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# TEMPORARY TERMINATION: A LAYOFF LAW BLUEPRINT FOR THE COVID ERA

Rachel Arnow-Richman\*

## ABSTRACT

The current pandemic-induced unemployment crisis demands a new strategy for addressing temporary, economic-based terminations. Workplace regulation has long neglected workers separated for economic reasons, leaving the problem to the social welfare system, which has been overwhelmed by record numbers of unemployment applicants. In prior work, this author has called for laws requiring employers to provide mandatory advance notice of termination or commensurate severance pay to laid off workers. Building on that work, this article argues for recognizing “temporary separation” as a distinct legal status that confers individual rights to affected employees within the context of a comprehensive law of layoffs. Under this system, all workers terminated for economic reasons would be entitled to advance notice or its equivalent in severance pay. However, employers could suspend such obligations by classifying workers as temporarily separated. These individuals would retain their status as employees, obtain fast-track access to unemployment benefits, and enjoy a right to reinstatement when their jobs return. Should the employer choose not to recall a temporarily separated worker, or if the lack of work becomes permanent, the employer would be required to fulfill its deferred severance obligation.

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## INTRODUCTION

No statistic better captures the economic devastation of the COVID-19 pandemic than the unemployment rate. Between March and July of 2020, over 50 million individuals lost their jobs in the wake of government shut down orders and the cessation of ordinary commercial life.<sup>1</sup> There is no comprehensive data on the terms or effects of these many individual job losses, but we know anecdotally that, like everything about the pandemic, the pain has not been equally distributed.<sup>2</sup> Some separated workers received generous severance pay from their employers, some more modest amounts, and some none at all.<sup>3</sup> Some separated workers promptly secured unemployment insurance; some faced long delays and administrative hurdles.<sup>4</sup> Perhaps most importantly, some separated workers have since returned to work, some still expect to return, and some have lost their jobs permanently.<sup>5</sup>

This uncertainty and variability in workers' experience of job loss owes

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1. In the eighteen-week period between March 7, 2020 and July 4, 2020 there were more than 50 million initial unemployment insurance claims filed. For comparison, in the eighteen-week period between October 5, 2019 and February 1, 2020, there were less than 4 million initial claims. See U.S. DEP'T. LAB., UNEMPLOYMENT INSURANCE WEEKLY CLAIMS DATA 6 (July 4, 2020), <https://www.dol.gov/ui/data.pdf> [<https://perma.cc/37FB-TYJX>].

2. As has been widely reported, workers of color and low-wage workers have disproportionately suffered both the health effects and economic consequences of the pandemic. See Elise Gould & Valerie Wilson, *Black Workers Face Two of the Most Lethal Preexisting conditions for coronavirus – racism and economic inequality*, ECONOMIC POLICY INSTITUTE (June 1, 2020), <https://www.epi.org/publication/black-workers-covid/> [<https://perma.cc/K8SU-9FNK>]; Mark Hugo Lopez, Lee Rainie & Abby Budiman, *Financial and health impacts of COVID-19 vary widely by race and ethnicity*, PEW RESEARCH CENTER (May 5, 2020) <https://www.pewresearch.org/fact-tank/2020/05/05/financial-and-health-impacts-of-covid-19-vary-widely-by-race-and-ethnicity/> [<https://perma.cc/6WSJ-7U4X>].

3. See *infra* Part II.B

4. See Tony Romm, *Underfunded, understaffed and under siege: Unemployment offices nationwide are struggling to do their jobs*, WASH. POST (Apr. 6, 2020), <https://www.washingtonpost.com/business/2020/04/06/unemployment-benefits-coronavirus/> [<https://perma.cc/LF3W-UW56>]; *infra* Part II.B.

5. See, e.g., *MGM Resorts lays off 18,000 furloughed workers*, WASH. POST (Aug. 28, 2020) <https://www.washingtonpost.com/business/2020/08/28/mgm-resorts-layoffs-furloughs/> [<https://perma.cc/GAA7-CPV6>] (reporting that of 62,000 workers initially furloughed during company closure, most have been called back to work and 18,000 have been terminated). At the height of government closures in May 2020, the vast majority of unemployed individual (more than 10 million of the 14 million out of work) described themselves as on “temporary layoff.” U.S. BUREAU LAB. STATS., <https://www.bls.gov/news.release/empst.t12.htm#> [<https://perma.cc/2CGE-YCCX>].

to a failure of law.<sup>6</sup> The United States is unique among western countries in lacking what I have called a “law of layoffs.”<sup>7</sup> Absent narrow circumstances, economic terminations are treated like any other at-will termination: employers are free to separate workers at their discretion without any obligation to cushion or support their transition out of work. I refer to this regulatory vacuum as the “economic termination gap.”

Elsewhere I have called for mandatory advance notice or commensurate severance pay to laid off workers.<sup>8</sup> Such “separation rights,” as I now label them, are critically important in the COVID era, which has seen record-breaking numbers of individuals out of work. Yet a unique aspect of the current crisis is that, for many affected workers, job separation was or will be a temporary event. Since government shut down orders began lifting during the summer of 2020, many (though far from all) workers have returned to their jobs, and others likely will still. These workers are differently situated from those whose terminations are or will become permanent. For workers in the latter category, the goal of layoff law and policy is to transition them to new employment, perhaps in different sectors of the economy. In contrast, the goal with respect to those in the former category should be to maintain their workplace attachments and support them financially through what ideally will be a finite period out of work.

This article argues for recognizing “temporary separation” as a distinct legal event that confers statutory rights to affected employees within the context of a comprehensive law of layoffs. Under this system, all employees terminated for economic reasons would be entitled to advance notice or its equivalent in severance pay, as I have previously argued.<sup>9</sup> In addition, however, employers would be permitted to suspend those obligations by classifying workers as temporarily separated. Like workers furloughed under collective bargaining agreements, these individuals would retain their status as employees, receive streamlined access to unemployment benefits, and be entitled to reinstatement when work

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6. I use the term “economic termination” as shorthand for any termination based on business reasons unrelated to the employee, (i.e., a non-performance-based termination). This is without regard to how an employer administratively classifies the separation (e.g., layoff, reduction in force, etc.) as a matter of internal policy.

7. Rachel Arnow-Richman, *Toward an American Law of Redundancy*, 2 COMP. LAB. & SOC. SECURITY L. REV. 138, 138 (2017).

8. Rachel Arnow-Richman, *Just Notice: Re-Reforming Employment at Will*, 58 UCLA L. REV. 1, 2 (2010).

9. *Id.*

becomes available. Should the employer elect not to restore them, or the lack of work become permanent, the employer would be required to fulfill its deferred severance obligation.<sup>10</sup>

Two disclaimers are in order. First, it is difficult to imagine expanding employers' financial obligations in the current environment. Amidst the pandemic, and in other times of crisis, employers would likely require assistance in meeting the separation obligations called for in this article.<sup>11</sup> My project, however, is not to solve the insurmountable challenges presented by COVID-19, but rather to propose a long-term solution to the underlying problem of economic termination generally. Second, this article does not take a position on how Congress should allocate funds in responding to this or a comparable economic crisis. Some commentators have suggested that policies designed to maintain employment are preferable to those that expand unemployment benefits.<sup>12</sup> However, the economic implications of different types of government interventions are beyond the scope of this project. I merely assert the importance of separation rights in imagining a coherent and compressive approach to regulating economic termination.

This article proceeds as follows: Part I describes the dearth of protections for laid off workers. Workers have no separation rights upon termination for economic reasons other than in the event of a statutory "plant closing" or "mass layoff." The rights they have in those narrow contexts prioritize formal notice of termination over actual income continuity, making them of limited value even where they apply. Part II discusses what this gap has meant for those I will call COVID-affected workers—individuals whose jobs have been temporarily or permanently eliminated due to the pandemic.<sup>13</sup> In the absence of any background rights,

10. As will be discussed, this is the approach taken in much of Canada. *See infra* Part III.B.

11. For instance, in mandating paid leave in response to the pandemic, Congress authorized a tax credit to employers for the full amount of wages paid as qualified sick and family/medical leave. *See* Families First Coronavirus Response Act §§ 7001(a), 7003(a).

12. *See, e.g.,* DAVID AUTOR ET AL., AN EVALUATION OF THE PAYCHECK PROTECTION PROGRAM USING ADMINISTRATIVE PAYROLL MICRODATA (2020), <http://economics.mit.edu/files/20094?referringSource=articleShare> [<https://perma.cc/ADB8-QMJQ>] (estimating that the Paycheck Protection Program, which provided forgivable loans to small employers conditioned on their maintaining employment rolls, boosted employment by 2 to 4.5 percent).

13. My focus is on workers affected by business slow-downs or closures. The rights of those individuals unable to work because they are sick with COVID, symptomatic, quarantining or at high

workers' access to severance pay or advance warning of job loss is the haphazard result of private ordering, placing outsized pressure on the unemployment system. Part III sketches a new law of layoffs focused on income continuity and job attachment. It imagines a system of mandatory advance notice of termination or severance pay for all employees with a safe harbor provision in the case of a statutorily defined temporary separation. Employers would avoid paying wages or severance during the statutory period, provided they reinstate the worker at its conclusion. Such a system would incent continued employer-specific attachment and ensure that employees have a period of income continuity in the event of a permanent job loss.

### I. THE ECONOMIC TERMINATION GAP

There is nearly a total absence of federal or state law regulating economic termination generally, let alone in times of economic crisis.<sup>14</sup> Workers have no federal right to severance pay and only a limited right to advance notice of job loss.<sup>15</sup> The only federal law that imposes obligations on employers in this context targets the narrow, though serious, problem of

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risk, as well as those with exceptional family responsibilities related to the virus are outside the scope of this article. Some of these issues are addressed elsewhere in this symposium. *See* Michele A. Travis, *A Post-Pandemic Antidiscrimination Approach to Workplace Flexibility*, 64 WASH. U. J.L. & POL'Y 304 (2021).

14. In general, federal and state employment protection legislation prohibits terminations effected for wrongful reasons such as those based on a worker's protected characteristics, *see, e.g.*, 42 U.S.C. § 2000e-2(a)(1) (prohibiting discrimination based on race, color, religion, sex, or national origin), rather than regulating those that are economically justified. *See* Arnov-Richman, *supra* note 7 at 141-43 (attributing this focus to the predominance of lifecycle employment models during the mid-twentieth century).

15. A handful of states have laws that purport to require employers to pay severance to terminated workers in specific situations, such as in the event of a corporate change in control. *See* RI ST § 28-7-19.2; Me. Rev. Stat. Ann. tit. 26, § 625-B(2); 3 Mass. Gen. Laws Ann. ch. 149, § 183(a); 4 15 Pa. Cons. Stat. Ann. § 2582(a); 6 V.I. Code Ann. tit. 24, § 473. However, the Employee Retirement Income Security Act (ERISA) preempts much of state law in this arena, *see* 29 U.S.C.S. § 1144(a), rendering some of these so-called "tin parachute" laws of uncertain validity. *See, e.g.*, *United Paperworkers Int'l Union Local 1468 v. Imperial Home Décor Group*, 76 F. Supp. 2d 179, 185 (D.R.I. 1999) (finding that Rhode Island state law required employers to create an administrative scheme and was therefore preempted by ERISA); *The Erisa Industry Committee v. Robert Asaro-Angelo*, Docket No. 3:20-cv-10094 (D.N.J. Aug. 6, 2020) (challenging recently enacted NJ law on preemption grounds). *But see* *Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 12 (1987) (upholding Maine severance law against preemption challenge because it merely involved "one-time, lump-sum payment triggered by a single event").

company towns devastated by the loss of their primary source of jobs. The Worker Adjustment & Retraining Notification (WARN) Act<sup>16</sup> requires employers with one hundred employees or more to provide sixty days advance notice of any job loss caused by one of two major events: a “plant closing” affecting at least fifty employees<sup>17</sup> or a “mass layoff” affecting at least fifty employees comprising at least a third of the workforce.<sup>18</sup> The statute’s eponymous goal is to provide advance warning to vulnerable communities with the hopes that workers will have an opportunity to prepare for the loss.<sup>19</sup> In other words, the statute aims to circumvent all-out destruction of local economies, not to remedy individual terminations.

WARN’s narrow definitions of both covered employers and triggering events bear this out. WARN’s one-hundred employee threshold for employer coverage is the largest by far in the federal canon.<sup>20</sup> Only about half of employers are even subject to the statute.<sup>21</sup> Closures and layoffs by small to medium-sized businesses simply do not fall within its purview. Neither do modest-sized layoffs at large, covered employers, or those that, while meeting the fifty-person minimum do not affect at least a third of the employer’s workforce.<sup>22</sup> The statute’s various coverage limits combine to

16. Worker Adjustment and Retraining Notification (WARN) Act, 29 U.S.C. §§ 2101–2109.

17. *Id.* § 2101(a)(2).

18. *Id.* § 2101(a)(3). A layoff affecting 500 or more employees also triggers WARN Act duties without regard to the percentage of the workforce affected. *Id.*

19. *See Weekes-Walker v. Macon Cnty. Greyhound Park, Inc.*, 877 F. Supp. 2d 1192, 1199 (M.D. Ala. 2012) (“The WARN Act’s legislative purpose is to secure for workers ample notice that their employment will be terminated so that they can better prepare themselves for reentry into the job market.”).

20. The workforce size threshold for employer coverage under WARN is twice that of the next highest among federal employment law statutes. *See* Family and Medical Leave Act of 1993, 29 U.S.C. § 2611(4)(A)(i) (2018) (defining covered “employer” as one employing fifty or more employees). In contrast, federal antidiscrimination laws impose a fifteen to twenty employee threshold, depending on the particular statute. *See, e.g.*, Civil Rights Act of 1964, 42 U.S.C. § 2000e(b) (fifteen or more employees); Americans with Disabilities Act of 1990, 42 U.S.C. § 12111(5)(A) (2018) (same); Age Discrimination in Employment Act of 1967, 29 U.S.C. § 630(b) (twenty or more employees).

21. According to Census Bureau statistics, as of 2017, U.S. businesses with more than 500 employees employ 52.9%—just over half—of the private workforce. U.S. & STATES, TOTALS, 2017 SUSB ANNUAL DATA TABLES BY ESTABLISHMENT INDUSTRY, U.S. CENSUS BUREAU, <https://www.census.gov/data/tables/2017/econ/susb/2017-susb-annual.html> [<https://perma.cc/QDR4-GAFD>]. This percentage is based on the foregoing data set which indicates that there were 68,035,731 individuals working for businesses with 500 or more employees out of 128,591,812 total employees in the United States in 2017.

22. A study conducted shortly after WARN’s enactment concluded that the “one-third” requirement excluded over eighty percent of otherwise qualifying mass layoffs. *See* U.S. GEN. ACCT.

make WARN inapplicable even to many mass termination events, which are in turn a mere subset of economic terminations generally.<sup>23</sup>

Such are the limits of the law in ordinary times, and current times are far from ordinary. WARN contains two exceptions of particular relevance to the COVID-19 pandemic. First, the Act does not apply to temporary events. It defines an “employment loss” triggering WARN obligations as a job loss or a reduction-in-hours of fifty percent or more enduring for at least six months.<sup>24</sup> This eliminates from coverage many of the COVID-related terminations that flowed from austere but temporary government shut down orders aimed at containing the virus. Ultimately some employers will be unable to survive such a dramatic, albeit short-lived, loss of business.<sup>25</sup> In other cases, jobs will not return due to shifts in consumption patterns triggered by the pandemic.<sup>26</sup> However, the employer’s duties under the Act

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OFF., GAO-03-1003, THE WORKER ADJUSTMENT AND RETRAINING NOTIFICATION ACT: REVISING THE ACT AND EDUCATION MATERIALS COULD CLARIFY EMPLOYER RESPONSIBILITIES AND EMPLOYEE RIGHTS 3 (2003) (concluding that employers were required to provide advance notice for approximately 13 percent of mass layoffs compared to approximately 82 percent of 1,253 plant closures.”).

23. As an example, as a rough comparison, there were 127,821 seasonally adjusted initial jobless claims resulting from mass layoff events in May 2013, the last month for which Department of Labor mass layoff data is available, compared to 1,391,000 total seasonally adjusted initial claims in the four-week period between May 4, 2013 through May 25, 2013. *Compare Mass Layoff Statistics*, U.S. BUREAU LAB. STATS., <https://data.bls.gov/cgi-bin/surveymost?ml> (select “Mass layoff initial claimants, US (seasonally adjusted) - MLSMS00NN0119005”; then click “Retrieve data”) (last visited Aug. 22, 2020) with *Unemployment Insurance Weekly Claims Data*, U.S. DEP’T LAB. EMP. & TRAINING ADMIN., <https://oui.doleta.gov/unemploy/claims.asp> (select “National”; then click “Submit”) (last visited Aug. 22, 2020). In other words, mass layoffs in the month of May 2013 accounted for only 9.19% of total initial unemployment claims in that same period. Indeed that percentage likely overstates the number of WARN-qualifying events insofar as the Bureau of Labor Statistics defines a “mass layoff” as one yielding at least fifty unemployment claims in a consecutive five-week period without regard to the size of the employer. See U.S. BUREAU OF LABOR STAT., MASS LAYOFF STATISTICS: FREQUENTLY ASKED QUESTIONS, <http://www.bls.gov/mls/mlsfaqs.htm> [<https://perma.cc/L9FR-TBRL>] (2013).

24. 29 U.S.C. § 2101(a)(6).

25. In hard hit sectors like retail, several long-established companies have already shuttered or declared bankruptcy. See Aisha Al-Muslim, *Chapter 11 Business Bankruptcies Rose 26% in First Half of 2020*, WALL ST. J. (July 2, 2020), <https://www.wsj.com/articles/chapter-11-business-bankruptcies-rose-26-in-first-half-of-2020-11593722250> [<https://perma.cc/ZUM5-G37U>] (reporting that 3,600 businesses filed for bankruptcy in the first six months of 2020, a 26% increase since the previous year); Abha Bhattarai, *Pandemic bankruptcies: A running list of retailers that have filed for Chapter 11*, WASH. POST (Aug. 12, 2020), <https://www.washingtonpost.com/business/2020/05/27/retail-bankruptcy-chapter11/> [<https://perma.cc/53K9-MRY4>] (cataloguing closures in the retail sector).

26. See Jose Maria Barrero et al., *COVID-19 Is Also a Reallocation Shock* (Becker Friedman Institute, Working Paper No. 59, 2020), [https://bfi.uchicago.edu/wp-content/uploads/BFI\\_WP\\_202059.pdf](https://bfi.uchicago.edu/wp-content/uploads/BFI_WP_202059.pdf) [<https://perma.cc/FU9B-R56>] (estimating that the COVID-19 shock caused 3 new hires for every 10 layoffs and that 32-42% of COVID-induced layoffs will be



are triggered only when the employer can reasonably foresee that the layoff will become permanent.<sup>27</sup> Until that point, there is no event requiring notice.

Second, even permanent terminations are excepted from the Act if they result from an unforeseen business circumstance.<sup>28</sup> According to Department of Labor regulations, these include circumstances “caused by some sudden, dramatic, and unexpected action or condition outside the employer’s control.”<sup>29</sup> Along with the loss of a major client or supplier, the regulations single out as examples a “major economic downturn” and – especially relevant to the current situation – “government ordered closing”.<sup>30</sup> In the face of such circumstances, the employer is excused from the sixty-day WARN Act obligation and required to give only what notice is practicable.<sup>31</sup>

This unforeseen business circumstances, or “UBC,” exception is already a source of consternation for compliance-minded employers. Its application turns on the reasonable business judgment of the employer under the circumstances, making it highly fact-dependent.<sup>32</sup> At some point,

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permanent); Zeynep Ton, *Rebuilding the Economy Around Good Jobs*, HARV. BUS. REV. (May 22, 2020), <https://hbr.org/2020/05/rebuilding-the-economy-around-good-jobs> [<https://perma.cc/K83N-RX3Y>] (stating the post-pandemic risks to traditional retailers due to the massive shift of consumers to online shopping).

27. EMP. & TRAINING ADMIN., U.S. DEP’T LAB., THE WORKER ADJUSTMENT AND RETRAINING NOTIFICATION ACT: EMPLOYER’S GUIDE TO ADVANCE NOTICE OF CLOSINGS AND LAYOFFS 5 (2003), [https://www.dol.gov/sites/dolgov/files/ETA/Layoff/pdfs/\\_EmployerWARN2003.pdf](https://www.dol.gov/sites/dolgov/files/ETA/Layoff/pdfs/_EmployerWARN2003.pdf) [<https://perma.cc/ZKB5-DWCB>] (explaining that if the extension of a temporary layoff beyond six months “occurs for reasons that were not reasonably foreseeable at the time the layoff was originally announced, notice need only be given when the need for the extension becomes known”); *United Steel Workers of Am. Local 2660 v. U.S. Steel Corp.*, 683 F.3d 882, 887 (8th Cir. 2012) (finding it was not foreseeable that the economic recession of 2008 would affect the U.S. Steel Industry until the sharply decreased demand for U.S. Steel in late November made layoff necessary); *Roquet v. Arthur Andersen LLP*, 398 F.3d 585, 589 (7th Cir. 2005) (concluding that although company was aware of economic recession as of October 2008, its full effect and impact on product demand were not apparent until late November in finding no WARN Act violation in steel company’s failure to provide sixty days’ notice); *Roquet v. Arthur Andersen LLP*, 398 F.3d 585, 589 (7th Cir. 2005) (finding that notwithstanding five-month investigation by Department of Justice in the wake of the Enron collapse, accounting firm’s closure was not foreseeable until DOJ indictment was handed down and its full scope became known).

28. 29 U.S.C. § 2102(b)(2)(A).

29. 20 C.F.R. § 639.9(b)(1) (2019).

30. *Id.*

31. *Id.* § 639.9; *Newman v. Crane, Heyman, Simon, Welch, & Clar*, 435 F. Supp. 3d 834, 842 (N.D. Ill. 2020); *Carroll v. World Mktg. Holdings, LLC*, 418 F. Supp. 3d 299, 312 (E.D. Wis. 2019).

32. 20 C.F.R. § 639.9(b)(2); *see Pena v. Am. Meat Packing Corp.*, 362 F.3d 418, 421 (7th Cir.

the consequences of unforeseen events become foreseeable.<sup>33</sup> With the pandemic now in its second year, a bumpy rollout to the vaccination program, and infection and death rates continuing to fluctuate, employers are likely aware that reduced operations, if not periodic shutdowns, will continue intermittently until the population achieves herd immunity.<sup>34</sup> However, the WARN Act contains a safe harbor for employers who act in good faith.<sup>35</sup> Where an employer fails to notify based on a reasonable good faith belief that circumstances justify an exemption, the court may reduce or eliminate damages.<sup>36</sup> Reliance on advice of counsel can demonstrate such a belief.<sup>37</sup>

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2004) (noting that the Department of Labor has declined to promulgate “*per se* rules as to what constitutes unforeseen business circumstances, and encourages a case-by-case examination of the facts”).

33. Compare Wholesale and Retail Food Distrib. Local 63 v. Santa Fe Terminal Servs., Inc., 826 F. Supp. 326, 333 (C.D. Cal. 1993) (finding that, although the loss of the company’s sole customer was unforeseen, by February 23rd the employer should have anticipated the likely effects on its business and sent notification to its workers), and Int’l Union, United Auto., Aerospace & Agr. Implement Workers of Am. v. MRC Indus. Grp., Inc., 541 F. Supp. 2d 902, 911 (E.D. Mich. 2008) (concluding that the failures of a potential sale “were neither hidden nor imagined” and could not excuse the employer’s failure to send notice to its workers, with *In re* Advanced Accessory Systems, LLC, 443 B.R. 756, 766 (Bankr. E.D. Mich. 2011) (finding that the loss of 95% of the employer’s business within a twenty-four hour period was unforeseen and the employer was not in violation for failure to provide notice), and United Steel Workers of Am. Local 2660 v. U.S. Steel Corp., 683 F.3d 882, 887–89 (8th Cir. 2012) (noting that although the economic recession was foreseeable, the sharply reduced demand for steel was not, in concluding that employer could rely on the unforeseen business circumstance exception).

34. For instance, spikes in infection and death rates in October 2020 led to a second round of shut down orders in some European countries. Aurelien Breede et al., *France and Germany Announce New Restrictions as Cases Surge in Europe*, N.Y. TIMES (Oct. 29, 2020), <https://www.nytimes.com/live/2020/10/28/world/covid-19-coronavirus-updates> [<https://perma.cc/77M4-MEG7>]; Mitch Smith, *The U.S. Hits the 9-Million Mark as Infections Keep Surging*, N.Y. TIMES (Oct. 30, 2020), <https://www.nytimes.com/live/2020/10/29/world/covid-19-coronavirus-updates> [<https://perma.cc/86ZM-GNZC>], and new temporary and permanent layoffs continued even as some laid off workers are began to be called back. See Jeanna Smialek, et al., *Workers Face Permanent Job Losses as the Virus Persists*, N.Y. TIMES (Oct. 3, 2020) <https://www.nytimes.com/2020/10/03/business/economy/coronavirus-permanent-job-losses.html> [<https://perma.cc/J4R3-ZGT7>].

35. 29 U.S.C. § 2104(a)(4) (“If an employer which has violated this chapter proves to the satisfaction of the court that the act or omission that violated this chapter was in good faith . . . the court may, in its discretion, reduce the amount of the liability or penalty provided for in this section.”).

36. *Kildea v. Electro Wire Prods., Inc.*, 60 F. Supp. 2d 710, 715 (E.D. Mich. 1998), *aff’d*, 238 F.3d 422 (6th Cir. 2000) (allowing “complete reduction” in damages); Int’l Ass’n of Machinists and Aerospace Workers, AFL-CIO v. Gen. Dynamics Corp., 821 F. Supp. 1306, 1313 (E.D. Mo. 1993) (same); *Watts v. Marco Holdings, L.P.*, NO. 14-00002, 1998 WL 211770, at \*2 (N.D. Miss. 1998) (allowing 50% reduction).

37. *Kildea*, 60 F. Supp. 2d at 713); *In re Old Electralloy Corp.*, 162 B.R. 121, 126 (Bankr. W.D. Pa. 1993).

Indeed, there is fairly strong consensus among lawyers and government regulators that the COVID-19 pandemic and economic shutdown are textbook examples of the unfair business circumstances exception. Management-side lawyers have cautiously counseled their clients that they can rely on the defense,<sup>38</sup> and the Department of Labor has all but greenlighted this position in publicly posted guidance.<sup>39</sup> Litigation initiated thus far invokes the defense.<sup>40</sup> Meanwhile, state lawmakers have taken steps to allow employers within their jurisdiction to avoid more onerous state law obligations.<sup>41</sup>

38. Andrea R. Calem et al., *COVID-19 and the “Unforeseen Business Circumstances” Exception to WARN Notification*, HUNTON ANDREWS KURTH (Mar. 18, 2020), <https://www.huntonlaborblog.com/2020/03/articles/employment-policies/covid-19-and-the-unforeseen-business-circumstances-exception-to-warn-notification/> [https://perma.cc/9F2J-264] (observing that “the COVID-19 pandemic seems to fit comfortably within [the UBC] exception”); *COVID-19 and Workforce Reductions: Federal and California WARN Act Considerations for Employers*, AKIN GUMP STRAUSS HAUER & FELD LLP (Mar. 23, 2020), <https://www.akingump.com/en/news-insights/covid-19-and-workforce-reductions-federal-and-california-warn-act-considerations-for-employers.html> [https://perma.cc/6VPP-XLHQ] (discussing unforeseeable business circumstances as “likely to apply during the crisis that is unfolding from COVID-19”).

39. U.S. DEP’T LAB., WORKER ADJUSTMENT AND RETRAINING NOTIFICATION ACT FREQUENTLY ASKED QUESTIONS 2, <https://www.dol.gov/sites/dolgov/files/ETA/Layoff/pdfs/WARN%20FAQ%20for%20COVID19.pdf> [https://perma.cc/5GMU-87D9] (“recommending that employers consider the unforeseeable business circumstances exception in determining whether to abide by the notice requirement”).

40. See, e.g., Amended Order at 12, *Benson v. Enterprise Holdings*, No. 6:20-cv-891-RBD-LRH (M.D. Fla. Feb. 4 2021), (refusing to grant defendant-employer’s motion to dismiss complaint based on the unforeseen business circumstances defense, noting that while the defense may apply, “[e]xactly when Defendants had to give notice will doubtless be a hotly contested factual issue”). The district court also rejected Enterprise’s invocation of the Act’s “natural disaster” exception, but certified this part of its order for interlocutory review. *Id.* at 10-12; Order at 4, *Benson v. Enterprise Holdings*, No. 6:20-cv-891-RBD-LRH (M.D. Fla. Feb. 4 2021.).

41. Several states have so-called “mini”-WARN acts that are more generous to workers than the federal act. Notably, in California, where state law lacks both the temporary layoff and UBC exceptions, Governor Newsom temporarily adopted an equivalent to the federal UBC exception via executive order for the duration of the pandemic. CAL. EXEC. ORDER N-31-20 (Mar. 17, 2020), <https://www.gov.ca.gov/wp-content/uploads/2020/03/3.17.20-EO-motor.pdf> [https://perma.cc/F4BV-KGF2]; cf. NEW YORK STATE DEPT. OF LABOR, <https://labor.ny.gov/workforcenypartners/warn/warnportal.shtm> [https://perma.cc/725R-86SN] (directing employers to provide notice “as soon as possible,” noting that state law “recognizes that businesses cannot predict sudden and unexpected circumstances beyond an employer’s control, such as government-mandated closures, the loss of your workforce due to school closings, or other specific circumstances due to the coronavirus pandemic.”) In New Jersey, the legislature has delayed the effective date a novel, recently enacted state severance pay law that would have gone into effect as of July 2020. See NJ LEGIS 22 (2020), 2020 NJ Sess. Law Serv. Ch. 22 (SENATE 2353) (WEST) (changing effective

Actions such as these make apparent that the WARN Act's limits in the present moment have less to do with the Act's coverage thresholds than with its overall approach to economic termination. The WARN Act envisions massive dislocation events as a business decision – the product of strategic planning by corporate executives determining how best to weather economic shifts in their particular industry. It ensures that when companies elect to downsize, offshore, or close shop altogether, employees are not the last to know. The Act has little to say about global economic events, let alone those as colossal and unprecedented as COVID-19 during which advance notice – the single obligation imposed on employers – is all but impossible.<sup>42</sup>

In the same way, the WARN Act fails to consider the most profound implication of economic termination for workers: loss of livelihood. This is because the Act is trained on reemployment, rather than income continuity, as its fundamental goal. The assumption is that advance notice will give workers time to line-up other work, ideally avoiding any gap in pay. Whether notice realistically achieves that goal in the context of a planned event, one that is clearly within the statute's reach, is an open question.<sup>43</sup>

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date 90 days after the termination of state executive order declaring public health emergency due to COVID-19).

42. The WARN Act has garnered much criticism from legal scholars, lawyers, and policy makers, on such matters as the Act's coverage limitations, the scope of its exceptions, and the rate of employer violations. See, e.g., Tonya M. Cross, *Failure to WARN: A Proposal That the WARN Act Provide a Compensatory, Make-Whole Remedy for UnWARNed Employees*, 40 SAN DIEGO L. REV. 711, 723 (2003) (asserting that ambiguities about the scope of WARN Act liability incentivize employers to "play the odds" in favor of non-compliance); Parisi G. Filippatos & Sean Farhang, *The Rights of Employees Subjected to Reductions in Force: A Critical Evaluation*, 6 EMP. RTS. & EMP. POL'Y J. 263, 324–25 (2002) (describing the Act as "riddled with exceptions, exemptions, and excuses for non-compliance"); Alan B. Krueger, *Lessons From the Chicago Sit-In*, N.Y. TIMES: ECONOMIX (Dec. 15, 2008, 6:30 AM), <https://economix.blogs.nytimes.com/2008/12/15/lessons-from-the-chicago-sit-in/#more-721> [<https://perma.cc/8ZJH-4QD7>] ("[T]he law applies in only a minority of plant closings and mass layoffs, and apparently it is widely violated, with little consequence, when it does apply."); Anne Marie Lofaso, *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'Y J. 55, 74 (asserting that the perverse consequence of WARN's exceptions is that "the very real and tangible effects" of the precipitating circumstances "are borne not by the employer, who arguably is in a better position to bear those burdens, [but rather] by the workers"). Prior to the pandemic, efforts were afoot to expand the Act's reach and the available remedies for violations. See Fair Warning Act of 2019, S. 2938 (116<sup>th</sup> Cong. 2019) (extending WARN Act coverage to employers with fifty or more employees, requiring an additional thirty days' notice, and providing for liquidated damages in the event of a violation). Those efforts would not have changed the law's limited applicability to the current situation.

43. Compare U.S. DEP'T LAB., BUREAU LAB. STATS., WORKER DISPLACEMENT: 2015-2017 2,

What is certain is that rights to notice are all but meaningless in the current pandemic in which entire segments of the economy are shut down or just barely operating. In this situation, workers do not need time to find new work, they need a source of income to hold them over until their jobs return. As the next section describes, many COVID-affected workers lack that economic cushion.

## II. THE INCOME CONTINUITY CRISIS

The previous section described the economic termination gap. This section discusses what it has meant for COVID-affected workers. Absent regulatory law establishing worker separation rights, access to continued pay for individuals permanently or temporarily laid off depends on the private choice of their employer. For workers whose employers do not voluntarily provide severance, the only recourse is the public benefits system, which has been overwhelmed by the number of unemployment applicants.<sup>44</sup> The result is that many COVID-affected workers have found themselves suddenly jobless, with only their last paycheck in hand and uncertain access to the public safety net.

### A. A Freedom of Contract Free-for-All

A potential source of income continuity for COVID-affected workers is employer-administered severance pay. Some employers choose to provide some amount of continued pay upon termination, despite the absence of legal mandates. For high-level executives and unionized workers, “voluntary severance,” as I refer to it, is a negotiated term of employment that is memorialized in the governing employment contract or collective

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<https://www.bls.gov/news.release/pdf/disp.pdf> [<https://perma.cc/3E7K-H89M>] (finding that reemployment rates were not statistically different for workers who received written advanced notice and those who did not) *with* GOV'T ACCOUNTABILITY OFF., DISLOCATED WORKERS: WORKER ADJUSTMENT & RETRAINING NOTIFICATION ACT NOT MEETING ITS GOALS 6 (1993), <https://www.gao.gov/assets/160/153184.pdf> [<https://perma.cc/989S-2KCA>] (reporting that “[a]bout 47 percent of the employers who gave a WARN notice reported that, as a result of providing advance notice, their workers found jobs more quickly than they would have otherwise”). Ultimately the usefulness of advance notice is market dependent, turning on the availability of other jobs in the region and sector and/or the affected workers’ ability to relocate or reskill.

44. See generally Romm, *supra* note 4; *infra* Part II.B.

bargaining agreement.<sup>45</sup> For most workers, however, access to voluntary severance turns on the employer's internal policies or practices. In other words, it depends on the employer's unilateral choices about how it wants to handle terminations.

There is little meaningful data on the pervasiveness of voluntary severance.<sup>46</sup> Some private sources suggest that nearly ninety percent of employers offer severance to at least some employees.<sup>47</sup> However, such data are based on self-reports by larger, more sophisticated employers.<sup>48</sup> In addition, such firm-level data can mask differences in coverage. Companies may choose to provide severance only to a portion of their workforce, most often to executive officers and managers, less frequently to the rank-and-file.<sup>49</sup>

Moreover, it can be difficult to know whether voluntary severance is being consistently applied. Only about half of reporting employers offering severance provide a standardized benefit to all eligible employees.<sup>50</sup> Practices vary in formality with some companies maintaining established policies and others operating more case-by-case.<sup>51</sup> Finally, severance

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45. See Stewart J. Schwab & Randall S. Thomas, *An Empirical Analysis of CEO Employment Contracts: What Do Top Executives Bargain For*, 63 WASH. & LEE L. REV. 231, 250–51 (2006) (finding that nearly 90 percent of sampled CEO contracts provided for continued salary to the executive for a period of time following a termination not based on performance-related cause); COLLECTIVE BARGAINING NEGOTIATIONS & CONTRACTS MANUAL, BLOOMBERG LAW, § 123.01 et seq. (last visited Oct. 20, 2020) (providing sample contract clauses guaranteeing severance pay upon layoff to unionized workers).

46. Most information comes from private consulting firms rather than independent government sources. See DONALD O. PARSONS, INST. LAB. ECON., VOLUNTARY EMPLOYER-PROVIDED SEVERANCE PAY4, 7–10 (2017) (discussing historical sources and limits of privately compiled survey data).

47. See, e.g., RISESMART, 2017 GUIDE TO SEVERANCE & WORKFORCE TRANSITION 8–9 (2017), <https://cdn2.hubspot.net/hubfs/1866346/Assets/2017-Guide-to-Severance-3b.pdf?t=1516320202326> [<https://perma.cc/7G8Y-HKG2>].

48. See *id.* (surveying companies with 500 employees or more). In addition, private data sources rely on surveys of human resource professionals meaning they do not sample companies too small to retain someone in this position. See, e.g., *id.*; LEE HECHT HARRISON, SEVERANCE & SEPARATION BENEFITS 2 (8th ed. 2020).

49. *Id.* at 13 (finding that, of organizations offering severance to some rather than all workers, eighty-seven percent cover officers and senior executives, eighty percent cover managers and professionals, and sixty-one percent cover clerical workers).

50. *Id.* at 14.

51. See LEE HECHT HARRISON, SEVERANCE & SEPARATION BENEFITS 8 (8th ed. 2020), Severance Separation Benchmark Study (on file with author or by request at <https://info.lhh.com/severancestudy2020.us>) (reporting that fifty-one percent of responding employers maintain a formal written plan, while just over thirty percent rely on written guidelines). Notably,

policies can be easily suspended or modified. Those that are relatively informal are likely non-contractual and subject to unilateral revocation.<sup>52</sup> Those that are more formalized and more complex likely qualify as welfare plans under the Employee Retirement Income Security Act (ERISA).<sup>53</sup> Participants in those plans will have viable claims if they do not receive authorized payments.<sup>54</sup> However, federal law does not restrict employers from altering its plans, nor does it require advance notice of those changes.<sup>55</sup>

As a practical matter then, the terms of COVID-related separations depend on the employer's judgment as to what it is able and willing to do to facilitate the layoff. The result is that the experiences of COVID-affected workers have varied dramatically. At least some terminated employees have received generous payouts. Notably, Airbnb laid off twenty-five percent of its workforce with fourteen weeks of pay plus one week per year of service.<sup>56</sup> Yet, that experience is far from the norm. Other companies have let go or furloughed employees with little to no warning or pay, sometimes compounding workers' distress with minimal or unclear information about

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companies are more likely to rely on formal plans with professional and managerial employees than with the rank-and-file. *See id.* at 8-9 (reporting that less than forty percent of companies maintain formal policies for non-exempt workers versus over seventy percent for executives and managers).

52. The contractual enforceability of a personnel policy depends on the reasonable expectations of the employee. *See Woolley v. Hoffmann-La Roche, Inc.*, 491 A.2d 1257, 1264 (N.J. 1985). Most courts hold that a prominent disclaimer and/or reservation of rights to modify will insulate the employer from liability for altering or failing to abide by its policies. *See, e.g., id.* at 1271; *Sutula-Johnson v. Office Depot, Inc.*, 893 F.3d 967, 972 (7th Cir. 2018) *Romstad v. City of Colo. Springs*, 650 Fed. Appx. 576, 580 (10th Cir. 2016); *Hackney v. Lincoln Nat'l Fire Ins. Co.*, 657 Fed. Appx. 563, 574 (6th Cir. 2016). Moreover, even contractual policies may, in most jurisdictions, be unilaterally modified in or, in a minority, modified upon the provision of any form of additional consideration to the employee. *See generally* Arnow-Richman, *Modifying At-Will Employment Contracts*, 57 B.C. L. REV. 427 (2016) (discussing and critiquing both approaches).

53. *See Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 12 (1987).

54. *See* 29 U.S.C. § 1132.

55. Employers must provide employees notice of material modifications to plans no later than 210 days after the close of the plan year for which the modification was adopted. 29 C.F.R. § 2520.104b-3. However, employers need not provide advance notice, provided that they do not misrepresent or, upon inquiry, fail to disclose anticipated changes. *See McAuley v. Int'l Bus. Machines Corp.*, 165 F.3d 1038, 1043 (6th Cir. 1999) (holding that where plan changes are under "serious consideration," the employer has a "fiduciary duty not to intentionally or unintentionally misrepresent the plans terms to participants.").

56. Elisabeth Buchwald, *Airbnb Will Give Laid-off Employees 14 weeks Base Pay and Health Insurance, but Millions of Other Laid-off Workers Are Not so Lucky*, MARKETWATCH (May 7, 2020), <https://www.marketwatch.com/story/airbnb-will-give-laid-off-employees-14-weeks-base-pay-but-millions-more-laid-off-workers-are-not-so-lucky-2020-05-06> [<https://perma.cc/3RAE-W7FJ>].

the separation terms.<sup>57</sup> Some examples reveal an acute lack of empathy. In a surprise two-minute video, the CEO of Cirque du Soleil notoriously laid off ninety-five percent of its workforce with no severance pay or, purportedly, access to paid time off.<sup>58</sup>

Thus, voluntary severance is highly precarious. Where it exists, it provides a valuable source of temporary income continuity for separated workers. Yet there is neither consistency nor predictability as to its availability, enforceability, or basic terms. In other words, the COVID-19 employment crisis is a private ordering free-for-all.

### *B. The Catch-as-Catch-Can Safety Net*

The backstop on these free market dynamics is the public benefits system. The joint state-federal unemployment insurance (UI) program, established by the 1935 Social Security Act, provides temporary partial income replacement to workers separated from employment for non-performance-based reasons.<sup>59</sup> Workers qualify for UI based on their past workforce attachment irrespective of need.<sup>60</sup> Their benefits are calculated based on their earning history pursuant to a state-determined rate and cap.<sup>61</sup>

In many ways, the UI system is the ideal mechanism for managing the COVID employment crisis. It was designed to address widespread

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57. Gaby Del Valle, *Laid-off Workers Are Getting Bad Severance Packages, and Worse Communication, from Their Employers*, VOX (Mar. 27, 2020), <https://www.vox.com/the-goods/2020/3/27/21195664/coronavirus-layoffs-furlough-severance> [https://perma.cc/SJ6E-F462].

58. Emily Alford, *In the Time it Takes to Boil Instant Rice, Cirque du Soleil's CEO Fired Thousands of Employees via Bizarre Video*, JEZEBEL (Mar. 19, 2020), <https://jezebel.com/in-the-time-it-takes-to-boil-instant-rice-cirque-du-so-1842415332> [https://perma.cc/4PDC-F9EF]; see also Jennifer Liu, *'Like a kid whose parents are withholding critical information': How workers feel about virtual layoffs*, CNBC (May 8, 2020), <https://www.cnbc.com/2020/05/08/how-workers-really-feel-about-virtual-layoffs.html> [https://perma.cc/87N7-TLTX] (providing similar examples).

59. 42 U.S.C. §§ 501–504 (2006). For background on the formation and purpose of the UI system, see UNEMPLOYMENT INSURANCE IN THE UNITED STATES: ANALYSIS OF POLICY ISSUES 3–12 (Christopher J. O'Leary & Stephen A. Wandner eds., 1997); Arnow-Richman, *supra* note 8 at 41–44; Gillian Lester, *Unemployment Insurance and Wealth Redistribution*, 49 UCLA L. REV. 335, 340–43 (2001). I draw on these sources throughout this section.

60. See UNEMPLOYMENT INSURANCE *supra* note 59 at 164–65 (describing how that the idea of basing benefits on need was “rejected at the outset” of the system’s creation); Lester, *supra* note 59 at 341 (noting that UI is “not means tested” but rather “recognize[s] the pure harm of downward mobility”).

61. Average weekly benefit ranges from just under \$200 per week in states with the lowest rates up to over \$500 per week in those with the highest rates. U.S. DEP’T LAB., Summary Data For State Programs, By State Report For 04/2020, <https://oui.doleta.gov/unemploy/claimssum.asp> (last visited Aug. 23, 2020).



unemployment in times when replacement work may not be readily available.<sup>62</sup> It gives workers an economic cushion to ride out difficult times, and it supports the economy generally by boosting consumer spending.<sup>63</sup> To the extent COVID-19 is an exogenous event, affecting all workers and businesses in shutdown industries irrespective of fault, it makes sense to handle the fallout through a national insurance system.

Yet, there are aspects of UI that make it an odd tool for managing the current crisis. UI is not designed to compensate for lost income, but rather the inability to find replacement work. In ordinary times, weekly benefits average about half of a worker's prior wages.<sup>64</sup> The aim is to incent continued labor market participation rather than reliance on the public coffer.<sup>65</sup> This reemployment goal is reinforced by eligibility requirements that turn on work search behavior. Ordinarily, a waiting period applies between job loss and benefit eligibility, during which the applicant ostensibly seeks new employment.<sup>66</sup> Applicants must continue their job search efforts during the benefits period and lose eligibility if they decline

62. Arnov-Richman, *supra* note 8 at 43 (“Unemployment insurance is a government-sponsored system of pooling funds to hedge against the risk that new work might not be available.”).

63. See UNEMPLOYMENT INSURANCE, *supra* note 59 at 182 (describing goal of UI “to stabilize aggregate spending by maintaining purchasing power during economic down turns”); Lester, *supra* note 59 at 342 (describing UI as “part of a broader program of Keynesian demand stabilization”); Walter Nicholson, *The Evolution of Unemployment Insurance in the United States*, 30 COMP. LAB. L. & POL’Y J. 123, 124–25 (2007) (discussing “consumption smoothing” goals of unemployment insurance).

64. In the last complete quarter prior to the pandemic for instance, the replacement rate ranged from approximately 54% in the highest paying state (Hawaii) to 31% in the lowest (Arkansas). DEP’T OF LABOR, UI Replacement Rates Report Q4 2019, [https://oui.doleta.gov/unemploy/ui\\_replacement\\_rates.asp](https://oui.doleta.gov/unemploy/ui_replacement_rates.asp) (last visited August 23, 2020); see also Manuel Alcalá Kovalski & Louise Sheiner, *How Does Unemployment Insurance Work? And How is it Changing During the Coronavirus Pandemic?*, BROOKINGS (July 20, 2020), <https://www.brookings.edu/blog/up-front/2020/07/20/how-does-unemployment-insurance-work-and-how-is-it-changing-during-the-coronavirus-pandemic/> [<https://perma.cc/4KWW-GG8U>].

65. See Sachin S. Pandya, *Retrofitting Unemployment Insurance to Cover Temporary Workers*, 17 Yale L. & Pol’y Rev. 907, 908–09 (1999) (describing the “claimant-side moral hazard problem” whereby benefit recipients reduce efforts to find reemployment, shifting the costs of their unemployment onto the system).

66. The period may be short, as little as one week in some states. See UNITED STATES DEP’T OF LABOR, COMPARISON OF STATE UNEMPLOYMENT LAWS 2019 (Jan. 1, 2019), <https://oui.doleta.gov/unemploy/comparison/2010-2019/comparison2019.asp> [<https://perma.cc/WJ44-N2WZ>]. However, the requirement reflects the underlying premise that an applicant qualifies for UI not by losing his or her job, but by failing to secure another. See generally Arnov-Richman, *supra* note 8, at 43.

suitable employment.<sup>67</sup>

Given its focus on reemployment, UI is an awkward vehicle for addressing temporary separation, in which workers are laid off for ostensibly finite intervals with a mutual expectation of rehire. Such is the case for many COVID-affected workers whose jobs were lost as a direct result of government shutdown orders. These individuals are not working but, depending on their understanding with their prior employer, may not be seeking new work.<sup>68</sup> Indeed, searching for work is of little value to them (or the system) at a time when much of the work in their field or industry has ground to a halt.

In response to the pandemic, both Congress and the states augmented and modified UI in ways that make the system operate more like wage replacement than unemployment insurance. The Federal Pandemic Unemployment Compensation (FPUC) program authorized under the CARES Act, provided an additional \$600 per week to any worker receiving UI.<sup>69</sup> That amount was calculated to replace one hundred percent of the mean U.S. wage when combined with the mean state UI benefit.<sup>70</sup> On the

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67. See Lester *supra* note 59 at 352–53 (describing UI’s continuing eligibility requirements, including availability for work, active searching, and willingness to accept suitable work). A difficult question is what constitutes suitable work given the pandemic. Workers may decline offers of employment due to health concerns if the job places them at risk of contracting the virus. See Jack Healy, *Workers Fearful of the Coronavirus Are Getting Fired and Losing Their Benefits*, N.Y. TIMES (June 4, 2020), <https://www.nytimes.com/2020/06/04/us/virus-unemployment-fired.html> [<https://perma.cc/Q59S-CYCW>]. At least some states have provided guidance to the effect that such workers can still qualify for UI. See, e.g., 7 COLO. CODE REGS. § 1101-2, pt. 4.3.2.1 (2020); MICHIGAN DEPARTMENT OF LABOR AND ECONOMIC OPPORTUNITY, SUITABLE WORK AND REFUSAL TO WORK, [https://www.michigan.gov/leo/0,5863,7-336-94422\\_97241\\_98585\\_100420---,00.html](https://www.michigan.gov/leo/0,5863,7-336-94422_97241_98585_100420---,00.html) [<https://perma.cc/W57M-SGJ3>]; TEXAS WORKFORCE COMM’N, TEXAS WORKFORCE COMM’N GUIDANCE TO UNEMPLOYMENT CLAIMANTS, <https://www.twc.texas.gov/texas-workforce-commission-guidance-unemployment-claimants> [<https://perma.cc/3MKL-EMMV>]. Elsewhere this remains uncertain.

68. See 42 U.S.C. § 503(a)(12) (2020). As previously noted, some temporary terminations will likely ripen into permanent ones – either because the worker’s employer does not survive to re-open following a government shut down or because its business does not rebound sufficiently to justify reestablishing its pre-COVID employment levels. See *supra* notes 26-31 and accompanying text. Moreover, even if an employer experiences a renewed need for labor, in an employment-at-will system it has no obligation to re-hire a particular worker, even if it previously designated a layoff as temporary. I will return to this separate problem in *infra* Part III.

69. See CARES Act 2104(b)(1), 15 U.S.C. § 9023 (2020). This includes so-called “gig” workers and other independent contractors who are receiving benefits under Congress’ expanded eligibility program. See *Id.* at 2102(c)(2).

70. Early evidence suggests that the median replacement rate is 134 percent with a large number

state level, some states suspended their work search requirements or funneled cases into pre-COVID exemption processes for work search waivers.<sup>71</sup> Some also authorized extensions in benefits.<sup>72</sup>

These are positive changes in terms of increasing the amount and availability of income continuity. However, they have added layers of complexity on top of an administrative process that was already strained prior to the pandemic.<sup>73</sup> At the peak of the crisis, workers faced extraordinary delays simply in applying for benefits only to wait weeks for offices to process their claims.<sup>74</sup> Backlogs continued even after initial filings

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of workers receiving benefits in excess of their prior wages. Peter Ganong et al., *US Unemployment Insurance Replacement Rates During the Pandemic 1* (Becker Friedman Inst. Working Paper No. 27216, 2020), [https://cpb-us-w2.wpmucdn.com/voices.uchicago.edu/dist/b/1275/files/2020/05/rep\\_rate-5-15-2020.pdf](https://cpb-us-w2.wpmucdn.com/voices.uchicago.edu/dist/b/1275/files/2020/05/rep_rate-5-15-2020.pdf) [<https://perma.cc/AG3S-WBSX>].

71. See, e.g., An Act Authorizing Waiver Of The 1-Week Waiting Period For Unemployment Benefits, 2020 Mass. Acts Ch. 40 (Massachusetts) <https://malegislature.gov/Laws/SessionLaws/Acts/2020/Chapter40>; *Reemployment Assistance Resource Guide - COVID-19*, FL DP'T OF ECONOMIC OPPORTUNITY, (December 30, 2020) [https://floridajobs.org/docs/default-source/reemployment-assistance-center/new-individual-faq-includes-cares-act-final.pdf?sfvrsn=5f2547b0\\_70](https://floridajobs.org/docs/default-source/reemployment-assistance-center/new-individual-faq-includes-cares-act-final.pdf?sfvrsn=5f2547b0_70) (last visited January 3, 2021) (Florida); *EDD Disaster-Related Services*, CA Employment Development Dep't, [https://www.edd.ca.gov/about\\_edd/disaster\\_related\\_services.htm](https://www.edd.ca.gov/about_edd/disaster_related_services.htm) (last visited January 4, 2021) (California);

cf. CARES Ac 2102(3)(A)(ii)(I) (waiving work search requirement under the FPUC for individuals unable to work due to COVID-related health issues, COVID-related childcare responsibilities, or the need to quarantine).

72. See e.g., CA Emp. Dev. Dep't, *FED-ED Extension* (2021), [https://www.edd.ca.gov/about\\_edd/coronavirus-2019/fed-ed.htm#:~:text=With%20new%20legislative%20changes%20adopted,a%20period%20of%20high%20unemployment](https://www.edd.ca.gov/about_edd/coronavirus-2019/fed-ed.htm#:~:text=With%20new%20legislative%20changes%20adopted,a%20period%20of%20high%20unemployment) [<https://perma.cc/E3UL-QKCQ>] (providing up to 20 weeks of additional benefits); NJ Dep't of Lab. and Workforce Dev., *Labor Department Offers Extended Benefits to Unemployed NJ Workers*,

[https://www.nj.gov/labor/lwdhome/press/2020/20200701\\_20weekextension.shtml#:~:text=The%20state%20extension%20kicks%20in,in%20benefits%20at%20this%20time](https://www.nj.gov/labor/lwdhome/press/2020/20200701_20weekextension.shtml#:~:text=The%20state%20extension%20kicks%20in,in%20benefits%20at%20this%20time) [<https://perma.cc/UE9P-MYV9>] (same).

73. See Michele Evermore, *National Employment Law Project, Policy Brief, Long Lines for Unemployment: How Did We Get Here and What Do We Do Now?*, NAT'L EMP. L. PROJECT (Apr. 21, 2020), <https://www.nelp.org/publication/long-lines-for-unemployment-how-did-we-get-here-and-what-do-we-do-now/> [<https://perma.cc/7VQD-6T5L>]; Olivia Solon & April Glaser, *A 'perfect storm' for chaos: Unemployment system's failures were a long time coming*, NBC NEWS (May 12, 2020), <https://www.nbcnews.com/business/business-news/decade-neglect-has-caught-u-s-unemployment-offices-n1205056> [<https://perma.cc/M284-7YCG>].

74. See Patrick McGeehan, *'I Cry Night and Day': How It Took One Woman 8 Weeks to Get Unemployment*, N.Y. TIMES (May 8, 2020), <https://www.nytimes.com/2020/05/08/nyregion/unemployment-benefits-ny-coronavirus.html> [<https://perma.cc/8TJA-U8VH>]; Sabrina Tavernise & Patricia Mazzei, *'Florida Is a Terrible State to Be*

tapered,<sup>75</sup> with some workers awaiting payment months after applying.<sup>76</sup> Others gave up on seeking benefits altogether.<sup>77</sup> Anecdotal reports of phone calls going unanswered, filing systems that crash, demands for repeat applications, and workers queueing (even camping out) at local offices revealed the extent of workers' frustration and desperation.<sup>78</sup>

In sum, UI has proved to be an unstable and awkward foundation on which to construct a wage replacement system. Present overreliance on the public safety net has overwhelmed an important failsafe that otherwise keeps workers out of poverty in the event of unemployment. Workers have been left stranded.

### III. TOWARD A LAW OF LAYOFFS

The previous section described how the economic termination gap has left COVID-affected workers struggling with sudden unemployment and only haphazard access to continued pay or public benefits. Yet this article's purpose is not to critique either the corporate or government response to what are truly unprecedented circumstances. The point rather is 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. This contrasts with other public and private systems that grant workers distinct

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an *Unemployed Person*, N.Y. TIMES (April 23, 2020), <https://www.nytimes.com/2020/04/23/us/florida-coronavirus-unemployment.html> [https://perma.cc/5LFV-X2CY].

75. After hitting a high of 6,867,000 seasonally adjusted initial UI claims in the week of March 28, 2020, initial UI claims declined and are currently hovering at approximately 800,000 seasonally adjusted initial UI claims per week since the end of August 2020. See U.S. DEP'T. LAB., UNEMPLOYMENT INSURANCE WEEKLY CLAIMS DATA, <https://www.dol.gov/ui/data.pdf> [https://www.dol.gov/ui/data.pdf] (Oct. 22, 2020).

76. Eli Rosenberg, *Workers Are Pushed to the Brink as They Continue to Wait for Delayed Unemployment Payments*, WASH. POST (July 13, 2020), <https://www.washingtonpost.com/business/2020/07/13/unemployment-payment-delays/> [https://perma.cc/TWD6-S4M8].

77. Ben Zipperer & Elise Gould, *Unemployment Filing Failures: New Survey Confirms that Millions of Jobless Were Unable to File an Unemployment Insurance Claim*, ECON. POL'Y INST. (Apr. 28, 2020), <https://www.epi.org/blog/unemployment-filing-failures-new-survey-confirms-that-millions-of-jobless-were-unable-to-file-an-unemployment-insurance-claim/> [https://perma.cc/9JTT-KJT6].

78. See Rosenberg, *supra* note 76.

separation rights imposed through direct obligations on employers.<sup>79</sup>

This section issues a renewed call for the adoption of such a system. As I have argued elsewhere, Congress should enact a “law of layoffs” that would require employers to provide severance pay to terminated workers where they are either unable or chooses not to provide advance notice of termination.<sup>80</sup> Adding to this work, I propose the creation of a deferral option, similar to 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.

#### A. Severance Pay as a Separation Right

The pandemic makes stark that what workers need most following an unanticipated termination is money in hand. A law of layoffs begins with a universal right to severance pay that addresses this problem. Companies should be obligated, as a matter of course, to provide some amount of continued pay in situations involving economic termination.<sup>81</sup>

Such a requirement is a standard feature of the regulatory infrastructure of many legal systems outside the fifty states where severance pay is a basic workplace right.<sup>82</sup> Within the United States, severance pay is a frequent term of collective bargaining agreements covering unionized workers and is often coupled with other separation rights.<sup>83</sup> Severance pay is also a component of the federal merit system that governs and protects federal

79. See *infra* Part III.A.

80. See Arnow-Richman, *supra* note 7; Arnow-Richman, *supra* note 8.

81. A typical model for voluntary and negotiated severance plans is to provide a certain number of weeks’ pay per year of service. See COLLECTIVE BARGAINING NEGOTIATIONS & CONTRACTS MANUAL, BLOOMBERG LAW, §§ 123.111-123.17 (providing sample clauses from union contracts); HECHT HARRISON, *supra* note 51 at 12–17 (providing breakdown of common calculations by industry, employer size, and employee position). In the federal merit system, employees receive one week per year of service up to ten years of service, and two weeks per year of service thereafter, with a substantial added allowance for individuals over age forty. 5 U.S.C. § 5595(c).

82. See, e.g., Employment Rights Act 1996, c. 18, Part XI, § 135 (Eng.) (requiring “redundancy” payments); P.R. LAWS ANN. tit. 29, §§ 185a-185m (2005) (requiring severance absent just cause to terminate); *cf.* Ontario Employment Standards Act, 2000 S.O., c. 41, s. 54, 61 (Can.) (providing for advance notice of termination or its equivalent in termination pay). For comparative treatment of these different systems, see generally Arnow-Richman, *supra* note 8, at 55–57 (highlighting select statutes).

83. See generally COLLECTIVE BARGAINING NEGOTIATIONS & CONTRACTS MANUAL, BLOOMBERG LAW, § 123.01 et seq. (last visited Oct. 20,2020) (surveying clauses guaranteeing severance pay and recall rights to unionized workers separated from employment).

workers.<sup>84</sup>

There are many justifications, both doctrinal and normative, for making severance pay a universal entitlement, which I have advanced elsewhere.<sup>85</sup> For present purposes what is important is that severance serves as an alternative to advance notice in situations where the latter is impossible.<sup>86</sup> Employees need some warning of termination in order to begin preparing for the loss – whether by searching for new work, retooling, or simply saving money. This is the rationale behind the WARN Act, which seeks to avoid the particularly devastating economic effects of numerous job losses in one geographic location,<sup>87</sup> but it applies equally to all terminations.<sup>88</sup> The broader concept is recognized and codified in commercial contract law which requires reasonable notice when terminating any ongoing relationship of indefinite duration.<sup>89</sup> Should a contracting party fail to comply, its affected partner has a cause of action for expected benefits during the notice period. In the case of employment, which is also an indefinite contractual relationship, severance pay is the equivalent.<sup>90</sup>

Of course, many employers currently face dire financial circumstances and it can be difficult to imagine expanding their financial obligations at this time. This is particularly true given the unforeseeability of the pandemic

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84. 5 U.S.C. § 5595.

85. Arnow-Richman, *supra* note 8.

86. In my prior work, I have referred to this as a pay-or-play system in which the employer may “play,” i.e., continue to use the worker’s services during the notice period, or simply “pay” out on its wage obligation for that period. Arnow-Richman, *supra* note 8, at 7. In Canada this relationship between pay and notice is framed explicitly in the governing statutory law. *See, e.g.*, Ontario Employment Standards Act, 2000 S.O., c. 41, s. 54, 61 (Can.); *see generally* DAVID DOOREY, *THE LAW OF WORK* 322–23 (2d ed. 2020).

87. *See supra* Part I.

88. This obligation to provide advance warning or continued pay is also justified under implicit contract theory as the embodiment of contemporary employers’ commitment to “employability.” ROSABETH MOSS KANTER, *ON THE FRONTIERS OF MANAGEMENT* 192 (1997); *see generally* Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 *UCLA L. REV.* 519, 525 (2001) (discussing the new social contract under which employees trade organizational citizenship behavior for the promise of marketability). In a dynamic economy, in which fewer employers guarantee long-term employment, it makes sense to require the employer who has benefited from workers’ loyalty and commitment to bear some responsibility for the cost of their transition to other employment, either through advance warning or through post-termination severance. *See generally* Arnow-Richman *supra* note 8, at 39.

89. *See* U.C.C. § 2-309(3) (2003) (“Termination of a contract by one party except on the happening of an agreed event requires that reasonable notification be received by the other party . . .”).

90. *See* Arnow-Richman, *Mainstreaming Employment Contract Law: The Common Law Case for Reasonable Notice of Termination*, 66 *FLA. L. REV.* 1513 (2014) (exploring this analogy).

and employers' lack of control over its consequences. In ordinary times, employers retain the ability to manage the effects of economic challenges even when they are sudden or unpredictable. Thus, an employer that loses a major client can decide whether and how to scale down its operating costs. An obligation to provide notice or severance appropriately forces the employer to include losses to laid off workers in that calculus.<sup>91</sup> Government shut down orders, by contrast, leave employers no such flexibility.

Such considerations, however, merely provoke questions about how severance pay should be funded in times of crisis. In response to the pandemic, Congress enacted programs to directly assist employers in meeting both pre-existing and newly enacted obligations to employees. Under the Families First Coronavirus Response Act (FFCRA), for instance, small and medium-sized<sup>92</sup> employers are temporarily obligated to provide paid sick leave and expanded Family Medical Leave to workers who are unable to work due to a qualifying COVID-related reason.<sup>93</sup> The Act grants employers a credit against payroll taxes for those expenditures.<sup>94</sup> Similarly, Congress has advanced forgivable loans to small employers through the Payroll Protection Program, which can be used to fund payroll and other operating costs during the crisis.<sup>95</sup> The loans will be fully forgiven if used for qualified purposes, of which at least sixty percent must be directed toward payroll.<sup>96</sup> These programs help employers meet their obligations to workers who remain employed. Support could similarly be directed to employers fulfilling obligations to workers who have been separated.

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91. See Arnov-Richman, *supra* note 8, at 40 (“Unsuccessful businesses and dying industries fold; other entities reap the benefits of these losses. The pressing question is what will happen to workers in the process.”); Lofaso, *supra* note 42 at 74 (observing that employers are better able to bear the losses inherent in closing or reducing operations in response to economic challenges than employees).

92. The Act applies to private employers with less than 500 employees. Pub. L. No. 116-127, § 5110(2)(i)(I), 134 Stat. 199 (2020).

93. These include experiencing, quarantining for, or caring for someone with COVID-19, or caring for children due to COVID-related school closures. See § 5102(a).

94. Pub. L. No. 116-127, § 7001(a), 7003(a), 134 Stat. 178 (2020).

95. Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 1102(a)(2)(A)(viii), 134 Stat. 281 (2020). Other permissible uses of the funds include rent, utilities and mortgage payments.

96. Paycheck Protection Program Flexibility Act of 2020, Pub. L. No. 116-142, § 3(b)(2), 134 Stat. 641 (2020). Initially the amount was seventy-five percent, but was adjusted in response to demands from small businesses and interest groups. See Natalie Andrews, *Senate Approves Bill Extending Paycheck Protection Program*, WALL ST. J. (June 3, 2020), <https://www.wsj.com/articles/senate-approves-bill-extending-paycheck-protection-program-11591226261> [<https://perma.cc/FM7X-V57>].

Indeed, examples of government support provide an additional justification for universal severance: triage. Employer payroll is an up-and-running system that can continue to front funds to employees without resort to an outside administrative process. The UI experience has revealed the difficulties of achieving timely income continuity through the public benefits system. To be sure, the current processing backlog is extraordinary. Yet even in the best of times, applicants must anticipate several weeks between filing a claim and receiving benefits.<sup>97</sup> That combined with the waiting period that typically applies in normal times means that workers may have to go a month or more without income. Given notoriously low savings in the United States, many households are unable to cover such a gap.<sup>98</sup> Universal severance – with appropriate government support – cleanly and quickly puts money into workers’ hands.

### *B. Temporary Separation as Legal Status*

Once universal severance is in place, the system can better account for issues specific to temporary separations in times of economic crisis. In enacting a law of layoffs, Congress could create a severance deferral option for employers who designate a layoff as temporary and commit to reinstating the worker within a designated period of time post-separation. Temporary separation status could be linked to UI eligibility, relieving some of the challenges facing that system, and could be leveraged to incent employers to bring workers back on the job.

The practice of placing workers on a form of temporary layoff is one that supersedes the exigencies of the current crisis. Companies need periodic flexibility to let go and rehire workers in the face of any number of short-term stresses, ranging from supply chain interruptions, to labor stoppages, to natural disasters and shortages. Ordinary downturns might

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97. The Department of Labor advises applicants to anticipate it taking two to three weeks to receive their first benefit check. See U.S. DEP’T LAB., *How Do I File for Unemployment Insurance?*, <https://www.dol.gov/general/topic/unemployment-insurance> [<https://perma.cc/43UG-5MBX>].

98. Over 40% of American households do not have sufficient savings to cover basic expenses for three months. See American Savings Promotion Act, Pub. L. No. 113–251, § 2, 128 Stat. 2888 (2014); Kim Parker et al., *About Half of Lower-Income Americans Report Job or Wage Loss Due to COVID-19*, PEW RESEARCH CENTER (April 21, 2020), <https://www.pewsocialtrends.org/2020/04/21/about-half-of-lower-income-americans-report-household-job-or-wage-loss-due-to-covid-19/#many-adults-have-rainy-day-funds-but-shares-differ-widely-by-race-education-and-income> [<https://perma.cc/8WAQ-J8HK>].



provoke a temporary rather than permanent layoff where the employer anticipates that the decline in business will be short-lived. In the context of COVID-19, the concept of a temporary separation is particularly apt given the unique nature of the interruption: government shutdown orders forced a total, but necessarily finite, cessation of operations. In this situation, both parties might find the temporary separation concept appealing: the worker who would like assurance of future re-employment, and the employer who wants to hit the ground running once business resumes.

Yet in most workplaces, temporary separation is an administrative characterization not a legal status. There is no common terminology for the phenomenon – workers might be described as idled, furloughed, or on “stand by,” among other labels – and it generally confers no legal rights. In an at-will system, employers can hire, fire, and rehire at their discretion, meaning they have no obligation to bring a worker back, despite characterizing the separation as temporary.<sup>99</sup> Absent a contractual guarantee or other legal overlay, an employer is free to offer work to other applicants when it next finds itself in need of labor.<sup>100</sup> Thus, an employer might opt to hire new help at lower wages rather than reinstate separated workers who would expect pay commensurate with their past earning history.

In the current moment with the UI crisis still in full tilt, such possibilities are not the foremost concerns. Yet a handful of cities in California have already anticipated this problem. In May 2020, Los Angeles adopted a city ordinance requiring employers in certain hard hit-industries to give job priority to laid off employees when a new position becomes available.<sup>101</sup> The purpose of the law is to ensure that experienced workers are not

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99. See e.g., *Pearson v. John Hancock Mut. Life Ins. Co.*, 979 F.2d 254, 258 (1st Cir. 1992) (“The undisputed fact is that Hancock did no more than terminate (or, in a sense, refuse to reinstitute) an at-will employment relationship. So viewed, the instant case reduces to a prototypical employment case in which one party has exercised its legal right to end a relationship with no stated term.”); cf. *Cesarini v. FCA US, LLC*, No. 342674, 2019 WL 2711584, at \*7 (Mich. Ct. App. June 27, 2019) (“[B]ecause plaintiff remained an at-will employee while on leave, she had no basis for asserting that defendant breached its contract with her by not reinstating her after her leave of absence ended.”).

100. See *Smith v. F.W. Morse & Co.*, 76 F.3d 413, 426 (1st Cir. 1996) (“A contract to reinstate an at-will employee to an at-will position (from which she could immediately be removed without cause) is no contract at all.”); *accord Kvintus v. RL Polk & Co.*, 3 F. Supp. 2d 788, 797-98 (E.D. Mich. 1998).

101. L.A., Cal., Ordinance 186602 (Apr. 29, 2020). The city also passed a related ordinance imposing retention obligations on successor companies following a change in ownership or control. L.A., Cal., Ordinance 186603 (Apr. 29, 2020).

replaced by “newer, cheaper” labor when the economy comes back.<sup>102</sup> Employers in the airport, events and hospitality, and commercial building services industries must recall any covered worker laid off for COVID-related reasons for any job that is the same or similar to the one he or she previously held prior to offering the position to a new hire.<sup>103</sup> Workers wrongfully denied hiring preference can sue for reinstatement.<sup>104</sup> Since the Los Angeles initiative, several other California cities in the state have followed suit.<sup>105</sup>

The rights conferred by the L.A. ordinance and its progeny are reminiscent of the separation terms typically contained in collective bargaining agreements governing unionized workplaces. Such agreements often have elaborate layoff and recall provisions that revolve around seniority.<sup>106</sup> Workers are generally laid off in reverse seniority order (last-in, first-out), then recalled in order of seniority.<sup>107</sup> In some cases, an agreement may contain a blanket prohibition on the hiring of new employees if there are laid off workers who desire and are capable of performing the needed work.<sup>108</sup> Such clauses create enforceable contract rights actionable under the National Labor Relations Acts.<sup>109</sup>

Short of creating a comparable direct mandate, a law of layoffs could incent rehire by granting employers a complete or partial severance deferral option in the case of a temporary separation. Such is the law in much of Canada. Under Canadian provincial law, absent employee misconduct or

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102. Alene Tchekmedyan & Colleen Shalby, *Garcetti Pushes Law Protecting Displaced Workers from Being Replaced by Cheaper Labor*, L.A. TIMES (Apr. 21, 2020), <https://www.latimes.com/california/story/2020-04-21/garcetti-pushes-for-law-protecting-seniority-of-workers-displaced-by-coronavirus> [https://perman.cc/8Y6A-ZV4R].

103. L.A., Cal., Ordinance 186602 at § 200.32. The obligation also applies to non-similar jobs for which the laid off worker is qualified or could become qualified through the same training that would be provided to a new hire. *Id.* If more than one laid off worker is eligible for a position, preference goes to the one with greater seniority. *Id.*

104. *Id.* at § 200.33(A). They can also obtain compensatory and punitive damages and costs and attorneys’ fees. *Id.*

105. See Oakland, Cal., Ordinance 13,607 (July 21, 2020); S.F., Cal., Ordinance 104-20 (June 18, 2020); Long Beach, Cal., Code ch. 5.55.030 (2020); San Diego, Cal., Code ch. 3, art. 11, div. 1, § 311.0104(a) (2020).

106. See generally Arnow-Richman, *supra* note 8 (drawing on this analogy in arguing for statutory notice/severance obligations).

107. COLLECTIVE BARGAINING NEGOTIATIONS & CONTRACTS MANUAL, BLOOMBERG LAW §§ 117.1132, 117.125 (last visited Sept. 29, 2020).

108. *Id.* at § 117.125.

109. 29 U.S.C. § 185(a).

other exceptions,<sup>110</sup> employers must either provide advance notice of any termination or else pay the worker for the requisite notice period.<sup>111</sup> The latter obligation, referred to as pay-in-lieu-of-notice (PILN) or termination pay, is effectively a severance requirement. However, in some jurisdictions, employers can avoid these obligations by placing a worker on a “temporary lay-off.” For instance, in Ontario, the largest Canadian province by population, an employer is not required to provide notice or pay to employees laid off for fewer than thirteen weeks.<sup>112</sup> If the employee is not restored to work, the temporary layoff is converted to a termination, triggering the employer’s payment obligation.<sup>113</sup>

The value of a formal temporary separation status to employers is that it provides an additional option for those who can neither provide advance notice nor pay its equivalent. Such might be the case, for instance, where the employer faces a sudden or precipitous need to reduce its workforce. If economic pressures abate and the employer is able to restore the worker, it avoids its outstanding severance obligation entirely. For the worker’s part, he or she gains an enforceable right to reinstatement, rather than a mere

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110. Ontario Reg. 288/01 s. 2(1). Notably, subsection (4) of the regulation creates an exception where the “contract of employment has become impossible to perform or has been frustrated by a fortuitous or unforeseeable event or circumstance.” *Id.* As discussed, *infra*, Canadian jurisdictions have responded to the COVID unemployment crisis by expanding temporary layoff provisions. However, this exception, which essentially codifies the common law impossibility doctrine, *see* Restatement (Second) of Contracts §§ 261, 265 (Am. L. Inst. 1981), provides another failsafe that could conceivably apply to the current or a comparable future situation.

111. *See, e.g.*, Employment Standards Act, 2000 S.O., c. 41, s. 54, 61 (Ontario). In Canada, such statutory obligations exist alongside common law requirements that require “reasonable” notice of termination or pay in lieu thereof (known as “PILN”). *See generally* DAVID DOOREY, THE LAW OF WORK 327–28 (2d ed. 2020); GEOFFREY ENGLAND, ESSENTIALS OF CANADIAN LAW: INDIVIDUAL EMPLOYMENT LAW 289–324 (2d ed. 2008).

112. Employment Standards Act, 2000, SO 2000 c 41, s 56(2)(a) (Ontario); *see also* Canada Labour Standards Regulations, C.R.C., c. 986, s. 30(1)(c) (Can) (permitting temporary layoff of three months or less for federal jurisdiction employees). Temporary status in Ontario may be extended up to thirty-five weeks if the employer provides some amount of continued pay or benefits, and the statute permits unions and management to agree to lengthier arrangements. Employment Standards Act, 2000, SO c 41, s 56(2)(b) & (c).

113. The effect is similar to what occurs under the WARN Act. The statute excludes separations of six months or less from the statute’s definition of “employment loss.” See 29 U.S.C. § 2101(a)(6); *supra* Part I. Once the employer knows that the separation will exceed that period of time, it must comply with the Act’s notice obligations. *See* EMP. & TRAINING ADMIN., U.S. DEP’T OF LAB. OR, THE WORKER ADJUSTMENT AND RETRAINING NOTIFICATION ACT: EMPLOYER’S GUIDE TO ADVANCE NOTICE OF CLOSINGS AND LAYOFFS 5 (2003), [https://www.dol.gov/sites/dolgov/files/ETA/Layoff/pdfs/\\_EmployerWARN2003.pdf](https://www.dol.gov/sites/dolgov/files/ETA/Layoff/pdfs/_EmployerWARN2003.pdf) [<https://perma.cc/ZKB5-DWCB>]; *supra* Part I.

expectation of rehire, or else the balance of severance owed. During the intervening period the worker and employer maintain attachment by virtue of the formal status designation and the prospect of reemployment.

Of course, this type of deferral option, if adopted in isolation, would ensure rather than rectify the income continuity problem at the heart of the COVID-19 employment crisis. If a new law of layoffs were to permit employers to fully defer required severance pay, workers might find themselves without pay and facing the type of UI backlog currently plaguing COVID-affected workers in future times of high unemployment. It could also create a firm-side moral hazard problem, incenting employers to make use of the public benefits system as a means of temporarily reducing labor costs.<sup>114</sup>

There are several ways that the system could be designed to mitigate this problem. One would be to permit only a partial severance deferral. Employers would be obligated to provide at least a portion of the severance pay otherwise owed, either a reduced number of days or weeks' wages or a percentage of the full amount. Another option would be to pair deferral with administrative changes that hasten workers' access to UI. There is currently no system-wide mechanism for exempting temporary separations from work-search eligibility requirements.<sup>115</sup> Applicants must navigate their state's idiosyncratic requirements or exemption process, compounding the complexity of accessing benefits.<sup>116</sup> A federal severance deferral option would create a formal, standardized designation of temporary status that all states could rely on to qualify applicants automatically.<sup>117</sup>

As a further step, the law could place some of the administrative burden of obtaining UI on employers who opt to defer severance. Employers will often have the resources and experience to interface with the UI system

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114. See Pandya, *supra* note 65 at 909 (describing the “employer-side moral hazard problem [in which] employers shift their labor costs onto UI by laying off workers temporarily during [economic slumps], intending to rehire them when business improves”) (emphasis omitted).

115. As previously described, some states have temporarily suspended these requirements in response to COVID. See *supra* Part II.B.

116. States have differing rules about such things as whether and how temporary status must be certified, how long an employee can remain on temporary status, and whether a return date must be specified.

117. Cf. 20 C.F.R. 204.5(a)(3) (deeming workers on temporary layoff as satisfying the “available for work” UI eligibility requirement).

more easily than individual employees.<sup>118</sup> In situations where employers place multiple workers on temporary status, an employer-managed application process would improve efficiency, relieving state services offices of some of the administrative burden of handling numerous individual applications.<sup>119</sup> Congress could also require employers to submit a temporary layoff plan, similar to what is required for state-level “short-time” compensation programs.<sup>120</sup> This would encourage the employer to carefully consider its short- and long-term labor needs, and provide an additional layer accountability with respect to the duration of the separation and the employer’s recall plans.

Finally, the law could combine a partial payment requirement with an employer administrative role to achieve continuity between severance and UI. Employers could be given responsibility for facilitating workers’ access to public benefits along with the obligation to pay severance up until the first benefit check arrives. This would incent prompt filing by the employer, as well as continued oversight of the state agency process, that could lead to more timely administration of claims. Most importantly, it would eliminate the gap between notice of layoff and receipt of benefits, helping temporarily separated workers stay afloat at a time of transition and loss.

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118. For instance, larger employers are likely to have human resources personnel who have experience with UI as well as with other public insurance systems like workers compensation.

119. Involving employers in the application process might also be administratively beneficial in the “experience rating” process, whereby the state social security system seeks roughly to align employers’ individual tax rates with the amount of unemployment they cause. *See* Pandya, *supra* note 65 at 926–28 (describing flaws in the experience rating system that may insufficiently disincent employer reliance on temporary hiring and firing in managing labor costs). Regardless, it will be important to pair the deferral option proposed here with appropriate adjustments to the experience rating process to avoid any increase in firm-side moral hazard. *See id.* at 909.

120. The little-used short time compensation (“STC”) program is designed to encourage employers to institute across-the-board hours reductions rather than layoffs by providing a pro-rated benefit to affected workers in partial compensation for their lost work hours. *See generally* JULIE WHITAKER, CONG. RSCH. SERV., COMPENSATED WORK SHARING ARRANGEMENTS (SHORT-TIME COMPENSATION) AS AN ALTERNATIVE TO LAYOFFS, <https://fas.org/sgp/crs/misc/R40689.pdf> [<https://perma.cc/HA3L-4SRT>] (describing history of the program and current requirements); *see also* Sanchin S. Pandya, *Short-Time Compensation* in WORK LAW UNDER COVID-19 (2020) (explaining the intersection between STC and federal pandemic legislation). To take advantage of the program, employers must submit a plan detailing such things as the number of affected workers and amount of hours reduced in conformity with the program limits, *see* WHITAKER, *supra* note 120 at 2, and in some states, can apply for benefits on behalf of the affected worker. *See, e.g.,* Conn. State Agencies §§ 31-222-13(d)(7).

## CONCLUSION

Prescription in a time of crisis is a dangerous thing. There is likely no amount of legislative forethought that would have prepared the country for the COVID-19 employment crisis, nor is it wise to allow such aberrational circumstances to dictate policy going forward. At the same time, catastrophe exposes structural flaws that can inform future lawmaking. The sheer absence of any separation rights or ready source of income continuity for workers terminated for economic reasons is a long-neglected problem. Its ramifications amidst the pandemic differ in size, but not in kind.

This article has proposed a law of layoffs that would fill this regulatory gap. Much still remains to be considered. Lawmakers must decide the details and parameters of the type of system sketched here, such as the duration of notice/severance obligations, the maximum length of temporary status, and a myriad of other issues regarding coverage, eligibility, and exceptions. Thought must be given to whether employers will fully bear the cost of new notice and severance obligations in ordinary times,<sup>121</sup> as well as to how they might be supported in truly calamitous moments.<sup>122</sup> Ultimately, there may be circumstances that require serious deviations from the law proposed here.<sup>123</sup> However, a first step is to change the baseline for how economic terminations are effected. No individual should be separated from his or her sole source of income on a moment's notice without any economic cushion and only uncertain access to the public safety net. Establishing that basic principle is a long overdue and much needed change to workplace law and policy.

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121. One possibility would be to give favorable tax treatment to amounts paid as severance in the same way that current tax law treats benefits paid through ERISA-qualifying plans. *See, e.g.*, 26 U.S.C. § 501(c)(25)(C)(i) (granting corporate tax exemption to qualified pension, profit sharing, and stock bonus plans).

122. As previously noted, Congress appropriated funds to support workers and businesses during the pandemic in a variety of ways, including by providing forgivable loans to small employers to support payroll. *See supra* Part III.A. The question of how to most effectively direct limited funds in times of economic hardship like the present moment is one beyond the scope of this article.

123. In Canada, for instance, provinces have adjusted and suspended parts of their termination laws to give employers more leeway to place workers on temporary layoff or alternative statuses in order to postpone termination pay. *See, e.g.*, O. Reg. 228/20R.S.A. 63.1 (Ontario) (deeming workers laid off during COVID-19 to be on emergency infectious disease leave); RSA 2000, c E-9, s 63.1(2) (Alberta) (expanding limits on temporary layoff from 90 days to 180 days).

