

## Changing the Legal Baseline for Effecting Mass Economic Dismissals

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Rachel Arnow-Richman, [Temporary Termination: A Layoff Law Blueprint for the COVID Era](#), 64 *Wash. U. J. L. & Pol'y* 1 (2021).

In her article, *Temporary Termination: A Layoff Law Blueprint for the COVID Era*, Professor Arnow-Richman argues “that the exigencies of the pandemic bring to light a long-neglected flaw in the pre-existing regulatory framework: there is no reliable just-in-time source of continued pay, nor any form of separation rights, for laid-off workers.” (P. 20.) The article is divided into three main sections. First, it describes the dearth of protections for laid-off workers. Second, it explains the legal significance this gap holds in protecting laid-off workers. Third, it “sketches a new law of layoffs focused on income continuity and job attachment.” (P. 4.)

In Part I (Pp. 5–12), *The Economic Termination Gap*, Professor Arnow-Richman explains that there are few federal (or state) protections for workers whose employment is terminated, permanently or temporarily, for economic reasons. The one federal right that Congress has created is a limited right to advance notice of job termination under the Worker Adjustment and Retraining Notification (WARN) Act, 29 U.S.C. §§ 2101-2109. The WARN Act requires certain large employers to provide 60-days’ advance notice of job loss resulting from a plant closing or mass layoff, as those terms are statutorily defined.

But like all labor statutes, the WARN Act is only as good as the breadth of its protection. Professor Arnow-Richman points out that the Act is limited even in the best of circumstances—it applies only to employers with at least one hundred workers that either close a plant affecting at least fifty workers or order a mass layoff affecting at least fifty workers and comprising one-third of the employer’s workforce. But even if those conditions are met, then workers still *may not* be entitled to advance notice if an exception applies. Professor Arnow-Richman explains, the WARN Act’s advance notice provision does not apply to temporary employment separations during a pandemic precisely because the unforeseen business circumstances (UBC) exception can be successfully invoked by the employer. This result highlights that the WARN Act’s “fundamental goal” of “re-employment” undercuts another value underlying work, “income continuity.” The latter turns out to be significantly more important during an infectious disease pandemic when no one can safely work. (Pp. 11–12.) In effect, the WARN Act is inadequate in dealing with temporary job losses resulting from such outbreaks.

In Part II (Pp. 12–19), *The Income Continuity Crisis*, Professor Arnow-Richman explains the significance of this income replacement gap for “COVID-affected workers—individuals whose jobs have been temporarily or permanently eliminated due to the pandemic.” (P. 4.) In Section II.A., Arnow-Richman starts with the acknowledgement that some employers will voluntarily provide severance pay for workers who are temporarily or permanently laid off resulting from a world-wide pandemic. These voluntary payments come in two forms: informal and formal. Under informal agreements, such as those contained in employee manuals, the employer can generally and legally modify or suspend such payments under state law. Arnow-Richman explains that most workers will fall into this category if they are fortunate enough even to have access to voluntary severance payments, which “turns on the employer’s internal policies or practice” and therefore “depends on the employer’s unilateral choices about how it wants to handle terminations.” (P. 13.)

Formal agreements also come in two types. First are actual contracts such as severance pay provided in collective-bargaining agreements and those provided by contract typically for firm executives. Second are “[t]hose . . . more

formalized and more complex [agreements that] likely qualify as welfare plans under the Employee Retirement Income Security Act (ERISA).” (P. 14.) Whether formal or informal, these agreements cover a fraction of the U.S. labor force and therefore fail to provide the blanket income continuity that Professor Arnow-Richman suggests.

In Section II.B., Arnow-Richman discusses public benefits for income replacement, which includes unemployment insurance (UI) and the “Federal Pandemic Unemployment Compensation (FPUC) program authorized under the CARES Act, [which] provided an additional \$600 per week to any worker receiving UI.” (Pp. 16–18.) Although the FPUC gave workers access to income replacement in terms of “increasing the amount and availability of income continuity,” there were such “extraordinary delays” in both applying for and waiting for benefits that many workers simply gave up, never to collect the benefit. (Pp. 18–19.)

In Part III (Pp. 19–29), Professor Arnow-Richman explains that her “purpose is not to critique either the corporate or government response to what are truly unprecedented circumstances.” Rather, her point is to highlight the deficiencies of the WARN Act in providing income replacement during pandemics and other circumstances that may trigger an exception. (P. 20.) Her solution, some of which she has written about in prior articles, is two-fold. First, “Congress should enact a ‘law of layoffs’ that would require employers to provide severance pay to terminated workers where they are either unable or choose[] not to provide advance notice of termination.” (P. 20, Pp. 20–23.) Second, she “propose[s] the creation of a deferral option, like what exists in Canada, for terminations formally classified as temporary. Workers would receive streamlined access to UI during the temporary period, after which employers could choose either to reinstate them or pay their deferred severance obligation.” (P. 20, Pp. 23–29.) These triggering events would avoid some of the disastrous results that occurred while workers waited for their COVID benefits due to administrative delay.

Mass economic dismissals are ubiquitous in the history of capitalist economies. In these circumstances, employers, employees, and local communities suffer when a plant closes, or a mass economic dismissal is effectuated. This is especially true in economic circumstances that are not localized, such as is the case in a world-wide pandemic. Mass economic dismissals are difficult problems to solve because typically no one is at fault and therefore there is no actor on which efficiently to place the duty of income replacement for the workers. Add to that a pandemic and even the government may not be able to handle the situation. This article is an excellent start to a conversation about how to handle these types of situations in the future, before they recreate the type of suffering that we all witnessed in 2020.

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