

STATUTE OF LIMITATIONS FOR EMPLOYEE ACTIONS UNDER THE WORKER ADJUSTMENT AND RETRAINING NOTIFICATION ACT

INTRODUCTION

The sudden termination of a company's operations results in devastating losses to the affected employees and their communities.¹ An unexpected plant closing hinders the workers' ability to obtain alternative employment² and burdens state welfare systems.³ In 1988, Congress responded to these concerns by enacting the Worker Adjustment and Retraining Notification Act (WARN).⁴ WARN requires an employer⁵ to provide its

1. *Economic Dislocation and Worker Adjustment Assistance Act: Hearings on S. 538 Before the Subcomm. on Labor Management Relations of the Senate Labor and Human Resources Comm.*, 100th Cong., 1st Sess. 1 (1987) (statement of Owen Beiber, President, International Union, UAW); 133 CONG. REC. E2443 (daily ed. July 14, 1988) (statement of Rep. Murphy); 134 CONG. REC. 15,765 (1988) (statement of Sen. Metzenbaum); ANTOINE ABOUD, NEW YORK STATE SCHOOL OF INDUSTRIAL AND LABOR RELATIONS AT CORNELL UNIVERSITY, *PLANT CLOSING LEGISLATION*, at v (1984).

2. *Effectiveness of the Worker Adjustment and Retraining Notification Act: Hearings Before the Senate Comm. on Labor and Human Resources*, 103d Cong., 1st Sess. 7 (1993) (statement of Linda Morra, General Accounting Office) [hereinafter *Effectiveness of WARN*]. Employees often fail to seek alternative employment when their employer closes its business without providing advance notice. *Id.*

3. See ABOUD, *supra* note 1, at v.

4. 29 U.S.C. §§ 2101-2109 (Supp. 1993). The stated purpose of WARN is to provide "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 on the job market." 20 C.F.R. § 639.1(a) (1993). See generally T.S. Lough, *WARN: The Rights, Duties and Obligations of Employers, Employees and Unions*, 42 LAB. L.J. 285 (1991) (discussing the legislative history of WARN); John O'Connor, *Employers Be Forewarned: An Employer's Guide to Plant Closing and Layoff Decisions After the Enactment of the Worker Adjustment and Retraining Notification Act*, 16 OHIO N.U. L. REV. 19 (1989) (providing

workers with written notice at least sixty days prior to shutting down a plant⁶ or instituting a mass layoff.⁷ Section 5 of the Act allows employees to file suit in federal district court if their employer fails to adhere to the advance notice requirement.⁸

Thus far, employees have invoked WARN sparingly,⁹ but several recent developments suggest that the number of lawsuits under WARN will increase in the near future. Almost 7000

guidance in meeting the requirements of WARN to lawyers representing management); Howard Weg, *Introduction to Federal Regulation of Plant Closings and Mass Layoffs*, 94 *COM. L.J.* 123 (1989) (interpreting each provision of WARN in accordance with the regulations promulgated by the Department of Labor).

5. WARN defines an "employer" as "any business enterprise that employs 100 or more employees, excluding part-time employees; or 100 or more employees who in the aggregate work at least 4000 hours per week (exclusive of hours of overtime)."

WARN § 2(a)(1), 29 U.S.C. § 2101(a)(1) (1988).

6. Plant closings covered by WARN include:

[T]he 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 at the single site of employment during any 30-day period for 50 or more employees excluding any part-time employees.

WARN § 2(a)(2), 29 U.S.C. § 2101(a)(2). The phrase "single site of employment" replaced "place of employment," which appeared in the original bill. The change was intended to clarify that separate operations "are not to be combined when determining whether the employment threshold for triggering the notice requirement is met." H.R. REP. No. 576, 100th Cong., 2d Sess. 1046 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2078, 2079.

7. WARN defines a "mass layoff" as:

[A] reduction in force which —

(A) is not the result of a plant closing; and

(B) results in an employment loss at the single site of employment during any 30-day period for —

(i) (I) at least 33 percent of the employees (excluding any part-time employees); and

(II) at least 50 employees (excluding any part-time employees); or

(ii) at least 500 employees.

WARN § 2(a)(3), 29 U.S.C. § 2101(a)(3).

8. Section 5 of WARN states:

A person seeking to enforce such liability, including a representative of employees or a unit of local government aggrieved under paragraph (1) or (3), may sue either for such person or for other persons similarly situated, or both, in any district court of the United States for any district in which the violation is alleged to have occurred, or in which the employer transacts business.

WARN § 5(a)(5), 29 U.S.C. § 2104(a)(5).

9. As of September 1993, 94 lawsuits had been filed under WARN. *Daily Lab. Rep.* (BNA) No. 196, at D-8 (Oct. 13, 1993).

plants closed in 1990 and 1991 alone,¹⁰ but less than 10% of the affected workers received advance notice.¹¹ Studies attribute the scarcity of lawsuits in part to the fact that most employees lack knowledge of their WARN rights.¹² Recently, Congress agreed to consider implementing a program to educate workers about WARN.¹³ In 1993, members of Congress introduced bills to amend WARN by broadening the Act's coverage¹⁴ and increasing the damages available to employees.¹⁵ Also, courts have interpreted the existing damage provision favorably to employees.¹⁶ A combination of these factors indicates that employees will soon bring more WARN suits in federal courts.

As WARN suits become more common, various aspects of the Act will likely require judicial interpretation. This Recent Development addresses Congress's failure to provide a statute of limitations for suits alleging violation of the advance notice

10. See *Effectiveness of WARN*, *supra* note 2, at 3.

11. Daily Lab. Rep. (BNA) No. 151, at D-10 (Aug. 3, 1993).

12. See *Effectiveness of WARN*, *supra* note 2, at 15.

13. *Id.* at 2. The education proposal was submitted to the Senate Committee on Labor Management Relations by Julie Hurwitz, Executive Director, Sugar Law Center for Economic and Social Justice. *Id.* at 8.

14. On May 27, 1993, Rep. Ford (D-Mich.) introduced a bill (H.R. 2300) which would extend WARN's notification period from 60 to 180 days. Daily Lab. Rep. (BNA) No. 103, at D-22 (June 1, 1993). Currently, WARN requires advance notification of a mass layoff when there is an employment loss for 33% of employees and at least 50 workers, or for at least 500 employees. WARN § 2(a)(3), 29 U.S.C. § 2101(a)(3). Representative Ford's bill would eliminate the 33% requirement and lower the layoff threshold from 50 to 25 workers. Daily Lab. Rep. No. 103, *supra*. The bill would also afford the Labor Department the power to sue to enforce WARN. *Id.*

In a draft proposal distributed to employment lawyers and members of Congress, the Department of Labor favored changes to WARN. Daily Lab. Rep. (BNA) No. 175, at D-9 (Sept. 13, 1993). One of the changes advocated by the Department of Labor was to lower the employee threshold in a manner similar to that proposed by Rep. Ford. *Id.* Senator Howard Metzenbaum is presently drafting legislation to make WARN more effective. *Id.*

15. Pursuant to Rep. Ford's bill, attorney's fees would be mandatory for prevailing plaintiffs. Daily Lab. Rep. No. 103, *supra* note 14.

16. See *United Steelworkers of Am. v. North Star Steel Co.*, 5 F.3d 39 (3d Cir. 1993). The court determined that an employer that laid off its employees in violation of WARN is liable for back pay to each aggrieved employee for each day of the violation, regardless of whether or not that day would have been a regular work day for that employee. *Id.* at 42-43. The court also held that successful employees should recover attorney's fees from their employer unless special circumstances render such an award unjust. *Id.* at 44. The court rejected the employer's argument that WARN allows employees to recover attorney's fees only when the employer litigates in bad faith. *Id.* See also *Solberg v. Inline Corp.*, 740 F. Supp. 680, 687 (D. Minn. 1990) (holding that an employer that successfully defended a WARN suit could not collect attorney's fees from its former employees because the suit was not frivolous, baseless, or unreasonable).

requirement. In the first federal court of appeals decision to rule on the appropriate statute of limitations,¹⁷ the Second Circuit in *United Paperworkers International Union Local 340 v. Specialty Paperboard, Inc.*¹⁸ held that the limitation period governing state contract actions applies to WARN.¹⁹

Part I of this Recent Development describes the history and parameters of WARN. Part II discusses the means by which federal courts generally determine the statute of limitations for federal laws which provide no specific limitation period. Part III explains the Second Circuit's decision in *Specialty Paperboard*. Part IV analyzes the Second Circuit's decision and concludes that the court incorrectly applied a state statute of limitations for the federal cause of action under section 4 of WARN. Part V proposes a congressional amendment to WARN that adopts a three-year limitation period in accordance with the Employee Retirement Income Security Act (ERISA),²⁰ a statute which is similar to WARN.

I. PARAMETERS AND HISTORY OF WARN

Historically, the common law employment at will doctrine afforded employers the absolute right to close a factory.²¹ In 1935, Congress enacted the National Labor Relations Act (NLRA),²² which provided two potential sources for restraining an employer's ability to cease operations. First, section 8(a)(3) prohibits the termination of employees to discourage union activity.²³ Second, section 8(a)(5) requires employers to bargain with unions regarding the terms and conditions of employment.²⁴

17. *United Paperworkers Int'l Union Local 340 v. Specialty Paperboard, Inc.*, 999 F.2d 51 (2d Cir. 1993). The court explained that no court of appeals had decided the issue. *Id.* at 54.

Several district courts have addressed the issue, with varying results. *Compare Automobile Mechanics' Local No. 701 v. Santa Fe Terminal Services, Inc.*, 830 F. Supp. 432, 437 (N.D. Ill. 1993) (rejecting the NLRA statute of limitations for WARN actions but refusing to rule on the appropriate limitation period); *Frymire v. Ampex Corp.*, 821 F. Supp. 651, 654-55 (D. Colo. 1993) (applying a state contract statute of limitations to WARN); *Wallace v. Detroit Coke Corp.*, 818 F. Supp. 192, 196 (E.D. Mich. 1993) (applying six-year state contract statute of limitations to WARN and finding the six-month statute of limitations provided by the NLRA inapplicable); *with Staudt v. Glastron, Inc.*, 1993 WL 85356, at *2 (W.D. Tex. Feb. 23, 1993) (holding that the NLRA statute of limitations governs WARN); *Newspaper & Mail Deliverers' Union v. United Magazine Co.*, 809 F. Supp. 185, 191 (E.D.N.Y. 1992) (same).

18. 999 F.2d 51 (2d Cir. 1993).

19. *Id.* at 57.

20. 29 U.S.C. §§ 1001-1461 (1988 & Supp. IV 1992).

21. See FRANCIS A. O'CONNELL, JR., *PLANT CLOSINGS* 1 (1986).

22. 29 U.S.C. §§ 151-169 (1988).

23. *Id.* § 158(a)(3).

24. *Id.* § 158(a)(5).

The United States Supreme Court interpreted these provisions as offering only limited protection from plant closings. In *Textile Workers v. Darlington Manufacturing Co.*,²⁵ the Court held that an employer may close its entire business without violating section 8(a)(3), even if motivated solely by anti-union considerations.²⁶ In *First National Maintenance Corp. v. NLRB*,²⁷ the Court held that section 8(a)(5) does not require an employer to bargain with a union regarding the decision to close a plant.²⁸ The Supreme Court's interpretations of the NLRA rendered the Act fairly ineffective in altering an employer's common-law right to terminate a factory's operations.

Plant closing legislation failed to gain majority support in every session of Congress from 1973 to 1987.²⁹ In 1985, the

25. 380 U.S. 263 (1965).

26. *Id.* at 269-70. The Court explained that an employer's decisions concerning the closing or relocation of its operations are so peculiarly matters of management prerogative that such decisions are not unfair labor practices under § 8(a)(3). The *Darlington* decision, however, is limited to complete closings. *Id.* at 275. The Court noted a partial plant closing may constitute a violation of § 8(a)(3), and promulgated a list of controlling standards to determine if a less than complete shutdown unlawfully discriminates against union employees. *Id.* at 275-76. The primary factors to be considered are:

[Whether] the persons having control over a plant being closed for anti-union reasons (1) have an interest in another business, whether or not affiliated with or engaged in the same line of commercial activity as the closed plant, or sufficient substantiality to give promise of their reaping a benefit from the discouragement of unionization in that business; (2) act to close their plant with the purpose of producing such a result; and (3) occupy a relationship to the other business which makes it realistically foreseeable that its employees will fear that such business will also be closed down if they persist in organizational activities.

Id. Cf. *Illinois Coil Spring Co., Milwaukee Spring Div. (Milwaukee Spring II)*, 268 N.L.R.B. 601 (1984) (holding that an employer's transfer of work to another plant, to other employees within the same plant, or to a subcontractor is not necessarily a violation of the NLRA).

27. 452 U.S. 666 (1981).

28. *Id.* at 686. The Court explained that the decision to terminate operations is similar to the decision whether to go into business at all. *Id.* The Court analogized the case to *Darlington*. *Id.* See *supra* note 25 and accompanying text for a discussion of *Darlington*. See also *Dubuque Packing Co. II*, 303 N.L.R.B. 386 (1991) (holding that, in some cases, an employer is required to bargain over the decision to relocate work). See generally THE DEVELOPING LABOR LAW 859-61 (Patrick Hardin et al. eds., 3d ed. 1992) (summarizing *First Nat'l Maint. Corp. v. NLRB*); WAYNE R. WENDLING, THE PLANT CLOSURE POLICY DILEMMA: LABOR, LAW AND BARGAINING 77-99 (1984) (proposing that an employer should be required to inform the NLRB prior to ordering a plant closing and the employer should be obligated to bargain with a union if the Board determines that the reasons for the closure are such that collective bargaining may be beneficial).

29. See BUREAU OF NATIONAL AFFAIRS, PLANT CLOSINGS: THE COMPLETE

House of Representatives defeated a bill which attempted to overrule *First National Maintenance* by requiring employers to bargain with employees before closing a plant.³⁰ In 1987, the Senate Labor Committee introduced a bill requiring employers to provide three to six months advance notice of plant closings.³¹ The Senate included the proposal in the Omnibus Trade and Competitiveness Act, which President Reagan vetoed.³² In 1988,

RESOURCE GUIDE 1 (1988) [hereinafter BUREAU OF NATIONAL AFFAIRS]. The first major piece of federal legislation offered to regulate an employer's right to close a plant was proposed by former Senator Walter Mondale in 1973. 134 CONG. REC. 15,760 (1988) (statement of Sen. Hatch). The bill presented by Sen. Mondale would have established a National Employment Relocation Administration to oversee changes in business operations in the United States. *Id.* at 15,760-61. The Mondale bill required employers with more than 50 employees to provide workers 2 years advance notice of the employer's intent to close a plant or transfer work. *Id.* at 15,761.

Several states have successfully enacted plant closing legislation. See CONN. GEN. STAT. ANN. § 31-51o (West 1987) (covering companies with 100 or more employees and requiring employers to pay for the continuation of existing group health insurance for terminated employees); HAW. REV. STAT. § 39413-9 (Supp. 1992) (mandating 45 days written advance notice of plant closing, partial closing, or relocation to each affected employee and the director of labor relations for employers with 50 or more employees); ME. REV. STAT. ANN. tit. 26, § 625-B (1988 & West Supp. 1993) (requiring employers with at least 100 employees to provide 60 days advance notice and severance pay to any employee with three or more years of service); MASS. ANN. LAWS ch. 151A, §§ 71A-71G (Law. Co-op. 1989) (providing voluntary advance notice of a plant closing or layoff to the director of the division of employment security); MICH. COMP. LAWS ANN. § 450.736 (West 1990) (encouraging employers to give advance notice as early as possible to the department of labor, affected employees, any employee representatives, and the affected community); S.C. CODE ANN. § 41-1-40 (Law. Co-op. 1986) (providing that any employer that requires its employees to give notice before quitting a job must post advance written notice of its purpose to quit work or shutdown, the date of cessation, and the expected duration of cessation in every room of the plant); TENN. CODE ANN. §§ 50-1-601 to -604 (1991) (requiring notification of a plant closing for employers that employ more than 50 workers and are planning to reduce the workforce by 50 or more during any 3 month period); WIS. STAT. ANN. § 109.07 (West 1989) (mandating 60 days advance notice to the department of labor, affected employees, union representatives, and the affected community).

30. The bill was proposed by Rep. Ford. See O'CONNELL, *supra* note 21, at 6. The bill was introduced as the Labor Management Notification and Consultation Act. *Id.* It was voted down 208-203. *Id.* The bill's stated purpose was "to require employers to notify and consult with employees before ordering a plant closing or permanent layoff." *Id.*

31. See BUREAU OF NATIONAL AFFAIRS, *supra* note 29, at 10. The bill was introduced by Sens: Metzenbaum (D-Ohio), Kennedy (D-Mass.), and Simon (D-Ill.) as the Economic Dislocation and Worker Adjustment Act on February 19, 1987. 133 CONG. REC. 3725 (1987). The bill called for at least 90 days advance notice of any plant closing and covered employers with 50 or more employees. *Id.* The bill also established federally-funded worker training programs for affected employees. *Id.*

32. See BUREAU OF NATIONAL AFFAIRS, *supra* note 29, at 13.

Democratic members of Congress separated the plant closing provision from the trade bill and introduced WARN as a free-standing proposal.³³ The bill passed both houses of Congress³⁴ despite vigorous opposition from Republicans.³⁵ WARN became law in August 1988 without President Reagan's signature.³⁶

WARN requires employers with 100 or more employees to provide affected workers³⁷ or their union³⁸ and government officials³⁹ at least 60 days advance written notice of any plant closing or mass layoff.⁴⁰ An employer may avoid liability by

33. 134 CONG. REC. 15,000 (1988). WARN was introduced by Sen. Metzbaum. *Id.*

34. The Senate passed WARN by a vote of 72-23. 134 CONG. REC. 16,691 (1988). The House of Representatives passed the bill by a vote of 286-136. 134 CONG. REC. 17,879 (1988).

35. See 134 CONG. REC. 15,515 (1988) (statement of Sen. Dole); 134 CONG. REC. 15,521 (1988) (statement of Sen. Hatch).

36. See Weg, *supra* note 4, at 123. The effective date of WARN was February 4, 1988. 29 U.S.C. § 2101 (1988).

37. "Affected employees" include "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." WARN § 2(a)(5), 29 U.S.C. § 2101(a)(5). One court stated that workers who have been laid off for several years without receiving notice of recall are not affected employees. *Damron v. Rob Fork Mining Corp.*, 945 F.2d 121 (6th Cir. 1991). *But cf. Kildea v. Electro Wire Products, Inc.*, 792 F. Supp. 1046, 1046 (E.D. Mich. 1992) (holding that an employer was required to provide advance notice of a plant closing to employees who had been laid off for less than six months). See also *Jones v. Kayser-Roth Hosiery, Inc.*, 748 F. Supp. 1292 (E.D. Tenn. 1990) (concluding that workers on temporary layoff qualified as affected employees when they had a reasonable expectation of recall).

38. The Act states that the employer shall serve notice upon each representative of the affected employees. WARN § 3(a)(1), 29 U.S.C. § 2102(a)(1). The Act defines a "representative" as an exclusive representative under the NLRA. WARN § 2(a)(4), 29 U.S.C. § 2101(a)(4).

39. WARN requires notice to "unit[s] of local government." WARN § 3(a)(2), 29 U.S.C. § 2102(a)(2). A unit of local government is "any general purpose political subdivision of a State which has the power to levy taxes and spend funds, as well as general corporate and police powers." WARN § 2(a)(7), 29 U.S.C. § 2101(a)(7). WARN also allows local governments to sue to enforce the advance notice requirement. WARN § 5(a)(5), 29 U.S.C. § 2104(a)(5). On July 15, 1993, the city of Portage, Pennsylvania filed what is believed to be the first WARN suit in which a unit of local government acted as plaintiff. *Daily Lab. Rep. (BNA) No. 164*, at D-8 (Aug. 26, 1993). The suit was filed against Pennshire Stores, Inc. in the U.S. District Court for the Western District of Pennsylvania. *Id.* If successful, the city could recover damages in the amount of \$500 for each day the employer failed to give notice. WARN § 5(a)(3), 29 U.S.C. § 2104(a)(3).

40. WARN § 3(a), 29 U.S.C. § 2102(a). See also *supra* notes 6-7 for definitions of "plant closing" and "mass layoff." One court held that an employer was not obligated to provide notice at the first sign of economic downturn in order to avoid liability for failure to give 60 days advance notice. *Chestnut v. Stone Forest Indus., Inc.*, 817 F. Supp. 932, 937 (N.D. Fla. 1993).

demonstrating either that it acted in good faith⁴¹ or that unforeseeable occurrences⁴² necessitated the plant closing. Workers alleging a violation of WARN may file suit in a federal district court sitting in either the state in which the plant closed or any state where the employer transacts business.⁴³

See also *Oil Workers Int'l Union Local 7-515 v. American Home Prod. Corp.*, 790 F. Supp. 1441, 1448 (N.D. Ind. 1992) (determining that an employer complied with WARN when it served notice of a plant closing on the union local's vice president rather than president because the president received a copy of the notice on the day it was released).

41. Section 3 of WARN provides:

An employer may order the shutdown of a single site of employment before the conclusion of the 60-day period if as of the time that notice would have been required the employer was actively seeking capital or business which, if obtained, would have enabled the employer to avoid or postpone the shutdown and the employer reasonably and in good faith believed that giving the notice required would have precluded the employer from obtaining the needed capital or business.

WARN § 3(b)(1), 29 U.S.C. § 2102(b)(1). This provision was included in WARN in response to concerns expressed by some members of Congress that the advance notice requirement would cause financially-troubled firms to cease operations rather than seek sources of income which would allow them to remain active. 133 CONG. REC. E2414 (daily ed. July 14, 1988) (statement of Rep. Rowland).

42. Section 3 of WARN provides: "An employer may order a plant closing or mass layoff before the conclusion of the 60-day period if 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." WARN § 3(b)(2)(A), 29 U.S.C. § 2102(b)(2)(A).

Employers have generally been successful in using this provision to avoid liability. *See International Ass'n of Machinists v. General Dynamics Corp.*, 821 F. Supp. 1306, 1312 (E.D. Mo. 1993) (holding that a defense contractor did not violate WARN by failing to give advance notice of a mass layoff when the layoff was caused by the unforeseeable cancellation of a defense contract); *Chestnut v. Stone Forest Indus., Inc.*, 817 F. Supp. 932, 936 (N.D. Fla. 1993) (concluding that mass layoffs did not require advance notice when they were due to a drastic drop in the price of employer's product); *Jones v. Kayser-Roth Hosiery, Inc.*, 748 F. Supp. 1292, 1302 (E.D. Tenn. 1990) (determining that a plant closure was the result of unforeseeable business circumstances when the employer's major customer withdrew its account). *But cf. Carpenters Dist. Council v. Dillard Dep't Stores, Inc.*, 778 F. Supp. 297, 305-06 (E.D. La. 1991) (rejecting an employer's argument that uncertainty about the date on which the Securities Exchange Commission would approve a corporate merger constituted an unforeseeable business circumstance).

WARN also allows employers to close a plant or institute a mass layoff without providing advance notice if the plant closure or layoff is caused by natural disasters. WARN § 3(b)(2)(B), 29 U.S.C. § 2102(b)(2)(B).

43. The venue provision of WARN states: "A person seeking to enforce such liability, including a representative of employees or a unit of local government . . . may sue . . . in any district court of the United States for any district in which the violation is alleged to have occurred, or in which the

Employees who prove that their employer failed to provide advance notice may recover back pay for sixty days and attorney's fees.⁴⁴

II. JUDICIAL FRAMEWORK FOR DETERMINING STATUTE OF LIMITATIONS

Numerous federal laws lack a specific statute of limitations.⁴⁵ Federal courts generally borrow a limitation period from state law to supplement deficient federal statutes.⁴⁶ This "state-borrowing" doctrine dates back to 1830, when the Supreme Court cited the Rules of Decisions Act for the proposition that a limitation period from state law should apply to federal causes

employer transacts business." WARN § 5(a)(5), 29 U.S.C. § 2104(a)(5). Under this provision, an employer may be sued in any district where the company has a facility or an office, or where it sells its products. *See generally* International Shoe Co. v. Washington, 326 U.S. 310 (1945) (describing the minimum contacts necessary for a party to have with a state in order to impose liability on the party in that state).

44. WARN § 5(a)(1), 29 U.S.C. § 2104(a)(1). For a discussion of how this provision has been interpreted by the courts, see *supra* note 16 and accompanying text.

45. *See, e.g.*, Securities Exchange Act of 1934, § 10(b), 15 U.S.C. § 78 (1988); Investment Advisors Act of 1940, 15 U.S.C. § 80 (1988 & Supp. IV 1992); Trademark Act of 1946, 15 U.S.C. § 1117 (1988); Labor-Management Relations Act of 1947, 29 U.S.C. § 185 (1988); Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 412 (1988); Rehabilitation Act of 1973, 29 U.S.C. § 791 (1988 & Supp. IV 1992); Employee Retirement and Income Security Act of 1974, 29 U.S.C. § 1132 (1988 & Supp. IV 1992); Clean Water Act, 33 U.S.C. § 1365(a) (1988 & Supp. IV 1992); Civil Rights Act of 1877, 42 U.S.C. §§ 1981, 1983, 1985 (1988 & Supp. IV 1992); Clean Air Act, 42 U.S.C. § 7604 (1988 & Supp. IV 1992); Railway Labor Act, 45 U.S.C. § 182 (1988); Airline Deregulation Act of 1978, 49 U.S.C. § 1552(d)(1) (1988).

Federal civil causes of action arising under a federal statute enacted after December 1, 1990 that do not contain a statute of limitations are covered by the Judicial Improvements Act of 1990, which provides: "Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than four years after the cause of action accrues." 28 U.S.C. § 1658 (Supp. IV 1992). *See generally* Patrick McDowell, Note, *Limitation Periods for Federal Causes of Action After the Judicial Improvements Act of 1990*, 44 VAND. L. REV. 1355 (1991) (discussing the legislative history of the Act).

46. *See* Reed v. United Transp. Union, 488 U.S. 319, 324 (1989) (noting that state law usually supplies a statute of limitations for a federal statute lacking a limitation period); Agency Holding v. Malley-Duff & Associates, Inc., 483 U.S. 143, 147 (1987) (same); Wilson v. Garcia, 471 U.S. 261, 266-67 (1985) (same). *See generally* Ellen E. Kaulbach, *A Functional Approach to Borrowing Limitations Periods for Federal Statutes*, 77 CAL. L. REV. 133 (1989).

of action containing no statute of limitations.⁴⁷ Under the state-borrowing doctrine, federal courts characterize the federal claim at issue and apply the statute of limitations from the most analogous state-law claim.⁴⁸ For example, in *Wilson v. Garcia*,⁴⁹ the Supreme Court invoked the state-borrowing doctrine and characterized suits under section 1983 of the Civil Rights Act of 1871 as tort actions.⁵⁰ Consequently, the timeliness of a complaint filed under section 1983 is governed by the statute of limitations for personal injury actions under the law of the state in which the claim arose.⁵¹

The Supreme Court, however, has rejected the state-borrowing doctrine for federal causes of action susceptible to multiple characterizations.⁵² In such cases, federal courts borrow a statute

47. *M'Cluny v. Silliman*, 28 U.S. (3 Pet.) 270, 277 (1830). The Rules of Decisions Act provided: "[T]hat the laws of the several states, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply." *Id.* The Rules of Decision Act is codified at 28 U.S.C. § 1652 (1988). See generally Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49 (1923) (arguing that the Rules of Decisions Act does not necessarily require state-borrowing).

48. See *Agency Holding*, 483 U.S. at 147. The Court explained that "the characterization of a federal claim for purposes of selecting the appropriate statute of limitations is generally a question of federal law." *Id.* at 147-48. See also *Board of Regents v. Tomanio*, 446 U.S. 478, 483-84 (1980) (describing the state-borrowing doctrine).

49. 471 U.S. 261 (1985).

50. *Id.* at 267.

51. *Id.* at 265-66. See generally Julie Davies, *In Search of the "Paradigmatic Wrong?": Selecting a Limitations Period for Section 1983*, 36 KAN. L. REV. 133 (1987).

52. See *Agency Holding*, 483 U.S. at 147. The *Agency Holding* Court borrowed the four-year statute of limitations of the Clayton Act, 15 U.S.C. § 15b (1988), for suits under the Racketeering Influence and Corruption Act (RICO), 18 U.S.C. § 1964 (1988). 483 U.S. at 156. The Court deemed state-borrowing inappropriate because RICO "encompasses numerous topics and subtopics" and therefore may not be characterized uniformly by courts. *Id.* at 149. The Court explained that while the state-borrowing doctrine has provided the general rule,

[W]hen a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking, [the Court] has not hesitated to turn away from state law.

Id. at 148 (citations omitted). See also *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983). In *DelCostello*, the Court refused to invoke the state-borrowing doctrine and held that the statute of limitations provided by the NLRA applied to suits alleging violation of the duty of fair representation under the Labor Management Relations Act (LMRA), 29 U.S.C. § 185 (1988). *Id.* at 169.

of limitations from an analogous federal statute.⁵³ The Court also advocates federal-borrowing when state-borrowing creates the possibility of forum shopping.⁵⁴ In *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*,⁵⁵ the Court explained that the “practicalities of litigation,” including the potential for forum shopping and the possibility of multiple characterizations, sometimes require federal-borrowing, but only when a federal statute clearly provides a closer analogy to the deficient federal claim than state alternatives.⁵⁶

III. SECOND CIRCUIT RESPONSE: *Specialty Paperboard*

In *United Paperworkers International Union Local 340 v. Specialty Paperboard, Inc.*,⁵⁷ the Second Circuit Court of Ap-

53. See *Agency Holding*, 483 U.S. at 147 (holding that the Clayton Act statute of limitations should be used for RICO); *DelCostello*, 462 U.S. at 169 (using the NLRA statute of limitations). See also *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 368 (1977) (adopting a federal statute of limitations for EEOC enforcement actions); *McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221, 224 (1958) (applying a federal statute of limitations to action under federal admiralty law); *Holmberg v. Armbrrecht*, 327 U.S. 392, 396 (1946) (declining to apply the state-borrowing doctrine).

54. See *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773, 2779 (1991). The Court noted that in some circumstances, “[T]he use of state statutes would present the danger of forum shopping.” *Id.* (quoting *Agency Holding*, 483 U.S. at 154). Forum shopping is when litigants attempt to have their cases moved to jurisdictions where they might receive more favorable decisions. Stephen W. Bialkowski, Note, *State Limitations Period For Personal Injury Actions Applies to All Section 1983 Claims*, 16 SETON HALL L. REV. 831, 848 (1986). Logically, most litigants will try procedurally to move their cases to jurisdictions with longer statutes of limitations. *Id.*

55. 111 S. Ct. 2773 (1991).

56. *Id.* at 2778. The Court explained that “federal-borrowing [is] a closely circumscribed exception to be made only . . . when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking.” *Id.* Citing *Wilson* and *Agency Holding*, the Court announced a three-part inquiry to determine whether a federal court should apply federal-borrowing. *Id.* The inquiry requires a court to consider whether a uniform statute of limitations is to be selected because the federal statute at issue is susceptible to multiple characterizations, whether application of state law would encourage forum shopping, and whether an analogous federal law provides a closer analogy to the deficient federal statute than state alternatives. *Id.* at 2779.

The *Lampf* Court concluded that suits under § 10(b) of the Security Exchange Act, 15 U.S.C. § 78, should be governed by the one and two year limitation periods explicitly provided in §§ 9 and 18 of the Act. 111 S. Ct. at 2781.

The Court applied its holding retroactively, which resulted in the dismissal of numerous complaints. See Jill E. Fisch, *As Time Goes By: New Questions About the Statute of Limitations for Rule 10b-5*, 61 FORDHAM L. REV. S101, S110-11 (1993).

57. 999 F.2d 51 (2d Cir. 1993).

peals held that the statute of limitations for state law contract suits applied to WARN.⁵⁸ The court considered applying a limitation period from an analogous federal law, but determined that the practicalities of litigation under WARN do not require federal-borrowing.⁵⁹ Moreover, the court held that no federal statute provides a closer analogy to WARN than available state alternatives.⁶⁰

The *Specialty Paperboard* litigation resulted from the sale of a Vermont paper mill.⁶¹ On the day of the completed transaction, the seller terminated all 232 of the mill's workers.⁶² The buyer rehired 141 of the employees on the day of the sale.⁶³ Nearly one year later, the United Paperworkers International Union filed suit in the United States District Court for the District of Vermont under WARN on behalf of the laid-off employees.⁶⁴ The union alleged that both the seller and purchaser violated WARN by failing to give the workers sixty days advance written notice of the impending layoffs.⁶⁵ The defendants urged the district court to dismiss the complaint as time-barred, arguing that the NLRA six-month statute of limitations governs WARN actions.⁶⁶ The union responded by urging the court to adopt a limitation period from state law or the Fair Labor Standards Act (FLSA).⁶⁷

The Second Circuit found neither the NLRA nor the FLSA closely analogous to WARN.⁶⁸ The court acknowledged that both the NLRA and WARN regulate relations between an

58. *Id.* at 57.

59. *Id.* at 54-55.

60. *Id.* at 56-57.

61. Appellee's Brief at 3. On March 15, 1991, Specialty Paperboard, Inc. sold its paper mill in Sheldon Springs, Vermont to the Rock-Tenn Corporation. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* The employees' representative filed suit on March 13, 1993. Appellee's Brief at 3. When the plant was sold, Specialty Paperboard's hourly employees were represented by the United Paperworkers International Union Local No. 340, but there was no collective bargaining agreement in effect. *Id.* The union filed suit because more than one-third of the employees suffered an "employment loss." *Id.* Under WARN, an employment loss is any loss of employment in excess of six months. 20 C.F.R. § 639.3(f) (1993).

65. Appellee's Brief at 3.

66. Appellant's Brief at 2-3. The NLRA provides a six-month statute of limitations. 29 U.S.C. § 160(b) (1988).

67. Appellee's Brief at 4 n.1, 6. The FLSA requires employers to pay employees a minimum wage set by Congress. 29 U.S.C. § 206 (1988 & Supp. IV 1992). The FLSA provides a three-year statute of limitations for willful violations. 29 U.S.C. § 255 (1988).

68. 999 F.2d at 55.

employer and its employees, but explained that the NLRA serves solely to protect the right of employees to join labor unions and engage in collective bargaining with their employers.⁶⁹ In contrast, Congress passed WARN in order to alleviate the distress associated with plant closings for all workers.⁷⁰ Unlike the NLRA, the court reasoned, WARN's coverage extends to workers who display no interest in joining a labor union.⁷¹

Enforcement procedures differ under the NLRA, the FLSA, and WARN. The National Labor Relations Board (NLRB) enforces the NLRA,⁷² and an administrative structure enforces the FLSA.⁷³ Private civil actions constitute the sole enforcement mechanism under WARN.⁷⁴ Therefore, the *Specialty Paperboard* court concluded that neither the NLRA nor the FLSA provided a close analogy to WARN.⁷⁵

Furthermore, the court concluded that the practicalities of litigation fail to mandate application of a uniform, federal statute of limitations for WARN.⁷⁶ The court reasoned that WARN suits are not subject to multiple characterizations because the statute simply requires employers to provide advance notice of a plant closing.⁷⁷ The court also rejected the notion that state-borrowing would encourage employees to forum shop, although forum shopping is theoretically possible.⁷⁸

As the *Specialty Paperboard* court noted, WARN's venue provision could, in theory, allow plaintiffs to forum shop.⁷⁹ Employees alleging that their employer violated the advance

69. *Id.* at 54.

70. *Id.* See also *supra* note 4 and accompanying text for a statement of the purpose of WARN.

71. 999 F.2d at 54.

72. 29 U.S.C. § 153 (1988).

73. 29 U.S.C. § 204 (1988). The FLSA is enforced by the Wage and Hour Division of the Department of Labor. *Id.*

74. See *supra* note 8 and accompanying text for a discussion of WARN's enforcement provision.

75. 999 F.2d at 55.

76. *Id.* at 55-56. See *supra* note 56 and accompanying text for an explanation of why the practicalities of litigation must be considered when determining the appropriate statute of limitations for a federal civil action arising under a congressional enactment lacking a specific limitation period.

77. 999 F.2d at 56. The court contrasted WARN with RICO, which provides grounds for a variety of causes of action. *Id.* See *supra* note 52 and accompanying text discussing the *Agency Holding* case in which the Court determined that the state-borrowing doctrine was inappropriate for RICO because that statute is susceptible to multiple characterizations.

78. 999 F.2d at 56.

79. *Id.* For a definition of "forum shopping," see Bialkowski, *supra* note 54.

notice requirement may file suit in a district court sitting in either the state in which the plant closed or in any state where the employer does business.⁸⁰ Limitation periods under state law vary by jurisdiction.⁸¹ Consequently, applying the state-borrowing doctrine to WARN could allow employees to forum shop if the limitation period under the law of the state in which the plant closed is shorter than the time period under the law of a state in which the employer conducts business.⁸²

Despite this theoretical possibility, the *Specialty Paperboard* court concluded that use of a state statute of limitations to supplement WARN does not actually encourage forum shopping.⁸³ The court stated that even if employees file suit in a district court located outside the state in which the alleged violation occurred, choice of law rules will require the court to apply the law of the state where the plant closing occurred.⁸⁴ Accordingly, the statute of limitations provided by the law of the state where the actionable event occurred determines the timeliness of the complaint, regardless of where the employees file suit.⁸⁵

After finding federal-borrowing inappropriate under WARN, the *Specialty Paperboard* court characterized WARN suits as state law contract actions,⁸⁶ and thus held that Vermont's six-year statute of limitations governed the timeliness of the union's complaint.⁸⁷ The court explained that in Vermont, workers' compensation claims are subject to the state's contract statute of limitations.⁸⁸ According to the court, both WARN and workers' compensation laws seek to protect workers from unexpected joblessness.⁸⁹ The court refused to characterize WARN suits as tort claims, noting that a tort plaintiff must prove negligence or wrongful conduct, whereas an employee may recover under

80. See *supra* note 43 and accompanying text for a discussion of WARN's venue provision.

81. With respect to state statutes of limitations for contract suits, *see, e.g.*, ALA. CODE § 6-2-34 (1977) (six years); ALASKA ADMIN. CODE tit. 45 § 101 (Sept. 1986) (four years); CAL. LAB. CODE § 2855 (West 1989) (seven years); GA. CODE ANN. § 9-3-25 (1982) (four years); ILL. REV. STAT. ch. 110, para. 13-205 (1991) (five years); MASS. GEN. LAWS ANN. ch. 260, § 2 (West 1992) (six years).

82. Many American businesses have contacts in more than one state such that WARN actions could be brought in a number of states.

83. 999 F.2d at 56 n.9.

84. *Id.*

85. *Id.*

86. *Id.* at 57.

87. *Id.*

88. 999 F.2d at 57 (citing *Hartman v. Ouellette Plumbing & Heating Corp.*, 507 A.2d 952, 953 (Vt. 1985)).

89. *Id.* at 57.

WARN simply by showing that their employer closed its plant without providing the requisite advance notice.⁹⁰

IV. EVALUATION

In *Specialty Paperboard*, the Second Circuit erroneously concluded that the state-borrowing doctrine adequately serves the federal policies manifested in WARN. Despite the court's assertion to the contrary, WARN's expansive venue provision allows employees to forum shop if federal courts borrow a limitation period from state law.⁹¹ Consequently, Congress should amend WARN to include a uniform statute of limitations applicable in all jurisdictions.

A. *Rationale for Uniform Federal Statute of Limitations*

Under state law, the statute of limitations for contract actions varies by jurisdiction.⁹² The *Specialty Paperboard* court noted that WARN's expansive venue provision arguably allows employees to shop for a favorable forum.⁹³ Nevertheless, the court concluded that choice of law rules require federal courts to apply the statute of limitations provided under the law of the state in which the plant closed.⁹⁴

Indeed, if all federal courts adhered to such a rule, the state-borrowing doctrine as applied to WARN would not allow employees to forum shop. The *Specialty Paperboard* court, however, simply ignored the decisions explicitly rejecting the argument that a federal court must apply the statute of limitations provided by the law of the state in which the actionable event occurred.⁹⁵ In *Champion International Corp. v. United Paperworkers International Union*,⁹⁶ the Sixth Circuit applied a Tennessee limitation period even though the actionable event occurred in Mississippi.⁹⁷

90. *Id.*

91. See *infra* notes 93-101 and accompanying text for a discussion of the possibility of forum shopping under WARN.

92. See *supra* note 81 for an illustration of state law contract statutes of limitations which vary in length.

93. See *supra* note 79 and accompanying text.

94. See *supra* notes 77-83 and accompanying text for a discussion of *Specialty Paperboard*.

95. See *Edelman v. Chase Manhattan Bank*, 861 F.2d 1291 (1st Cir. 1988) (applying the statute of limitations provided by the law of the forum state rather than the state in which the claim arose); *Champion Int'l Corp. v. United Paperworkers Int'l Union*, 779 F.2d 328 (6th Cir. 1985) (same).

96. 779 F.2d 328 (6th Cir. 1985).

97. *Id.* at 334.

In *Champion International*, an employer filed suit in the United States District Court for the Middle District of Tennessee seeking to vacate an arbitration award under section 301 of the Labor Management Relations Act (LMRA).⁹⁸ The dispute arose out of a change in the work schedule at the employer's plant in Mississippi.⁹⁹ The union sought dismissal of the suit and urged the district court to apply Mississippi's limitation period.¹⁰⁰ The Sixth Circuit rejected the union's argument, holding that the district court correctly applied Tennessee's ninety-day statute of limitations for a suit seeking to vacate an arbitration award.¹⁰¹

The *Champion International* court noted that Tennessee's choice of law rules would require application of the Mississippi statute of limitations.¹⁰² The court, however, refused to adopt the forum state's choice of law principles.¹⁰³ Instead, the Sixth

98. *Id.* at 329. The LMRA does not contain a specific statute of limitations. In *DelCostello*, the Supreme Court held that actions under the LMRA alleging a breach of the duty of fair representation are governed by the six-month limitation period provided by the NLRA. 462 U.S. at 169. See *supra* note 52 for a discussion of *DelCostello*.

99. 779 F.2d at 330.

100. *Id.* at 331.

101. *Id.* at 334.

102. *Id.* at 331. Tennessee's choice of law rules would have required the court to apply the Mississippi statute of limitations due to Tennessee's "borrowing statute." *Id.* The borrowing statute provided: "Where the statute of limitations of another state or government has created a bar to an action upon a cause accruing therein, while the party to be charged was a resident in such state or such government, the bar is equally effectual in this state." TENN. CODE ANN. § 28-1-112 (1980).

103. 779 F.2d at 334. Federal subject matter jurisdiction is generally based on either diversity of citizenship or questions arising under federal law. 28 U.S.C. §§ 1331-1332 (1988). In cases in which jurisdiction is based upon diversity of citizenship, federal courts must apply the choice of law principles of the forum state, *i.e.*, the state in which the federal court sits, to identify the state whose law will apply. *Klaxon v. Stentor Elec. Mfg.*, 313 U.S. 487, 496 (1941). When jurisdiction is based upon matters arising under federal law, a federal court is not required to follow the forum state's conflicts of law principles. *UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696, 705 n.8 (1966). The *Champion International* court was not required to follow the *Klaxon* rule because the case arose under the LMRA, a federal statute. 779 F.2d at 332. Nevertheless, some federal courts apply the forum state's choice of law rules even when subject matter jurisdiction is based on matters arising under federal law. See, *e.g.*, *Loveridge v. Dreagoux*, 678 F.2d 870 (10th Cir. 1982) (applying the forum state's choice of law rules in a suit under § 10(b) of the Securities Exchange Act).

Historically, state choice of law rules required application of the forum state's statute of limitations. EUGENE SCOLES & PETER HAY, *CONFLICT OF LAWS* 58 (1992). This rule resulted from the generally accepted theory that statutes of limitations were procedural, and a court should apply the procedural rules of the forum state, even if the substantive law governing the case is

Circuit borrowed Tennessee's longer limitation period even though the claim arose in Mississippi.¹⁰⁴

Similarly, in *Edelman v. Chase Manhattan Bank*,¹⁰⁵ the First Circuit applied the law of the forum state to determine the timeliness of the complaint although many of the events leading to the claim occurred in a different jurisdiction.¹⁰⁶ In reaching its decision, the *Edelman* court invoked certain principles of the *Restatement (Second) of Conflict of Laws (Restatement)*.¹⁰⁷ The

derived from a different state. ROBERT A. LEFLAR ET AL., *AMERICAN CONFLICTS LAWS* § 121, at 331 (4th ed. 1986). See generally Margaret Rosso Grossman, *Statutes of Limitation and the Conflict of Laws: Modern Analysis*, 1980 ARIZ. ST. L.J. 1.

Application of the forum state's limitation period, however, may encourage forum shopping if the forum's statute of limitations is longer than that provided by the law of the state in which the claim arose. SCOLES & HAY, *supra*, at 59. Consequently, two developments, one judicial and the other legislative, altered the historical rule that a court must apply the statute of limitations of the forum state. Judicially, some courts have begun to characterize statutes of limitations as substantive rather than procedural. *Id.* at 60. Usually, this occurs when the statute of limitations provided by the law under which the claim arose is intended to extinguish the right and not merely the remedy. *Id.* For example, limitations in wrongful death statutes and shareholder liability statutes are frequently characterized as substantive. *Id.* Legislatively, the majority of states have enacted borrowing statutes which provide that a cause of action will be time-barred in the forum state if it is time-barred in the state in which the claim arose. *Id.* at 61-62.

104. 779 F.2d at 334.

105. 861 F.2d 1291 (1st Cir. 1988).

106. *Id.* at 1293. The case involved the liability of the Chase Manhattan Bank for deposits in a Cuban branch. *Id.* at 1291-92. The suit was filed under The Edge Act, 12 U.S.C. § 632 (1988). 861 F.2d at 1294 n.14. The court acknowledged that when jurisdiction is not based on diversity of citizenship, the *Klaxon* rule does not necessarily apply. *Id.* See *supra* note 103 for an explanation of *Klaxon*.

107. 861 F.2d at 1295. The court applied the choice of law principles in § 6 of the *Restatement*, which provides:

- (1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law
- (2) When there is no such directive, the factors relevant to the choice of law include
 - (a) the needs of the interstate and international systems,
 - (b) the relevant policies of the forum,
 - (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
 - (d) the protection of justified expectations,
 - (e) the basic policies underlying the particular field of law,
 - (f) certainty, predictability and uniformity of result, and
 - (g) ease in the determination and application of the law to be applied.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1988). See also *Sandefur Oil & Gas, Inc., v. AIG Oil Rig, Inc.*, 846 F.2d 319, 322 (5th Cir. 1988)

Restatement generally requires application of a statute of limitations derived from the law of the forum, even when the suit would be time-barred under the limitation period in the jurisdiction where the claim arose.¹⁰⁸ In light of *Champion International* and *Edelman*, the *Specialty Paperboard* court incorrectly assumed that the limitation period under the law of the state in which the plant closed necessarily applies in all WARN actions.

B. Proposed Amendment to WARN: Three Year Statute of Limitations

WARN requires a federal, uniform statute of limitations because application of state law limitation periods encourages forum shopping¹⁰⁹ and fails to achieve uniformity. As the Supreme Court noted in *Textile Workers Union v. Lincoln Mills*,¹¹⁰ federal labor relations law is a matter of national concern.¹¹¹ Consequently, as the Court explained in *DelCostello v. International Brotherhood of Teamsters*,¹¹² the need for uniformity is especially important.¹¹³ Application of the state-borrowing doctrine to WARN fails to provide uniform results, particularly when a single employer closes plants in several states.¹¹⁴ If federal courts follow *Specialty Paperboard* and borrow limitation periods from the states in which the plants close, the employees affected by the plant closings have varying lengths of time to file their claims.¹¹⁵ In determining the appropriate limitations period for WARN suits, Congress should examine analogous federal labor and employment laws.¹¹⁶ ERISA¹¹⁷ is the statute

(applying the *Restatement*); *Hoffman v. Merrell Dow Pharmaceuticals, Inc.*, 857 F.2d 290, 304 (6th Cir. 1988) (applying the *Restatement* principles for choice of law in a case arising under a federal question).

108. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 142 (1988).

109. See *supra* notes 91-107 and accompanying text for a discussion of forum shopping under WARN.

110. 353 U.S. 448 (1957).

111. *Id.* at 453.

112. 462 U.S. 151 (1983).

113. *Id.* at 152.

114. American companies frequently close plants in several states simultaneously. See Allen Myerson, *IBM Aims to Cut 25,000 More Jobs: Sees Record Loss*, N.Y. TIMES, Dec. 26, 1992, at A1; Barbara Noble, *Straddling the Law on Layoffs*, N.Y. TIMES, Feb. 28, 1993, § 3, at 37.

115. See *supra* note 81 for an illustration of the various lengths of state contract statutes of limitations.

116. See *supra* notes 53-56 and accompanying text for a discussion of the relevance of other federal labor laws.

117. 29 U.S.C. §§ 1001-1461 (1988 & Supp. IV 1992).

most analogous to WARN because the statutes share common purposes¹¹⁸ and include many of the same provisions.¹¹⁹

ERISA, enacted in 1974, provides a uniform national system to regulate employee pension and benefit plans.¹²⁰ Congress enacted the statute because few employees were actually receiving the pension benefits they expected.¹²¹ ERISA protects employee benefit plans by imposing a minimum funding requirement on most private plans.¹²² The statute includes vesting requirements that protect employee benefits from forfeiture.¹²³ ERISA also provides for pension plan termination insurance¹²⁴ and federal fiduciary standards which require plan administrators to invest funds in accordance with the interests of employees.¹²⁵ Under ERISA, employees can file suit to enforce the Act's provisions in federal or state court.¹²⁶ Employees alleging a breach of fiduciary duty by their employer or plan administrator must file suit within three years after they acquire actual knowledge of the breach.¹²⁷

118. See *infra* notes 128-31 for a discussion of the purposes of WARN and ERISA.

119. See *infra* notes 127-37 for a discussion of similar provisions in WARN and ERISA.

120. Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 832 (1974) (codified as amended at 29 U.S.C. §§ 1001-1461 (1988 & Supp. IV 1992)). A detailed discussion of ERISA is beyond the scope of this Recent Development. For a general overview of ERISA, see JAMES O. CASTAGNERA & DAVID A. LITTEL, *FEDERAL REGULATION OF EMPLOYEE BENEFITS* 35-81 (1992); Leslie Wellman & Shari J. Clark, *An Overview of Pension Benefit and Fiduciary Litigation Under ERISA*, 26 WILLAMETTE L. REV. 665 (1990).

121. HOUSE COMM. ON EDUCATION AND LABOR, *EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974*, H.R. DOC. NO. 533, 93d Cong., 2d Sess. 1 (1974), reprinted in 1974 U.S.C.C.A.N. 4639.

122. 29 U.S.C. §§ 1081-1086 (1988 & Supp. IV 1992).

123. *Id.* §§ 1051-1053.

124. *Id.* §§ 1001-1168, 1301-1453.

125. *Id.* §§ 1101-1114.

126. *Id.* § 1132.

127. The statute of limitations for breach of fiduciary duty provides:
No action may be commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of —

(1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation, or

(2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation;

except that in the case of fraud or concealment, such action may

Plant closings always raise concerns regarding employee benefit plans. In fact, Congress enacted ERISA primarily to ensure that employees affected by plant closings would receive their expected benefits.¹²⁸ In enacting ERISA, Congress also sought to maintain a mobile workforce.¹²⁹ Before ERISA, the fear of lost benefits prevented many employees from switching employers.¹³⁰ As with ERISA, Congress passed WARN to allow workers affected by plant closings to obtain positions with other companies.¹³¹ Section 5 of WARN expressly refers to ERISA, which further indicates the close relationship between plant closings and employee benefit plans.¹³²

In addition to sharing common purposes, ERISA and WARN contain many of the same provisions. Both statutes provide good faith exceptions that allow employers to avoid liability.¹³³ Also, the venue provision of ERISA bears a close resemblance to WARN's section 4.¹³⁴ WARN requires employers to notify

be commenced not later than six years after the date of discovery of such breach or violation.

29 U.S.C. § 1113. This Recent Development proposes a three-year statute of limitations for WARN because, when a plant closes, employees necessarily have actual knowledge that their employers failed to provide advance notice.

By its plain language, the limitation period provided in § 1113 applies only to suits alleging a breach of fiduciary duty. No other cause of action under ERISA has a specific statute of limitations. Federal courts have generally borrowed a limitation period from state law for causes of action under an ERISA provision other than the fiduciary duty section. *See generally* Todd M. Worscheck, *Eighth Circuit Struggles to Select Appropriate Statute of Limitations for ERISA Claims: Difficulties with a Straightforward Matter*, 18 WM. MITCHELL L. REV. 861 (proposing a uniform statute of limitations for ERISA in order to eliminate forum shopping).

128. HOUSE COMM. ON WAYS AND MEANS, EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, H.R. DOC. NO. 807, 93d Cong., 2d Sess. 11 (1974), reprinted in 1974 U.S.C.C.A.N. 4670, 4680. *See also* JOHN LANGBEIN & BRUCE WOLK, PENSION AND EMPLOYEE BENEFIT LAW 55 (1990). Specifically, the widely publicized closure of a Studebaker auto plant in South Bend, Indiana caused nearly 4400 employees to lose their pensions. H.R. DOC. NO. 807, *supra*.

129. *See* WILLIAM GREENOUGH & FRANCIS KING, PENSION PLANS AND PUBLIC POLICY 155 (1976).

130. *Id.*

131. *See supra* note 4 and accompanying text for the purposes behind WARN.

132. WARN § 5(a)(1)(B), 29 U.S.C. § 2104(a)(1)(B) (1988).

133. WARN's good faith provision (WARN § 3(b)(1)) is codified at § 2102(b)(1). *See supra* note 41 for the text of that section. ERISA's good faith provision is found at 29 U.S.C. § 1108.

134. The venue provision of ERISA provides:

Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served

government officials prior to closing a plant.¹³⁵ ERISA includes a similar provision,¹³⁶ which requires an employer to notify government officials prior to termination of a benefit plan.¹³⁷

Although any federal statute of limitations would eliminate forum shopping and achieve uniformity, the *Specialty Paperboard* court correctly rejected the NLRA and the FLSA as sources from which to derive a limitation period for WARN.¹³⁸ By enacting WARN, Congress recognized the hardships employees experience when their company ceases operations.¹³⁹ The affected employees suffer financial hardship due to a loss of income¹⁴⁰ and must seek alternative employment.¹⁴¹ The NLRA six-month statute of limitations¹⁴² provides an inadequate time period for employees affected by a plant closing to file a lawsuit. Faced with a loss of income, it is unlikely that the employees will have enough money to finance a lawsuit within six months of the plant closing.

Employees who file a complaint under the NLRA or the FLSA do not face excessive litigation expenses because federal agencies exist to enforce those statutes.¹⁴³ The agencies process the complaint at no cost to the employee.¹⁴⁴ Moreover, the shorter FLSA statute of limitations is justified because employees know their rights under that statute. The FLSA requires employers to post notices informing employees of the minimum wage.¹⁴⁵ Conversely, few employees know their WARN rights.¹⁴⁶

in any other district where a defendant resides or may be found. 29 U.S.C. § 1132(e)(2) (1988). See *supra* note 8 for text of the WARN venue provision.

135. 29 U.S.C. § 2102(a) (1988). See *supra* note 39 for text of WARN's government notice provision.

136. 29 U.S.C. § 1341(a) (1988).

137. *Id.* Notice must be given to the Pension Benefit Guaranty Corporation, a unit of the Department of Labor that establishes procedures for terminating pension plans. 29 U.S.C. § 1302 (1988 & Supp. IV 1992).

138. See *supra* notes 72-90 and accompanying text for a discussion of the *Specialty Paperboard* decision.

139. For a discussion of the purposes of WARN, see *supra* notes 1-4 and accompanying text.

140. See *ABOUD*, *supra* note 1, at v.

141. See *Effectiveness of WARN*, *supra* note 2, at 3-8.

142. 29 U.S.C. § 160(b) (1988).

143. See *supra* notes 72-73 for citations to the relevant statutory provisions.

144. See *supra* notes 72-73.

145. 29 C.F.R. § 697 (1993).

146. See *Effectiveness of WARN*, *supra* note 2, at 15. The two-year statute of limitations provided by FLSA, however, is not as objectionable as the NLRA six-month limitation period. The primary benefit of using ERISA instead of the FLSA as the source of a uniform limitation period for WARN is that a three-year statute of limitations would streamline litigation.

In addition, neither the NLRA nor the FLSA were enacted to protect employees from the effects of a plant closing.¹⁴⁷ A three-year statute of limitations under WARN would provide employees affected by a plant closing sufficient time to seek alternative employment, acquire information regarding their statutory rights, and obtain the financial resources necessary to file suit.

Amending WARN to include the same statute of limitations as ERISA would streamline litigation because plant closings and layoffs may trigger both ERISA and WARN suits.¹⁴⁸ If the two statutes shared a limitation period, courts could easily determine the timeliness of WARN and ERISA claims simultaneously.

V. CONCLUSION AND PROPOSED AMENDMENT

Congress could eliminate forum shopping by specifying a statute of limitations for lawsuits under WARN. A uniform, easily identifiable limitations period would eliminate the waste of judicial resources presently devoted to determining the proper time limit. A statute of limitations amendment would require little congressional effort, particularly because members of Congress have already introduced other bills to amend WARN.¹⁴⁹ Consequently, Congress should amend WARN as follows:

No action may be commenced under this title with respect to the advance notice requirements of section 2102 more than three years after the date upon which employees suffer an employment loss as a result of a plant closing or mass layoff.

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147. The stated purpose of the NLRA is "to protect the rights of individual employees in their relations with labor organizations." 29 U.S.C. § 141 (1988). The FLSA was enacted in 1935, in response to labor conditions which were "detrimental to the . . . health, efficiency, and general well-being of workers." 29 U.S.C. § 202(a).

148. See, e.g., *James v. Fleet/Norstar Fin. Group*, 992 F.2d 463 (2d Cir. 1993); *Local 217, Hotel & Restaurant Employees Union v. MHM, Inc.*, 976 F.2d 805 (2d Cir. 1992); *Adcox v. Teledyne, Inc.*, 810 F. Supp. 909 (N.D. Ohio 1992).

149. See *supra* notes 14-15 and accompanying text for a discussion of the bills presently before Congress.

* J.D. 1994, Washington University.