



MANHATTAN INSTITUTE FOR POLICY RESEARCH

**Sequestration: Examining Employers'  
WARN Act Responsibilities**

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**Testimony before the Subcommittee on Workforce Protections,  
House Committee on Education and the Workforce**

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## **Sequestration: Examining Employers' WARN Act Responsibilities**

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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.<sup>i</sup> Though the original sequester was scheduled for January 2, 2013, the American Taxpayer Relief Act of 2012 moved the date to March 1, 2013.<sup>ii</sup> 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.<sup>iii</sup>

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.<sup>iv</sup> The WARN Act is meant to allow workers to prepare themselves for the risk of layoff, temporary or permanent.<sup>v</sup>

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.<sup>vi</sup>

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 employer 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."<sup>vii</sup>

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.”<sup>viii</sup>

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.<sup>ix</sup>

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. <sup>x</sup> 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 President 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.

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- i 112<sup>th</sup> Congress, 1<sup>st</sup> Session, *Budget Control Act of 2011*, Section 251a, <http://www.gpo.gov/fdsys/pkg/BILLS-112s365enr/pdf/BILLS-112s365enr.pdf>.
- ii 112<sup>th</sup> Congress, 2<sup>nd</sup> 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](http://www.whitehouse.gov/sites/default/files/omb/assets/legislative_reports/stareport.pdf).
- iv 110<sup>th</sup> 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&](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](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>.