

October 31, 2007

The Honorable Nancy Pelosi  
Speaker  
U.S. House of Representatives  
Washington, D.C. 20515

The Honorable John Boehner  
Minority Leader  
U.S. House of Representatives  
Washington, D.C. 20515

Dear Speaker Pelosi and Minority Leader Boehner:

We are writing to express the strong opposition of the HR Policy Association and the Society for Human Resource Management to proposed changes to the Worker Adjustment and Retraining Notification Act (WARN) in H.R. 3796, the “Early Warning and Health Care for Workers Affected by Globalization Act.” We understand that some or all of the provisions of H.R. 3796 are likely to be incorporated into H.R. 3920, which will be voted on this week. H.R. 3796 was ordered reported by the House Education and Labor Committee on October 18th in the absence of any hearing demonstrating a record of a need for changes to the WARN Act. The proposed changes would further increase the challenge to employers of complying with a law that is already extremely complicated and unreasonably require them to forecast the employment effects of changing market conditions a full quarter in advance.

HR Policy Association is a public policy advocacy organization representing the chief human resource officers of over 240 leading employers doing business in the United States. Representing nearly every major industry sector, HR Policy members have a combined U.S. market capitalization of more than \$7.5 trillion and employ more than 18 million employees world wide. The Society for Human Resource Management (SHRM) is the world’s largest association devoted to human resource management. The Society serves the needs of HR professionals and advances the interests of the HR profession. Founded in 1948, SHRM has more than 225,000 members in over 125 countries, and more than 575 affiliated chapters.

Among other things, the proposed WARN amendments would increase the requirement for notice prior to a covered “plant closing” or “mass layoff” from 60 to 90 days while lowering the threshold triggering the notice requirement. Since its enactment in 1988, it has been the experience of both of our organizations that our members have diligently complied with both the letter and the spirit of the WARN Act and, where possible, gone beyond its requirements in seeking to assist employees who are affected by large scale layoffs and plant closings. In addition to providing even lengthier notice where possible, employers often provide additional

transition assistance in the form of severance, benefits, retraining, and outplacement assistance. To the extent that changes in the law increase the overall costs and complexities of compliance with WARN, this could have the effect of reducing or eliminating many of these benefits. This would be even more likely in situations where the assistance is put together to address a specific closing or layoff situation where it would otherwise be combined with a waiver of WARN claims, which would no longer be allowed by the bill.

It is important that Congress realize the challenges that employers face in complying with WARN. The statute currently imposes an obligation on an employer to make a number of difficult predictions 60 days in advance of an action that may have an effect on jobs at a particular workplace. The employer must predict:

- Whether the number of employees (currently excluding part-timers) experiencing an “employment loss” (*i.e.*, termination, layoff of at least six months, or substantial reduction in hours) within a 30-day period will exceed the statutory minimum (at least 50) to trigger the 60-day notice requirement;
- Even if there are not enough employees within that period, whether there will be other employment losses in the 30 days prior to and 30 days after that period that will cause the statutory minimum to be exceeded (unless the employer believes it can prove to a court that those employment losses are the result of “separate and distinct causes” and not part of an attempt to evade that notice requirement);
- In a non-union setting, the specific employees who will experience an employment loss, which may be complicated by seniority systems that allow bumping of less senior employees (in a union setting, the employer gives notice to the union only); and
- The precise date when each employee will experience an employment loss (*i.e.*, each WARN notice must inform the employee of the specific date, which can only vary within a two-week period).

For obvious reasons, the further in advance an employer is required to make these predictions, the more difficult they become if at all possible. Yet the bill would increase the required notice period to 90 days, while requiring notice any time 50 or more employees experience employment losses, regardless of the percentage of the workforce involved. This would be further complicated by also requiring the employer to include part-time workers in the count. Moreover, in addition to making compliance substantially more difficult, the bill would more than double the penalty for a violation by requiring two-times back pay per day of violation up to ninety days.

True, the Act does have a limited exception for “unforeseeable business circumstances,” but this has been very narrowly construed by DOL regulations and the courts and can only be resolved through litigation. Similarly, by lowering the minimum number of employment losses that trigger the notice requirement, employers would need to make these predictions on a much more frequent basis. One unintended effect would be to inhibit employers from taking other actions that would have beneficial employment effects—*e.g.*, a retailer increasing staffing levels to respond to increased consumer demands that may prove to be temporary, or redeployment of employees who may otherwise lose their jobs to facilities with potential, but not guaranteed, long-term employment possibilities for them.

While the increase of the notice period and the lowering of the triggers are our foremost concern with the bill, there are a number of other provisions that are problematic. First, the bill would require employers in unionized settings to give notice to the union and the affected represented employees. The current law requirement that only the union be notified has worked well because the union is typically engaged in determining through the seniority process which employees will ultimately experience an employment loss. Since the purpose of the proposed change would appear to be to ensure that the represented employees ultimately receive the WARN notice, a more sound approach would be to impose a statutory obligation on the union to provide the WARN notice, coupled with liability comparable to that of an employer for failure to comply.

We are also opposed to procedural changes the bill would make that would stimulate more litigation of WARN claims. In addition to substantially increasing the damages under the law, the bill would also impose unprecedented new restrictions on waivers of WARN claims, even where employees receive additional consideration in return. The bill would also establish a two-year statute of limitations even though an individual's failure to receive a WARN notice while the requisite numbers of his or her coworkers also experience employment loss simply does not take two years for a potential claimant to realize. The individual and collective result of all of these changes could only mean an overwhelming increase in WARN litigation at the expense of timely and just resolution of disputes.

For all of these reasons, we oppose the provisions of H.R. 3796 and encourage the House to reject them as either a free-standing measure or as part of a larger bill. If you have any questions, please do not hesitate to contact Dan Yager at 202-789-8670 or Mike Aitken at 703-535-6027. Thank you for your consideration.

Sincerely,



Daniel V. Yager  
Senior Vice President and General Counsel  
HR Policy Association



Michael P. Aitken  
Director, Governmental Affairs  
Society for Human Resource Management

cc: Members of the U.S. House of Representatives