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TO: STATE WORKFORCE AGENCIES
STATE WORKFORCE ADMINISTRATORS
STATE WORKFORCE LIAISONS

FROM: JANE OATES
Assistant Secretary

SUBJECT: Guidance on the Applicability of the Worker Adjustment and Retraining Notification (WARN) Act, 29 U.S.C., 2101-2109, to layoffs that may occur among Federal Contractors, including in the Defense Industry as a Result of Sequestration

1. Purpose. To provide guidance to grantees, and particularly State Dislocated Worker Units, on the applicability of the Worker Adjustment and Retraining Notification (WARN) Act, 29 U.S.C., 2101-2109, to layoffs that may occur among Federal contractors, including in the defense industry, as a result of the sequestration mandated by the Balanced Budget and Emergency Deficit Control Act of 1985 (BBEDCA), as amended by the Budget Control Act of 2011 (BCA), 2 U.S.C. 901a(7)(A) and (8).

2. References.

- Worker Adjustment and Retraining Notification Act, 29 U.S.C., 2101-2109;
- Worker Adjustment and Retraining Notification Act Regulations, 20 CFR Part 639;
- The Balanced Budget and Emergency Deficit Control Act of 1985 (BBEDCA), as amended by the Budget Control Act of 2011 (BCA), 2 U.S.C. 901a(7)(A) and (8); and
- Workforce Investment Act, title I, 29 U.S.C. 2801 – 2945.

3. Background. Questions have recently been raised as to whether the WARN Act requires Federal contractors—including, in particular, contractors of the Department of Defense (DOD)—whose contracts may be terminated or reduced in the event of sequestration on January 2, 2013, to provide WARN Act notices 60 days before that date to their workers employed under government contracts funded from sequestrable accounts. The answer to this question is "no." In fact, to provide such notice would be inconsistent with the purpose of the WARN Act. This guidance provides clarity about the WARN Act responsibilities of Federal contractors and is intended to prevent the inefficient use of resources that are deployed in response to WARN Act notices.

RESCISSIONS	EXPIRATION DATE
None	Continuing

BBEDCA, as amended by the BCA, requires that the President issue a sequestration order on January 2, 2013, that reduces non-exempt defense and non-exempt non-defense accounts by a uniform percentage. 2 U.S.C. 901a(7)(A) and (8). The Congressional Budget Office has estimated that base defense discretionary spending would be cut by approximately 10 percent while non-defense discretionary spending would be cut by almost 8 percent. Members of both Congress and the Administration have stated that their goal is to avoid the sequester[1], and the Office of Management and Budget has not directed Federal agencies to begin planning for the specific manner in which they will operate were sequestration to occur.

4. WARN Act. "The purpose of [the] WARN Act [is] to provide notice to workers so alternative employment or necessary training can be obtained on a timely basis." 53 Fed. Reg. 49078 (Dec. 5, 1988). Generally, the WARN Act requires employers with at least 100 employees to provide written notice at least 60 days before ordering a plant closing or mass layoff to: "affected employees" – either through notice to their representative, or to each affected employee if the employees are not represented; to the state entity designated to provide rapid response activities under the Workforce Investment Act; and to the local government. 29 U.S.C. 2102(a). A "plant closing" or a "mass layoff" is defined in terms of numbers of workers at a single site of employment who suffer an "employment loss." *Id.* § 2101(a)(2) and (3). "Affected employees" are 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." *Id.* § 2101(a)(5). An "employment loss" is defined as a termination from employment other than a termination for cause, voluntary departure, or retirement; a layoff for more than 6 months; or a reduction in hours of more than 50 percent in each month of a 6-month period. *Id.* § 2101(a)(6). These statutory provisions demonstrate that the WARN Act is designed to require employers to provide notice to those workers who are reasonably likely to lose their jobs or suffer other serious employment consequences, but not to those workers who will suffer no such consequences or who have only a speculative chance of suffering them.

The WARN Act regulations require a WARN Act notice to contain specific information. 20 C.F.R. 639.7. Notices to the State Dislocated Worker Unit must contain the following information in writing: (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 (within 14 days) of the first separation, and the anticipated schedule for making

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[1] See Letter from Acting Director Jeffrey D. Zients, Office of Management and Budget, to Chairman Paul Ryan, Committee on the Budget, U.S. House of Representatives, May 25, 2012 ("The President has made clear that Congress should act to avoid [the] sequester.... I urge the Congress to enact bipartisan balanced deficit reduction legislation that the President can sign into law and avoid the sequestration scheduled to take place on January 2."); Controller Danny Werfel, Office of Management and Budget, Testimony Before the Committee on the Budget, U.S. House of Representatives, Apr. 25, 2012 (noting that "[t]he Administration has repeatedly provided a blueprint for Congress to avoid the sequester while meeting the nation's fiscal challenges"); and Letter from Committee Ranking Members, U.S. House of Representatives, to Speaker John Boehner and Committee Chairs, U.S. House of Representatives, July 25, 2012 (requesting "immediate negotiations...on replacing the scheduled 2013 sequester with a balanced deficit reduction plan. We all agree that a sequester starting in January, 2013 is not in the country's best interest and is not the best way to assure responsible deficit reduction.").

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; and (6) The name of each union representing affected employees, and the name and address of the chief elected officer of each union. 20 CFR 639.7(e) and (f).

The WARN regulations recognize that an employer may not always know exactly which workers will suffer an employment loss 60 days before it orders a plant closing or mass layoff. This could occur, for example, because employee bumping rights make it difficult to predict exactly which workers will lose their jobs or because circumstances make accurate prediction 60 days in advance difficult. Although some commenters sought to have the final regulations allow broad notice in situations like these, the Department rejected these suggestions, and the final regulations provide for a more focused notice. 54 Fed. Reg 16042, 16046, 16047 (April 20, 1989). Indeed, in the preamble to the WARN final rule, the Department agreed with a comment that stated that "Congress clearly condemned" "overbroad notice." *Id.* at 16046. In addition, the preamble states that "it is not appropriate for an employer to provide blanket notice to workers." *Id.* at 16058. Thus, in cases where it may be difficult to identify the worker who will actually lose his/her job because of the elimination of a particular position, the regulations provide that notice must be given to the worker who holds that position at the time notice is provided. 20 CFR 639.6(b).

The WARN Act and regulations also recognize that there may be situations in which an employer cannot give 60 days advance notice. The Act lists three situations in which notice may be given fewer than 60 days before a plant closing or mass layoff will occur. These exceptions are referred to as the faltering company, unforeseeable business circumstances, and natural disaster exceptions. 29 U.S.C. 2102(b). Of these three exceptions, the unforeseeable business circumstances exception is the one that would apply to plant closings or mass layoffs occurring before or in the wake of the potential sequestration on January 2,. The unforeseeable business circumstances exception occurs when "the closing or mass layoff is caused by business circumstances that were not reasonably foreseeable as of the time that notice would have been required." 29 U.S.C. 2102(b)(2).

The WARN regulations expand on the definition of unforeseeable business circumstances. Section 639.9(b)(1) states that an important indicator of whether a circumstance was reasonably foreseeable is if it was "caused by some sudden, dramatic, and unexpected action or condition outside the employer's control." 20 C.F.R. 639.9(b)(1).

5. <u>Application of WARN Act to Potential Sequestration</u>. Although it is currently known that sequestration may occur, it is also known that efforts are being made to avoid sequestration.[2] Thus, even the occurrence of sequestration is not necessarily foreseeable. In addition, the sequester's impact on particular accounts will depend at least in part on Fiscal Year (FY) 2013 funding that Congress has not yet enacted. Perhaps more importantly, Federal agencies also have some discretion in how to implement the required reductions if sequestration were to occur. Given that Federal agencies, including DOD, have not announced which contracts will be affected by sequestration were it to occur, and that many contracts may be completely unaffected,

2 See footnote 1.

the actual contract terminations or cutbacks that will occur in the event of sequestration are unknown. Thus, in the absence of any additional information, potential plant closings or layoffs resulting from such contract terminations or cutbacks are speculative and unforeseeable.

If Federal agencies announce before January 2, or in the wake of sequestration, specific contract terminations or cutbacks that will require contractors to lay off or separate their employees in less than 60 days, such Federal announcements would be sudden and dramatic, and in such cases, consistent with the WARN Act, employers will not have to provide the full period of notice. Many such Federal agency decisions may also occur later than January 2, as these agencies, including DOD, will need time to determine how to operate ongoing programs, projects, and activities for the remainder of FY 2013 within the constraints of any sequestration order. BBEDCA itself recognizes that agencies will need substantial time to implement a sequester and determine its effects on specific programs, providing that "[a]dministrative regulations or similar actions implementing a sequestration shall be made within 120 days of the sequestration order." 2 U.S.C. 956(k)(3). In such instances, contractors' obligation to provide notices under the WARN Act would not be triggered until the specific closings or mass layoffs are reasonably foreseeable, pursuant to the statutory and regulatory standards discussed above.

Furthermore, while the nature of the cause of the business circumstance is an important indicator, the test for unforeseeability is whether an employer exercised "commercially reasonable business judgment as would a similarly situated employer in predicting the demands of its particular market." 20 C.F.R. § 639.9(b)(2). It is unlikely that employers will have enough information to predict which contracts will be affected and therefore which plants could close and which groups of employees could experience employment losses at least without additional information about FY 2013 funding (which has not yet been enacted) and how agencies will operate within the constraints of a January 2 sequestration order (should one have to be issued) for the remainder of FY 2013. Where, as here, employers now have virtually no information from which to determine whether their contracts will be affected, there is no basis on which to form a business judgment.

Nor is blanket notice consistent with one of the most important purposes of the WARN Act. The WARN Act is intended to provide notice to workers who are reasonably expected to be affected by a plant closing or mass layoff so that they can have an opportunity to obtain a new job or at least lessen the impact of the employment loss that they will suffer. That is why the WARN Act requires that notice be given to the state or the State Dislocated Worker Unit. 29 U.S.C. 2102(a)(2). In turn, the Workforce Investment Act (WIA), 29 U.S.C. 2801 *et seq.*, requires states to provide statewide rapid response activities. 29 U.S.C. 2864(a)(2)(A)(i). WIA defines rapid response activity to include "the establishment of onsite contact with employers and employee representatives – (i) immediately after the state is notified of a current or projected permanent closure or mass layoff." 29 U.S.C. 2801(38)(A)(i). Thus, WARN Act notice initiates the state's rapid response and gives workers the opportunity to learn about and access services which can lessen the effects of losing their jobs or suffering long layoffs or reductions in hours and can help them find new employment. To give notice to workers who will not suffer an employment loss both wastes the states' resources in providing rapid response activities where none are needed and creates unnecessary uncertainty and anxiety in workers. Both of those effects are inconsistent with the WARN Act's intent and purpose.

Moreover, as noted above, pursuant to 20 CFR 639.7, a notice to State Dislocated Worker Units must contain several pieces of specific information to satisfy the WARN Act, including the name and address of the specific employment site where the plant closing or mass layoff will occur, the expected date (within 14 days) of the first separation, and the job titles of positions to be affected. For the reasons stated above, it is extremely unlikely that employers will have the information required by 20 CFR 639.7 prior to a possible sequestration (let alone 60 days prior to a possible sequestration). Therefore, even if a Federal contractor were to send out generalized notices indicating that sequestration may lead to layoffs, it is unlikely that any notices received by state units before that date would be legally compliant WARN Act notices, and additional notifications would likely be required for employers to comply with the WARN Act if and when the employer does have the requisite information.

Finally, relevant case law indicates that under the current circumstances Federal contractors, including defense contractors, are not obligated to provide WARN Act notifications 60 days before the date of the BCA sequestration order. *See Halkias v. Gen. Dynamics Corp.*, 137 F.3d 333 (5th Cir. 1998). In *Halkias*, the court upheld summary judgment for the employer finding that when (1) the employer was aware of three possible outcomes - restructuring of the contract, cancellation of the contract, or default and (2) the Department of Defense continued to express support for the A-12 Avenger II fighter-bomber program, the WARN Act's unforeseen business exception applied "probably until the last minute" before the contract was canceled. *Halkias*, 137 F.3d at 337. The Eighth Circuit came to the same conclusion in evaluating the totality of the circumstances around the cancellation of another employer's A-12 contract. *Loehrer v. McDonnell Douglas Corp.*, 98 F.3d 1056, 1062 (8th Cir. 1996). As long as the likelihood and timing of contract cancellation remains speculative, an employer is not obligated to provide WARN notifications. *See Halkias*, 137 F.3d at 337.

For these reasons, in the context of prospective across-the-board budget cuts under the BBEDCA, as amended by the BCA, WARN Act notice to employees of Federal contractors, including in the defense industry, is not required 60 days in advance of January 2, 2013, and would be inappropriate, given the lack of certainty about how the budget cuts will be implemented and the possibility that the sequester will be avoided before January.

6. Action Requested. States are requested to distribute this information to the appropriate state and local staff.

7. Inquiries. Questions about this guidance should be directed to Ms. Ceola Coles, Employment and Training Administration, Office of National Response, at 202-693-3519 or coles.ceola@dol.gov.