

Statement of

**Thomas P. Gies, Esq.
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

Good morning Chairman Walberg, Ranking Member Courtney and distinguished members of the subcommittee. My name is Tom Gies. I am a partner with Crowell & Moring LLP, based here in Washington. I thank you for the invitation to provide testimony this morning. 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.

Many federal contractors are increasingly apprehensive as we get closer to March 1. This anxiety stems in part from ambiguities regarding their obligations under the WARN Act in light of the lack of clarity from government agencies about the specific impacts of the sequester. The reality facing contractors today, particularly in the defense sector, is that the sequester calls into doubt both the availability of funding for future contract awards and the agencies' ability to continue funding under many existing contracts.

The Navy's cancellation of the A-12 fighter bomber program in January 1991 is a cautionary tale. Both McDonnell Douglas and General Dynamics had numerous discussions with the Navy over a several month period. This led to several exchanges of proposals and communications, including employee communications issued by the contractors prepared with an eye towards WARN compliance. The upshot was that the Navy terminated the contracts with only a few days notice. Both companies got sued for WARN violations, and neither was vindicated until they went all the way through costly trials in federal court.

Fast forward to March 1. Contractors will begin to get more specific information about the plans of contracting agencies regarding sequestration in the coming days. For instance, we are aware that the Military Departments within DOD are currently preparing specific plans. But these plans 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. Without more detail, it is doubtful that any contractor can accurately predict the specific impacts of sequestration on its business.

But, as more information becomes available, contractors will have to begin making tough decisions. Mindful of legal risk, many companies are likely to conclude they should begin providing some sort of notice within the next two weeks, or as soon as they learn of anything more specific. Depending on specific government procurements, one can envision a subsequent wave of conditional notices as more information becomes available.

These communications will cause significant disruption and confusion. Productivity will suffer as employees become increasingly anxious about job security. There is the very real worry of a major league brain drain at some companies. Notwithstanding weaknesses in the overall labor market, in the technology sector competition remains fierce for highly talented and skilled employees like software design engineers. Many contractors employing such individuals are understandably worried about retention of talented employees who are critical to their success.

The complexities of WARN compliance itself will add to the challenge. Two examples illustrate the problem.

Counting the right number of employees who will be affected is often difficult. WARN has arcane "aggregation rules" requiring a company to consider, in some circumstances, other workforce reductions that take place before, and after, the planned event, in order to determine whether the WARN targets have been met. WARN likewise makes it difficult to determine whether a particular job loss impacts a "single site of employment." The regulations and case law make razor-fine distinctions in situations involving groups of structures that form a campus or an industrial park, or separate facilities across the street from each other. Because each company's situation is likely to be unique, we can expect numerous lawsuits filed around the country against contractors accused of guessing wrong on a variety of WARN issues.

The incremental dissemination of information from contracting agencies will present additional problems for some contractors. Many states have mini-WARN statutes, some of which impose arguably inconsistent obligations on employers. The New York law, for example, requires 90 days advance notice rather than 60. And companies with a unionized workforce may have additional concerns, depending on the wording of labor contracts and the nature of their relationships with labor unions.

For many companies, their decision about how to manage upcoming layoffs will be driven in part by the government's position on whether the costs associated with workforce reductions will be viewed as "allowable costs" under particular contracts and thus reimbursed by the government. 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.

The central question in the inevitable litigation will be the latest version of the old question of "what did they know and when did they know it." You have heard testimony about the guidance issued by the Department of Labor in July 2012, and the subsequent guidance issued by OMB. That guidance, of course, does not address the question of what a contractor should do after March 1. And as we sit here today, many of even the most sophisticated federal contractors aren't sure about what to do.

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