidance on this matter was not in line with their interpretation of the law. However, with the new sequester deadline of March 1, 2013 rapidly approaching just fourteen days from today, the truth is that little has changed since the Department issued their July guidance.

While sequestration appears more likely to be triggered today than it did last summer, I believe there remains bipartisan interest in both chambers of Congress to avoid these broad and indiscriminate cuts to our federal budget. And, in reality, the specific impacts of sequestration on particular programs, projects and contracts still remains to be seen—in the case of defense contracts, for example, it may take several months or even years before the actual impact of budget cuts from sequestration will be felt. Many other factors, such as the calculation of unobligated balances, adjustments to contract terms and timing and potential flexibility in a company to readjust their workforce between government and private work, could potentially be at play here.

As such, broad notices are inappropriate until such time that more detailed information is known about specific impacts to contracts and projects—and their resulting impact on a company's workforce—should this process be triggered. Until then, the uninformed uncertainty and consternation—as well as the use of limited retraining dollars and resources by already cash-strained states—that is triggered by WARN notices would be premature and counterproductive.

The reality is that the uncertainty surrounding sequestration is being felt now. On January 30, the U.S. Department of Commerce reported that gross domestic product fell at a 0.1-percent annual rate in the fourth quarter of 2012, down from three-percent growth in the quarter before. The sudden dip is due to uncertainty caused by the threat of sequestration. This uncertainty caused a drop in the defense sector, which fell at an alarming 22.2-percent annual rate in the quarter. Although personal consumption expenditures rose at a 2.2-percent rate, business spending on equipment and software rose at a 12.4-percent rate, and housing investment rose at a 15.4 percent clip, strong performances in those sectors were not enough to offset a severe slowdown in defense spending as the Pentagon and defense firms gird for sequestration.

As we are all too well aware, the impact of sequestration goes well beyond the defense sector. For instance, more than 2,700 would see their Title I education funds cut at a time when local school systems are strained more than ever to provide our schools with the resources they need. Cuts to IDEA and special education programs would eliminate federal support for more than 7,200 teachers and staff who work each and every day to support children with disabilities. And, more than 70,000 Head Start and Early Start students would have their early education reduced or eliminated. From food safety to economic development, law enforcement to supporting those struggling to make ends meet, sequestration's impacts will be felt far and wide in nearly every aspect of our economy.

Let us remember that sequester was not a new concept that was thought up in the summer of 2011; this mechanism was first authorized 27 years ago by the bipartisan Balanced Budget and Emergency Deficit Control Act of 1985 (commonly known as the Gramm-Rudman-Hollings Act). Notably, Senator Phil Gramm, one of the authors of the 1985 sequester law, told the Senate Finance Committee in 2011 that "It was never the objective of Gramm-Rudman to trigger the sequester; the objective of Gramm-Rudman was to have the threat of the sequester force compromise and action."

The single more important thing that this Congress can do right now to provide employers and employees with the certainty they need is to come together to pass a balanced and bipartisan agreement to ward off the looming trigger of sequestration. It is my sincere hope that this Congress can once again make the compromises and take the action necessary to provide our employers with the certainty they need

and avoid the self-inflicted damage to our economy that we have within our power to prevent.

Chairman WALBERG. I thank the gentleman.

Pursuant to committee Rule 7(c), all members will be permitted to submit written statements to be included in the permanent hearing record. And without objection the hearing record will remain open for 14 days to allow statements, questions for the record and other extraneous material referenced during the hearing to be submitted into the official record.

It is now my pleasure to introduce formally our distinguished panel of witnesses.

First, the Honorable Jane Oates is the Assistant Secretary for the Employment and Training Administration at the U.S. Department of Labor.

Our second is Mr. Kerry Notestine—I hope I got that right, who is a shareholder and co-chair of the Business Restructuring Practice Group at Littler Mendelson law firm in Houston Texas. Welcome.

Mr. Thomas Gies is a partner and founding member of the Labor and Employment Law Group at Crowell & Moring law firm in Washington, D.C. Welcome.

Mr. Ross Eisenbrey is the vice president at the Economic Policy Institute in Washington, D.C. And I would say Go Blue to you as well.

Ms. Diana Furchtgott-Roth is senior fellow at the Manhattan Institute for Policy Research in Washington, D.C.

Thank you all for being here. None of you are novices at that table. You know the lighting system, the 5-minute process, the warning yellow light that comes on, and then our appreciation when you keep as close to that 5-minute time period as possible. And we will attempt to keep ourselves to the 5-minute time period as closely as possible as members also.

So, having said all of that, Undersecretary Oates, thank you again for being here, and we would appreciate your comments now.

Is the microphone on there?

STATEMENT OF HON. JANE OATES, ASSISTANT SECRETARY, EMPLOYMENT AND TRAINING ADMINISTRATION, U.S. DEPARTMENT OF LABOR

Ms. OATES. Oh. There it is. I am sorry. As a former ninth grade teacher I did not want to bellow at you. I am sorry.

Good morning. I appreciate the opportunity to discuss the Department of Labor's June 30th guidance to the State Dislocated Worker Units on whether as of that date the possibility of a January 2, 2013 sequestration would trigger the advance notice requirements of the Worker Adjustment and Retraining Notification Act, the WARN Act.

The WARN Act was enacted in 1988, and many of you know the history better than I, with wide bipartisan support. The law provides protection to workers, their families and their communities by requiring employers subject to certain exceptions to give workers or their representatives 60 days advanced notice of plant closings and mass layoffs. Employers are also required to give notice

to local government and State Dislocated Worker Units so that workers can promptly receive the appropriate assistance that they may need.

The Department of Labor does not enforce the WARN Act, as you said, Mr. Chairman. That is left up to private parties and the courts. We do, however, have statutory authority to issue regulations, which we did soon after the law took effect in 1988.

Our objective in issuing those rules was to articulate clear principles and guidelines that could be applied in specific circumstances. These regulations require WARN Act notices to contain specific information. These requirements are consistent with the WARN Act's primary purpose, which is to give specific workers who are likely to lose their jobs a period of time in which they can find new work or make other arrangements, and can obtain assistance from the state and local workforce programs.

These requirements are also consistent with the notion that advanced notice should not be provided to workers who are not likely to be affected. As the regulation's preamble explains, it is not appropriate for an employer to provide a blanket notice to workers.

At the time we issued the regulations, the department recognized that the rules could not address every advance notice issue that might arise under the WARN Act. We have supplemented over time those regulations with less formal guidance to help State Dislocated Worker Units and employers carryout the law is important purpose.

For example, we have a special Web site for the WARN Act that has compliance assistance materials containing, among other things, a worker's guide, an employer's guide and a fact sheet. Another type of informal guidance we frequently provide the states across our issues in ETA is our training and employment guidance letter known as TEGLs. Everything has an acronym.

These advisories provide direction and information on procedural, administrative, management and program issues. One such issue arose last spring when Congress, state workforce agencies and others began asking whether the possibility of the sequestration was a sufficient predicate to require federal contractors to issue WARN notices.

To provide clarity to state workforce agencies and others, the department issued a TEGL. The TEGL summarized the relevant WARN framework and reiterated a straightforward principle that a blanket notice is neither appropriate nor legally sufficient under the WARN Act.

It also explained that because the law requires notice only for the specific employees who may reasonably be expected to experience an unemployment situation as a result of a plant closing or mass layoff, employers have no WARN Act notice obligation when particular employment losses are speculative.

The TEGL then applied the WARN Act framework to the potential sequester on January 2, 2013. At the time the TEGL was issued, members of Congress and the administration had both indicated that their goal was to avoid sequestration. So the TEGL explained that the occurrence of sequestration was not necessarily foreseeable.

In addition, the OMB had not directed federal agencies to begin planning for how they would operate in the event of sequestration. Agencies had not announced which contracts would be affected by sequestration should it occur. The TEGL stated that in the absence of additional information any potential plant closing or layoff that might come about through a sequestration-related contract termination or cutbacks were speculative and unforeseeable.

WARN Act notices, the TEGL concluded, were not required 60 days in advance of January 2, 2013. The TEGL also makes clear that the prospect of sequestration was part of a dynamic process, and that additional information would make the possibility of plant closings or layoffs less speculative and more foreseeable.

It is important to keep in mind that a TEGL is an interpretative aid for state workforce agencies and their administrators and liaisons who on a daily basis field questions from federal contractors and help workers who are dislocated by plant closings and mass layoffs. The TEGL does not suggest that federal contractors don't need to take the WARN Act into account when considering the consequences of a possible sequestration.

The department is committed to help ensure that WARN Act notices are provided in appropriate circumstances. However, providing WARN notices to workers who are not likely to lose their job can unnecessarily disrupt their lives, be disruptive for the employers because very important employees could choose to leave their job. And it also wastes government resources by forcing the state workforce agencies to kick in with rapid response efforts. These are serious situations that should be avoided.

Let me close by saying that our analysis and guidance regarding the WARN Act's application to sequestration was and is correct. And workers and the state workforce system have all been well served as a result of the TEGL. Funds were not sequestered on January 2, 2013, nor were contracts terminated, plants shuttered, or to our knowledge unnecessary advanced notices sent. Just as important, lives and businesses were not disrupted unnecessarily, and resources were not wasted.

Thank you for inviting me, and I look forward to your questions.

[The statement of Ms. Oates follows:]

STATEMENT OF
JANE OATES
ASSISTANT SECRETARY
EMPLOYMENT AND TRAINING ADMINISTRATION
U.S. DEPARTMENT OF LABOR
BEFORE THE
SUBCOMMITTEE ON WORKFORCE PROTECTIONS
COMMITTEE ON EDUCATION AND THE WORKFORCE
UNITED STATES HOUSE OF REPRESENTATIVES
February 14, 2012

Good morning, Chairman Walberg, Ranking Member Courtney, and Members of the Subcommittee. I appreciate the opportunity to discuss the Department of Labor's July 30, 2012 guidance to State Dislocated Worker Units on whether, as of that date, the possibility of a January 2, 2013 sequestration would trigger the advance notice requirements of the Worker Adjustment and Retraining Notification (WARN) Act.

The WARN Act was enacted in 1988 with wide, bipartisan support. The law provides protection to workers, their families, and their communities by requiring employers – subject to certain exceptions – to give workers or their representatives 60 days' advance notice of plant closings and mass layoffs. Employers also are required to give notice to local government officials and to State Dislocated Worker Units, so that workers can promptly receive appropriate assistance.

As Representative Robert Garcia explained during the final debates on passage of the WARN Act in 1988, this legislation was fair to both workers and businesses. It was fair to workers, he said, because they deserved more than a day or two of notice of impending closings and layoffs. And it was fair to businesses, he said, because the legislation recognized that companies may not be able to give the full measure of required advance notice if a plant closing

or mass layoff results from circumstances that cannot reasonably be anticipated. Twenty-five years later, Representative Garcia's words continue to resonate.

The Department of Labor does not enforce the WARN Act – that's left up to private parties. We do, however, have statutory authority to issue regulations, which we did soon after the law took effect. Our objective in issuing those rules was to articulate clear principles and guidelines that could be applied in specific circumstances.

These regulations require WARN Act notices to contain specific information. For example, notices to State Dislocated Worker Units must include:

- The name and address of the employment site where the plant closing or layoff will occur;
- A statement as to whether the planned action is expected to be permanent or temporary;
- The expected date of the first separation and the anticipated schedule for making separations;
- The job titles of positions to be affected; and
- The number of affected employees in each job classification.

These requirements are consistent with the WARN Act's primary purpose, which is to give specific workers who are likely to lose their jobs a period of time in which they can find new work or make other arrangements, and can obtain assistance from State and local workforce programs. These requirements are also consistent with the notion that advance notice should not be provided to workers who are not likely to be affected. As the regulation's preamble explains, "it is not appropriate for an employer to provide a blanket notice to workers."

At the time we issued the regulations we recognized that our rules could not address every advance notice issue that might arise under the WARN Act. We have supplemented these regulations with less formal guidance to help State Dislocated Worker Units and employers carry out the law's important purposes. For example, we have a special website for WARN Act compliance assistance materials [www.doleta.gov/layoff/warn.cfm], which contains, among other things, a Worker's Guide, an Employer's Guide, a WARN Fact Sheet, and a set of Frequently Asked Questions and Answers.

Another type of informal guidance we frequently provide to State Workforce Agencies is our Training and Employment Guidance Letters, known as TEGLs. These advisories provide the Department's interpretations of Federal requirements, and they provide direction and information on procedural, administrative, management, and program issues that may arise within the workforce system.

One such issue arose last Spring, when Congress, State Workforce Agencies, the press, government contractors, other Federal agencies, and lawyers began asking whether the possibility of the sequestration on January 2, 2013, mandated by the Balanced Budget and Emergency Deficit Control Act of 1985 (BBEDCA), as amended by the Budget Control Act of 2011 (BCA), was a sufficient predicate to require federal contractors to issue WARN Act notices. To answer this legal question and provide clarity to State Workforce Agencies and other interested parties, the Department issued a TEGL.

The TEGL first summarized the relevant WARN Act framework, reiterating the straightforward principle – reflected in the legislative history and the preamble to the regulations – that a blanket notice is neither appropriate nor legally sufficient under the WARN Act. It also explained that, because the law requires notice only for the specific employees who may

reasonably be expected to experience an employment loss as a result of a plant closing or mass layoff, employers have no WARN Act notice obligations when particular employment losses are speculative.

The TEGL then applied (as of July 2012) the WARN Act framework to the potential sequester on January 2, 2013. At the time the TEGL was issued, Members of Congress and the Administration had indicated that their goal was to avoid sequestration, so the TEGL explained that the occurrence of sequestration was not necessarily foreseeable. In addition, the Office of Management and Budget had not directed Federal agencies to begin planning for how they would operate in the event of sequestration, given that such planning, once undertaken, would necessarily divert scarce resources from other important agency activities and priorities. And those same agencies – each of which had some discretion over how to implement any sequestration-related reductions – had not announced which contracts would be affected by sequestration should it occur. Taking into account each of these facts, the TEGL stated that, in the absence of additional information, any potential plant closings or layoffs that might come about through sequestration-related contract terminations or cutbacks were speculative and unforeseeable. WARN Act notices, the TEGL concluded, were not required 60 days in advance of January 2, 2013.

The TEGL also makes clear, though, that the prospect of sequestration was part of a dynamic, ongoing process, and that additional information – such as specific information as to how an agency will implement sequestration – would make the possibility of plant closings or layoffs less speculative and more foreseeable. In that event, employers may be required to provide notice even if it were not possible to give it for the full 60-day period.

It is important to keep in mind that a Training and Employment Guidance Letter is an interpretive aid for State Workforce Agencies and their administrators and liaisons who, on a daily basis, field questions from federal contractors and help workers who are dislocated by plant closings and mass layoffs. The TEGL does not suggest that federal contractors do not need to take the WARN Act into account when considering the consequences of a possible sequestration.

The Labor Department's role under the WARN Act is a modest but important one. WARN Act notices serve an extremely important purpose, and the Department is committed to helping ensure that they are provided in appropriate circumstances, through our regulations and guidance. But we also recognize that WARN Act notices cannot be taken lightly. Providing such notice to workers who are not likely to lose their jobs can have at least three unfortunate consequences:

- It can unnecessarily disrupt the lives of workers and their families;
- It can be disruptive for employers because they risk losing workers who, fearing the immediate loss of work, might look for and find other jobs; and
- It can waste government resources by forcing State Dislocated Worker Units to provide rapid response activities to individuals who do not actually need them.

These are serious consequences that should be avoided. As the Department has previously observed, Congress in enacting the WARN Act did not intend for employers to provide overbroad notice.

Let me close by saying that our analysis and guidance regarding the WARN Act's application to sequestration was and is correct, and workers and the State Workforce System have been well served as a result. Funds were not sequestered on January 2, 2013; nor were contracts terminated, plants shuttered, or, to our knowledge, unnecessary advance notices sent.

Just as important, lives and businesses were not disrupted unnecessarily and resources were not wasted.

Thank you for the opportunity to discuss our guidance. I welcome any questions you may have.

Chairman WALBERG. Mr. Notestine.

STATEMENT OF KERRY NOTESTINE, SHAREHOLDER, LITTLER MENDELSON

Mr. NOTESTINE. Thank you, Chairman Walberg, Ranking Member Courtney, members of the subcommittee.

My name is Kerry Notestine. I am a shareholder in the Houston office of Littler Mendelson, the nation's largest law firm exclusively devoted to representing management in employment matters. I want to focus my time with you today on the uncertainty regarding employers' obligations to comply with the Worker Adjustment and

Retraining Notification Act, or WARN, in response to the potential upcoming sequestration.

As you may know, the WARN Act requires certain employers to provide their employees and government entities with 60-days advanced notice of mass layoff or plant closings, and subjects those who fail to provide notice with harsh penalties, including 60 days back pay plus benefits to affected employees, $500-a-day penalties to local government where the event occurred, and attorney's fees and litigation.

WARN was enacted with workers in mind. The express purpose of the act is to provide workers and their families advance notice of potential job losses in order to give them time to adjust to the prospective loss of employment, seek and obtain alternative jobs, and, if necessary, enter skills training or retraining that will allow them to successfully compete in the job market. For this reason in the past the Department of Labor consistently has advocated employers should provide as much notice as possible for WARN events.

Even President Obama while in the Senate advocated broadening the requirements of WARN to prevent employers from using what he called loopholes in the act to withhold notice. Specifically, in May 2008 at a hearing of a Senate Committee on Health, Education, Labor and Pensions, then-Senator Obama gave a prepared statement urging employers to provide as much notice as possible, even in ambiguous situations, stating that workers in their communities have the right to know when they are facing a serious risk of plant closing.

The upcoming sequestration arguably imposes just such a risk on thousands of federal contractors, subcontractors and their employees. Nevertheless, the Department of Labor in its July 30, 2012 guidance addressing federal contractor obligation under WARN, is taking a very different position than years' past. Advocating that contractors should provide no notice in advance of sequestration due to the uncertainty regarding whether those automatic cuts will take place at all, and if they do, when and where those spending cuts will occur.

According to the Department of Labor, such uncertainty provides contractors with a statutory exception from complying with WARN, that is the unforeseen business circumstances exception. The OMB subsequently released its own guidance indicating that federal contractors who heed the Department of Labor's advice will be permitted to recover their liability and litigation costs from the contracting agencies.

While the Department of Labor and OMB guidance appear to benefit employers by potentially relieving them of obligations under WARN, I would note that they appear to do so at the expense of thousands of employees who, as President Obama put it, deserve to know when their jobs are in jeopardy.

Additionally, circumstances have changed since the DOL issued its opinion 6 months ago. Sequestration appears more likely to occur this time around. And new information is coming out every day regarding where the government will be implementing these cuts. The chances of employers successfully claiming that layoffs and plant closings are unforeseeable are diminishing every day.

Finally, DOL and OMB guidance failed to disclose three key points that employers need to know when considering their obligations under WARN.

First, they fail to disclose that the DOL's guidance is not binding on federal courts, those entities that are responsible for enforcing the act. We cannot say what about of deference, if any, a court will give the DOL's opinion in this matter, and it is therefore entirely possible that a contractor will heed the DOL's opinion only to find that a federal court disagrees and subjects it to significant liability.

Second, they failed to mention that employers must give as much notice as possible once the layoff or closure becomes reasonably foreseeable. And along with that notice they must provide a brief statement explaining the reason for reducing the notification period. Importantly, without this additional statement, the statutory exception relied upon by the DOL becomes unavailable.

Third, they failed to mention that notwithstanding federal WARN there are numerous other potential areas of liability that a contractor may be subjecting itself to by failing to provide notice. For instance, many states have their own mini-WARN statutes that contain different eligibility requirements and notice periods. Some states, like California and New Jersey for example, don't include in their statute an exception for unforeseen business circumstances.

Additionally, employers may have contractual notice obligations under collective bargaining agreements or individual employment agreements. DOL and OMB fail to mention any of these potential liability areas, leaving employers uncertain about their responsibilities.

More importantly, these three critical omissions may have some—leave some contractors with the mistaken belief that by following DOL's guidance they are free from potential liability; a fact, which I have described is not the case.

Chairman Walberg, Ranking Member Courtney, I thank you again for inviting me. I am happy to answer any questions that you have.

[The statement of Mr. Notestine follows:]

Prepared Statement of Kerry E Notestine, Esq.,
Littler Mendelson, P.C.

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

I. Executive Summary

With the January 1, 2013 passage of the American Taxpayer Relief Act of 2012, Congress addressed the expiration of the Bush-era tax cuts, but delayed resolution of the automatic spending cuts known as "sequestration." Defense and other federal contractors stand to be significantly impacted by massive budget cuts that, by virtue of the new law, are now scheduled to begin on March 1, 2013, unless Congress acts before then. If the sequestration of federal funds occurs, affected employers face potentially dramatic cuts in federal contracts and, as a possible result, may need to implement significant furloughs or layoffs, or even close some facilities. The prospect of sudden and dramatic downsizing raises important employment law concerns, including the requirement under the Worker Adjustment and Retraining Notification (WARN) Act that employers provide employees 60 days' advance notice of certain mass layoffs and plant closings, or face significant penalties.

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

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

II. Introduction

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

III. Sequestration

The Balanced Budget and Emergency Deficit Control Act of 1985 (BBEDCA), as amended by the Budget Control Act of 2011 (BCA), 2 U.S.C. 901a(7)(A) and (8), required that, in the event the Joint Select Committee on Deficit Reduction (i.e., Super Committee) failed to produce deficit reduction legislation with at least $1.2 trillion in cuts, then Congress could grant a $1.2 trillion increase in the debt ceiling, but this would trigger across-the-board cuts in both mandatory and discretionary spending by reducing both non-exempt defense accounts and non-exempt non-defense accounts by a uniform percentage. Following the Super Committee's announcement on November 21, 2011 that it had failed to reach bipartisan agreement on deficit reduction legislation, sequestration became an apparent inevitability—set to automatically occur on January 2, 2013, unless Congress took action to avoid its effects. This deadline and the negotiations leading up to it became commonly referred to as the "fiscal cliff." However, with only one day remaining before reaching the

fiscal cliff, Congress passed the American Taxpayer Relief Act of 2012. Seen as a temporary resolution to the fiscal cliff, the act delayed the effects of sequestration until March 1, 2013.

IV. The WARN Act

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

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

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

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

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

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

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

V. DOL Guidance and the Unforeseeable Business Circumstances Exception

In response to these concerns, on July 30, 2012, the Department of Labor (DOL) issued its Training and Employment Guidance Letter No. 3-12, addressing the

WARN Act's requirements in the event of sequestration.[5] The DOL concluded that federal contractors were not required to provide WARN Act notices to potentially thousands of employees 60 days in advance of sequestration (which would have been on or about November 2, 2012) because of uncertainty about whether Congress would act to avoid sequestration and if they did not act, what effect the sequestration would have on particular governmental contacts.

A. Unforeseeable Business Circumstances

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

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

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

VI. What the DOL Guidance Doesn't Tell Employers

A. Additional Notice Requirements under the Unforeseeable Business Circumstances Exception

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

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

B. Authority of DOL to Issue Its Guidance

It is highly questionable whether the DOL even has authority to issue its Guidance in this instance. Indeed, the WARN regulations specifically provide that "[t]he Department of Labor has no legal standing in any enforcement action and, there-

fore, will not be in a position to issue advisory opinions of specific cases." 20 CFR § 639.1(d) (emphasis added). On the contrary, the regulations provide that the federal courts are the sole arbiters of WARN compliance and thus, the DOL's opinion is not binding on these courts. As a result, it is unclear what amount of deference, if any, a court would apply to such an opinion.

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

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

While the Department of Labor has no enforcement responsibility, the agency did promulgate regulations regarding WARN. See 20 CFR § 639. These regulations indicate that employers are encouraged, even when not required, to provide advance notice to employees about proposals to close a plant or significantly reduce a workforce. 20 CFR § 639.1. Furthermore, in its regulations, the Department of Labor concedes that the statute can be very vague when an attempt is made to apply WARN to a specific situation. The regulations read in part:

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

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

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

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

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

Indeed, the DOL Guidance appears to even contravene President Obama's assessment of what protections WARN should provide. On May 20, 2008, the Senate Committee on Health, Education, Labor and Pensions held a hearing examining plant closings and focusing on workers' rights and the WARN Act's 20th anniversary. During the hearing, a then-Senator Obama remarked on his days as a community organizer working on the south side of Chicago helping people in communities affected by steel plant closings get back on their feet. According to Senator Obama, one of the things he learned early on, and saw over and over again, was that "American workers who have committed themselves to their employers expect in return to be treated with a modicum of respect and fairness." He therefore reasoned that "failing to give workers fair warning of an upcoming plant closing ignores their need to prepare for the transition and deprives their community of the opportunity to help prevent the closing."[7] Furthermore, in his closing remarks, Senator Obama reasoned:

Workers and their communities have a right to know when they are facing a serious risk of a plant closing. Making that information available before the plant closes can, in the best case scenario, help communities come together to prevent the loss

and, in the worst case scenario, help workers and communities prepare for the difficult transition to come.

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

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

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

20 CFR § 639.7(a)(3). Similarly, courts reviewing this issue may ultimately determine that employers should have provided 60 days' conditional notice to employees in advance of the sequestration, stating that, in the event sequestration occurs and funding to a particular project is cut, the plant closing or mass layoff will occur on a projected date. Although the regulations state that the notice must be specific, they also provide that the notices must be based on the best information available at the time notice is given. 20 CFR § 639.7(a)(4). Thus, a court will look to the individual circumstances and what information the employer had available at the time to determine whether a "similarly situated employer in the exercise of commercially reasonable business judgment would have foreseen the closing." See Hotel Employees Int'l Union Local 54, 173 F.3d at 186 (3d Cir. 1999).

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

VIII. The OMB Guidance Only Raises Additional Questions

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

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

While the OMB Guidance appears to be aimed at reassuring employers by promising them indemnification against potential WARN-related liability, attorneys' fees and litigation costs in the event they follow the DOL Guidance by failing to issue WARN notices, the OMB Guidance may unintentionally be providing employers

false assurances that all liability and litigation costs will be covered. Specifically, Federal WARN is only one avenue amongst several that employees may take to challenge the results of a reduction-in-force and seek damages for failure to provide advance notice. Other areas of potential liability include state Mini-WARN laws and laws requiring advance notice of changes to employee pay and/or hours worked, as well as contractual obligations found in collective bargaining agreements and individual employment agreements. It is not clear whether and to what extent the OMB Guidance provides for indemnification of these potential liability areas.

A. State Mini-WARN Acts and Other State Law

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

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

Finally, where sequestration results in employee furloughs or reductions in employee hours and/or pay, there are other legal issues that an employer must consider. In furlough cases, it is advisable to provide advance notice to employees and have employees sign an agreement regarding the terms of the furlough. If the employer wishes the time to be unpaid, it should expressly inform employees, preferably in writing, not to do work while on the furlough.[9] Some state laws require advance notice of changes in pay (the longest being a 30-day advance notice obligation in Missouri), and it is unresolved whether placing employees on an unpaid furlough may trigger those notice obligations. Employers arguably may have an excuse for failing to provide required notice for reasons similar to those addressed above related to WARN obligations, but employers are advised to provide as much notice as possible to maintain defenses to these notice obligations.

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

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

B. Collective Bargaining and Contractual Agreements

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

C. How Will the Litigation Costs be Covered?

Other than stating that employee compensation costs, attorneys' fees and other litigation costs "would be covered by the contracting agency," the OMB Guidance provides very little actual guidance to employers regarding how the indemnification process will actually work. For instance, will the contracting agency be covering the costs of litigation from its inception? Or will it wait until the case is resolved and reimburse costs at that time? The former option raises questions regarding what level of input or oversight the contracting agency will have over the selection of legal counsel. For instance, will government attorneys be required, or will the employers be allowed to select their own outside counsel? Will the contracting agency pay whatever hourly rates legal counsel is charging or will the employer/attorneys be provided guidelines regarding what is "otherwise reasonable and allocable?" Additional questions are also raised regarding the level of input and oversight into the overall litigation strategy. For instance, will the contracting agency have any input into whether the employer seeks an early settlement or sees the litigation through to trial?

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

IX. Conclusion

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

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

ENDNOTES

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

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

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

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

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

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

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

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

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

Chairman WALBERG. Thank you.

Mr. Gies.

STATEMENT OF THOMAS GIES, PARTNER, CROWELL & MORING, LLP

Mr. GIES. Good morning, Chairman Walberg, Ranking Member Courtney and other distinguished members of the subcommittee. My name is Tom Gies. I am a partner with the Crowell & Moring law firm based here in Washington. And I thank you for the invitation to provide testimony this morning.

Many federal contractors are increasingly apprehensive as we get closer to March 1. This anxiety stems in part from ambiguities regarding their obligations under the WARN Act in light of the lack of clarity about the specific impacts of the looming sequester. The reality facing contractors today, particularly in the defense sector, is that the sequester calls into doubt both the availability of funding for future contract awards and the contracting agency's ability to continue funding under many existing contracts.

The Navy's cancellation of the A-12 fighter bomber program back in 1991 is a cautionary tale. Both McDonnell Douglas and General Dynamics had numerous discussions with the Navy over a several-month period. This led to several exchanges of proposals and communications, including employee communications issued by both contractors, prepared with an eye towards WARN compliance.

The upshot was that the Navy terminated the contracts with only a few days' notice. Both companies got sued for WARN violations. And neither was vindicated until they went all the way through costly trials and federal court.

Fast forward to March 1. Contractors will soon begin to get more specific information about the plans of contracting agencies regarding sequestration. We are aware that the military departments within DOD, for example, are currently preparing specific plans. But these plans are unlikely to identify particular contracts, options, task orders or other contract vehicles that the military de-

partments may terminate or elect not to proceed upon if sequestration were to occur.

Without more detail it is doubtful that any contractor can accurately predict today the specific impacts of sequestration on its business. But, as information becomes more—becomes available, contractors will have to begin making tougher decisions. Mindful of legal risks, many companies are likely to conclude they should begin providing some sort of notice within the next 2 weeks, or as soon as they learn of anything more specific.

Depending on specific government procurements, one can envision a subsequent wave of conditional notices as more information becomes available. These communications will cause significant disruption and confusion, both for employers and employees. Productivity will suffer as employees become increasingly anxious about job security.

There is the very real worry of a major league brain drain at some companies. Notwithstanding weaknesses in the overall labor market, in the technology sector competition remains fierce for highly talented and skilled employees like software design engineers.

The complexities of WARN compliance itself will add to the challenge facing many companies. Two examples should illustrate that problem. Counting the right number of employees who will be affected is often difficult. WARN has arcane aggregation rules requiring a company to consider, in some circumstances, other workforce reductions that took place before and after the particular planned event in order to determine whether the WARN targets have been met.

WARN likewise makes it difficult to determine, in some cases, whether a particular job loss impacts a single site of employment. The regulations and case law make razor fine distinctions in situations involving, for example, groups of structures that form a campus or an industrial park, or separate facilities across the street from each other. Because each company's situation is likely to be unique we can expect numerous lawsuits filed around the country against contractors accused of guessing wrong on a variety of WARN issues.

For many companies their decision about how to manage upcoming layoffs will be driven in part by the government's position on whether the costs associated with workforce reductions will be viewed as allowable costs, and thus reimbursed by the government. There is no definitive one-size-fits-all answer to the question of whether, in the event of sequestration, a contractor's costs of complying with the WARN Act or of defending against alleged violations of the statute would be deemed allowable by the contracting agency.

That said, a contractor's costs of complying with the WARN Act or of successfully defending its compliance with the statute would generally be deemed an allowable cost. The central question and the inevitable litigation will be the latest version of the old question of what did they know and when did they know it?

You have heard testimony about the guidance issued last year by the Department of Labor. By its terms that does not of course address the question of what a contractor should do after March 1.

And as we sit here today, many of even the most sophisticated federal contractors aren't sure about what to do.

Chairman Walberg, Ranking Member Courtney, I thank you again for inviting me to testify. I would be happy to answer any questions.

[The statement of Mr. Gies follows:]

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Statement of

Thomas P. Gies, Partner
Crowell & Moring LLP

Before the United States House of Representatives
Committee on Education and the Workforce
Subcommittee on Workforce Protections

Hearing

Sequestration: Examining Employers' WARN Act Responsibilities

February 14, 2013

Crowell & Moring LLP
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Telephone: (202) 624-2500
Facsimile: (202) 628-5116
www.crowell.com

Statement of

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Sequestration: Examining Employers' WARN Act Responsibilities

February 14, 2013

Good morning Chairman Walberg, Ranking Member Courtney and distinguished members of the subcommittee. My name is Tom Gies. I thank you for the invitation to provide this testimony about the practical problems sequestration will impose on federal government contractors in light of the WARN Act. I am a partner with Crowell & Moring LLP, based here in Washington. I have practiced labor and employment law for more than 35 years and have been with Crowell & Moring since 1983. Crowell & Moring has more than 500 lawyers in 11 cities. We have a national practice representing employers in addressing the full range of issues arising under labor, employment and employee benefits law. Our clients include a substantial number of government contractors across every major industry. Crowell & Moring's government contracts practice handles litigation, counseling, and transactional matters for many of this country's largest and most sophisticated contractors. My testimony reflects my own views of this subject, and I am not speaking on behalf of either the firm or any of our clients.

I. Summary of Relevant WARN Act Principles

The uncertainties facing federal contractors is best understood in context. The Worker Adjustment and Retraining Notification Act (WARN), enacted in 1988, obligates employers with 100 or more employees to give workers 60 days' notice before conducting either a plant closing or mass layoff. 29 U.S.C. § 2101 et seq. A plant closing is defined as a facility closure that results in an employment loss for 50 or more employees. A mass layoff is an employment loss for 500 employees, or 33% of the workforce, at a single site of employment.

The WARN Act and its implementing regulations promulgated by the Department of Labor define several terms that pose significant compliance issues with respect to the threatened sequester. They include: the determination of who is an affected employee (including the treatment of part-time employees); assessing the contours of a "single site" of employment; and what constitutes an "employment loss" for purposes of triggering WARN's obligations. WARN also contains detailed requirements regarding the content of the various notices required by the statute and the individuals and entities that are entitled to notice.

WARN provides that an employer failing to give timely notice is liable to terminated employees for back pay and benefits for each "day of violation," *i.e.*, each day during which the employee had not received the required notice, to a maximum of 60 days. 29 U.S.C. § 2104(a)(1)(A) & (B). Back pay liability may be offset by any wages or benefits paid to employees during the period of violation, and by any "voluntary and unconditional payment" by the employer to the employee that is not required by any legal obligation. WARN provides for a $500 a day penalty to be paid to the local government where the employment loss occurred. The statute also provides for attorneys' fees to prevailing parties in litigation under a standard that would rarely give contractors an opportunity to recover their defense costs. The Supreme Court has yet to decide whether there is a right to a jury trial in a WARN case, and lower courts are split on the issue. *Compare Bentley v. Arlee Home Fashions, Inc.*, 861 F. Supp. 65 (E.D. Ark. 1994) *with Bledsoe v. Emery Worldwide Airlines, Inc.*, 635 F.3d 836 (6th Cir. 2011), *cert. denied* 132 S. Ct. 114 (2011).

There are several exceptions to the WARN notice requirements. For purposes of this testimony, the most important exception is the provision that allows an employer to provide notice of less than 60 days in advance of a plant closing or mass layoff where the employment losses are caused by business circumstances not reasonably foreseeable. 29 U.S.C. § 2102(b)(2)(A). The reasonable foreseeability exception requires the employer to give notice as soon as practicable, along with a brief statement of the basis for reducing the notification period. 29 U.S.C. § 2102(b)(3).

WARN regulations define "reasonable foreseeability" as a situation where the employment loss is caused by "some sudden, dramatic, and unexpected action or condition outside the employer's control." 20 C.F.R. § 639.9(b)(1). Examples of such circumstances include a client's sudden and unexpected termination of a contract, a strike at a major supplier, unanticipated and dramatic economic downturn, or a government-ordered closing of an employment site that occurs without prior notice. *Id.*

The employer has the burden of proof as to the "reasonable foreseeability" standard. Courts evaluate the employer's conduct under a totality of the circumstances test, inquiring whether the employer exercised prudent business judgment in assessing its business prospects. *See, e.g., Watson v. Michigan Industrial Holdings*, 311 F.3d 760 (6th Cir. 2002)(key customer's cessation of payments and cancellation of contract on short notice was sudden and unexpected).

Resolution of litigation on this issue often turns on a very close analysis of the specific business threats facing the employer during the period in which it is considering whether to issue WARN notices. *See, e.g., United Steel Workers of America Local 2660 v. U.S. Steel Corp.*, Civil No. 09-2223 (JRT/LIB), 2011 WL 3609490 (D. Minn. Aug. 16, 2011). The court there granted

the employer's motion for summary judgment on the unforeseeable business circumstances defense, finding that the sudden economic downturn during the summer and autumn of 2008 was unforeseeable. In ruling for the employer, the court agreed with plaintiffs that the general economic downturn was well known 60 days prior to the date of the layoffs in that case. But the court concluded that the employer was not in a position to anticipate the dramatic decrease in demand from its automobile industry customers for steel that led to the layoffs, in part because of the uncertainties associated with the possibility of government intervention: "Given that [Defendant] was balancing the unprecedented high demand for steel and the possibility of the government bailout of the auto industry, the choice to delay plant closings [by idling blast furnaces] would not have raised the eyebrows of any prudent business person [i.e., the choice was commercially reasonable]." *Id.*

The practical problems facing contractors in today's environment are illustrated by the WARN litigation filed in the wake of the Defense Department's 1991 decision to cancel the A-12 fighter bomber program on short notice. That litigation, summarized below, demonstrates the challenges contractors will face in defending how and when they exercised business judgment on this issue. *See, e.g., Loehrer v. McDonnell Douglas Corp.*, 93 F.3d 1056 (8th Cir. 1996).

II. Other Related Legal Obligations

Several states have enacted what are called sometimes referred to as "mini-WARN" statutes. Some of them impose requirements in addition to those required by WARN.[1]

Unionized employers may face additional notice obligations as a result of provisions in collective bargaining agreements that may require a specific level of advance notice to the union representing employees covered by the agreement. Unions often negotiate these provisions in labor contracts in order to provide them with sufficient time to bargain with the employer about the effects of the proposed job loss, as required by Section 8 of the Labor Management Relations Act, 29 U.S.C. § 185(a)(5).

III. Where We Are Now

The threatened sequester has understandably raised significant concerns in the federal contracting community. At the most basic level, the threatened sequester calls into doubt the availability of future contract awards and agencies' ability to exercise options or issue task orders under existing contracts. Even at this late stage, there is no clear path forward. Contractors are dealing with many unknowable business and legal risks, including the question of how best to manage compliance with the WARN Act. Many factors have combined to create this uncertainty, including the requirements of the threatened sequester itself, and the lack of actionable detail as to how federal agencies intend to implement the sequester.

[1] For example, New York's statute requires 90 days advance notice in some circumstances. And California's statute requires advance notice of a mass layoff if it affects 50 employees at particular site, irrespective of the number of employees working at the facility. States with some version of mandatory advance notice or benefit continuation requirements include: California, Connecticut, Hawaii, Illinois, Kansas, Maine, Minnesota, Ohio, New Jersey, Pennsylvania, Tennessee and Wisconsin.

As the Committee is well aware, the sequester was enacted as part of the Budget Control Act of 2011 ("BCA").[2] In exchange for approving an increase in the U.S. debt ceiling, the BCA mandated that Congress enact legislation that would achieve $1.2 trillion in total budgetary savings by fiscal year ("FY") 2021. If no such legislation were enacted by certain deadlines, then $1.2 trillion in automatic cuts, equally divided between defense and nondefense budgetary categories, would begin on January 2, 2013. As enacted under the BCA, these cuts, *i.e.*, the sequester, would result in annual federal spending reductions of roughly $109 billion through FY2021. The American Taxpayer Relief Act of 2012 delayed the sequester by roughly two months, with these cuts now scheduled to begin on March 1, unless Congress further delays the effective date or passes an alternative deficit reduction package before that time.[3]

As things now stand, the greatest risk to contractors come March 1 involves new contracts that have not yet been awarded, options that have not yet been exercised, and task orders that have not yet been issued. This is because, for each of these contract vehicles, the funds would not yet be obligated when the sequester begins. As sequestration is implemented and agencies' funding levels are reduced, many agencies simply will not have sufficient funds to fully fund all of the projects, programs, and activities that were anticipated at the start of FY2013. Consequently, the threat of radical de-funding and associated job loss is greatest to those personnel who act under a contract that is subject to renewal, re-award, option exercise, or task order issuance after March 1, 2013.

This is not to suggest, however, that contract vehicles issued before March 1, are necessarily safe from the effects of sequestration. As a technical legal matter, the current guidance within the Executive Branch does not indicate that agencies would be legally *required* to terminate or retroactively adjust existing contractual commitments in order to meet the reduced funding levels that would be imposed under sequestration.[4] But as a practical matter, agencies may find it necessary or advantageous to do so. For instance, by terminating for convenience its low priority contracts now, an agency would be able to de-obligate the unspent FY2013 funds from those contracts. The agency could then apply those de-obligated funds toward the reduction targets that the agency must meet under sequestration. Alternatively, if such reductions have already been applied and if the agency's coffers are already running at a reduced level, it could apply those de-obligated funds to other, higher priority FY2013 contract actions for which sufficient funding is otherwise unavailable.

While these two scenarios show that different types of contract actions hold varying degrees of risk, nearly all likely scenarios are subject to considerable ambiguities. Unfortunately, none of the likely near-term options seem to involve disclosure of the concrete facts necessary for contracts to make an informed decision as to their WARN obligations. For instance, we are aware that the Military Departments, upon the direction of the Deputy Secretary of Defense, are currently preparing plans to address the budget uncertainties posed by the

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[2] P.L. 112-25 § 302, 125 Stat. 240 (2011).

[3] P.L. 112-240 § 901, 126 Stat. 2313 (2103).

[4] *See generally* Memorandum from Office of Management & Budget Deputy Director for Management Jeffrey Zientz, Subject: Planning for Uncertainty with Respect to Fiscal Year 2013 Budgetary Resources (Jan. 14, 2013); Memorandum from Deputy Secretary of Defense Ashton Carter, Subject: Handling Budgetary Uncertainty in Fiscal Year 2013 (Jan. 10, 2013) (hereinafter, "Carter Memo").

threatened sequester and the pending expiration of the FY13 Continuing Appropriations Act.[5] But even these plans – likely to be the most detailed sequestration implementation plans released to date – are unlikely to identify particular contracts, options, task orders, or other contract vehicles that the Military Departments may terminate or elect not to proceed upon if sequestration were to occur. To be sure, these plans are likely to exacerbate the anxiety level in many sectors of the contractor community, by confirming the general sense that significant cuts are forthcoming and that the specter of a contracting agency's termination for convenience is looming larger than before. But without more detail, it is doubtful that any contractor can currently predict with any degree of certainty the specific impacts of sequestration on its business, including the specific questions of which contractor's contracts (and at which locations) are likely to be affected at a level that would trigger WARN notices.

The next section of this testimony summarizes some of the specific issues that federal contractors will have to address in trying to minimizing both business and legal risk.

IV. Particular Uncertainties and Practical Problems

The following discussion of specific issues should be understood in context. In addition to protecting their business interests and managing legal risk, responsible companies want to do the right thing by their employees. Apart from litigation exposure, the current uncertainties present serious employee retention and morale issues for both contractors and employees.

A. WARN Compliance Issues

The WARN Act presents several difficult issues for many federal contractors facing sequestration, some of which are summarized below.

1. Aggregation of Multiple Employment Losses

WARN's notification provision is triggered if, within any 90-day period, there are "employment losses for 2 or more groups at a single site of employment, each of which is less than the [requisite] minimum number of employees . . . but which in the aggregate exceed that minimum number . . . ." 29 U.S.C. § 2102(d). This provision does not explicitly address whether one employment loss that is sufficient to trigger WARN's notification provision is aggregated with another employment loss that is insufficiently large to trigger the notification obligation.

Aggregation can often be a tricky problem for employers that have undergone a series of layoffs and other workforce restructuring events. DOL regulations require the employer to "look ahead and behind" 30 days and 90 days, respectively, to determine whether a series of workforce reductions both taken and planned will reach the minimum numbers for a WARN notice. *See* 20 C.F.R. § 639.5(a)(2). The practical challenges posed by trying to make an accurate count of the affected employees during the relevant time periods are made more complex by statutory

[5] *See* Carter Memo, *supra*. Although the consequences of the looming expiration of the FY13 Continuing Appropriations Act are beyond the scope of this Hearing, expiration is relevant to the question addressed today as to how uncertainty in the current budgetary environment is affecting employee retention and overall morale among participants in the federal contractor community. It is reasonable to assume that many valuable employees look at these two budgetary hurdles and perceive an impending double whammy.

prohibitions against taking steps to evade the statute. WARN provides that that it is the employer's burden to show that a series of smaller reductions (which would not be aggregated) are the result of separate and distinct causes and not an attempt to evade the notice requirements. 29 U.S.C. § 2102(d); 20 C.F.R. § 639.5(a). Sophisticated contractors will be examining the aggregation rules with extreme care. In the absence of any additional guidance from regulatory authorities or Congress, even the most sophisticated and well-meaning companies may face considerable uncertainty on this point.

2. Single Site of Employment

Whether employment losses occur at a "single site of employment" may determine whether a plant closing or layoff is subject to WARN. The exercise involved in making this determination is often complex.

The term "single site of employment" is not statutorily defined. It can refer to either a single location or a group of contiguous locations. 20 CFR § 693.3(i)(1). Whether multiple locations constitute a "single site" under WARN is a totality of the circumstances analysis. *Carpenters Dist. Council of New Orleans & Vicinity v. Dillard Dept. Stores, Inc.*, 15 F. 3d. 1275, 1289 (5th Cir. 1994).

As a general rule, geographically related facilities are "single sites of employment," whereas geographically separate facilities are separate sites for purposes of WARN. *Rifkin v. McDonnell Douglas Corp.*, 78 F. 3d 1277, 1280 (8th Cir. 1996); *see also Frymire v. Ampex Corp.*, 61 F. 3d 757, 766 (10th Cir. 1995) ("proximity and contiguity are the most important criteria for making single site determinations"). Separate facilities located in different states hundreds of miles apart cannot be considered a "single site of employment" for WARN purposes. *Williams v. Phillips Petroleum Co.*, 23 F.3d 930, 934 (5th Cir. 1994). Similarly, branch offices of an employer in different locales in a single state are not a "single site" despite the main office's centralized control over their operations. *See Rifkin v. McDonnell Douglas Corp., supra*, 78 F. 3d at 1280. Likewise, noncontiguous sites in the same geographic area that do not share the same staff or operational purpose do not constitute a single site. 20 CFR § 639.3(i)(4). Even centralized payroll and certain other centralized managerial and personnel functions typically do not establish separate, noncontiguous locations as a "single site." *See International Union, United Mine Workers v. Jim Walter Resources, Inc.*, 6 F. 3d 722, 724-726 (11th Cir. 1993).

Groups of structures that form a campus or industrial park, or separate facilities across the street from one another, may be considered a single site of employment. 20 CFR § 639.3(i)(1). On the other hand, contiguous buildings owned by the same employer that have separate management, produce different products, and have separate workforces constitute separate employment sites. 20 CFR § 639.3(i)(5).

Case law holds that two facilities need not be contiguous to be a "single site" for WARN purposes. For noncontiguous sites to constitute a "single site," there must be some connection between the separate sites beyond that of common ownership. *Rifkin v. McDonnell Douglas Corp., supra,* 78 F. 3d at 1280. In such cases, to constitute a single employment site, the

separate facilities must: (1) be in "reasonable geographic proximity;" (2) be "used for the same purpose;" and (3) "share the same staff and equipment."

As with most multi-factor tests, sequestration will force many federal contractors to struggle with the application of the single site rules. An incorrect assessment of this test promises to be expensive.

3. Pay in lieu of Notice

For a variety of reasons, employers may choose to forego the 60-day notice requirement of WARN in favor of a fairly rapid, if not immediate, layoff of affected employees. In such circumstances, where an employer pays the affected employees for the 60-day period, it can substantially reduce its potential exposure in litigation. This is because the statute provides that any amount of back pay owed to employees because of a failure to provide notice is offset by wage or salary payments made during that period. [cite.]

Sophisticated contractors understand that this strategy is not without risk. Open questions remain as to how pay and benefits must be calculated in order to comply with this provision, and whether the pay must cover 60 calendar days or work days. *See, e.g., Gray v. Walt Disney Co.*, Civil No. CCB-10-3000, 2011 WL 2115659 (D. Md. May 27, 2011) (denying Defendants' motion to dismiss WARN Act complaint, reasoning that plaintiffs had made a plausible claim that the amount of money paid to them during 60 days of administrative leave was insufficient as not based on the "make-whole compensatory provisions of WARN, which requires the higher of a three-year average or the final regular rate. 29 U.S.C. § 2104(a)(1)(A); court ruled that discovery was necessary to determine whether the alleged reduction in pay, combined with the offset of severance, may have amounted to a constructive termination triggering the compensatory provisions of the Act).

4. The A-12 Fighter Bomber Contract Cancellation

The dilemma for many contractors facing sequestration is illustrated by the WARN litigation resulting from the 1991 decision of the Defense Department to cancel the A-12 fighter bomber procurement on extremely short notice. *See Loehrer v. McDonnell Douglas Corp.*, 98 F.3d 1056 (8th Cir. 1996). The facts of the dispute are worth retelling.

McDonnell Douglas, along with General Dynamics, entered into contracts with the U.S. Navy in 1988 to engineer and develop the A-12 fighter bomber. The contractors experienced difficulty in completing the project on time and within budget. As a result, relationships with the Navy deteriorated. In early December 1990, a government oversight board identified problems with the design of the A-12. McDonnell Douglas was notified on December 17, 1990 that its performance was "unsatisfactory" and that unless it met certain specified conditions by January 2, 1991, "the Government may terminate for default." In response, McDonnell Douglas, on December 20, issued "advisory memoranda" to employees "explaining that the A-12 program was in danger." On December 21, McDonnell Douglas notified approximately 2,500 employees that they would lose their jobs should the A-12 project be terminated.

On January 2, McDonnell Douglas submitted a written response to the Navy's December 17 default notice, arguing, *inter alia*, that many of the problems identified with the program had been corrected. That same day, McDonnell Douglas met with representatives of the Navy and offered a proposal for continuation of the project. After this meeting, the Navy gave McDonnell Douglas a Memorandum of Understanding ("MOU") setting forth the terms under which the Navy was willing to continue with the project, and informed the company that the Navy had "no intent to terminate." Despite these positive developments, the Navy terminated the contract five days later, on January 7, 1991. About a week thereafter, McDonnell Douglas issued formal notice to hundreds of affected employees that their employment would terminate at the end of the month.

Litigation inevitably ensued. The case went all the way to a trial at which the company prevailed. Affirming the decision of the trial court, the Eighth Circuit held that the unforeseeable business circumstance exception to WARN's 60-day notice requirement excused McDonnell Douglas' failure to proffer a timely notice of the mass layoffs. *Id.* at 1061-62. The court explained that although McDonnell Douglas had notice of the precarious nature of the contract long before it was terminated, the Navy's cancellation "was not reasonably foreseeable." *Id.* at 1062. The court reasoned that due to the "unique, politically charged" field of defense contracting, and the fact that the government rarely cancels a contract for a program for which it has expressed a need, it was reasonable for McDonnell Douglas to delay issuing WARN notices until the contract was actually terminated on January 7. After summarizing the evidence, the court concluded that it had "little difficulty in concluding that the Government's January 7 announcement was sudden, dramatic and unexpected." *Id.*

The *Loehrer* court also rejected plaintiffs' additional argument that McDonnell Douglas should have issued an earlier, conditional notice. After observing that an employer "would in most situations be well-advised to undertake notification in order to fend off the prospect of liability," the court found no violation on this theory. The court explained that because the "decision whether to give conditional notice is committed to an employer's discretion," even if it had been appropriate for McDonnell Douglas to issue such notice, failure to do so "cannot, in itself, justify the imposition of WARN liability." *Id.*[6]

General Dynamics took a different approach to the crisis. It issued a communication to its affected employees on December 20. This communication was specifically described as a conditional WARN notice. General Dynamics got sued anyway, in a WARN lawsuit brought by the labor union representing a substantial number of the individuals who were ultimately laid off. Like McDonnell Douglas, that company had to go all the way to trial before it ultimately prevailed, after the district court denied its motion for summary judgment on the issue of reasonable foreseeability. Following a bench trial, the district court in that case held for the contractor, holding that the December 20 communication constituted a valid "conditional notice"

[6] While the issuance of conditional notice is discretionary, "WARN generally encourages giving notice when a plant closing is anticipated, even if the notice is not strictly required. Both WARN and its implementing regulations state that an employer who is not required to comply with WARN's notice requirement 'should, to the extent possible, provide notice to employees about a proposal to close a plant or permanently reduce its workforce.'" *Local 179 of the Int'l Bhd. of Teamsters v. TSC Enters., Inc.*, No. 94 C 3356, 1995 U.S. Dist. LEXIS 3945, at *26-27 (N.D. Ill., Mar. 29, 1995) (quoting 29 U.S.C. §2106; 20 C.F.R. § 639.1(c)).

that complied with WARN. *International Ass'n of Machinists v. Gen'l Dynamics Corp.*, 821 F.Supp. 1306, 1310 (E.D. Mo. 1993).

5. Conditional Notice

The A-12 saga illustrates that whether to issue conditional notice may be the most challenging decision facing federal contractors this month. DOL regulations provide some guidance as to the circumstances in which conditional notice of an upcoming employment loss may satisfy a company's WARN obligations. The applicable regulations state:

> Notice may be given conditional upon the occurrence or nonoccurrence of an event, such as the renewal of a major contract, only when the event is definite and the consequences of its occurrence or nonoccurrence will necessarily, in the normal course of business, lead to a covered plant closing or mass layoff less than 60 days after the event.

20 C.F.R. § 639.7(a)(3).

Commentary on the final rule implementing WARN, issued by the Department of Labor, Employment and Training Administration, provides some additional guidance regarding conditional notice. The following hypothetical involves a utility that operates a nuclear power plant that is the subject of some opposition:

> A referendum is scheduled to take place to decide whether the utility should continue to operate the plant. If the voters decide that the plant should be closed, the utility may have to begin terminating workers fairly quickly after the referendum occurs. In these circumstances, if a schedule of layoffs can be determined 60 days in advance of the first layoff, conditional notice may be advisable.

Worker Adjustment and Retraining Notification, 54 FR 16042 (April 20, 1989).

The commentary further states that "conditional notice is permitted *only if there is a definite event*, like the renewal of a major contract, the consequences of the occurrence or non-occurrence of which will definitely lead to a covered plant closing or mass layoff less than 60 days after the event." *Id.* (emphasis added). Some of those who commented on the rule "raised concerns that a conditional notice requirement could lead to 'rolling' or overbroad notice and to liability for employers who fail to give conditional notice." *Id.*

The case law confirms that, in order to be effective, a conditional notice must describe a future definite event. *See, e.g., New England Health Care Employees Union v. Fall River Nursing Home, Inc.*, No. CV-96-12216-PBS, 1998 U.S. Dist. LEXIS 12817, at *20-21 (S.D. Mass., July 30, 1998) (the WARN "regulations permit conditional notice where the occurrence or non-occurrence of some future event, which is certain to transpire, will necessarily lead within sixty days to a plant closing or mass layoff").

In addition to the practical problems with identifying a future definite event, the A-12 litigation illustrates how a contractor can be second-guessed as to its decision of when to issue a conditional notice.

The complexities associated with a conditional notice strategy are illustrated by *Poland v. CSC Applied Techs.*, No. 1:10-cv-326, 2010 WL 5401406 (S.D. Ohio, Dec. 23, 2010). The employer in *Poland* held a contract with the United States Postal Service ("USPS"), which was due to expire on June 30, 2009, to service mail transport equipment. *Id.* at *1. After the USPS informed the employer on April 17, 2009 that it had not yet decided whether to renew the contract, the employer, on April 30, issued a written notice to employees that their employment would terminate due to the anticipated plant closing. *Id.* at *2. The employer explained that this action was necessary "due to the fact that [the USPS] has not yet made a final decision on the possible renewal of the contract at this facility, which we must at this time conclude to mean the permanent end of the contract at this facility." *Id.*

Thereafter, the employer engaged in negotiations with the USPS about an extension of the contract, which necessitated the employer leasing new property to conduct its operations. *Id.* at *3. After agreeing to a contract extension with the USPS and securing a new facility, the employer, on June 8, issued a revised notice to employees explaining that it would begin permanent layoffs at its current location on June 15 in light of the winding down of operations at the current facility. *Id.* On June 18, the employer notified employees at its current location that they had the option to transfer to the new facility, and that those employees who chose not to transfer would be laid off on June 30. *Id.* at *4. On June 29, the employer notified all those employees who opted not to transfer to the new facility that their employment was terminated due to a layoff effective the next day, June 30. *Id.* at *5.

A group of laid off employees responded by filing a WARN Act complaint. The court granted summary judgment to the employer on plaintiffs' claims that it failed to provide proper notice under the WARN Act. The Court held that the employer's notice to employees, which "was conditional because USPS had not made a final decision as to whether to renew its contract," was "consistent with the WARN Act's authorization of conditional notices." *Id.* at *8 (citing 20. C.F.R. § 639.7(a)(3)). Rejecting plaintiffs' claim that the notice was deficient because it did not "clearly state that the facility would be closing or that layoffs were likely," the Court explained that the conditional notice was satisfactory because it apprised employees that the employer "would no longer be able to offer [them] continued employment with the Company because it anticipated the permanent end of the [USPS] contract at this facility." *Id.* at *8 (internal quotation omitted).

6. Other WARN Issues

The dilemma facing many contractors is further complicated by other challenges in complying with WARN and related statutes. Additional issues that are likely to cause headaches after sequestration include:

a) Uncertainty as to the WARN Act implications of 'in-sourcing' decisions that may be made by contracting agencies. *See, e.g., Deveratuda v. Globe Aviation Security Servs.*, 454 F.3d 1043 (9th Cir. 2006)(no WARN

violation on specific facts showing that workers were laid off due to federal government take-over).

b) Ambiguities in WARN's definition of a "plant closing" in situations where a few employees remain after production operations are concluded at a particular facility. 29 U.S.C. § 2101(2).

c) Similar ambiguities with respect to the significance of a distinct operation within a particular facility. *See, e.g., Pavao v. Brown & Sharpe Mfg. Co.,* 844 F.Supp. 890 (D.R.I. 1994)(shut down of specific parts of a manufacturing department found to be a plant closing for WARN purposes where the court found that the department had a distinctive product, operation and work function at a single site of employment); *Bagwell v. Peachtree Doors & Windows, Inc.,* 2:08-CV-191-RWS-SSC, 2011 WL 1497831 (N.D. Ga. Feb. 8 2011)(discussion of treatment of various operating units within a plant).

d) Assessing a variety of issues necessary to make an accurate count of affected employees, including resolving questions of whether individuals hired as temporary or seasonal workers, certain part-time workers, or employees hired as temporary project workers, must be counted in determining whether a workforce reduction meets the WARN thresholds. *See, e.g.,* 29 U.S.C. § 2103(1); 20 C.F.R. § 639.5(c); *Marques v. Telles Ranch, Inc.,* 867 F.Supp. 1438 (N.D. Cal. 19094)(certain agricultural workers deemed permanent seasonal employees entitled to WARN notice). *See also Ellis v. DHL Express Inc. (USA),* 633 F.3d 522 (7th Cir. 2011), reh'g denied (Feb. 8, 2011), *cert. denied* 132 S. Ct. 102 (Oct. 3, 2011) (addressing the issue of whether individuals who executed severance agreements in connection with a prior workforce restructuring should be deemed as "voluntary" departures for purposes of determining whether the WARN thresholds were met in a subsequent layoff); *Collins v. Gee West Seattle LLC,* 631 F.3d 1001 (9th Cir. 2011) (reversing district court and holding that employees who left their jobs because business was closing suffered an "employment loss" for WARN).

e) Determining when a short-term layoff amounts to an "employment loss" that triggers WARN notification obligations, particularly in the (perhaps likely) event of a subsequent decision by a contracting agency to restore funding to a particular program or contract. WARN generally provides that notice is not required in a case of a layoff of less than six months, or a reduction of hours of less than 50% during a six month period. *See* 29 U.S.C. § 2101(a)(6). *See Bledsoe v. Emery Worldwide Airlines, Inc.,* 635 F.3d 836 (6th Cir. 2011), *cert denied,* 132 S. Ct. 114 (2011)(discussion of various communications issued by employer regarding the expected duration of a layoff caused by regulatory dispute with FAA).

f) Ambiguities about satisfying the employee transfer requirements of WARN. The statute provides that an employee does not experience an "employment loss" for purposes of triggering WARN obligations in certain situations in which transfer opportunities are offered to affected employees. *See, e.g., Martin v. AMR Serv., Corp.*, 877 F.Supp. 108 (E.D.N.Y. 1995)(employees terminated on June 4 and place in new position with acquiring company three days later did not suffer an "employment loss" for WARN purposes).

B. Employee Retention and Other Employee Morale Issues

Contractors are particularly concerned about how the current uncertainty will affect their valued employees. Employee retention is a critical goal for most employers. In some industry sectors, federal contractors are worried about a "brain drain" scenario, in which significant numbers of mission-critical employees, *e.g.*, engineers, computer professionals, may decide to change employers rather than face the prospect of possible layoff.

The threat of sequestration poses a different (but no less serious) set of employee morale issues for individuals who may not be able to find another job as quickly as a highly trained software design engineer. Productivity and morale suffer when employees are concerned about job security. These concerns will be exacerbated by the likely scenario of temporary furloughs and recalls, subject to the vagaries of the procurement process following the sequester.

V. The Government's Position on Allowable Costs

Whether a federal contractor's costs are deemed "allowable," and may thus be paid by the government, is a highly fact-specific inquiry that involves numerous objective (*e.g.*, the specific costs in question, the timing of the costs, etc.) and subjective assessments (*i.e.*, were the costs reasonable). For this reason, there is no definitive, "one-size-fits-all" answer to the question of whether, in the wake of sequestration, a contractor's costs of complying with the WARN Act, or of defending against alleged violations of the WARN Act, would be deemed allowable by the contracting agency. That said, a contractor's costs of complying with the WARN Act, or of successfully defending its compliance with the WARN Act, would *generally* be deemed an allowable cost for which the contractor may seek compensation from its contracting agency.[7] For purposes of this analysis, there is no meaningful distinction between such costs incurred as a result of sequestration-induced contract action (*e.g.*, termination for convenience, failure to exercise an option, etc.) and costs incurred as a result of a similar contract action occurring in the ordinary course of government operations.

The questions of whether a particular contractor's costs will be deemed "allowable" in the event of sequestration is thus likely to hinge on the contractor's compliance with the WARN Act, rather than on a unique application of the cost principles. The central question in litigation will be an assessment of when the contractor knew, with sufficient specificity, that sequestration-

[7] In a typical scenario, a contractor would likely request this compensation from the government by submitting a claim or as part of its termination settlement proposal.

induced cuts will result in adverse contract action(s) which, in turn, will produce the type of layoffs as to trigger WARN Act notification obligations.

In July 2012, the Department of Labor ("DOL") issued guidance opining that sequestration-induced "contract terminations or cutbacks are speculative and unforeseeable," and that issuance of WARN Act notifications prior to the effective date of the sequester "would be inappropriate."[8] While this DOL guidance is not binding upon federal courts, which have sole responsibility for determining whether a contractor's conduct is compliant with the WARN Act, the Office of Management and Budget ("OMB") issued subsequent guidance stating that a contractor's "consisten[cy] with [the] DOL guidance" will be used by contracting agencies as a yardstick for determining allowable WARN Act costs.[9] Specifically, the OMB guidance provides:

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

This guidance, of course, does not address the question of what a contractor should do after March 1, when the sequester is scheduled to be effective. As discussed above, any number of circumstances, some of which are unknowable at present, could combine to present a plausible argument by plaintiffs' lawyers or a labor union that a contractor violated WARN by not issuing notices to affected employees.

As of the date of this testimony, no further guidance has been issued to shed more definitive light on the allowability of costs that may be incurred in connection with a contractor's sequestration-induced workforce reductions.

VI. Conclusion

Federal contractors would welcome additional guidance on the various issues summarized above. Many of even the most sophisticated contractors are not entirely sure about what to do next.

Chairman Walberg, Ranking Member Courtney, I thank you again for inviting me to testify. I am happy to answer any questions.

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[8] *See* Dep't of Labor Training & Employment Guidance Letter No. 3-12 (July 30, 2012).

[9] *See* Memorandum, Office of Management & Budget, Subject: Guidance on Allowable Contracting Costs Associated with the Worker Adjustment and Retraining Notification (WARN) Act (Sep. 28, 2012).

Chairman WALBERG. Thank you.
Mr. Eisenbrey, welcome.

STATEMENT OF ROSS EISENBREY, VICE PRESIDENT, ECONOMIC POLICY INSTITUTE

Mr. EISENBREY. Mr. Chairman—thank you Mr. Chairman. It is a pleasure to be here. As you know, I was the staffer to Congressman Bill Ford, who was the principle House author of the bill. I worked on the legislation for 9 years and helped negotiate the conference report with the Senate, and helped draft a couple of rounds

of comments that are in one of your committee prints, which I helpfully brought for you. And so I have a long history with this act.

I have three main points today. One is that what the department did was completely appropriate. Giving guidance to employers is part of their responsibility. They have been doing it ever since the law passed, and that is totally appropriate.

Number two, if federal contractors—you have heard there is really no doubt about this now. If contractors had given 60 days' notice back in November because of the proposed sequester, it would have been counterproductive and needlessly disruptive. It would have done a lot of damage in fact to the contractors themselves and their communities.

The issues—finally, the issues of the WARN Act and its potential for mass layoffs is only here before us because Congress hasn't dealt with sequestration. And as Mr. Courtney said, that is the real problem. That is what has to be addressed. And we should be looking forward, I think it would be more helpful than looking back to what the department did or didn't do.

But, in any event, what the department did was appropriate. You know that on the department's Web site is, as Ms. Oates said, is guidance that they have given in Katrina without any objection from anybody, guidance that they gave in 2003 when they put together the employer handbook for the WARN Act.

It—on the one hand you can't say that those, as my colleagues, my fellow panelists have said, that those things were appropriate and somehow this wasn't. The department should give guidance. And they have been proven right.

I mean, that is the other thing. They said this was speculative. It might not happen. In fact, it is less likely to happen than to happen on January 2nd. So, giving notice, even conditional notice would be inappropriate. The department was right.

The law in this area has been dealt with in the submissions, but you know I think it is important to just read one thing from the A-12 cases that Mr. Gies mentioned. And that is that the court said this isn't a case of a single contract cancellation. They said the question of reasonable foreseeability begs another question.

By adopting the standard, does the WARN Act envision the probability of an unforeseen business circumstance, i.e. a contract cancellation, or instead the mere possibility of such a circumstance? We can only conclude that it is the probability of occurrence that makes a business circumstance reasonably foreseeable.

That is in the case of a single cancellation. Here we are talking about sequestration that will lead to who knows how many cancellations. The Department of Defense in its letter on the subject says for contracts in place that are incrementally funded, any action to adjust funding levels would likely occur, if it occurred at all, several months after sequestration.

This is a point that Mr. Courtney said. It is way too early for employers to be giving these notices. And I am very confident that courts would agree with my interpretation of the law.

Finally, let us talk about sequestration. This is a disaster. The CBO, I think, has said that there would be three quarters of a million jobs lost if it went forward. At my institute the economists at the Economic Policy Institute have estimated that 660,000 jobs will

be lost just in 2013 if the sequestration were to take place on March 1st.

That is the problem that Congress needs to be dealing with. It needs to be stopped. And I really encourage this committee and every committee to put their energy there. Thank you.

[The statement of Mr. Eisenbrey follows:]

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

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

I have three points to convey today:

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

The Department of Labor's guidance was appropriate

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

The WARN Act is intended to do three things:

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

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

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

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

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

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

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

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

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

It would have been counterproductive to issue WARN notices in November

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

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

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

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

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

Congress should focus on preventing sequestration

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

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

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

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

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Chairman WALBERG. Thank you, Mr. Eisenbrey. And I certainly concur with you as I said in my opening statement that sequestration is a terrible thing to happen. And its time appears to have come, sadly, after this House on two occasions offered an alternative to that. Nonetheless, we are here today. So, thank you.

Ms. Furchtgott-Roth, thank you for being with us. It is your time.

STATEMENT OF DIANA FURCHTGOTT–ROTH, SENIOR FELLOW, MANHATTAN INSTITUTE FOR POLICY RESEARCH

Ms. FURCHTGOTT-ROTH. Thank you very much for inviting me to testify today. Two days ago the Labor Department brought out its job openings and labor turnover data for December. That showed that the rate of job openings declined from 2.8 percent to 2.6 percent. The rate of hires declined from 3.3 percent to 3.1 percent.

Workers in America are hurting. That is why it is so important that if there is a chance that they are being laid off they need to be given their WARN notices. We are now at February 14. The sequester is due March 1st. Even though you passed two bills to avoid the sequestration, it doesn't look like Senate and President Obama are following suit.

The biggest problem, I would say, in the economy is not sequestration. It is lack of economic growth. It is the growing government deficit. Government outlays have grown from about 20 percent of GDP in 2007 to about 24 percent of GDP. The deficit has ballooned. The public debt has ballooned. We are talking about cutting 2 percent—about 2 percent of federal spending. Surely as you have shown with your alternative bills, we should be able to do that.

In terms of these WARN notices we are not talking about blanket WARN notices. Large defense firms are undoubtedly planning for the sequester. It would be irresponsible of them not to do this. And the purpose of the WARN notices was just to allow them to share these plans with their employees so that their employees are not left surprised.

Just as the CEOs are looking at plans for the companies and are looking at what their shareholders expect them to do, they should be sharing this information with the workers who also have the right to plan. And employees are not stupid. They know that the January 1 sequester was put off. Here it is February 14. They might be thinking the March 1st one would be put off too. But it is up to them to have that knowledge.

There are probably other cuts that could be made in DOD. I would just like to suggest one. Stop buying green fuels. The military has made a push towards green fuels. This is costing about $27 a gallon. Regular fuel is about $3.50 per gallon. I would suggest instead of eliminating the submarines or cutting back on submarines, instead of stopping to refuel the Lincoln they should be thinking about how to make the military more efficient rather than less efficient by going green.

I calculate that if 10 percent of workers were laid off in the seven major defense firms penalties would be about $412 million in back pay, plus about $100 million in benefits. And it is not up to the Office of Management and Budget to say well the Defense Department is just going to be paying those penalties and costs.

Twenty percent, I calculate, it would be about $825 million in back pay, $200 million in benefits for about a billion dollars. And these amounts need to be appropriated and authorized by Congress, not just told by OMB that it would pay the penalties.

It is unconscionable for the Office of Management and Budget, for our government to be telling companies that they should break the law and that they will pick up the penalties for doing this. This is the kind of thing we read about happening in countries such as

Russia and Venezuela. We should be very shocked that it is happening here.

And defense companies are being put in a very awkward position since the federal government is their major employer. And if someone comes to them and asks them to do this they are caught between a rock and a hard place.

So, with that I would just like to summarize that I think economic growth is the most important thing to do. We need to be cutting spending. We should not be considering raising taxes, which we have just done on January 1st, because that slows economic growth.

The American worker deserves a growing economy. A growing economy means an efficient economy, low taxes, low burden of regulation and clear, predictable rules for how to operate.

Thanks very much for allowing me to testify today. I would be glad to answer any questions.

[The statement of Ms. Furchtgott-Roth follows:]

Prepared Statement of Diana Furchtgott-Roth, Senior Fellow, Manhattan Institute

Chairman Walberg, Ranking Member Courtney, members of the Committee, I am honored to be invited to testify before you today on the subject of employers' WARN Act responsibilities. I am a senior fellow at the Manhattan Institute. From 2003 until April 2005 I was chief economist at the U.S. Department of Labor. From 2001 until 2002 I served at the Council of Economic Advisers as chief of staff. I have also been a senior fellow at the Hudson Institute and a resident fellow at the American Enterprise Institute. I have served as Deputy Executive Secretary of the Domestic Policy Council under President George H.W. Bush and as an economist on the staff of President Reagan's Council of Economic Advisers.

The Budget Control Act of 2011, signed into law by President Obama on August 2, 2011, put in place a sequester of $1.2 trillion over the next ten years if Congress did not cut spending.[i] Though the original sequester was scheduled for January 2, 2013, the American Taxpayer Relief Act of 2012 moved the date to March 1, 2013.[ii] Under current law, according to a September 14, 2012 White House report on details of the sequester, the Pentagon's spending will decline by over $500 billion over ten years.[iii]

This means that defense contractors will in all likelihood have to lay off workers, because of cuts to spending used to fund contractors' work. House Budget Committee Chairman Paul Ryan predicted recently that sequestration will occur in March. Like Congressman Ryan, businesses can foresee the layoffs that will be necessary—and this predictability triggers a legal requirement that they send out notices to their employees 60 days in advance. Currently, they are not doing so.

The requirement that firms expecting mass layoffs, plant closings, or certain other employment losses inform their employees 60 days in advance comes from the Worker Adjustment and Retraining Notification Act of August 1988, passed by a Democratic Congress over President Ronald Reagan's veto.[iv] The WARN Act is meant to allow workers to prepare themselves for the risk of layoff, temporary or permanent.[v]

Congress was so adamant on the necessity of the WARN Act that it did not permit employer waivers. No government agency can exempt firms from issuing the notice of potential job loss.

Sending out WARN notices is routine. Firms that sent out recent WARN notices include American Airlines, Pfizer, and Sodexo. In 2011 Qimonda AG, an electronic memory products manufacturer, reached a $35 million settlement for not sending out notices in time.[vi]

Informed workers might look for other jobs, skip a planned vacation, or delay the purchase of a car or dishwasher. Or, another member of the family might start looking for a job.

WARN notices serve a purpose, because laid-off workers generally see a decline in earnings. It is particularly hard to find a job in today's economy. In January the economy created only 157,000 jobs, and the unemployment rate rose to 7.9 percent.

The economy has 3.2 million fewer jobs than at the start of the recession, in December 2007. On Tuesday the Bureau of Labor Statistics issued its Job Openings and Labor Turnover Survey results for December 2012. It showed that rates of em-

ployer hiring, job openings, separations, and quits have not yet recovered from the recession.

The poor economic climate makes it even more surprising that the Labor Department and the White House have asked federal contractors to break the law and not send out required WARN notices. Many contractors were expecting layoffs on January 2, and are now expecting layoffs on March 1. Some have already reduced hiring in anticipation of future spending cuts.

The Labor Department, which supposedly has employees' best interests at heart, issued a guidance notice on July 30, 2012 discouraging firms from issuing WARN notices.

The guidance notice from Assistant Secretary Jane Oates said: "WARN Act notice to employees of Federal contractors, including in the defense industry, is not required 60 days in advance of January 2, 2013, and would be inappropriate, given the lack of certainty about how the budget cuts will be implemented and the possibility that the sequester will be avoided before January." [vii]

The July guidance letter was followed by a Memorandum for Chief Financial Officers and Senior Procurement Executives of Executive Departments and Agencies from the White House Office of Management and Budget. Dated September 28, 2012, the memo counseled defense employers not to issue layoff notices on November 1. It is the first time in history that the White House has asked firms not to file layoff notices.

The reason for the memo was that "Despite DOL's guidance, some contractors have indicated they are still considering issuing WARN Act notices, and some have inquired about whether Federal contracting agencies would cover WARN Act-related costs in connection with the potential sequestration." [viii]

Daniel Werfel, Controller of OMB's Office of Federal Financial Management, and Joseph Jordan, Administrator for Federal Procurement Policy, assured employers that if they did not send out layoff notices and layoffs occurred, the "contracting agency," namely the Pentagon, would absorb the penalties and attorneys' fees the employers would have to pay, a significant cost to taxpayers.

The White House does not have the authority to offer to pay the costs, because such funds are authorized and appropriated by Congress, i.e. Members of this Committee. Some senators, such John McCain and Lindsay Graham, said in October that they will not allow government funds to be spent on penalties and costs.[ix]

However, OMB's memo states that if sequestration occurs and the contractor has followed Labor Department guidelines, "any resulting employee compensation costs for WARN Act liability as determined by a court, as well as attorneys' fees and other litigation costs (irrespective of litigation outcome), would qualify as allowable costs and be covered by the contracting agency, if reasonable and allocable."

If firms don't file WARN notices and certain levels of plant closings or layoffs occur, employers are liable for penalties of 60 days back pay and benefits paid to workers.

What could that cost?

Lockheed Martin has stated that it expects to lay off 10,000 employees if a sequester occurs. Given other firms' current payrolls, if they laid off 10 percent of their workers, I estimate that Boeing would lose 17,000 employees; General Dynamics, 9,500 employees; Northrop Grumman, 7,000; and Raytheon, 6,800, and SAIC 4,000. This adds up to 54,300 employees.

If the firms do not file WARN Act notices, they might be liable for 60 days back pay in penalties. Using BLS's average weekly earnings in the industry of $951, I calculate that the wage bill would come to about $76 million for Lockheed Martin for its 10,000 workers. Boeing would owe around $129 million; General Dynamics, $72 million; Northrop Grumman, $53 million; Raytheon, $52 million; and SAIC $30 million.

These contractors and the Defense Department would be liable for $412 million in back pay, plus benefits. If 20 percent of employees were laid off, the bill would run to $825 million plus benefits.

Benefits liabilities would be significant. A 2012 CBO study noted that 30 percent of a private-sector employee's total compensation cost was tied to benefits.[x] Using even a conservative version of that ratio, benefits owed could top $100 million in a 10 percent layoff scenario.

These amounts do not account for court costs and attorney fees, which might run into additional tens of millions.

Defense contractors are being put in an untenable position. They can break the law and keep the White House happy, or follow the law and annoy their major customer.

I am not privy to internal White House discussions, but it is likely that the White House asked contractors to break the law in the interests of the re-election of Presi-

dent Obama. The Obama administration was concerned that layoff notices mailed on November 1, 2012, could cost the Obama-Biden ticket votes, especially in Ohio and Virginia, swing states with a strong defense presence.

Since firms have stated they will not issue the WARN notices, their potential liability in penalties should be declared on their next quarterly SEC filings. Otherwise, they might be liable for additional millions from shareholder suits.

However, this major campaign donation to President Obama has not appeared on any campaign disclosure forms.

The Administration has devoted substantial resources to making sure that companies are run efficiently. The Dodd-Frank labyrinth, with its armies of regulators, is supposed to make sure that companies do not make financial mistakes. Yet the penalties for not filing WARN notices could reach into the millions of dollars. Should not shareholders be informed?

On January 20 and 21, President Obama was sworn in for his second term. He took the oath of office, in which he swore to defend the Constitution. The Constitution's Article II, Section 3 states that the president "shall take Care that the Laws be faithfully executed." Yet the White House has told some of the largest corporations in America to break the law in order to help re-elect a sitting president, and offered to pick up the penalties and court costs.

If this were Russia, no one would think twice. But in America, if we're not shocked, something is very wrong.

ENDNOTES

[i] 112th Congress, 1st Session, Budget Control Act of 2011, Section 251a, *http://www.gpo.gov/fdsys/pkg/BILLS-112s365enr/pdf/BILLS-112s365enr.pdf.*

[ii] 112th Congress, 2nd session, American Taxpayer Relief Act of 2012, Title IX, Section 901, *http://www.gpo.gov/fdsys/pkg/BILLS-112hr8eas/pdf/BILLS-112hr8eas.pdf.*

[iii] White House Office of Management and Budget, OMB Report Pursuant to the Sequestration Transparency Act of 2012 (P. L. 112—155), September 14, 2012, p. 5, *http://www.whitehouse.gov/sites/default/files/omb/assets/legislative—reports/stareport.pdf.*

[iv] 110th Congress, House Report 110-410, *http://thomas.loc.gov/cgi-bin/cpquery/?&dbname=cp110&sid=cp1100AFa6&refer=&r—n=hr410.110&item=&sel=TOC—18846&.*

[v] U.S. Department of Labor, Employment and Training Administration, The Worker Adjustment and Retraining Notification Act Fact Sheet, *http://www.doleta.gov/programs/factsht/warn.htm.*

[vi] Klehr Harrison Harvey Branzburg LLP, Qimonda WARN Act Case Information, May 17, 2011, *http://www.klehr.com/C7756B/assets/files/News/SCN—20110517115438—001.pdf.*

[vii] Oates, Jane, Guidance on the Applicability of the Worker Adjustment and Retraining Notification (WARN) Act, 29 U.S.C., 2101-2109, to layoffs that may occur among Federal Contractors, including in the Defense Industry as a Result of Sequestration, Employment and Training Administration Advisory System, July 30, 2012.

[viii] Werfel, Daniel I. and Joseph G. Jordan, Memorandum for the Chief Financial Officers and Senior Procurement Executives of Executive Departments and Agencies, Executive Office of the President, Office of Management and Budget, M-12-19, September 28, 2012, *http://www.whitehouse.gov/sites/default/files/omb/memoranda/2012/m-12-19.pdf.*

[ix] Senator Lindsey Graham, Senators Urge Defense Contractors To Follow The WARN Act, Press Release, October 5, 2012, *http://www.lindseygraham.com/2012/10/release-senators-urge-defense-contractors-to-follow-the-warn-act/.*

[x] Congressional Budget Office, Comparing the Compensation of Federal and Private-Sector Employees, January 2012, p. 9, *http://www.cbo.gov/sites/default/files/cbofiles/attachments/01-30-FedPay.pdf.*

Chairman WALBERG. Thank you. We appreciate your comments.

And thank you to all of the witnesses for your insights and your thoughts on this issue. I now recognize myself for 5 minutes of questioning.

Assistant Secretary Oates, again thank you for being here, were you aware of the efforts in letters from Chairman Kline, myself, from our committee, phone calls, meetings that have been going on for 6 months trying to get answers on this very issue had been undertaken? Were you aware of those efforts?

Ms. OATES. Mr. Chairman, I was tangentially aware of the conversations back and forth. But oversight is handled by our Office of Congressional and Government Relations. It is not something handled in the Employment and Training Administration. So, I wouldn't have—I wouldn't be able to answer any specific questions.

It is a small building. Everybody knows pretty much what everybody is doing. But I was not involved in any of it.

Chairman WALBERG. Well, that is a concern to me as well because you know last night as I mentioned in my opening comments, this packet was slipped under a door after 9:00. I really don't know what is in it other than a disk. Our staff doesn't know for certain all that is in it other than it is about 400 pages of information, hopefully containing information we request in our letters.

Do you know if it does contain that information that we requested?

Ms. OATES. The direct answer would be no, sir. But I need to tell you that the department takes seriously all of the questions that Congress puts up there. So, if you are asking my opinion, my opinion would be that OCIA answer to the best of their ability.

Chairman WALBERG. So the best ability in 6 months since we initiated the request on this, as we all would agree, a very, very critical issue of sequestration and the use of the WARN Act. Regardless of where we stand on the sequestration itself, whether we think it is going to result in as many layoffs as it potentially could.

I would hope it wouldn't take calling a subcommittee hearing in order to get information like this, 400 pages of it, the night before the hearing. And I guess I would ask would you concur with that? That it shouldn't take calling a hearing to get information; that the oversight responsibility of this committee and many other committees have to be carried out.

Ms. OATES. Sir, you know that I spent the majority of my career here in Washington on the other side of this bench staffing members. So, I understand your frustration.

But I hope you understand that I am saying to you I am on a team and OCIA is part of that team. And I have to assume that they are doing everything in their power to answer your questions as fully as possible. And I will be happy to take your concerns back to them when I go back to the Department of Labor.

Chairman WALBERG. Well, I would appreciate that. I would appreciate if you could give me your assurance that in the future when we request information like this we won't have to go through this process, but we will have timely response. Even if it is saying we are still compiling.

But I would hate to think that there is obstruction taking place of the efforts that we ought to be working together on. If I could have your assurance on that for the future I would appreciate that.

Ms. OATES. I can't give you my assurance, sir. If you ask me that about ETA I would do my best to give you my assurance. What I can assure you of is that I will take your concerns back immediately to OCIA and to the departmental leadership.

Chairman WALBERG. Well, let's talk about ETA then——

Ms. OATES. Okay.

Chairman WALBERG [continuing]. In relationship to this. In the wake, as was expressed by Mr. Eisenbrey, in the wake of Hurricane Katrina in 2005 the Employment and Training Administration issued a fact sheet to aid employers in understanding their requirements under the WARN Act. That is a matter of record.

Ms. OATES. Yes, sir.

Chairman WALBERG. The fact sheet specifically states, and I quote—"employers should be aware that the U.S. federal court solely enforces the WARN Act, and these answers are not binding on the courts." That was what was stated in that advisory.

Ms. OATES. Yes, sir.

Chairman WALBERG. You concur. Your most recent guidance in reference to what we are here about today contained no statement or qualification equal to this, or more importantly at all. Could you please explain the Employment and Training Administration's change in policy regarding binding nature of guidance issued on the WARN Act in this case?

Ms. OATES. So, as you know, Mr. Chairman, I wasn't in this position in 2005. But that guidance still remains in place today and is used for a number of businesses that are incurring the same——

Chairman WALBERG. But was not in your guidance submitted——

Ms. OATES. No, no.

Chairman WALBERG [continuing]. Or this particular situation.

Ms. OATES. But it exists on our WARN Web page and is still used by people. The audience for that guidance in 2005 were employers, and it was very important to state that. The audience for my guidance that was issued last summer were the state workforce agencies and the local workforce agencies.

Answering a question does someone giving a blanket statement about the possibility of sequestration respond to the requirements in the WARN Act? So, we were getting those questions from a number of people.

The reason for the guidance was to make sure that states knew employers have the right to have good, strong communications with their employees at all times. But until they have the specific information required by the WARN Act, they could not use conversations about pending sequestration to count as their activities documented under the WARN Act.

So, the importance of that guidance in the summer was to clarify that at that time we did not have sufficient information to be able to allow employees to give the information—I am sorry, employers—the specific information that they would need to comply with the WARN Act.

Chairman WALBERG. The—and I appreciate that explanation. But still the policy remains that you don't have the authority to make that statement to employers or state agencies dealing with what ought to be the part—what ought to be the requirements of the WARN Act. And that is our concern, that there seems to be a different means of handling it this time than others.

My time has expired. But I hope that further questions bring to light why the change went on at this point. I thank you.

I now recognize the ranking member, Mr. Courtney, for his questions.

Mr. COURTNEY. Thank you, Mr. Chairman.

Again, at the outset I just want to share with the group here today that when Undersecretary Carter was—for DOD—was at the hearing yesterday, again he did start to lay out specifics in terms of you know if the catastrophe occurs. And made it very clear, unfortunately, the civilian workforce at the Department of Defense is

probably going to be subject to some pretty heavy layoffs, which is sickening.

I mean 87 percent of those reside outside of D.C. I mean they provide critical support for military installations, you know programs of all sorts. O&M, you know Operations & Maintenance repair work again, would probably again be something that in this fiscal year would be sort of on the hit list or targeted, again, but not on March 1st.

You know there is going to be sort of an implementation rationale even though this is an irrational process that they would try and lay out. So, again, I just—the granular presentation that was given to us yesterday, again, is that again, it is not going to be done by the department all at once on one single day.

Undersecretary Oates, just to sort of talk TEGL here for a minute, again, a TEGL is not sort of some once in a lifetime event. I mean it is something that your department is in the business of issuing on a pretty frequent basis. Is that correct?

Ms. OATES. Yes, Congressman.

Mr. COURTNEY. And so I mean I have some statistics here that it looks like in 2012 you had a total of 51 TEGLs that were issued.

Ms. OATES. Yes, sir.

Mr. COURTNEY. Okay. So I mean this is nothing sort of extraordinary in terms of what the department was doing in terms of this normal administrative act.

Ms. OATES. That is correct. We issue them so that there is consistency. There is over 1,000 employees nationwide in the Department of Labor under ETA. And anybody could call any of them. The TEGLs come out so that there is consistency. No matter who you ask they have the same information so you are not getting different information from different people.

So, it is a routine thing. We also have other instruments like UPLs for UI and TENs. We issue, again, an equal number of those every year.

Mr. COURTNEY. Okay. And just, again, just to underline the point, this request for an opinion did not come from the White House. It did not come from David Axelrod. It came from state labor departments across the country. Is that correct?

Ms. OATES. And local labor force people too. But yes, sir; just to clarify, I never had a discussion with the White House about this guidance.

Mr. COURTNEY. Thank you. Okay. And so——

Ms. OATES. They don't routinely call me.

Mr. COURTNEY. Yes. You are not alone.

But in any case, Mr. Eisenbrey, again, when WARN was designed, I mean again it really was focused on trying to sort of trigger assistance to workers, right? I mean and that is why there is a pure—I mean a perfect logic to the fact that that would be the entity that would be contacting the Department of Labor looking for some help. Isn't that correct?

Mr. EISENBREY. That is right. The act was part of a larger effort to deal with waves of plant closings that were happening in the 1980s. It set up State Dislocated Worker Units to respond, that are part of the system that Ms. Oates oversees.

And it required notice to the state so that they could respond to local governments so that they could begin to prepare for what could be a disaster in a small community, or it would always be of a concern anywhere, a mass layoff. And then for the workers, and they were supposed to get specific notice, not just we were very concerned and Congressman Ford and the other authors made sure that the department forbade blanket notices as a way to comply with the act.

What we wanted was people not just to know that there was a concern, but that their job was going to be eliminated. They needed to change their behavior and prepare for what would be——

Mr. COURTNEY. So——

Mr. EISENBREY [continuing]. Very hard.

Mr. COURTNEY [continuing]. The opposite happened. You said, yes, you know WARN Act, all hands on deck. Notices went out. State labor departments you know kind of activated. I mean the fact is is that it would have been really obviously a stressful reaction for people. But at the end of the day it wouldn't have accomplished——

Mr. EISENBREY. Right. What would they have done? They wouldn't have known where to send their resources. A rapid response unit, where would they go to? I mean Ms. Furchtgott-Roth talks about thousands and thousands of people who are going to lose their job.

We don't know that yet, you know where they are going to be. Would they go to every employer, to every facility? It would be a real waste of resources to do that.

Mr. COURTNEY. Thank you. I yield back.

Chairman WALBERG. Gentleman's time is expired. I recognize Dr. DesJarlais.

Mr. DESJARLAIS. Thank you, Mr. Chairman.

Mr. Gies, would you expect litigation to ensue, even with the DOL and OMB guidance?

Mr. GIES. Yes. Yes, congressman. And the reason I think, to elaborate briefly on that, is I think we find as lawyers representing companies any decision you make can be second-guessed, and this would be like most others.

Mr. DESJARLAIS. Okay. How long would a typical WARN Act cause of action take to complete if it were to go to trial?

Mr. GIES. It depends on how busy the federal court is. It could very easily be 2 years before you get to jury trial if the case went that far. And I say jury trial; that is another open legal issue whether or not there is a right to a jury trial. But irrespective, in many busy federal courts it might be 2 years.

Mr. DESJARLAIS. Okay. Can you discuss the cost associated with WARN Act litigation?

Mr. GIES. Only generally. I mean, you have heard from the other witness an estimate of what the costs would be. I mean the statute is pretty clear in terms of what the back pay and benefits liability would be. Attorney's fees is like any other form of complex civil litigation how much it might cost.

Mr. DESJARLAIS. Okay. The OMB guidance purports to reimburse contractors who are subject to litigation for following DOL

guidance irrespective of litigation outcome. Is this generally an allowable cost?

Mr. GIES. I think that is a contract-specific question. The general rule is that costs that are reasonable are reimbursed. But that is a decision made by the contracting officer on a contract-specific basis.

Mr. DESJARLAIS. Okay. What triggers the need to provide a WARN Act notice?

Mr. GIES. I am sorry, sir?

Mr. DESJARLAIS. What triggers the need to provide a WARN Act notice——

Mr. GIES. Oh, the trigger? Well, as you have heard in brief it is an employment loss of a certain number of employees. If it is a mass layoff or a plant closing, if it is a complete closure of a facility, that is a single side of business.

Mr. DESJARLAIS. Does it have to be public knowledge?

Mr. GIES. No.

Mr. DESJARLAIS. It does not. Okay.

Do you believe the administration's guidance from DOL and OMB will indemnity contractors from litigation on the federal WARN Act? What—do you believe it will indemnify contractors from litigation?

Mr. GIES. I think it is impossible to know today.

Mr. DESJARLAIS. Okay. Are contractors correctly considering sending out WARN notices despite the encouragement from DOL and OMB to refrain from sending such notices?

Mr. GIES. I think each company is thinking hard about that, as you have heard from lots of people on this panel. And each company will make its own decision based on what they know.

Mr. DESJARLAIS. Okay. I assume you have had an opportunity to read Assistant Secretary Oates' written testimony.

Mr. GIES. I did.

Mr. DESJARLAIS. In your opinion does her testimony make clear the department's guidance and any assurance it provided stakeholders applies to the current March 1st sequester?

Mr. GIES. It is not clear to me.

Mr. DESJARLAIS. That is all I have. I yield back.

Chairman WALBERG. I thank the gentleman.

I now recognize for questioning, Mr. Bishop.

Mr. BISHOP. Thank you, Mr. Chairman. Thank you for holding this hearing.

I first want to observe that I am—how delighted I am. This is my sixth term on this committee and I am delighted to see that we are having a hearing, the purpose of which, I hope, is to protect worker rights. That is a rare occurrence on this committee.

We spend most of our time in this committee when the Republicans are in the majority taking up measures or looking at issues in which we are endeavoring to pursue the protection of employer rights, often at the expense of employees. And so I am delighted that we are focusing on a concern for employees.

I also think that we are engaged in what might be called revisionist history, and we are also engaged in some denial of current reality. I noted the chairman in his opening statement said that

President Obama insisted on the sequester. I note that we now are referring to the sequester as the "Obamaquester."

I also note, as the ranking member said, the chairman—that Speaker Boehner said that he got 98 percent of what he wanted out of the deal that brought us the sequester. And I think we can all agree that the sequester constitutes a touch more, a touch more than 2 percent of the deal.

I also note that the chairman said that sequestration is not how Washington should conduct the people's business. I couldn't agree more. I absolutely agree. But I think it is instructive to enter into the record statements that our colleagues on the Republican side of the aisle have made.

Representative Mike Pompeo, "The sequester is here. It is time. We have got to get these spending reductions in place. It is going to be a home run."

Representative Cynthia Lewis, "Sequestration will take place. I am excited. It will be the first time since I have been in Congress that we really have significant cuts."

Representative Paul Broun, "I want to see sequestration go into place."

Representative Steve Scalise, "The consensus is we want the sequester numbers to come in and to finally see spending reduced in Washington."

Representative Mick Mulvaney, "We want to see—keep the sequester in place, and take the cuts we can get."

And finally, Representative DesJarlais, a member of this committee, "Sequestration needs to happen. Bottom line, it needs to happen, and that is the deal we struck to raise the debt limit."

So, this is not an issue, clearly, where there is unanimity on the Republican side of the aisle that this is "not the way we should conduct the people's business." In my view it is not the way we should conduct the people's business. And 14 days away from a self-imposed crisis, we should be focusing all of our efforts on how to avoid sequestration in a fair and balanced way, not by trying to score political points and assess blame.

So, let me ask Ms. Furchtgott-Roth a question. In the—on the last page of your written testimony you say, and I am now going to quote. I am going to read from it. "I am not privy to internal White House discussions, but it is likely that the White House asked contractors to break the law in the interest of the reelection of President Obama."

You then go on to say two paragraphs later "On January 20th and 21st President Obama was sworn in for his second term. He took the oath of office in which he swore to defend the Constitution. The Constitution's Article II Section 3 states that the president shall 'take care that the laws be faithfully executed' yet the White House has told some of the largest corporations in America to break the law in order to help reelect the sitting president."

That is a pretty serious charge. Now, may I ask, aside from what I presume to be a willingness to attribute to the president the most nefarious of motives whenever he takes a position, what evidence do you have to substantiate that pretty serious charge?

Ms. FURCHTGOTT-ROTH. The OMB memo. The OMB——

Mr. BISHOP. Have you——

Ms. FURCHTGOTT-ROTH [continuing]. Is out of the White House.

Mr. BISHOP [continuing]. Submitted your concerns to the Department of Justice?

Ms. FURCHTGOTT-ROTH. No.

Mr. BISHOP. Have you asked any member of Congress to institute proceedings in which the impeachment of the president would be undertaken for failure to uphold the Constitution?

Ms. FURCHTGOTT-ROTH. I was not asked my opinion by any member of Congress.

Mr. BISHOP. I am asking your opinion right now.

Ms. FURCHTGOTT-ROTH. I have not spoken to any member of Congress.

Mr. BISHOP. Will you? This is a very serious charge you have leveled against the president.

Ms. FURCHTGOTT-ROTH. Will I ask a member of Congress——

Mr. BISHOP. Yes. Yes.

Ms. FURCHTGOTT-ROTH [continuing]. To start an impeachment proceeding?

Mr. BISHOP. Yes.

Ms. FURCHTGOTT-ROTH. I am just an economist and I wouldn't——

Mr. BISHOP. I understand. I understand that. But you have leveled a very serious charge against the president of the United States in a subcommittee of the United States Congress.

Ms. FURCHTGOTT-ROTH. Well, it is very serious when the Office of Management and Budget asks defense contractors to break the law because the——

Mr. BISHOP. And the Office of Management and Budget——

Ms. FURCHTGOTT-ROTH [continuing]. Was supposed to go out November——

Mr. BISHOP. The Office of Management and Budget memorandum to which you refer specifically says that contractors should break the law?

Ms. FURCHTGOTT-ROTH. It says—it advises them not to send out the WARN notices, and it says the contract agency——

Mr. BISHOP. But we have——

Ms. FURCHTGOTT-ROTH [continuing]. Will pick up——

Mr. BISHOP. We have an advisory opinion from the Department of Labor that says that sending out the WARN notice is not required in this circumstance. Is that not correct?

Ms. FURCHTGOTT-ROTH. That is what the Labor Department said. I don't think that that is true.

Mr. BISHOP. Are you attributing nefarious motives to the Labor Department as well?

Ms. FURCHTGOTT-ROTH. No, but I am saying they are incorrect. Companies should follow the law.

Mr. BISHOP. They are incorrect.

Ms. FURCHTGOTT-ROTH. Yes.

Mr. BISHOP. So, if the OMB followed what you characterize as an incorrect guidance, you have inferred from the following of that incorrect guidance that OMB was encouraging the president to break the law. So at a minimum is it not fair to understand that if the OMB—pardon me, the Department of Labor guidance was incorrect, an opinion I don't share, and OMB acted on an incorrect guid-

ance, is it not fair, reasonable, if all of those factors were in place, to assume that the OMB acted incorrectly and advised the president incorrectly as opposed to advising the president to break the law? Is that not a reasonable conclusion from the set of facts that you are presenting?

Ms. FURCHTGOTT-ROTH. That certainly is one possible conclusion. Another is that the WARN notice——

Chairman WALBERG. The gentleman's time is expired. We have offered the latitude for that. I think questions—the comments——

Mr. BISHOP. I thank the chairman.

Chairman WALBERG. Thank you.

I now recognize Dr. Bucshon.

Mr. BUCSHON. Thank you, Mr. Chairman.

In deference to Mr. Bishop's attack to try to divert the conversation away from the real issue, I really find it ironic that the administration and people on the other side of the aisle are here essentially arguing against employer's rights—employee's rights. This is a hearing about employee's right to know.

It is very ironic because the discussion, in my view, is clearly about that. And let us be clear. This was about reelecting the president. This was about large amounts of employees not knowing they were going to be let go, but prior to November 6th of 2012. In my view that is what this is about.

Let me quote from Senator Obama, and this has been quoted already when he talked about this. "American workers"—this is in the discussion of the WARN Act 2008. "American workers who have committed themselves to their employers expect in return to be treated with a modicum of respect and fairness. Failing to give workers fair warning ignores their need to prepare for the transition. It adds insult to injury to close a plant without warning employees. Workers and their communities have a right to know when they are facing a serious risk of a plant closing."

We are not talking about a blanket statement. We are talking about companies that know if they are facing the loss of a contract or other things, specifically which employees are going to lose their jobs. They know that. And if they don't, then they are not doing their job.

This is just a long list of things where the administration subverts Congress. And I can list; it is a long list. Immigration, welfare, NLRB appointments that were proven to be unconstitutional, and they have even attempted to tell Congress when or when we are not in session. So, it is not about a blanket notice.

What I wanted to ask you, Ms. Oates, is do you have a list and the letters from the specific states and the specific people that ask you to give guidance on this? Who—I—and if you do I would like those submitted to the committee because I am assuming they don't just pick up the phone and say can you do a guidance on this. There is written correspondence between the Labor Department and people who request these things.

If that is true, then I am requesting that all of those letters from everyone that requested this guidance be submitted to Congress. Can you do that? Can you provide that?

Ms. OATES. Well, let me first answer your question, congressman. The conversations that I have with people—and this is how I con-

duct operations as many of the members of this committee know, I do have state labor commissioners from both parties who pick up the phone and call me on my office phone or my cell phone.

I also spend a lot of time, once a month I meet with all the IGOs and spend a lot of time when I am out in the areas.

Mr. BUCSHON. In this type of controversial guidance that you knew was going to be controversial—this is a huge issue, wouldn't you—I would expect that it would be more than a call to your cell phone asking this kind of guidance to be released.

Ms. OATES. Sir, with great respect, at the time that we offered this guidance there was not a sense that there was going to be any controversy. I mean we had heard from a number of——

Mr. BUCSHON. I would disagree with that opinion.

Ms. OATES. Well, but I am telling you honestly that we heard from a number of state and local workers——

Mr. BUCSHON. I am not denying that you are. I just want to know who they are.

Ms. OATES. I could get—I would be happy to share my calendar so you could see an area where—who I met with——

Mr. BUCSHON. I just want Congress to know you are talking about states submitting requests for guidance, companies submitting requests.

Ms. OATES. No, sir. I never said anything about a company. What I said——

Mr. BUCSHON. Okay. States. That is fine. And——

Ms. OATES. I didn't say they submitted——

Mr. BUCSHON. I would like to know which states.

Ms. OATES. They——

Mr. BUCSHON. Because my argument will be that it is a bunch of blue states that are—that are doing this. And if that is not true I would just like to know the—I would just like to have the list.

Ms. OATES. I don't have any correspondence to give you, sir, so——

Mr. BUCSHON. The other question I had—have is on this. Who made the decision to offer taxpayer funds to corporations that don't comply with the WARN Act? Did you make that decision? Or who told—who told you, as part of your guidance, to offer—just offer taxpayer funds to companies if they get sued because they have violated this act? I would like to know specifically——

Ms. OATES. Certainly.

Mr. BUCSHON [continuing]. Who told you to do that.

Ms. OATES. With great respect, that was not mentioned in my guidance. I think your staff may be referring you to the OMB guidance. And I think those questions would be best directed to OMB. I had no conversation about that.

Mr. BUCSHON. So, it is not-that is the other tactic is it is the other guy all the time. And you know——

Ms. OATES. Sir, I am sorry you feel that way.

Mr. BUCSHON. Well, because we have this hearing after hearing. We just had it yesterday on an NLRB hearing. That it is not—you know where does the buck stop? You released the guidance. You were responsible.

Ms. OATES. Sir, that wasn't mentioned in the guidance released by the Department of Labor.

Mr. BUCSHON. Who also made the decision ultimately to release the guidance? Did you? I mean because somebody has—you get all these requests. And my time is expired, but—so I will just make a statement.

You get all these requests to release the guidance that you say you have been requested. Who actually makes the decision to release the guidance? And if that is you then I think I respectfully ask you to submit the list of people who requested to be guided.

Thank you. I yield back.

Chairman WALBERG. Thank the gentleman whose time is expired.

I now recognize the gentlelady from Ohio, Ms. Fudge.

Ms. FUDGE. Thank you very much, Mr. Chairman.

I have been sitting, listening to this. So what I would like to do is to get away from the spin that I am hearing from the other side, and get away from the politics and the political attacks on you, madam. So let's go to the act itself. Let's see if we can be clear.

I want to start with my first question to Mr. Eisenbrey. You talked about—you gave us a quote from the language. Let me just see—let me give you a couple of other things I think that are important because I see no ambiguity, not like the other attorneys sitting here. I don't see the ambiguity they see, and I too am an attorney, just for the record.

The preamble to the act says that they want to condemn an overbroad notice. They say that they want to prevent unhelpful blanket notice. They talk about, as you so aptly quoted, the part about WARN notice, until a mass layoff is a probability rather than a mere possibility.

So, the question is, just as a hypothetical or an example. In your opinion do you believe that sending pink slips to all the employees of a company, although only 10 percent will be laid off, meets the probability threshold of the WARN Act's requirements?

Mr. EISENBREY. Well, it might for the 10 percent who the companies knows are being laid off. But certainly that would be a terrible thing to do to the other 90 percent who are not being laid off.

Ms. FUDGE. And it would be an overbroad application, would it not be?

Mr. EISENBREY. It would.

Ms. FUDGE. Assistant Secretary Oates—by the way I think that your position is a correct one. The actual impact of the sequester as we know is unknown. Even though we don't want the sequester, Democrats are very much against the sequester, it in fact may happen, as we are not the majority of this House.

As you know, the notice required by the WARN Act must include the name and location of the sites where the layoffs will take place, and the positions of the people who will be laid off. How would a company be able to comply with the WARN Act requirements given the uncertainty that the sequester poses? And how could a company provide the proper notification when it is unclear whether its contract will even be affected?

Ms. OATES. That is exactly why we issued the guidance, congresswoman. We—as soon as a company has those specific elements, they are required—it triggers WARN notice. But until they have those specifics WARN is not applicable.

Ms. FUDGE. Thank you. Further, was it reasonably foreseeable that sequestration was going to occur on January 2, 2013?

Ms. OATES. No, ma'am, it was not.

Ms. FUDGE. Okay. Thank you.

Mr. Notestine, you said in your testimony that it is highly questionable whether the Department of Labor has the authority to issue guidance in this matter. Why would you make such a statement, sir?

Mr. NOTESTINE. Well, because—because they have authority to make statements such as they did. They do have authority to issue regulations. They did issue regulations some years ago. And those regulations are very clear I believe, specifically where it talks about notice in ambiguous situations.

It says it is therefore prudent for employers to weigh the desirability of advance notice against the possibility of expensive and time consuming litigation to resolve disputes where notice has not been given. The department encourages employers to give notice in all circumstances. And then they come out with a statement in the TEGL which appears to me to be inconsistent with that. And that was my concern.

Ms. FUDGE. I am questioning the fact that you say they do not have the authority to issue guidance.

Mr. NOTESTINE. They don't—I do not believe they have authority to issue something inconsistent with their regulations.

Ms. FUDGE. But that is not what you said. I just want to be clear; they do in fact have the authority.

Mr. NOTESTINE. They can issue TEGLs. There is no doubt about it.

Ms. FUDGE. I just wanted to be clear.

Thank you, Mr. Chairman. I yield back.

Chairman WALBERG. I thank the gentlelady. I now recognize the chairman of the committee, Mr. Kline.

Mr. KLINE. Thank you, Mr. Chairman. Thanks to the witnesses for being here.

Secretary Oates, I have just learned today about the envelope that Chairman Walberg was talking about and I—it is just astonishing to me that after hours last night an envelope with a computer disk and a post-it note with a password was slid under the door. And I heard your response that that is not your doing.

Would it be—could you guess that it would be the congressional liaison office who would have sent somebody over here to slide this under the door? Who—where would it have come from?

Ms. OATES. My assumption, sir, is that it came from someone who works in OCIA.

Mr. KLINE. So, I am just trying to imagine what that discussion was that said, gosh I think it would be a really good idea to take this disk, put a password on it and go over—let us go over to Congress and slide it under the door. I just would love to have heard that discussion. That is amazing.

And I would like to know, following up to the chairman's questions, if we can find out where that came from. I mean it is just sort of an envelope slid under the door; a very, very strange, I would opine, way of communicating with the Congress of the United States. And I have been—because it is not your disk, and

not your note, you wouldn't know if there is any sensitive material, if that password was available for the people who are sort of cleaning the floor or—it is out of your scan. Is that correct?

Ms. OATES. I wasn't involved in that, sir——

Mr. KLINE. Okay.

Ms. OATES [continuing]. That is correct.

Mr. KLINE. All right. Let's move onto something that you are involved with.

Your testimony doesn't address sequestration's current effective date at the end of this month. Does your guidance and its analysis currently apply to sequestration? Or is that just a thing of the past?

Ms. OATES. It would apply today, sir, but as we all know, as the ranking member mentioned, there was testimony yesterday. I have no idea when we will get guidance from OMB to begin sequestration plans or what conversations they are having with other people. But as of right now, yes, it does apply. And again, the most important thing is any employer who has this specific information should invoke the WARN when they have that information.

So as employers are getting information from government agencies—that is why I want to be careful. I mean, I think that somebody could get the specific information they needed and they would have to invoke WARN sooner than March 1st or on March 1st.

But my guidance would still apply. Until you have that level of specific information about the specific job titles that will be impacted by reductions it doesn't impact WARN.

Mr. KLINE. So then presumably OMB's guidance, which is based on your guidance, is still applicable. Is that correct?

Ms. OATES. The OMB guidance that they issued, I have no idea what their plans are on that, sir.

Mr. KLINE. And so you haven't talked to them about it at all?

Ms. OATES. No, sir.

Mr. KLINE. Dark hole. Okay.

Thank you. I yield back.

Chairman WALBERG. I thank the chairman.

I recognize the gentleman from New Jersey, Mr. Andrews.

Mr. ANDREWS. Thank you, Mr. Chairman.

Dr. Furchtgott-Roth, did I pronounce your name correctly?

Ms. FURCHTGOTT-ROTH. Yes. Yes, but I am not a doctor.

Mr. ANDREWS. Oh, well——

Ms. FURCHTGOTT-ROTH. Ms. Furchtgott-Roth.

Mr. ANDREWS. Okay. All right.

You make a statement that "I am not privy to internal White House discussions, but it is likely that the White House asked contractors to break the law." Do you have any personal knowledge of discussions between the Obama campaign and the White House about this notice issue?

Ms. FURCHTGOTT-ROTH. No. That is why I said likely.

Mr. ANDREWS. Okay.

Ms. FURCHTGOTT-ROTH. I did not say it definitively.

Mr. ANDREWS. Okay. Did you have any personal knowledge of discussions between the White House and any contractors about this issue of these notices?

Ms. FURCHTGOTT-ROTH. No. That is why I said likely, not definitively.

Mr. ANDREWS. I think it is likely that your statement is motivated by political malice against the administration. Not being a fact, I didn't say certainly; I said likely as well.

I want to ask you a question. In a few days, March 1st, this sequester is about to take place and there are some estimates that it will cost us 750,000 jobs. As an economist, as a commentator on our economy, do you believe we should let the sequester stay in place or try to lift it?

Ms. FURCHTGOTT-ROTH. I believe we should replace the sequester with more sensible packages of spending cuts.

Mr. ANDREWS. And I agree with that actually.

Ms. FURCHTGOTT-ROTH. That is good that we agree on something.

Mr. ANDREWS. In part. No, we agree on many things.

In part, Mr. Van Hollen, who is the senior Democrat on the budget committee has a proposal that would defer the sequester for a year and replace it with a combination of cuts and revenue increases. Now, I am not asking you if you support that proposal or not because I assume you have not read it. And if you did I am not going to ask you that question. Do you think that we should put that proposal up for a vote this week?

Ms. FURCHTGOTT-ROTH. Well, I am not a member of Congress. There are many, many important things before Congress and I don't know whether this—it is not up to me to say what should be on the congressional calendar.

Mr. ANDREWS. I just want your opinion. What we are voting on today is a rule that will let us debate a bill tomorrow. The bill is to freeze the wages of federal employees for a certain period of time.

We are leaving town tomorrow after that. We are not coming back for I believe 9 or 10 days. Just in your opinion as a citizen observer, do you think that we should come back next week and vote on a proposal that would delay the sequester?

Ms. FURCHTGOTT-ROTH. No. I think that spending needs to be cut, not the cuts in the sequester, but a more sensible spending package. And you should vote on that. In fact you have already passed it twice.

Mr. ANDREWS. Well, we have not passed it twice. The—do you think that we should come back and consider your proposal, and Mr. Van Hollen's and others' next week? Or that we should take a recess? What do you think is the more responsible course?

Ms. FURCHTGOTT-ROTH. I think it would be responsible to vote in place other spending cuts, even greater spending cuts because federal spending as a percent of GDP has grown from 20 percent to 24 percent.

Mr. ANDREWS. Okay. Irrespective of which plan you want to follow, that is not what I am asking you. The current plan of the House leadership is to leave town on Friday and go God knows where next week and do whatever. I am asking you if you think it is a more reasonable proposal to reconvene next week and let different members put up their plans as to what to do.

I told you Mr. Van Hollen's proposal. You have a different thing that you would like to do. Don't you think we should come back next week and do that?

Ms. FURCHTGOTT-ROTH. There have been two bills that were already passed in the House that would transform the sequester spending cuts into a more sensible package of cuts. And I think the Senate should consider those. And perhaps the president should consider signing those into law. And I gave the example of the biofuels required by the Defense Department at $27 a gallon when they could be paying $3.50 in diesel fuels.

Mr. ANDREWS. And you know what? Your idea may or may not have merit. But I don't think there is any merit to taking a 9-day vacation when there is 750,000 layoffs looming. Now you and I have different views how to solve this problem——

Ms. FURCHTGOTT-ROTH. You should tell Speaker John Boehner.

Mr. ANDREWS. Excuse me. Well, maybe you should. You probably talk to him more often than I do.

Ms. FURCHTGOTT-ROTH. I haven't——

Mr. ANDREWS. We have said to Speaker Boehner, who is a friend who used to chair this committee that we think we should stay here next week and put proposals on the floor and try to pass something that the Senate would take up and move on. Don't you think we should do that?

Ms. FURCHTGOTT-ROTH. I don't have any opinion on what the congressional calendar should be. But I do think that spending cuts need to be passed. But I don't know how. I mean why don't you pass them——

Mr. ANDREWS. Excuse me. It is my time.

You must think that the Congress should try to pass some law that would defer 750,000 layoffs. Don't you think that?

Ms. FURCHTGOTT-ROTH. I think perhaps you should do it today or tomorrow and then go on the 9-day recess.

Mr. ANDREWS. I agree. So I will ask unanimous consent on the floor today, with your blessing, to take up Mr. Van Hollen's proposal and put it to a vote. Would you support that?

Ms. FURCHTGOTT-ROTH. I don't support Mr. Van Hollen's proposal.

Mr. ANDREWS. But would you support taking a vote on it because it is a way out of this problem?

Ms. FURCHTGOTT-ROTH. Since the vote isn't going to pass I wouldn't support it.

Mr. ANDREWS. You only support things that will pass.

Ms. FURCHTGOTT-ROTH. I think it is time——

Mr. ANDREWS. You don't support the House plan because it will not pass the Senate.

Ms. FURCHTGOTT-ROTH. I think it is time to take a realistic view. Spending growth in the federal government is extremely serious. It is gone from 20 percent of GDP in 2007 to 24 percent this year.

Mr. ANDREWS. I think it is likely that you have made an unsubstantiated allegation for political reasons.

I yield back the rest of my time.

Chairman WALBERG. The gentleman's time is expired. Thank you.

I now recognize the ranking member, Mr. Courtney, for closing comments. And I thank the panel for your testimony today.

Mr. COURTNEY. And likewise. Thank you for your appearance here today and your words.

You know I just want to end with what I thought was one of the most powerful statements yesterday at the Armed Services Committee. Admiral Jonathan Greenert, who is the chief naval officer, runs the U.S. Navy, said to the Armed Services Committee, there is still time.

I mean the fact of the matter is, and we saw this on January 1st, that literally while people were home watching football the House took up a bill that, again, avoided the fiscal cliff and enacted a 2-month delay of sequestration, and used again a combination of revenue and spending cuts to avoid that from hitting.

And the admiral is totally right on the law that you know we can do this today if we wanted to if we could get people to agree. And we can certainly do it on February 28th or on March 1st itself or even on March 2nd because again it is not going to all end on one day.

And that really should be, in my opinion, the takeaway for all of us as members of Congress and as Americans that, you know, in terms of the people who are out there defending our country, the people who are out there keeping the airports safe and planes landing on time, the people who protect the homeland, the people who educate our children, the people who care for seniors, they deserve better than to have, again, a Congress not in session next week and not dealing with this—the gravity of this issue.

And again, the law does not require a super committee to have to do it. The fact of the matter is that two sides can negotiate and fix this dilemma, that would be a completely self-inflicted damage to the economy, as Mr. Eisenbrey, again, testified. And as the Bipartisan Policy Center they actually had a higher estimate. They said it would be a million lost jobs if sequestration were allowed to fully implement.

So you know hopefully that will be our takeaway here today as well. And you know that, I think again, is the mission that we have before us.

I think the Department of Labor scrupulously followed the law in terms of a request, a legitimate request that came in from people who work hard out there to implement programs that help workers and families deal with mass layoffs. And again, I think events proved your judgment was in fact the correct one.

Again, Mr. Chairman, I want to thank you for my maiden hearing, your gracious manner in terms of handling it. And with that I would yield back.

Chairman WALBERG. I thank the gentleman. And I concur that this has been an important hearing, made even more important by this request for information that should have been forthcoming a long time ago. And the fact that it was slipped under the door at 9:00 last night with a password on a sticky note concerns me greatly.

But more than that, in testimony today, to hear that in a small, small department that information that should have been known

that was going to be asked today. There is still a lot of gaps in understanding, why, when, what for?

Sequestration is a huge thing, as has been mentioned on both sides of the aisle. I concur with the fact that the whole idea of sequestration was that it would never happen.

It would be the last-ditch resort because it is a terrible process to undergo. And I would state for the record that this subcommittee and I believe the full committee will pay very close attention, very close attention to employees' protections and rights as well as employers' protections and rights.

That is our responsibility. And we will be held accountable for that. Not simply by our electorate, but by the future of our nation and the outcome of our nation that is based upon employers and employees working together in safe environment, in as secure an environment as possible, and growing this great economy which is called the United States of America. And I commit you, my ranking member and members of the other side of the aisle as well, that that will be a purpose here.

We may differ at times on how much we consider it is being carried out. But we will make that a purpose. And we will make it a purpose over politics. And I think that was our concern when we initially drafted the letter and sent it for information that I hope has been finally supplied to us.

It was to get beyond politics and to say there is a sequestration date certain. We have changed that. But at that time it was certain. It has impact, potentially on thousands of lives, let alone our economy.

There is a law that is in place that we have one of the drafters in the room today, thankfully. And there is a purpose for that. And I think this—the gravity of this situation with sequestration has been far stronger than any other time before. And we deserve answers.

This subcommittee is responsible for oversight. We will do oversight, as well as dealing with issues and policy. But to make sure that our citizens are well served, we will do oversight so that the Departments of State as well as the members of Congress who represent our nation's citizens will be teammates together as best possible, outside of politics. And this function will produce good impact.

We will undertake looking at these 400 pages. And on the basis of what we find out I guess we will decide where we go from here. But I am disappointed that it took a committee hearing to be called for us to get that. And so now it comes to our responsibility of seeing how we make the process work more fully and completely on behalf of our workers and our employees and our nation for the future.

And with that I close my—oh. One thing, thank you for reminding me, I get emotionally involved and I forget.

Also, I think we need to go back to a point that was made and carried on in several ways with statements that were made by specifically one of our witnesses. But it is not unique, even in the fact that ABC News, Mary Bruce and Jake Tapper reported in an article they wrote October 1, 2012, "At White House Request Lockheed Martin Drops Plan to Issue Layoff Notices."

The opening sentence says "Defense contractor Lockheed Martin heeded a request," so at least the perception was there, "heeded a request from the White House today, one with political overtones, and announced it will not issue layoff notices to thousands of employees, just days before the November presidential election." That is concerning to me. And I would request that this be submitted as part of the record without objection.

[The information follows:]

[From go.com, Oct. 1, 2012]

At White House Request, Lockheed Martin Drops Plan to Issue Layoff Notices

By MARY BRUCE and JAKE TAPPER

Defense contractor Lockheed Martin heeded a request from the White House today—one with political overtones—and announced it will not issue layoff notices to thousands of employees just days before the November presidential election.

Lockheed, one of the biggest employers in the key battleground state of Virginia, previously warned it would have to issue notices to employees, required by law, due to looming defense cuts set to begin to take effect after Jan. 2 because of the failure of the Joint Select Committee on Deficit Reduction—the so-called Super-committee, which was created to find a way to cut $1.5 trillion from the federal deficit over the next decade.

Such massive layoffs could have threatened Obama's standing in the state he won in 2008 and is hoping to carry again this November.

On Friday, the Obama administration reiterated that federal contractors should not issue notices to workers based on "uncertainty" over the pending $500 billion reduction in Pentagon spending that will occur unless lawmakers can agree on a solution to the budget impasse, negotiations over which will almost definitely not begin until after the election.

Contractors had been planning to send out notices because of the WARN Act—Worker Adjustment and Retraining Notification Act—which according to the Department of Labor requires "most employers with 100 or more employees to provide notification 60 calendar days in advance of plant closings and mass layoffs."

In a statement Friday, GOP Senators John McCain, Lindsey Graham and Kelly Ayotte accused Obama of putting "his own reelection ahead of the interests of working Americans and our national security by promising government contractors that their salary and liability costs will be covered at taxpayer expense if they do not follow the law that requires advance warning to employees of jobs that may be lost due to sequestration. * * * Apparently, President Obama puts politics ahead of American workers by denying them adequate time to plan their finances and take care of their families. The people who work in the defense industry and other government contracting companies deserve as much notice as possible that they are on track to lose their jobs."

In July the Labor Department issued legal guidance making clear that federal contractors are not required to provide layoff notices 60 days in advance of the potential Jan. 2 sequestration order, and that doing so would be inconsistent with the purpose of the WARN Act.

In Friday's memo, the Office of Management and Budget reiterated that notice, urging agencies' contracting officials and CFOs to "minimize the potential for waste and disruption associated with the issuance of unwarranted layoff notices."

The guidance issued Friday told contractors that if the automatic cuts happen and contractors lay off employees the government will cover certain liability and litigation costs in the event the contractor is later sued because it hadn't provided adequate legal warning to its employees, but only if the contractor abides by the administration's notice and refrains from warning employees now.

After "careful review" Lockheed announced today that it will abide by the administration's guidance.

"We will not issue sequestration-related WARN notices this year," Lockheed announced in a written statement.

"The additional guidance offered important new information about the potential timing of DOD actions under sequestration, indicating that DOD anticipates no contract actions on or about 2 January, 2013, and that any action to adjust funding levels on contracts as a result of sequestration would likely not occur for several months after 2 Jan. The additional guidance further ensures that, if contract actions due to sequestration were to occur, our employees would be provided the protection

of the WARN Act and that the costs of this protection would be allowable and recoverable.

"We remain firm in our conviction that the automatic and across-the-board budget reductions under sequestration are ineffective and inefficient public policy that will weaken our civil government operations, damage our national security, and adversely impact our industry. We will continue to work with leaders in our government to stop sequestration and find more thoughtful, balanced, and effective solutions to our nation's challenges," Lockheed said.

Chairman WALBERG. Hearing no objection, it will be part of our record.

Having said that, there being no further business, the committee stands adjourned.

[Whereupon, at 11:34 a.m., the subcommittee was adjourned.]