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# United States Senate

COMMITTEE ON HEALTH, EDUCATION,  
LABOR, AND PENSIONS

WASHINGTON, DC 20510-6300

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August 3, 2012

The Honorable Hilda Solis  
U.S. Department of Labor  
200 Constitution Ave, NW  
Washington, DC 20210

Dear Secretary Solis,

I write regarding Training and Enforcement Guidance Letter (TEGL) Number 3-12, issued by the Department of Labor (DOL) on July 30, 2012. In the Guidance, DOL advises that requiring defense contractors to provide Worker Adjustment and Retraining Notification (WARN) Act notices in preparation for the mandatory sequestration provisions of the Budget Control Act of 2011 would be "inconsistent with the purpose of the WARN Act." Your analysis found the sequestration cuts qualify as an unforeseeable business expense. This Guidance has created confusion and an appearance of selective enforcement of the law which the Department must immediately address. It also raises questions about future application of the WARN Act which deserve a serious and timely response.

Some assertions on which the Guidance is based are incorrect. It states that "the Office of Management and Budget has not directed Federal Agencies to begin planning for the specific manner in which they will operate were sequestration to occur." Yet, on July 31, OMB issued just such a memorandum informing agencies that it would work with them to prepare for sequestration cuts. Did your agency consult OMB in your analysis of the WARN Act application?

Additionally, the Guidance argues that the WARN Act favors narrower distribution of notices in order to allow for greater precision. While it cites the enforcing regulations preamble and a comment submitted during the rulemaking process in 1989, it fails to cite the one provision of the regulation which directly addresses the question of uncertainty. In 20 CFR 639.1(e), the current regulation states:

(e) *Notice in ambiguous situations.* It is civically desirable and it would appear to be good business practice for an employer to provide advance notice to its workers or unions, local government and the State when terminating a significant number of employees. In practical terms, there are some questions and ambiguities of interpretation inherent in the application of WARN to business practices in the market economy that cannot be addressed in these regulations. It is therefore prudent for employers to weigh the desirability of advance notice against the possibility of expensive and time-consuming litigation to resolve

disputes where notice has not been given. The Department encourages employers to give notice in all circumstances.

Was section 639.1(e) considered as part of the Department's analysis? If so, why was it not cited in the Guidance?

The Department's novel interpretation of an unforeseeable business expense has surprised many employers. They legitimately wonder if this newly expanded defense will apply to private sector employer obligations under the WARN Act hereafter. Please address the following tenants of the Department's analysis and declare whether they may now be relied upon by all employers subject to the WARN Act:

Efforts to Avoid the Loss: The Guidance finds the fact that efforts are being made to avoid sequestration to negate the foreseeability of the cuts. In situations where private sector employers are taking efforts to prevent, reverse or recoup the loss that is likely to cause a layoff or termination, are they now exempt from the WARN Act?

Uncertainty of Cuts Application: The Guidance notes that terminations and cutbacks are unforeseeable because defense contractors do not know exactly how required reductions will be carried out. However, the Budget Control Act enacted on August 2, 2011 specifies a 10% reduction for defense accounts and an 8% reduction for non-defense discretionary accounts. This is similar to many employers who lose a contract making up 10% of current business. They face a similar situation of not knowing how reductions will be carried out precisely 60 days in advance notice. Where this is the case, are employers now exempt from the WARN Act?

State Resource Conservation: The Guidance states that WARN Act notices in advance of sequestration cuts are inappropriate because the cuts may not occur, because "to give notice to workers who will not suffer an employment loss both wastes the states' resources in providing rapid response activities where none are needed and creates unnecessary uncertainty and anxiety in workers." In cases where a private sector employer hopes to make up or prevent the coming loss, can they now abstain from issuing WARN Act notices due to the fact that it could waste state resources in providing rapid response activities and create uncertainty and anxiety?

Finally, a number of states have adopted WARN Acts of their own or related laws imposing burdens on employers prior to plant closings and mass layoffs. Has the Department reached out to states to explain the exemption being created for defense contractors subject to sequestration? What efforts have been made to ensure that liability under state laws will be similarly waived?

The WARN Act Guidance has created a disturbing appearance of politics at play in enforcement of labor laws. I urge you to respond swiftly and thoroughly to these questions in order to uphold the Department of Labor's reputation as a fair and consistent enforcer of the law.

Thank you for your attention to this important matter. If you have any questions regarding this request, please have your staff contact Kyle Hicks, my Labor Policy Director on the Health, Education, Labor and Pensions Committee.

Sincerely,

A handwritten signature in blue ink that reads "Michael B. Enzi". The signature is fluid and cursive, with the first name "Michael" being the most prominent part.

Michael B. Enzi

U.S. Senator