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TOWARD AN AMERICAN LAW OF REDUNDANCY

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In November 2016, in the wake of his surprise victory, U.S. president-elect Donald Trump announced that he had successfully negotiated the retention of 1,000 jobs previously destined for Mexico.¹ Carrier, an air-conditioning manufacturer, agreed to keep the positions at its Indiana plant in exchange for state tax cuts and other government perks. It was a dramatic, if ultimately suspect, show of making good on Trump's core campaign focus on preserving American jobs.²

One of the many questions about Trump's presidency is the degree to which he will be able to keep such promises. Even more uncertain is the economic wisdom of his approach. Executive deal-making with individual employers cannot stay the formidable market forces that underlie the erosion of American manufacturing.³ The core issue then is not preserving jobs but insulating workers from the consequences of inevitable obsolescence.

As I will show, the U.S. currently lacks a "law of layoffs"⁴ – a coherent set of doctrines applicable to workers terminated for economic reasons. Trump's rhetoric suggests the time may be ripe to change that. Part I demonstrates how American "layoff law" subsists primarily in voluntary employer practices. Part II places this gap in an historical context. Contemporary employment law developed in an age of economic security in which the problem of job loss was equated with hostile

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- 1 Ted Mann, *Carrier Will Receive \$7 Million in Tax Breaks to Keep Jobs in Indiana*, THE WALL STREET JOURNAL, December 2, 2016.
 - 2 Nelson D. Schwartz, *Trump Sealed Carrier Deal with Mix of Threat and Incentive*, THE NEW YORK TIMES, December 1, 2016.
 - 3 *Trumponomics: The President-Elect's Perilous Trade Policy*, THE ECONOMIST, January 5, 2017.
 - 4 Contemporary American English uses the word "layoff" to refer to an involuntary termination for business reasons not attributable to employee performance.

employer motivation. Part III calls for the adoption of mandatory severance pay as the first step toward an American law of layoffs focused directly on economic termination.

I - LAYOFF LAW IN AN AT-WILL WORLD

Like all American employment law, the regulation of economic termination is a piecemeal affair. In the United States, private sector employment is presumed to be “at will,” meaning it can be terminated by either party at any time for any or no reason. Various statutes and common law doctrines forbid employers from terminating for particularly egregious reasons. Each of these exceptions disallows a particular basis for employer action. No American law requires private employers to affirmatively justify their employment decisions.

In such a system, economic terminations are no special concern. In fact, they are more defensible than many forms of arbitrary termination that employment at will tolerates. Only one federal law imposes a direct obligation on employers in reducing their workforce – the Worker Adjustment, Notification & Retraining (“WARN”) Act.⁵ WARN requires large employers to provide notice to workers in advance of a mass layoff or plant closure. Given the absence of any other regulatory constraint on employers, workers’ layoff rights, to the extent they exist, derive almost exclusively from private contract.

A - WARN: LAYOFF LAW “LITE”

The 1988 WARN Act was an effort by Congress to address the problem of economically induced worker dislocation. The original bill envisioned a comprehensive response imposing robust employer obligations in the European tradition. The final Act – the product of fifteen years of legislative wrangling -- imposes only a single duty: Employers must provide 60 days’ advance notice to employees affected by a qualifying termination event.⁶

WARN’s notice obligation is of limited applicability. The Act applies only to large employers – those with 100 or more employees -- and only to massive dislocations of at least fifty full-time workers.⁷ Absent discriminatory selection, employees terminated in non-qualifying layoffs have no statutory rights against the terminating employer. They are expected to find replacement work of their own accord and, if unsuccessful, to seek unemployment benefits.

WARN also contains many exceptions. Notable for their potential breadth are the “faltering company” and “unforeseeable circumstances” exceptions.⁸ The former applies when providing WARN notice would jeopardize a distressed company’s ability to secure life-saving funding. The latter relieves employers of the duty to provide notice when the events precipitating the layoff or closure were unanticipated. These exceptions should be construed narrowly consistent with WARN’s remedial purpose. Indeed, courts have refused to apply the faltering company exception absent a showing that providing WARN notice

5 29 U.S.C.A. § 2101 *et seq.* (2017).

6 29 U.S.C.A. § 2102 (2017).

7 29 U.S.C.A. § 2102(a) (2017). In the case of a layoff that does not involve a plant closure, the affected employees must comprise at least 33% of the company’s workforce, otherwise the layoff must affect at least 500 employees.

8 29 U.S.C.A. § 2102(b) (2017).

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would have derailed an active and realistic funding pursuit that would have avoided layoffs.⁹ However, they have been deferential to employers alleging unforeseen circumstances. For instance, courts have accepted employer arguments that a triggering event was caused by the unforeseen act of a third party, such as the loss of a key customer, even if the adverse event merely accelerate a known business decline.¹⁰ Where the exception applies, the employer need only provide whatever notice it is able; there is no obligation to pay wages to make up for the lost days.¹¹ Since many if not most WARN events are the product of multiple economic forces, this exception allows employers to avoid the minimal obligations imposed by the Act in the very situation it was designed to address.

B - CONTRACTUAL SEVERANCE PAY

The limited duties imposed by WARN mean that for most laid off workers any rights against their employer owe exclusively to private ordering. Many employers voluntarily provide severance pay and other benefits to affected employees, either as a matter of policy, practice, or contract. Depending on the circumstances, such commitments may be legally enforced.

American workers typically do not have formal written contracts. They are employed pursuant to oral or written offers which document only salient terms, like title and pay. The relatively exceptions are high-level executives and unionized workers. The former typically negotiate for a guaranteed term of employment plus severance pay in the event of early termination. Absent serious cause, the terminating employer must continue paying the executive's salary, either for a designated period or the balance of the term.¹² Unionized workers, a small minority of the U.S. work force, are governed by their collective bargaining agreement (CBA).¹³ In industries where they maintain a stronghold, union-negotiated layoff rights are common. A typical CBA might include seniority protection, advance notice, severance pay, continued health benefits, and recall rights with the extent of the rights depending on the strength of the union, the employer's financial position, and the customs of the industry.

For workers outside these narrow categories, access to severance is the product of corporate benevolence and employer self-interest. In many ways, providing layoff benefits can be advantageous to employers. Employees who receive severance are often ineligible for unemployment benefits. By paying severance, therefore, the employer can avoid the tax consequences of its termination.¹⁴ Employers can also use severance pay to induce advantageous terms of separation. Employers may offer such pay in exchange for a release of possible claims against the company or to obtain a departing employee's agreement not to seek employment with a competitor. Offering severance pay has morale benefits. Workers are more secure and productive when they trust they will have some income continuity

9 See, e.g., *Childress v. Darby Lumber*, 357 F.3d 1000 (9th Cir. 2004).

10 See, e.g., *Halkias v. Gen. Dynamics Corp.*, 137 F.3d 333 (5th Cir. 1998).

11 29 U.S.C.A. § 2102(b)(3) (2017).

12 See Stewart J. Schwab & Randall S. Thomas, *What Do CEOs Bargain For?: An Empirical Study of Key Legal Components of CEO Employment Contracts*, 63 WASH. & LEE L. REV. 231 (2006).

13 A mere 10.7% of American workers are union members. See Economic News Release, Bureau of Labor Statistics, U.S. Dep't of Labor, Union Members (Jan. 26, 2017).

14 Employers' tax contribution rate to the unemployment system is loosely tied to the number of claims they generate.

in the event of a layoff, and the depressive effect of a layoff on remaining incumbents is minimized if the separation of affected workers goes smoothly.¹⁵ Finally, employers who provide severance through an ongoing plan, can receive a federal tax credit for the plan value.

There is little reliable data on voluntary employer severance. An established program will usually provide workers an unqualified sum based on length of service, often one week's pay per year up to a cap. This amount can be substantial for long-term employees, and will often exceed the benefits available through unemployment insurance. However, estimates suggest that only a minority of the workforce has access to voluntary severance benefits and that coverage is declining.¹⁶ In addition, workers face enforcement obstacles in the event of employer default. In the case of a formal plan, federal law regulating employer-provided retirement and welfare plans requires employers to comply with the terms of their own plans.¹⁷ Employees seeking payment under non-qualified policies, however, must proceed under contract law doctrines that give employers wide leeway to modify or even retract severance policies.

Workers not covered by an established employer program may still get severance in a planned layoff. In such cases, employers offer benefits strategically to avoid employee disgruntlement and possible legal liability. Affected workers are asked, in exchange for payment, to sign releases that forgo any claim arising from the termination or from the relationship in its entirety. Federal law requires such releases to be knowing and voluntary and, in the case of waivers of age discrimination protections, employers must follow certain procedural steps.¹⁸ But such protections do not change the core constraint on employee choice – the prospect of an immediate loss of income for an indefinite duration. Employees are forced to forego what few legal rights they have for the one that is most due – a right to temporary income continuity when terminated for the business reasons of the employer rather than any fault of their own.

II - EMPLOYMENT LAW IN A WORLD WITHOUT LAYOFFS

In short, what U.S. law lacks is a comprehensive mandate requiring pay and benefit continuity following economic dislocation. Workers have only *ad hoc* access to such rights, achieved circuitously through laws not primarily designed for that purpose. Rather, American wrongful discharge law is comprised almost exclusively of doctrines limiting employer discretion in terminating for *non-economic* reasons.

This gap can be explained historically. Contemporary employment law is the product of the economic growth and stable employment practices that prevailed during much of the twentieth century. The post-war years witnessed increased prosperity, the emergence of mass domestic markets, and the rise of large corporations. These companies required a steady, committed workforce rich in firm-specific knowledge to capitalize on existing opportunities. An implicit understanding, or “social contract,” emerged under which

15 See Lee Hecht Harrison, *Severance & Separation Practices: Benchmark Study*, 6th ed. (2014).

16 John Bishow & Donald O. Parsons, *Trends in Severance Pay Coverage in the United States, 1980-2001* (2004).

17 29 U.S.C. § 1132(a) (2017).

18 These include affording employees time to review the release with counsel and a window in which to rescind improvident assent. See 29 U.S.C. § 626(f) (2017).

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workers were promised secure employment coupled with periodic raises and generous benefits in exchange for their loyalty and hard work.¹⁹ The risk of economic dislocation was not a pressing concern; the assumption was that companies would insulate workers against ordinary market fluctuations.²⁰

Against this backdrop, the risk of arbitrary termination became the principle focus of employee advocates and legal scholarship. The social contract of secure employment for quality work was largely self-enforcing: companies had every incentive to retain good workers as their businesses expanded.²¹ Yet individual managers might act for idiosyncratic, unjust, or even animus-based reasons. Collective bargaining agreements addressed this by insisting on termination only for just cause, progressive discipline policies, and procedures for appeal and review of suspect decisions. The Civil Rights era brought to light the mistreatment of racial minorities and other historically excluded groups and gave rise to federal laws proscribing status discrimination in employment decisions.²² States created their own versions of these laws and went on to enact additional – sometimes idiosyncratic – protections for workers.²³

By the 1980s, courts too had contributed to the emerging body of motive-based wrongful discharge law, recognizing various common law “exceptions” to employment at will. These doctrines prohibited employers from terminating without “cause,” either a performance or business justification for the decision, or for terminating for egregious reasons contrary to the public interest, such as whistleblowing or refusing unlawful orders.²⁴ Economic terminations remained outside the core concerns of courts and policy makers, and there was a strong sense that employment at will as a whole was eroding. On the strength of that movement, scholars called for a universal just cause rule, and one state enacted such legislation.²⁵

But while this movement in law and advocacy was gathering speed, the social contract that first inspired it was deteriorating. Beginning in the 1970s, economic growth slowed and the U.S. began to face serious competition from foreign suppliers. The role of unions declined, owing to weakened legal protections as well as increased tolerance for conflict on the part of employers.²⁶ Soon employers were not only facing significant pressure to cut cost, but also had more options for responding to strikes and other forms economic pressure by relocating or outsourcing work in a much larger market.²⁷ By the 1980s,

19 PETER CAPPELLI, *THE NEW DEAL AT WORK: MANAGING THE MARKET DRIVEN WORKFORCE* (1996).

20 Kevin F. Hallock, *Job Loss and the Fraying of the Implicit Employment Contract*, 23 J. ECON. PERSPECTIVES 69 (2009).

21 Edward B. Rock & Michael L. Wachter, *The Enforceability of Norms and the Employment Relationship*, 144 U. PA. L. REV. 1913 (193).

22 See, e.g., 42 U.S.C.A. § 2000e-2 (2017).

23 Examples include laws providing limited protections to domestic violence victims, cigarette smokers, and social media users.

24 Stewart J. Schwab & Randall S. Thomas, *What Do CEOs Bargain For?: An Empirical Study of Key Legal Components of CEO Employment Contracts*, 63 WASH. & LEE L. REV. 231 (2006).

25 See Montana Code § 39-2-903. That regime codifies economic reasons as a defense to wrongful discharge claims.

26 These include the passage of the Taft-Hartley Act of 1947, the advent of state “right to work laws,” and case law permitting companies to permanently replace striking workers.

27 LOUIS UCHITELLE, *THE DISPOSABLE AMERICAN: LAYOFFS AND THEIR CONSEQUENCES* (2007).

companies were terminating an average of nearly 2 million workers per year.²⁸ The modern corporate layoff had been born.

By the time these drastic changes in the economy had occurred, the structure of American employment law was already firmly established. The WARN Act, whose initial introduction coincided with the first signs of decline, might have signaled a change in the law's direction from policing impermissible reasons for termination to regulating the incidence and consequences of lawful ones. But it was not to be. Early proposals that would have required employers to negotiate with affected workers, provided adjustment assistance and training, and helped parties consider alternatives to dislocation, gave way to an Act that merely provides workers with advance notice of a *fait accompli*.²⁹

From the vantage point of today what is clear is that the emergence of mass layoffs in the late twentieth century was not a dramatic response to an isolated economic event, but the beginning of a new way of doing business. In an increasingly fast-paced and globalized market, companies feel compelled to adjust their workforce to meet changing demands, adapt new technologies, and compete in the race to deliver products and services at the lowest possible cost. This means that economic termination is a persistent reality for workers in all industries at all skill levels, not merely the last nail in the coffin of American manufacturing.³⁰ Employers' commitment to long-term work has been replaced by the message that job security is contingent on the external market. In such an environment, employment law's preoccupation with hostile motives appears anachronistic if not irrelevant.³¹ A "law of layoffs" – a law that enables secure transitions – is desperately needed.

III - TOWARD AN AMERICAN LAW OF LAYOFF

Viewed in this light, the current political rhetoric surrounding economic termination is out of step with the on-the-ground reality. Trump's call to preserve manufacturing jobs seeks to retrench a mid-twentieth century social contract premised on career employment in an industry already languishing in the global economy. Policies trained on such ends, particularly if coupled with site-specific interventions like the Carrier deal, risk expending political capital on solutions that are unlikely to help workers in the long term.

Yet the political climate also holds promise for meaningful law reform. Once law and policy makers acknowledge the inevitability of job loss, they can train their efforts on mitigating the costs of job transition. A first step would be the creation of a federal severance law. Currently severance is a voluntary practice rather than an employment right. Joblessness is considered the province of the social security system, which serves as a safety net in the event that terminated individuals are unable to find suitable replacement work.³² There is no direct obligation on employers to provide any form of income continuity upon termination. As a consequence employees have only on modest government benefits

28 Richard W. McHugh, *Fair Warning or Foul? An Analysis of the Worker Adjustment and Retraining Notification (WARN) Act in Practice*, 14 BERKELEY J. EMP. & LAB. L. 1 (1993)

29 *Id.*

30 Rachel Arnow-Richman, *Just Notice: Re-Reforming Employment At Will*, 58 UCLA L. REV. 1 (2010).

31 *Id.*

32 The unemployment system has been described as "a public welfare insurance program to combat destitution." Kenneth M. Casebeer, *Unemployment Insurance: American Social Wage Labor Organization and Legal Ideology*, 35 B.C.L. REV. 259, 263 (1994).

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on which to rely in bridging income gaps, and employers have limited incentive to seek alternatives to termination in their quest for profit and efficiency.

The federal WARN Act provides an obvious platform for enacting a severance mandate. WARN was framed exclusively as a notice statute, a characterization deemed essential to its ultimate adoption. The law's democratic proponents went so far as to reject an amendment that would have sanctioned severance pay as an alternative to notice for fear of imposing additional financial obligations on employers. But this is an artificial distinction that has created unnecessary rigidity for both employers and employees. In the international arena, where statutory notice laws are commonplace, employers typically have the option of providing "working" notice or offering pay in lieu thereof. Such a system imposes a definite obligation on which employees can rely and gives employers flexibility in assessing and managing the costs of termination.

The unfortunate consequences of a pure notice statute can be seen in the expansive interpretation of the unforeseen circumstances defense and its consequences. It makes sense that employers might be unable to provide sixty days' notice in cases where the triggering termination was precipitated by unanticipated events. But there is no similar rationale for granting employers relief from making severance payments. As it stands, workers are entitled to pay as a remedy only for the limited period during which actual notice could have been provided. This means that an employee who receives no notice from a company in precarious economic circumstances must pursue litigation under highly fact dependent law in order to obtain what may be merely a partial remedy.³³ The risks are compounded by WARN's good faith provision, which completely relieves an employer of liability if it had a good faith and reasonable basis for believing its failure to provide notice was lawful.³⁴

Of course, even converting WARN to a severance statute and eliminating some of the distressed company defenses will only help those employees involved in a sufficiently large layoff at a sufficiently large employer to trigger the statute's narrow coverage limits. Such events represent a mere subset of economic layoffs, and it has been widely argued that both the definition of employer and covered events should be expanded. Indeed, some states have expanded coverage for companies within their borders by enacting more employee-friendly "mini-WARN" statutes. A revised federal WARN Act could incorporate appropriately scaled notice/severance periods in order not to overburden smaller employers.

Finally, it is worth considering whether WARN could be reformed in other ways to encourage employers to consider alternatives to layoffs. Labor economists have puzzled over why firms seem to prefer layoffs to other cost saving practices, such as wage cuts and work spreading, that could achieve similar efficiencies with less detrimental consequences

33 There are no specialized employment courts in the U.S., nor is there any government agency with enforcement authority over the WARN Act.

34 29 U.S. Code § 2104(a)(4).

to employees. The original WARN Act would have forced employers to consult with employees about anticipated layoffs and closings, and at least one legal scholar has proposed re-introducing that requirement.³⁵ Such obligations are, of course, a component of European redundancy law. By contrast, in an at-will system, where few employees have the benefit of union representation, it is easy to suppose that such a requirement would yield a mere show of consultation. But creative lawmaking could package the requirement with other reforms that might produce meaningful collaboration despite such obstacles. As one example, the law might incorporate a duty to consult in the existing good faith defense along with a penalty provision. An employer could then be obligated to prove good faith consultation in order to avoid liability for additional fees and damages. Other types of liability-linked incentives are surely imaginable.

CONCLUSION

Although the U.S. economy has significantly recovered since the Great Recession, worker dislocation continues to be a significant problem. Many of the challenges facing laid off workers are beyond the reach of employment law. No severance mandate, however generous, can solve the problem of inadequate replacement work. Ultimately policy makers must find ways to stimulate the creation of well-compensated, full-time jobs. In this way, Trump's "buy America" pledge and his campaign commitments to U.S. infrastructure may hold more promise than more high-profile moves like the Carrier negotiation.³⁶ But there are steps that legislators can take to improve existing law in recognition of the new labor practices attending our global economy. Recasting the federal WARN Act as a severance law would place a direct obligation on employers to provide a period of full income replacement in the inevitable situation of job transition. Such reform could prove a valuable and politically viable first step in realigning American employment law with the needs and demands of contemporary workers and businesses.

35 Anne M. Lafaso, *Talking is Worthwhile: The Role of Employee Voice in Protecting, Enhancing, and Encouraging Individual Rights to Job Security in a Collective System*, 14 EMP. RTS. & EMP. POL. J. 55 (2010).

36 Exec. Order N°. 13788, 82 Fed. Reg. 18837 (April 21, 2017).