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REPORT
110–410

EARLY WARNING AND HEALTH CARE FOR WORKERS AFFECTED BY GLOBALIZATION ACT

OCTOBER 25, 2007.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. GEORGE MILLER of California, from the Committee on Education and Labor, submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany H.R. 3796]

[Including cost estimate of the Congressional Budget Office]

The Committee on Education and Labor, to whom was referred the bill (H.R. 3796) to amend the Worker Adjustment and Retraining Notification Act to minimize the adverse effects of employment dislocation, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Early Warning and Health Care for Workers Affected by Globalization Act".

SEC. 2. AMENDMENTS TO THE WARN ACT.

(a) DEFINITIONS.—

(1) EMPLOYER, PLANT CLOSING, AND MASS LAYOFF.—Paragraphs (1) through (3) of section 2(a) of the Worker Adjustment and Retraining Notification Act (29 U.S.C. 2101(a)(1)–(3)) are amended to read as follows:

"(1) the term 'employer' means any business enterprise that employs 100 or more employees;

"(2) the term 'plant closing' means the permanent or temporary shutdown of a single site of employment, or of one or more facilities or operating units within a single site of employment, which results in an employment loss at such site, during any 30-day period, for 25 or more employees;

"(3) the term 'mass layoff' means a reduction in force at a single site of employment which results in an employment loss at such site, during any 30-day period, for 25 or more employees.".

(2) SECRETARY OF LABOR.—

(A) DEFINITION.—Paragraph (8) of such section is amended to read as follows:

"(8) the term 'Secretary' means the Secretary of Labor or a representative of the Secretary of Labor.".

(B) REGULATIONS.—Section 8(a) of such Act (29 U.S.C. 2107(a)) is amended by striking "of Labor".

(3) CONFORMING AMENDMENTS.—

(A) NOTICE.—Section 3(d) of such Act (29 U.S.C. 2102(d)) is amended by striking out ", each of which is less than the minimum number of employees specified in section 2(a)(2) or (3) but which in the aggregate exceed that minimum number," and inserting "which in the aggregate exceed the minimum number of employees specified in section 2(a)(2) or (3)".

(B) DEFINITIONS.—Section 2(b)(1) of such Act (29 U.S.C. 2101(b)(1)) is amended by striking "(other than a part-time employee)".

(b) NOTICE.—

(1) NOTICE PERIOD.—

(A) IN GENERAL.—Section 3 of the Worker Adjustment and Retraining Notification Act (29 U.S.C. 2102) is amended by striking "60-day period" and inserting "90-day period" each place it appears.

(B) CONFORMING AMENDMENT.—Section 5(a)(1) of such Act (29 U.S.C. 2104(a)(1)) is amended in the matter following subparagraph (B), by striking "60 days" and inserting "90 days".

(2) RECIPIENTS.—Section 3(a) of such Act (29 U.S.C. 2102(a)) is amended—

(A) in paragraph (1), by striking "or, if there is no such representative at that time, to each affected employee; and" and inserting "and to each affected employee;"; and

(B) by redesignating paragraph (2) as paragraph (3) and inserting after paragraph (1) the following:

"(2) to the Secretary; and".

(3) INFORMATION REGARDING BENEFITS AND SERVICES AVAILABLE TO WORKERS AND DOL NOTICE TO CONGRESS.—Section 3 of such Act (29 U.S.C. 2102) is further amended by adding at the end the following:

"(e) INFORMATION REGARDING BENEFITS AND SERVICES AVAILABLE TO EMPLOYEES.—Concurrent with or immediately after providing the notice required under subsection (a)(1), an employer shall provide affected employees with information regarding the benefits and services available to such employees, as described in the guide compiled by the Secretary under section 12.

"(f) DOL NOTICE TO CONGRESS.—As soon as practicable and not later than 15 days after receiving notification under subsection (a)(2), the Secretary of Labor shall notify the appropriate Senators and Members of the House of Representatives who represent the area or areas where the plant closing or mass layoff is to occur.".

(c) ENFORCEMENT.—

(1) AMOUNT.—Section 5(a)(1) of the Worker Adjustment and Retraining Notification Act (29 U.S.C. 2104(a)(1)) is amended—

(A) in subparagraph (A)—

(i) by striking "back pay for each day of violation" and inserting "two days' pay multiplied by the number of calendar days short of 90 that the employer provided notice before such closing or layoff";

(ii) in clause (ii), by striking "and" at the end thereof;

(B) by redesignating subparagraph (B) as subparagraph (C);

(C) by inserting after subparagraph (A) the following:

"(B) interest on the amount described in subparagraph (A) calculated at the prevailing rate; and"; and

(D) by striking the matter following subparagraph (C) (as so redesignated).

(2) EXEMPTION.—Section 5(a)(4) of such Act (29 U.S.C. 2104(a)(4)) is amended by striking "reduce the amount of the liability or penalty provided for in this section" and inserting "reduce the amount of the liability under subparagraph (C) of paragraph (1) and reduce the amount of the penalty provided for in paragraph (3)".

(3) ADMINISTRATIVE COMPLAINT.—Section 5(a)(5) of such Act (29 U.S.C. 2104(a)(5)) is amended—

(A) by striking "may sue" and inserting "may,";

(B) by inserting after "both," the following: "(A) file a complaint with the Secretary alleging a violation of section 3, or (B) bring suit"; and

(C) by adding at the end thereof the following new sentence: "A person seeking to enforce such liability may use one or both of the enforcement mechanisms described in subparagraphs (A) and (B).".

(4) ACTION BY THE SECRETARY.—Section 5 of such Act (29 U.S.C. 2104) is amended—

(A) by redesignating subsection (b) as subsection (d); and

(B) by inserting after subsection (a) the following new subsections:

"(b) ACTION BY THE SECRETARY.—

"(1) ADMINISTRATIVE ACTION.—The Secretary shall receive, investigate, and attempt to resolve complaints of violations of section 3 by an employer in the same manner that the Secretary receives, investigates, and attempts to resolve complaints of violations of sections 6 and 7 of the Fair Labor Standards Act of 1938 (29 U.S.C. 206 and 207).

"(2) SUBPOENA POWERS.—For the purposes of any investigation provided for in this section, the Secretary shall have the subpoena authority provided for under section 9 of the Fair Labor Standards Act of 1938 (29 U.S.C. 209).

"(3) CIVIL ACTION.—The Secretary may bring an action in any court of competent jurisdiction to recover on behalf of an employee the backpay, interest, benefits, and liquidated damages described in subsection (a).

"(4) SUMS RECOVERED.—Any sums recovered by the Secretary on behalf of an employee under subparagraphs (A), (B), and (D) of section 5(a)(1) shall be held in a special deposit account and shall be paid, on order of the Secretary, directly to each employee affected. Any such sums not paid to an employee because of inability to do so within a period of 3 years, and any sums recovered by the Secretary under subparagraph (C) of section 5(a)(1), shall be credited as an offsetting collection to the appropriations account of the Secretary of Labor for expenses for the administration of this Act and shall remain available to the Secretary until expended.

"(5) ACTION TO COMPEL RELIEF BY SECRETARY.—The district courts of the United States shall have jurisdiction, for cause shown, over an action brought by the Secretary to restrain the withholding of payment of back pay, interest, benefits, or other compensation, plus interest, found by the court to be due to employees under this Act.

"(c) LIMITATIONS.—

"(1) LIMITATIONS PERIOD.—An action may be brought under this section not later than 2 years after the date of the last event constituting the alleged violation for which the action is brought.

"(2) COMMENCEMENT.—In determining when an action is commenced under this section for the purposes of paragraph (1), it shall be considered to be commenced on the date on which the complaint is filed.

"(3) LIMITATION ON PRIVATE ACTION WHILE ACTION OF SECRETARY IS PENDING.—If the Secretary has instituted an enforcement action or proceeding under subsection (b), an individual employee may not bring an action under subsection (a) during the pendency of the proceeding against any person with respect to whom the Secretary has instituted the proceeding.".

(d) POSTING OF NOTICES; PENALTIES.—Section 11 of the Worker Adjustment and Retraining Notification Act (29 U.S.C. 2101 note) is amended to read as follows:

"SEC. 11. POSTING OF NOTICES; PENALTIES.

"(a) POSTING OF NOTICES.—Each employer shall post and keep posted in conspicuous places upon its premises where notices to employees are customarily posted a notice to be prepared or approved by the Secretary setting forth excerpts from, or summaries of, the pertinent provisions of this chapter and information pertinent to the filing of a complaint.

"(b) PENALTIES.—A willful violation of this section shall be punishable by a fine of not more than $500 for each separate offense.".

(e) NON-WAIVER OF RIGHTS AND REMEDIES; INFORMATION REGARDING BENEFITS AND SERVICES AVAILABLE TO EMPLOYEES.—Such Act is further amended by adding at the end the following:

"SEC. 12. RIGHTS AND REMEDIES NOT SUBJECT TO WAIVER.

"(a) IN GENERAL.—The rights and remedies provided under this Act (including the right to maintain a civil action) may not be waived, deferred, or lost pursuant to any agreement or settlement other than an agreement or settlement described in subsection (b).

"(b) AGREEMENT OR SETTLEMENT.—An agreement or settlement referred to in subsection (a) is an agreement or settlement negotiated by the Secretary, an attorney general of any State, or a private attorney on behalf of affected employees.

"SEC. 13. INFORMATION REGARDING BENEFITS AND SERVICES AVAILABLE TO WORKERS.

"The Secretary of Labor shall maintain a guide of benefits and services which may be available to affected employees, including unemployment compensation, trade adjustment assistance, COBRA benefits, and early access to training and other services, including counseling services, available under the Workforce Investment Act of 1998. Such guide shall be available on the Internet website of the Department of Labor and shall include a description of the benefits and services, the eligibility requirements, and the means of obtaining such benefits and services. Upon receiving notice from an employer under section 3(a)(2), the Secretary shall immediately transmit such guide to such employer.".

(f) NOTICE EXCUSED WHERE CAUSED BY TERRORIST ATTACK.—Section 3(b)(2) of the Worker Adjustment and Retraining Notification Act (29 U.S.C. 2102(b)(2)) is amended by adding at the end the following new subparagraph:

"(C) No notice under this Act shall be required if the plant closing or mass layoff is due directly or indirectly to a terrorist attack on the United States.".

SEC. 3. EXTENSION OF COBRA BENEFITS FOR CERTAIN INDIVIDUALS CERTIFIED AS TAA ELIGIBLE.

(a) AMENDMENTS TO THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974.—

(1) SPECIAL RULE FOR QUALIFIED TAA ELIGIBLE EMPLOYEES.—

(A) IN GENERAL.—Section 602(2)(A) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1162(2)(A)) is amended—

(i) by moving clause (v) to after clause (iv) and before the flush left sentence beginning with "In the case of a qualified beneficiary"; and

(ii) by inserting after clause (v) the following new clause:

"(vi) SPECIAL RULE FOR QUALIFIED TAA ELIGIBLE EMPLOYEES.—In the case of a qualifying event described in section 603(2), clauses (i) and (ii) shall not apply to a qualified TAA eligible employee (as defined in section 607(6)).".

(B) QUALIFIED TAA ELIGIBLE EMPLOYEE DEFINED.—Section 607 of such Act (29 U.S.C. 1167) is amended by adding at the end the following new paragraph:

"(6) QUALIFIED TAA ELIGIBLE EMPLOYEE.—The term 'qualified TAA eligible employee' means a covered employee, with respect to a qualifying event, if—

"(A) the qualifying event is attributable to the conditions specified in section 222 of the Trade Act of 1974 (19 U.S.C. 2272) based on which the Secretary of Labor has certified a group of workers as eligible to apply for adjustment assistance under subchapter A of chapter 2 of title II of such Act;

"(B) such certification applies to the covered employee; and

"(C) as of the date of such qualifying event the covered employee has attained age 55 or has completed 10 or more years of service with the employer.".

(2) CONFORMING AMENDMENTS.—Section 602(2)(A) of such Act (29 U.S.C. 1162(2)(A)) is further amended—

(A) in clause (i), by striking "In the case of" and inserting "Subject to clause (vi), in the case of"; and

(B) in clause (ii), by striking "If a qualifying event" and inserting "Subject to clause (vi), if a qualifying event".

(b) EFFECTIVE DATE.—

(1) GENERAL RULE.—The amendments made by this section shall apply for plan years beginning on or after January 1, 2008.

(2) SPECIAL RULE FOR COLLECTIVE BARGAINING AGREEMENTS.—In the case of a group health plan maintained pursuant to one or more collective bargaining agreements between employee representatives and one or more employers ratified before the date of the enactment of this Act, the amendments made by this section shall not apply to plan years beginning before the earlier of—

(A) the later of—

(i) the date on which the last of the collective bargaining agreements relating to the plan terminates (determined without regard to any extension thereof agreed to after the date of the enactment of this Act), or

(ii) July 1, 2008, or

(B) the date which is 3 years after the date of the enactment of this Act.

SEC. 4. EFFECTIVE DATE.

Except as otherwise provided in this Act, the provisions of this Act, and the amendments made by this Act, shall take effect on the date of the enactment of this Act.

PURPOSE

Trade can produce both positive and negative consequences. When international free trade agreements were being proposed in the early 1990s, proponents argued that they would produce a net economic benefit for the U.S. and its trading partners. While there have been some winners, the consequence of a global economy is that many U.S. businesses have and will move offshore, are forced to downsize or shut down altogether. Consequently, there is increased economic insecurity and job instability among millions of U.S. workers with more and more losing their jobs and health care every day.

Congress has a responsibility to provide meaningful assistance to workers who are negatively affected by trade. When international trade agreements cause American workers to lose their jobs through no fault of their own, Congress must ensure that displaced workers can make ends meet while they find a new job or, in the case of older workers, until they reach retirement age. While income support and training benefits through Trade Adjustment Assistance (TAA) are critical to the viability of displaced workers, it is equally important to ensure that workers have as much advance notice as possible before a plant closing or layoff. The Early Warning & Health Care for Workers Affected by Globalization Act amends the Worker Adjustment and Retraining Notification Act (WARN) so that more workers will have a longer period of time to prepare for imminent job loss. Furthermore, the bill will ensure that workers are educated and informed about benefits and services for which they may eligible before they find themselves unemployed and unsure of what to do next.

In addition, H.R. 3796 will ensure that workers who have lost their job due to trade have access to continued health care coverage. The bill permits TAA eligible employees who are 55 and older or who have worked for an employer for 10 or more years to utilize an additional healthcare option: COBRA[1] coverage until they are eligible for Medicare at age 65 or covered by another health plan. This additional health care option is critical for older workers displaced by trade because they face even tougher obstacles when trying to obtain affordable and adequate health care coverage.

COMMITTEE ACTION INCLUDING LEGISLATIVE HISTORY AND VOTES IN COMMITTEE

99TH CONGRESS

On March 20, 1985, Representative William D. Ford (D–MI), along with Representative Silvio O. Conte (D–MA), introduced H.R. 1616, the Labor-Management Notification and Consultation Act of 1985. The bill focused on two issues: (1) advance notification and (2) consultation between employers and unions over plant closing or layoff decisions. The bill had 173 co-sponsors and was referred to the Education and Labor Committee.

A joint hearing was held by the Subcommittees on Labor-Management Relations and Employment Opportunities to consider the "Labor-Management Notification and Consultation Act of 1985,

[1] Title X of the Consolidated Omnibus Budget Reconciliation Act (COBRA).

H.R. 1616" on May 15, 1985. Witnesses included union and business representatives as well as academics. H.R. 1616 was defeated in the House on November 21, 1985, by a margin of five votes 203–208.[2]

100TH CONGRESS

On February 18, 1987, Representative Ford (D–MI) introduced the Economic Dislocation and Worker Adjustment Assistance Act, H.R. 1122. It had 108 cosponsors and was referred to the House Committee on Education and Labor. H.R. 1122 was favorably reported out of Committee.[3] However, no vote was taken in the House.

Subcommittee hearing on H.R. 1122

A joint hearing was held on March 16, 1987 by the Subcommittee on Labor-Management Relations and the Subcommittee on Employment Opportunities on the "Economic Dislocation and Worker Adjustment Assistance Act, H.R. 1122."[4] Testimony was provided by Owen F. Bieber, President of the United Automobile, Aerospace and Agriculture Implement Workers of America, UAW, AFL–CIO; Thomas Fricano, assistant regional Director of Region 9, UAW; Dave Steinwald, shop chairman, local 2100, UAW; Robert Geiger, Vice President of Labor Relations, Allied Signal Inc.; Bruce J. Johnston, Executive Vice President, Employee Relations, USX; the Honorable Angelo R. Martinelli, Mayor, Yonkers, NY; Howard D. Samuel, President of the Industrial Union Department AFL–CIO; Douglas H. Soutar, National Center on Occupational Readjustment; Isiah Turner, Commissioner, Washington State Employment Security Department; William H. Wynn, President, United Food & Commercial Workers International Union.

In the Senate S. 538, the Economic Dislocation and Worker Adjustment Assistance Act was introduced on February 19, 1987 by Senator Howard Metzenbaum (D–OH). It garnered 21 cosponsors and was referred to the Labor and Human Resources Committee. Joint hearings entitled "Economic Dislocation and Worker Adjustment Assistance Act" were held by the subcommittee on Labor and the subcommittee on Employment and Productivity on March 10, 1987 and March 26.

Although both bills were reported out of their respective Committees as separate pieces of legislation, a revised version of S. 538 was added as Subtitle E of H.R. 3, the Omnibus Trade and Competitiveness Act of 1988. As revised, the bill required 60 days advance notice of plant closings or mass layoffs resulting in permanent job losses or layoffs of at least six months in duration.

H.R. 3 was vetoed by President Ronald Reagan with the President's principal objection being the presence of advance notification provisions. On April 21, 1988 the House of Representatives overrode the President's veto by a vote of 308–113,[5] however, the Senate failed to do so by a vote of 61–37.[6]

[2] Roll Call No: 421.
[3] Report No: 100–285.
[4] Serial No. 100–53.
[5] Record Vote No: 150.
[6] Record Vote No: 169.

On June 16, 1988, the Workers Adjustment and Retraining Notification Act, S. 2527 was introduced by Senator Howard Metzenbaum. S. 2527 had 23 co-sponsors. The bill was virtually identical to the advance notification provisions of H.R. 3 which was vetoed by President Reagan. On August 4, 1988 WARN became Public Law No: 100–379 over a presidential veto.[7]

102ND CONGRESS

On November 22, 1991, the American Jobs Protection Act, H.R. 3878, was introduced by Representative Ford (D–MI) and had 70 co-sponsors. The bill would have required that employers provide notice and information on continuing benefits to employees who are subject to a plant closing or mass layoff because their work is transferred to another country. H.R. 3878 was referred to the Education and Labor Committee, where it was referred to the Subcommittee on Labor-Management Relations.

Full committee field hearing on H.R. 3878

On January 17, 1992, the Education and Labor Committee, led by Chairman William D. Ford[8] (D–MI), conducted a field hearing on the American Jobs Protection Act in Westland, MI. The hearing featured testimony from witnesses, including: Owen Bieber, President, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW); Hattie Smith, Former Employee, U.S. Auto Radiator; Bernadette Helkowski, Former Employee, U.S. Auto Radiator; Becky Nordstrom, Wayne County Private Industry Corporation; Joan E. Greenfield, Greenfield & Associates, Inc.; Harriet B. Saperstein, President, Highland Park Development Company; Bernadette Ford, Former Employee, Electro-Wire Products; Melanie Bishop, Former Employee, Electro-Wire Products; Penny Reha, Former Employee, Electro-Wire Products; Margaret McAvoy, Executive Director, Shiawassee Employment and Training; Patrick J. Marutiak, Attorney for Former Employees of Electro-Wire Products; and the Honorable Thomas C. Sawyer, Representative from Ohio.

Full committee field hearing on H.R. 3878

On March 28, 1992, the Education and Labor Committee, led by Chairman Ford (D–MI), conducted a field hearing on the American Jobs Protection Act in Flint, MI. The hearing featured testimony from witnesses, including: Ruben Burks, Regional Director, UAW Region 1–C; the Honorable Woodrow Stanley, Mayor of Flint; Jack Minore, City Councilman, Flint; Joe Sanchez, Gaines, Michigan; Estela Mata, Burton, Michigan; Dale Whitney, Saginaw, Michigan; Deborah Sparks, Boyne Falls, Michigan; Kelly Breakey, East Jordan, Michigan; and Chris Uhas, Northwest Michigan Council of Governments.

Full committee field hearing on H.R. 3878

On March 30, 1992, the Education and Labor Committee, led by Chairman Ford (D–MI), conducted a field hearing on the American

[7] The House passed H.R. 2527 by a vote of 286–136, while the Senate passed WARN by a vote of 72–23.

[8] Representative William D. Ford served as Chairman to the Education and Labor Committee from 1991–1995.

Jobs Protection Act in Columbus, OH. The hearing featured testimony from witnesses, including: the Honorable Howard M. Metzenbaum, United States Senator; Linda S. Starr of Swanton, Ohio; Gary Schondel of Toledo, Ohio; Carole Guice, Vanguard Vocational Center in Fremont, Ohio; Jim Laird of Bellevue, Ohio; Lawrence Bankowski, President, American Flint Glass Workers Union, AFL–CIO; Luis Pantoja, Mold Maker, Libby Glass, Inc., Toledo; John Meier, Vice President/General Manager, Libbey Glass, Inc., Toledo; Willie Thorpe, IUE, Local 801, Moraine, Ohio; Dr. James M. Cypher, California State University, Department of Economics, Fresno, California; and Wally Wagner, Wayne, Ohio. Testimony was submitted for the record by: the Honorable Marcy Kaptur, Representative from Ohio; Ray T. Kest, Lucas County Treasurer; Rebecca Merrill.

Full committee field hearing on H.R. 3878

On April 24, 1992, the Education and Labor Committee, led by Chairman Ford (D–MI), conducted a joint field hearing on the American Jobs Protection Act in San Francisco, CA with the Committee on Interior and Insular Affairs. The hearing featured testimony from witnesses, including: Jack Henning, Executive Secretary-Treasurer, California Labor Federation, AFL–CIO; Douglas Dowd, Professor, Johns Hopkins School of Advanced International Studies and San Jose State University; David Arian, President, International Association of Machinists, Air Transportation Employees, Local Lodge 1781, Burlingame, CA; Craig Merrilees, Co-Director, Fair Trade Campaign, San Francisco; Carl Pope, Associate Executive Director, Conservation and Communications, Sierra Club; and Al Meyerhoff, Senior Attorney, National Resources Defense Council. Testimony was submitted for the record by Lou Franchimon, Napa-Solano Counties, Building and Construction Trades Council.

On March 4, 1992, the Save American Jobs Act, S. 2311, was introduced by Senator Howard Metzenbaum (D–OH). The bill would have required a covered employer to provide affected workers and the Secretary of Labor with a 120-day relocation notice and provide dislocated workers with specified coverage of severance pay, health care benefits, and retraining reimbursement. S. 2311 had 2 cosponsors. It was referred to the Committee on Labor and Human Resources, where it was referred to the Subcommittee on Labor.

Full committee hearing on S. 2311

On April 7, 1992, the Committee on Labor and Human Resources, led by Chairman Edward Kennedy (D–MA), conducted a legislative hearing on the Save American Jobs Act. The hearing featured testimony from witnesses, including: Anita Mingus, employee, Zenith Electronics Corporation, Springfield, MO; Tony Sanchez, Manager, El Paso District Board, Amalgamated Clothing and Textile Workers Union, El Paso, Texas; Owen Bieber, President, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America; the Honorable Gerald D. Lucia, Mayor, Mount Pleasant, PA and former employee, Volkswagen of America; and Jeff Faux, President, Economic Policy Institute.

103RD CONGRESS

On March 3, 1993, H.R. 1207, the Jobs Preservation Act of 1993, was introduced by Representative Tim Roemer (D–IN). H.R. 1207 would have amended WARN to require that the Secretary of the Treasury be notified prior to certain plant closings. It was referred to the Committee on Education and Labor, where it was referred to the Subcommittee on Labor-Management Relations, and to the Committee on Ways and Means. No action was taken on H.R. 1207.

On May 27, 1993, the American Jobs Protection Act, H.R. 2300 was introduced by Chairman Ford (D–MI). The bill would have provided assistance to workers who were affected by a plant closing or mass layoff when their job was transferred to a foreign country. H.R. 2300 would have also amended WARN to expand coverage and strengthen notification requirements. H.R. 2300 had no co-sponsors. It was referred to the Committee on Education and Labor, where it was referred to the Subcommittee on Labor-Management Relations. Neither the full committee nor the subcommittee took any action on H.R. 2300.

On March 17, 1994, H.R. 4072, the Worker Adjustment and Retraining Notification Amendments Act, was introduced by Chairman Ford (D–MI). It would have amended WARN to cover more employers and situations, lengthen the period of advance notification, and include coverage of part-time employees. H.R. 4072 was referred to the Committee on Education and Labor and subsequently referred to the Subcommittee on Labor-Management Relations. No hearings were held on the bill.

On March 24, 1994, S. 1969, the Worker Adjustment and Retraining Notification Amendments Act, was introduced by Senator Howard Metzenbaum (D–OH) with similar provisions as the House version. It had 8 co-sponsors. No further action was taken on S. 1969.

On October 5, 1994, S. 2504, the Contingent Workforce Equity Act, was introduced by Senator Howard Metzenbaum (D–OH). The bill would have extended to part-time employees the right to advance notice of layoffs and plant closings and other rights under WARN. S. 2504 was referred to the Committee on Labor and Human Resources. However, no further action was taken.

105TH CONGRESS

On June 17, 1997, H.R. 1946, the Employee Ownership Enhancement Act, was introduced by Representative James Traficant, Jr. (D–OH). It would have amended WARN to require an employer which is terminating its business to offer its employees an employee stock ownership plan. It was referred to the Committee on Education and the Workforce. The Committee did not consider H.R. 1946.

On March 5, 1998, H.R. 3397, the Corporate Good Citizenship Contract Act of 1998, was introduced by Representative David Obey (D–WI). It would have required an employer which is subject to WARN and who gives a notice of a plant closing to negotiate in good faith regarding possible means of using the plant and equipment for continued employment. It was referred to the Committee on Education and Labor, where it was referred to the Sub-

committee on Employer-Employee Relations, and to the Committee on Ways and Means. No further action was taken on H.R. 3397.

106TH CONGRESS

On February 2, 1999, H.R. 499, the Employee Ownership Enhancement Act, was again introduced by Representative James Traficant, Jr. (D–OH). H.R. 499 was referred to the Committee on Education and the Workforce, where it was referred to the Subcommittee on Workforce Protections. No further action was taken on H.R. 499.

108TH CONGRESS

On January 7, 2003, H.R. 137, the Rural America Job Assistance and Creation Act, was introduced by Representative John McHugh (R–NY). Among other provisions, the bill would have amended the WARN to require employer notification of Federal, State, and local elected officials prior to dislocation of workers. H.R. 137 was referred to the Committee on Education and the Workforce, where it was referred to the Subcommittee on Workforce Protection and the Subcommittee on 21st Century Competitiveness; the Committee on Ways and Means; the Judiciary Committee, where it was referred to the Subcommittee on Immigration and Claims; the Agriculture Committee, where it was referred to the Subcommittee on Conservation, Credit, Rural Development and Research; and the Financial Services Committee, where it was referred to the Subcommittee on Domestic Monetary Policy, Technology and Economic Growth. No further action was taken on H.R. 137.

On February 11, 2004, H.R. 3808, the Safeguarding Assets for Employees in Bankruptcy Act of 2004, was introduced by Representative Luis Gutierrez (D–IL). H.R. 3808 would have prioritized the payment of employee claims arising under WARN. It was referred to the Judiciary Committee, where it was referred to the Subcommittee on Commercial and Administrative Law. Neither the full Committee, nor the Subcommittee, took any further action on H.R. 3808.

On June 25, 2004, H.R. 4740, the Jobs for America Act of 2004, was introduced by Representative George Miller (D–CA). H.R. 4740 had 30 co-sponsors. It was referred to the Committee on Education and the Workforce, where it was referred to the Subcommittee on Workforce Protections. A companion bill, S. 2090, was introduced on February 12, 2004 by Senator Tom Daschle (D–SD). It was referred to the Health, Education, Labor, and Pensions (HELP) Committee and had 24 co-sponsors. Both bills would have amended WARN to provide protections for employees relating to the offshoring of jobs. No further action was taken on either bill.

109TH CONGRESS

On January 24, 2005, S. 14, the Fair Wage, Competition, and Investment Act of 2005, was introduced by Senator Debbie Stabenow (D–MI). The bill would have amended WARN to include offshoring of jobs among the circumstances for which employers are required to post notices of employee rights. S. 14 had 13 co-sponsors and was referred to the Finance Committee. No further action was taken.

On March 2, 2006, S. 2357, the Right TRACK Act, was introduced by Senator Edward Kennedy (D–MA). This bill would have required an employer to give 90-day notice before ordering the offshoring of jobs. It was referred to the Finance Committee. No action was taken on S. 2357.

110TH CONGRESS

On July 16, 2007, S. 1792, the Forewarn Act of 2007, was introduced by Senator Sherrod Brown (D–OH). It has 7 co-sponsors and was referred to the Health, Education, Labor, and Pensions Committee, however no further action has been taken.

On September 25, 2007, H.R. 3662, the Forewarn Act of 2007, was introduced by Representative John McHugh (R–NY). It was referred to the Committee on Education and Labor. No further action has been taken.

Education and Labor Committee hearings on the strengthening the middle class

On January 31, 2007, the Committee on Education and Labor held a full committee hearing on "Strengthening America's Middle Class: Evaluating the Economic Squeeze on America's Families." The hearing featured testimony from witnesses including: Jacob Hacker, Ph.D., Professor, Yale University; Eileen Appelbaum, Director, Center for Women and Work, Rutgers University; Christian Weller, Senior Economist, Center for American Progress; Rosemary Miller, flight attendant; Ms. Diana Furchtgott-Roth, Director, Center for Employment Policy; Ms. Kellie Johnson, President, ACE Clearwater Enterprises, Inc.

On February 7, 2007, the Committee on Education and Labor held a full committee hearing on "Strengthening America's Middle Class: Finding Economic Solutions To Help America's Families." The hearing featured testimony from witnesses, including: Richard L. Trumka, Secretary-Treasurer, AFL–CIO; Judy Feder, Dean, Georgetown Public Policy Institute, Georgetown University; William T. Archey, President and Chief Executive Officer, AeA; Dr. Lynn A. Karoly, Senior Economist, RAND Corporation. A statement was submitted for the record by the Honorable Janet Napolitano, Governor, State of Arizona.

Congressional hearings on the effectiveness of trade adjustment programs

On March 26, 2007, the Committee on Education and Labor held a hearing on "How Effective are Existing Programs in Helping Workers Impacted by International Trade?" The hearing featured testimony from witnesses including: Stan Dorn, Senior Research Associate, Urban Institute; Bruce Herman, Executive Director, National Employment Law Project; Lael Brainard; Vice President and Director, Bernard L. Schwartz, Chair in International Economics, Brookings Global Economy and Development Program; David Lee Brevard, Former Maytag Employee, Galesburg, Illinois; Thea Lee, Policy Director, AFL–CIO; and Tim Alford, Ph.D., Director, Alabama Office of Workforce Development.

On June 14, 2007, the Ways and Means Committee held a full committee hearing on "Promoting U.S. Worker Competitiveness in a Globalized Economy."

The hearing featured testimony from witnesses including: The Honorable Adam Smith, Representative from the State of Washington; Sigurd R. Nilsen, Ph.D., Director for Education, Workforce, and Income Security Issues, Government Accountability Office; John Edward Bolas, Jr., Freedom, Pennsylvania; Tammy Flynn, Trade Adjustment Assistance State Coordinator, Bureau of Workforce Programs, Department of Labor and Economic Growth, Lansing, Michigan; Virginia Ponser Flanagan, Consultant, Campbellsville University, Campbellsville, Kentucky; Curtis Morrow, Workforce Development Unit Manager, North Carolina Employment Security Commission, Raleigh, North Carolina; James Fusco, East Brunswick, New Jersey; Marcus Courtney, President, Washington Alliance of Technology Workers, Seattle, Washington; Karen Pollitz, Research Professor, Health Policy Institute; Georgetown University; Diana Furchtgott-Roth, Senior Fellow and Director of Center for Employment Policy, Hudson Institute; Jane M. McDonald-Pines, Workforce Policy Specialist, American Federation of Labor and Congress of Industrial Organizations; Howard Rosen, Executive Director, Trade Adjustment Assistance Coalition; The Honorable Mason M. Bishop, Deputy Assistant Secretary, Employment and Training Administration, Department of Labor; David R. Williams, Director of Electronic Tax Administration and Refundable Credits, Internal Revenue Service. Testimony was submitted for the record by the Illinois Department of Commerce and the National Association of Health Underwriters.

The Early Warning and Health Care for Workers Affected by Globalization Act

On October 10, 2007, the Early Warning and Health Care for Workers Affected by Globalization Act, H.R. 3796 was introduced by Chairman George Miller (D–CA). It currently has 9 co-sponsors and was referred to the Committee on Education and Labor.

Full committee mark-up of H.R. 3796

The Full Committee met on October 18, 2007 to mark up H.R. 3796. The Committee adopted by voice vote an amendment in the nature of a substitute offered by Chairman George Miller (D–CA). Two other amendments were offered and debated. An amendment offered by Representative Tom Price (R–GA) was adopted by voice vote, while an amendment in the nature of a substitute offered by Ranking Member Howard "Buck" McKeon was offered and then withdrawn. The Committee voted to favorably report H.R. 3796, by a vote of 26–18.

The amendment offered by Representative Price (R–GA) would add a terrorist attack on the United States as a fourth exception businesses can assert when failing to notify employees 90 days prior to a mass layoff or plant closing. The amendment was adopted by voice vote.

The McKeon (R–CA) amendment in the nature of a substitute would have amended the Workforce Investment Act. The McKeon substitute was withdrawn and no further action was taken on it.

The Miller amendment in the nature of a substitute contained the following modifications to H.R. 3796:

• Deletes the separate notice requirement for layoffs at multiple work sites. As introduced, H.R. 3796 would have required WARN

notification if an employer laid off 100 or more workers at multiple worksites within a 30-day period.

• Adds "counseling and early access to training" to the list of possible available services that the Secretary of Labor shall provide information on to employers, and which should be made available to affected workers. Employees should have access to job training and counseling services as they prepare for imminent job loss.

• Makes clear that employers cannot ask employees to waive their statutory notice rights under the WARN Act. Employers have avoided their responsibilities under the WARN Act by requiring employees waive their rights under the law when they are terminated in exchange for severance pay. This amendment ensures that more employees and communities will receive notice prior to a mass layoff or plant closing.

• Clarifies the definition of "back pay" so that employees can recover two days pay multiplied by the number of calendar days short of 90 that the company provided notice of a mass layoff or plant closing. The original WARN Act intended for employees to get 60 days of pay in compensation when an employer failed to give a pre-layoff notice. However, some courts have held that employees are only entitled to "back pay" for the 5 days in each week. The Miller substitute intends to clarify that employees shall be permitted to recover the total number of calendar days that notice was required but not given.

• A fifth modification included within the substitute which would have amended Section 3 of the bill was removed by unanimous consent as extraneous material.

SUMMARY

The Early Warning and Health Care for Workers Affected by Globalization Act provides workers with advance notice of impending job loss and with an additional option for health care coverage when that job loss is the result of trade. H.R. 3796 builds on and improves the Worker Adjustment and Retraining Notification Act. Over the last 18 years the WARN has provided help to some workers facing a plant closing or a mass layoff. But the law has a number of weaknesses. H.R. 3796 addresses the central problems with the WARN Act by simplifying when and to whom notice is required. It will help to reduce the devastating impact of plant closures and mass layoffs on workers, their families and their communities. While early warning of impending job loss won't prevent workers from losing their jobs, it can help them prepare to find a new job or seek additional skills for new employment.

Specifically, the Early Warning and Health Care for Workers Affected by Globalization Act requires that employees, the local government, and the U.S. Department of Labor (DOL) receive 90 days' notice prior to a mass layoff or plant closing affecting 25 or more employees, including part-time employees, at a single jobsite within a 30-day period. It eliminates a loophole that has allowed employers to avoid giving notices by shifting employees around jobsites and increases penalties from up to 60 days' worth of back pay to up to 90 days' worth of double back pay for each calendar day notice was required but not given. DOL is authorized to investigate complaints and bring enforcement suits when employers fail to comply with the law. The bill requires employers provide com-

prehensive information about dislocated worker benefits and services to affected workers to help them manage during their period of unemployment.

In addition, H.R. 3796 provides an important additional health care option to older and tenured workers who lose their jobs because of trade. Currently, workers can elect continued group health coverage through what is known as COBRA for up to 18 months. H.R. 3796 would permit workers aged 55 or older or workers with 10 or more years of service with their employer to continue purchasing a group health care plan until they are enrolled in another health plan, whether it is a private one or Medicare.

STATEMENT AND COMMITTEE VIEWS

The Committee on Education and Labor has spent considerable time over the last ten months discussing the economic squeeze on American families and finding ways this Congress can strengthen and grow the middle class. Americans are losing ground in the current economy and they are right to be concerned about the impact of international trade agreements. H.R. 3796 will help workers who lose their job due to a plant closing or mass layoff prepare for imminent job loss. It will also provide those older and tenured workers who lose their jobs due to trade with the option to extend their COBRA coverage until they turn 65 or secure alternative coverage.

The global economy and its impact on U.S. workers

American families are currently caught in an economic squeeze as incomes have not kept pace with rising costs.[9] As the cost of basic expenses—for housing, food, education, transportation and health care—increase, paychecks have remained stagnant.[10] While the economy has performed strong overall, economic insecurity has infiltrated American middle-class life, "increasingly, middle-class Americans find themselves on a shaky financial tightrope, without an adequate safety net if they lose their footing." [11]

The U.S. economy faces increased pressures as a result of an intensification of domestic and international competition—impacting all industries, occupations and regions.[12] With the passage of more international free trade agreements and an increase in the number of jobs lost and/or moved offshore, "no sector of the U.S. economy is immune from the effects of globalization." [13]

The reality for displaced workers is that they are entering a difficult job market; job growth is currently the weakest on record.[14]

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[9] "Strengthening America's Middle Class: Evaluating the Economic Squeeze on America's Families," 110th Cong., 1st Sess. (2007) (written testimony of Eileen Applebaum, Professor II, School of Management and Labor Relations, Rutgers, The State University of New Jersey) at 1. [Hereinafter Applebaum Testimony].

[10] "Strengthening America's Middle Class: Evaluating the Economic Squeeze on America's Families," 110th Cong., 1st Sess. (2007) (written testimony of Christian Weller, Senior Economist, Center for American Progress) at 1. [Hereinafter Weller Testimony].

[11] "Strengthening America's Middle Class: Evaluating the Economic Squeeze on America's Families," 110th Cong., 1st Sess. (2007) (written testimony of Jacob Hacker) at 1. [Hereinafter Hacker Testimony].

[12] "Promoting U.S. Worker Competitiveness," 110th Cong. 1st Sess. (2007) (written testimony of Howard Rosen, Executive Director, Trade Adjustment Assistance Coalition) at 1–2. [Hereinafter Rosen Testimony].

[13] Id.

[14] Gene Sperling and Christian E. Weller, "Five Economic Challenges that Need More Policy Attention," Center for American Progress (Jan. 22, 2007), available at: http://www.americanprogress.org/issues/2007/01/state__of__economy.html. During the current business cycle, beginning in March 2001, job growth has averaged an annualized 0.5 percent per month,

While overall job losses stopped in August 2003, the economy has still had slower job growth than during similar periods of prior business cycles. Between March 2001 and December 2006, the average length of unemployment totaled 17.5 weeks.[15] This is higher than any other business cycle since World War II. The share of workers looking for a job for more than 27 weeks averaged 18.8 percent during the current business cycle, which also represents the highest level on record.[16] Making matters worse, employment opportunities have declined. In the 1990s, the employment rate grew by an annualized 0.14 percentage points each month. The employment rate has decreased by 0.16 percentage points in the current business cycle, marking the first business cycle since the 1950s in which job opportunities dropped.[17]

Globalization not only impacts job security and employment opportunities, it can significantly decrease the wages a family earns each year.[18] Over 40 percent of workers suffer an earnings loss after they are reemployed.[19] Globalization has caused the average household to lose about $2,000 in annual earnings, increased inequality in U.S. earning by about 7 percent by 2006.[20] The result is an increase in "wage inequality and wage losses that may only get worse with time."[21]

The Economic Policy Institute (EPI) concludes that a substantial contributor to the country's unemployment problem is the rise in large-scale layoffs.[22] The Bureau of Labor Statistics reports that between 1996 and 2003 there were 51,516 extended mass layoff events[23] which caused 10,679,358 job losses in this country.[24] Thousands of job losses each year are the direct result of trade; the number of Trade Adjustment Assistance petitions certified in Fiscal Year 2006 was 1,700 covering an estimated 400,000 workers.[25]

Displaced workers face significant difficulties when confronted with imminent job loss. Dave Bevard, a worker displaced by trade, testified to the Committee that it can take workers time to process the knowledge that they will soon be unemployed. He said the emotional and financial stress caused by sudden job loss can be paralyzing and, "until you have experienced it, you cannot truly appreciate the emotional devastation of [losing your job] and [the world

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the lowest of any business cycle since the Great Depression. This represents less than a quarter of the average of all prior business cycles since World War II. Since the recession ended in November 2001, job growth has averaged an annualized 0.8 percent, or 85,000 jobs per month, substantially less than the 2.7 percent average growth rate during recoveries of at least equal length since World War II.

[15] Id.

[16] Id.

[17] Id.

[18] Josh Bivens, "Globalization and American Wages: Today and Tomorrow," Economic Policy Institute (Oct. 11, 2007).

[19] Rosen Testimony at 6.

[20] Bivens supra note 18.

[21] Id.

[21] Sperling, supra note 14.

[22] Economic Policy Institute, "Economic Snapshots," (Mar. 5, 2003).

[23] The Bureau of Labor Statistics defines extended mass layoffs as the separations associated with the movement of work, domestically or overseas, reflect job loss at companies employing at least 50 workers where at least 50 people filed for unemployment insurance during a five-week period and the layoff lasted more than 30 days.

[24] The Bureau of Labor Statistics, "Mass Layoff Statistics—Extended Mass Layoff Separations," available at: http://data.bls.gov/cgi-bin/surveymost.

[25] GAO Trade Adjustment Assistance Report.

as you know it]."[26] Furthermore, "maneuvering through the Trade Adjustment Assistance Act and other programs can be like entering a bureaucratic minefield * * * and it is often difficult to get clear consistent answers concerning eligibility and available benefits."[27] In light of the difficulties displaced workers like Dave Bevard face as they seek new employment and navigate through the system, advance notice of a layoff or plant closing is an essential and critical component to helping workers and communities survive.

Overview of the WARN Act

Prior to the passage of the WARN Act in 1988 an increasing number of U.S. workers were losing their jobs due to downsizing, plant closing or mass layoffs.[28] The job loss had considerable effects on public health. Furthermore, "the financial burdens imposed on states as a result of increasing unemployment levels,"[29] were intensified because "very few employers disclosed their decision to significantly reduce or cease operations in advance thus leaving workers and communities without an opportunity to adjust and plan for impending dislocation."[30]

Congress first considered legislation to encourage advanced notification to workers for plant closings in 1973. The Trade Act of 1974[31] encouraged firms that planned to move their operations outside of the United States to provide at least 60 days advance notice to employees likely to be adversely affected by their actions as well as to the Secretaries of Labor and Commerce.[32]

Efforts to enact mandatory advance layoff notice continued over the next decade. On June 16, 1988 Senator Howard Metzenbaum introduced the WARN Act, S. 2527. The purpose of the bill was to provide:

> protections to workers, their families and communities by requiring employers to provide notification 60 calendar days in advance of plant closings and mass layoffs. Advance notice provides workers and their families some transition time to adjust to the prospect of loss of employment, to seek and obtain alternative jobs and, if necessary, to enter skill training and retraining that will allow these workers to successfully compete in the job market.[33]

The Senate Committee on Labor and Human Resources articulated Congress' principles behind the legislation: (1) advance notice was essential for workers to successfully adjust to job loss; (2) advance notice would save the government approximately $257–$386 million in unemployment compensation benefits each year; (3) advance notice would make adjustment efforts more efficient by per-

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[26] "How Effective Are Existing Programs in Helping Workers Impacted by Trade," 110th Cong. 1st Sess. (2007) (written testimony of Dave Bevard) at 1. [Hereinafter Bevard Testimony].

[27] Bevard Testimony at 2.

[28] See, Paul O. Flaim & Ellen Sehgal, Displaced Workers of 1979–83: How Well Have They Fared?, Monthly Lab. Rev., June 1985, at 3 (indicating that 11.5 million workers lost their jobs as a result of plant closings and mass layoffs between 1979 and 1983).

[29] Meredith Klapholtz, Judicial Interpretation of the WARN Act Exceptions and Their Implication in the Health Care Industry, 3 U. Pa. J. Lab. & Emp. L. 113, 114 (2000).

[30] Christopher P. Yost, Comment, The Worker Adjustment and Retraining Notification Act of 1988: Advance Notice Required?, 38 Cath. U. L. Rev. 675, 675 (1989).

[31] Title II, Sect. 283 of P.L. 93–618.

[32] Title II, Section 283 of P.L. 93–618; See also, Linda Levine "The Worker Adjustment and Retraining Act (WARN)", Congressional Research Service, September 26, 2007.

[33] 20 C.F.R. 639.1(a) (1999).

mitting employees to return to work quickly and at better wages; and (4) advance notice is a matter of "fair play" for workers and their families.[34] On July 6, 1988 the Senate approved S. 2527 and the House of Representatives approved it one week later. WARN was enacted on August 4, 1988 overriding President Reagan's veto[35] and became effective in February 1989.

Employers with 100 or more employees, including hourly and salaried workers, as well as managerial and supervisory employees are covered by WARN. Employees who have worked less than 6 months in the last 12 months and part-time employees working less than 20 hours a week are not counted toward the 100 employee threshold. Federal, State, and local government entities which provide public services are not covered.[36]

The Act currently requires that employers give written notice to: (1) either affected workers or their representatives; (2) the State dislocated worker unit; and (3) the appropriate unit of local government[37] 60 days in advance of covered plant closings and covered mass layoffs.

There are two situations that trigger a WARN notice: (1) a plant closing, whereby the employer is required to give notice when an employment site (or one or more facilities or operating units within an employment site) will be shut down, and the shutdown will result in an employment loss for 50 or more employees; and (2) a mass layoff whereby the employer is required to give notice if there is to be a mass layoff which does not result from a plant closing, but which will result in an employment loss at the employment site during any 30-day period for 500 or more employees, or for 50–499 employees if they make up at least 33 percent of the employer's active workforce.

If during a 90-day period the employer has employment losses[38] affecting 2 or more groups at a single site which in aggregate constitute a mass layoff or a plant closing, the situation shall be treated as a mass layoff or a plant closing triggering a WARN notice unless the employer can show that they are separate actions and causes and not an attempt to evade the requirements of WARN.[39]

Employers are not required to provide pre-layoff notice if the employment relationship is temporary in nature. If the layoffs or plant closing result from the completion of a project and the employees knew the employment relationship was temporary, notice is not required. Plant closings or mass layoffs that are the result of a strike or lockout are exempt from notice unless employers lockout employees to evade compliance with the Act.[40] Furthermore, employers who might otherwise be responsible for providing the 60-day notice may be exempt in certain situations. These circumstances include:

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[34] Richard W. McHugh, Comment, Fair Warning or Foul? An analysis of the Worker Adjustment and Retraining Notification (WARN) Act in Practice, 14 Berkley J. Emp. & Lab. L. 1, 11–12 (1993). See also, Klapholtz, supra note 29 at 115.

[35] P.L. 100–379, 29 USC 2101–2109.

[36] 29 USC 2101.

[37] 29 USC 2102.

[38] "Employment loss" in these circumstances is defined to mean: (1) an involuntary employment termination; (2) a layoff exceeding 6 months; or (3) a reduction in hours of work of more than 50 percent during each month of any six-month period. However, employees are not considered to have endured employment loss if the employer offers to transfer the employee to: (1) a different site of employment within commuting distance; or (2) any other site of employment if the employee accepts within 30 days of the offer or closing or layoff, whichever is later.

[39] 29 USC 2102.

[40] Levine supra note 5 at 31.

(1) faltering company—the employer has been seeking financing or business for their faltering business and they thought they had a realistic chance of obtaining funds or new business to avoid the layoffs or plant closing; (2) unforeseeable business circumstances—the employer could not reasonably foresee the business event that led to the mass layoffs or plant closing; or (3) natural disaster—the occurrence of a flood, earthquake, drought, or storms.[41]

An employer who violates the WARN provisions by ordering a plant closing or mass layoff without providing appropriate notice is liable: (1) to each aggrieved employee for an amount including up to 60 days back pay and benefits for the period of violation; and (2) to a unit of local government for a civil penalty not to exceed $500 for each day of violation. WARN is enforced through the United States district courts. If an employer makes "voluntary and unconditional payments" to terminated employees for failure to give the required notice, the amount of penalty could be reduced. In addition, an employer's liability for back pay can be reduced if an employer's failure to comply was in "good faith" and "with reasonable grounds for believing" that the closure or layoff did not violate the law.[42] The Department of Labor has no administrative or enforcement responsibility under WARN and cannot provide specific guidance with respect to individual situations.[43]

Prior to the enactment of WARN, many in industry and business organizations argued that advance notice could increase economic inefficiency due to possible loss of customers, credit and employees, as well as increase friction in labor management relations.[44] However, WARN's implementation has not produced the devastating results that industry and business feared.[45] In addition, WARN has not played a significant role in labor law litigation and has survived a Constitutional challenge. The Fifth Circuit held that WARN was rationally related to Congressional concern over the economic harms caused by plant closings and did not involve a prohibited governmental invasion of an employer's property.[46]

Implementation of the WARN Act and the need for reforms

Over the past 18 years, WARN has been effective at helping U.S. workers. However, critical problems with the Act's coverage, compliance and enforcement still remain. Thousands of workers are laid off each year and do not receive the advance notice of the layoff as required under the law, "under current law, fair notice has proven to be the exception not the rule. Employers have laid off workers in phases to avoid threshold level, used subsidiaries to

[41] 29 USC 2102.
[42] 29 USC 2102.
[43] 29 USC 2104.
[44] Klapholtz supra note 29 at 115.
[45] Prior to WARN's passage, employers argued that complying with WARN could cost them up to $15,000 a year. Five years after WARN's enactment, GAO reported that approximately 61 percent of employers who filed WARN notices experienced little or no costs ($500 or less [per employer]). See, Introductory Statement for S. 1969 by Senator Howard Metzenbaum. [Hereinafter Metzenbaum Statement].
[46] Carpenters Dist. Council of New Orleans v. Dillard Dep't Stores, 15 F.3d 1275, 1280 (5th Cir. 1994) (held the WARN Act was not unconstitutionally vague and it violated the takings and due process clauses of the Fifth Amendment). See also, Klapholtz supra note 29 at 116.

evade liability and pressured workers to sign documents to waive their rights."[47]

In 1993, the WARN Act's original sponsor Senator Howard Metzenbaum, along with the Government Accountability Office (GAO) and others identified fundamental flaws with the Act's implementation. Congressional intent remained unfulfilled because insufficient notice was being given (even with 60 days) serious loopholes and ambiguities existed as did significant enforcement problems. Consequently, employers manipulate workforce reductions to evade the requirements under WARN.[48] In other cases, employers simply choose not to comply with the law and the majority of violations go unenforced.[49]

Ambiguity and confusion over the Act's requirements

Many workers are not protected by WARN because of its threshold requirements, and in many cases, employers have intentionally manipulated workforce reductions to evade WARN requirements. The complexity of WARN's requirements makes it hard for workers to know whether they are covered, particularly at worksites where workers are not organized.

There is substantial confusion and ambiguity over when and how to apply the Act's threshold requirements. GAO found that between 1998 and 2002 the most commonly litigated issues related to layoff thresholds, "employers, employer and employee representatives and lawyers cited the statute's definition of calculating the 50 employees who have been laid off, the one-third rule and the aggregation of multiple layoffs within a 90-day period as difficult to apply to their specific circumstances."[50] Neither the statute nor the Department of Labor were able to provide sufficient guidance to help employers and employees understand the definitions.[51]

Part of the confusion when determining if a mass layoff or plant closing triggers WARN stems from the multiple complicated steps involved in determining if the threshold requirement is met. First, employers must decide if an employment loss[52] has been suffered by at least 50 employees or one-third of the workforce at a single worksite. Employees who have worked less than the last 6 out of 12 months or fewer than 20 hours per week are excluded from the

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[47] Steve Eder, Reform Overdue, WARN Act Critics Say Worker Advocates Look to Eliminate Flaws, Loopholes in Federal Law, TOL. BLADE (July 18, 2007) (quoting Senator Sherrod Brown, D–OH).

[48] "Examining the Coverage, Compliance, and Enforcement of the WARN Act," Senate Subcommittee on Labor of the Committee on Labor and Human Resources, 103rd Cong., 1st Sess. (1993) (written testimony of Julie H. Hurwitz, Executive Director, Sugar Law Center for Economic and Social Justice) at 1. [Hereinafter Hurwitz Testimony]. The Sugar Law Center has served as a clearinghouse for the WARN Act. The Institute works with labor unions and State and local governments, and counsels workers about their rights and in some cases helps workers bring lawsuits.

[49] "Examining the Coverage, Compliance and Enforcement of the WARN Act," Hearing before the Senate Subcommittee on Labor of the Committee on Labor and Human Resources, 103rd Cong., 1st Sess. (1993) at 2. [Hereinafter S. Hrg. 103–35].

[50] "The Worker Adjustment and Retraining Notification Act: Revising the Act and Education Materials Could Clarify Employer Responsibilities and Employee Rights," Government Accountability Office (Sept. 2003) at 14. [Hereinafter GAO 2003 Report].

[51] Id.

[52] Employment loss is defined as an employment termination, other than a discharge for cause, voluntary departure, or retirement, a layoff exceeding 6 months, or a reduction in hours of work for individual employees of more than 50 percent during each month of any 6 month period.

threshold count.[53] This formula leaves considerable discretion to the employer and often leaves employees unaware of whether or not the layoff or plant closing triggers WARN.

In addition, further complications can arise when multiple layoffs occur during a 90-day period. When multiple layoffs at a single worksite occur within a 90-day period and cause the layoff of at least 50 workers and one-third of the workforce, employers are be subject to the requirements under WARN.[54] While Congress intended the aggregate of multiple layoffs during a 90-day period to trigger a WARN notice for all affected employees, in practice that has not been the result. For example, if a company has three layoffs during a 90-day period involving 20 workers in the first two layoffs and then 60 in the third, the employer is only required to give a WARN notice to the employees in third layoff, who by themselves meet the threshold.[55]

In 2001, GAO found that employers who were required to provide a WARN notice did so for almost one-half (46 percent) of plant closings and one-quarter of mass layoffs. Overall, covered employers gave a required WARN notice approximately 36 percent of the time before a mass layoff or plant closure.[56] A significant reason for low employer compliance can partially be attributed to the calculation of the layoff threshold (i.e. "whether the requisite number of employees have been laid off within prescribed time frames")[57] that trigger WARN requirements. Business acknowledges that some companies utilize WARN's ambiguous threshold requirements to find ways to cut workers without violating the law, "we have seen companies out there that lay off 45 people a quarter; they just keep clicking away at it until they get to that 500-employee figure that they want to get to over a year and a half."[58]

While some employers are savvy and utilize WARN's ambiguities to evade responsibility, some employers are simply confused by the Act's requirements and unsure of when the Act is triggered. GAO found that questions employers and employees ask about the application of WARN indicate the difficulties they are having in applying its provisions.[59] Approximately 36 state Dislocated Worker Units (DWU) reported that they receive thousands of inquiries each year into WARN. Employers predominately question whether their circumstances require notice, while employees inquire as to whether their layoff is covered.[60]

Many employees unknowingly waive their right to a WARN notice

Rather than provide a WARN notice, employers often require employees waive their right to notice as part of a severance agree-

[53] The exclusion of part-time workers has created difficulties for the courts when deciding which employer entities are legally liable under WARN and what job losses meet the WARN threshold. See, McHugh supra note 34 at 13–16.
[54] GAO 2003 Report at 15.
[55] Id.
[56] Id. at 16.
[57] Id. at 4.
[58] James Drew and Steve Eder, Without Warning: Flaws, Loopholes Deny Employees Protection Mandated By WARN Act (July 15, 2007) (quoting Mark Wilbur, president and chief executive officer of Employers Group, a Los Angeles-based personnel consulting firm. Mr. Wilbur goes on to say, "some people will call it a loophole. The reality is it's the way the law is written. If you don't like the law, write your legislator."
[59] GAO 2003 Report at 13.
[60] Id.

ment.[61] Waivers are problematic for several reasons. First, employees often waive their rights without knowing that they could be entitled to back pay for the number of days notice was required but not given and agree to less severance than they are legally entitled. Second, employers have too much leverage over employees who face imminent job loss for the employees to properly value these rights that they are asked to waive. Third, employees are at a significant disadvantage when asked to sign a waiver because severance pay may be so important to them they are willing to waive their rights even if they would have had a claim. Finally, waiving the right to notice undermines Congress' decision to establish a specific right.

While employees may receive compensation for foregoing a WARN notice, the lack of advance notice can have a negative impact on a workers ability to access dislocated worker services and ultimately become reemployed, "the state is less likely to be able to deploy services to facilitate workers' reemployment before the plant closure or mass layoff."[62] A WARN notice: (1) enables the state dislocated worker units to develop a relationship with company and employee representatives; (2) allows the DWU to work with the local service providers to develop budgets; (3) survey those who will be displaced; and (4) compile support from additional community service agencies. Most DWU arrive at the worksite within 5 to 7 working days which helps workers reenter into the job market more quickly thus reducing the amount of unemployment insurance claims, increasing the saving of social service programs and creating an environment where the negative effect on both the employer and employees is significantly decreased.[63]

Furthermore, waiving the right to a WARN notice can have devastating effects on the community at-large. Congress intended WARN to also protect communities from the effects of a sudden plant closing or mass layoff. Advance notice gives local government time to prepare for new burdens on its retraining and education programs and gives local businesses a heads up that their customers will not be spending what they did in the past.[64] Without time to prepare for a plant closing or mass layoff, there can be a spiraling effect on the affected community. Less money funneled into the local economy can result in many smaller businesses also shutting down and more jobs lost. This can result in a decline in property values and the erosion of the local tax base, leaving public schools and other community services lacking in funds and unable to provide for the increased needs of the laid-off workers and their families.[65]

WARN's current remedies are ineffective and inadequate

The remedies available under WARN have been cited as a significant impediment to the Act's effectiveness.[66] WARN currently only provides for a private right of action when an employee believes he/she was unlawfully denied a WARN notice. The fact that

[61] GAO 2003 Report at 10.
[62] Id. at 10–11.
[63] Metzenbaum Statement.
[64] Evan Hudson-Plush, NOTE: WARN's Place in the FLSA/ Employment Discrimination Dichotomy: Why A Warning Cannot Be Waived. 27 Cardozo L. Rev. 2929 (Apr. 2006) at 2.
[65] Id.
[66] See generally, GAO 2003 Report, Hurwitz Testimony, Ross Eisenbrey, "Stop Corporate Abuse and Fix Layoff Warning Law," DET. NEWS (Aug. 24, 2007), Metzenbaum Statement.

only about one-third of employers comply with WARN demonstrates that the current remedy of 60 days' back pay and benefits is an inadequate deterrent against employers breaking the law. Furthermore, failure to receive notice of impending job loss can cause an aggrieved employee to lose their home, the healthcare and their livelihood. While workers suffer severe harm when notice is not given, employers only bear minimal risk for breaking the law because they are only liable to an aggrieved employee for straight back pay. Five years after WARN's enactment, GAO found that while there were over 10,000 violations of the WARN Act since its enactment, the vast majority of violations went unenforced.[67] Between 1988 and 1993, WARN's enforcement rate was a staggeringly low 1 percent, only about 100 lawsuits were filed under the Act.[68]

The average American worker cannot bear the expense of litigation and the remedies available can be minimal at best. Employers who violate WARN can mitigate their liability by arguing their failure to comply with the Act was in "good faith" with "reasonable grounds for believing" that its closure was not a violation of the law. In those cases where the employer is found liable, the amount of recovery can be significantly diminished depending on where the case is decided. Circuit courts interpret the calculation of back pay differently. While the law entitles an aggrieved employee to up to 60 days' back pay, the law does not specify whether the 60 days should be interpreted as calendar days or workdays. The difference between the two approaches can decrease a recovery by almost one-third. Employees who recover 60 calendar days of pay receive 1 day wages multiplied by 60, while employees who recover 60 work days of pay receive 42 days of wages, the number of workdays in a 60-day period. Calculating back pay as work days can reduce an aggrieved employee's recovery by 30 percent.[69]

Enforcement of WARN is further stifled by a lack of knowledge about the law and a scarcity of lawyers willing to take on these cases due to the litigation costs coupled with very limited relief.[70] It is difficult for workers to obtain the information they need to determine whether the employer violated WARN.[71] Unlike all other worker protection labor laws, DOL currently has no investigative or enforcement authority under WARN. It is only authorized to write regulations and provide assistance to employers and employees in understanding them. Providing DOL with the authority to oversee, investigate and bring administrative action against culpable employers in conjunction with the individual's private cause of action will increase compliance with the law.[72]

Health care realities of workers dislocated by trade

The loss of health care benefits can have a significant impact on displaced workers. Dave Bevard testified to the Committee that as if the loss of a job is not overwhelming enough, the loss of health

[67] GAO 1993 Report. See also, Metzenbaum Statement.
[68] Id.
[69] GAO 2003 Report at 17.
[70] Hurwitz Testimony at 2.
[71] Id.
[72] Id.

care, in his case with a wife fighting cancer, can be devastating.[73] Older workers displaced by trade can face even tougher obstacles when trying to obtain affordable and adequate health care coverage. Coverage outside an employer sponsored health plan is often restrictive, expensive and out of reach for many workers.

For non-elderly Americans, 74 percent of all health care is provided through employers.[74] Loss of employment often results in the termination of health coverage. In fact, job loss is the cause of the lack of insurance for two-thirds of the uninsured population.[75]

Currently, workers who are eligible for TAA qualify for the health coverage tax credit (HCTC). The HCTC pays 65 percent of the health insurance premiums for displaced workers who receive other forms of TAA. The credit is payable in advance to insurers, allowing workers to benefit before they file their tax returns. It is also refundable: workers can receive the full credit even if they have no regular tax liability.[76] Significant problems with the administration of the HCTC have been identified. As a result of the program's complexities and administrative burdens, only about 28,000 workers access HCTC—just 11 percent of the potentially 250,000[77] workers eligible to use the HCTC.[78]

Providing individuals with the option of extending their health insurance through COBRA will often be more affordable and allows for continuity in care. Currently, employers who offer health insurance are required to provide continued coverage for their employees. It was enacted to expand access to coverage for those people who become uninsured as a result of changes in their employment status. In 2004, there were approximately 2.7 million private sector individuals and 168,760 state and local government COBRA enrollments[79] with an average premium of $360 a month.[80] While employers can charge employees 102 percent of the group plan premium (2 percent is paid to cover the administrative costs), this can be much less expensive than coverage available in the individual insurance market. Currently, coverage generally lasts 18 months, but in certain circumstances it can last for longer periods.

Obtaining long-term continuing coverage for older workers can be especially expensive in the individual market because the premiums are substantially higher. Consequently, H.R. 3796 will provide older workers and long-term employees displaced by trade with an additional option to ensure that they have adequate health coverage until they are re-employed or reach Medicare eligibility. H.R. 3796 extends the period of COBRA coverage beyond the 18 months currently provided for under law. Workers who are TAA eligible and 55 or older or individuals who have worked for an employer for 10 or more years have the option to elect COBRA coverage until they become Medicare eligible at 65 or until they obtain health coverage through a subsequent employer.

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[73] See generally Bevard Testimony at 3. Bevard testified that he was fortunate to have continuing health care coverage through his union.

[74] "How Effective Are Existing Programs in Helping Workers Impacted by Trade," 110th Cong. 1st Sess (2007) (written testimony of Stan Dorn, Senior Research Associate, Urban Institute) at 1. [Hereinafter Bevard Testimony].

[75] Id.

[76] Id.

[77] Id.

[78] Id.

[79] Agency for Healthcare Research and Quality (2004).

[80] Kaiser Family Foundation and the Health and Research and Educational Trust (2006).

The need for H.R. 3796

Job loss that results from a plant closure or permanent layoff has a severe emotional and financial impact on dislocated workers and their families. Providing workers with the information and the time to access information about dislocated worker benefits and services before an actual layoff or plant closure can have an immediate and lasting impact on the workers' ability to secure alternative employment or job training. WARN is part of the "comprehensive set of integrated efforts * * * necessary to help the economy adjust to the enormous pressures due to globalization."[81]

While WARN has helped thousands of workers prepare for imminent job loss, it is "shot through with loopholes that greatly weaken its usefulness to workers * * *."[82] Reforming WARN is "an integral part of dislocated worker programs."[83] GAO has identified WARN as an effective tool in notifying workers of their eligibility for TAA and can assist them with the delivery of services.[84] Advance warning of a plant closure or layoff is critical to helping displaced workers plan for the transition, keep their dignity, and start new lives. It also gives communities the time to prepare for the local impact and minimize the harmful consequences of an impending plant closing or permanent layoff.

The Early Warning & Health Care for Workers Affected by Globalization Act will remedy the deficiencies of WARN and strengthen its ability to help workers and communities prepare for a mass layoff or plant closing. H.R. 3796 will provide more workers with a longer period of time to prepare for imminent job loss and will secure the rights of workers by ensuring that adequate remedies are available when an employer violates the law. Furthermore, H.R. 3796 will assist older and tenured TAA eligible workers with securing long-term health care coverage through COBRA.

SECTION-BY-SECTION ANALYSIS

Section 1 is the short title: "The Early Warning & Health Care for Workers Affected by Globalization Act".

Section 2: Amendments to the Worker Adjustment and Retraining Act

Section 2(a)(1)"(1)" defines "employer" as any business enterprise that employs 100 or more people.

Section 2(a)(1)"(2)" defines "plant closing" as the permanent or temporary shutdown of a single site of employment or of one or more facilities within a single site of employment which results in

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[81] Rosen Testimony at 1.

[82] Testimony before the Senate Subcommittee on Oversight of Government Management of the Committee on Governmental Affairs, 93rd Cong. 1st Sess. (1993) (written testimony of Harry Browne, Research Associate, Inter-Hemispheric Education Resource Center) at 4. [Hereinafter Browne Testimony].

[83] "The Reemployment Act of 1994, H.R. 4050," 93rd Cong. 2nd Sess. (1994) (written testimony of Richard W. McHugh, Associate General Counsel, on behalf of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW)) at 2. [Hereinafter McHugh Testimony].

[84] "Promoting U.S. Worker Competitiveness," 110th Cong. 1st Sess. (2007) (written testimony of Sigurd R. Nilsen, Director, Education, Workforce, and Income Security Issues, Government Accountability Office) (testifying that notifying workers of their TAA eligibility has been a challenge. For layoffs in a certified industry, agencies could make use of the existing WARN notices to connect with workers) at 10. [Hereinafter Nilsen Testimony].

an employment loss at such site during any 30-day period for 25 or more employees.

Section 2(a)(1)"(3)" defines "mass layoff" as a reduction in force at a single site of employment which results in an employment loss at such site during any 30-day period for 25 or more employees.

Section 2(a)(3)(A) amends the calculation of employees who in the aggregate over a 90-day period trigger a pre-layoff notice to say the employees which in the aggregate exceed the minimum number of employees specified.

Section 2(a)(3)(B) amends the definition of "employees" to include part-time employees.

Section 2(b)(1)(A) and (B) amend the amount of advance time with which employers must provide notice from 60 days to 90 days.

Section (2)(b)(2) requires that each affected employee receive notice of the layoff or plant closing.

Section 2(b)(2) and (3) require that employers provide the Secretary of Labor with a copy of the WARN notice. The Secretary of Labor must provide employers with information regarding benefits and services available to the workers. In addition, the Secretary of Labor must notify the appropriate Members of Congress as soon as practicable but no later than 15 days after a WARN notice is issued.

Section 2(c)(1) amends the remedies an employee may receive to include 2 pay times the number of calendar days short of 90 days that notice was required but not given.

Section 2(c)(2) clarifies that the good-faith exception for an noncompliant employer is not a complete liability exemption. The Act establishes that good-faith exceptions can only be used to avoid liability at the remedy stage of a lawsuit.

Section 2(c)(3) provides that an aggrieved individual can bring suit against an employer individually and/or file a complaint with the Department of Labor.

Section 2(c)(4) provides the Secretary of Labor with the authority to initiate, investigate, and attempt to resolve complaints of an employer's failure to comply with the law. The Secretary has the authority to bring an action in any court of competent jurisdiction to recover backpay, interest, and liquidated damages on behalf of an employee.

Section 2(d) amends Section 11 of the WARN Act to require that employers post in conspicuous places upon its premises notice of the pertinent information about WARN and information about filing a complaint.

Section 2(d) amends Section 11 of the WARN Act to provide that the rights and remedies provided under the Act cannot be waived, deferred or lost pursuant to any agreement of settlement other than a settlement or agreement negotiated by the Secretary of Labor, an attorney general of any State, or a private attorney on behalf of affected employees.

Section 2(d) amends Section 12 of the WARN Act to require that the Secretary of Labor maintain a guide of benefits and services which may be available to affected employees, including trade adjustment assistance, unemployment compensation, counseling, pretraining, COBRA benefits, and services available under the Workforce Investment Act. The Secretary of Labor shall immediately

transmit this information to an employer who gives a WARN notice.

Section 3: Extension of COBRA benefits to certain TAA eligible individuals

Section 3(a) Extends the period during which TAA recipients can elect to continue health care coverage under COBRA. Employees who are 55 or older or individuals who have worked for an employer for 10 or more years have the option to elect COBRA coverage until they become Medicare eligible at 65 or until they obtain health coverage through a subsequent employer.

Section 3(b)(2) provides that the effective date of the Section 3(a) amendments be on January 1, 2008. However, in the case of a group health plan arranged by collective bargaining agreements, the amendments made by Section 3(a) shall not apply to plan years beginning before the earlier of (1) the later of July 1, 2008 or the expiration of the last collective bargaining agreement or (2) 3 years after the date of this Act's enactment.

EXPLANATION OF AMENDMENTS

The Amendment in the Nature of a Substitute is explained in the body of this report.

Ranking Member Howard ("Buck") McKeon (R–CA) introduced an amendment in the nature of a substitute which would have amended the Workforce Investment Act. The McKeon substitute was withdrawn and no further action was taken it.

Representative Price (R–GA) introduced an amendment which would add a terrorist attack on the United States as a fourth exception businesses can assert when failing to notify employees 90 days prior to a mass layoff or plant closing. The amendment was adopted by voice vote.

APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Section 102(b)(3) of Public Law 104–1, the Congressional Accountability Act, requires a description of the application of this bill to the legislative branch. The Committee believes that H.R. 3796 will have no significant impact on the legislative branch.

REGULATORY IMPACT STATEMENT

The Committee has determined that H.R. 3796 will have minimal impact on the regulatory burden.

UNFUNDED MANDATE STATEMENT

Section 423 of the Congressional Budget and Impoundment Control Act (as amended by Section 101(a)(2) of the Unfunded Mandates Reform Act, P.L. 104–4) requires a statement of whether the provisions of the reported bill include unfunded mandates.

EARMARK STATEMENT

H.R. 3796 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(d), 9(e) or 9(f) of rule XXI.

ROLL CALL

COMMITTEE ON EDUCATION AND LABOR

ROLL CALL: 1 BILL: H.R. 3796 DATE: 10/18/2007
AMENDMENT NUMBER ADOPTED: 26 AYES / 18 NOES
SPONSOR/AMENDMENT: WOOLSEY / FAVORABLY REPORT THE BILL AS AMENDED

MEMBER	AYE	NO	PRESENT	NOT VOTING
Mr. MILLER, Chairman	X			
Mr. KILDEE, Vice Chairman	X			
Mr. PAYNE	X			
Mr. ANDREWS	X			
Mr. SCOTT	X			
Ms. WOOLSEY	X			
Mr. HINOJOSA	X			
Mrs. McCARTHY	X			
Mr. TIERNEY				X
Mr. KUCINICH	X			
Mr. WU	X			
Mr. HOLT	X			
Mrs. SUSAN DAVIS	X			
Mr. DANNY DAVIS	X			
Mr. GRIJALVA	X			
Mr. TIMOTHY BISHOP	X			
Ms. SANCHEZ	X			
Mr. SARBANES	X			
Mr. SESTAK	X			
Mr. LOEBSACK	X			
Ms. HIRONO	X			
Mr. ALTMIRE	X			
Mr. YARMUTH	X			
Mr. HARE	X			
Ms. CLARKE	X			
Mr. COURTNEY	X			
Ms. SHEA-PORTER	X			
Mr. McKEON		X		
Mr. PETRI		X		
Mr. HOEKSTRA				X
Mr. CASTLE		X		
Mr. SOUDER		X		
Mr. EHLERS		X		
Mrs. BIGGERT		X		
Mr. PLATTS		X		
Mr. KELLER		X		
Mr. WILSON		X		
Mr. KLINE		X		
Mrs. McMORRIS RODGERS		X		
Mr. MARCHANT				X
Mr. PRICE		X		
Mr. FORTUÑO		X		
Mr. BOUSTANY		X		
Mrs. FOXX		X		
Mr. KUHL				X
Mr. ROB BISHOP		X		
Mr. DAVID DAVIS		X		
Mr. WALBERG		X		
Mr. HELLER				X
TOTALS	**26**	**18**		**5**

STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE

In compliance with clause 3(c)(1) of rule XIII and clause 2(b)(1) of rule X of the Rules of the House of Representatives, the Committee's oversight findings and recommendations are reflected in the body of this report.

NEW BUDGET AUTHORITY AND CBO COST ESTIMATE

With respect to the requirements of clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the Committee has received the following estimate for H.R. 3796 from the Director of the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, October 25, 2007.

Hon. GEORGE MILLER,
Chairman, Committee on Education and Labor,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 3796, the Early Warning and Health Care for Workers Affected by Globalization Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Christina Hawley Anthony.

Sincerely,

ROBERT A. SUNSHINE,
(For Peter R. Orszag, Director).

Enclosure.

H.R. 3796—Early Warning and Health Care for Workers Affected by Globalization Act

Summary: H.R. 3796 would amend the Worker Adjustment and Retraining Notification (WARN) Act, which requires employers to provide advance notice of closings and layoffs. The bill would expand the number of employers and employees covered by the act, and would require employers to provide notice 30 days earlier than under current law. In addition, the bill would increase civil penalties against employers that violate the law and would authorize the Department of Labor (DOL) to investigate violations of the law and seek civil action. Under current law, redress is available only through the courts. Finally, H.R. 3796 would amend the Employee Retirement Income Security Act of 1974 (ERISA) to allow certain beneficiaries under the Trade Adjustment Assistance (TAA) for Workers program to retain health insurance coverage beyond the 18 months provided under current law.

CBO estimates that enacting H.R. 3796 would affect direct spending and revenues by increasing costs of the Health Care Tax Credit (HCTC) that subsidizes a portion ofthe health insurance costs of individuals eligible for TAA. Because that tax credit is refundable, a portion of its budget impact is recorded as outlays. The

Joint Committee on Taxation (JCT) estimates that enacting H.R. 3796 would result in additional outlays of $16 million over the 2008–2012 period and $55 million from 2008 through 2017. Additionally, JCT estimates that revenues would fall by $6 million over the 2008–2012 period and $21 million over the 2008–2017 period.

H.R. 3796 contains intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA). The bill would broaden an existing mandate on governmental entities to provide written notice of plant closings or layoffs to affected employees, and it would increase the number of governmental entities that must provide such a notice. CBO estimates that the total cost to governmental entities of complying with the mandates in the bill would be small and well below the threshold established in UMRA ($66 million in 2007, adjusted annually for inflation).

H.R. 3796 would impose a number of mandates, as defined in UMRA, on the private sector. It would require more private employers to notify their employees before closing a plant or taking a mass layoff action. It would also reduce the threshold in the definition of a mass layoff and plant closing so that more events would require advance notification. CBO estimates that the aggregate cost of complying with those mandates would not exceed the threshold established by UMRA for private-sector mandates ($131 million in 2007, adjusted annually for inflation).

Estimated cost to the Federal Government: The estimated budgetary impact of H.R. 3796 is shown in the following table. The costs of this legislation fall within budget functions 500 (education, training, employment, and social services) and 550 (health).

	By fiscal year, in millions of dollars—											
	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2008–2012	2008–2017
CHANGES IN DIRECT SPENDING												
Estimated Budget Authority	2	3	3	4	4	5	6	8	9	11	16	55
Estimated Outlays	2	3	3	4	4	5	6	8	9	11	16	55
CHANGES IN REVENUES												
Estimated Revenues	−1	−1	−1	−1	−2	−2	−2	−3	−4	−4	−6	−21

Basis of estimate: For this estimate, CBO assumes that H.R. 3796 will be enacted near the beginning of fiscal year 2008.

Direct spending and revenues

H.R. 3796 would amend ERISA to authorize certain individuals eligible for TAA (those aged 55 and older or those with 10 or more years of service with their employer) to maintain their continuation health insurance coverage under COBRA for longer than the 18-month limit for other employees. That change would allow those individuals to receive a subsidy of their COBRA costs for their full TAA eligibility, which is up to two years. The Joint Committee on Taxation estimates that the provision would increase direct spending associated with the health care tax credit by $16 million over the 2008–2012 period and $55 million over the 2008–2017 period.

Additionally, JCT estimates that revenues would fall by $6 million over the 2008–2012 period and $21 million over the 2008–2017 period.

Spending subject to appropriation

H.R. 3796 would allow the Department of Labor to receive, investigate and attempt to resolve complaints of violations under the WARN Act. Under current law, DOL has no enforcement requirements, but receives inquiries and provides information regarding the act. CBO estimates that carrying out the additional requirements would cost less than $500,000 annually.

Estimated impact on State, local, and tribal governments: The WARN Act requires employers to provide at least 60 days notice to employees who are likely to be affected by a plant closing or mass layoff. H.R. 3796 would increase that notification period to 90 days and thus would expand an existing intergovernmental mandate. CBO estimates that the additional costs to governmental entities would be minimal. The bill also would amend the definition of affected employees to include part-time employees and would amend the definitions of plant closing and mass layoff. Those amendments would increase the number of governmental entities that would be required to comply with the act. CBO estimates that few new governmental entities would be required to comply with the mandate and that any additional costs would be small and well below the threshold established in UMRA ($66 million in 2007, adjusted annually for inflation).

Estimated impact on the private sector: H.R. 3796 would impose a number of private-sector mandates, as defined in UMRA, on employers who close plants or take layoff actions by changing the thresholds used to define which employers and which actions are subject to advance notification. Under the bill, part-time employees would no longer be excluded from the count of employees. Thus, more employers would meet the definition of a covered employer. Under the bill, the thresholds of affected employees that define the covered actions would be reduced. Thus more layoff and plant closing actions would meet the definition of an action requiring advance notification. Under the bill, notification would be required 90 days before the planned plant closing or mass layoff action, up from 60 days under current law. The direct cost of these mandates is the cost of preparing and distributing the additional notices. CBO estimates that the aggregate cost of complying with those mandates

would not exceed the threshold established by UMRA for private-sector mandates ($131 million in 2007, adjusted annually for inflation).

Estimate prepared by: Federal Costs: Christina Hawley Anthony; Impact on State, Local, and Tribal Governments: Lisa Ramirez-Branum; Impact on the Private Sector: Keisuke Nakagawa.

Estimate approved by: Peter H. Fontaine, Assistant Director for Budget Analysis.

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

In accordance with clause 3(c) of House rule XIII, the goal of H.R. 3796 is to amend the Worker Adjustment and Retraining Notification Act to ensure that covered employers give at least 90-day notice to workers who will be laid off as a result of a mass layoff or plant closing. It is also intended to provide older or tenured workers displaced by trade with extended group health coverage until they become Medicare eligible at 65 or secure alternative health care coverage.

CONSTITUTIONAL AUTHORITY STATEMENT

Under clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee must include a statement citing the specific powers granted to Congress in the Constitution to enact the law proposed by H.R. 3796. The Committee believes that the amendments made by this bill which extend collective bargaining rights to public safety employees are within Congress' authority under Article I, Section 8 of the U.S. Constitution.

COMMITTEE ESTIMATE

Clause 3(d)(2) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison of the costs that would be incurred in carrying out H.R. 3796. However, clause 3(d)(3)(B) of that rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

WORKER ADJUSTMENT AND RETRAINING NOTIFICATION ACT

SEC. 2. DEFINITIONS; EXCLUSIONS FROM DEFINITION OF LOSS OF EMPLOYMENT.

(a) DEFINITIONS.—As used in this Act—

[(1) the term "employer" means any business enterprise that employs—

[(A) 100 or more employees, excluding part-time employees; or

[(B) 100 or more employees who in the aggregate work at least 4,000 hours per week (exclusive of hours of overtime);

[(2) the term "plant closing" means the permanent or temporary shutdown of a single site of employment, or one or more facilities or operating units within a single site of employment, if the shutdown results in an employment loss at the single site of employment during any 30-day period for 50 or more employees excluding any part-time employees;

[(3) the term "mass layoff" means a reduction in force which—

[(A) is not the result of a plant closing; and

[(B) results in an employment loss at the single site of employment during any 30-day period for—

[(i)(I) at least 33 percent of the employees (excluding any part-time employees); and

[(II) at least 50 employees (excluding any part-time employees); or

[(ii) at least 500 employees (excluding any part-time employees);]

(1) the term "employer" means any business enterprise that employs 100 or more employees;

(2) the term "plant closing" means the permanent or temporary shutdown of a single site of employment, or of one or more facilities or operating units within a single site of employment, which results in an employment loss at such site, during any 30-day period, for 25 or more employees;

(3) the term "mass layoff" means a reduction in force at a single site of employment which results in an employment loss at such site, during any 30-day period, for 25 or more employees.

* * * * * * *

[(8) the term "part-time employee" means an employee who is employed for an average of fewer than 20 hours per week or who has been employed for fewer than 6 of the 12 months preceding the date on which notice is required.]

(8) the term "Secretary" means the Secretary of Labor or a representative of the Secretary of Labor.

(b) EXCLUSIONS FROM DEFINITION OF EMPLOYMENT LOSS.—(1) In the case of a sale of part or all of an employer's business, the seller shall be responsible for providing notice for any plant closing or mass layoff in accordance with section 3 of this Act, up to and including the effective date of the sale. After the effective date of the sale of part or all of an employer's business, the purchaser shall be responsible for providing notice for any plant closing or mass layoff in accordance with section 3 of this Act. Notwithstanding any other provision of this Act, any person who is an employee of the seller [(other than a part-time employee)] as of the effective date of the sale shall be considered an employee of the purchaser immediately after the effective date of the sale.

* * * * * * *

SEC. 3. NOTICE REQUIRED BEFORE PLANT CLOSINGS AND MASS LAYOFFS.

(a) NOTICE TO EMPLOYEES, STATE DISLOCATED WORKER UNITS, AND LOCAL GOVERNMENTS.—An employer shall not order a plant closing or mass layoff until the end of a [60-day period] *90-day period* after the employer serves written notice of such an order—

(1) to each representative of the affected employees as of the time of the notice [or, if there is no such representative at that time, to each affected employee; and] *and to each affected employee;*

(2) to the Secretary; and

[(2)] *(3)* to the State or entity designated by the State to carry out rapid response activities under section 134(a)(2)(A) of the Workforce Investment Act of 1998, and the chief elected official of the unit of local government within which such closing or layoff is to occur.

* * * * * * *

(b) REDUCTION OF NOTIFICATION PERIOD.—(1) An employer may order the shutdown of a single site of employment before the conclusion of the [60-day period] *90-day period* if as of the time that notice would have been required the employer was actively seeking capital or business which, if obtained, would have enabled the employer to avoid or postpone the shutdown and the employer reasonably and in good faith believed that giving the notice required would have precluded the employer from obtaining the needed capital or business.

(2)(A) An employer may order a plant closing or mass layoff before the conclusion of the [60-day period] *90-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.

* * * * * * *

(C) No notice under this Act shall be required if the plant closing or mass layoff is due directly or indirectly to a terrorist attack on the United States.

* * * * * * *

(d) DETERMINATIONS WITH RESPECT TO EMPLOYMENT LOSS.—For purposes of this section, in determining whether a plant closing or mass layoff has occurred or will occur, employment losses for 2 or more groups at a single site of employment[, each of which is less than the minimum number of employees specified in section 2(a)(2) or (3) but which in the aggregate exceed that minimum number,] *which in the aggregate exceed the minimum number of employees specified in section 2(a)(2) or (3)* and which occur within any 90-day period shall be considered to be a plant closing or mass layoff unless the employer demonstrates that the employment losses are the result of separate and distinct actions and causes and are not an attempt by the employer to evade the requirements of this Act.

(e) INFORMATION REGARDING BENEFITS AND SERVICES AVAILABLE TO EMPLOYEES.—Concurrent with or immediately after providing the notice required under subsection (a)(1), an employer shall provide affected employees with information regarding the benefits and

services available to such employees, as described in the guide compiled by the Secretary under section 12.

(f) DOL NOTICE TO CONGRESS.—As soon as practicable and not later than 15 days after receiving notification under subsection (a)(2), the Secretary of Labor shall notify the appropriate Senators and Members of the House of Representatives who represent the area or areas where the plant closing or mass layoff is to occur.

* * * * * * *

SEC. 5. ADMINISTRATION AND ENFORCEMENT OF REQUIREMENTS.

(a) CIVIL ACTIONS AGAINST EMPLOYERS.—(1) Any employer who orders a plant closing or mass layoff in violation of section 3 of this Act shall be liable to each aggrieved employee who suffers an employment loss as a result of such closing or layoff for—

(A) [back pay for each day of violation] *two days' pay multiplied by the number of calendar days short of 90 that the employer provided notice before such closing or layoff* at a rate of compensation not less than the higher of—

(i) the average regular rate received by such employee during the last 3 years of the employee's employment; or

(ii) the final regular rate received by such employee; [and]

(B) interest on the amount described in subparagraph (A) calculated at the prevailing rate; and

[(B)] *(C)* benefits under an employee benefit plan described in section 3(3) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(3)), including the cost of medical expenses incurred during the employment loss which would have been covered under an employee benefit plan if the employment loss had not occurred.

[Such liability shall be calculated for the period of the violation, up to a maximum of 60 days, but in no event for more than one-half the number of days the employee was employed by the employer.]

* * * * * * *

(4) If an employer which has violated this Act proves to the satisfaction of the court that the act or omission that violated this Act was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of this Act the court may, in its discretion, [reduce the amount of the liability or penalty provided for in this section] *reduce the amount of the liability under subparagraph (C) of paragraph (1) and reduce the amount of the penalty provided for in paragraph (3).*

(5) A person seeking to enforce such liability, including a representative of employees or a unit of local government aggrieved under paragraph (1) or (3), [may sue] *may,* either for such person or for other persons similarly situated, or both, *(A) file a complaint with the Secretary alleging a violation of section 3, or (B) bring suit* in any district court of the United States for any district in which the violation is alleged to have occurred, or in which the employer transacts business. *A person seeking to enforce such liability may use one or both of the enforcement mechanisms described in subparagraphs (A) and (B).*

(b) ACTION BY THE SECRETARY.—

(1) ADMINISTRATIVE ACTION.—The Secretary shall receive, investigate, and attempt to resolve complaints of violations of sec-

tion 3 by an employer in the same manner that the Secretary receives, investigates, and attempts to resolve complaints of violations of sections 6 and 7 of the Fair Labor Standards Act of 1938 (29 U.S.C. 206 and 207).

(2) SUBPOENA POWERS.—For the purposes of any investigation provided for in this section, the Secretary shall have the subpoena authority provided for under section 9 of the Fair Labor Standards Act of 1938 (29 U.S.C. 209).

(3) CIVIL ACTION.—The Secretary may bring an action in any court of competent jurisdiction to recover on behalf of an employee the backpay, interest, benefits, and liquidated damages described in subsection (a).

(4) SUMS RECOVERED.—Any sums recovered by the Secretary on behalf of an employee under subparagraphs (A), (B), and (D) of section 5(a)(1) shall be held in a special deposit account and shall be paid, on order of the Secretary, directly to each employee affected. Any such sums not paid to an employee because of inability to do so within a period of 3 years, and any sums recovered by the Secretary under subparagraph (C) of section 5(a)(1), shall be credited as an offsetting collection to the appropriations account of the Secretary of Labor for expenses for the administration of this Act and shall remain available to the Secretary until expended.

(5) ACTION TO COMPEL RELIEF BY SECRETARY.—The district courts of the United States shall have jurisdiction, for cause shown, over an action brought by the Secretary to restrain the withholding of payment of back pay, interest, benefits, or other compensation, plus interest, found by the court to be due to employees under this Act.

(c) LIMITATIONS.—

(1) LIMITATIONS PERIOD.—An action may be brought under this section not later than 2 years after the date of the last event constituting the alleged violation for which the action is brought.

(2) COMMENCEMENT.—In determining when an action is commenced under this section for the purposes of paragraph (1), it shall be considered to be commenced on the date on which the complaint is filed.

(3) LIMITATION ON PRIVATE ACTION WHILE ACTION OF SECRETARY IS PENDING.—If the Secretary has instituted an enforcement action or proceeding under subsection (b), an individual employee may not bring an action under subsection (a) during the pendency of the proceeding against any person with respect to whom the Secretary has instituted the proceeding.

[(b)] *(d)* EXCLUSIVITY OF REMEDIES.—The remedies provided for in this section shall be the exclusive remedies for any violation of this Act. Under this Act, a Federal court shall not have authority to enjoin a plant closing or mass layoff.

* * * * * * *

SEC. 8. AUTHORITY TO PRESCRIBE REGULATIONS.

(a) The Secretary [of Labor] shall prescribe such regulations as may be necessary to carry out this Act. Such regulations shall, at a minimum, include interpretative regulations describing the meth-

ods by which employers may provide for appropriate service of notice as required by this Act.

* * * * * * *

[SEC. 11. EFFECTIVE DATE.

[This Act shall take effect on the date which is 6 months after the date of enactment of this Act, except that the authority of the Secretary of Labor under section 8 is effective upon enactment.**]**

SEC. 11. POSTING OF NOTICES; PENALTIES.

(a) POSTING OF NOTICES.—Each employer shall post and keep posted in conspicuous places upon its premises where notices to employees are customarily posted a notice to be prepared or approved by the Secretary setting forth excerpts from, or summaries of, the pertinent provisions of this chapter and information pertinent to the filing of a complaint.

(b) PENALTIES.—A willful violation of this section shall be punishable by a fine of not more than $500 for each separate offense.

SEC. 12. RIGHTS AND REMEDIES NOT SUBJECT TO WAIVER.

(a) IN GENERAL.—The rights and remedies provided under this Act (including the right to maintain a civil action) may not be waived, deferred, or lost pursuant to any agreement or settlement other than an agreement or settlement described in subsection (b).

(b) AGREEMENT OR SETTLEMENT.—An agreement or settlement referred to in subsection (a) is an agreement or settlement negotiated by the Secretary, an attorney general of any State, or a private attorney on behalf of affected employees.

SEC. 13. INFORMATION REGARDING BENEFITS AND SERVICES AVAILABLE TO WORKERS.

The Secretary of Labor shall maintain a guide of benefits and services which may be available to affected employees, including unemployment compensation, trade adjustment assistance, COBRA benefits, and early access to training and other services, including counseling services, available under the Workforce Investment Act of 1998. Such guide shall be available on the Internet website of the Department of Labor and shall include a description of the benefits and services, the eligibility requirements, and the means of obtaining such benefits and services. Upon receiving notice from an employer under section 3(a)(2), the Secretary shall immediately transmit such guide to such employer.

EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

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TITLE I—PROTECTION OF EMPLOYEE BENEFIT RIGHTS

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SUBTITLE B—REGULATORY PROVISIONS

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PART 6—CONTINUATION COVERAGE AND ADDITIONAL STANDARDS FOR GROUP HEALTH PLANS

* * * * * * *

SEC. 602. CONTINUATION COVERAGE.

For purposes of section 601, the term "continuation coverage" means coverage under the plan which meets the following requirements:

(1) * * *

(2) PERIOD OF COVERAGE.—The coverage must extend for at least the period beginning on the date of the qualifying event and ending not earlier than the earliest of the following:

(A) MAXIMUM REQUIRED PERIOD.—

(i) GENERAL RULE FOR TERMINATIONS AND REDUCED HOURS.—[In the case of] *Subject to clause (vi), in the case of* a qualifying event described in section 603(2), except as provided in clause (ii), the date which is 18 months after the date of the qualifying event.

(ii) SPECIAL RULE FOR MULTIPLE QUALIFYING EVENTS.—[If a qualifying event] *Subject to clause (vi), if a qualifying event* (other than a qualifying event described in section 603(6)) occurs during the 18 months after the date of a qualifying event described in section 603(2), the date which is 36 months after the date of the qualifying event described in section 603(2).

* * * * * * *

(v) MEDICARE ENTITLEMENT FOLLOWED BY QUALIFYING EVENT.—In the case of a qualifying event described in section 603(2) that occurs less than 18 months after the date the covered employee became entitled to benefits under title XVIII of the Social Security Act, the period of coverage for qualified beneficiaries other than the covered employee shall not terminate under this subparagraph before the close of the 36–month period beginning on the date the covered employee became so entitled.

(vi) SPECIAL RULE FOR QUALIFIED TAA ELIGIBLE EMPLOYEES.—In the case of a qualifying event described in section 603(2), clauses (i) and (ii) shall not apply to a qualified TAA eligible employee (as defined in section 607(6)).

* * * * * * *

SEC. 607. DEFINITIONS AND SPECIAL RULES.

For purposes of this part—

(1) * * *

* * * * * * *

(6) QUALIFIED TAA ELIGIBLE EMPLOYEE.—The term "qualified TAA eligible employee" means a covered employee, with respect to a qualifying event, if—

(A) the qualifying event is attributable to the conditions specified in section 222 of the Trade Act of 1974 (19 U.S.C. 2272) based on which the Secretary of Labor has certified a group of workers as eligible to apply for adjustment as-

sistance under subchapter A of chapter 2 of title II of such Act;

(B) such certification applies to the covered employee; and

(C) as of the date of such qualifying event the covered employee has attained age 55 or has completed 10 or more years of service with the employer.

* * * * * * *

COMMITTEE CORRESPONDENCE

None.

MINORITY VIEWS

INTRODUCTION

Over the last twelve years, Committee Republicans have established a long and well-documented history of taking a proactive approach to the challenges of globalization, and the issues facing American workers and American competitiveness. In 2004, the Committee brought then-Federal Reserve Chairman Alan Greenspan before it to examine in greater detail the obstacles our nation faces to continued competitiveness in a changing world. The Committee heard at that time that perhaps the single most important factor in responding to competitive challenges was to bolster our education and training systems to better prepare current and future workers for success. Efforts to revitalize and enhance these training systems remain the linchpin of Republican competitiveness efforts to this day.

H.R. 3796, the "Early Warning and Health Care for Workers Affected by Globalization Act," rejects this approach. Instead of offering proactive solutions that will allow American workers to compete and thrive, the bill does nothing more than layer on additional federal red tape for employers while offering only incremental support for workers that will do nothing to help them adjust to the changing workplace. The massive expansion of the WARN Act (and extension of near-indefinite eligibility for health coverage under COBRA) contemplated under the bill would be incredibly burdensome for employers struggling to keep pace with a changing economy, and the constraints imposed by these proposals do not match the real-world scenarios in which employers may be shifting their workforce to meet changing needs.

H.R. 3796 will expand exponentially the scope of our nation's plant closure and health care continuation laws, increasing litigation, regulation, and, most troubling, liability for businesses struggling to stay competitive in a global economy. As a matter of substance, the bill would create a system that is more focused on punishing employers than truly helping workers who lose their jobs, and for this reason alone should be rejected.

Equally troubling, however, as a matter of process, H.R. 3796 represents yet another instance of what has become a troubling trend in this Committee. With this bill, once more Committee Democrats have abandoned even the pretense of responsible legislating, instead rushing to report ill-conceived and wholly unexamined legislation with far-reaching consequences, and without the benefit of any substantive examination. The evidentiary record to support legislation of this scope if not merely lacking—it is in fact a nullity. In the absence of compelling evidence to support the sorts of changes embodied in H.R. 3796, Congress should reject this effort.

In short, and sadly, H.R. 3796 represents yet another example of Committee Democrats' dramatic failure of both policy and process, and should be rejected by the House.

BACKGROUND

The Worker Adjustment Retraining and Notification (WARN) Act

In 1988, Congress enacted the Worker Adjustment and Retraining Notification Act (the "WARN Act," or the "Act") to aid workers whose jobs have been terminated due to large-scale layoffs or plant closing.[1] The WARN Act was intended to focus dislocated worker resources and to provide adequate notice where a significant number of employees would be losing their jobs in a single location or community.[2]

The WARN Act generally requires that a covered employer (typically, a single employer of 100 or more workers, excluding part-time employees) must provide at least 60 days' notice to employees (or, where a union is present and representing employees, to the union) and to local officials (the state dislocated worker unit and the chief elected official of the municipality) prior to engaging in a "plant closing" or "mass layoff' that results in job losses of a certain size. The Act defines "plant closing" as the closure of a single site of employment which results in loss of 50 jobs (excluding part-time workers) during a 30-day period; a "mass layoff' is defined as a reduction in force at a single site of employment that results in either: (a) 50 lost jobs representing at least 33 percent of employees (excluding part-time workers); or (b) 500 lost jobs (irrespective of the percentage of the workforce, and still excluding part-time workers).[3]

An employer that fails to provide statutory notice under the WARN Act generally may be held liable for up to 60 days' pay and benefits to those employees that have lost their jobs. The Act is enforced by way of a private right-of-action; an individual may bring suit in federal court on behalf of himself and others similarly situated.

Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA)

Enacted as part of budget reconciliation legislation in 1986, the Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA) generally provides that when an employee loses his or her health insurance because of a job loss, he or she is eligible to continue health coverage under the former employer's health plan for up to 18 months (or, in limited instances, 36 months).

During the COBRA period, the employee is responsible for bearing the full expense of coverage and a nominal administrative fee which can total no more than 102 percent of the monthly COBRA

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[1] See P.L. 100–379, codified at 29 U.S.C. § 2101 et seq.

[2] Notably, nothing in the WARN Act under current law (or as proposed to be amended by H.R. 3796) limits the Act's applicability to situations where jobs are lost due to foreign competition or trade; rather, under the law, where WARN Act notice is required as a function of meeting specified statutory thresholds, it is required irrespective of the reason for the imminent job losses.

[3] See 29 U.S.C. §§ 2101(a)(2), (3). In addition, in certain instances, multiple job dislocations must be aggregated and calculated across a 90-day period. See 29 U.S.C. 2102(d).

premium cost.[4] An individual's eligibility for continuation coverage under COBRA generally terminates at the earliest of: (a) the end of his or her specified COBRA period; (b) when he or she obtains health care coverage under a new employer's plan; or (c) when the individual is eligible for Medicare.

H.R. 3796, THE "EARLY WARNING AND HEALTH CARE FOR WORKERS AFFECTED BY GLOBALIZATION ACT"

On October 10, Chairman Miller introduced H.R. 3796, the "Early Warning and Health Care for Workers Affected by Globalization Act," legislation amending both the WARN Act and COBRA.

WARN Act provisions

With respect to the WARN Act, H.R. 3796, inter alia:

- Expands WARN Act coverage to apply to any business which employs 100 or more employees, including part-time workers;
- Expands the definition of "plant closing" to include the closure of a single site of employment which results in the loss of at least 25 jobs (including part-time workers) during any 30-day period;
- Expands the definition of "mass layoff' to include a reduction in force at a single site of employment that results in the loss of at least 25 jobs (including part-time workers, and irrespective of the percentage of the workforce represented) during any 30-day period.
- Expands the definitions of "plant closing" and "mass layoff' to include job losses of 100 or more employees (including part-time workers) at aggregated "multiple sites" of a single employer;
- Increases WARN Act notice requirement and liability from 60 to 90 days;
- Provides for new, automatic liquidated double damages equal to lost wages and benefits for up to 90 days;
- Expands the notice requirement where a union is present to include requirement of notice to each individual worker;
- Includes new requirements that employers provide notices of benefits and services available to employees and of WARN Act requirements and information as to how to file a complaint; and
- Adopts a two-year statute of limitations on claims brought under the Act.

COBRA provisions

H.R. 3796 would expand COBRA eligibility in circumstances where: (a) an individual loses health coverage as a result of losing his or her job; (b) the individual is certified by the Department of Labor (DOL) as TAA-eligible; and (c) the individual: (1) is at least

[4] In 2002, the Trade Adjustment Act (TAA) was amended to provide a refundable tax credit (the Health Care Tax Credit or HCTC) which covers up to 65 percent of the costs of health coverage (including COBRA premiums) for TAA-eligible individuals. TAA-eligible individuals are still subject to the COBRA limitations periods (18 or 36 months). An employee is eligible for the HCTC so long as he or she is receiving TAA benefits.

55 years old; or (2) has at least 10 years of service with the employer. If so qualified, that individual may elect COBRA coverage and continue such coverage indefinitely. Thus under H.R. 3796, a qualified individual's COBRA eligibility would only lapse when either; (a) he or she obtains coverage under a new employer's heath plan, or (b) becomes eligible for Medicare.

LEGISLATIVE ACTIVITY

H.R. 3796 was introduced on October 10, 2007.

No hearing on H.R. 3796 was held in the Committee on Education and Labor subcommittee with jurisdiction over the WARN Act, the Subcommittee on Workforce Protections.

No hearing on H.R. 3796 was held in the Committee on Education and Labor subcommittee with jurisdiction over COBRA, the Subcommittee on Health, Employment, Labor, and Pensions.

No hearing on H.R. 3796 was held in the Committee on Education and Labor.[5]

The Subcommittee on Workforce Protections did not meet to mark up H.R. 3796.

The Subcommittee on Health, Employment, Labor, and Pensions did not meet to mark up H.R. 3796.

On Thursday, October 18, 2007, eight days after its introduction, the Committee on Education and Labor met to mark up H.R. 3796. An Amendment in the Nature of a Substitute was offered by Chairman Miller. An Amendment to the Miller Substitute in the Nature of a Substitute was offered by Senior Republican Member Howard P. "Buck" McKeon and withdrawn. An amendment to the Miller Substitute offered by Representative Tom Price was accepted by voice vote. The Miller Substitute was further amended by the adoption of an amendment by Chairman Miller by unanimous consent. The Miller Substitute, as amended, was adopted by voice vote.

The Committee favorably reported H.R. 3796, as amended, on a rollcall vote of 26 to 18. Republican Committee Members were unanimous in their opposition to reporting the bill favorably to the House of Representatives.

COMMITTEE CONSIDERATION OF H.R. 3796

A series of amendments was offered during Committee consideration of H.R. 3796.

McKeon Amendment in the Nature of a Substitute. Committee Republicans support efforts to bolster our nation's education and training systems to better prepare current and future workers for success. Such an approach recognizes that addressing challenges to American competiveness must be on a comprehensive basis, and rejects the increased regulation contemplated by H.R. 3796—regulation which will serve only to negatively impact our nation's small and large businesses and do nothing for the American worker that

[5] At the closest thing to a relevant hearing held in the 110th Congress—a March 2007 hearing on "globalization" and "trade adjustment assistance for workers"—not one of the five witnesses called by the Democrats (nor the single witness allowed to be called by Republicans) so much as mentioned the WARN Act (nor did any advocate for the expansion of COBRA eligibility contained in this legislation). See Committee on Education and Labor Hearing, "How Effective Are Existing Programs in Helping Workers Impacted by International Trade?" (March 26, 2007), available at: *http://edlabor.house.gov/hearings/fc032607.shtml.*

has lost his or her job as a result of increased trade and globalization.

To that end, Senior Republican Member McKeon offered an amendment in the nature of a substitute that would have reauthorized and strengthened the Workforce Investment Act (WIA). Instead of adding to economic instability, the McKeon Substitute (which was similar to the text of H.R. 3747, the "Workforce Investment Improvement Act" which Committee Republicans introduced on October 4, 2007) would have built on and improved our nation's job training system so that it could respond quickly and effectively to the changing needs of both workers and employers and enhance skills and improve career opportunities in the 21st century workforce.

The McKeon Substitute would have improved job training opportunities for Americans striving to get back to work by streamlining unnecessary bureaucracy, increasing cooperation among workforce development partners, allowing faith-based service providers to participate in the job training system, fostering regional economic development, and promoting the creation of high-skill and high-wage opportunities. Notwithstanding the substantive merits of this approach, in the face of parliamentary concerns which would have prevented consideration of the McKeon Substitute, the amendment was withdrawn.

Miller Amendment in the Nature of a Substitute. At markup, Chairman Miller offered an Amendment in the Nature of a Substitute. The Miller Substitute made several changes to the base text of H.R. 3796. Specifically, the Miller Substitute:

- Eliminated H.R. 3796's expansion of covered plant closures and mass layoffs to include aggregated job losses at multiple sites of employment;
- Expanded liability under the WARN Act to eliminate the current-law provision that caps liability at pay and benefits for no more than one-half the number of days a worker has been employed, and revised H.R. 3796's liquidated damages provision to provide for double damages;
- Expanded notice-of-services requirements imposed under the bill on the Secretary of Labor;
- Eliminated the right of an individual to knowingly, freely, and voluntarily waive his or her rights under the WARN Act, even in exchange for significant consideration; and
- Authorized the Secretary of Labor to use unobligated H–1B visa fees to pay health insurance premiums under COBRA for eligible individuals under the bill.

The Miller Substitute was adopted by the Committee by voice vote.

Price Amendment. Representative Tom Price (R–GA) offered an amendment which provides that no notice under the WARN Act is required where a plant closure or mass layoff is due, directly or indirectly, to a terrorist attack on the United States. The Price Amendment ensures that where an employer is forced to close a facility or layoff workers because of a terrorist attack, that employer is not bogged down in legal "red tape" or later subject to second-guessing that it should have given advance notice of its business closure.

The WARN Act currently recognizes a limited number of exceptions to notice requirements—for example, where job losses are caused by a natural disaster, or unforeseen business circumstances. The Price Amendment builds on these exceptions. That said, in contrast to the requirement that an employer provide reduced notice where a covered job loss is the result of unforeseen business circumstances, the Price Amendment excuses notice entirely where a covered loss is a result of a terrorist attack. Similarly, insofar as regulations promulgated under the WARN Act exception for natural disasters draw a distinction between covered losses that are directly versus indirectly caused by a natural disaster,[6] the Price Amendment expressly avoids this distinction by excusing all notice where a covered event is the result of a terrorist attack, whether directly or indirectly. The Price Amendment was adopted by voice vote.

Miller Amendment to Strike H–1B Fee Program. Chairman Miller asked unanimous consent to strike the provision contained in his Substitute relating to the authorization of the Department of Labor to use of H–1B visa fees to defray the cost of COBRA premiums. The Chairman indicated that the COBRA offset provision had been included due to a technical error. The Miller Amendment striking the H–1B Fee Program was adopted by unanimous consent.

REPUBLICAN VIEWS

Fundamentally, H.R. 3796 represents a misguided approach to addressing issues of competitiveness and the dislocation of some jobs due to foreign trade and overseas competition. In contrast to forward-looking, proactive approaches supported by Committee Republicans, H.R. 3796 would dramatically expand the burdens of federal regulation and mandates on employers. The bill does nothing to minimize job loss to foreign competition or the impact of trade and competition on workers, and represents a failure of both policy and process. Committee Republicans were unanimous in rejecting this measure.

H.R. 3796 exponentially expands the scope of and liability under the WARN Act

Foremost, H.R. 3796 would exponentially expand the burdens of the WARN Act on employers by increasing both the number of employers subject to the Act and the number of events which trigger WARN Act notice requirements. It is axiomatic that such increases translate into both increased compliance costs and increased penalties for failure to comply.

Under H.R. 3796, the scope of WARN Act coverage is extended by, for the first time, including in the Act's 100-employee threshold part-time employees. At the same time, WARN Act "triggers" are cut in half—under the bill, both "plant closing" and "mass layoff" notice requirements would be triggered by losses of as few 25 employees. Equally important, the bill eliminates entirely any requirement that 25 laid-off employees represent any significant portion of an employer's workforce; indeed, a large employer of 25,000 em-

[6] See 20 CFR 639.0 (distinguishing application of exception where plant closing or mass layoff is indirectly caused by natural disaster).

ployees can trigger "mass layoff" notice by laying off as few as 25 employees—less than one-tenth of one percent—over a 90-day period.

The result of these changes is that an increasing number of employers will now have to centralize all personnel decisions and plan even minor changes to the workforce more than 90 days out. This is not only logistically near-impossible, but also would greatly limit employers' responsiveness to local markets and customer needs, and the need to maintain competitive flexibility.

As to liability, the bill is almost limitless in its perniciousness. First, it increases the required notice period by fully fifty percent, from 60 days to 90 days. Second, it provides for the automatic doubling of back pay and benefits for even inadvertent non-compliance, and limits the ability of an employer who acted in good faith to limit its liability. Third, it provides that a worker is entitled to 90 calendar days of back pay and benefits (of course, doubled)—even where it is beyond dispute that the worker would not have worked 90 days in that time period. Finally, it eliminates the provision in current law which caps damages at back pay for no more than one-half the number of days which a worker has been employed.[7] Taken in concert, these provisions transform the WARN Act from a statute requiring notice to employees where there is significant job dislocation to a mandatory "six month severance package" bill for every terminated employee. It is beyond serious debate that these increased compliance burdens and costs will undermine the ability of employers to preserve American jobs or create new ones.

Finally, the bill vastly increases the administrative burdens of WARN Act administration on the Department of Labor, and federalizes what has long been a private enforcement scheme by granting broad authority to the Secretary of Labor to enforce the Act's requirements. The Department itself has raised serious concerns with these provisions, and has suggested that they are counterproductive and ill-advised:

> [H.R. 3796] would also provide a new, significant enforcement role for the Department of Labor under the WARN Act. Currently, the WARN Act requirements may be enforced by civil actions brought by employees or unions. In addition to these civil actions, the bill would provide for the Department to receive and investigate complaints regarding noncompliance, and to bring civil actions in federal court to recover damages due employees. The Department believes this enforcement role would place the Department in an adversarial position with respect to employers on worker adjustment matters, which could impede the Department's ability to work with businesses in providing services to their employees, especially in facilitating on-site rapid response services and TAA-relates services that depend on effective partnerships with employers. The enforcement role also would require the creation of a new

[7] Indeed, under the Miller bill, an employer can start his very first day of work on a Friday; if the plant closes on Monday, that one day of work has gifted the employee with six months of pay and benefits.

bureaucracy and potentially significant administrative costs.[8]

In short, against a range of measures, the WARN Act provisions of H.R. 3796 are fundamentally anti-competitive, and likely to have the absurd result of weakening U.S. employers' ability to compete with their foreign competitors and preserve U.S. jobs.

H.R. 3796 increases the administrative burdens and costs of COBRA

Unfortunately, H.R. 3796 does not limit itself to increasing the administrative and substantive burdens of our nation's plant closing laws, but instead adds burdens on employers already struggling to provide affordable health care coverage for workers.

The COBRA provisions contained in H.R. 3796 will increase administrative burdens for employers, potentially pushing more employers (and their workers) out of the voluntary health care system. H.R. 3796 conceivably requires an employer to continue to enroll former employees in its health plan for decades (e.g., a younger worker with ten years of service is potentially COBRA-eligible for decades until he or she is eligible for Medicare). This increased administrative burden on employers translates into additional expense, at a time when many employers are struggling to provide or maintain high quality health care coverage for employees because of cost.

Moreover, H.R. 3796 threatens to raise premium costs for employers. By requiring employers to maintain extended coverage for these individuals in employer-sponsored health plans, perhaps decades after they have left employment, employers will have to include such individuals in premium calculations. This has the potential to increase risk for the plan, and more important, the cost of risk-based premiums and coverage.[9]

In addition, DOL suggests that the COBRA provisions of H.R. 3796 may result in an additional $100 million cost to trade-impacted former employers; DOL has expressed concern that inasmuch as many of these employers are likely experiencing financial hardship, the bill could, at the margins, result in an employer terminating the health plan. Alternately, DOL notes, H.R. 3796 may simply serve to "crowd out" other insurance that the worker would otherwise purchase or obtain from a new employer.[10]

H.R. 3796 is yet another example of a flawed Democrat committee process

No evidence before the Committee suggests that the dramatic expansion of the WARN Act and COBRA contemplated in H.R. 3796 is warranted or necessary. There has been not a single legislative hearing on this proposal or anything like it, nor has any record established the need for, wisdom, or consequences of the provisions

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[8] Letter from Kristine A. Iverson, Assistant Secretary for Congressional and Intergovernmental Affairs, Department of Labor, to Chairman George Miller dated October 17, 2007 (hereinafter, "DOL Letter") (emphasis added).

[9] Although in many instances an employee bears the cost of extended COBRA coverage, this is not always the case. For example, the 2002 Trade Adjustment Act amendments provided for a refundable health care tax credit that covers up to 65 percent of the costs of health coverage (including COBRA premiums) for TAA-eligible individuals; it is reported that this 65 percent figure will be increased when the House takes up reauthorization of TAA.

[10] See DOL Letter at 2.

contained in the bill.[11] As noted earlier, at the full Committee's only examination of "competitiveness" and "trade dislocation" issues, not one of the five witnesses called by the Democrats (nor the single witness allowed to the Minority) so much as mentioned the WARN Act, or the expansion of COBRA contemplated in H.R. 3796.[12]

Indeed, in many respects H.R. 3796 represents yet another episode of a heavy-handed Democrat majority rushing to legislate—even where stakeholders, regulators, and simple logic dictate otherwise. H.R. 3796 was all of eight days old when it was rushed to markup—the Substitute adopted by the Committee had seen less than twenty-four hours in print. The unintended (and, in some instances, intended) consequences of this legislation have not begun to be realized, and the flaws in the bill indict the unilateral process by which it was brought to consideration.

CONCLUSION

H.R. 3796 is fundamentally flawed as a matter of policy. Instead of offering proactive solutions that will allow American workers to compete and thrive, the bill simply expands regulation and liability, adding to the burdens on employers already under enormous competitive pressure, while doing nothing to provide real help to workers facing job loss.

The policy failings contained in H.R. 3796 underscore what has too often become a pattern in the Committee with respect to consideration of legislation—particularly contentious legislation. In pushing through hastily-drafted and wholly unexamined legislation, once more the Democrat Majority has completely abandoned any semblance of regular order and the Committee's legislative process. The flawed legislative product that is the result of this abandonment represents a grave disservice to the Committee and its Members, one which should be rejected by the House.

For all of these reasons, we oppose the passage of H.R. 3796.

HOWARD P. MCKEON.
TOM PETRI.
PETER HOEKSTRA.
MARK SOUDER.
JUDY BIGGERT.
TODD R. PLATTS.
JOE WILSON.
JOHN KLINE.
CATHY MCMORRIS RODGERS.
THOMAS PRICE.
LUIS FORTUÑO.
C.W. BOUSTANY, Jr.

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[11] For example, the Democrat Majority trumpets a provision contained within the Miller Substitute that eliminates the ability of a worker to freely, knowingly, and voluntarily waive his or her rights under the WARN Act in exchange for enhanced severance pay (not required by law to be paid) from his or her employer. It is no breathtaking leap to predict that this provision will result in fewer employers offering these severance benefits to employees, inasmuch as no amount of severance will shield them from clever plaintiffs' lawyers down the road.

[12] Indeed, while the Majority's Views appear to recount in numbing detail every legislative proposal even remotely related to worker dislocation introduced in the Congress since 1985 (years before the enactment of the WARN Act), the last hearing examining these issues to which they are able to cite occurred fifteen years ago.

ROB BISHOP.
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TIM WALBERG.

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