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The Failure of WARN to Warn: An Analysis of Work-Status Exceptions in the Worker Adjustment and Retraining Notification Act (WARN)

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I. INTRODUCTION

In 1988, Congress passed the Worker Adjustment and Retraining Notification Act, otherwise known as WARN.¹ In general, the WARN Act requires sixty days notice of major layoffs and plant closings.² Under the terms of the law, an employer must give at least sixty days notice of a plant closing or mass layoff to each representative of the affected employees, each employee suffering an employment loss if no representative exists, the state dislocated worker unit, and the chief elected official of the area where the closing occurs.³

The notification requirement is enforced through lawsuits for damages on behalf of affected workers or through the local government.⁴ The act limits enforcement to monetary remedies with the maximum liability of an employer being the value of sixty days back pay and fringe benefits for each affected employee.⁵ The act does not give a federal court the authority to stop a plant closing or mass lay-off.⁶

According to the final Labor Department regulations on WARN issued on April 20, 1989, the purpose of the statute is to "provide protection to workers, their families and communities by requiring employers to provide notification sixty calendar days in advance of plant closings and mass layoffs. Advance notice provides workers and their families some transition time to adjust to the prospective loss of employment"⁷ However, not all workers are protected equally. This article reviews the limitations of the WARN Act as it relates to the terms and conditions of part-time work and the part-time worker.

The second section of this article provides an overview of the differences between part-time and full-time work, and a discussion of the demographic differences between part-time and full-time workers. The third sec-

1. 29 U.S.C. §§ 2101-09 (1989).

2. 29 U.S.C. § 2102(a) (1988).

3. *Id.* There are several exceptions to the sixty day notice requirement including:

- a. if the notice would prevent the employer from receiving capital or business which would enable the employer to avoid or postpone a shut-down;
- b. if the layoff was caused by unforeseeable business events; or
- c. if the layoff was caused by a natural disaster. *Id.* § 2102(b).

In addition, the Act shall not apply to a plant closing or mass layoff if, generally, the closing is of a temporary facility, or the closing constitutes a strike or lockout not intended to evade the requirements of this Act. *Id.* § 2102(b).

4. 29 U.S.C. § 2104 (1988).

5. *Id.* § 2104(a).

6. 29 U.S.C. § 2104(b) (1988).

7. 20 C.F.R. § 639.1(a) (1989).

tion of the article describes and contrasts the two predominant research strategies on work status distinctions. The fourth section reviews the legislative history of WARN.

The fifth section of the article describes the current law. The first part of this section overviews where the explicit language of the Act makes work status distinctions. The next part gives six hypothetical work places showing how the work status exceptions could result in employers being exempt from the notification requirements of WARN. The final part of this section shows how WARN has been interpreted in three federal cases where the plaintiffs have included part-time workers and part-time work status was an issue.

The conclusion of the paper draws together the theoretical discussions in part III with the evidence in parts IV and V to suggest that the work status distinctions in WARN were made by the legislators enacting the law and the courts interpreting the law to protect the full-time male worker in a core sector industry. It cannot be ignored that those workers excluded from the protections of WARN are, as section II describes, disproportionately women.

II. THE PART-TIME WORK FORCE

There are differences between full-time and part-time workers, and full-time and part-time work. As this section will show, these differences translate to lower pay and benefits for part-time workers, and that these part-time employees are predominantly women.

Currently, almost one in five workers is a part-timer; out of the 108.7 million workers in the total civilian workforce, 19.6 million worked less than thirty-five hours per week in 1990.⁸ The proportion of male and female part-time workers is approximately the reverse of male and female full-time workers; i.e. whereas over two-thirds of the part-time workforce is female, less than forty percent of full-time workers are female.⁹ Women are more likely than men to be employed part-time during the peak earning years, ages twenty-five to fifty-four.¹⁰ Part-time work for men most likely occurs in the very early or later parts of their adult lives, indicating that part-time work only supplements other lifetime activities, such as schooling or retirement.¹¹ For women, however, part-time work is more of the life course.

8. POLLY CALLAGHAN & HEIDI HARTMANN, *CONTINGENT WORK: A CHART BOOK ON PART-TIME AND TEMPORARY EMPLOYMENT 2* (Economic Policy Institute, 1991).

9. *Id.* at 38, Table 7.

10. *Id.* at 20, Figure 18.

11. CHRIS TILLY, *SHORT HOURS, SHORT SHRIFT: CAUSES AND CONSEQUENCES OF PART-TIME WORK 13* (Economic Policy Institute, 1990).

The over-representation of women in contingent work¹² has been incorrectly assumed to reflect women's preferences rather than discrimination, or difficulty in finding stable full-time jobs.¹³ Although women are the majority of part-time and other contingent workers, the majority of women are *not* contingent workers: "Like male workers, who are also working primarily to support themselves and their families, women workers increasingly seek full-time employment."¹⁴ Another sign of women's growing commitment to employment, in spite of the difficulty they face in finding full-time jobs, is the increase in the number of women moonlighting. The number of women with multiple jobs increased nearly five fold (from 636,000 to 3,109,000) between 1970 and 1989.¹⁵ Of all multiple job-holders, more women than men put together full-time schedules by combining part-time jobs.¹⁶

Part-time workers are concentrated in particular occupations. They are more likely to be in service, sales, clerical and unskilled occupations, and less likely to be managers or professionals.¹⁷ One result of this occupational distribution is that part-time workers are concentrated in the occupations that are the lowest paying.¹⁸ In addition, part-time workers are concentrated in the trade and service sectors of the economy.¹⁹ Between 1970 and 1990, part-time workers in trade and services increased their share in the total nonagricultural wage and salary workforce from eleven to fourteen percent.²⁰ By 1990, one in seven workers was a part-time worker in trade or services²¹. Part-time workers have twice the participation in the trade and service sectors as do full-time workers, i.e. while thirteen percent of those workers in the

12. CALLAGHAN & HARTMANN, *supra* note 8, at 2. Contingent work can take many forms, including part-time, temporary, and contract employment. *Id.* at 22-29. Contingent workers are those who are employed in jobs that do not fit the traditional description of a full-time, permanent job with benefits. *Id.* at 1.

13. *Id.* at 21.

14. *Id.*

15. *Id.* at 22.

16. *Id.* 33% and 11.3% respectively.

17. *Id.* at 12.

18. *Id.*

19. *See id.* at 24. *See also* Karen Holden & Lee Hansen, *Part-time Work, Full-time Work, and Occupational Segregation*, in *GENDER IN THE WORKPLACE* 217 (C. Brown & J. Pleckman eds., 1987).

20. CALLAGHAN & HARTMANN, *supra* note 8, at 24. The expansion of part-time employment would appear even greater if the Department of Labor statistics counted the number of part-time jobs rather than the number of persons whose total hours worked fall below the full-time threshold of 35 hours. *See* TILLY, *supra* note 11, at 4. "Multiple job holders—86% of whom work 24 hours or less on their second jobs—climbed from 4.9% of the workforce in 1979 to a record high of 6.2% in 1989." *Id.* When the total number of hours worked by an individual reaches 35 or more hours, the person is considered a full-time worker, regardless of the number of jobs worked. *Id.* at 4 n.2. This indicates that there could be an increase in the number of part-time jobs without a corresponding increase in part-time employment figures. *Id.* at 4.

21. CALLAGHAN & HARTMANN, *supra* note 8, at 24.

core sector are part-time, twenty-seven percent of workers in the trade and service sectors are employed part-time.²²

Research in this area indicates that rewards to employees are higher in the core sector, regardless of factors such as education and experience.²³ The wage differential between peripheral sector work and core sector work—traditionally large—widened dramatically between 1970 and 1980.²⁴ In 1970, for every dollar manufacturing employees earned in weekly pay, workers in retail trade earned \$.62; by 1980, retail workers earned only \$.51 for every dollar earned by manufacturing workers.²⁵ One analysis estimated that two-thirds of the wage gap between full-time and part-time workers results from this unfavorable occupational distribution.²⁶ Another study estimated that if part-time female workers were to experience only the level of occupational segregation experienced by full-time workers, over one-third of the wage gap between female part-time workers and female full-time workers would be eliminated.²⁷

Another aspect of the concentration of part-time work in the retail trade and service sectors is a lack of workforce unionization. Only 7.3% of part-time workers were union members in 1984, compared with 21.5% of full-time workers.²⁸ In 1977, women part-time workers covered by union contracts earned fifty percent more than those who were not unionized.²⁹ However, many unions have ignored part-time workers because they perceive part-time workers as a threat to the job security and earning capacity of their full-time members.³⁰

In general, part-time workers' wages are depressed, and their benefits are minimal. In 1990, part-time workers had a median hourly wage of

22. *Id.* at 25, Figure 22.

23. Randy Hodson, *Labor in the Monopoly, Competitive, and State Sectors of Production*, 8 POL. AND SOC'Y 429, 462-464, Tables 7-8 (1978).

24. Joan Smith, *The Paradox of Women's Poverty: Wage Earning Women and Economic Transformation*, 10 SIGNS: THE J. OF CULTURE AND SOC'Y 291, 294 (1984).

25. *Id.*

26. John D. Owen, *Why Part-time Workers Tend to be in Low-Wage Jobs*, MONTHLY LAB. REV., June 1978, at 11-12.

27. See Joan Smith, *The Effects of Hours Rigidity on the Labor Market Status of Women*, 11 URB & SOC. CHANGE REV. 44 (1978).

28. U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, *EMPLOYEE BENEFITS IN MEDIUM AND LARGE FIRMS 1984* (1985).

29. Carol Leon & Robert W. Bednarzik, *A Profile of Women on Part-time Schedules*, MONTHLY LAB. REV., Oct. 1978, at 3, 10-11.

30. Eileen Appelbaum & Judith Gregory, *Union Response to Contingent Work: Are Win-Win Outcomes Possible?*, in FLEXIBLE WORKSTYLES: A LOOK AT CONTINGENT LABOR 69, 72 (K. Christensen & M. Murphee eds., 1988).

\$5.06, about sixty percent of the full-time median of \$8.09.³¹ In addition, twenty-eight percent of all part-time jobs pay the minimum wage, compared to only five percent of all full-time jobs.³² Approximately three-quarters of part-time workers have no health or pension coverage.³³ While some part-time workers gain health insurance coverage through their spouses, the Employee Benefits Research Institute estimates that forty-two percent of part-time workers have no direct or indirect employer-provided health coverage.³⁴

III. PREVIOUS RESEARCH ON THE TERMS AND CONDITIONS OF PART-TIME WORK

Combined, these data indicate that there are significant differences between part-time workers and part-time work, and full-time workers and full-time work. Recent research concerning the terms and conditions of part-time work and workers has focused on either (1) the need for, or advantages of flexible work arrangements for working mothers,³⁵ or (2) the problems associated with the growth of the involuntary³⁶ part-time

31. CALLAGHAN & HARTMANN, *supra* note 8, at 11.

32. TILLY, *supra* note 11, at 9.

33. *Id.* at 10 (citing DEBORAH CHOLLET, EMPLOYER PROVIDED HEALTH BENEFITS, COVERAGE PROVISIONS AND POLICY ISSUES, (EMPLOYEE BENEFITS RES. INST. (1984))); Richard Worsnop, *Part-time Work*, 1 EDITORIAL RESEARCH REPORTS 290 (1987).

34. See TILLY, *supra* note 11, at 10 (citing Chollet, *supra* note 33).

35. See HILDA KAHNE, RECONCEIVING PART-TIME WORK (1985). See also Barney Olmsted, *Changing Times: The Use of Reduced Work Time Options in the United States*, 122 INT. LAB. REV. 479 (1983); ANN HARRIMAN, THE WORK/LEISURE TRADE OFF: REDUCED WORK TIME FOR MANAGERS AND PROFESSIONALS (1982); Richard Belous, *How Firms Adjust to the Shift Towards Contingent Workers*, MONTHLY LAB. REV., Mar. 1989, at 7; James E. Long & Ethel B. Jones, *Married Women in Part-time Employment*, 34 INDUS. & LAB. REL. REV. 413 (1981); Eileen Applebaum, *Restructuring Work: Temporary, Part-time and At Home Employment*, in COMPUTER CHIPS AND PAPER CLIPS: TECHNOLOGY AND WOMEN'S EMPLOYMENT 268 (Heide Hartmann ed., 1987); Chris de Neuborg, *Part-time Work: An International Quantitative Comparison*, 124 INT. LAB. REV. 1 (1985); ALTERNATIVE WORK SCHEDULES (Jon L. Pierce et al. eds., 1989); John D. Owen, *Why Part-time Workers Tend to be in Low-Wage Jobs*, MONTHLY LAB. REV., June 1978, at 11; Max L. Carey & Kim L. Hazelbaker, *Employment Growth in the Temporary Help Industry*, MONTHLY LAB. REV., Apr. 1986, at 37; Thomas J. Nardone, *Part-Time Workers: Who Are They?*, MONTHLY LAB. REV., Feb. 1986, at 13; William Deutermann & Scott Brown, *Voluntary Part-time Workers: A Growing Part of the Labor Force*, MONTHLY LAB. REV., June 1987, at 3; Alice H. Eagly, *Gender Stereotypes, Occupational Roles, and Beliefs About Part-time Employees*, 10 PSYCHOL. OF WOMEN Q. 252 (1986); JEAN HALLAIRE, PART-TIME EMPLOYMENT: ITS EXTENT AND ITS PROBLEMS (1968); Howard Hayghe, *Working Mothers Reach Record Numbers in 1984*, MONTHLY LAB. REV., Dec. 1984, at 31; Carol B. Leon & Robert W. Bednarzik, *A Profile of Women on Part-time Schedules*, MONTHLY LAB. REV., Oct. 1978, at 3.

36. U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, LINKING EMPLOYMENT PROBLEMS TO ECONOMIC STATUS, Bulletin No. 2169 (1983). Since 1948, the Bureau of Labor Statistics has used a standard of 35 hours per week to differentiate between full-time and part-time workers. *Id.* at 1. Any job requiring 35 or more hours of work is considered full-time, less is part-time. *Id.* The Bureau

workforce as a result of deindustrialization.³⁷

Research which concludes that part-time workers, especially female part-time workers, need flexibility points out that the standard paid work-day ignores women's traditional unpaid labor in the home. However, in doing so, this perspective often assumes that childcare and household labor are "women's work." These analyses address women's experiences of, and attitudes toward work almost entirely in terms of their role within the family. A prevalent theme is how a secondary role, that of wage earner, can be combined with the primary role of wife and mother.³⁸ This flexibility approach, which has the advantage of highlighting the ways in which many women are forced to balance competing demands on them, has several flaws. British scholars Veronica Beechey and Tessa Perkins have criticized these gender models of work for failing to account for structural factors and patriarchal family relationships, such as the way in which women's labor market participation is affected by the organization of production and the sexual division of labor within the family.³⁹ Legal scholar Martha Chamallas suggests that the "gender model of work" has meant that attitudes towards all part-time workers mirror attitudes towards working mothers.⁴⁰ One opinion poll indicated that the generalized soci-

of Labor Statistics also defines two different types of part-time workers: voluntary and involuntary. *See id.* Tables 6, 7 and 8. Involuntary part-time workers are those workers who would prefer to work full-time but whose hours have been reduced because of economic conditions. *Id.* at 1. The involuntary part-time workforce includes those workers whose hours have been reduced from full-time to part-time status because of layoffs or short-time work. *Id.* Voluntary part-time workers are those who either sought part-time jobs or were hired into a part-time position. *See, e.g., id.* Tables 6, 7 and 8. Voluntary part-time workers include those who must work part-time because of a disability, inadequate transportation, inability to find affordable childcare, or other constraints on options. *Id.*

37. Robert Moore, *American Labor Law and Workplace Control: Addressing the Issue of De-industrialization and the Increased Utilization of Temporary Labor (1988)* (unpublished dissertation, State University of New York-Buffalo). Richard Belous, *How Human Resource Systems Adjust to the Shift Towards Contingent Workers*, MONTHLY LAB. REV., Mar. 1989, at 7; Richard L. Worsnop, *Part-time Work*, EDITORIAL RES. REP., June 1987, at 290; Robert W. Bednarzik, *Short Workweeks During Economic Downturns*, MONTHLY LAB. REV., June 1983, at 3. *See also*, TILLY, *supra* note 11; David Stem, *Part-time Work, Full-time Work, and Occupational Segregation: Comments by David Stern*, in *THE WORKPLACE* (Clair Brown & Joseph A. Pechman eds., 1987); HARRY BRAVERMAN, *LABOR AND MONOPOLY CAPITAL: THE DEGRADATION OF WORK IN THE TWENTIETH CENTURY* (1974); DANIEL BELL, *THE COMING OF POST-INDUSTRIAL SOCIETY: A VENTURE IN SOCIAL FORECASTING* (1973); BARRY BLUESTONE AND BENNETT HARRISON, *THE DEINDUSTRIALIZATION OF AMERICA: PLANT CLOSINGS, COMMUNITY ABANDONMENT, AND THE DISMANTLING OF BASIC INDUSTRY* (1982); SEGMENTED WORK, DIVIDED WORKERS: THE HISTORICAL TRANSFORMATIONS OF LABOR IN THE UNITED STATES (David M. Gordon, et. al., 1982); Ronald E. Kutscher & Valerie A. Personik, *Deindustrialization and the Shift to Services*, MONTHLY LAB. REV., June 1986, at 3.

38. VERONICA BEECHEY & TESSA PERKINS, *A MATTER OF HOURS* 120-49 (1988).

39. *Id.*

40. Martha Chamallas, *Women and Part-time Work: The Case for Pay Equity and Equal Access*, 64 N.C.L. REV. 709, 712 (1986).

etal hostility toward married women working outside the home has decreased, but only when their employment does not conflict with the perceived needs of their husband and young children.⁴¹ Under this perspective, a woman's primary work should be in the home and the low status of the part-time worker is likely related to the unpaid nature of housework and childcare. However, this research strategy fails to acknowledge evidence that the growth of part-time work is less related to the supply-side characteristics of part-time workers than to the demand-side requirements of employers.⁴² Employers, not employees, are organizing work shifts on a part-time basis to meet peak-hour demands in the expanded service and retail sectors of the economy.⁴³

The second predominant research strategy about part-time work and part-time workers examines the growth of the retail and service sectors of the economy and the shrinking of the core sector due to deindustrialization.⁴⁴ Analyses within this perspective concentrate almost exclusively on the growth of the "involuntary" part-time workforce, i.e., those workers whose hours per week have been reduced from full-time to part-time status because of layoffs or short-time work.⁴⁵

Under this research strategy, scholars argue that people are not *choosing* their part-time work involvement at any greater rate than in the past. According to one commentator: "[S]tatistical analysis suggests that changes in the demographics of the work force account for only one-sixth of the recent growth in part-time employment."⁴⁶ The data indicates that if the rates of part-time work within each of the age-gender groups had remained at the 1969 levels, while the age-groups composition of the workforce changed, the rate of part-time employment in 1988 would have risen by less than one-half of one percent.⁴⁷ According to this research, women in their child-bearing years slightly decreased their rate of part-time employment in the period from 1969 to 1988.⁴⁸ These analyses strongly suggest that the growth in overall part-time labor, rather than rising from putative gender-based preferences, has resulted from changes in the form and content of available work.⁴⁹ However, these analyses

41. Michael Levin, *Comparable Worth: The Feminist Road to Socialism*, 8 COMMENTARY 13, 15, Sept. 1984.

42. CALLAGHAN & HARTMANN, *supra* note 8, at 4.

43. *Id.*

44. *See supra* note 37 and sources cited therein.

45. *Id.*

46. TILLY, *supra* note 11, at 13.

47. *Id.* *See also id.* at 14, Table 2.

48. *Id.*

49. CALLAGHAN & HARTMANN, *supra* note 8, at 22-30.

often minimize the existence of gender differences between the part-time and full-time workforce and make an assumption that "voluntary" part-time employment is a result of individual workers' choices.⁵⁰ These perspectives fail to adequately address the evidence that many women workers "choose" part-time jobs because those are the jobs that are available,⁵¹ and often lack any discussion of household labor and childcare and how this work in the home constrains choice.

Combined, the flexibility and structural approaches to the study of part-time work and part-time workers provide a description of the composition of the part-time workforce and an analysis of its growth in recent decades. However, separately they do not adequately address both the sexual division of labor in the workplace and home, and structural factors addressing the change in the organization of work. In addition, very little of the existing research looks specifically at the role of the state, through its federal labor and employment policies, in maintaining the inferior status of the part-time worker.⁵² The following analysis of one law, the Worker Adjustment and Retraining Notification Act, attempts to help fill the gap.

IV. LEGISLATIVE HISTORY OF THE WORKER ADJUSTMENT AND RETRAINING NOTIFICATION ACT⁵³

There has been a plant closing bill introduced in one or both houses of Congress since the 1973-74 legislative session.⁵⁴ In the first session of the 93rd Congress, then-Senator Walter Mondale introduced legislation which, if

50. See Moore, *supra* note 37. See also TILLY, *supra* note 11, at 6.

51. See CALLAGHAN & HARTMANN, *supra* note 8, at 19-22. See also Martin J. Gannon, *Preferences of Temporary Workers: Time, Variety and Flexibility*, MONTHLY LAB. REV., Aug. 1984, at 26.

52. Diana Pearce, *On the Edge: Marginal Women Workers and Employment Policy*, in INGREDIENTS FOR WOMEN'S EMPLOYMENT POLICY 197-210 (Christine Bose & Glenna Spitz eds., 1987). One notable exception to this general lack of research is Pearce's documentation that the majority of women workers are employed either part-time or part-year, or both. *Id.* at 197. These women workers garner extensive low and poverty-level incomes and high levels of economic and health insecurity. *Id.* This is due in part to the fact that women workers who do not fit the full-time, full-year employee model are excluded from many of the policies and programs explicitly addressed to the inequities and insecurities experienced by all workers. *Id.* at 197-98.

53. For a general overview see Christopher P. Yost, John H. Fanning Labor Law Writing Competition Winner, *The Worker Adjustment and Retraining Notification Act: Advance Notice Required?* 38 CATH. U.L. REV. 675, at section II (1989).

54. See, e.g., S. 2809, 93d Cong., 1st Sess. (1973); H.R. 13,541, 93d Cong., 2d Sess. (1974); H.R. 76, 94th Cong., 1st Sess. (1975); H.R. 76, 95th Cong., 1st Sess. (1977); H.R. 5040, 96th Cong., 1st Sess. (1979); S. 1608, 96th Cong., 1st Sess. (1979); S. 1609, 96th Cong., 1st Sess. (1979); H.R. 2847, 98th Cong., 1st Sess. (1983); H.R. 1616, 99th Cong., 1st Sess. (1983); H.R. 3, 100th Cong., 1st Session (1987); H.R. 1122, 100th Cong., 1st Sess. (1987); S. 538, 100th Cong., 1st Sess. (1987); S. 1420, 100th Cong., 1st Sess. (1987).

enacted, would have required employers to provide employees with two years notice of any plant closing or relocation.⁵⁵ In the next session Representative Ford introduced a similar bill which would have required prenotification of closings or relocations.⁵⁶ In 1983, Representative Ford continued to introduce legislation which would require reporting of plant closings or dislocations. This bill mandated advance notice of six months to one year as well as severance pay and transfer rights to dislocated workers.⁵⁷

In attempts to move these bills out of committee and to full Congressional debate, each of these bills decreased the notification period, as well as decreased an employer's responsibility to laid-off workers. However, none made distinctions between workers based on work status, i.e. the notification requirements as well as benefits were afforded to both full-time and part-time workers.

In 1985, the Labor Management Notification and Consultation Act⁵⁸ was introduced by Representative Ford. This was the first plant closing bill which reached a full debate in either the House of Representatives or the Senate. Like the previous plant closing bills, the first version of H.R. 1616 made no work status distinctions. An "employer" was simply any business enterprise that employed fifty or more workers.⁵⁹ However, this employer definition became a center of Congressional debate. During the 1985 legislative session, Representative Petri introduced a substitute which would have excluded part-time workers from H.R. 1616:

First, the substitute will limit the definition of affected employees to those who are permanent employees working twenty hours or more per week. This change is necessary in order to address the increasingly common use of part-time and temporary employees. Such employees are frequently used to supply manpower needs resulting from market vagaries and to maximize job security for a core workforce. Inherent in the use of part-time and temporary employees is the transient nature of the work. For the legislature not to recognize expressly this increasingly common form of employment relationship would seriously disrupt the labor market, and impede employers' efforts to provide stable, secure employment for most of their employees.⁶⁰

55. S. 2809, 93d Cong., 1st Sess. (1974).

56. H.R. 13,541, 93d Cong., 2d Sess. (1974).

57. National Employment Priorities Act, H.R. 2847, 98th Cong., 1st Sess. (1983).

58. H.R. 1616, 99th Cong., 1st Sess. (1985).

59. *Id.*

60. 131 CONG. REC. H10000 (daily ed. Nov. 12, 1985) (statement of Rep. Petri).

Representative Petri's statement contains several presumptions about the organization of the work environment. Though Petri has acknowledged that part-time labor is an increasingly common form of employment, he makes the erroneous assumption that part-time work is transient, instead of an integral part of the current organization of the workplace. He states that employers need the flexibility, without interference from the state, to employ part-time and seasonal labor for the success of their business enterprise. He implies that state protection of part-time or temporary workers will impede a "secure [work] environment" for full-time employees.⁶¹ Without explanation he assumes that since all employees cannot be provided with a secure work environment, then full-time workers can and will be afforded the privilege at the expense of part-time employees. Petri's statement assumes that employers are confronted with such a choice, though there is no evidence to support this claim. His statement also assumes that employers can (and do) provide stable, secure employment for full-time workers. No representative commented that since more and more workers are temporary and part-time, that perhaps these workers should be afforded *extra* protection because of their already marginal status.

Following the reasoning of Representative Petri, Representative Jeffords of Vermont offered an amendment which increased the number of employees required for an employer to be covered and limited the protections of the act to "affected employees," defined as persons "employed full-time by an employer for more than six months and who would reasonably expect to experience an employment loss as a consequence of a proposed plant closing or mass lay-off."⁶² The Jeffords' substitute also explicitly excluded any seasonal or other workers "for whom there is no reasonable expectation of permanent employment."⁶³

Two days later, in response to Jeffords, Representative Ford offered an amendment in the nature of a substitute. Ford's compromise language limited the definition of "employer" to "any business enterprise that (A) employs 50 or more full-time employees, or (B) 50 or more employees who in the aggregate work at least 2000 hours/week exclusive of overtime."⁶⁴ According to Ford, the impetus for this as well as his other modifications were not only to "answer every substantive complaint that has been raised" but also to address the lobbying by the National Restaurant Association:

61. *Id.*

62. 99 CONG. REC. H10110 (daily ed. Nov. 12, 1985).

63. *Id.*

64. 131 CONG. REC. H10214 (daily ed. Nov. 14, 1985) (statement of Rep. Ford).

Finally the National Restaurant Association has complained that the bill would cover even modest restaurants because they use many part-time employees and could easily have 50 employees without much sales volume. Obviously that is not the kind of a [business] that is our principal concern. To make that clear, we amend the bill to clarify for the purpose of coverage, "employees" means full-time employees and to be covered an employer must employ at least 50 workers [who work] 2,000 hours per week. That is 50 workers times 40 hours, excluding over-time. Now that can leave no question about part-time or occasional employment.⁶⁵

Although the Ford substitute limited the inclusion of part-time workers, the substitute did not exclude seasonal workers from the number of workers to be considered for an employer to meet the statutory definition. During the debate that ensued on November 21, 1985, Representative Jeffords submitted a revised version of his substitute which, though adopting Ford's threshold of 50 full-time workers or 2000 aggregate hours worked regardless of work status, totally excluded seasonal workers: "[t]here would be no coverage of temporary or seasonal workers. Our concern is for those workers who are permanent in the sense that they are members of the community and have employment that gives them a secure life. Those are the ones that we are primarily interested in."⁶⁶ Jeffords explicitly disagreed with Ford's inclusion of seasonal workers as employees: "[w]e have modified with respect to the 50 threshold versus that of the Ford substitute. We have defined more specifically the employees covered, to make sure that *wasters*, such as temporary employees are not covered."⁶⁷ These comments by Jeffords imply that part-time, temporary, and seasonal workers lack the requisite commitment to the workforce to be afforded legislative protection.

The concept of "commitment" is seemingly very important both to employers setting wages and legislators enacting laws, i.e., workers who are committed to the workforce are more deserving of higher wages and benefits than workers who are not perceived to be committed. Representative Jeffords offered no evidence that part-time or temporary workers are any less productive or have less longevity on the job or are less "permanent members of the community." There was no evidence that "commitment" has any relation with an individual worker's productivity or even

65. 131 CONG. REC. H10215 (daily ed. Nov. 14, 1985) (statement of Rep. Ford).

66. 131 CONG. REC. H10466 (daily ed. Nov. 21, 1985) (statement of Rep. Jeffords).

67. *Id.* (emphasis added).

attitude. Instead, "commitment to the workforce" could be a proxy for the employer's subjective belief that full-time workers should receive a "family wage", i.e., enough earnings to support a family. In contrast to the "committed worker" the stereotypical part-time worker is a woman, who is "taken care of" by a primary wage-earner, and thus not needing or deserving of wages that can support a family.⁶⁸

There is a long history of employer and organized labor pre-disposition for full-time male labor.⁶⁹ Such working men could be perceived by employers, because of their theoretical obligations to support a family, to be more committed to the workforce than working women who are perceived not to have the same obligations. However, the "family wage" has never been a reality. There have never been standards which dictate that workers be paid enough to support a family. Wage adjustments have never been made based on number of family dependents or "need." On average, a female head-of-household does not receive wages equal to that of a single working man.⁷⁰ Federal minimum wage laws have not been indexed to standards which would keep a family above the poverty level.⁷¹ Federal laws have never obligated employers to consider a worker's well-being or the well-being of a worker's family in setting compensation structures.⁷²

Some historians have argued that the family wage ideology has meant that because men are perceived as the legitimate bread-winners of a family, jobs that have historically been held by women are compensated less than jobs traditionally held by men.⁷³ Under the family-wage ideology, women who work in sex-typed jobs or do not work full-time, full-year, are perceived by employers to be less committed to the workforce because of family obligations. Neo-functionalist economic theory explains the wage gap between men and women as a function of, in part, women entering and leaving the job market for these perceived family responsibilities.⁷⁴ This "lack of com-

68. See DAVID R. ROEDIGER & PHILIP S. FONER, *OUR OWN TIME: A HISTORY OF AMERICAN LABOR AND THE WORKING DAY* (1989). See also Martha May, *Bread Before Roses: American Workingmen, Labor Unions and the Family Wage*, in *WOMEN WORK AND PROTEST: A CENTURY OF US WOMEN'S LABOR HISTORY* (Ruth Milkman ed., 1985).

69. See generally ROEDIGER & FONER, *supra* note 68.

70. ALICE ABEL KEMP, *WOMEN'S WORK: DEGRADED AND DEVALUED*, at Table 6.10 (1994).

71. Pearce, *supra* note 52, at 204.

72. See generally *id.* at 203-07; Callaghan & Hartmann, *supra* note 8.

73. ROEDIGER & FONER, *supra* note 68, at 174. See Holden & Hansen, *supra* note 19. See also E. Johnson, *PROTECTIVE LEGISLATION AND WOMEN'S WORK: OREGON'S TEN-HOUR LAW AND THE MULLER V. OREGON CASE, 1900-1913*, (1983) (Published Dissertation, University Microfilms International).

74. See Solomon Polachek, *Discontinuous Labor Force Participation and Its Effect on Women's Market Earnings*, in *SEX DISCRIMINATION AND THE DIVISION OF LABOR* 99-120 (C. Lloyd ed., 1975). The neo-functionalist human capital explanation for the earnings gap between men and women emphasizes women's weaker labor force attachment as the major reason why women earn less

mitment" according to individualist theorists is justifiably a negative factor in a compensation scheme. However, the empirical evidence refutes the validity of this analysis; instead, structural factors attributable to the effects of occupational segregation better explain the wage gap between men and women.⁷⁵

than men. The original versions of the human capital explanation posited that women had lower levels of human capital than men and were paid in the labor force accordingly; that is, men were socialized to amass skills, training, education, and work experience for market work, and women were socialized for household labor and therefore did not have the necessary background to compete with men in the job market. *Id.*

Recently human capital theorists have expanded their model of individual choice in light of evidence that male and female employees often have equivalent human capital. See Francine Blau & Marianne Ferber, *Career Plans and Expectations of Young Women and Men, The Earning Gap and Labor Force Participation*, 26 THE J. OF HUM. RESOURCES 581 (1991). In such situations human capital theorists argue that women choose jobs to accommodate a combination of paid work and family responsibilities. *Id.* Thus women sacrifice mobility, wages, and autonomy for ease of work, flexibility, and sociability. Moreover, according to the human capital explanation for wage disparities, women can maximize lifetime earnings by choosing jobs with lower penalties for intermittency. See, e.g., Jacob Mincer & Solomon Polachek, *Family Investments in Human Capital: Earnings of Women*, 82 J. OF POL. ECON. S76 (1974). "Some theorists argue that women rationally choose occupations with part-time opportunities to maximize their earnings or minimize depreciation from intermittent employment during the child bearing years." Jennifer Glass & Valerie Camarigg, *Gender, Parenthood, and Job-Family Compatibility*, 98 AM. J. OF SOC. 131, 132 (1992). For example, they contend that compensating amenities in the workplace that attract women can account for occupational segregation and for most of the wage gap between men and women who have equivalent amounts of general human capital. See, e.g., Michael Killingsworth, *The Economics of Comparable Worth: Analytical, Empirical and Policy Questions*, in COMPARABLE WORTH: NEW DIRECTIONS FOR RESEARCH 86 (Heidi Hartmann ed. 1985); R. Filer, *Occupational Segregation, Compensating Differentials, and Comparable Worth*, in PAY EQUITY: EMPIRICAL INQUIRIES 153 (R. Michael et al. eds., 1989).

In this view, the negative relationship between wages and female concentration in jobs occurs for two reasons: First, women tend to take jobs which compensate workers with such amenities as flexible hours or easy work, instead of with wage premiums for onerous working conditions. Second, mothers contribute an oversupply of labor to those jobs that accommodate parenting. Since mothers more often choose (or are forced) to trade wages for job flexibility, they soon dominate employment in jobs that can accommodate them. See Glass & Camarigg, *supra*, at 13.

Human capital theorists argue that these rational individual choices made by women can be measured by using as proxy certain family characteristics, such as marital status, family size, and child spacing. See Polachek, *supra*. Thus, characteristics of women with household responsibilities can be used as a proxy for the choice of these women to sacrifice wages for the presumed flexibility of lower wage part-time jobs.

In contrast to the human capital explanation, numerous studies have been done which show that female dominated low wage jobs do not have lower penalties for intermittency and do not allow for flexibility, such as frequent breaks or holidays, to accommodate family responsibilities. Janis Barry, *Women Production Workers: Low Pay and Hazardous Work*, 75 AM. ECON. REV. 262 (1987); Denise Bielby & William Bielby, *She Works Hard for the Money: Sex Segregation within Organizations*, 93 AM. J. OF SOC. 1031 (1988); Jennifer Glass, *The Impact of Occupational Segregation on Working Conditions*, 68 SOC. FORCES 779 (1990). According to Glass and Camarigg, there is no support for the notion that gender wage differentials can be attributed to the lesser hazards or positive working conditions of female dominated occupations. Glass & Camarigg, *supra*, at 132-35; see also, Barry, *supra*, at 262-65; Jerry Jacobs & Ronnie Steinberg, *A Test of the Theory of Compensating Wage Differentials Using Data from the New York Comparable Worth Study*, 69 SOC. FORCES 439 (1990).

75. See *supra* note 73.

Thus, Jeffords' comments,⁷⁶ which reflect a perception of part-time workers as lacking in requisite commitment to the labor force, have adopted a vision of work-family life that is not supported by theory or empirical evidence. No congressional member debated his assertions. The Jeffords amendment was adopted by a vote of 211 to 201.⁷⁷

The version of the bill which came to a final House vote on November 21, 1985, and which was narrowly defeated,⁷⁸ adopted the Jeffords substitute language for the definition of employer, i.e., fifty or more full-time workers, or fifty or more employees working a total of 2000 hours per week at a single site, excluding overtime.⁷⁹ Thus, in 1985, work status became a crucial element in defining which employers would be covered. Seasonal workers were completely excluded from coverage, and part-time worker coverage was severely limited. The language and debate surrounding the Labor Management Notification and Consultation Act of 1985⁸⁰ formed the parameters of subsequent congressional debate.

In the first session of the 100th Congress two bills were introduced which contained plant closing provisions. Senator Howard Metzenbaum introduced the Economic Dislocation and Worker Adjustment Assistance Act⁸¹ as an amendment to the Jobs Training Partnership Act (JTPA).⁸² The bill, which focussed on notification requirements when an employer was planning a shut-down, included several exclusions from coverage and reduced the amount of notice required under certain unforeseeable business circumstances.⁸³

While the Economic Dislocation and Worker Adjustment Assistance Act was being debated in the Senate, both the House and Senate were debating the Omnibus Trade and Competitiveness Act.⁸⁴ Senator Metzenbaum proposed making the provisions of the Economic Dislocation and Worker Adjustment and Assistance Act an amendment to the Trade Act.⁸⁵ To accommodate the criticisms of the bill's opponents, Metzenbaum modified several of its original provisions, calling his amended language "pro-business."⁸⁶

76. See *supra* notes 66-67 and accompanying text.

77. 131 CONG. REC. H10477 (1985).

78. 131 CONG. REC. H10487 (1985). The bill was defeated by a vote of 203-208. *Id.*

79. *Id.*

80. See *supra* note 58 and accompanying text.

81. S. 538, 100th Cong., 1st Sess., 133 CONG. REC. S2228 (Feb. 19, 1987).

82. *Id.*

83. S. 538, 100th Cong., 1st Sess., § 202(b); see also 133 CONG. REC. S9493 (daily ed. July 9, 1987) (statement of Sen. Spector).

84. H.R. 3, 100th Cong., 1st Sess. (1987); S. 1420, 100th Cong., 1st Sess. (1987).

85. 133 CONG. REC. S9384-85 (daily ed. July 8, 1987).

86. 133 CONG. REC. S2937 (daily ed. July 8, 1987) (statement of Sen. Metzenbaum).

According to Metzenbaum the first major change in the language of the plant-closing bill was a reduction in the notice period from ninety days to sixty days.⁸⁷ Second, the small business exemption was raised from fifty to 100 employees.⁸⁸ Metzenbaum stated, “[t]his means that eighty-five percent of all American companies are exempt from the notice provisions and small business concerns have been fully addressed.”⁸⁹ The third major modification excluded seasonal and part-time workers.⁹⁰

On the following day, Senator Leahy changed his vote to favor the Metzenbaum bill because of these changes: “[Now] seasonal and part-time employees are not included in the determination of when advance notice is required. This change is important to Vermont’s vital retail industry.”⁹¹ However, because the original House version of the Trade and Competitiveness Act did not include the plant closing provisions, the bill was returned to the House. The House disagreed with the revisions but did agree to a conference to discuss the issues.⁹² On March 29, 1988, the House conference was held and the conference committee adopted most of the Senate version of the Trade Act.⁹³ However, one of the conferees’ decisions was to merge and redefine the definitions of “part-time employee” and “seasonal worker.” Recall that Metzenbaum’s Senate amendment to the Trade Act defined a “part-time employee” as one *who was hired* to work an average of fewer than fifteen hours per week.⁹⁴ A “seasonal worker” was defined as a worker who was hired for a period not to exceed three months per year to do work that is seasonal in nature.⁹⁵ Note that the Senate language was a definition of the *job*, not the worker. The House Conference Agreement subtly changed the focus from *job* to *worker* by combining these concepts into a single definition: a “part-time employee” includes an employee who works fewer than twenty hours per week, or who has worked less than six months in the twelve month period prior to the point at which the employer is required to

87. *Id.*

88. *Id.*

89. *Id.*

90. 131 CONG. REC. S9367 (daily ed. July 9, 1987) (statement of Sen. Metzenbaum). According to Metzenbaum, “[t]he Amendment would make it clear that seasonal employees, defined as those who do seasonal work for less than 3 months per year for a particular employer, and part-time employees, defined as those who average less than 15 hours of work per week for a particular year, are not included when determining whether or not notice is required.” *Id.*

91. 133 CONG. REC. S9482 (daily ed. July 9, 1987) (statement of Rep. Leahy).

92. 133 CONG. REC. S11321, H7303 (daily ed. August 7, August 5 1987). Conference agreement on the Omnibus Trade and Competitiveness Act of 1987, H.R. Per. No. 576, 100th Cong., 2d Sess. 1045, *reprinted* in 1988 U.S.C.C.A.N. 1547 [hereinafter Conference Agreement].

93. 134 CONG. REC. D355 (daily ed. Mar. 29, 1988).

94. *See supra* note 90.

95. *Id.*

serve notice.⁹⁶ The definition of seasonal employees was eliminated. The House adopted the Conference report and voted in favor of the revised Trade bill.⁹⁷ President Reagan vigorously opposed the mandatory advance notice requirements⁹⁸ and vetoed the entire bill. The House overrode the veto,⁹⁹ but it was sustained in the Senate.¹⁰⁰

After the President's veto, the plant closing advance notice provisions were reintroduced as a separate measure on June 15, 1988, as the Worker Adjustment and Retraining Notification Act (WARN)¹⁰¹. Opposition to WARN was led by Senator Orrin Hatch who, along with other opponents, offered technical amendments designed to strip the mandatory elements of the bill and reduce employer liability.¹⁰²

Before the final House vote on the Act, the issue of work status again became paramount. Representative Clay, in arguing for passage of WARN, summarized the Act as acceptable, in part, because of its summary exclusion of part-time and seasonal workers.¹⁰³ In contrast, Representative Bartlett urged opposition to the bill; "[t]he bill applies most of its negative aspects against small and medium sized businesses. The coverage is triggered at 100 employees, even if those employees are part-time, as few as twenty hours per week."¹⁰⁴ Interestingly, both representatives misconstrued the language to further their opposing positions. Although part-time workers and seasonal workers receive very little protection from the bill, unlike Clay's summary exclusion, they do in fact have some protections and are counted as employees in some situations. Bartlett, in an attempt to make his point, incorrectly stated that 100 workers working twenty hours per week, would make an employer covered under the proposed law. In Bartlett's example, the employer of 100 part-time workers would *not* be covered because the minimum threshold of 4000 hours of work per week in aggregate was not met. Later that day, the House passed WARN with a wide enough margin to override a presidential veto.¹⁰⁵

96. See Conference Agreement, *supra* note 92, at 142.

97. 134 CONG. REC. H2375 (daily ed. Apr. 21, 1988).

98. 134 CONG. REC. H3531 (daily ed. May 24, 1988).

99. 134 CONG. REC. H3553 (daily ed. May 24, 1988).

100. 134 CONG. REC. S7385 (daily ed. June 8, 1988).

101. 100th CONG. REC. S2527, 134 CONG. REC. S8869-70 (daily ed. July 6, 1988).

102. See, Yost, *supra* note 53, at note 145. Throughout the Senate floor debate, over 75 amendments were considered. See 134 CONG. REC. S8501-02 (daily ed. June 23, 1988); *id.* at S8541, S8549, S8568 (daily ed. June 24, 1988); *id.* at S8598, S8610-11, S8620-21, S8626, S8639-40 (daily ed. June 27, 1988); *id.* at S8665-66, S8669, S8671-72, S8679-81, S8683-84, S8686, S8689, S8697, S8719-21, S8727, S8729-30 (daily ed. June 28, 1988); *id.* at S8820 (daily ed. June 29, 1988); *id.* at S8855, S8859 (daily ed. July 6, 1988).

103. 134 CONG. REC. H5500 (daily ed. July 7, 1988) (statement of Rep. Clay).

104. 134 CONG. REC. H5500 (daily ed. July 13, 1988) (statement of Rep. Bartlett).

105. 134 CONG. REC. H5519-20 (daily ed. July 13, 1988).

On July 22, 1988, WARN was presented to President Reagan. The law was passed on August 3, 1988,¹⁰⁶ when Reagan neither signed nor vetoed the bill.¹⁰⁷ Several Republican legislators urged the President to allow the bill to become law without signature because continued administration opposition could have hurt Vice-President Bush's presidential bid.¹⁰⁸

V. CURRENT LAW

A. Language

There are several distinctions made in the WARN Act between full-time and part-time workers. These work-status distinctions include the employers covered by the act, and the definitions of "employment loss," "mass layoff," and "plant closing."¹⁰⁹ The next section of the article will outline the provisions of the law which have explicit work status distinctions, describe some hypothetical examples of the effects of these provisions, and then provide some analysis.

Employers must have a minimal number of employees (or their equivalent in hours worked) before being obligated to follow the requirements of WARN:

- (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 4000 hours per week (exclusive of hours of overtime).¹¹⁰

If either of these two alternative definitions of employer is met, all the employees of the covered employer must be notified of an impending mass layoff or plant closing.

The employer is covered under the first definition if there are 100 or more employees *excluding part-time workers*.¹¹¹ A part-time employee under WARN is defined in one of two ways. The first definition of a "part-time"

106. Pub. L. No. 100-379, 102 Stat. 890 (codified as amended at 29 U.S.C. §§ 2101-09 (1988)).

107. The President exercised his option under U.S. CONST. art. I, § 7.

108. Ellen Hume & Walter Mossberg, *President Yields on Plant-Closing Bill*, WALL ST. J., April 3, 1988, at A1; Stuart Auerbach, *President Yields on Plant Closing Bill*, WASH. POST, Aug. 3, 1988, at A1.

109. 29 U.S.C. § 2101 (1989).

110. *Id.* § 2101(a)(1).

111. *Id.* (emphasis added).

worker is "an employee who is employed for an average of fewer than twenty hours per week."¹¹² The period used for this calculation is the shorter of the actual time the worker has been employed or the most recent ninety days.¹¹³ The second definition of a "part-time worker" is "any worker who has been employed for fewer than six of the twelve months preceding the date on which notice is required."¹¹⁴ This definition of part-time worker includes many workers who work full-time, but at seasonal jobs. Such workers have been explicitly excluded from inclusion as employees under the first employer definition:

Employees in agriculture and construction frequently hire workers for harvesting, processing, or work on a particular building or project. Such work may be seasonal but recurring. Such work falls under this exception if the workers understood at the time they were being hired that their work was temporary.¹¹⁵

Thus, the first definition of an employer under WARN includes only full-time workers, and only those full-time workers who have worked for the employer during the previous six months. This definition results in many employers of predominantly part-time workers not being covered under the Act, and also excludes many business enterprises that employ seasonal workers, even if those workers return each year to perform the same tasks.

The second definition of employer under WARN covers those employers who have 100 or more employees who work at least 4000 hours in the aggregate, excluding hours of overtime. Under this definition part-time employees are counted. Therefore, all hours worked during any week must be counted to determine employer coverage under this definition.

Workers on temporary layoff or leave who have a reasonable expectation of recall are included as employees under these definitions.¹¹⁶ However, though full-time workers who have been laid off because of the closing of a temporary facility or because they are an economic striker under the National Labor Relations Act are included in the employee count to determine if an employer is covered by the act, part-time workers in temporary facilities or part-time strikers are not counted to determine if an employer is covered under the act.¹¹⁷

112. *Id.* § 2101(a)(8).

113. 29 C.F.R. § 639.3(h) (1989).

114. 29 U.S.C. § 2101(a)(8) (1989).

115. 20 C.F.R. § 639.5(c)(3) (1989).

116. *Id.* § 639.3(a)(ii).

117. *Id.* § 639.3(a)(3).

Several aspects of these definitions are unclear and have yet to be resolved. For example, what is the definition of "temporary layoff," and how will the courts interpret the definition of "reasonable expectation of recall?"¹¹⁸ In addition, it is not clear when an employer must reach the 100-employee level. There are also questions involving subsidiaries and the use of contractors. Various issues must be determined about an employer's "single site of employment."¹¹⁹ What is clear is that if an employer is not covered under WARN, workers do not have a cause of action for failure to be notified of their impending job loss.

Although these definitions of employer are problematic, the following are four hypothetical workplaces. Each workplace includes a basic job description, number of workers at the job, and hours worked in aggregate at each job. This is followed by an evaluation of whether each of the employers would be covered under WARN.

118. According to the regulations "[a]n employee has a reasonable expectation of recall when he/she understands, through notification or through industry practice, that his/her employment with the employer has been temporarily interrupted and that he/she will be recalled to the same or a similar job." *Id.* § 639.3(a)(1).

119. See YOUR RIGHT TO BE WARNED: A UAW MANUAL ON MASS LAYOFF AND PLANT NOTIFICATION UNDER THE WORKER ADJUSTMENT AND RETRAINING NOTIFICATION ACT (2d ed. 1989).

B. Example Workplaces

Workplace #1: Small Industrial Factory

JOB	NUMBER OF WORKERS	HOURS WORKED IN AGGREGATE LAST WEEK
Factory Workers 8-Hour Shifts	80	3,200
Factory Workers on Temporary Layoff Until New Order Arrives	40	0
Office Workers 8-Hour Shifts	10	400
Office Workers Part-time Shifts:		
1) 9am-noon	1	15
2) 1pm-5pm	1	20
3) 10am-2pm	1	20
 Total Active Workers Last Week		93
Total Full-Time Workers Last Week (as defined by WARN)		92
Total Hours Worked in Aggregate Last Week:		3,655
Total Workers for WARN Purposes		132

Analysis of the Small Factory for WARN Purposes

The employer in this example is covered under the second employer definition under WARN. Under the first employer definition, which requires that the number of full-time active workers be counted, the employer is not covered. In this example, there were ninety-three workers actively working last week. Only ninety-two workers are counted for WARN purposes; the morning part-time office worker is not counted because he is defined by the act as a "part-time employee,"¹²⁰ i.e., an employee who works less than twenty hours per week. Therefore, this employer is not covered under the first definition because there are not 100 employees.

Under the second employer definition the number of hours worked in the aggregate are counted, and part-time work hours are included. Last week the number of hours worked in aggregate totaled 3,655, less than the re-

120. 29 U.S.C. § 2101(a)(8) (1988).

quired 4,000. Thus, under the first interpretation of the second definition, this employer is not covered for WARN purposes. However, this employer is covered because the forty workers on temporary layoff are counted towards the total number of workers, even though they were not working last week. Thus, the total number of workers is the sum of the total full-time active workforce (ninety) and the full-time workers on temporary lay-off (forty). Together these workers total 132 and if they were all working forty hour work weeks the aggregate hours worked would exceed 4,000, and therefore the employer is covered. If, however, the workers on temporary layoff had no reasonable expectation of recall, or were formally hired with the explicit knowledge that the duration of their employment was temporary, this employer would not be covered. In addition, if the workers on temporary layoff were part-time workers they would not be counted, and the employer would therefore not be covered.

Workplace #2: Cannery

JOB	NUMBER OF WORKERS	HOURS WORKED IN AGGREGATE LAST WEEK
Managers		
40 Hours/Week		
Year-Round	10	400
Harvest (5-Month)	10	400
Drivers		
37.5 Hours/Week		
Year-Round	10	375
Harvest (5-Month)	10	375
Packing-Line Workers		
40 Hours/Full Week		
20 Hours/Part Week		
Year-Round, Full-Week	20	800
Harvest, Full-Week	100	4,000
Harvest, Part-Week	100	2,000
Total Active Workers Harvest Season		260
Hours Worked Per Week During Harvest Season		8,350
Total Active Workers Non-Harvest Season		40
Hours Worked Per Week Non-Harvest Season		1,575

Analysis of the Cannery Example for WARN Purposes

The employer in this example is covered under the law during the harvest season and is not covered during the non-harvest season. Under the first employer definition the number of full-time workers are counted. In this example there were 260 active workers per week during the five month harvest season. However, the first definition of "employee" under WARN excludes part-time workers. The definition of part-time worker according to WARN includes workers who have been employed for fewer than six of the twelve months preceding the date on which notice is required. When the harvest employees are excluded, the number of workers is reduced to forty. This figure does not meet the employer definition threshold of 100 workers.

Under the second employer definition the number of hours worked in the aggregate must be counted. The number of hours worked in aggregate during the harvest season totals 8350, more than double the required 4000 hours for employer coverage. Thus, during the harvest season the employer meets the second definition of a covered employer under WARN. During the non-harvest season, neither the number of workers (forty) nor the hours worked (1575) meet the minimum thresholds for employer coverage under the law.

Workplace #3: Grocery Store

JOB	NUMBER OF WORKERS	HOURS WORKED IN AGGREGATE LAST WEEK
Managers		
40 Hours/Week		
Meat	4	160
Produce	4	160
Shelf Stocking	4	160
Fish	4	160
Deli	2	80
Cashier	8	320
Front Office		
40 Hours/Week	10	400
Cashiers		
8-Hour Shifts, 5 Days/Week	10	400
8-Hour Shifts, 3 Days/Week	10	240
8-Hour Shifts, 2 Days/Week	10	160
4-Hour Shifts, 3 Days/Week	20	240
4-Hour Shifts, 5 Days/Week	5	100
4-Hour Shifts, 4 Days/Week	5	90
Stock Clerks/Baggers		
8-Hour Shifts, 5 Days/Week	5	200
4-Hour Shifts, 3 Days/Week	20	240
Total Active Workers Last Week		121
Total Full-Time Workers Last Week (under WARN)		66
Total Hours Worked in Aggregate Last Week		3,110

Analysis of the Grocery Store Example for WARN Purposes

The employer in this example is not covered under the law. Under the first employee definition the number of full-time workers are counted. In this example there were 121 active workers last week. However, when part-time workers are excluded (using as the definition of part-time those workers who work less than twenty hours per week), this number is reduced to sixty-six. This figure does not meet the employer definition threshold of 100 workers.

Under the second employer definition the number of hours worked in the aggregate are counted and part-time work hours are included. Last week the number of hours worked in aggregate totaled 3110, less than the required

4000 for employer coverage. Thus, because the part-time workers are not included, this employer is not covered even though the total number of workers exceeds the minimum threshold by twenty-one percent.

Workplace #4: The Fashion Boutique

JOB	NUMBER OF WORKERS	HOURS WORKED IN AGGREGATE LAST WEEK
Buyers		
Full-Time, 40 Hours/Week	2	80
Part-Time, 15 Hours/Week	4	60
Overtime, 20 Hours/Person	6	120
Managers		
Monday-Friday, 40 Hours/Week	14	160
Saturday-Sunday, 16 Hours/Week	12	192
Overtime, 8 Hours/Person	4	32
Clerks		
Full-Time, 37.5 Hours/Week	40	1,505
Part-Time, 18.75 Hours/Week	70	1,312.5
Overtime, 10 Hours/Person	30	300
Janitor^a		
40 Hours/Week	2	80
Bookkeeper^a		
18 Hours/Week	1	18
Inventory^a		
6 Hours/Week	25	150
Security^a		
Monday-Friday, 40 Hours/Week	4	160
Saturday-Sunday, 16 Hours/Week	12	192
Overtime, 8 Hours/Person	4	32

^a Workers in these job categories were hired from temporary agencies.

Total Active Workers Last Week	176
Total Full-Time Workers Last Week (under WARN)	46
Total Hours Worked in Aggregate Last Week	4,388.5
Total Hours Worked in Aggregate (as defined by WARN)	3,304.5

Analysis of the Retail Store Example for WARN Purposes

The employer in this example is not covered under the law. Under the first employee definition the number of full-time workers are counted. In this example there were 176 active workers last week. However, the part-time managers, buyers and the seventy clerks who work one-half of the week are not included. It is not uncommon for work shifts to be based on a 37.5 hour work week, e.g., 9:00am - 5:00pm with a one-half hour unpaid lunch. Using these figures, working one-half time is equivalent to 18.75 hours per week. Such a worker does not meet the twenty hour minimum threshold under WARN and is therefore not included in the employee count using the WARN definitions. In addition, workers hired through a temporary employment agency are not counted,¹²¹ even if those workers have steadily worked for the covered employer. Therefore, the forty-four workers hired through the temporary employment agencies are not included in the employee count or in counting aggregate hours worked (i.e., the security guards, the inventory workers, the bookkeeper and janitor). Thus, the total number of employees for WARN purposes is forty-six, approximately one-quarter of the actual number of employees working at the store last week. This figure does not meet the employer definition threshold of 100 workers.

Under the second employer definition the number of hours worked in the aggregate, *excluding overtime*, must be counted. Last week the number of hours worked in aggregate totaled 4388.5. First, excluding overtime hours worked, the number of hours worked in the aggregate becomes 3904.5. Second, excluding those workers hired through employment agencies, the number of hours worked in the aggregate is reduced to 3304.5, which is less than the required 4000 hours. Thus, the employer in this example is not covered by either definition and is not bound by the notification requirements of WARN.

The preceding were four examples to show how WARN's definition of an employer excludes many business enterprises that employ part-time workers. Several aspects of the definition are notable: the arbitrary choice of twenty hours per week as determining part-time work status, the differential treatment of seasonal workers, and the exclusion of workers hired through temporary employment agencies.

These examples show that even though an employer is covered under the act, not every layoff or plant closing is covered under WARN. An employer's coverage under WARN also depends on whether a particu-

121. 20 C.F.R. § 639.3(a)(2) (1993).

lar job loss meets two other definitions. First, the job loss must amount to an "employment loss." Second, this employment loss must meet the definition of either a "plant closing" or "mass layoff."

The law defines an "employment loss" as either (1) an employment termination (other than a discharge for cause, voluntary leaving, or retirement); (2) a layoff of more than six months; or (3) a 50 percent reduction in hours of work during each month of a six-month period.¹²² There is an exclusion from this definition that includes a work-status distinction, which addresses the respective responsibilities under WARN of the buyer and seller of a covered employer's business. There will not be an employment loss for WARN purposes if one employer sells the business to another employer, and the workers are transferred to the new employer's payroll.¹²³ The law states that, "[a]ny 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."¹²⁴

Under one interpretation, the new employer need not hire any of the part-time workers and need not notify any of the workers, and will still be in compliance with the provisions of the act because of this exception. Thus, the seller of a business with predominantly part-time workers who is covered under WARN because of the second employer definition, i.e., having 100 or more workers who work 4000 or more hours in the aggregate, would not be required to notify the part-time workers of the impending sale because there would be no employment loss, even if the seller knew that the buyer would not be hiring the part-time workers. For example, consider a store which has 300 total employees, 250 who work sixteen hours per week, and fifty who work forty hours per week. The employer is covered under the second employer definition of WARN because the aggregate number of hours worked last week exceeds 4000. In this example 5000 hours were worked. Assume that the store is owned by Employer A. Employer A is in the process of selling the store to Employer B. The definition of employment loss requires Employer A to provide notice of any plant closing or mass layoff, up to and including the effective date of the sale.¹²⁵ Employer B is responsible for notice after the date of the sale.¹²⁶ However, under the exclusion, only full-time employees of employer A are required by the act to be considered employees

122. 29 U.S.C. § 2101(a)(6) (1988).

123. *Id.* § 2101(b).

124. *Id.* (emphasis added).

125. *Id.*

126. *Id.*

of Employer B after the sale. Therefore, Employer B need only transfer the fifty full-time workers. The part-time workers will be without jobs, and no notice would be required to the part-time employees by either Employer A or Employer B.¹²⁷

Not only must an employer be covered by WARN, and an employment loss occur, WARN only covers those employment losses which are either "mass-layoffs" or "plant-closings." According to the WARN definition, a mass layoff occurs when there is a reduction in the work-force in any thirty day period at a single site of employment which is not the result of a plant closing, and the employment loss affects thirty three percent of the employees at the site, *excluding part-time employees*, and a minimum of fifty employees, *excluding part-time employees*, or at least 500 employees, again *excluding part-time employees*.¹²⁸

Unlike the employer definition discussed at the beginning of this section, which includes not only a count of full-time workers but also allows that hours worked in aggregate be used as a proxy for full-time equivalents, the definition of mass layoff has no comparable hours in aggregate proxy. This definition of mass-layoff effectively excludes from coverage employers of predominantly part-time workers. To avoid notification requirements, an employer need only maintain the full-time workforce and dismiss part-time workers.

A plant closing under WARN is defined as an employment loss of at least fifty employees in any thirty day period, *excluding part-time employees*.¹²⁹ Again, like the definition of mass-layoff, no hours in aggregate equivalent proxy exists. Part-time workers are excluded from the count.

Thus, the definitions of both mass layoff and plant closing exclude part-time workers from the count of employees losing jobs. Although an employer who has part-time workers might be covered under WARN, dismissal of part-time workers might not result in a triggering of the notification requirements if the definition of mass layoff or plant closing is not met.

The following are two hypothetical workplaces which illustrate how the definitions of mass layoff and plant closing would prevent notice of job loss to employees working in a business where part-time workers are employed.

127. See *infra* notes 156-69 and accompanying text.

128. 29 U.S.C. § 2101 (1988) (emphasis added).

129. *Id.* (emphasis added).

Workplace #5: Large Grocery Store

Total Full-Time Workers	40
Hours Worked	1,600
 Total Part-Time Workers	 150
Hours Worked	2,700
 Total Employees (Full- and Part-Time)	 190
Total Hours Worked (Full- and Part-Time)	4,300

This employer is a covered employer under the second definition of employer—but this employer would never need to notify its employees of impending job loss. Under the definitions of both mass layoff and plant closing,¹³⁰ fifty full-time workers must lose their jobs before the notification requirements are triggered. There are only forty full-time workers in this example, thus, no notification would *ever* be required.

Workplace #6: Large Retail Store

Total Full-Time Workers	120
Hours Worked	4,800
 Total Part-Time Workers	 200
Hours Worked	2,000
 Total Employees (Full- and Part-Time)	 320
Total Hours Worked (Full- and Part-Time)	6,800

This employer has over 100 full-time employees and is therefore covered under the first definition of employer. In addition, this employer is covered under the second employer definition because the hours worked in aggregate exceeded 4000. If the employer laid off 100 part-time workers, and thirty-five full-time workers, the total workforce would be 180 workers working 4200 hours. However, the definition of mass layoff excludes part-time workers from inclusion to determine if a mass-layoff occurred. Although forty-two percent of the entire workforce has been laid off, only twenty-nine percent of the full-time workers have been laid off. According to the definition of mass layoff, thirty-three percent of the

130. *Id.*

full-time employees must be laid off to meet the threshold requirements, and at least fifty full-time workers must lose their jobs. In this example, there has not been a mass layoff. In addition, because a minimum of fifty full-time workers have not lost their jobs, a plant-closing has not occurred either. Therefore, no notification is required.

These last two examples show that employers of predominantly part-time workers need not notify workers of an impending job loss. In some of the initial four examples exploring whether an employer would be covered under the act, a covered employer might not ever need to notify its employees of a plant closing or mass layoff. For instance, in the cannery example,¹³¹ there are only forty full-time workers for WARN purposes. This employer, though covered by WARN, would never need to notify the workers of an impending job loss because the employer would never meet the definitions of a mass layoff or plant closing. Thus, these definitions of employer, affected employee, employment loss, plant closing, and mass layoff all include work status distinctions which could result in workers being excluded from the notification provisions of WARN.

C. Federal WARN Cases

Three district court cases have addressed issues regarding part-time work and workers under WARN. The definition of a part-time worker was the major issue in *Solberg v. Inline Corp.*¹³² In *Solberg*, the court decided that a mass-layoff had not occurred after excluding from consideration all workers who had been employed less than six months.¹³³ The parties in *Solberg* did not dispute that the employer, in anticipation of a large contract, increased its workforce from 30 to over 300 employees during a six-month period.¹³⁴ The large contract was cancelled and the corporation discharged employees without notice, until the workforce was reduced to thirty-two.¹³⁵

The employer's main argument was that WARN's notice provisions were not implicated since the plaintiffs were part-time employees under the statute.¹³⁶ According to the defendants, only eight of the discharged employ-

131. See *supra* this section Workplace Example 2 and accompanying text.

132. 740 F. Supp. 680 (D. Minn. 1990).

133. *Id.* at 685-86.

134. *Id.* at 682. Inline Corporation is a Minnesota corporation which packages products manufactured by others. *Id.* The six named plaintiffs are former employees of Inline, and they seek to represent more than 200 other former employees who allege that the defendants violated WARN by failing to give sixty days notice prior to conducting a mass layoff. *Id.* Defendants reply that WARN's notice provisions were not implicated since the plaintiffs were part-time employees and no mass layoff occurred. *Id.*

135. *Id.*

136. *Id.* at 683.

ees were full-time employees. It was the defendants' position that no mass lay-off occurred because the requisite number of full-time employees were never discharged.¹³⁷ The court agreed.¹³⁸

In making this decision, the court looked to the legislative history of WARN, specifically the House Conference Report which redefined part-time worker to incorporate the Senate's definition of seasonal worker.¹³⁹ The court was particularly interested in that portion of the Conference Report which detailed the final definition of part-time worker to include not only those workers who worked less than twenty hours per week, but also those workers who worked full-time but less than six months.¹⁴⁰ In addition, the court cited the Department of Labor's promulgated regulations under WARN which, according to the court, "provide further support for a literal interpretation of Section 2101(a)(8)."¹⁴¹ According to the court: "[A]n agency's interpretation of the statute that it is charged with administering is entitled to considerable deference."¹⁴²

The language of the Conference Report, according to the plaintiffs, ignored the congressional debate which indicated that the exclusion of workers employed less than six months was directed specifically at seasonal workers, not at workers who were hired with an expectation of continuous employment.¹⁴³ Though the plaintiffs argued successfully that WARN is a "remedial statute and must be construed broadly,"¹⁴⁴ the court disagreed that WARN would allow for the plaintiffs' "[construction of] a world in which a new hire may rely on an expectation of permanency in the job."¹⁴⁵ Thus, the court interpreted that the language "less than six months employed" not only excluded seasonal workers, but also allowed the employer a six-month grace period for new workers before the WARN protections applied.

137. *Id.*

138. *Id.*

139. *Id.* at 684. See Conference Report, *supra* note 92.

140. *Id.*

141. *Id.* at 685. The Department of Labor Regulation is as follows:

(h) Part-time employee. 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, including workers who work full-time. This term may include workers who would traditionally be understood as short-term, "seasonal" employees.

20 C.F.R. § 639.3(h) (1993).

142. *Solberg*, 740 F. Supp. at 685 (citing *Groseclose v. Bowen*, 809 F.2d 502, 505 (8th Cir. 1987)) (citing *Dep't of Social Serv. v. Bowen* 804 F.2d 1035, 1038 (8th Cir. 1986)).

143. *Solberg*, 740 F. Supp. at 683-84, 685-86.

144. *Id.* at 685.

145. *Id.* at 685-86.

In conclusion, the court agreed with the defendants that the plaintiffs were part-time workers under the act, and therefore were not to be counted to determine if a mass-layoff occurred.¹⁴⁶ Without the inclusion of these part-time workers, the minimum threshold of workers needed to trigger the notice provisions was not reached.¹⁴⁷ Therefore, no notice was required, and the defendants were not liable.

The reasoning of *Solberg*¹⁴⁸ was cited in a case the following year, *Kildea v. Eltro Wire Products*.¹⁴⁹ As in *Solberg*, at issue in the *Kildea* case was whether the plaintiffs were “affected employees” within the meaning of the act.¹⁵⁰ On one hand, using the statutory definition of a part-time worker, the court in *Kildea* included in the count of affected employees five workers who were employed by the defendant for more than six of the previous twelve months, and averaged more than twenty hours of work per week.¹⁵¹ It is unclear from reading the decision why these workers were not included as employees by the defendants. It can only be surmised that they were considered “part-time” by the company, but were full-time within the definition of the statute.

On the other hand, the court in *Kildea* refused to include as affected employees six workers who were laid off but rehired during or just after the thirty day period.¹⁵² The court ruled that these workers did not suffer an employment loss as defined by the statute.¹⁵³ Relying on *Solberg*, the court defined these employees as part-time.¹⁵⁴ The employees continuity of work and expectation of continuity was not a triggering mechanism for WARN, rather the length of employment with the covered employer was the primary factor for determining part-time status for workers employed full-time but only part-year. Because these workers were excluded from the count of affected employees, the plaintiffs in this case failed to establish that a mass lay-off occurred.¹⁵⁵

146. *Id.*

147. *See* 29 U.S.C. § 2101(a)(8) (1988).

148. *Solberg*, 740 F. Supp. at 684-86.

149. 775 F. Supp. 1014 (E.D. Mich. 1991). The plaintiffs in this case consisted of two overlapping classes of former employees: those who were allegedly laid-off in a mass layoff without notice, and those who were on lay-off status at the time notice was given to other employees of the plant closing. *Id.* at 1014. Defendant was the owner and operator of an airbag-production plant in Owosso, Michigan, from 1971 to 1990. *Id.* at 1015.

150. *Id.* at 1016.

151. *Id.* at 1019.

152. *Id.*

153. *Id.* at 1019.

154. *Id.* at 1020.

155. *Id.*

In the third case under the Worker Adjustment and Retraining Notification Act,¹⁵⁶ one of the issues was whether part-time workers were affected employees.¹⁵⁷ The defendants argued that the part-time workers should be dismissed from the class, because part-time workers of the seller do not become part-time workers of the buyer, and therefore should be excluded for WARN purposes.¹⁵⁸ In addition, the defendants argued that affected employees are not part-time workers.¹⁵⁹ The court disagreed, reasoning that if Congress intended to exclude part-time workers from the definition, it would have done so, as was done elsewhere in the Act.¹⁶⁰ Even when part-time workers are not included in the count of employees to determine if a mass-layoff or plant closing has occurred, they are workers entitled to notice.¹⁶¹ Therefore, the court concluded that part-time as well as full-time employees may be affected employees entitled to notice.¹⁶²

The defendants also argued that part-time workers are not counted as employees during a buy-sell transaction. The contested part of the Act reads, in relevant part:

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 . . . 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 lay-off . . . *Notwithstanding any other provisions for this chapter, 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.*¹⁶³

The defendant argued that under this provision, at the time of the merger, only full-time employees became the employees of the buyer, part-time

156. *Carpenters Dist. Council v. Dillard Dep't Stores*, 778 F. Supp 297 (E.D. La. 1991).

157. *Id.* at 297. In this case former employees and their union brought an action under WARN for the employers' failure to give sixty days written notice of closings or layoffs that occurred after a corporate merger. *Id.* Among the contested issues was whether part-time workers were affected employees. *Id.* at 297-98.

158. *Id.* at 312.

159. *Id.* at 314.

160. *Id.* at 314-15.

161. *Id.* at 314.

162. *Id.*

163. *Id.* (emphasis added) (citing 29 U.S.C. § 2101(b)(1)(1988)).

employees did not.¹⁶⁴ Therefore, since part-time employees were not employees of Dillard, Dillard was not required to give them notice of a plant closing or mass lay-off.¹⁶⁵

According to the plaintiffs, this language should have been interpreted to mean that the seller's full-time employees remained full-time employees after the merger, while part-time employees remained part-time employees.¹⁶⁶ The Court agreed with the plaintiffs:

Plaintiffs point out that if the Act did not contain this provision that full-time employees of the purchaser . . . would become part-time employees for six months because they would have been employed . . . for less than six months. Thus during the first six months after the purchase [the buyer] could terminate any and all employees and not be required to give any one notice, since plant closings and mass layoffs require the termination of 50 or more employees excluding part-time employees. Plaintiffs contend that the last sentence of 2101(b)(1) was designed to close this loophole by providing that the employment of full-time employees would be continuous.¹⁶⁷

Interestingly, the court in *Dillard*, by accepting the reasoning of the plaintiffs, departed from the literal language of the statute. As described in one of the earlier hypothetical examples,¹⁶⁸ the plain language of WARN indicates that the part-time workers would not necessarily become employees of the buyer upon the sale of the business. It is unclear if the court referred to the legislative history of the act, which would indicate that part-time workers were *not* to be covered during a buy-sell transaction.¹⁶⁹ However, it does not appear that this language was debated again in 1988.

VI. CONCLUSION

Although many employment laws have excluded workers from coverage based on work status, many other labor and employment policies make no such distinctions. For example, Title VII of the Civil Rights Act of 1964¹⁷⁰

164. *Dillard*, 778 F. Supp. at 314.

165. *Id.*

166. *Id.*

167. *Id.*

168. See text accompanying note 127.

169. 134 CONG. REC. S8719-02 (daily ed. June 28, 1988) (statement of Sen. Hatch).

170. 42 U.S.C. §§ 2000(e)-1 to 2000(e)-17 (1988 & Supp. III 1991).

and the National Labor Relations Act¹⁷¹ (once workers are unionized) have no explicit work-status distinctions. The Occupational Safety and Health Act¹⁷² and the minimum wage law¹⁷³ also cover part-time workers. Thus, Congress has made non-uniform decisions regarding the coverage of part-time workers in labor and employment policies. Further research is needed to understand the model of work that the legislators were envisioning when these other laws were passed. In WARN, the legislators were obviously envisioning two different types of work: one which was full-time and continuous, and one which was not; one would be protected, the other would not.

The legislative history, the language, and the interpretations of WARN indicate that the inferior terms and conditions of part-time work were not an unanticipated result of hasty legislation: work-status distinctions were made knowingly. It is also clear that the legislators and courts use a male model of work when thinking about the terms and conditions of work. On the other hand, the evidence does not clearly indicate that the legislators and courts understand the impact that work status distinctions have on women workers. What is apparent is that the courts and legislators perceive part-time work and workers as fundamentally different than full-time work and workers.

The WARN Act explicitly excludes from coverage those businesses organized predominantly on a part-time basis. Thus, the statute implicitly protects the "newer" workforce organization, where employers rely much less on full-time workers and much more on contingent labor. This workforce organization is completely within an employer's prerogative. Although some employers of predominantly part-time workers might be considered covered employers under the law, it is unlikely that these employers would ever need to notify their workers of impending job loss because the notification requirements mandate that there be either a plant-closing or mass layoff, both of which are defined solely on the number of *full-time* workers who lose their jobs.

The interpretation of WARN by the courts has reiterated the employer's prerogative to hire and fire as it desires without cause during at least the first six months of an employee's tenure. Although congressional floor comments during the debate surrounding the work-status language in WARN indicated that the work-status distinction was based on the perceived lack of commitment of seasonal and part-time workers, courts have rejected the argument by newly hired full-time workers that they were in fact committed to the job, and therefore should be protected by WARN. Instead, courts have ruled that

171. 29 U.S.C. § 151 (1988).

172. 29 U.S.C. § 651 (1988).

173. Fair Labor Standards Act, 29 U.S.C. §§ 201-19 (1988 & Supp. IV 1992).

nothing in WARN gives workers a secure environment, and that the plain meaning of the language gives the employer the right to hire and fire within a six-month period without any interference from the statute, regardless of worker desires. Again, commitment has little to do with an individual worker's attitude or productivity, but has been defined by the state for the employer's benefit.

The Worker Adjustment and Retraining Notification Act is a very limited, narrowly tailored law that excludes from coverage, regardless of work status, most workers and most businesses. However, it took nearly two decades for a plant closing bill to become law. WARN is perceived to be pro-labor and anti-management,¹⁷⁴ but it has not been acknowledged by these supporters that as the economy continues to shift from core industries with primary sector workers to peripheral industries with secondary sector workers, the impact of WARN will be reduced. Thus, WARN fails to protect many of those workers most in need of federal legislation. By exempting from coverage employers of predominantly part-time workers, the legislation leaves increasingly vulnerable workers who already receive less pay and benefits than full-time workers.

One of the findings of this analysis is that part-time workers have not attempted to argue that these work-status distinctions in the laws are discriminatory. There have been very few federal court cases brought by part-time workers. Perhaps the explanation lies with the very explicit language of the law that excludes part-time workers. Such language defies an individual or even a class of individuals to argue that they are covered by the law. These potential plaintiffs would need to argue that work-status distinctions in the laws are the result of discriminatory biases on the parts of employers, the Congress, and the courts. Such a burden would be onerous, as not only the explicit language of the law excludes part-time workers but the legislative history of the Act supports the language.

It is outside the scope of this discussion to talk about the significance of "symbolic" acts, specifically the idea that once a building block is in place, other blocks can be placed upon it. WARN provides a minimal floor of protection for workers employed in only one model of work; such a model ignores the sexual division of labor and sanctions the employer prerogative to increasingly organize work on a part-time basis with minimal interference from the state.

174. See, e.g., Hume & Mossberg, *supra* note 108; Auerbach, *supra* note 108.