Statement of

Thomas P. Gies, Partner
Crowell & Moring LLP

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

Hearing

Sequestration: Examining Employers' WARN Act Responsibilities

February 14, 2013

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

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

I. Summary of Relevant WARN Act Principles

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

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

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

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

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

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

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

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

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

II. Other Related Legal Obligations

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

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

III. Where We Are Now

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

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

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

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

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

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

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

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

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

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

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

IV. Particular Uncertainties and Practical Problems

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

A. WARN Compliance Issues

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

1. Aggregation of Multiple Employment Losses

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

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

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

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

2. Single Site of Employment

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

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

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

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

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

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

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

3. Pay in lieu of Notice

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

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

4. The A-12 Fighter Bomber Contract Cancellation

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

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

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

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

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

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

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

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

5. Conditional Notice

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

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

20 C.F.R. § 639.7(a)(3).

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

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

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

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

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

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

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

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

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

6. Other WARN Issues

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

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

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

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

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

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

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

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

B. Employee Retention and Other Employee Morale Issues

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

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

V. The Government's Position on Allowable Costs

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

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

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

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

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

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

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

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

VI. Conclusion

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

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

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

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