and management of computers and related telecommunications systems. This authority may not be redelegated.

Nicholas F. Brady,

Secretary of the Treasury.

[FR Doc. 89-9426 Filed 4-19-89; 8:45 am]

BILLING CODE 4810-25-M

UNITED STATES INFORMATION AGENCY

Culturally Significant Objects Imported for Exhibition; Determination

Notice is hereby given of the following determination: Pursuant to the authority vested in me by the act of October 19, 1965 (79 Stat. 985, 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978 (43 F.R. 13359, March 29, 1978), and Delegation Order No. 85-5 of June 27, 1985 (50 FR 27393, July 2, 1985), I hereby determine that the objects to be included in the exhibit, "Mary Cassatt: The Color Prints" (see list [1]) imported from abroad for the temporary exhibition without profit within the United States are of cultural significance. These objects are imported pursuant to loan agreements with the foreign lenders. I also determine that the temporary exhibition or display of the listed exhibit objects at the National Gallery of Art in Washington, DC, beginning on or about June 18, 1989, to on or about August 27, 1989, at The Museum of Fine Arts, Boston, Massachusetts, beginning on or about September 9, 1989, to on or about November 5, 1989, and at the Williams College Museum of Art, Williamstown, Massachusetts, beginning on or about November 25, 1989, to on or about January 21, 1990, is in the national interest.

Public notice of this determination is ordered to be published in the Federal Register.

R. Wallace Stuart,

Acting General Counsel.

Date: April 13, 1989.

[FR Doc. 89-9540 Filed 4-19-89 8:45 am]

BILLING CODE 8230-01-M

[1] A copy of this list may be obtained by contacting Mr. R. Wallace Stuart of the Office of the General Counsel of USIA. The telephone number is 202-485-7979, and the address is Room 700, U.S. Information Agency, 301 4th Street SW., Washington, DC 20547.

Sunshine Act Meetings

Federal Register
Vol. 54, No. 75
Thursday, April 20, 1989

This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409) 5 U.S.C. 552b(e)(3).

BOARD FOR INTERNATIONAL BROADCASTING

TIME AND DATE: 9:00 a.m. May 15, 1989.

PLACE: Radio Free Europe/Radio Liberty, Inc., Oettingenstrasse 67, Am Englischen Garten, 8000 Munich 22, Germany.

STATUS: Closed, pursuant to 5 U.S.C. 552(b)(c)(1) 22 CFR 1302.4 (c) and (h) of the Board's rules (42 FR 9388, March 12, 1977).

MATTERS TO BE CONSIDERED: Matters concerning the broad foreign policy objectives of the United States Government.

CONTACT PERSON FOR ADDITIONAL INFORMATION: Mark G. Pomar, Deputy Executive Director, Board for International Broadcasting, Suite 400, 1201 Connecticut Avenue, NW., Washington, DC 20036.

Mark G. Pomar,

Deputy Executive Director.

[FR Doc. 89-9609 Filed 4-18-89; 2:10 am]

BILLING CODE 6155-01-M

U.S. COMMISSION ON CIVIL RIGHTS

April 18, 1989.

PLACE: 1121 Vermont Avenue, NW., Room 516, Washington, DC 20425.

DATE AND TIME: Friday, April 28, 1989, 9:00 a.m.–5:00 p.m.

STATUS OF MEETING: Portion open to the public and portion closed.

MATTERS TO BE CONSIDERED:

Agenda

I. Approval of Agenda
II. Approval of Minutes of March Meeting
III. Announcements
IV. SAC Reports and Recharters
  Nutrition Services for Minority Elderly; Census Data and Hispanic Elderly; and State Grant-in-Aid Program (Delaware)
  The Impact of Two Consent Decrees on Employment at Major Hotels/Casinos in Nevada
  Desegregation of Public Higher Education in Tennessee
  Colorado SAC Recharter
  Delaware SAC Interim Appointment
  District of Columbia SAC Interim Appointments
  West Virginia SAC Interim Appointment
V. Commission Reauthorization Discussion
VI. Project Proposal—*Window Dressing on the Set: The Sequel*
VII. Commission Subcommittee Reports
  A. ICRA
  B. Regional Forums
  C. Medical Discrimination Against Children With Disabilities
  D. Set-aside Draft
  E. Asian Roundtable
  F. Proposals Presented to the Conservative Opportunity Society
VIII. Staff Director's Report
  A. Briefing—Bigotry and Violence on College Campuses
  B. Discussion—New Perspectives
  C. Incomes Study
  D. Testing Consultation
  E. Civil Rights Monitoring—U.S. Department of Education
  F. Immigration Report
IX. Future Agenda Items
X. Executive Session closed to the public at end of public meeting to discuss personnel matters

PERSON TO CONTACT FOR FURTHER INFORMATION: John Eastman, Press and Communications Division, (202) 376-8312.

William H. Gillers,

Solicitor.

[FR Doc. 89-9571 Filed 4-18-89; 11:53 am]

BILLING CODE 6335-01-M

federal register

Thursday
April 20, 1989

Part II

Department of Labor

Employment and Training Administration

20 CFR Part 639
Worker Adjustment and Retraining Notification; Final Rule

DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Part 639

Worker Adjustment and Retraining Notification

AGENCY: Employment and Training Administration, Labor.

ACTION: Final rule.

SUMMARY: The Employment and Training Administration of the Department of Labor is publishing a final regulation carrying out the provisions of the Worker Adjustment and Retraining Notification Act (WARN). WARN provides that, with certain exceptions, employers of 100 or more workers must give at least 60 days' advance notice of a plant closing or mass layoff to affected workers or their representatives, to the State dislocated worker unit, and to the appropriate local government.

EFFECTIVE DATE: May 22, 1989.

FOR FURTHER INFORMATION CONTACT: Mr. Robert N. Colombo, Director, Office of Employment and Training Programs, Employment and Training Administration, Department of Labor, Room N4469, 200 Constitution Avenue NW., Washington, DC 20210. Telephone: (202) 535-0577.

SUPPLEMENTARY INFORMATION:

Introduction

The Worker Adjustment and Retraining Notification Act (WARN, the statute, or the Act), Pub. L. 100-379, 102 Stat. 890, was enacted on August 4, 1988. 29 U.S.C. 2101 et seq. Section 11 of the Act provides that WARN goes into effect on February 4, 1989. WARN provides that, with certain exceptions, employers of 100 or more workers must give at least 60 days' advance notice of a plant closing or mass layoff to affected workers or their representatives, to the State dislocated worker unit (see 29 U.S.C. 1661(b)(2)), and to the appropriate local government. 29 U.S.C. 2902 and 2903. Section 8(a) of the Act requires that the Secretary of Labor "prescribe such regulations as may be necessary to carry out this Act. Such regulations shall, at a minimum, include interpretative regulations describing the method by which employers may provide for appropriate service of notice as required by this Act." 29 U.S.C. 2107(a). Under section 11 of the Act, the authority to issue regulations for WARN became effective on August 4, 1988.

The Employment and Training Administration (ETA) of the Department of Labor (DOL or Department), since the enactment of WARN, has published in the **Federal Register** for comment various notices, a discussion paper, an interim interpretative rule and a proposed rule on WARN. 53 FR 34844 (September 8, 1988); 53 FR 36056 (September 16, 1988); 53 FR 38026 (September 29, 1988); 53 FR 39403 (October 6, 1988); 53 FR 43731 (October 28, 1988); 53 FR 48884 (December 2, 1988); and 53 FR 49076 (December 5, 1988). After full consideration of public comments received in response to the notices, discussion paper, interim interpretative rule and proposed rule, ETA is publishing this final rule.

Prior Actions

On September 16, 1988, the Department published a notice in the **Federal Register** inviting comments from interested parties regarding: "(1) The extent to which the Department should issue interpretive regulations; and (2) To the extent that regulations are needed, the specific views of commenters on how particular sections of the law should be implemented through regulations."

A total of 63 letters was received from employer associations, companies, law firms, unions, employee associations, Members of Congress, State officials, and a private citizen. Commenters strongly encouraged DOL to publish regulations to explain how WARN would be implemented and to clarify WARN provisions they found ambiguous. Commenters also requested that DOL address a number of specific items and define particular terms.

On October 28, 1988, the Department published the WARN Discussion Paper in the **Federal Register** and solicited comments. This paper reviewed sections 2, 3, 4, and 11 of the statute, discussing questions raised in comments on the September 16, 1988 Notice and issues addressed in the legislative history.

DOL received 62 comment letters in response to the October 28 Discussion Paper from employer associations, employers, labor unions, law firms, a State governmental agency, four members of Congress who were legislative sponsors, and another member of Congress. Commenters generally expressed agreement with the scope of the issues presented and many of the tentative positions covered in the Discussion Paper. Commenters did raise specific points of disagreement, posed additional questions, sought information about the application of WARN in specific situations, and provided examples.

On December 2, 1988 and December 5, 1988, the Department published an interim interpretative rule effective through April 1, 1989, and a proposed rule, respectively, implementing the provisions of WARN and soliciting comments (these documents will be referred to as the proposed rule or regulation). 53 FR 48884 and 53 FR 49076. The rules were identical. In their preambles, the Department discussed issues under the Act and comments received in response to the October 28, 1988 Discussion Paper. DOL received 82 letters of comment on the interim interpretative and proposed rules from employer associations, employers, labor unions, City governments, government interest groups, professional associations, four members of Congress who were legislative sponsors, a municipal utility and a Federal agency. The comments were fully considered, along with the written comments on the September 16, 1988 Notice and the October 28, 1988 Discussion Paper, in ETA's development of this final rule. The comments are discussed at considerable length in order to make clear the Department's interpretation of WARN through these final regulations and of their application to some of the problems that may arise in implementing the Act. At various points in this preamble the Department, in response to comments, has provided advice to employers on methods by which WARN liability may be avoided. This advice is for guidance only and should not be interpreted to impose any new or additional standards or requirements on employers.

Analysis of Final Rule and Comments

(1) General Issues

(a) Organization of Regulations

The Department has written and presented the WARN regulations so they will be understandable, and offer guidance to readers in the business and labor communities. Issues are discussed in their logical sequence, in an effort to easily convey the intent of the Act and employers' responsibilities.

(b) Scope and Purpose

These regulations cover sections 2, 3, and 4 of the Worker Adjustment and Retraining Notification Act. Section 2 of the Act provides necessary definitions and exclusions. Section 3 creates the notice requirement, describes the service of notice, sets forth the legal bases for providing reduced notice, provides for the extension of a layoff period, and specifies the consideration of employment losses over a 90-day period in determining whether some employers are covered by WARN

requirements. Section 4 outlines two exemptions to coverage of plant closings and mass layoffs.

(c) General Comments

A commenter suggested that the final regulations should only deal with what WARN requires, not what the Department encourages. In developing these final regulations, DOL has attempted to faithfully follow the language and intent of WARN. The Department also has been aware that some of the provisions of WARN may be ambiguous. In an effort to assist the public in avoiding unintentional noncompliance, DOL has tried to point out potential problems and in some cases has suggested methods of compliance.

A commenter suggested that DOL should not regard the comments of four of the Congressional sponsors, who commented both on the Discussion Paper and on the proposed regulations, as legislative history and should disregard those comments. The Department agrees that these comments do not have the force of legislative history. On the other hand, there is no reason to disregard them. They have been treated as any other comments.

A commenter suggested that the final regulations should contain specific citations to the legislative history for clarity and to preclude litigation. DOL agrees that citations may be useful and has provided them.

(2) Section 639.1 Purpose and Scope

(a) Section 639.1(a) Purpose of WARN

This section gives a brief overview of the purpose of the Act. None of the comments discussed this provision and it remains unchanged in the final regulations.

(b) Section 639.1(b) Scope of These Regulations

This section discusses the Department's intent in developing these regulations. None of the comments discussed this provision and it remains unchanged in the final regulations.

(c) Section 639.1(c) Notice Encouraged Where Not Required

This section quotes the statutory provision reflecting the intent of Congress that notice be provided even where not required by WARN. None of the comments discussed this provision and it remains unchanged in the final regulations.

(d) Section 639.1(d) WARN Enforcement

This provision discusses the WARN enforcement scheme. Commenters suggested that the regulations should include interpretations of several of the provisions of § 5 of WARN, which contains the enforcement provisions. Specifically, it was suggested that the regulations should discuss the "buy-out" provisions of sections 5(a) (2) and (3), which provide that an employer may reduce its monetary liability for violations of WARN by the amounts of certain payments made to or on behalf of the affected workers. One of the commenters also suggested that the regulations should discuss the basis for calculating the amount of monetary liability and should distinguish between violations of the Act from failure to give notice and violations for giving notice in a "technically deficient fashion".

The Department believes that in the unique WARN enforcement scheme, under which all enforcement will occur in the context of private civil lawsuits, it is inappropriate for the Department to regulate with respect to these issues. These matters have been left solely to the courts to decide.

The Department generally agrees with the comment that technical violations of the notice requirements not intended to evade the purposes of WARN ought to be treated differently than either the failure to give notice or the giving of notice intended to evade the purposes of the Act. The final regulations, in § 639.7(a)(3), include language to make it clear that inadvertent errors and factual errors which occur because of subsequent changes in events are not intended to be violations of the regulations. Other kinds of violations, i.e., the failure to provide information required in these regulations, may constitute a violation of WARN.

The proposal referred to these rules as interpretative regulations. Upon re-evaluation, this reference has been eliminated in the final regulation. The final regulation reflects the Department's careful consideration of the issues raised in this rulemaking and extensive analysis of the numerous comments it has received.

(e) Section 639.1(e) Notice in Ambiguous Situations

This section discusses the desirability of giving notice in situations where questions may arise about the applicability of WARN. While no comments were received which directly discussed this provision, DOL has received numerous comments and questions which illustrate the principle of this provision and demonstrate the existence of a possible source of confusion for some employers. These comments inquire about whether or not an employer planning a plant closing or mass layoff is covered because of some events which may occur between the date that notice is required to be given and the date of the event. An example of a typical inquiry is: an employer is planning to close a unit which employs 55 people; the employer will subsequently offer early retirement incentives to some of these employees, six of whom accept the early retirements before the termination occurs; since only 49 workers will finally be terminated is there a covered plant closing? Technically, the correct answer may be that no covered plant closing will have occurred (assuming, of course, that other actions within the 30- or 90-day aggregation periods provided in WARN do not trigger coverage). However, an employer has to make a decision on whether or not to give notice based on what it *knows* 60 or more days before the plant closing or mass layoff will occur. If, as in this example, at the time the decision to give notice has to be made, the employer is not certain that its early retirement incentives will be accepted or how many workers will accept early retirement, the employer is best advised to give notice. If the employer "gambles" that a sufficient number of employees will accept the offer and "loses', the employer's cost will be 60 days' pay and benefits to at least 50 workers. If the employer gives notice, the cost will be the cost of preparing and mailing 55 notices. Given the relative costs involved, the employer is best advised to give notice unless it is *certain, at the time it must decide to give notice,* that there is no possibility of coverage.

Because of this possible source of confusion, DOL has strengthened the language of this recommendation.

(f) Section 639.1(f) Coordination With Job Placement and Retraining Programs

This provision discusses coordination with other DOL programs aimed at providing assistance to dislocated workers. None of the comments discussed this provision and it remains unchanged in the final regulations.

(g) Section 639.1(g) WARN Not to Supersede Other Laws and Contracts

This provision discusses the requirement of § 6 of WARN that the provisions of the Act "are in addition to, and not in lieu of, any other contractual and statutory rights of the employees". In the preamble to the proposed regulations, DOL solicited comments on: (1) Whether and to what extent the final regulations might provide that collective bargaining agreements which provide for terms different from the terms

incorporated into the WARN regulations may be used as legitimate alternative methods of Compliance with WARN; and (2) whether such a provision should apply only to collective bargaining agreements that are entered into after the effective date of WARN or whether agreements that predate WARN also should be included. DOL received a number of comments on this issue. Some commenters supported broad application of collective bargaining agreements to define the terms of WARN. Other commenters opposed any application of collective bargaining agreements to alter or modify the provisions of WARN.

After considering comments received, the Department concludes that the WARN requirements stand by themselves and cannot be set aside in favor of collective bargaining agreements, regardless of whether such agreements were entered into before or after the effective date of WARN. However, where collective bargaining agreements include provisions which are consistent with and not inferior to WARN requirements, application of those provisions to further define or clarify WARN terms in a specific context would satisfy WARN. For example, WARN requires that notice of a mass layoff be provided at least 60 days in advance to affected employees or their representatives, to the State dislocated worker unit, and to a unit of local government. If a collective bargaining agreement provides for an employer to issue written notice to the union representing the affected workers 10 days prior to an anticipated layoff, this provision will not satisfy the WARN requirements for 60-day advance notice to the union representing the workers. But if the contract provides for an employer to issue written notice to the union 75 days in advance of anticipated layoffs, that provision will satisfy the WARN requirement for 60-day advance notice.

The Department also recognizes that certain of the provisions of WARN involves subjects which are typically covered in collective bargaining agreements. For example, the definition of the term "operating unit" depends on the organizational and functional structure of each plant, a matter often covered under seniority or other provisions of collective bargaining agreements. Similarly, WARN provides that a worker does not experience an employment loss if the employer offers to transfer the worker to a job at a different site within a reasonable commuting distance. The definition of the term "reasonable commuting distance" is a flexible one intended to take local conditions into consideration. If a collective bargaining agreement includes provisions for transfers and stipulates what constitutes reasonable commuting distance, that definition should control; it is the parties' agreement on the meaning of the term in the local conditions. Also, the collective bargaining agreements often will help in defining whether certain of the exceptions to the general definition of "single site of employment" are applicable.

(3) Section 639.2 What Does WARN require?

This section provides a brief overview of the WARN notice scheme. None of the comments discussed this provision and it remains unchanged in the final regulations.

(4) Section 639.2 Definitions

(a) Section 639.3(a) Definition of "Employer"

This provision provides a definition of the term "employer". It repeats the statutory definition of the size threshold for coverage under WARN as an employer and specifies which workers are counted in making coverage determinations; it makes it clear that private nonprofit organizations, as well as for-profit entities, are covered; it discusses the status of independent contractors and subsidiaries as separate employers; and it clarifies that an employer is defined in terms of the overall corporate or business entity, not in terms of any particular plant.

In the preamble to the proposed regulations, DOL requested comments on whether agencies of State and local government which are independent and perform business activities should be covered. Several commenters opposed inclusion of these entities, arguing that the statutory definition of employer as a "business enterprise" is inapplicable to government agencies, that the tax payment test for notice to local governments is inapplicable to agencies of local government and that any definition would sweep too broadly and include school boards and similar entities. Other commenters supported inclusion as consistent with the intent of WARN to broadly protect workers against dislocation. Because of the use of the term "business enterprise", DOL concludes that regular Federal, State, and local government public agencies and services are outside the purview of WARN. For completeness, federally recognized Indian tribal governments have also been added to the list of governments not covered by WARN. The legislative history is not helpful on the specific question of coverage of public and quasi-public business enterprises. DOL agrees that the underlying intent of WARN is worker protection. Given the nature and the language of the law, DOL concludes that the term "business enterprise" used in the statute includes public and quasi-public entities which engage in business (i.e., take part in a commercial or industrial enterprise; supply a service or good on a mercantile basis, or provide independent management of public assets, raising revenue and making desired investments). Whether a particular public or quasi-public entity is covered will be determined by the functional test described above and by an organizational test, i.e., whether the entity is managed by a separately organized governing body with independent authority to manage its personnel and assets. It should be noted that DOL has not defined covered public enterprises in terms of the traditional/non-traditional governmental functions distinction that was rejected by the Supreme Court as unworkable in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1984). The test that has been adopted is intended to be a relatively precise one that will include such entities as regional transportation authorities and independent municipal utilities, but will exclude such organizations as school boards. Several commenters pointed out that the phrase in § 639.3(a)(1), defining additional workers who are counted in determining whether an employer meets the coverage threshold, "[w]orkers on temporary layoff who have a reasonable expectation of recall" needs further definition. Particularly, commenters from the construction industry pointed out that when construction crafts workers are laid off at the end of a project, they expect to be reemployed within the construction industry, but not necessarily with the same employer. DOL agrees with the commenters that further definition of the phrase is appropriate and has added a definition. A worker is considered to have a "reasonable expectation of recall" if the worker "understands, either through notification or 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." This definition, derived from case law under the National Labor Relations Act (NLRA), is intended to cover those situations in which, for a variety of reasons, workers are laid off with the understanding that they will be called back at a later date. The

definition is intended to be applied in accordance with the case law developed under the NLRA.

Another commenter suggested that the regulations should define the status of workers who are on leave from their employers. DOL thinks that the same rules apply to these workers as apply to workers in layoff status, that is, whether workers on leave from an employer understand that their leave status constitutes a temporary interruption of their job and that they have rights upon the conclusion of their leave to return to the same or a substantially similar job with the employer. Language has been added in § 639.3(a)(1) to include workers on leave within the category of workers who may be counted for determining the coverage thresholds for the definition of employer.

Several commenters raised questions about the definition of "[i]ndependent contractors and subsidiaries" in § 639.3(a)(2). Some of these commenters suggested that the definition should be simplified to treat subsidiaries as separate employers as long as they are "bona fide separate and distinct companies and hold themselves out to the public as such"; or to define as separate companies entities that have separate payroll functions. One commenter requested special treatment for the garment industry because of the peculiar relationship of jobbers and contractors within that industry. Another commenter suggested that the regulation also should recognize the doctrine of joint employer status, as that doctrine has been developed under the NLRA. A commenter suggested that the National Mediation Board should be recognized as the authority for determining whether companies covered by the Railway Labor Act (RLA) are separate. Another commenter stated that the rule on subsidiaries also should apply to operating divisions.

The intent of the regulatory provision relating to independent contractors and subsidiaries is not to create a special definition of these terms for WARN purposes; the definition is intended only to summarize existing law that has developed under State Corporations laws and such statutes as the NLRA, the Fair Labor Standards Act (FLSA) and the Employee Retirement Income Security Act (ERISA). The Department does not believe that there is any reason to attempt to create new law in this area especially for WARN purposes when relevant concepts of State and federal law adequately cover the issue. Thus, no change has been made in the definition. Similarly, the regulation is not intended to foreclose any application of existing law or to identify the source of legal authority for making determinations of whether related entities are separate. To the extent that existing law recognizes the joint employer doctrine or the special situation of the garment industry, nothing in the regulation prevents application of that law. Nor does the regulation preclude recognition of the National Mediation Board as an authoritative decision maker for entities covered under the RLA. Neither does the regulation preclude treatment of operating divisions as separate entities if such divisions could be so defined under existing law.

A commenter suggested that the regulations be clarified to reflect that if a business loses a contract, it is not responsible for employment losses that occur if the successor contractor fails. DOL agrees with the comment, but believes that the proposition state is axiomatic in the WARN scheme; an employer is only responsible for giving notice to its employees for covered employment losses that occur as a result of its actions. The Department does not believe that any clarification of the regulations is needed.

A question has been raised whether temporary employees are to be counted when determining whether an employer is covered under WARN. The Department notes that there is no exception for temporary employees (or more accurately, for employees working on temporary projects or in temporary facilities) in the definition of employer in the law; the only category of workers not counted in determining coverage is part-time employees, as defined in the statute. In determining employer coverage, therefore, temporary employees are counted unless they are part-time employees. Of course, while an employer may be covered by virtue of employing a sufficient number of temporary—but not part-time—workers, the employer may be exempt from any requirement to give these employees notice if they are working in a temporary facility, or on a temporary project or undertaking, as defined in § 4(a) of the Act and § 639.5(c) of these regulations.

The Federal Home Loan Bank Board (FHLBB) specifically commented on the application of WARN to its activities and those of the Federal Savings and Loan Insurance Corporation (FSLIC) in the current savings and loan (S & L) banking crisis. FHLBB argues that, because of its statutory mandate, it should not be considered an employer when it or the FSLIC closes a bank. The Department agrees that under the statutory scheme of the deposit insurance laws, neither the Board nor the FSLIC, which are exercising strictly governmental authority in ordering the closing, are to be considered as employers.

Another commenter suggested that "fiduciaries" in bankruptcy proceedings should be excluded from the definition of employer. Since adequate protections for fiduciaries are available through the bankruptcy courts, the Department does not think it appropriate to change the regulations to address this situation. Further, DOL agrees that a fiduciary whose sole function in the bankruptcy process is to liquidate a failed business for the benefit of creditors does not succeed to the notice obligations of the former employer because the fiduciary is not operating a "business enterprise" in the normal commercial sense. In other situations, where the fiduciary may continue to operate the business for the benefit of creditors, the fiduciary would succeed to the WARN obligations of the employer precisely because the fiduciary continues the business in operation.

(b) Section 639.3(b) Definition of "Plant Closing"

This section closely replicates the statutory definition of the term "plant closing" and applies the definition to other WARN requirements. There were few comments on the regulatory language itself, and they supported the approach taken.

A comment made in the preamble to the proposed regulation, suggesting that a plant closing occurs only where the threshold number of workers are terminated or laid off as a direct result of one or more plant closings, did, however, draw considerable comment. A number of commenters supported this interpretation. Several commenters opposed it, pointing to the structure of the statutory language. DOL has revisited this issue and has decided to revise its earlier position. Section 2(a)(2) of WARN defines plant closing as "the permanent or temporary shutdown of * * * one or more facilities or operating units * * * if the shutdown results in an employment loss during any 30-day period for 50 or more employees * * *." This language, particularly the use of the words "results in", contemplates that both employment losses of the employees who work in the facility(s) or operating unit(s) and those who lose their jobs as the direct result of the shutdown(s) are to be counted in determining when a plant closing has occurred. Thus, for example, if the 45 worker computer data entry department at a plant is closed

and, *as a direct result of that closing*, (and within 30 days of the closing), 5 computer programmers also are terminated, a covered plant closing has occurred.

Another commenter suggested that a series of closings or layoffs should be considered a plant closing or mass layoff "only if each stems from the same business decision, personnel action, or other distinct cause"; where no distinct cause accounts for a threshold number of employment losses there is no WARN coverage. DOL disagrees with this interpretation. WARN Section 2(a)(2) and (3) say nothing about cause. Under the language of those provisions, one merely counts up all the employment losses that occur in a 30-day period to determine coverage.

(c) Section 639.3(c) Definition of "Mass Layoff"

This section closely follows the statutory language defining the term "mass layoff" and contrasts plant closings and mass layoffs. In reviewing the language of the regulation, DOL has determined that the insertion of the phrase "which can be triggered by the termination of a smaller number of workers than a mass layoff" in the description of a plant closing, is technically incorrect, and, therefore, that phrase has been removed. Both mass layoffs and plant closings can be triggered by the layoff or termination of 50 workers. In the case of a mass layoff of less than 500 workers, however, coverage only will be triggered if the number of workers terminated is equal to 33 percent of the total number of workers at the single site of employment. Thus, the termination of 50 affected workers does not automatically lead to coverage as it does in the case of a plant closing.

One commenter noted that the legislative history of WARN makes it clear that only employees who are actively working for the employer at the single site of employment as of the time of the layoff are to be considered in determining whether the one-third threshold is met. Remarks to this effect were made by Sen. Metzenbaum, the Senate floor manager of the bill. (133 CONG. REC. S9488 (daily ed. July 9, 1987) (remarks of Sen. Metzenbaum)). Since the statutory language can be read to include only active employees and since no contrary interpretation has been discovered, the regulation has been revised accordingly. The Department believes that "actively working" employees refers to those currently on the payroll and in pay status as of the time of the mass layoff.

Another commenter suggested that the phrase "or the entire site" be added at the end of the third sentence of the section. The Department agrees that this change more closely conforms to the statutory language and has added the phrase.

A commenter suggested that the regulations should make it clear that part-time workers are not counted in determining mass layoff or plant closing thresholds. While this is a correct statement, the regulations adequately address the issue. For reasons already discussed, language has been added in the final regulations to clarify that workers on temporary projects or in temporary facilities who do not meet the definition of part-time workers are counted for purposes of determining whether covered plant closing or mass layoff coverage thresholds have been met.

(d) Section 639.3(d) Definition of "Representative"

This section quotes the definition of the term representative as it appears in section 2(a)(4) of WARN. The comments supported this use of the definition and no change has been made in the final regulations.

(e) Section 639.3(e) Definition of "Affected employees"

This section quotes the statutory definition of the term "affected employees": "employees who may reasonably be expected to experience an employment loss as a consequence of a proposed plant closing or mass layoff"; and discusses specific applications of the term to certain classes of employees, including "bumpees", managerial and supervisory employees and employees of independent contractors. It also indicates a rule for determining the number of affected employees for purposes of determining coverage thresholds.

The purpose of WARN, to provide notice to workers so alternative employment or necessary training can be obtained on a timely basis, applies to white-collar and managerial employees as well as to employees in the skilled trades and other blue-collar occupations. Therefore, the Department includes managerial and supervisory workers as "affected employees".

This provision drew a number of comments. A substantial number of commenters opposed any requirement of notice to "bumpees", that is, to workers who lose their jobs as a result of the exercise by an employee whose position has been eliminated (or by other more senior workers who have previously been bumped) of seniority or bumping rights established by a seniority system. Most of these commenters pointed out the complexity of many seniority systems and the difficulty of accurately predicting 60 days in advance which workers will actually lose their jobs. It was also pointed out that requiring notice to bumpees could lead to overbroad notice, which Congress clearly condemned. These commenters suggested that notice to incumbents in the positions to be eliminated satisfies the Act (although one of these commenters also suggested that it is extremely difficult to identify incumbents 60 days in advance). Some commenters suggested alternative notice to bumpees; either general notice to all potentially affected workers, some kind of different notice to bumpees, or specific notice to bumpees as soon as they are identified.

One commenter supported notice to bumpees but opposed any requirement that notice to bumpees be given only "to the extent that such workers can be identified at the time notice is required to be given." The commenter argued that section 3(b)(3) of WARN requires employers to give affected employees "as much notice as practicable".

Most of the comments discuss collectively bargained seniority systems under which the identification problems suggested in the comments will not arise since employers are required only to notify the affected unions and to provide them with information about the positions affected and the incumbents in those positions, not about the ultimate "bumpees". More fundamentally, the commenters' position on this issue, as it may apply to non-bargained seniority systems, directly conflicts with the plain language of WARN. Section 2(a)(5) of the Act defines "affected employees" (in non-union situations, the persons entitled to WARN notice) as "employees who *may reasonably be expected* to experience an employment loss". The plain meaning of this language is that notice must be given to those workers who will actually lose their jobs, to the extent they can reasonably be identified. Only if the workers who will lose their jobs cannot be reasonably identified is notice to incumbents sufficient.

DOL recognizes that, in cases of non-bargained, employer-developed seniority or bumping systems, there are real complexities which militate against imposing an absolute requirement that notice be given to all potentially affected employees. DOL is persuaded that there are factors, including the difficulty of predicting a bumping path

where employees have several options among positions or lines of progression into which they can bump, which make it difficult to predict who will finally be affected as a result of a plant closing or mass layoff. Nonetheless, DOL is constrained by the statutory language to provide for notice to bumpees. The final regulations provide some flexibility by providing that notice need only be given to individual workers who can reasonably be identified at the time notice is required to be given. This section and § 639.6(b) have been revised to clarify these principles.

In addition, the Department recommends that notice be given to bumpees who are not given the full 60 days' notice as soon as they are identified. Such notice, while not required, would tend to show good faith compliance. The Department does not agree that section 3(b)(3) of WARN provides authority for a separate requirement that notice be given to bumpees as soon as they are identified since that provision applies only to situations in which one of the three bases for providing less than 60 days' notice is invoked.

To some extent, it is true that broad notice may be the prudent course in cases where complex seniority systems exist, but the concerns raised by some commenters on this score appear to be overstated. Notice is not required to be given to intermediate bumpees in situations in which multiple bumps will occur. If an employee who has available bumping or seniority rights refuses to exercise those rights and quits or resigns instead, that employee has voluntarily quit, has not suffered an employment loss and is not entitled to notice. Therefore, an employer need only provide notice to two classes of workers: to those workers who are likely to actually lose their jobs taking into consideration the probability that bumping rights will be exercised, and to incumbents in the positions to be eliminated, in cases where it is not possible 60 days in advance of the covered event to identify the ultimate bumpees. Although the complexities of identifying these ultimate bumpees may still exist, the group of workers to whom notice must be given is considerably smaller than some commenters appear to think.

A commenter suggested that the regulations should be clear that the number by which to measure whether the plant closing or mass layoff threshold has been met is the number of employment losses that actually occur, if that number is less than the number of positions eliminated. While the Department agrees that this statement is correct and has revised the language of this section to reflect this interpretation, it is important to point out that, from a practical point of view, the number on which an employer must focus, in determining whether to give notice, is the number of potential employment losses which can be determined 65 days [1] before the closing or layoff is to occur, the time at which the decision to give notice must be made. As the same commenter stressed repeatedly in other comments, it is often difficult to predict 65 days in advance exactly how many employment losses will actually occur. Thus, an employer faced with a decision about whether to give notice may be well advised to base its decision on the number of positions to be eliminated, which is a known fact at the relevant time.

Commenters raised the question whether notice extends to bumpees who may be bumped at other employment sites (to the extent that they can be identified when notice is required to be given). DOL interprets the definition of affected employees to include such workers, who are, therefore, entitled to receive notice. It should be noted, however, that workers who suffer an employment loss at another single site of employment are not counted in determining whether plant closing or mass layoff coverage thresholds are met. (DOL notes again the caution that the employer must evaluate the facts as they appear when it must make its decision to give notice.) Thus, if an employer closes an operating unit which employs 55 workers and, because of crossplant bumping rights, 6 workers at another site lose their jobs, (and if these facts can be accurately predicted 65 days in advance of the closing date) the plant closing threshold has not been met at the first site. It is also possible that an employment action that affects large numbers of workers may trigger a second covered action at a separate site if enough workers lose their jobs through cross-plant bumping.

A commenter suggested that "the regulations should specify that consultant or contract employees employed by another employer or self-employed are not counted toward the threshold for determining employer coverage." DOL agrees with this proposition, as long as the separate employment relationship is established under existing legal rules. It is specifically covered in section 639.3(e).

[1] The figure of 65 days is used as an approximation of the number of days it will take to identify workers and to prepare and serve notices 60 days in advance of a planned action.

(f) Section 639.3(f) Definition of "Employment Loss"

This section defines "employment loss" and exclusions from employment loss when certain transfers occur. These definitions closely follow the language of the statute. The proposed regulation provided that workers who retained "full employment status" could be reassigned without suffering employment loss. The Department notes that it interprets the statutory terms "termination" and "layoff" in section 3(a)(6) to be distinguishable and to have their common sense meanings. Thus, for the purposes of defining "employment loss", the term "termination" means the permanent cessation of the employment relationship and the term "layoff" means the temporary cessation of that relationship.

A number of commenters questioned the use of the term "full employment status" in section 639.3(f)(2). They argued that this concept, if broadly applied to mean that an employee can be reassigned only if he/she retains full pay and benefits, is inconsistent with the statutory definition of employment loss and with employers' rights to reassign workers.

The intent of the "full employment status" language was to deal with a specific comment from a major employer which has a program for moving workers who are to be terminated or laid off for a long time into job-finding or retraining activities, all at full pay and benefits. The "full employment status" language was an attempt to distinguish this kind of program, in which an employee is not working at his old job but is retained on the payroll, and does not experience an employment loss, from other kinds of severance pay or supplemental unemployment benefits (SUB) programs which occur after the end of the job and do not postpone the date of the employment loss. DOL recognizes that the comments have merit and that the "full employment status" concept is capable of overbroad application. The regulations have been revised to delete the concept but to retain language encouraging the kinds of employer-sponsored retraining programs for which the full employment status concept was developed.

It must be noted that the ability to reassign workers is not without limits. An employer may not vary the terms of a worker's assignment so much as to constructively discharge (as discussed in greater detail below) the employee. Language to this effect has been added to the regulation.

The question also has been raised as to whether an employment loss occurs if an employee retains full pay and benefits and other entitlements but is not required to report to work. DOL notes that neither WARN nor the regulations dictate the nature of work to be performed—or whether work must be performed—during a period of employment after notice of an impending plant closing or mass layoff has been given. However, WARN does not replace or alter any other contractual or statutory rights and remedies of employees, and other contracts or statutes may be applicable when employers consider reassignments or assignment to non-work status after giving notice in advance of plant closings or mass layoffs.

Several commenters requested further definition of what constitutes a "voluntary departure, or retirement", which are excluded from the definition of employment loss. One commenter suggested that "incentive programs" should be specifically recognized as voluntary departures. Another commenter suggested that employees who are offered transfers to another employment site and who refuse those offers should be considered to have voluntarily quit. Other commenters suggested that "voluntary layoffs", that is, layoffs provided for in certain collective bargaining agreements under which more senior workers may accept a layoff in return for certain SUB or other benefits should be excluded from the definition of employment loss. Other commenters disagreed and suggested that workers who retire or quit in the face of an impending termination should not be treated as having voluntarily departed.

DOL agrees with the commenters that some clarification of the concept of voluntary departures is appropriate. The concept is not a new one in the law; there is a developed body of law under such statutes as the NLRA, Title VII of the 1964 Civil Rights Act and the Age Discrimination in Employment Act. This body of law recognizes the concept of constructive discharge, under which a worker's resignation or retirement may be found not to be voluntary if the employer has created a hostile or intolerable work environment or has applied other forms of pressure or coercion which forced the employee to quit or resign. Similarly, acceptance of incentive programs, particularly incentive retirement programs, can be found to be involuntary where a worker was unduly pressured to accept the program. The regulations have been revised to include this concept. Since the law in this area is well developed, the regulations do not attempt to specifically define the parameters of voluntariness, but merely refer to the existing legal concepts.

In terms of the specific issues raised in the comments, the Department agrees that incentive programs, including incentive retirement programs and voluntary layoffs, that meet the definition of voluntariness outlined above, are voluntary departures for purposes of WARN. DOL does not, however, agree that a worker who, after the announcement of a plant closing or mass layoff, decides to leave early has necessarily been constructively discharged or quit "involuntarily". (In the situation posted, where the plant closing or mass layoff has been announced, and, presumably, notice has been given, the worker already has received the notice that WARN requires and whether his later resignation or retirement is voluntary or not is no longer germane.)

The comment about workers who quit when offered a transfer involves another provision of WARN (section 2(b)(2)) which defines exclusions from employment loss. Under that section, which will be discussed in greater detail below, the basic rule is that if, as a part of a relocation or consolidation of all or part of an employer's business, a worker is offered a transfer within a reasonable commuting distance, the worker is not considered to have suffered an employment loss whether or not the worker declines the transfer. There is no requirement for acceptance of the offer in this situation and, unless the offer itself may be deemed to be a constructive discharge, the offer of the transfer itself means that the worker is not deemed to suffer an employment loss. On the other hand, if the transfer is beyond a reasonable commuting distance, WARN requires that the employee accept the transfer and refusal to accept means that the employee has suffered an employment loss. If the transfer is not covered under these provisions, because not offered as a result of a relocation or consolidation, a technical employment loss occurs. If an employer offers to transfer a worker in this situation and if the worker accepts, the employer may still wish to provide notice as additional protection from liability.

Several commenters suggested that the regulations incorporate a concept of "net employment loss" to cover situations in which an employer lays off one group of workers and simultaneously hires another group to work on a different aspect of the same task or project. Other commenters suggested that the definition of employment loss exclude government service contractors; since when such employers lose their contracts, their employees ordinarily are hired by the successor contractor. Similarly, a commenter suggested that where work is contracted out and the contractor hires the former employer's old workers to perform the contracted work, no notice should be required unless more than the threshold number of employees are not rehired. These definitions cannot be squared with the definition of employment loss or with the statutory structure, which focuses on the effects of employment losses on groups of workers. WARN requires notice to workers who lose their jobs with a particular employer, whether or not other workers have gained other jobs and whether or not other employers may hire those workers.

As noted above, § 639.3(f)(4) reiterates the statutory exclusion of certain transfers from the definition of employment loss. Commenters suggested that further definition of the terms "relocation" and "consolidation" are needed. One commenter suggested that the definition should be consistent with the definition under the NLRA; which it summarized as stating that the terms should be given a broad meaning not dependent on labels, as long as the transfer offer is bona fide and is to a related enterprise. While the Department agrees that a broad definition of the terms is appropriate in light of the intent of WARN to focus on actual losses of employment, the commenter's proposal cannot be accepted since it would give no meaning to the words "relocation or consolidation". The final regulations have been revised to include a broad definition, suggested by another commenter, under which the transfer of definable business, whether customer orders, product lines or operations, to a different site will be considered a relocation or consolidation.

Commenters questioned how to determine whether there has been a more than 50% reduction in hours for purposes of the third branch of the definition of employment loss. They asked whether overtime hours should be counted; whether overtime should be calculated on the basis of an 8-hour day or a 40-hour week; and how to determine the base for employees with fluctuating hours. The Department thinks that overtime hours or hours in addition to the normal and customary hours of the worker should not be counted in determining the base hours of

work. In terms of the other questions, DOL will rely on the definitions found in the FLSA, that overtime is calculated based on a 40-hour week and that each week is treated separately. For an employee who works fluctuating hours, the monthly base would be the sum of the non-overtime hours worked in each week of the month.

A commenter questioned whether employees laid off for an indefinite period (i.e., where the employer expects to recall them but does not know whether their recall will occur before or after 6 months) are automatically to be considered as experiencing an employment loss at the time of the layoff. In this situation, the layoff is not automatically deemed an employment loss. If the layoff lasted for more than 6 months, the workers would experience an employment loss, would be counted toward the trigger level for the plant closing or mass layoff of which their individual layoffs were a part, and would have been entitled to notice if the layoff or closing met coverage thresholds. Since an employment loss begins with the layoff and since notice is due 60 days in advance, a prudent employer wishing to avoid potential liability would provide notice to the workers at least 60 days prior to their layoff unless it is certain that the layoff will not exceed 6 months.

A commenter asked how to define the date on which to measure the 6-month period to determine whether there has been a more than 50% reduction in hours of work. The commenter suggests using a "snapshot" on the date notice first should be given. While DOL agrees that the determination whether a reduction in hours will take place must be made around the time notice must be given, the use of the term "snapshot" is confusing since it implies looking at events that have already occurred. Notice that is given based on what has happened over the past 6 months may be too late.

The reduction in hours language of the definition of employment loss is not explained in the legislative history. This language can be interpreted to require either that notice be given 60 days before the beginning of the 6-month period in which hours are to be reduced more than 50% or that notice be given 60 days before an employee will suffer 6 consecutive months of more than 50% reduction in hours (that is, 60 days before the end of the 6-month period.) There are practical reasons for favoring each interpretation. The former interpretation better protects workers against a substantial loss of income. The latter interpretation is more consistent with what is probably the more common situation, in which substantial reductions in hours occur, where the reductions are not planned 6 months in advance, but happen incrementally because of changing conditions, for example, a reduction in cash flow that extends for many months. Thus, DOL beclieves that a common sense rule should be followed in determining when to give notice of a covered reduction in hours: When it becomes evident that the reduction will extend beyond 6 months, WARN notice should be given. This rule will, at least, establish the employer's good faith effort to comply with WARN. (Of course, if the employer knows in advance that a reduction in hours of more than 50% will occur for each of 6 months, the rule requires that the employer give notice at least 60 days in advance of the beginning of the period or as soon as the duration of the reduction becomes clear.)

Another commenter suggested that the regulations should be clarified to state whether a layoff, recall and layoff of a worker within a 30-day period constitutes one or two employment losses. Since WARN defines employment loss as a layoff exceeding 6 months in duration, a layoff and recall which occurred within a 30-day period cannot be an employment loss. Thus, only the second layoff may count, if it will be of sufficient duration.

(g) Section 639.3(g) Definition of "Unit of Local Government

"Unit of local government" is defined in the proposed regulations as in the Act. This section also provides a rule, based on total taxes paid to each unit, for determining which unit of local government to notify where a plant is located within more than one unit of local government. A commenter pointed out that some taxes are not paid directly to the local government but are paid as a surcharge on a State tax and are collected by the State. The commenter suggested that the employer may not be able to easily determine how much tax it paid to a unit of local government. The Department agrees and has revised the definition to include only taxes paid directly to the unit of local government.

(h) Section 639.3(h) Definition of "Part-Time Employee"

The definition of "part-time employee" in the proposed regulations follows the statutory language. Some commenters were unsure whether regular full-time employees with employment during less than 6 of the last 12 months would be considered part-time or full-time employees. The statute defines such employees as part-time.

Other commenters were unsure as to the status of employees who are traditionally understood to be "seasonal" and short-term, yet are hired on a recurring basis. According to the Act, if there employees worked for less than 6 of the past 12 months, they are part-time employees. Such employees would, in many cases, also fall under the "temporary facility/limited employment" exemption in section 4(a). Further, "seasonal" employees who work 6 months or more may also fall under the "limited employment" exemption.

In response to commenters' requests for guidelines in determining the period used in calculating whether a worker has worked "an average of fewer than 20 hours per week," DOL has established that the shorter of the time the worker has been employed or the most recent 90 days should be used.

(i) Section 639.3(i) Definition of "Single Site of Employment"

This section provides a definition of "single site of employment" which is drawn from the April 1988 Conference Report on H.R. 3. (H.R. Rep. 100–576, 100th Cong., 2nd Sess., 1046 (April 20, 1988)). As a general rule, a geographic connection or proximity is required to define "single site of employment." Even where several distinct operations are performed at a geographically connected site, that building or complex will be counted as a single site of employment. The regulations also recognize that, in some limited cases, geographically separate sites may still be considered a single site of employment because of an inextricable operational connection. DOL intends this exception to be a narrow one to cover those cases where separate buildings are used for the same purpose and share the same staff and equipment.

Several commenters expressed concerns that the definition of single site of employment could be read either too broadly or too narrowly. Two commenters were concerned that the discussion of geographically separate but operationally connected sites in § 639.3(i)(2) could be read broadly to cover separate sites which occasionally

share staff or which are supplied from a common source. As noted above, this exception is intended to be read narrowly to cover those rare situations in which two separate buildings share staff, equipment and functions. DOL believes that the language of the exception conveys this narrow reading.

A commenter urged that the definition be amended to treat geographically contiguous facilities that are functionally separate as distinct sites. The Department agrees that this is an appropriate distinction in those cases where two plants are clearly separate, that is, where they produce distinct products, have different workforces and have separate management at the plant level. This reading does not appear to be inconsistent with Congress' concern, reflected in the Conference Report, that geographically separate plants be considered different single sites of employment. The language of the regulation has been revised to reflect this exception. Again, this is intended to be a narrow exception to the general rule that geographically related facilities are single sites of employment and geographically separate facilities are separate sites.

The comments just discussed also caused the Department to review the language of the regulation and to add a new subparagraph to make it clear that in office buildings or similar sites, where several different businesses rent or own space, the single site of employment for each employer is the space within the building that it rents or owns.

Several commenters focused on the "catchall clause" in § 639.3(i)(4). Some commenters suggested that the clause either be clarified or deleted to prevent it becoming an escape clause. Two commenters described their individual employment arrangements and suggested that the clause should be interpreted to include them. These employers have cross-plant bumping and worker transfer among a number of geographically separate facilities over a large area, in one case a major metropolitan area, in another a several hundred square mile area. Given the concern expressed in the Conference Report on H.R. 3 that geographically separate facilities be treated separately, neither of these situations is an appropriate exception to the rule which Congress intended to apply, that individual plants should be treated individually. (H.R. Rep. 100–576, 100th Cong., 2nd Sess., 1046 (April 20, 1988)). DOL continues to believe it prudent, however, to maintain some flexibility in the definition of "single site of employment", to provide for truly unusual organizational situations which DOL could not anticipate. The clause in § 693.3(i)(4) has been retained in the final regulations, with the proviso that application of any alternative, situation-specific definition is allowable only if its use is not intended to evade the purpose of WARN to provide notice. Thus, a firm which has a factory or other site which would otherwise qualify as a single site of employment and whose size would permit treatment of some small layoffs as mass layoffs (i.e., a plant that employs fewer than 1499 workers) cannot be combined with other sites within an area for the purpose of eliminating WARN coverage of mass layoffs.

A commenter suggested that foreign sites of employment should not be covered under WARN. DOL agrees that the general rule is that foreign sites are not considered covered by a statute unless coverage is specified in the language of the act, and have added an exclusion for foreign sites of employment to the definition of single site of employment. The exclusion of foreign sites does not exclude the U.S. workers at those foreign sites from being counted to determine coverage as an employer, i.e., whether an employer has 100 employees.

(j) Section 639.3(j) Definition of "Facility or Operating Unit"

The regulations adopt common sense definitions of the terms "facility" and "operating unit" within a single site of employment. These terms are important for determining whether a plant closing has occurred. DOL has defined these terms in a manner which attempts to define physically and operationally distinct entities for purposes of determining whether a plant closing, the shutdown of a distinct entity, has occurred.

Several commenters were concerned that the definition of "operating unit" was overly broad and suggested that it be made clear that the term refers to only a "fundamental, distinct or structural organizational segment of the enterprise". These commenters were critically of the use of the word "task" within the definition, arguing that the term is capable of application to activities that are neither fundamental nor distinct. Another commenter thought the definition was too narrow and should be revised to include any distinct operation, department or division of work at a worksite, defined in terms of function or organization. While these two commenters are apparently seeking different results in terms of how operating units would be defined in practice, there appears to be little difference in the definitions they present and DOL agrees with both commenters that only distinct structural or operational entities within a single site of employment are intended to be included as operating units. DOL agrees that the use of the word "task" might be construed to include specific work assignments within a distinct unit that would not be appropriately included as an operating unit. The final regulations do not use the term "fundamental" in the definition simply because it might create more ambiguities in applying the definition that it would avoid. The definition of operating unit has, therefore, been revised to include these concepts. The revised definition reads: "an organizationally or operationally distinct product, operation or specific work function".

Two examples may help to clarify our view of the appropriate limits of the definition. If an automobile manufacturing plant has an assembly line which assembles cars, there may be groups of workers whose job is to put on the doors or the bumpers. The operating unit should be the assembly line, not the groups of workers who perform the task of door or bumper assembly. Similarly, a data processing department may have within it data entry workers, computer programmers, computer maintenance workers and clerical workers. If the department is clearly a distinct entity in terms of the employer's organizational structure, the data processing department is the appropriate operating unit and the separate task groups are simply a part of that operating unit. (These examples are merely illustrative and are not intended to create rules applicable to all assembly lines or data processing departments. There may well be cases in which workers performing different jobs as a part of a larger operation may be sufficiently organizationally or operationally distinct to be defined as a separate operating unit.)

The critical factor in determining what constitutes an operating unit will be the organizational or operational structure of the single site of employment. Sources of evidence which will assist in defining separate and distinct units will be applicable collective bargaining agreements, the employer's organizational structure and industry understandings of what constitute distinct work functions. One commenter suggested that in the trucking industry, lines of progression would constitute operating units, i.e., over-the-road drivers, mechanics and clericals would each be in separate operating units. As the Department understands the

comment, the use of lines of progression may well be an appropriate basis for defining operating units in the trucking industry. In other industries, however, seniority lines or lines of progression may not be a useful basis for defining an operating unit. Several different groups of workers in different lines of progression may be organized into a recognized department, like the data processing department discussed above, which would be an operating unit.

In the preamble to the proposed regulations the following example was used to illustrate the operating unit definition: "a 24-hour store eliminating its night shift would not carry out a closing of an operating unit, but the elimination of all warehouse and stock workers on all three shifts would constitute the closing of an operating unit if 50 or more workers were affected". Several commenters disagreed with the example. Some suggested that shifts could constitute operating units depending on the employer's organizational structure and whether the elimination of the shift "results in the closing of the facility during the time the workforce was previously employed". It is possible that there may be situations in which shifts can be operating units if the workers on the shift perform some separate and distinct function from the workers on other shifts. If, for example, a shift performed only maintenance functions which were not performed on other shifts, if the workers on that shift were in a separate job classification and, possibly, if the workers were recognized in the employer's organizational structure or in applicable collective bargaining agreements as a separate department, the shift could be an operating unit. The Department disagrees, however, that the mere closing of a plant for hours when it was previously open constitutes the closing of an operating unit. As long as the plant continues to operate and no recognized department, operation or major work function has been terminated, the fact of a reduction in hours of plant operation is not the closing of an operating unit.

Other commenters disagreed that all warehouse and stock workers would necessarily constitute an operating unit. They suggested that whether such workers would be defined as an operating unit would depend on the employer's organization. If the store were organized by product departments, the departments would be the operating units and the stock workers would be assigned to those units. DOL agrees that, in the situation posited, the product departments are the operating units.

Another commenter suggested that the definition of operating unit should exclude "common tasks" such as maintenance, secretarial or housekeeping. Whether maintenance, clerical or housekeeping workers will be considered as an operating unit will depend on how they are organized and how they operate. If there is a separate maintenance or housekeeping department or a central clerical pool, the workers in those units will be in separate operating units. If the workers are assigned to other distinct departments, for example, if different clerical workers work exclusively in several distinct departments, the workers will be considered assigned to those departments.

Another commenter suggested that the definition of operating unit is too broad and proposed that operating units should be defined only as including production processes and should not include support staff. The Department disagrees. The reason for the use of the term "operating unit" in WARN is to apply the protections of the law to small units of workers in a larger plant when their units are closed. It is not relevant to this purpose whether the workers are production workers or support workers; their job loss and their need for protection is as real in either case.

A commenter suggested that the definition of operating unit be clarified to reflect that, in the construction industry, employees of a subcontractor on the construction site where several different activities are taking place are an operating unit. DOL agrees that this will often be the case if the workers are performing a separate part of the work. However, this would not necessarily always be the case. Consistent with the decision not to attempt to cover industry-specific cases in the regulations, these final regulations have not been revised to provide for this particular case.

Another commenter suggested that in the railroad industry certain maintenance crews have no home base and should be treated as separate operating units. While such workers may well be considered as a separate operating unit, their status must be determined in terms of the single site of employment to which they are assigned. These workers may not have an assigned home base, but they must get their orders or assignments from somewhere, even if that place changes from time to time. In order to cover this situation and the situation of outstationed workers and traveling workers who report to but do not work out of a particular office, that part of the regulation relating to mobile workers has been revised to clarify that such workers should be treated as assigned to their home base or to the single site from which their work is assigned or to which they report. This part of the definition has been moved, for reasons of organizational clarity, to be a part of the definition of "single site of employment" in § 639.3(i).

(k) Section 639.3(k) Definition of "State Dislocated Worker Unit"

The definition of the term "State dislocated worker unit" refers to the statutory provisions under which such units are created. None of the comments discussed this definition and it remains unchanged.

(l) Section 639.3(l) Definition of "State"

The definition of State refers to the 50 States, the District of Columbia, the Commonwealth of Puerto Rico and the U.S. Virgin Islands. None of the comments discussed this definition and it remains unchanged.

(5) Section 639.4 Who Must Give Notice

The prefatory language in § 639.4 states the basic rule of WARN about giving notice to the appropriate parties. None of the comments discussed this definition and it remains unchanged.

(a) Section 639.4(a) Who Should Give Notice

This section discusses who, within the employer's organization, should give notice. None of the comments discussed this definition and it remains unchanged.

(b) Section 639.4(b) Layoffs That Extend Beyond 6 Months

This section discusses an employer's responsibility in situations in which a covered layoff, which originally was announced as being for 6 months or less in duration, is extended beyond 6 months and, therefore, falls within the definition of "employment loss" in section 2(a)(6) of WARN and triggers the requirement of notice. One commenter proposed that any suggestion in the regulations that employers indicate the length of layoffs be deleted since some courts might interpret it as a requirement. Another commenter suggested that there should be no requirement of written notice for layoffs of 6 months or less. Another commenter objected to the inclusion of the phrase "consistent with section 3(c) of WARN" and suggested that the requirements of that section be spelled out.

In response to these comments and the Department's own review of the statute and the regulations, language has been added to the final regulations in an effort to provide better guidance to employers. The Department's view is that an employer who announced at the outset that a layoff would be for 6 months or less, who did not provide advance notice under WARN and who plans to extend the layoff beyond 6 months may violate the Act unless: (i) The extension is due to business circumstances (including unforeseeable changes in price or cost) not reasonably foreseeable at the time of the initial layoff; and (ii) notice is given when it becomes reasonably foreseeable that the extension is required. A layoff extending beyond 6 months for any other reason is treated as an employment loss from the date of its commencement. Although the standard for foreseeability under this provision may be seen as less exacting than it is under the "unforeseeable business circumstances" exception of section 3(b)(2)(A) of WARN, due to the addition of the parenthetical phrase in section 3(c), there still may be situations in which an employer may be found in violation of WARN when it gives notice that a layoff will extend beyond 6 months. For example, if an employer shuts down for 5 months to retool his plant for a new product line and the retooling process takes longer than originally anticipated, *and the employer has experienced similar delays in previous retoolings*, the employer may be liable under WARN for having failed to give notice 60 days before the shutdown was begun since the cause of the extension arguably was foreseeable. An employer may, therefore, want to consider giving notice at least 60 days prior to the layoff unless it is certain that the layoff will not exceed six months.

The Department does not view the regulations as requiring any form of notice of a layoff that will not extend for more than 6 months. The statutory use of the term "announced" merely recognizes the reality that if an employer closes down or lays off some workers for a short period of time and expects to reopen or recall the workers, it will somehow communicate to the workers the fact that the closing or layoff is temporary.

(c) Section 693.3(c) Sales of Businesses

WARN creates an absolute division of responsibility for giving notice between a buyer and a seller of a business; the seller is liable to give notice of covered actions which occur up to and including the date (time) of sale and the buyer is responsible thereafter. Thus, at all times one of the parties to the transaction is responsible for giving notice. The proposed regulations offered guidance to employers anticipating a sale or purchase transaction to avoid confusion regarding service of notice and liability under WARN, by suggesting that each party's responsibility with respect to these items be covered in the contract of sale.

There were a wide variety of comments on this provision. One commenter suggested that the regulations make it clear that if the employees of a business that has been sold are not rehired by the buyer, the responsibility for giving notice is on the seller. The Department believes that such an allocation of responsibility is precisely contrary to the statutory language and intent. If a plant closing occurred as a result of the buyer's decision not to rehire the seller's workers, and the closing occurred after the effective time of the sale, the buyer is responsible for giving notice. This view is consistent with the statutory provision that the employees of the seller become the employees of the buyer immediately after the sale, with the intent of WARN that notice be given to workers who will suffer dislocations and with the reality of allocating responsibility for notice to the party to the transaction that actually makes the decision to order the plant closing or mass layoff. Other commenters agreed with the allocation of notice responsibility just discussed; one suggested that the apportionment of liability turn solely on when the plant closing or mass layoff occurs relative to the effective date of the sale.

Some commenters suggested that the regulations be clarified to assign responsibility to the seller through the date of sale and to the buyer on the next day. Such an interpretation is a possible reading of the statutory language; but DOL has rejected that reading because it would either make the seller responsible for the acts of the buyer or it would create a period in which no one is responsible for giving notice. The former alternative is inconsistent with the legal position of the parties after the sale has become effective. The latter alternative is inconsistent with the intent of the statute.

A commenter suggested that the regulations make it clear that the seller is not responsible for a layoff ordered by the buyer within 60 days of the sale. For the reasons already discussed, DOL agrees that no such responsibility attaches.

Several commenters suggested that no employment loss is experienced in a sale situation if the seller's employees are hired by the buyer within 6 months of the sale. Assuming there has been an announcement that a layoff of 6 months or less has been ordered, this is a correct statement since the definition of employment loss excludes layoffs of 6 months or less.

Several commenters discussed the provision of WARN that assigns the seller's employees to the buyer after the sale. These commenters agreed that this provision does not create any additional employment rights, other than WARN notice rights and that, although a technical termination (i.e., the termination of employment with the seller) may be deemed to have occurred in a sale, that termination, by itself, is not a basis for WARN notice. One commenter suggested that nothing in the WARN provision on sales requires that a buyer actually hire the seller's employees. Another commenter suggested that it should be made clear that employees in a sale situation have the same WARN rights as do any other workers. The Department generally agrees with all these statements and believes the final regulations reflect them; but notes that the buyer is responsible for giving notice to workers if it does not hire them.

One commenter suggested that the regulation should focus on the closing date and time of the sale, not on the effective date and time. The Department does not view these terms as different and the final regulations continue to use the term "effective date" because it is used in the Act.

One commenter suggested that the phrase "at all times, one of the parties to the transaction is responsible for giving notice" be added to the regulations. DOL agrees and has added the phrase in the final regulations.

The variety of comments suggests that the regulations needed to be clarified, along the lines suggested in this discussion. This section has been revised extensively. The examples in § 639.4(c)(1)–(3) have been revised to make it clear that these are merely suggestions about how the buyer and seller may wish to handle notice responsibilities between themselves and do not change the basic allocation of responsibility for notice. While specific mention of the contract of sale has been deleted in the final regulations, since the parties to a transaction may utilize other methods to allocate WARN responsibility, DOL continues to suggest that prudent employers make provisions for WARN notice, if applicable, in the

contract of sale or elsewhere. The federal regulations also make it clear that if the seller gives notice as the buyer's agent, the responsibility for giving notice still remains with the buyer.

The FHLBB also described the situation in which it takes over an institution and keeps it operating while seeking to merge it with another bank or to find new owners. In that case, the new owner stands in the position of a buyer under WARN and is responsible for notice from the time the merger or acquisition becomes effective.

One commenter suggested that DOL not promulgate regulations on sales. DOL believes that such a course of action would be inconsistent with its statutory role and with its efforts to assist employers and workers in fully understanding their rights and obligations under a complex statute.

(6) Section 639.5 When Must Notice Be Given

(a) Section 639.5(a) General Rule

This section discusses the basic WARN rule that notice must be given 60 days in advance of a planned plant closing or mass layoff. It also discusses the 30- and 90-day aggregation periods found in sections 2(a) and 3(d) of WARN and suggests alternative rules for measuring the size of an employer's workforce for determining whether coverage thresholds are met.

Notice with respect to an individual worker's employment loss must be given 60 days in advance of that worker's separation from employment. In response to requests for clarification as to what date is the separation date, the Department has specified in § 639.5(a)(1) of the regulations that a worker's last day of employment is considered the date of that worker's layoff. The word "calendar" also has been added in this section to clarify that 60-day notice is not based on working days.

To aid employers in complying with the Act and issuing notice when it is due, DOL suggests that the employers look ahead and behind, not only 30 days, but 90 days (to determine whether coverage is triggered under section 3(d) of the Act) in determining whether planned employment actions will trigger notice requirements. By doing this, an employer can look at its planned employment actions in the broader framework of the Act, and reduce potential liability for failure to give notice when thresholds have been met. For example, if an employer has 300 employees, 60 of whom experience an employment loss on March 5 and an additional 40 of whom suffer an employment loss on March 30, sixty days' notice is required for both the March 5 and the March 30 employment losses, since they occurred within a 30-day period and constitute a mass layoff. If a third layoff affecting 60 employees occurs on April 20, these employees also are entitled to notice since their employment losses fall within a second 30-day period which includes the March 30 layoffs.

Section 3(d) of WARN provides that if, within a 90-day period, separate employment losses occur, each of which involves fewer than the number of workers necessary to trigger coverage but which together add up to the minimum numbers necessary to trigger coverage, WARN notice must be given unless the employer can demonstrate that the individual actions arose from separate and distinct causes. The Department recognizes that this provision may place employers in jeopardy for failing to accurately predict their employment actions. DOL is, however, constrained to interpret the provision according to its terms. It is important to note that the 90-day aggregation provision applies only to separate actions each of which is under the coverage threshold. Thus, small plant closings or layoffs are not aggregated with covered plant closings or mass layoffs. Also, as some commenters pointed out, it does appear that, in some cases where an employer underestimates the size of a layoff, the unforeseeable business circumstances exception for reduced notice may be applicable. Use of this exception may reduce liability for the second group of workers who are laid off, but it does not appear to provide much assistance as to the failure to give notice to the first group.

A number of commenters asked for additional definition of the term "separate and distinct actions and causes". One suggested that the definition be that the layoffs arise from different events. Another commenter suggested that, in the construction industry, the completion of one phase of a project and the layoff of the crafts workers on that phase should be considered as separate and distinct causes. The Department does not find either of these suggestions helpful; the first is too ambiguous to be useful; the second, while probably correct in the context of the construction and similar industries, does not provide a general definition. (In any event, since most construction workers will be engaged in work on temporary projects, the definition will be irrelevant to most layoffs in that industry.) DOL has considered these comments, but believes that the words of the statute are clear.

One commenter suggested that the regulations not include language that an employer should look ahead 90 days to determine whether separate but related events will trigger coverage. The commenter argues that this language is gratuitous and might undermine an employer's defense that the layoffs arose from separate and distinct causes. The Department believes that this language is an appropriate caution to employers about the obligations which WARN places upon them.

One commenter gave a specific example of a situation in which 90-day aggregation might apply and asked questions about the application of that provision. The commenter offered the following example:

Day 1—Company has 180 employees;

Day 2—Company terminates 30 employees (now 150 employees);

Day 31—Company terminates 29 employees (now 121 employees);

Day 60—Company terminates 6 employees (now 115 employees);

Day 90—Company terminates 5 employees (now 110 employees).

The commenter asked, to whom is the company liable? The commenter argued that there is liability only to the first 30 workers because the other three groups when aggregated do not constitute ⅓ of the number of employees on Day 31 and, therefore, the mass layoff threshold has not been met as to those workers. The commenter also asked what if the first group were "fired" for cause, poor productivity; is there a violation if there are no further layoffs?

In answer to these questions: Assuming that no notice was given, the company is liable to all 70 employees because the mass layoff threshold has been reached through separate actions which did not occur for separate and distinct causes within a 90-day period. All employees terminated within the 90-day period have suffered a mass layoff and all are entitled to 60 days' notice before the date of their termination. For this purpose, the date on which the company size is measured is Day 1. (Note that the aggregation periods are rolling and the second layoff starts a second 90-day period where the applicable workforce is 121 workers.) On the second question, if the workers were fired for cause they have not suffered an employment loss as defined in WARN section 2(a)(6)(A), which excludes discharges for cause. (The remaining 40 workers who suffered an employment loss are not numerous enough to trigger mass layoff coverage.) It is, however, likely that a mass firing

will be challenged and if it is determined that the firing was not for cause, the notice obligation will revive. The courts may well look at the question of whether the mass firing was intended to evade the Act.

The regulation also provides for a "snapshot" test for determining the number of employees in an employer's workforce or at a single site of employment for purposes of determining coverage. The "snapshot" test is simply to look at the employer's employment levels on the date notice is due to be given. An alternative test also is suggested for those unusual situations in which the results of the snapshot test are not representative. Under the alternative test, an employer or employees may look to a date or to a time period in which employment levels were more representative.

A number of commenters suggested that the alternative test be abandoned because it might create too many ambiguities and because it might lead to second guessing in many situations. DOL believes that there are situations in which the workforce at a single point in time may be genuinely unrepresentative and may lead to inappropriate coverage or lack of coverage, such as situations where workers are temporarily transferred among plants. Because there is a need to provide protection to both employers and workers in these cases, the final regulations retain the alternative test. In so doing, the final regulations have been revised to stress that the alternative test is intended to be used only in unusual situations. It is not to be applied in cases where a workforce has shrunk through ordinary attrition. Language has been added to the final regulations to make it clear that the alternative test is only to be used in unusual situations and is not to be invoked for the purpose of evading WARN.

Another commenter disagreed with both the snapshot and the alternative tests. The commenter argued that the employer's workforce should be determined before notice is due to be given. The commenter suggested a bright line test for determining coverage: an employer should be covered if, at any time before an employment loss, it had 100 or more workers. While, from a practical point of view the employer probably must look at its workforce on the date on which it must decide to give notice, the Department concludes that the use of the date on which notice is to be given is a reasonable date to use and is more easily applied than any alternative date. The commenter's suggested test poses serious problems because it does not permit legitimate shrinkage of the workforce due to attrition to be taken into account and since it does not apply to measuring the workforce at a single site of employment for purposes of determining whether mass layoff thresholds have been met.

Questions were raised with regard to whether temporary employees are to be counted when determining whether the closing/layoff threshold is reached. As stated earlier, there is no exception for counting temporary employees in the law or the regulations. Part-time employees, as defined in WARN, are the only workers that are not counted when making this threshold determination. Temporary employees, unless they are part-time, should, therefore, be included in the calculation.

Several commenters raised a related issue not covered in the regulations. They suggested that an exception for government ordered closings be included in the regulations. No language recognizing such an exception appears in WARN and the Department is reluctant to create such an exception. However, some government-ordered closings may constitute unforeseeable business circumstances to which reduced notice applies. This approach is supported in the legislative history. (133 CONG REC S9435 (daily ed. July 8, 1987) (remarks of Sen. Kennedy)). Although this treatment will lead to after the fact notice in some cases, it also will lead to the provision of some notice to workers affected by the closing. These workers have a legitimate need for notice, particularly for notice of whether the closing will be a permanent or temporary closing.

Some commenters discussed several types of governmental actions which they argued should be treated as government ordered closings. DOL agrees that those closings which are the direct result of governmental action and which occur without notice should be counted as government ordered closings to which after the fact notice is applicable. Examples of such closings would be the closing of a restaurant by a local health department or the closing of nuclear power plant by the Nuclear Regulatory Commission. Other agencies do not take such direct action. For example, the Occupational Safety and Health Administration and the Environmental Protection Agency take enforcement actions which might result in the closing of a plant by the employer either to remedy the violation or because it cannot continue to operate. These agencies do not, however, directly order the closing of the plant and they usually give some notice of the violation and an opportunity to contest the findings. Such closings, although they may result from a government action, are not government ordered and are not subject to the same treatment. (Depending on the length of the notice given, a claim that the closings qualify for reduced notice under the unforeseeable business circumstances exception may be available.) A commenter also suggested that terminations of government contracts should qualify as government ordered closings. In most cases, there is some notice of the government's intent to terminate a contract, even if the termination is for cause and, for the reasons stated above, these contract terminations should not be treated as government ordered closings.

The Department notes an important difference between the closings discussed above and the absolute closing of a savings and loan institution by the FHLBB. In the case discussed above, the employer remains in control of its business. The employer can remedy the conditions that caused the closing and reopen the business. In the cause of an absolute closing or shut-down of a S & L, in contrast, the previous ownership is ousted from control of the institution and the FSLIC assumes control of the enterprise. In this case, there is no employer to give notice and the after the fact notice requirement cannot be imposed, since the S & L employer has been removed.

(b) Section 639.5(b) Transfers

This section discusses the application of section 2(b)(2) of WARN which excludes certain transfers from the definition of employment loss. It discusses what kind of transfer offer meets the statutory requirement, the definition of "reasonable commuting distance" and discusses the operation of the provision relating to transfers beyond a reasonable commuting distance.

A number of commenters criticized the inclusion in the regulations of the requirement that, in order to qualify as a transfer to which the exclusion applies, a transfer must be to a job that is "substantially equivalent in terms of pay and working conditions." That language was adopted because of the use of the term "equivalent position" in the Senate Report on S. 538. (S. Rep. 100–62, 100th Cong., 1st Sess., 23, 69–70 (June 2, 1987).) The transfer provision in the Senate Bill differed substantially from the present transfer provision in WARN. The Provision in the Senate Bill was an exemption to coverage involving the transfer of "substantially all" of the

affected workers with no more than a two-week break in employment. The WARN transfer provision focuses on the individual worker and permits a break in employment of no more than 6 months. The Department has found nothing in the legislative history to explain these changes. The Department agrees that the language of the transfer provision is not consistent with the definition of employment loss, to which the break in employment provision appears related. The Department concludes that its earlier reliance on the legislative history is not supported by the later changes in the language of the transfer provision. The "substantial equivalence" requirement has, therefore, been deleted from the final regulations. Consistent with the earlier discussion of the law of constructive discharge, language has been added to the final regulation to state that a job offer which constitutes a constructive discharge constitutes an employment loss for purposes of WARN.

Several commenters criticized the adoption of the Internal Revenue Service (IRS) definition of "reasonable commuting distance" as the definition of the same term for WARN purposes. Some commenters suggested other factors that should be added to the definition. These included industry practice, a comparison of the employee's pre- and post-commuting times, transportation costs in the area and the availability of alternate forms of transportation, public transportation and car and vanpools. One commenter suggested that the regulations should state that transfers within a metro-wide area are always within a reasonable commuting distance. Other commenters suggested the adoption of a standard, such as the 30 miles/45 minutes "rule of thumb" contained in the Senate Committee Report on S. 538. (S. Rep. 100–62, 100th Cong., 1st Sess., 23 (June 2, 1987).) One commenter suggested that the regulation should permit the employer to rely on a written acknowledgment from the worker that the commuting distance is reasonable.

The Department borrowed the IRS definition because it appears to be appropriately general to permit considerable flexibility in arriving at a determination of what constitutes a reasonable commuting distance. In doing so, the Department did not intend to adopt all the IRS interpretations that apply to situations not directly relevant to WARN. The language of the final regulation has, therefore, been revised to eliminate specific reference to the IRS regulation. DOL believes that the IRS definition encompasses all of the factors discussed by the commenters. The Department notes that the determination of what is a reasonable commuting distance may be strongly influenced by industry practice or the provisions of collective bargaining agreements. While setting a "rule of thumb" has some appeal, DOL has decided not to do so because any such role could be inappropriate in a large number of situations and may cause more confusion than it eliminates. Similarly, establishing a rule of thumb that transfers within a metropolitan area are always within a reasonable commuting distance is inappropriate, although such transfers will usually meet the definition. In the case of the specific commenter, it appears that the company's collective bargaining agreements recognize the metropolitan area as an area within which transfers are permissible. In that case, any transfer within the metropolitan area would be deemed to be within a reasonable commuting distance. While an employer may seek to obtain written acknowledgments that a transfer is within a reasonable commuting distance, adopting that practice as a rule poses three problems: First, it may be seen to require employers to adopt certain employment practices; second, it will not provide an employer any protection if workers refuse to sign the acknowledgment; and third, the employer might not find out that not enough workers will sign the acknowledgment until after the time to give notice has passed, thus possibly becoming liable for failing to give notice.

(c) Section 639.5(c) Temporary Projects or Facilities

This section discusses the exemption from notice in section 4(a)(1) of WARN. Under that exemption, no notice is required to be given when a plant closing or mass layoff occurs because of the closing of a temporary facility or the completion of a temporary project or undertaking, and the affected workers were hired with the understanding that their employment was limited to the duration of the facility or project. Since such an understanding could arise in a variety of ways, the proposed regulation specifies reference to employment contracts or local or industry employment practices, but leaves the burden of proof to employers. The regulation also discusses some examples of what do and do not constitute temporary projects.

Some commenters, representing the construction industry, requested an exemption for their industry. DOL does not believe that industry-specific exemptions from WARN notice requirements are appropriate or justified. The construction industry and similar industries, including the shipbuilding industry and the roadbuilding industry, will receive appropriate treatment under the temporary projects exemption. To the extent that their workforces only work on a project-specific basis, the employers are exempted from having to give notice under the Act and the regulations. To the extent that they employ workers on a more permanent basis, an exemption would defeat the purpose of WARN.

Several commenters opposed the imposition of a temporal limitation in the definition of "project". They pointed out that certain projects, like dams, take years to complete. The discussion of the duration of a job in § 639.5(c)(4) was not intended to suggest a time limitation on temporary projects. It was intended to respond to comments that suggested that certain long-term contractual arrangements also should be considered temporary projects. Nonetheless, that point can be made without reference to the duration of the contract and the final regulation has been revised to eliminate the reference.

A commenter criticized the same provision, arguing that long-term government contracts can be cancelled with less than 60 days' notice and that employers should be absolved from giving notice in that situation. DOL disagrees with this analysis. The temporary projects exemption applies to the nature of the project, not to the length of the notice given when it is terminated. If an employer receives less than 60 days' notice of cancellation, it may be able to give less than 60 days' notice under the unforeseeable business circumstances exception.

Another commenter pointed out that to qualify as a temporary project, a project must be for a "defined and limited" period and must have been begun with "an announced and ascertainable duration and a terminal point". DOL generally agrees with this characterization of the statutory requirement. It must be recognized, however, that the duration and terminal point of many temporary projects may not be capable of being precisely defined at the beginning of the project due to the vargaries of other conditions and other factors. What is important is that it be clear at the outset that upon the completion of some defined undertaking, the project will be complete.

Several commenters opposed the use of the word "clearly" when describing the workers' understanding that a

project is temporary. Another commenter opposed the assignment to employers of the burden of proof of the existence of the understanding that the project is temporary. The word "clearly" comes from the description of the Congressional understanding of the way the exemption would work in the Conference Report on H.R. 3. (H.R. Rep. No. 100–576, 100th Cong., 2d Sess., 1051 (April 20, 1988)). Although it is true that the statute does not mention the burden of proof as it does in other instances, it is reasonable to assign the burden to the employer in this case because the employer is seeking an exemption from the general rule of 60-day notice (or, legally speaking, is asserting an affirmative defense) and because, in the nature of the language of the exemption, it is the employer that must prove that it communicated the nature of the project. The final regulation has been revised to make it clear that the employer must show that it communicated to its employees the temporary nature of the project or facility. The final regulation also has been revised to make it clear that the test of clear communication focuses on the understandings of the affected employees in general, not on whether each individual employee understood the temporary nature of the project or facility.

Another commenter supported the approach taken in the regulation, arguing that if the worker understood that he/she would be transferred to another project at the completion of the work, the exemption does not apply. DOL agrees with this formulation. The last point is particularly important. Commenters in the shipbuilding industry referred to their "core staff" when describing their operations which the commenters claimed were temporary projects. While the Department agrees that the projects described in the comments qualify as temporary projects, if the term "core staff" refers to workers who remain on the payroll and move from project to project, the temporary project exemption would not apply to those workers because they would not understand that they had been hired to work on a particular project.

Some of the comments suggested that the commenters interpreted the regulation to require written notice that the job is a temporary project and insisted that the regulations should recognize industry practice. DOL believes that these commenters have misread the regulation, which specifically refers to "the employment practices of an industry or a locality". Reference to collective bargaining agreements as a source of evidence of the understanding that the project or facility is temporary also has been added in the final regulations.

One commenter suggested a form of written notice to workers which employers might use to reflect the understanding that the work is on a temporary project.

> Workers on this project are being hired on a project-only basis. When this contract is completed, your job will be terminated. At that time, you may or may not be offered another job on a different project as needs dictate.

Such written notice is not always required by WARN since industry practice may be sufficient to demonstrate that workers understand that their jobs are on temporary projects. It may, however, be useful to some employers to give written notice. To provide assistance to those employers who may wish to give written notice that a job is on a temporary project, DOL has reviewed the commenter's proposed language. While the last sentence might be considered confusing, DOL understands that in the construction and similar industries workers often work for the same employer on different projects. In light of that fact, the notice as a whole appears to adequately convey the temporary nature of the job.

Another commenter suggested that the words "or project" be added to clarify the example in § 639.5(c)(3). The Department agrees and has so revised the final regulation.

A commenter suggested that the temporary projects exemption should apply to depletable resources. This does not appear to be an appropriate extension of the exemption since depletable resources may last for so long a time that they cannot be said to have a termination date, even though eventually the resource may run out.

A commenter asked that the regulations include transportation projects in the regulation. Another commenter asked that it be made clear that the examples in the regulation are not inclusive. DOL agrees with the second commenter; the purpose of the example in the regulation (as with exemples in other parts of these rules) is to be illustrative, not to include every industry that might work on temporary projects. The Department also agrees that roadbuilding projects may qualify as temporary.

A commenter asked that the regulation be clarified as to the construction industry to acknowledge that the completion of a project may result in a layoff from a job but not a separation from the industry. DOL assumes that this is true for most industries that work on temporary projects, but has decided not to revise the regulations to reflect this fact.

The FHLBB stated that when it closes down a savings and loan institution, it sometimes rehires the employees of the closed institution to work on closing down the bank. The FSLIC rehires the workers with the understanding that their work will only last until the affairs of the S & L are wound up, although the time that this task will take is not certain at the time the workers are rehired. The FHLBB suggested that these employees should be covered under the temporary projects exemption. DOL agrees, under the circumstances stated, that these workers are covered under the temporary projects exemption.

A commenter from the trucking industry suggested that the temporary projects exemption should cover "casual" workers in that industry, that is, workers who are hired on an "as needed" basis when freight volumes increase and are laid off indefinitely subject to recall. The Department does not agree that these workers, while their work may be temporary, are working on a temporary project, which is a distinct undertaking not simply an increase in already existing and continuing work. It appears from the description of these workers that most of them will be part-time workers for WARN purposes (i.e., they will work less than 6 months in any 12-month period) and thus are not counted in determining whether a plant closing or mass layoff has occurred.

Another commenter suggested that the definition of temporary project include project-specific fabrication or component manufacturing. To the extent that workers are hired specifically and only to work on fabrication or component manufacturing that relates to a specific project, they will be working on a temporary project. To the extent that workers manufacture or fabricate components for more than one project, they will not qualify. DOL believes that the regulation adequately covers those workers in any industries to which it is applicable.

(d) Section 639.5(d) Strikes and Lockouts Exemption

This section discusses the strikes and lockouts exemption of section 4(d) of WARN. That exemption provides that notice is not required to be given where a plant closing or mass layoff "constitutes" a strike or lockout not intended to evade the requirements of the Act. Notice is also not required when an employer permanently replaces "a person who is deemed to be an

economic striker" under the NLRA. The exemption provision in the Act also indicates that nothing in WARN affects judicial or administrative rulings relating to the hiring of permanent replacements for economic strikers under the NLRA. Because this language is so closely tied to another law, administered by another agency having expertise in this area, DOL has chosen not to attempt any extensive regulatory explanation of this provision.

The Department solicited comments on issues related to strikes and lockouts. One commenter recommended that the regulations should include the definition of lockout which appears in the Conference Report on H.R. 3, i.e., a lockout occurs when, for tactical reasons relating to collective bargaining, an employer refuses to utilize some or all of its employees for the performance of available work. (H.R. Rep. 100–576, 100th Cong., 2d Sess., 1051 (April 20, 1988).) The Department agrees, and has included this definition in § 639.5(d). Consequently, a layoff that occurs in response to a decrease in orders, and thus a lack of work, in anticipation of a possible labor dispute cannot be characterized as a lockout.

The Department also is aware that lockouts may occur for defensive reasons in the course of a labor dispute. The Conference Report definition does not appear to take account of that possibility. In the final regulations, the definition of lockout has been modified to cover defensive lockouts that occur during labor disputes.

Several commenters objected to the inclusion of the phrase "in the normal course of collective bargaining" in the regulation, arguing that it could be construed to exclude sympathy or wildcat strikes from the coverage of the exemption. The Department agrees that this construction is possible but was not intended and has deleted the phrase. Whether a strike or other form of concerted activity will fall under this exemption is ultimately a question which will have to be decided under the NLRA or other applicable laws.

A commenter suggested that the regulations should make it clear that work slowdowns also are included under the strikes/lockouts exemption. This is a complex area of law under the NLRA and other federal statutes. Because other agencies with responsibility to administer these statutes regularly are involved in these areas, the regulations will not address the issue.

A commenter questioned whether notice is required when an employer permanently shuts down or relocates an operation after the commencement of a lockout. The exemption for a lockout is applicable only if the closing or layoff constitutes a lockout. If, after the commencement of a lockout, another decision is made which results in employment loss for a sufficient number of workers (including locked-out workers), as might occur if an employer decided to relocate, notice would be due based on the new circumstances.

A commenter suggested that the regulation should be revised to provide that an employer need not give notice when replacing an unfair labor practice striker since it will be required to rehire that worker at the end of the strike. WARN specifically mentions the permanent replacement of economic strikers but provides no other exceptions for notice of replacement for other kinds of strikers. Also, as discussed above, the Department does not view the strikes/lockouts exemption as applying to situations in which plant closings or mass layoffs are ordered because of other conditions than the particular strike or lockout. For these reasons, and because the status of strikers raises many complex questions under the NLRA and other federal laws, the Department has not revised the regulations in the manner suggested.

A commenter suggested that the regulations provide for some method to determine whether a lockout is intended to evade the purposes of the Act. The commenter suggested that if an employer remains closed for 4 months, it should be required to demonstrate an intent to reopen. The Department does not view this as a practical suggestion, since WARN provides no administrative mechanism for monitoring compliance. Also, given the complexities of the collective bargaining process, DOL can see no basis for imposing arbitrary time limits on the length of strikes or lockouts.

In the preamble to the proposed regulations, the Department also indicated its intent to provide in the final regulations that notice is due to non-strikers at the site at which the strike is occurring and to provide that the strikes/lockouts exemption does not apply to plant closings or mass layoffs that occur at other sites as an indirect result of the strike. It also was indicated that the regulations would be clarified to indicate that the unforeseeable business circumstances exception may well apply to the indirect effects of strikes. The Department invited comments on these issues.

A number of commenters opposed notice to non-strikers. The commenters gave a number of reasons for their opposition, including: (1) The NLRA only requires a union to provide 60 days' notice of contract termination or modification and thus the employer may not know that the strike might happen in time to give WARN notice. (2) The NLRA requires employers to negotiate in good faith and notice might be used as evidence of a lack of good faith. (3) The strike or lockout will generally be for 6 months or less and notice will not be required. (4) The type of employment loss that will occur in a strike situation is not the same type that WARN was intended to address, i.e., the kind of loss that requires planning to get a new job or training. (5) Requiring notice will lead to "preventive" notices or to rolling or periodic notices that WARN seeks to avoid. (6) Since the union alone decides to strike, it makes no sense that Congress intended to cover this situation; also, it would require notice to the union that initiated the strike. (7) Requiring notice to non-strikers gives unions a powerful weapon to expand the impact of strikes and is inconsistent with WARN's philosophy of neutrality with respect to labor law.

While the Department recognizes that the comments raise several good policy arguments for application of the strikes/lockouts exemption to non-strikers, at least at the plant at which the strike occurs, the Department believes that the legislative history is clear that non-strikers were intended to receive notice. During the Senate debates on the bill, Sen. Quayle offered an amendment that would have extended the exemption to non-strikers. (134 CONG. REC. S8667 (daily ed. June 28, 1988) (remarks of See Quayle)). Sen. Metzenbaum, the floor manager of the bill, opposed the amendment and it was defeated. [134 CONG. REC. S8669 (daily ed. June 28, 1988) (remarks of Sen. Metzenbaum)]. The final regulations contain language making it clear that notice is due to non-strikers. Where a union which is on strike represents more than one bargaining unit at a single site, non-strikers include the non-striking bargaining unit(s). Notice is also due to those workers who are not part of the bargaining unit which is involved in the labor negotiations that led to the lockout.

The Department notes that if, as a commenter pointed out, most strikes do not last over 6 months, no notice is required under WARN for temporary layoffs that last 6 months or less. Employers should exercise care in deciding not to give notice for this reason in a strike situation, since, as discussed earlier, WARN does apply if the layoff is extended beyond 6 months and the extension is not caused by business circumstances not reasonably

foreseeable at the time the layoff was announced.

Commenters also urged, if the strikes/lockouts exemption is not to apply to plants other than the plant at which the strike is occurring, that the regulations state that the unforeseeable business circumstances basis for reduced notice applies. The Department agrees that it is generally the case that strikes will not be foreseeable. The Department also acknowledges that the unforeseeable business circumstances exception to the 60-day notice requirement may well be applicable in most situations where a strike has effects at other plants, either other plants of the same employer or other plants of other employers. The unforeseeable business circumstances exception equally may apply to the plant at which the strike is occurring. The Department also notes that the "faltering company" exception may also apply in strike/lockout situations and has modified the final regulation accordingly.

The final regulations have been revised to make it clear that the exemption does not apply to the effects of strikes or lockouts at plants other than those at which the strike or lockout actually is occurring and to make it clear that the unforeeable business circumstances exception to the 60-day notice requirement may be applicable to these direct and indirect effects and to layoffs at the struck plant.

(7) Section 639.6 Who Must Receive Notice

Notice must be given to affected employees' representatives, directly to unrepresented affected employees, to the State dislocated worker unit, and to the chief elected official of the unit of local government. Section 639.6 of the regulations clarifies who is to receive notice in each case. The prefatory paragraph describes the general rule and discusses the provision in section 2(b)(1) of WARN relating to the status of employees of the seller in a sale of all or part of the business. This discussion has been revised to make it clear that the provision preserves notice rights, but creates no other employment rights and that the technical termination that may be deemed to occur upon the consummation of the sale does not, in itself, create notice rights. Other than the comments relating to the business sale provisions of WARN, already discussed in the review of § 639.4(c) of these regulations, there were no comments on this section and no other revisions have been made.

(a) Section 639.6(a) Notice to Representatives of Affected Employees

This section states the rule that notice must be served on the chief elected official of the exclusive representative or bargaining agent representing affected employees. It also recommends that, if this person is not an official of the affected local union, notice also be served on the local official.

Commenters suggested that the regulations be revised to clarify that if an employer provides notices to a union, it is not required to provide notice to the individual workers represented by the union or liable if these workers do not receive notice. DOL agrees that both these propositions are correct, but believes that the regulations adequately cover these points.

A commenter suggested that the regulations clarify that in right to work States, notice to the union is effective as notice to both the members of the union and to those non-members who it represents. Another commenter suggested that non-members of a union should receive individual notice. The Department agrees with the first comment, although it applies in non-right to work States as well. The Department believes that this duty to represent non-members in appropriate situations is inherent in the definition of "representative" in § 639.3(d) of this Part. WARN provides that, where there is a representative of affected employees as of the time of notice, an employer must provide notice to that representative rather than directly to the workers. Thus, the second suggestion would not be appropriate.

Commenters suggested that an employer should be required to give notice only to one individual on behalf of a union. While this proposition is generally correct, there may be situations in which a collective bargaining agreement recognizes more than one entity, for example, both a national and a local union, as the exclusive representative. In such cases, notice to the chief elected officer of both entities would be required.

A commenter suggested that the regulations should provide that a union must give notice to the affected employees it represents within 3–5 days and that a penalty should be imposed upon the union for failure to give notice. WARN contains no provisions imposing any notice obligations on unions. The suggestion cannot, therefore, be adopted.

(b) Section 639.6(b) Notice to Affected Employees

This section has been substantially revised in accordance with the previous discussion of the comments on notice to "bumpees" under § 639.3(e). The final regulations provide that notice is required to be given to employees who may reasonably be expected to experience an employment loss, including those workers who lose their jobs because of bumping rights and other factors, to the extent that they can be identified at the time notice is required to be given. If, at the time notice is required to be given, the employer cannot identify the employee who may reasonably be expected to experience an employment loss due to the elimination of a particular position, it is acceptable for the employer to provide notice to the incumbent in that position. The rule also provides that affected employees entitled to notice include part-time as well as full-time employees, since WARN specifically excludes part-time employees from being counted for threshold determination purposes but does not exclude them otherwise.

It is clear that such factors as voluntary separations, early retirements and transfers which occur after notice is given may make it difficult to determine which employees will actually experience employment loss. Commenters asked if, in a situation where it is uncertain who will be terminated or laid off, it is acceptable to give notice to more employees than will actually experience employment loss. Where it is not possible at the time notice is required to be given to determine who may reasonably be expected to experience employment loss, it may also be adviseable for an employer to give notice to other workers who may lose their jobs as the result of the seniority system, both to forewarn them and to avoid potential liability. However, it is not appropriate for an employer to provide blanket notice to workers. As noted earlier, intermediate bumpees need not receive notice if they have bumping rights they can exercise.

A commenter suggested that the regulations be clear that there is no obligation to notify employees of independent contractors and that such employees are not included in the "employee count" for threshold determination purposes. The Department concludes that this principle is adequately covered in the definition of "affected employee" in § 639.3(e).

A commenter opposed any requirement of giving notice to part-time

employees. For the reasons just stated, DOL disagrees that part-time employees are not entitled to notice; part-time employees have the same need to find other work or training as full-time workers.

(c) Section 639.6(c) Notice to the State Dislocated Worker Unit

States are required, under section 311(b)(2) of the Job Training Partnership Act and section 6305(a) of EDWAA, to have operating disclocated worker units as of July 1, 1989. To meet the requirement for notice to these units before they become fully operational and to permit States to set in motion existing worker adjustment assistance programs, the regulations specify that notice served upon the State Governor constitutes service upon the State dislocated worker unit.

A commenter suggested that service on the Governor should be sufficient service on the State dislocated worker unit and that DOL should publish a list of State dislocated worker units. DOL believes that the regulations provide appropriate recognition of the fact that all States will not have finally set up their dislocated worker units by the time these regulations are published and of the need for service of notice on the unit at the same time that workers or their unions get notice so that the States can engage in the rapid response activities that are stressed under EDWAA.

(d) Section 639.6(d) Notice to the Chief Elected Official of the Affected Unit of Local Government

Questions were raised about the identity of the chief elected official of a unit of local government, given the variety of local government structures. In particular, clarification was sought in the situation where local government is run by an elected board. The regulations clarify this situation by providing that the chairperson of the elected board is to receive notice.

(8) Section 639.7 Content of Notice

(a) Section 639.7(a) Notice Must Be Specific

The proposed regulations provide that notice must be specific, that conditional notice may be given in certain circumstances and that notice must contain all of the elements required by the regulations.

The provision on conditional notice provoked numerous comments. Several commenters supported this provision of the regulations. Other commenters opposed it, claiming that the WARN language about ordering plant closings means that notice must be unconditional and must be about a definite event. They also argued that if an event is not foreseeable 60 days in advance, the unforeseeable business circumstances exception should apply to it. The commenters argued that conditional notice under WARN could be used to legitimate kinds of notice which could be illegal under the NLRA. These commenters 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. They suggested that optional notice providing useful information to workers should be encouraged.

While acknowledging these views, there may nonetheless be situations in which a plant closing or mass layoff are quite foreseeable if a known event, such as the non-renewal of a contract, occurs. If the event and the consequences are foreseeable, the unforeseeable business circumstances exception cannot be available. If notice can be given only when the necessity of the layoff becomes definite, the employer cannot avoid liability. The Department believes that the best remedy for the problem is to permit contingent notice to cover these cases. The final regulations have, therefore, been revised to permit optional conditional notice to serve as compliance with WARN, while narrowing the definition so that the commenters' concerns are ameliorated. Thus, 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. The final regulations provide that conditional notice may not be used to legitimate notices which would be violations of other laws. Further, the regulations specify that conditional notice is optional to avoid the problem of imposing liability on employers for failing to give a conditional notice.

An example of a situation in which conditional notice might be applicable was provided by one commenter, a utility. The commenter operates a nuclear power plant which 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.

(b) Section 639.7(b)–(f) Elements of Notice

These sections in the proposed rule prescribed the elements which must be included in the notices to each of the individuals or entities who are entitled to receive notice. A number of commenters argued that the proposed rule imposed too many requirements on employers and went beyond the requirements of the Act. Comments were, in fact, received on each and every element of the notice. The commenters argued that WARN does not require a specific form of notice and that only simple notice is required under the Act; that the requirements can create other grounds for suit for technical violations of the requirements; that the requirements will discourage employers from providing longer notice and from voluntary compliance. On the specific elements of notice, the commenters were particularly opposed to any requirement that a specific date be given, claiming that employers cannot anticipate a specific date when a layoff will take place 60 or more days in advance. The commenters also opposed identification of the workers involved (in notice to unions) claiming that complex seniority systems made such identification difficult. One commenter supported all the elements of notice specified in the regulation and suggested that the name and address of a company contact person be included in the notice to affected employees.

While the Act does not enumerate specific elements which should be included in the advance written notice of an order for a plant closing or a mass layoff, the purpose of providing notice to the parties mentioned in the Act is to allow each of them to take appropriate action to facilitate training, employment or other adjustments for affected employees. The content of notice to each party is designed to provide information necessary for each of them to take responsible action. The information requested is not difficult to obtain and care was taken to keep the elements of notice to a minimum.

Nonetheless, DOL has reexamined the regulations to ensure that the notice requirements are not overly burdensome on employers while providing sufficient information to permit the other actors in the WARN process to receive the full protection intended by the Act and to perform their functions. Several changes, including clarifying language changes, have been made in the final regulations. In recognition of the difficulty of identifying specific separation dates for individuals 60 days

in advance, the final regulations provide for a 14-day period of flexibility. An employer may give a specific separation date, the beginning date of a 14-day period during which the separation is expected to occur or a combination of specific dates and 14-day periods, if appropriate. This revision applies to the dates in the individual workers' notices and to the date or schedule of dates in notices to representatives and government units.

In the final regulations prescribing the elements of notice to unions, the first and last elements have been combined. The requirement that unions be notified of the identity of other affected unions, the requirement that employers provide the number of affected employees and the requirement for a statement about applicable bumping rights have been eliminated.

In the final regulations prescribing notice to affected employees, the requirement that the notice state the name and address of the plant has been eliminated and a requirement that the employer provide the name and telephone number of a company contact person has been added.

The notice provisions for the State dislocated worker unit and the chief elected official of the affected local government have been combined into one paragraph in the final regulation, although separate notices still are required by WARN for each. The first and last elements of notice have been combined and the provision about the statement of bumping rights has been clarified.

In all of the notices, the requirement that the notice identify whether the proposed action is a plant closing or mass layoff also has been eliminated and the requirement has been revised to require that the employer state whether the planned action is temporary or permanent and, if applicable, to state that the entire single site of employment will be closed.

A new provision has been added to provide an alternative form of notice to the State dislocated worker unit and to the chief elected official of the affected local government. Under this alternative, an employer may provide an abbreviated notice to these parties which states the name and address of the plant at which the action is to take place, the name and telephone number of a company contact person, the first data on which an employment action is expected to take place, and the number of affected employees. All other information required by the regulation must be maintained by the employer at a readily accessible place for use by the State dislocated worker unit and the local government. DOL believes that this alternative provides a reasonable way to ease some of the perceived burden on employers.

DOL believes that the remaining elements of notice are important if the parties are to receive notice which will provide them with the information they need to take the appropriate actions to minimize the effects of the affected employees' employment loss. The name and address of the plant and of a contact person provides basic information to identify the employer who is giving notice, the place at which the plant closing and mass layoff will occur and someone to provide them with additional information, if needed. The date of the layoff or schedule of layoff dates is essential to enable all recipients of notice to understand when employment losses actually will occur. Whether the planned action is permanent or temporary and the date on which it is to occur are important pieces of information to enable workers and service providers to plan and to make decisions about what kind of services workers may need and when the services will be needed. The job titles of the positions to be eliminated and the names of the workers holding those positions (or the numbers of workers for the State dislocated worker unit and the local government) enable unions and service providers to quickly identify the workers who will be affected and the size and scope of the action and the services needed to respond to it. The statement about whether bumping rights exist enables the governmental actors to determine that the workers who will actually need services may be difficult to determine at the outset. The name of each union representing affected employees, and the name and address of the chief elected officer of each union in the notices to State dislocated worker units and local governments is needed for the governmental actors to be able to contact the unions with which they will work to provide services. The statement about whether the entire plant will close provides needed information about job and general economic prospects in the local community and enables workers and the State and local governments to more accurately gauge the kinds of actions that will be needed.

DOL also agrees with commenters who were concerned that technical errors in providing the information required in the regulation could lead to claims that employers violated the Act. Language has been added to the final regulation, in § 639.7(a)(3), to make it clear that the notice must contain the best information available to the employer when the notice is given. The intent of adding this language is to attempt to prevent claims that might arise when an employer makes what turns out to be a factual error because circumstances later changed. DOL recognizes that in developing notices, considerable amounts of information may be required to be reviewed and considered by employers. While the Department expects employers to use their best efforts to be accurate in providing the information required by the regulations, DOL also recognizes that minor, inadvertent errors may be made. The final regulations provide that such minor errors should not be the basis for liability.

DOL notes that it is not the intent of WARN to interfere with collective bargaining contract provisions calling for notice to employees or their unions in advance of WARN's 60-day notice period. The content of notice requirements provide for some flexibility where this situation exists. Such long term notice need not contain all the elements required by this section as long as the remaining information is provided in writing 60 days in advance of the covered action. For example, where such long-term notice is given that otherwise includes all required notice elements but does not identify a definite termination date or 14-day period, the giving of an additional notice specifying a termination date or 14-day period 60 days in advance of that date or period constitutes full compliance with WARN.

In § 639.7(d) of the proposed regulations, prescribing the requirements of notice to affected workers, the regulations require that the notice be "in language understandable to the employee". Several commenters suggested that this statement be revised to make it clear that there is no requirement that notice be in a language other than English. Other commenters asked that the regulations be clarified to reflect that the standard is that the notice be understandable to the average worker. It was not DOL's intention that the regulations require that notices be in a language other than English and the Department does not believe that the language of the proposed regulation suggests such a requirement, so no change has been made. Employers should, however, be aware that under various civil rights laws, notices of various kinds have been required to be given in languages other than English where substantial numbers of recipients of those notices primarily speak another language. Employers whose workforces contain large numbers of such workers may wish to consider whether to

provide notices in a language other than English. The Department agrees with those commenters who suggest a standard of understandability to the average worker and has changed the word "employee" to "employees" to make this point clearer.

(9) Section 639.8 How Is Notice To Be Served

This section provides that any reasonable method of serving notice is acceptable, as long as the intended recipient has the notice in hand 60 days before the separation occurs. Additionally, the regulation indicates that a ticketed notice fails to meet the requirements of WARN.

Commenters suggested that rules should be added to state when mailed notice is deemed to be timely mailed or that mailed notice is deemed served on the date it is postmarked. Commenters also asked that the regulations state that a notice sent in a pay envelope is deemed to be served on the date of the payday on which it is to be delivered. Since WARN and the regulation focus on receipt of the notice and since the time it will take for mailed notice to be received will vary with local conditions and with the location of the recipient, DOL does not believe that any additional rule for when notice is deemed served is appropriate. Employers should mail notice far enough in advance, given local mail conditions, so that the notice will be received 60 days in advance of the date of the plant closing or mass layoff. Section 8(b) of WARN specifies that mailing notice to the employee's last known address or inserting notice in the employee's paycheck are acceptable methods of service. DOL does not view this language as requiring that each employee actually receive notice 60 days in advance of a covered event as long as the method of service is timed so that the employees generally receive timely notice. For the same reason, deeming notice to be served when postmarked will not ensure timely delivery. Similarly, because notice served by insertion in a pay envelope may be delivered or mailed or directly deposited in the worker's bank account with a pay stub being delivered later, DOL does not think that an absolute rule deeming notice to be served on the payday on which the paycheck is to be delivered is appropriate.

(10) Section 639.9 When May Notice Be Given Less Than 60 Day in Advance

The prefatory paragraph of the proposed regulation indicates that three exceptions to giving a full 60 days' notice exist and that they are to be construed narrowly. The paragraph also states that they are to be construed narrowly. The paragraph also states that if one of the exceptions is invoked, the employer must still give as much notice as is practicable, and must give notice containing a brief statement of the reason of the reason for giving less than 60 day's notice and the elements of notice required in § 639.7.

Several commenters disagreed with the statement that all the exceptions should be narrowly construed. Some of these commenters cited specific aspects of the legislative history to show that the unforeseeable business circumstances and natural disaster exceptions should not be narrowly construed. The Department has reviewed the legislative history and agrees that it may not have been appropriate to say that the unforeseeable business circumstances and natural disaster exceptions should be narrowly construed. While the Conference Report on H.R. 3 (H.R. Rep. No. 100–576, 100th Cong., 2nd Sess., 1049 (April 20, 1988)) may be read to suggest a narrow construction of the unforeseeable business circumstances exception because of the various requirements for proving the applicability of the exception that appear in the report, the debates on the bill suggest that the exception was not intended to be narrowly construed. (133 CONG. REC. S9435 (daily ed. July 8, 1987) (remarks of Sen. Kennedy); 134 CONG. REC. S8856, S8857 (daily ed. July 6, 1988) (remarks of Sen. Metzenbaum); 134 CONG. REC. H2370 (daily ed. April 21, 1988) (remarks of Cong. Ford); see also H.R. Rep. No. 100–285, 100th Cong., 1st Sess., 16, 34–35 (August 8, 1987)). Particularly significant are the continued references to the exception when questions were raised about how the bill would work. The legislative history does indicate that the faltering company exception ws intended to be narrowly construed. (H.R. Rep. No. 100–576, 100th Cong., 2nd Sess., 1048 (April 20, 1988)). In the final regulations, the reference to narrow construction has been deleted from the prefatory paragraph. In § 639.9(b), covering the unforeseeable business circumstances exception, the definition of what constitutes an unforeseeable business circumstance has been revised to be more in line with the language of the Conference Report by the addition of the word "dramatic". The language in § 639.9(a), discussion the faltering company exception has been revised to indicate that exception should be narrowly construed.

(a) Section 639.9(a) The "Faltering Company" Exception

This section describes the "faltering company" exception in the language of the Conference Report. (*Id.*). This exception requires that an employer must have been actively seeking capital or business at the time 60-day notice was due to be given, that there must have been a realistic chance to obtain the capital or business; that if the capital or business were obtained it would have been sufficient to keep the business operating for a reasonable period of time; and that the employer must have believed in good faith that giving notice 60 days in advance would have precluded the employer from obtaining the needed capital or business. The regulation also provides that the employer's financial situation will be viewed in a company-wide context.

A commenter suggested that the test for the "faltering company" exception should be whether "similarly situated employers would have followed a similar course of action" and that the regulation should clearly state that failure to obtain the capital or business is not a factor under the test. DOL believes that the first point is correct, or, stated another way, that an employer must demonstrate that it exercised "commercially reasonable business judgment" in its actions. The Department believes that the regulations reflect this standard and has not changed them. The commenter's second point is confusing since the exception requires that the business or financing must have been sufficient to keep the company or the plant open for some reasonable time. Thus, the need for notice will only be triggered if the employer fails to obtain the business or financing it seeks.

Another commenter, representing the food marketing industry, objected to the language that the "faltering company exception will be viewed in a company-wide context". The commenter argued that since retail grocery stores operate on slim profit margins, closing one store may save others and under the regulatory language that would not be possible. DOL does not think this language must be read as narrowly as the commenter does. Congress was concerned with situations in which a company has substantial assets or cash which it simply chooses not to use to save a faltering branch. If the whole position of the company shows that the closing of one branch to save others was a reasonable business judgment, the faltering company exception is available. It should also be noted that,

in some circumstances, it may be appropriate for a company to make a judgment not to use its other assets to save a branch. In this case, the company simply cannot avail itself of the faltering company exception and it must give 60 days' notice.

The same commenter suggested a broad reading of the "faltering company" exception so that grocery stores that run sales and try to attract customers can avail themselves of the exception. The commenter argued that faltering stores will lose employees and customers if they give notice, which will become a self-fulfilling prophecy. The commenter also suggested that the regulations should address cases in which secured creditors intervene and force the closing or sale of one or more stores or in which creditors seek time to sell the business before foreclosing.

The Department believes that the suggestion about running sales is too broad for general application. Any business can make a general claim it was seeking more customers or orders. The faltering company exception requires some more specific efforts to get customers. If the store can show an unusually great effort to attract customers and that there was valid reason to believe that the customers would abandon the store if they knew it would close, the exemption would appear to apply. On the questions about actions by secured creditors, DOL thinks that if it can be shown that the creditors do not want their efforts to be known, the exception would apply.

One commenter suggested that since WARN section 3(b)(3) merely requires the employer to give a brief statement of the reasons for giving less than 60 days' notice, the regulations should follow the burden of proof model of Title VII of the Civil Rights Act and impose the burden on the challenging party to prove that the claim of exception was a pretext if the employer proffers a sworn statement as part of the notice process. The commenter also suggested that the rule should define the terms "good faith" and "reasonable". The commenter also asserted that the rules create a much tougher standard than Congress intended. DOL notes that the language the regulation comes directly from the Conference Report, and that the statements about the burden of proof are a reasonable interpretation of the Report's statements that the employer must show that various of the elements of the exception are met. (*Id*). DOL does not think that the Title VII model is appropriate since, in the case of the assertion of an exception to full notice, the employer is in the position of the proponent of an affirmative defense, i.e., the employer must prove that it is entitled to use the exception. DOL believes that, by referring to "commercially reasonable business judgments", the regulations do define "reasonable" and "good faith" in the context of the faltering company exception.

Another commenter asserted that the narrowness of the "faltering company" exception will preclude any unionized company from using it because it could lead to onerous information disclosure requirements under the NLRA. While the Department is not the agency charged with expertise with respect to the NLRA, DOL believes that the regulations accurately reflect the statutory language and Congressional intent.

(b) Section 636.9(b) The "Unforeseeable Business Circumstances" Exception

This section also draws its language from the Conference Report on H.R. 3. (*Id.*) The regulations define the exception as applying to circumstances that are not reasonably foreseeable at the time 60 days' notice would have been required. The regulation cites some examples of events which might be unforeseeable business circumstances. It focuses the test for determining whether business circumstances were reasonably unforeseeable on the employer's commercially reasonable business judgment.

A commenter suggested that the test for the application of the unforeseeable business circumstances exception is that an event could not "reasonably" have been foreseen and that reasonableness should be determined on an objective standard. The Department agrees with this formulation and believes that the regulations provide an objective test by focusing on the commercial reasonableness of the employer's actions.

The same commenter pointed out that the unforeseeable business circumstances exception still requires that an employer give as much notice as feasible. DOL agrees and has so provided in the regulation.

The same commenter pointed out the provision in the Conference Report that the exception applies only where "it is not economically feasible to require the employer to give notice and wait until the end of the notice period before effecting the plant closing or mass layoff" (*id.*) and asserted that the burden is on the employer to prove feasiblity. The Department believes that the quoted language simply describes an element of the factual predicate that must extist for an event to be an unforeseeable business circumstance; but does not create any kind of separate test. DOL believes that the quoted language merely requires an employer to show that a "sudden, dramatic and unexpected" event occurred which precipitated a covered employment action, which, in light of the circumstances at that plant, could not have been postponed. The test of whether the action could have been postponed is one of commercially reasonable business judgment.

The Deparment solicited comments on examples of unforeseeable business circumstances that might be included in the regulations as illustrating principles applicable to employers generally, and the circumstances in which they might apply. Commenters suggested that DOL include as examples of unforeseeable business circumstances strikes or lockouts elsewhere, loss of or failure to award contracts, unexpected major market downturns, fires, changes in prices and costs, declines in customer orders, State and local regulatory changes, cases in which layoffs become larger than originally expected, loss of raw materials, loss of financing, legislation, court decisions, unavailability of a ship to be repaired, force majeure, actions related to public health and safety, other, and "secondary effects of economic conditions". While the commenters did not respond to the second part of the invitation and state any generally applicable principles, DOL agrees that many of these factors may constitute unforeseeable business circumstances, and has included four examples in the regulations.

What emerges from consideration of the variety of factors mentioned by the commenters is that it is not appropriate to develop a rule defining certain conditions as *per se* unforeseeable business circumstances. While many of the factors suggested by the commenters will, in most cases, be unforeseeable business circumstances, for example, strikes at another plant of the same company, one can conceive of situations in which they would not be reasonably unforeseeable, as where the strike is part of a union busting strategy. Some of the factors mentioned do not seem unforeseeable in many cases. For example, regulatory changes are often preceded by lengthy notice and comment procedures, often have delayed effective dates and sometimes have time to attain compliance built in. The effects of such regulations will not be unforeseeable. The same is true of legislation, which often has delayed effective dates and is the suject of

lengthy public debate. Similarly, while the timing and content of court decisions may not be foreseeable 60 days in advance, the execution of the judgement may be delayed for a long time for a variety of reasons and prudent businessmen make provision for the consequences of adverse judgments. Finally, loss of contracts, particularly government contracts may be preceded by notice and by the opportunity to respond. (It also must be pointed out that DOL does not understand the last of the factors listed and does not mean to suggest approval of this factor.)

What is important is that the circumstance be "sudden, dramatic and unexpected". Each claim of unforeseeable business circumstances must be examined on its own merits, in these terms and in terms of whether the employer reasonably (exercising commercially reasonably business judgment) could not foresee that the even would occur or that it would have the effects it had.

The FHLBB suggested that persons or institutions that take over ailing savings and loan institutions should be considered covered under the unforeseeable business circumstances exception since they may not know all of the problems they face in taking over the ailing institution. While there will be circumstances in which surprise discoveries of bad debts or assets may require covered employment actions to be ordered in less than 60 days and where the unforeseeable business circumstances exception will clearly apply, the Department cannot agree to a blanket application of the exception. These buyers must exercise commercially reasonable business judgement in discovering the problems of the institution it is acquiring and in deciding what employment actions to take in light of these problems; they may not simply rely on the fact that their action was assisted by the Federal Government.

(c) Section 639.9(c) The "Natural Disaster" Exception

This section discusses the exemption for plant closings and mass layoffs caused by natural disasters. The regulation lists some of the conditions that are natural disasters. It provides that the natural disaster exception applies to the direct results of a natural disaster, while the indirect results of a natural disaster may be covered under the unforeseeable business circumstances exception. It also provides that notice must be provided when a natural disaster causes a covered closing or layoff, even if the notice is after the fact.

Several commenters opposed the provision of the regulations that applies the natural disaster exception only to events directly caused by natural disasters. These commenters cited remarks in the floor debates by the sponsor of the natural disaster exception amendment suggesting that the exception applies to the "downstream" effects of natural disasters. (134 CONG. REC. S8687 (daily ed. June 28, 1988) (remarks of Sen. Dole)). These commenters did not discuss the entire debate on the amendment. The amendment originally offered specifically included the direct and indirect effects of natural disasters. (*Id.* at S8686). The floor manager opposed the amendment because of the language about indirect effects. (*Id.* at S8687 (remarks of Sen. Metzenbaum). The amendment was withdrawn, the language stricken and the amendment accepted. (*Id.* at S8688). DOL thinks that the legislative history, considered in its entirety, supports the position taken in the proposed regulations and no change has been made in the final regulations.

Other commenters objected to the requirement that after the fact notice be given when a natural disaster causes a plant closing or mass layoff. In this regard, the statutory language may be confusing. The natural disaster exception, section 3(b)(2)(A), begins with the words "[n]o notice under this Act shall be required". On the other hand, the final subsection of section 3(b) of WARN, section 3(b)(3), which, by its terms, applies to the entire section, to all the exceptions, requires that as much notice as practicable be given when one of the exceptions is invoked. The Department believes that the approach that it has decided upon is the best approach in this ambiguous situation since it is consistent with the needs of workers to have information on whether their jobs will continue to exist and how long they may be without work and thus is consistent with the intent of WARN to provide such information to workers. The final regulation has been revised to conform to the statutory language and to make it clear that such after the fact notice need only contain such information as is available to the employer at the time the notice is given.

(11) Section 639.10 When May Notice Be Extended

This section covers the length of time after the date (or the ending date of the 14-day period) specified in the notice for which the notice is valid. To ensure that the parties who are due notice have the most current and helpful data available and, thus, can make appropriate plans, additional notice is due if the original date or the ending date of the 14-day period is not met. If the postponement is for less than 60 days, the notice need only contain a reference to the earlier notice, the date to which the planned action is postponed, and the reasons for the postponement. This type of notice will provide the parties with needed information and be less burdensome to the employer. If the postponement extends for 60 days or more, the additional notice should be treated as new notice and meet the specified requirements.

Several commenters disagreed with this interpretation, arguing that there is no specific statutory requirement to support it; that a 180-day period is more in keeping with the rolling 90-day aggregation period for determining employment loss under section 3(d); that if any "secondary" notice is required, posting general notice on a bulletin board should be sufficient; that the reasons for extending the layoff date may not enable the employer to make precise calculations of how long the plant may remain open; and that such notices might require the disclosure of confidential information. One commenter supported the approach taken in the regulations and suggested that the regulations make it clear that the short term, less than 60-day postponement notice is mandatory.

DOL believes that the approach it has adopted is most consistent with Congressional intent in two important respects. First, it furthers the Congressional purpose that notice to workers provide the workers and governmental authorities with specific information in order to react to a dislocation event and to obtain new employment or training to minimize the effects of that event. If workers are not informed of changes in planned termination dates their planning will be disrupted and either they will run the risk of losing other opportunities or the employer will lose employees who it may need to carry on its operations. Secondly, DOL's approach is in accord with Congress' express intent to prohibit rolling notice. (134 CONG. REC. S8680 (daily ed. June 28, 1988) (remarks of Sens. Kennedy and Metzenbaum)). The Department also notes that some of the concerns expressed by the commenters will be ameliorated by the provision that notices can identify a 14-day period during which the layoff may take place. The Department does recognize that the notice of short term postponements can create a burden on employers. The final regulations have, therefore, been revised to make it clear that any form of notice or method of providing the information

about a postponement for less than 60 days is acceptable as long as the information about the postponement is effectively communicated to all the affected workers.

A commenter asked the following questions about the application of this provision. If an employer gave notice on January 1, 1989 of a layoff scheduled for December 31, 1989 and then realizes on December 15, 1989 that it can keep open until January 15, 1990, is notice required to be given and, if so, must it be 60 days' notice? Under the regulations, the employer is not required to give a new 60-day notice for a 15-day postponement; but it is required to inform its employers of the postponement in any reasonable way which will get the information to all affected workers. The commenter also asked if a new 60-day notice was required on November 1, 1989 if the employer adheres to the original closing date. The answer is no in the circumstances stated. One notice is sufficient no matter how far in advance it is given if it contains the information required in section 639.7.

(12) Effective Date

Several commenters continued to oppose DOL's "interpretation" of the effective date. These commenters suggested that the final regulations should adopt a definition of the effective date provision of section 11 of WARN that requires notice to begin to be given on the February 4, 1989 effective date of WARN for plant closings or mass layoffs that occur on April 5, 1989. DOL believes that the course it took in the preamble to the proposed regulations was the most correct and appropriate one. DOL recognized that there were three supportable interpretations of the effective date provision. The Department chose not to adopt any interpretation but simply to inform employers of the interpretations and of their possible liability. DOL continues to believe that the issue of the meaning of the effective date is a purely legal issue that the courts will decide without giving any deference to any interpretation that DOL might adopt. Thus, any interpretation that might be adopted possibly could mislead employers to their detriment.

Regulatory Impact

The final rule interprets the provisions of the Worker Adjustment and Retraining Notification Act. It does not have the financial or other impact to make it a major rule and, therefore, preparation of a regulatory impact analysis is not necessary. See Executive Order No. 12291, 5 U.S.C. 601 Note.

At the time the interim interpretative and proposed rules were published, the Department of Labor notified the Chief Counsel for Advocacy, Small Business Administration, and made the certification pursuant to the Regulatory Flexibility Act at 5 U.S.C. 605(b), that the rule would not have a significant economic impact on a significant number of small entities. No significant economic impact would be imposed by the rule.

Paperwork Reduction Act

Pursuant to the Paperwork Reduction Act, information collection requirements imposed by these regulations have been approved by the Office of Management and Budget as a final rule under OMB No. 1205–0276, expiring December 31, 1990.

Public reporting burden for this collection of information is estimated to vary from 64 to 168 hours for 960 responses with an average of 112 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Office of Information Management, Department of Labor, Room N–1301, 200 Constitution Avenue, NW., Washington, DC 20210; and to the Office of Management and Budget, Paperwork Reduction Project (1205–0276), Washington, DC 20503.

List of Subjects for 20 CFR Part 639

Employment, Labor, Labor management relations, Labor unions, Penalties.

Final Rule

Accordingly, Chapter V of Title 20, Code of Federal Regulations, is amended by revising Part 639, to read as follows:

PART 639—WORKER ADJUSTMENT AND RETRAINING NOTIFICATION

Sec.

Authority: 29 U.S.C. 2107(a).

§ 639.1 Purpose and scope.

(a) *Purpose of WARN.* The Worker Adjustment and Retraining Notification Act (WARN or the Act) provides protection to workers, their families and communities by requiring employers to provide notification 60 calendar days in advance of plant closings and mass layoffs. Advance notice provides workers and their families some transition time to adjust to the prospective loss of employment, to seek and obtain alternative jobs and, if necessary, to enter skill training or retraining that will allow these workers to successfully compete in the job market. WARN also provides for notice to State dislocated worker units so that dislocated worker assistance can be promptly provided.

(b) *Scope of these regulations.* These regulations establish basic definitions and rules for giving notice, implementing the provisions of WARN. The Department's objective is to establish clear principles and broad guidelines which can be applied in specific circumstances. However, the Department recognizes that Federal rulemaking cannot address the multitude of industry and company-specific situations in which advance notice will be given.

(c) *Notice encouraged where not required.* Section 7 of the Act states:

> It is the sense of Congress that an employer who is not required to comply with the notice requirements of section 3 should, to the extent possible, provide notice to its employees about a proposal to close a plant or permanently reduce its workforce.

(d) *WARN enforcement.* Enforcement of WARN will be through the courts, as provided in section 5 of the statute. Employees, their representatives and units of local government may initiate civil actions against employers believed to be in violation of § 3 of the Act. The Department of Labor has no legal standing in any enforcement action and, therefore, will not be in a position to issue advisory opinions of specific cases. The Department will provide assistance in understanding these regulations and may revise them from time to time as may be necessary.

(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.

(f) *Coordination with job placement and retraining programs.* The Department, through these regulations and through the Trade Adjustment Assistance Program (TAA) and Economic Dislocation and Worker Adjustment Assistance Act (EDWAA) regulations, encourages maximum coordination of the actions and activities of these programs to assure that the negative impact of dislocation on workers is lessened to the extent possible. By providing for notice to the State dislocated worker unit, WARN notice begins the process of assisting workers who will be dislocated.

(g) *WARN not to supersede other laws and contracts.* The provisions of WARN do not supersede any laws or collective bargaining agreements that provide for additional notice or additional rights and remedies. If such law or agreement provides for a longer notice period, WARN notice shall run concurrently with that additional notice period. Collective bargaining agreements may be used to clarify or amplify the terms and conditions of WARN, but may not reduce WARN rights.

§ 639.2 What does WARN require?

WARN requires employers who are planning a plant closing or a mass layoff to give affected employees at least 60 days' notice of such an employment action. While the 60-day period is the minimum for advance notice, this provision is not intended to discourage employers from voluntarily providing longer periods of advance notice. Not all plant closings and layoffs are subject to the Act, and certain employment thresholds must be reached before the Act applies. WARN sets out specific exemptions, and provides for a reduction in the notification period in particular circumstances. Damages and civil penalties can be assessed against employers who violate the Act.

§ 639.3 Definitions.

(a) *Employer.* (1) The term "employer" means any business enterprise that employs—

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

(ii) 100 or more employees, including part-time employees, who in the aggregate work at least 4,000 hours per week, exclusive of hours of overtime.

Workers on temporary layoff or on leave who have a reasonable expectation of recall are counted as employees. An 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 to a similar job. The term "employer" includes non-profit organizations of the requisite size. Regular Federal, State, local and federally recognized Indian tribal governments are not covered. However, the term "employer" includes public and quasi-public entities which engage in business (i.e., take part in a commercial or industrial enterprise, supply a service or good on a mercantile basis, or provide independent management of public assets, raising revenue and making desired investments), and which are separately organized from the regular government, which have their own governing bodies and which have independent authority to manage their personnel and assets.

(2) Under existing legal rules, independent contractors and subsidiaries which are wholly or partially owned by a parent company are treated as separate employers or as a part of the parent or contracting company depending upon the degree of their independence from the parent. Some of the factors to be considered in making this determination are (i) common ownership, (ii) common directors and/or officers, (iii) de facto exercise of control, (iv) unity of personnel policies emanating from a common source, and (v) the dependency of operations.

(3) Workers, other than part-time workers, who are exempt from notice under section 4 of WARN are nonetheless counted as employees for purposes of determining coverage as an employer.

(4) An employer may have one or more sites of employment under common ownership or control. An example would be a major auto maker which has dozens of automobile plants throughout the country. Each plant would be considered a site of employment, but there is only one "employer", the auto maker.

(b) *Plant closing.* The term "plant closing" means the permanent or temporary shutdown of a "single site of employment", or one or more "facilities or operating units" within a single site of employment, if the shutdown results in an "employment loss" during *any 30-day period* at the single site of employment for *50 or more* employees, excluding any part-time employees. An employment action that results in the effective cessation of production or the work performed by a unit, even if a few employees remain, is a shutdown. A "temporary shutdown" triggers the notice requirement only if there are a sufficient number of terminations, layoffs exceeding 6 months, or reductions in hours of work as specified under the definition of "employment loss."

(c) *Mass layoff.* (1) The term "mass layoff" means a reduction in force which first, is not the result of a plant closing, and second, results in an employment loss at the single site of employment during *any 30-day period* for:

(i) *At least 33 percent* of the active employees, excluding part-time employees, and

(ii) *At least 50 employees*, excluding part-time employees.

Where 500 or more employees (excluding part-time employees) are affected, the 33% requirement does not apply, and notice is required if the other criteria are met. Plant closings involve employment loss which results from the shutdown of one or more distinct units within a single site or the entire site. A mass layoff involves employment loss, regardless of whether one or more units are shut down at the site.

(2) Workers, other than part-time workers, who are exempt from notice under section 4 of WARN are nonetheless counted as employees for purposes of determining coverage as a plant closing or mass layoff. For example, if an employer closes a temporary project on which 10 permanent and 40 temporary workers are employed, a covered plant closing has occurred although only 10 workers are entitled to notice.

(d) *Representative.* The term "representative" means an exclusive representative of employees within the meaning of section 9(a) or 8(f) of the National Labor Relations Act or section 2 of the Railway Labor Act.

(e) *Affected employees.* The term "affected employees" means employees who may reasonably be expected to experience an employment loss as a consequence of a proposed plant closing or mass layoff by their employer. This includes individually identifiable employees who will likely lose their jobs because of bumping rights or other factors, to the extent that such individual workers reasonably can be identified at the time notice is required to be given. The term "affected employees" includes managerial and

supervisory employees, but does not include business partners. Consultant or contract employees who have a separate employment relationship with another employer and are paid by that other employer, or who are self-employed, are not "affected employees" of the business to which they are assigned. In addition, for purposes of determining whether coverage thresholds are met, either incumbent workers in jobs being eliminated or, if known 60 days in advance, the actual employees who suffer an employment loss may be counted.

(f) *Employment loss.* (1) The term "employment loss" means (i) an employment termination, other than a discharge for cause, voluntary departure, or retirement, (ii) a layoff exceeding 6 months, or (iii) a reduction in hours of work of individual employees of more than 50% during each month of any 6-month period.

(2) Where a termination or a layoff (see paragraphs (f)(1)(i) and (ii) of this section) is involved, an employment loss does not occur when an employee is reassigned or transferred to employer-sponsored programs, such as retraining or job search activities, as long as the reassignment does not constitute a constructive discharge or other involuntary termination.

(3) An employee is not considered to have experienced an employment loss if the closing or layoff is the result of the relocation or consolidation of part or all of the employer's business and, prior to the closing or layoff—

(i) The employer offers to transfer the employee to a different site of employment within a reasonable commuting distance with no more than a 6-month break in employment, or

(ii) The employer offers to transfer the employee to any other site of employment regardless of distance with no more than a 6-month break in employment, and the employee accepts within 30 days of the offer or of the closing or layoff, whichever is later.

(4) A "relocation or consolidation" of part or all of an employer's business, for purposes of paragraph § 639.3(h)(4), means that some definable business, whether customer orders, product lines, or operations, is transferred to a different site of employment and that transfer results in a plant closing or mass layoff.

(g) *Unit of local government.* The term "unit of local government" means any general purpose political subdivision of a State, which has the power to levy taxes and spend funds and which also has general corporate and police powers. When a covered employment site is located in more than one unit of local government, the employer must give notice to the unit to which it determines it directly paid the highest taxes for the year preceding the year for which the determination is made. All local taxes directly paid to the local government should be aggregated for this purpose.

(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 "seasonal" employees. The period to be used for calculating whether a worker has worked "an average of fewer than 20 hours per week" is the shorter of the actual time the worker has been employed or the most recent 90 days.

(i) *Single site of employment.* (1) A single site of employment can refer to either a single location or a group of contiguous locations. Groups of structures which form a campus or industrial park, or separate facilities across the street from one another, may be considered a single site of employment.

(2) There may be several single sites of employment within a single building, such as an office building, if separate employers conduct activities within such a building. For example, an office building housing 50 different businesses will contain 50 single sites of employment. The offices of each employer will be its single site of employment.

(3) Separate buildings or areas which are not directly connected or in immediate proximity may be considered a single site of employment if they are in reasonable geographic proximity, used for the same purpose, and share the same staff and equipment. An example is an employer who manages a number of warehouses in an area but who regularly shifts or rotates the same employees from one building to another.

(4) Non-contiguous sites in the same geographic area which do not share the same staff or operational purpose should not be considered a single site. For example, assembly plants which are located on opposite sides of a town and which are managed by a single employer are separate sites if they employ different workers.

(5) Contiguous buildings owned by the same employer which have separate management, produce different products, and have separate workforces are considered separate single sites of employment.

(6) For workers whose primary duties require travel from point to point, who are outstationed, or whose primary duties involve work outside any of the employer's regular employment sites (e.g., railroad workers, bus drivers, salespersons), the single site of employment to which they are assigned as their home base, from which their work is assigned, or to which they report will be the single site in which they are covered for WARN purposes.

(7) Foreign sites of employment are not covered under WARN. U.S. workers at such sites are counted to determine whether an employer is covered as an employer under § 639.3(a).

(8) The term "single site of employment" may also apply to truly unusual organizational situations where the above criteria do not reasonably apply. The application of this definition with the intent to evade the purpose of the Act to provide notice is not acceptable.

(j) *Facility or operating unit.* The term "facility" refers to a building or buildings. The term "operating unit" refers to an organizationally or operationally distinct product, operation, or specific work function within or across facilities at the single site.

(k) *State dislocated worker unit.* The term "State dislocated worker unit" means a unit designated or created in each State by the Governor under Title III of the Job Training Partnership Act, as amended by EDWAA.

(l) *State.* For the purpose of WARN, the term "State" includes the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, and the U.S. Virgin Islands.

§ 639.4 Who must give notice?

Section 3(a) of WARN states that "an employer shall not order a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice of such an order * * *." Therefore, an employer who is anticipating carrying out a plant closing or mass layoff is required to give notice to affected employees or their representative(s), the State dislocated worker unit and the chief elected official of a unit of local government. (See definitions in § 639.3 of this part.)

(a) It is the responsibility of the employer to decide the most appropriate person within the employer's organization to prepare and deliver the notice to affected employees or their representative(s), the State dislocated worker unit and the chief elected official of a unit of local government. In most instances, this may be the local site

plant manager, the local personnel director or a labor relations officer.

(b) An employer who has previously announced and carried out a short-term layoff (6 months or less) which is being extended beyond 6 months due to business circumstances (including unforeseeable changes in price or cost) not reasonably foreseeable at the time of the initial layoff is required to give notice when it becomes reasonably foreseeable that the extension is required. A layoff extending beyond 6 months from the date the layoff commenced for any other reason shall be treated as an employment loss from the date of its commencement.

(c) In the case of the sale of part or all of a business, section 2(b)(1) of WARN defines who the "employer" is. The seller is responsible for providing notice of any plant closing or mass layoff which takes place up to and including the effective date (time) of the sale, and the buyer is responsible for providing notice of any plant closing or mass layoff that takes place thereafter. Affected employees are always entitled to notice; at all times the employer is responsible for providing notice.

(1) If the seller is made aware of any definite plans on the part of the buyer to carry out a plant closing or mass layoff within 60 days of purchase, the seller may give notice to affected employees as an agent of the buyer, if so empowered. If the seller does not give notice, the buyer is, nevertheless, responsible to give notice. If the seller gives notice as the buyer's agent, the responsibility for notice still remains with the buyer.

(2) It may be prudent for the buyer and seller to determine the impacts of the sale on workers, and to arrange between them for advance notice to be given to affected employees or their representative(s), if a mass layoff or plant closing is planned.

§ 639.5 When must notice be given?

(a) *General rule.* (1) With certain exceptions discussed in paragraphs (b), (c) and (d) of this section and in § 639.9 of this part, notice must be given at least 60 calendar days prior to any planned plant closing or mass layoff, as defined in these regulations. When all employees are not terminated on the same date, the date of the first individual termination within the statutory 30-day or 90-day period triggers the 60-day notice requirement. A worker's last day of employment is considered the date of that worker's layoff. The first and each subsequent group of terminees are entitled to a full 60 days' notice. In order for an employer to decide whether issuing notice is required, the employer should—

(i) Look ahead 30 days and behind 30 days to determine whether employment actions both taken and planned will, in the aggregate for any 30-day period, reach the minimum numbers for a plant closing or a mass layoff and thus trigger the notice requirement; and

(ii) Look ahead 90 days and behind 90 days to determine whether employment actions both taken and planned each of which separately is not of sufficient size to trigger WARN coverage will, in the aggregate for any 90-day period, reach the minimum numbers for a plant closing or a mass layoff and thus trigger the notice requirement. An employer is not, however, required under section 3(d) to give notice if the employer demonstrates that the separate employment losses are the result of separate and distinct actions and causes, and are not an attempt to evade the requirements of WARN.

(2) The point in time at which the number of employees is to be measured for the purpose of determining coverage is the date the first notice is required to be given. If this "snapshot" of the number of employees employed on that date is clearly unrepresentative of the ordinary or average employment level, then a more representative number can be used to determine coverage. Examples of unrepresentative employment levels include cases when the level is near the peak or trough of an employment cycle or when large upward or downward shifts in the number of employees occur around the time notice is to be given. A more representative number may be an average number of employees over a recent period of time or the number of employees on an alternative date which is more representative of normal employment levels. Alternative methods cannot be used to evade the purpose of WARN, and should only be used in unusual circumstances.

(b) *Transfers.* (1) Notice is not required in certain cases involving transfers, as described under the definition of "employment loss" at § 639.3(f) of this part.

(2) An offer of reassignment to a different site of employment should not be deemed to be a "transfer" if the new job constitutes a constructive discharge.

(3) The meaning of the term "reasonable commuting distance" will vary with local and industry conditions. In determining what is a "reasonable commuting distance", consideration should be given to the following factors: geographic accessibility of the place of work, the quality of the roads, customarily available transportation, and the usual travel time.

(4) In cases where the transfer is beyond reasonable commuting distance, the employer may become liable for failure to give notice if an offer to transfer is not accepted within 30 days of the offer or of the closing or layoff (whichever is later). Depending upon when the offer of transfer was made by the employer, the normal 60-day notice period may have expired and the plant closing or mass layoff may have occurred. An employer is, therefore, well advised to provide 60-day advance notice as part of the transfer offer.

(c) *Temporary employment.* (1) No notice is required if the closing is of a temporary facility, or if the closing or layoff is the result of the completion of a particular project or undertaking, and the affected employees were hired with the understanding that their employment was limited to the duration of the facility or the project or undertaking.

(2) Employees must clearly understand at the time of hire that their employment is temporary. When such understandings exist will be determined by reference to employment contracts, collective bargaining agreements, or employment practices of an industry or a locality, but the burden of proof will lie with the employer to show that the temporary nature of the project or facility was clearly communicated should questions arise regarding the temporary employment understandings.

(3) Employers in agriculture and construction frequently hire workers for harvesting, processing, or for work on a particular building or project. Such work may be seasonal but recurring. Such work falls under this exemption if the workers understood at the time they were hired that their work was temporary. In uncertain situations, it may be prudent for employers to clarify temporary work understandings in writing when workers are hired. The same employers may also have permanent employees who work on a variety of jobs and tasks continuously through most of the calendar year. Such employees are not included under this exemption. Giving written notice that a project is temporary will not convert permanent employment into temporary work, making jobs exempt from WARN.

(4) Certain jobs may be related to a specific contract or order. Whether such jobs are temporary depends on whether the contract or order is part of a long-term relationship. For example, an aircraft manufacturer hires workers to produce a standard airplane for the U.S. fleet under a contract with the U.S. Air Force with the expectation that its

contract will continue to be renewed during the foreseeable future. The employees of this manufacturer would not be considered temporary.

(d) *Strikes or lockouts.* The statute provides an exemption for strikes and lockouts which are not intended to evade the requirements of the Act. A lockout occurs when, for tactical or defensive reasons during the course of collective bargaining or during a labor dispute, an employer lawfully refuses to utilize some or all of its employees for the performance of available work. A lockout not related to collective bargaining which is intended as a subterfuge to evade the Act does not qualify for this exemption. A plant closing or mass layoff at a site of employment where a strike or lockout is taking place, which occurs for reasons unrelated to a strike or lockout, is not covered by this exemption. An employer need not give notice when permanently replacing a person who is deemed to be an economic striker under the National Labor Relations Act. Non-striking employees at the same single site of employment who experience a covered employment loss as a result of a strike are entitled to notice; however, situations in which a strike or lockout affects non-striking employees at the same plant may constitute an unforeseeable business circumstance, as discussed in § 639.9, and reduced notice may apply. Similarly, the "faltering company" exception, also discussed in § 639.9 may apply in strike situations. Where a union which is on strike represents more than one bargaining unit at the single site, non-strikers includes the non-striking bargaining unit(s). Notice also is due to those workers who are not a part of the bargaining unit(s) which is involved in the labor negotiations that led to the lockout. Employees at other plants which have not been struck, but at which covered plant closings or mass layoffs occur as a direct or indirect result of a strike or lockout are not covered by the strike/lockout exemption. The unforeseeable business circumstances exception to 60 days' notice also may apply to these closings or layoffs at other plants.

§ 639.6 Who must receive notice?

Section 3(a) of WARN provides for notice to each representative of the affected employees as of the time notice is required to be given or, if there is no such representative at that time, to each affected employee. Notice also must be served on the State dislocated worker unit and the chief elected official of the unit of local government within which a closing or layoff is to occur. Section 2(b)(1) of the Act states that "any person who is an employee of the seller (other than a parttime employee) as of the effective date [time] of the sale shall be considered an employee of the purchaser immediately after the effective date [time] of the sale." This provision preserves the notice rights of the employees of a business that has been sold, but creates no other employment rights. Although a technical termination of the seller's employees may be deemed to have occurred when a sale becomes effective, WARN notice is only required where the employees, in fact, experience a covered employment loss.

(a) *Representative(s) of affected employees.* Written notice is to be served upon the chief elected officer of the exclusive representative(s) or bargaining agent(s) of affected employees at the time of the notice. If this person is not the same as the officer of the local union(s) representing affected employees, it is recommended that a copy also be given to the local union official(s).

(b) *Affected employees.* Notice is required to be given to employees who may reasonably be expected to experience an employment loss. This includes employees who will likely lose their jobs because of bumping rights or other factors, to the extent that such workers can be identified at the time notice is required to be given. If, at the time notice is required to be given, the employer cannot identify the employee who may reasonably be expected to experience an employment loss due to the elimination of a particular position, the employer must provide notice to the incumbent in that position. While part-time employees are not counted in determining whether plant closing or mass layoff thresholds are reached, such workers are due notice.

(c) *State dislocated worker unit.* Notice is to be served upon the State dislocated worker unit. Since the States are restructuring to implement training under EDWAA, service of notice upon the State Governor constitutes service upon the State dislocated worker unit until such time as the Governor makes public State procedures for serving notice to this unit.

(d) *Chief elected official of the unit of local government.* The identity of the chief elected official will vary according to the local government structure. In the case of elected boards, the notice is to be served upon the board's chairperson.

§ 639.7 What must the notice contain?

(a) *Notice must be specific.* (1) All notice must be specific.

(2) Where voluntary notice has been given more than 60 days in advance, but does not contain all of the required elements set out in this section, the employer must ensure that all of the information required by this section is provided in writing to the parties listed in § 639.6 at least 60 days in advance of a covered employment action.

(3) 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. For example, if the non-renewal of a major contract will lead to the closing of the plant that produces the articles supplied under the contract 30 days after the contract expires, the employer may give notice at least 60 days in advance of the projected closing date which states that if the contract is not renewed, the plant closing will occur on the projected date. The notice must contain each of the elements set out in this section.

(4) The information provided in the notice shall be based on the best information available to the employer at the time the notice is served. It is not the intent of the regulations, that errors in the information provided in a notice that occur because events subsequently change or that are minor, inadvertent errors are to be the basis for finding a violation of WARN.

(b) As used in this section, the term "date" refers to a specific date or to a 14-day period during which a separation or separations are expected to occur. If separations are planned according to a schedule, the schedule should indicate the specific dates on which or the beginning date of each 14-day period during which any separations are expected to occur. Where a 14-day period is used, notice must be given at least 60 days in advance of the first day of the period.

(c) Notice to each representative of affected employees is to contain:

(1) The name and address of the employment site where the plant closing or mass layoff will occur, and the name and telephone number of a company official to contact for further information;

(2) A statement as to whether the planned action is expected to be permanent or temporary and, if the entire plant is to be closed, a statement to that effect;

(3) The expected date of the first separation and the anticipated schedule for making separations;

(4) The job titles of positions to be affected and the names of the workers currently holding affected jobs.

The notice may include additional information useful to the employees such as information on available dislocated worker assistance, and, if the planned action is expected to be temporary, the estimated duration, if known.

(d) Notice to each affected employee who does not have a representative is to be written in language understandable to the employees and is to contain:

(1) A statement as to whether the planned action is expected to be permanent or temporary and, if the entire plant is to be closed, a statement to that effect;

(2) The expected date when the plant closing or mass layoff will commence and the expected date when the individual employee will be separated;

(3) An indication whether or not bumping rights exist;

(4) The name and telephone number of a company official to contact for further information.

The notice may include additional information useful to the employees such as information on available dislocated worker assistance, and, if the planned action is expected to be temporary, the estimated duration, if known.

(e) The notices separately provided to the State dislocated worker unit and to the chief elected official of the unit of local government are to contain:

(1) The name and address of the employment site where the plant closing or mass layoff will occur, and the name and telephone number of a company official to contact for further information;

(2) A statement as to whether the planned action is expected to be permanent or temporary and, if the entire plant is to be closed, a statement to that effect;

(3) The expected date of the first separation, and the anticipated schedule for making separations;

(4) The job titles of positions to be affected, and the number of affected employees in each job classification;

(5) An indication as to whether or not bumping rights exist;

(6) The name of each union representing affected employees, and the name and address of the chief elected officer of each union.

The notice may include additional information useful to the employees such as a statement of whether the planned action is expected to be temporary and, if so, its expected duration.

(f) As an alternative to the notices outlined in paragraph (e) above, an employer may give notice to the State dislocated worker unit and to the unit of local government by providing them with a written notice stating the name of address of the employment site where the plant closing or mass layoff will occur; the name and telephone number of a company official to contact for further information; the expected date of the first separation; and the number of affected employees. The employer is required to maintain the other information listed in § 639.7(e) on site and readily accessible to the State disclocated worker unit and to the unit of general local government. Should this information not be available when requested, it will be deemed a failure to give required notice.

§ 639.8 How is the notice served?

Any reasonable method of delivery to the parties listed under § 639.6 of this part which is designed to ensure receipt of notice of least 60 days before separation is acceptable (e.g., first class mail, personal delivery with optional signed receipt). In the case of notification directly to affected employees, insertion of notice into pay envelopes is another viable option. A ticketed notice, i.e., preprinted notice regularly included in each employee's pay check or pay envelope, does not meet the requirements of WARN.

§ 639.9 When may notice be given less than 60 days in advance?

Section 3(b) of WARN sets forth three conditions under which the notification period may be reduced to less than 60 days. The employer bears the burden of proof that conditions for the exceptions have been met. If one of the exceptions is applicable, the employer must give as much notice as is practicable to the union, non-represented employees, the State dislocated worker unit, and the unit of local government and this may, in some circumstances, be notice after the fact. The employer must, at the time notice actually is given, provide a brief statement of the reason for reducing the notice period, in addition to the other elements set out in § 639.7.

(a) The exception under section 3(b)(1) of WARN, termed "faltering company", applies to plant closings but not to mass layoffs and should be narrowly construed. To qualify for reduced notice under this exception:

(1) An employer must have been actively seeking capital or business at the time that 60-day notice would have been required. That is, the employer must have been seeking financing or refinancing through the arrangement of loans, the issuance of stocks, bonds, or other methods of internally generated financing; or the employer must have been seeking additional money, credit, or business through any other commercially reasonable method. The employer must be able to identify specific actions taken to obtain capital or business.

(2) There must have been a realistic opportunity to obtain the financing or business sought.

(3) The financing or business sought must have been sufficient, if obtained, to have enabled the employer to avoid or postpone the shutdown. The employer must be able to objectively demonstrate that the amount of capital or the volume of new business sought would have enabled the employer to keep the facility, operating unit, or site open for a reasonable period of time.

(4) The employer reasonably and in good faith must have believed that giving the required notice would have precluded the employer from obtaining the needed capital or business. The employer must be able to objectively demonstrate that it reasonably thought that a potential customer or source of financing would have been unwilling to provide the new business or capital if notice were given, that is, if the employees, customers, or the public were aware that the facility, operating unit, or site might have to close. This condition may be satisfied if the employer can show that the financing or business source would not choose to do business with a troubled company or with a company whose workforce would be looking for other jobs. The actions of an employer relying on the "faltering company" exception will be viewed in a company-wide context. Thus, a company with access to capital markets or with cash reserves may not avail itself of this exception by looking solely at the financial condition of the facility, operating unit, or site to be closed.

(b) The "unforeseeable business circumstances" exception under section 3(b)(2)(A) of WARN applies to plant closings and mass layoffs caused by business circumstances that were not reasonably foreseeable at the time that 60-day notice would have been required.

(1) An important indicator of a business circumstance that is not reasonably foreseeable is that the circumstance is caused by some sudden, dramatic, and unexpected action or condition outside the employer's control. A principal client's sudden and unexpected termination of a major

contract with the employer, a strike at a major supplier of the employer, and an unanticipated and dramatic major economic downturn might each be considered a business circumstance that is not reasonably foreseeable. A government ordered closing of an employment site that occurs without prior notice also may be an unforeseeable business circumstance.

(2) The test for determining when business circumstances are not reasonably foreseeable focuses on an employer's business judgment. The employer must exercise such commercially reasonable business judgment as would a similarly situated employer in predicting the demands of its particular market. The employer is not required, however, to accurately predict general economic conditions that also may affect demand for its products or services.

(c) The "natural disaster" exception in section 3(b)(2)(B) of WARN applies to plant closings and mass layoffs due to any form of a natural disaster.

(1) Floods, earthquakes, droughts, storms, tidal waves or tsunamis and similar effects of nature are natural disasters under this provision.

(2) To qualify for this exception, an employer must be able to demonstrate that its plant closing or mass layoff is a direct result of a natural disaster.

(3) While a disaster may preclude full or any advance notice, such notice as is practicable, containing as much of the information required in § 639.7 as is available in the circumstances of the disaster still must be given, whether in advance or after the fact of an employment loss caused by a natural disaster.

(4) Where a plant closing or mass layoff occurs as an indirect result of a natural disaster, the exception does not apply but the "unforeseeable business circumstance" exception described in paragraph (b) of this section may be applicable.

§ 639.10 When may notice be extended?

Additional notice is required when the date or schedule of dates of a planned plant closing or mass layoff is extended beyond the date or the ending date of any 14-day period announced in the original notice as follows:

(a) If the postponement is for less than 60 days, the additional notice should be given as soon as possible to the parties identified in § 639.6 and should include reference to the earlier notice, the date (or 14-day period) to which the planned action is postponed, and the reasons for the postponement. The notice should be given in a manner which will provide the information to all affected employees.

(b) If the postponement is for 60 days or more, the additional notice should be treated as new notice subject to the provisions of §§ 639.5, 639.6 and 639.7 of this part. Rolling notice, in the sense of routine periodic notice, given whether or not a plant closing or mass layoff is impending, and with the intent to evade the purpose of the Act rather than give specific notice as required by WARN, is not acceptable.

Signed at Washington, DC this 13th day of April 1989.

Elizabeth Dole,

Secretary of Labor.

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