

September 2008

Competing Definitions of ‘Mass Layoffs’ Under the WARN Act

By Neil V. McKittrick and Elizabeth L. Schnairsohn

The Retraining and Notification Act (“WARN” or The Act) requires that covered employers provide at least 60 days’ notice of a “plant closing” or “mass layoff” to affected employees “to ensure that ‘workers receive advance notice of plant closures and mass layoffs that affect their jobs.’” See 29 U.S.C. § 2102; 20 CFR §§ 639.2, 639.6; *Kildea v. Electro-Wire Products, Inc.*, 144 F.3d 400, 405 (6th Cir. 1998), quoting *Marques v. Telles Ranch, Inc.*, 131 F.3d 1331, 1333 (9th Cir. 1997). However, the Act creates some uncertainty for employers because it contains two potentially conflicting definitions of the term “mass layoff” — one that looks to a 30-day period and another that aggregates layoffs over a 90-day period. In *Manchester v. Main Street Textiles, L.P., et al.*, 487 F. Supp. 2d 120 (D. Mass. 2007), the United States District Court for the District of Massachusetts squarely addressed the potential conflict between the two statutory provisions, and it determined that, when satisfied, WARN’s 30-day threshold was intended to be the default provision for determining when a “mass layoff” occurs.

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THE ACT

WARN defines a “mass layoff” as a reduction in force that:

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

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

(iii) at least 500 employees (excluding any part-time employees).

29 U.S.C. § 2101(a)(3); see also 20 CFR § 639.3(c).

The Act also contains another definition of “mass layoff” in 29 U.S.C. § 2102(d), which provides that “employment losses for two or more groups at a single site of employment, each of which is less than the minimum number of employees specified in § 2101(a)(2) [plant closing] or (3) [mass layoff] of this title, but which in the aggregate exceed that minimum number, and which occur within any 90-day period shall be considered to be a plant closing or mass layoff unless the employer demonstrates that the employment losses are the result of separate and distinct actions and causes and are not an attempt by the employer to evade the requirements of this chapter.”

Under the two statutory definitions of mass layoff, it is possible to have a “mass layoff” within a 30-day period that consists of two or more layoffs, none of which individually exceeds the minimum statutory thresholds. Furthermore, those individual layoffs could be partially subsumed by a mass layoff over a 90-day aggregation period as well. The plaintiffs in *Main Street* argued that this was precisely the situation which required that they receive WARN benefits. That is, the plaintiffs in *Main Street* contended that all such employees laid off in the 90-day period were entitled to benefits, even though there was no dispute that there had been a “mass layoff” within a 30-day period, as defined by § 2101(a)(3) of the Act.

THE ‘MASS LAYOFF’

Main Street Textiles, L.P. (“Main Street”) operated a weaving plant in Fall River, MA, producing decorative fabrics for the home furnishings industry. As a result of declining profitability in the textiles industry, Main Street was forced to reorganize its workforce in the spring and summer of 2003 and lay off employees. In early October 2003, Main Street determined that it would have to close the plant. On Oct. 17, 2003, Main Street issued a WARN notice to its remaining employees and to state and city officials, as required by the Act, in which it stated that it would be forced to close the

plant permanently, which it eventually did, on April 30, 2004.

The plaintiffs were employees of Main Street laid off in accordance with Main Street's seniority system in the early fall of 2003, prior to the issuance of the WARN Notice, because of then existing market conditions. Relying on 29 U.S.C. § 2102(d) (the 90-day aggregation rule), the plaintiffs argued that they were entitled to back pay and benefits for 60 calendar days because they were part of a "mass layoff" that occurred during the 90-day period between Aug. 26, 2003 and Nov. 22, 2003, and Main Street had not provided them with notice under the Act before their layoff.

In addition to the text of § 2102(d) itself, the plaintiffs relied upon 20 C.F.R. § 639.5(a)(2), which directs employers to "look ahead and behind" 30 days and 90 days to determine whether employment actions both taken and planned will reach the minimum numbers for a plant closing or mass layoff and trigger WARN coverage. The Department of Labor has also published an "Employer's Guide to Advance Notice of Closings and Layoffs" which suggests that WARN looks at employment losses taking place over both a 30- and 90-day period, and that a mass layoff may be attained during a 90-day period. The plaintiffs argued that, because there were allegedly more than 33% of Main Street's then employees laid off during the 90-day period between Aug. 26, 2003 and Nov. 22, 2003, they were part of a "mass layoff" and were entitled to WARN notice.

However, WARN only provides for the aggregation of employment losses over a 90-day period if two pre-conditions are satisfied. First, the employment losses for two or more groups in any 30-day period must be less than the minimum number of employees specified in 29 U.S.C. § 2101(a)(3) to constitute a mass layoff — *i.e.*, at least 50 employees and 33% of the workforce. See 29 U.S.C. § 2102(d). Second, the losses over the 90-day period

must exceed the 50 employees and 33% of the workforce thresholds set in § 2101(a)(3). See *Id.* "Clearly, Congress intended that § 2102(d) [the 90-day aggregation rule] only applies if 2101(a)(2) [plant closing] or (3) [mass layoff] are *not* met." *Roquet v. Arthur Anderson*, 2004 U.S. Dist. LEXIS, 3909 *11-12 (N.D. Ill. 2004) (emphasis added); see also *United Paperworkers*, 901 F. Supp. at 435 (only aggregating employment losses over 90-day period when layoffs fail to satisfy the requirements of § 2101(a)(3)); *United Electrical, Radio and Machine Workers of America (UE) and UE Local 291 v. Maxim, Inc.*, 1990 U.S. Dist. LEXIS 5988, *8-9 (D. Mass. 1990) (refusing to aggregate employment losses over 90-day period because layoffs satisfied the requirements of § 2101(a)(2)). In *Main Street*, the layoffs in the 30-day period between Nov. 6, 2003 and Dec. 5, 2003 met the requirements of 29 U.S.C. § 2101(a)(3) and constituted a mass layoff under the Act. Therefore, the 90-day aggregation scheme contained in § 2102(d) did not apply.

THE STATUTORY CONSTRUCTION

A statute's more general provision ordinarily yields to a more specific provision addressing the same subject matter. *National Cable & Telecomm. Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327, 335 (2002). Applying this rule of construction, the U.S. District Court in *Main Street* determined that the 30-day threshold of § 2101(a)(3) was intended to be the default provision for determining when a mass layoff occurred for two reasons: 1) the 30-day threshold rule appears in the more specific "definitions" sections of the Act rather than the more general implementing provisions of § 2102(d); and 2) by its own terms, the § 2102(d) aggregation rule is subordinate to § 2101(a)(3) because it states that the aggregation rule is to be applied only when the total number of employees laid off exceeds "the minimum number of employees specified in § 2101(a)(2) or (3) of this title." In addition, § 2102(d) permits

an employer to avoid the aggregation rule by establishing that employment losses exceeding the § 2101(a)(3) threshold are the result of "separate and distinct actions and causes and are not an attempt by the employer to evade the requirements" of the WARN Act, an affirmative defense that is not available in connection with § 2101(a)(3). The court ultimately held that the § 2101(a)(3) definition of "mass layoff" controlled in *Main Street*. Because the plaintiff employees were not part of the "mass layoff" that took place in the 30-day period between Nov. 6 and Dec. 5, 2003, as defined by § 2101(a)(3), they were not entitled to notice or related wages and benefits under the Act.

CONCLUSION

Stripped to its essentials, the WARN Act is about numbers. For the Act to apply, statutory minimums must be satisfied. The court's decision in *Main Street* makes clear that § 2101(a)(3) contains the primary definition of "mass layoff" under the Act. A court should only resort to the § 2101(d) 90-day aggregation rule if there is no "mass layoff" within any relevant 30-day period under the Act. Although employers and employees will continue to argue over the numbers, at a very minimum, the decision in *Main Street* should eliminate some of the uncertainty over which numbers should apply.

