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Urging Federal Contractors to Violate the WARN Act

Hans A. von Spakovsky

Refusing to follow federal law has become the hallmark of this Administration, but the White House's latest arrogant, unlawful ploy goes even further and may end up costing the American taxpayer a great deal of money.

On September 28, the Office of Management and Budget issued a "guidance" letter that assures defense contractors that the federal government will pay for any legal damages incurred for failing to issue layoff notices related to sequester-induced job losses as required by the Worker Adjustment and Retraining Notification (WARN) Act.[1] Specifically, the guidance states that "any resulting employee compensation costs for WARN Act liability as determined by a court, as well as attorneys' fees and other litigation costs (irrespective of litigation outcome)," will "qualify as allowable costs and be covered by the contracting agency."

In other words, the White House is telling defense contractors that the American taxpayer will compensate them for any liability incurred for *violating* federal law.

This guidance is the second notice issued by the government after defense contractors such as Lockheed Martin and EADS warned of impending layoffs because of automatic spending cuts in the defense budget.[2] However, the guidance is completely silent as to what legal authority enables the Administration to make such a guarantee—and for a good reason: There is none.

An Expensive Proposition. Sending employees layoff notices 60 days before a plant closing or mass layoff is required under the WARN Act,[3] a law that President Barack Obama previously supported. In 2007, when he wanted to amend the WARN Act to force employers to give 90 days' notice, then-Senator Obama said:

> American workers who have committed themselves to their employers expect in return to be treated with a modicum of respect and fairness. Failing to give workers fair warning... ignores their need to prepare for the transition.... Many of these workers support families that are living from pay check to pay check, squeezed by the demands of rising health care costs, the declining value of their homes, and wages that have been stagnant for decades. It adds insult to injury to close a plant without warning employees.[4]

Being shielded from this notice requirement no doubt provides comfort to defense contractors who, according to the law, would otherwise have to issue the notice letters by November 2 (four days before the election) in order to meet the January 2 start date for the spending cuts. Many of the defense contractor employees who would receive WARN notices are located in Virginia, a key battleground state.

Lawsuits related to a failure to meet the 60-day deadline can be very expensive, especially when multiplied by tens of thousands of affected employees, such as the 123,000 employees whom Lockheed CEO Bob Stevens said would receive such notices. Employers who violate the WARN Act are liable to their former employees for "back pay for each day of a violation" and "benefits under

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The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002
(202) 546-4400 | heritage.org

an employee benefit plan," as well as a penalty of $500 for each day that notice has not been sent to the local government where the layoffs will occur.[5]

Defense Cuts Uncertain?

This is not the first time the White House has taken action in order to prevent layoff notices from being issued before the election. The September 28 letter of guarantee refers to a guidance letter released by the Department of Labor (DOL) on July 30.[6] This guidance set out the government's interpretation of the WARN Act and DOL regulations, concluding that it would be "neither necessary nor appropriate" for defense contractors to issue such notices. That guidance claimed that the cuts due for January 2 were technically "uncertain."

But WARN Act regulations require that letters be sent out if layoffs are "reasonably foreseeable" by the employer.[7] The July 30 guidance did not ease the concerns of Lockheed's lawyers, who advised Stevens that the requirement to issue the layoff notices by November 2 was "so clear they believed they were forced to send them out or face legal retribution from employees for not doing so."[8] Based on DOL's regulations, this was sound legal advice.

The government's summer guidance letter specified that in order to avoid any "anxiety" on the part of employees, notices must not be "overbroad." In other words, there must be "specific contract terminations" by the government before layoff notices can be deemed "consistent with the WARN Act." However, the regulations cited in the summer guidance actually state that these notices must be issued to employees "who *may reasonably be expected* to experience an employment loss" and that even if "the employer cannot identify the employee who may reasonably be expected to experience an employment loss...the employer must provide notice."[9]

The summer guidance also instructed defense contractors that since the jobs that will be axed cannot yet be known, they would be exempted from the 60-day notice requirement. Although the guidance refers in part to the regulation's definition of "reasonably foreseeable," that interpretation does not stand up to scrutiny. According to the regulations, the circumstances that make such mass layoffs "foreseeable" are based on whether the employer exercised "commercially reasonable business judgment" that a "similarly situated employer" would make "in predicting the demands of its particular market."

The conclusion reached by Lockheed and other "similarly situated" defense contractors that massive layoffs will occur if the billions of dollars in impending defense spending cuts from the looming sequestration come to pass[10] is certainly a "commercially reasonable" one. Indeed, under these circumstances, a different conclusion would most likely be held to be commercially unreasonable.

These clear and unambiguous regulations explain Lockheed's reluctance to follow the government's initial guidance not to issue the required WARN Act notices. It also explains why Lockheed and the other contractors needed an additional taxpayer-funded indemnification guarantee—which the White

1. Office of Management and Budget, "Memorandum for the Chief Financial Officers and Senior Procurement Executives of Executive Departments and Agencies, Guidance on Allowable Contracting Costs Associated with the Worker Adjustment and Retraining Notification (WARN) Act," September 28, 2012.
2. Susan Crabtree, "Lockheed Says It Won't Issue Layoff Notices," *The Washington Times*, October 1, 2012, http://www.washingtontimes.com/news/2012/oct/1/lockheed-says-it-wont-issue-layoff-notices/?page=all (accessed October 22, 2012).
3. 29 U.S. Code §§ 2101. Employers are also required to send notice to the state and local government "within which such closing or layoff is to occur." 29 U.S. Code § 2102(a)(2).
4. Hearing, *Examining Plant Closings, Focusing on Workers' Rights and the Worker Adjustment and Retraining Notification (WARN) (Public Law 100-379) Act's 20th Anniversary*, Committee on Health, Education, Labor, and Pensions, U.S. Senate, 110th Cong., May 20, 2008, statement by Senator Barack Obama (D–IL), pp. 39–40, http://www.gpo.gov/fdsys/pkg/CHRG-110shrg42628/pdf/CHRG-110shrg42628.pdf (accessed October 24, 2012).
5. 29 U.S. Code § 2104.
6. U.S. Department of Labor, Employment and Training Administration Advisory System, Training and Employment Guidance Letter No. 3-12, July 30, 2012.
7. 20 Code of Federal Regulations § 639.9(b)(1).
8. Crabtree, "Lockheed Won't Send Out Layoff Notices."
9. 20 Code of Federal Regulations § 639.6(b) (emphasis added).
10. While the regulation provides that an employer in exercising its business judgment is "not required...to accurately predict *general* economic conditions that... may affect demand for its products or services" (20 Code of Federal Regulations § 639.9(b)(2); emphasis added), the mandated defense cuts and the looming deadline for sequestration are quite specific, and predicted layoffs based on this event would clearly not constitute a prediction based on far-less-predictable "general economic conditions."

House has now provided—as a way to counter their fears of enormous litigation costs.

Unlawful Guidance. This guarantee is not only unprecedented but also potentially unlawful. The Appropriations Clause of the Constitution states, "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."[11] The federal Antideficiency Act says that an "officer or employee" of the government may not "make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund."[12]

Congress has made no appropriation to reimburse defense contractors for civil liability incurred by them for violating the WARN Act. Appropriations made by Congress for defense contracts to purchase items such as fighter aircraft contain no provision allowing such funds to be used to pay attorneys' fees and any other costs or liability resulting from a defense contractor's not complying with a federal law such as the WARN Act.

Government contractors who rely on this "guarantee" from the White House do so at their peril: If this Administration or a new Administration changes its mind and withdraws the guarantee, those contractors will have no cause of action against the government for the cost of WARN Act violations. In *OPM v. Richmond*, the Supreme Court considered "whether erroneous oral and written advice given by a Government employee to a benefits claimant may give rise to estoppel against the Government and so entitle the claimant to a monetary payment not otherwise permitted by law." The Court held that "payments of money from the Federal Treasury are limited to those authorized by statute" and that estoppel could not be asserted against the federal government to collect funds that had not been appropriated for that purpose.[13]

Abuse of Authority. Whatever the reason, the Administration has issued an interpretation of the WARN Act that is contrary to the law and provides a financial guarantee that is not authorized under federal law. This is the ultimate abuse of the President's executive authority: inducing federal contractors to violate a federal law and promising to use taxpayer funds to reimburse them for any resulting liability that they incur for violating that law.

*—**Hans A. von Spakovsky** is a Senior Legal Fellow in the Center for Legal & Judicial Studies at The Heritage Foundation.*

11. U.S. Const. art. I, § 9, cl. 7.
12. 31 U.S. Code § 1341.
13. *OPM v. Richmond*, 496 U.S. 414, 416–417 (1990).