No. D070620

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT DIVISION ONE

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, ETC., ET AL.,

Plaintiffs and Respondents,

v.

NASSCO HOLDINGS INCORPORATED, ETC., ET AL.,

Defendants and Appellants.

Appeal From a Judgment of the San Diego Superior Court,
Case No. 37-2014-00041656-CU-OE-CTL, Hon. John S. Meyer, Judge Presiding

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

In accordance with rule 8.208 of the California Rules of Court, the undersigned certifies that there are no interested entities with either (1) an ownership interest of 10 percent or more in NASSCO Holdings Incorporated or National Steel and Shipbuilding Company dba General Dynamics NASSCO or (2) a financial or other interest in the outcome of this proceeding that the justices should consider in determining whether to disqualify themselves.

Dated: December 6, 2016

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INTRODUCTION

California's WARN Act — the Worker Adjustment and Retraining Notification Act (Lab. Code, § 1400 et seq.)[1] — requires covered employers to provide 60 days' notice to affected employees and others before any "mass *layoff*, relocation, or termination." (§ 1401, subd. (a), italics added.) The issue on this appeal is whether the trial court erred by reading "layoff" to include a furlough — a brief break during which approximately 90 employees did not report to work or earn wages but nevertheless remained on their employer's payroll and received benefits (such as insurance and seniority accrual). As we will show, the trial court erred.

In March 2014, Appellants NASSCO Holdings Incorporated and National Steel and Shipbuilding Company dba General Dynamics NASSCO (collectively NASSCO) was completing work in progress in the shipyard but would not begin production on new projects until the following month. Given this temporary lull, NASSCO furloughed approximately 90 employees for three to five weeks (the time varied from employee to employee). All furloughed employees were given a specific date to return to work, and all were recalled to work. While furloughed, these employees remained on NASSCO's payroll and continued to accrue seniority and receive insurance benefits, with NASSCO paying not only its share of their health and dental benefits but also the employees' share. This furlough, an alternative to a layoff, was designed to lessen the severity of the impact on employees and to allow NASSCO to retain its skilled workforce during the pause in work.

[1] Undesignated section references are to the Labor Code.

Dissatisfied, Plaintiffs — three employees and their union — sued NASSCO for more than $2.6 million in damages and penalties, contending NASSCO's furlough constituted a "mass layoff" under the California WARN Act and that NASSCO was obligated to provide 60 days' notice.

On cross-motions for summary judgment, the trial court agreed with Plaintiffs' interpretation of "layoff," reading the California WARN Act to require covered employers to provide 60 days' notice when more than 50 employees are told not to work for *any* period of time, no matter how brief, and without regard to the employees' continuing relationship with the employer. In a short bench trial following summary adjudication of the liability issue in favor of Plaintiffs, the trial court awarded $211,405 in back pay to the furloughed employees.

As we will show, the trial court's interpretation of the California WARN Act is inconsistent with the Act's text and intended purpose. As a textual matter, the trial court failed to appreciate the crucial distinction between a "layoff" — that is, a dismissal (even if temporary) terminating the existing employment relationship — and a "furlough" — a temporary leave of absence during which the employment relationship continues uninterrupted. That the Legislature used the word "layoff" in this accepted sense is confirmed by the California WARN Act's provisions defining layoff as a "separation" (termination) "from a position" and linking "layoff" to situations where employees have "lost employment."

The legislative history confirms the plain meaning of the statute, which mirrors the federal Warn Act with only two relevant exceptions — the California Act is triggered by mass layoffs of fewer employees and the federal Act expressly defines "mass layoff" to exclude a brief furlough (whereas the term is implied in the California Act). By the trial court's

departure from the settled understanding of "layoff," it adopted an interpretation that is certain to produce absurd consequences — as the trial court itself acknowledged, its ruling means an unpaid half-day shutdown before a holiday weekend would trigger the California WARN Act's notice requirements. That can't be what the Legislature intended.

STATEMENT OF APPEALABILITY

This timely appeal (filed June 30, 2016) is from a final judgment entered May 19, 2016. (5JA:2055).

STATEMENT OF FACTS

A. NASSCO confronts a temporary work slowdown.

NASSCO has been building and repairing ships for nearly 60 years (3JA:987), and its San Diego operation (employing thousands of workers, a number that varies due to the fluctuating nature of its business) is the only major West Coast shipyard performing new construction and repairs. (3JA:987, 988.) NASSCO operates in an industry known for the ebb and flow of its staffing requirements and that is what happened in early 2014 when NASSCO confronted a temporary work slowdown — as existing work in the shipyard was completed and there was a lull before production work would pick up again. (3JA:1041-1042.)

After unsuccessfully trying to accelerate work on upcoming projects, NASSCO evaluated possible reconfigurations of its workforce. (3JA:1041-1042.) To that end, it transferred many workers into other departments but ultimately was unable to accommodate approximately 90 employees by transfers or other alternatives. (3JA:1041-1042, 1JA:188.) Knowing there would be work available for these employees in the very near future and in

an effort to preserve jobs, NASSCO decided to furlough them, not terminate their employment. (3JA:1041-1042.)

B. NASSCO considers the state and federal WARN Acts.

Before implementing these furloughs, NASSCO management took pains to ensure that the planned actions would be consistent with both state and federal law by, among other things, conducting a thorough analysis of two potentially relevant statutes — the California and federal WARN Acts. (2RT:75-105, 109-117.)

1. The state and federal statutes.

As discussed more fully below, the California WARN Act prohibits an employer employing "75 or more persons" from ordering a "mass layoff, relocation, or termination at a covered establishment unless, 60 days before the order takes effect, the employer gives written notice of the order" to its employees and to various local entities. (§§ 1400, subd. (a), 1401, subd. (a).) An employer who fails to provide notice "is liable to each employee entitled to notice who lost his or her employment" for back pay and lost benefits (§ 1402, subd. (a)), and may be subject to a civil penalty of up to $500 "for each day of the employer's violation." (§ 1403.) These penalties may be reduced if the court determines the "employer conducted a reasonable investigation in good faith, and had reasonable grounds" to believe that its conduct was not a violation of the Act. (§ 1405.)

"Mass layoff" — the only relevant employer action allegedly triggering the California WARN Act's notice requirement here — is defined as "a layoff during any 30-day period of 50 or more employees at a

covered establishment." (§ 1400, subd. (d).)[2] The Act defines "layoff" as "a *separation from a position* for lack of funds or lack of work." (§ 1400, subd. (c), italics added.) If a covered employer lays off 50 or more employees within a 30-day period due to lack of funds or lack of work, the Act's 60-day notice requirement applies.

The federal WARN Act imposes similar notice requirements (60 days) on employers with 100 or more employees (29 U.S.C. § 2101(a)(1)) before "a plant closing or mass layoff." (*Id.* § 2102(a).) The federal Act defines a "mass layoff" as "a reduction in force" resulting in an "employment loss" at the single site of employment during any 30-day period of (i) at least 33 percent of the employees and at least 50 employees or (ii) at least 500 employees. (*Id.* § 2101(a)(3).) "Employment loss" is defined as "(A) an employment termination, other than a discharge for cause, voluntary departure, or retirement, (B) a layoff exceeding 6 months, or (C) a reduction in hours of work of more than 50 percent during each month of any 6-month period." (*Id.* § 2101(a)(6).)

2. NASSCO's determination that neither Act applied.

Because the anticipated furloughs would be far shorter than six months, NASSCO knew the federal WARN Act did not apply. (2RT:77-78, 95.)

Recognizing that the California WARN Act was silent as to any durational requirement, NASSCO investigated the application of the

[2] The California WARN Act requires notice to employees for "relocation" and "termination" but neither is at issue here. "Relocation" requires the "removal of all or substantially all of the industrial or commercial operations in a covered establishment to a different location 100 miles or more away." (§ 1400, subd. (e).) "Termination" means a plant closure. (§ 1400, subd. (f).)

California Act to these furloughs and, based on its definition of "layoff" and the Legislature's intent to follow the federal Warn Act, concluded the California Act did not apply. (2RT:115-116.) NASSCO interpreted the California Act consistently with its federal counterpart and determined a brief furlough (much shorter than six months and with the workers remaining on the payroll) would not trigger the California WARN Act's notice requirements. Notwithstanding a number of recent furloughs throughout California, NASSCO's legal counsel had "not heard of any legal challenge to a reduction or furlough being covered by the notice requirements of Cal-WARN." (7JA:2386)

Although NASSCO knew other cyclical employers used "rolling WARN notices" — the practice of constantly warning an entire workforce of an imminent layoff — NASSCO did not want to do that, believing the practice transformed the notices into "useless pieces of paper," thereby defeating the purpose of the California and federal Acts. (2RT:84.) Given the uncertainty about the exact time at which new production work in the shipyard would begin and the uncertainty of determining the specific affected employees (dependent in part on the collective bargaining agreement), NASSCO could not have provided precise notice at the time notice would have been required. (3JA:1041-1042; 2RT:77.)

Given its understanding of the California and federal WARN Acts, and its concern about the problems with unnecessary notices, NASSCO determined the furloughs were not a WARN-triggering event. (2RT:147.)

C. NASSCO implements the furloughs.

In late February 2014, NASSCO informed the union representing the majority of the relevant workers (The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers, and Helpers and

its affiliate, The Shipyard Workers Union, Local 1998) of its planned furloughs. (3JA:911, 912.) A few days later, NASSCO met with each of the relevant employees to explain the furlough process and to tell each employee when he or she would report to work (between three and five weeks after the date the furloughs began). (3JA:988, 912.)

All furloughed employees remained on NASSCO's payroll for the entirety of their brief absences, all continued to accrue seniority, and NASSCO provided health and dental benefits for all furloughed employees, paying both the employer's and employees' share of the premiums. (3JA:988, 1037.)

All furloughed employees reported back to work in conformity with the collective bargaining agreement, some before the return dates specified at the beginning of the furloughs, and all returned with their same job classifications. (3JA:988.)

D. The Union sues NASSCO.

In December 2014, the Union (along with individual employees Alberto Florian, Gustavo Perez, and Jose Rodarte, all of whom are included in our references to the Union) sued NASSCO, alleging it had violated the California WARN Act and seeking millions of dollars in damages and penalties. (1AA:32-33.) Discovery ensued, followed by cross-motions for summary judgment or, in the alternative, summary adjudication of issues. (1AA:105, 2JA:418.) The Union claimed NASSCO (i) had a duty to give 60 days' notice before the furloughs; (ii) breached that duty; and (iii) failed to conduct a reasonable investigation into whether its actions would violate the California WARN Act, and thus could not claim that the Act's civil penalties should be reduced because it acted in good faith. (1AA:105-106.)

NASSCO's motion was the mirror image of the Union's motion. (2JA:419-420.)

E. The trial court's decision on liability.

The trial court granted the Union's summary adjudication motion on the issue of liability, ruling that NASSCO's furloughs triggered the California WARN Act's notice requirements because a WARN Act "layoff" occurs whenever an employer imposes any sort of unpaid time away from work, however brief. (5JA:1876, 1878.) Why? The trial court articulated three reasons.

First, said the trial court, the California WARN Act does not expressly define "layoff" to exclude a "layoff" of fewer than six months, thus suggesting the Legislature did not intend to impose any time limit. (5JA:1873.) Second, said the trial court, the phrase "separation from a position" (used by the California WARN Act to define "layoff") refers to any loss of work. (5JA:1874-1875.) Third, said the trial court, the California Act's "separation from a position" is equivalent to the federal Act's "employment loss." (5JA:1875-1876.)

The trial court acknowledged that its expansive reading of the California WARN Act means notice would be required when a covered employer simply "shutdown for long holiday weekends" (5JA:1876) but, undeterred, stuck by its ruling.

F. The trial court's decision on penalties.

The trial court then conducted a bench trial to decide whether NASSCO had conducted a reasonable investigation in good faith to determine whether the California WARN Act applied (where notice should have been given but wasn't, a good faith investigation exempts the

employer from the statute's $500-per-day civil penalty provision). (§ 1405.) The trial court found NASSCO had established its good faith, observing that although the court found the WARN notice was required, it was an "unsettled determination." (2RT:194-195.) The trial court entered judgment in favor of the Union, awarding a total of $211,405 in back pay (but no additional penalty). (5JA:2032.)

LEGAL ARGUMENT

I. STANDARD OF REVIEW.

The orders granting summary adjudication on the liability issue and denying NASSCO's summary judgment motion — both based entirely on an issue of law (the construction of the California WARN Act) — are subject to de novo review. (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 453, fn. 3; *Regents of University of California v. Superior Court* (1999) 20 Cal.4th 509, 531; *Federal Deposit Ins. Corp. v. Dintino* (2008) 167 Cal.App.4th 333, 344.)

II. THE PLAIN LANGUAGE OF THE CALIFORNIA WARN ACT ESTABLISHES THAT NOTICE IS NOT REQUIRED FOR A TEMPORARY FURLOUGH.

When interpreting a statute, both trial and appellate courts "begin with the plain language," giving "the words of the provision their ordinary and usual meaning and viewing them in their statutory context, because the language employed in the Legislature's enactment generally is the most reliable indicator of legislative intent." (*Fluor Corp* v. *Superior Court* (2015) 61 Cal.4th 1175, 1198.) Here, three aspects of the California WARN Act establish the error in the trial court's reading of the Act vis-à-

vis temporary furloughs — the Legislature's use of the term "layoff" (§ 1401, subd. (a)), its definition of that term as a "separation from employment" (§ 1400, subd. (c)), and its linkage of that term to the concept of "lost . . . employment" (§ 1402, subd. (a)).

A. The trial court ignored the distinction between a "layoff" and a "furlough."

The California WARN Act's use of "layoff" demonstrates the Legislature's intent to exclude occasions when an employer simply directs employees not to report to work for a limited, specified period. Unlike a furlough where the employee is retained as an employee and is expected to report back to work, a layoff is the "*termination* of employment at the employer's instigation, usu[ally] through no fault of the employee; esp[ecially] the termination — either temporary or permanent — of many employees in a short time for financial reasons." (Black's Law Dictionary (10th ed. 2014) p. 1023, italics added; Gov. Code, § 71652 [defining "'layoff for organizational necessity'" as a "termination based on the needs or resources" of the employer].) "Termination of employment" generally requires the "complete severance of an employer-employee relationship." (Black's Law Dictionary, *supra*, p. 1700.) In short, a "layoff" requires the severance of the relationship between employer and employee, which is not what happened here.

On the other hand, a "furlough" does not involve a "termination" of the employment relationship — it is a "leave of absence from military or other employment duty." (Black's Law Dictionary, *supra*, p. 789; Gov. Code, § 20969 [characterizing "'mandatory furloughs'" as "time during which a member is directed to be absent from work without pay"].) A "leave of absence" is a "temporary absence from employment or duty with the intention to return." (Black's Law Dictionary, *supra*, p. 1028.)

Although a layoff and a furlough may both be temporary and laid-off workers may later be re-hired (Gov. Code, § 21022), the distinctions are critical. A temporary *layoff* occurs when an employer terminates an employee but suggests it may rehire the employee at some undefined future date, and under these circumstances (where workers are laid off without a definite recall date) "a layoff terminates the employment relationship." (*Campos v. Employment Development Dept.* (1982) 132 Cal.App.3d 961, 973 ["any recall offer to a laid-off employee in this situation constitutes an offer to enter into a new contract of employment"].)

Where, as here, an employee is furloughed for only a short time, told definitively that he will return to work on a certain date, and remains connected to the employer (receiving insurance benefits and continuing to accrue seniority), the employment relationship is not severed. (*Campos, supra*, 132 Cal.App.3d at p. 973; *Matson Terminals, Inc. v. California Empl. Com.* (1944) 24 Cal.2d 695, 706 [registered longshoremen had ongoing employment relationship even if they did not work on any given day because they would receive paid work if there was work to be done and intervals between work assignments were a normal incident of their employment]; *Barber v. California Emp. Stab. Com.* (1954) 130 Cal.App.2d 7, 21 [fact that employees were "not actually working" was irrelevant to existence of ongoing employment relationship where each "had a claim to available work"].) These employees are furloughed, not laid-off.

Professional Engineers in California Government v. Schwarzenegger (2010) 50 Cal.4th 989 illustrates the distinction. The issue there was the Governor's authority to order mandatory furloughs (two days each month) for nearly all executive branch state workers. (*Id*. at p. 1000.) Although the employees were not paid for these days, the order did not

affect their benefits. (*Id*. at pp. 1000–1001, fn. 1.) In rejecting the Governor's right to unilaterally take such action, the Supreme Court held that a statute authorizing the executive branch to implement layoffs could not be understood to authorize furloughs — and that the absence of a comparable statute authorizing furloughs suggested the Legislature's intent not to grant this authority. (*Id*. at pp. 1033–1036.)

The same is true here. In the California WARN Act, the Legislature compels notice to employees for certain "layoff[s]" (§ 1401, subd. (a)) but not for "furloughs." The use of "layoff" and the omission of "furlough" demonstrate the Legislature's intent to require notice only for layoffs, not for furloughs. Here, as in *Professional Engineers*, we are dealing with furloughs, not layoffs, because the employer simply reduced the employees' hours and wages for a defined period of time but did not terminate their employment. (*Professional Engineers*, *supra*, 50 Cal.4th at p. 1035.).

B. The trial court ignored the California WARN Act's definition of "layoff" as a "*separation* from a position."

The California WARN Act defines "layoff" as a "*separation* from a position." (§ 1400, subd. (c), italics added.) The trial court ignored this definition, notwithstanding that, in the employment context, a "separation" is the "[c]essation of a contractual relationship." (Black's Law Dictionary, *supra*, p. 1572.) The statutory definition confirms the Legislature's intent to require notice only when the employer's actions sever the employment relationship — which, of course, did not occur here.

This is not a novel concept. *Gonzalez v. Department of Corrections & Rehabilitation* (2011) 195 Cal.App.4th 89, for example, held that the

word "separation" in Government Code section 21153 (prohibiting the "separation" of a disabled employee) means "termination." (*Id.* at p. 96.) *Mooney v. County of Orange* (2013) 212 Cal.App.4th 865 held that "separate," as used in Government Code section 31721, subdivision (a) (protecting disabled employees from certain adverse actions), "refers to the employer's act of terminating employment." (*Id.* at p. 880.).[3]

The case relied on by the trial court for the opposite conclusion defeats rather than supports the ruling. (5JA:1874-1875.) *MacIsaac v. Waste Management Collection & Recycling, Inc.* (2005) 134 Cal.App.4th 1076 holds that the California WARN Act's notice requirement is not triggered when employees are not terminated from their positions but instead are simply transferred from one employer to another as part of the sale of a business. (*Id.* at p. 1079.) As *MacIsaac* explains, the WARN Act

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[3] The trial court said *Mooney's* interpretation is irrelevant in this case. (5JA:1877.) Not so. The plaintiff in *Mooney* claimed she had been "separated" from her employment within the meaning of Government Code section 31721, subdivision (a), notwithstanding that she had rejected her employer's offer of positions accommodating her disability. (*Mooney, supra*, 212 Cal.App.4th at pp. 869–870, 879.) She claimed "separated" should not mean "dismissed" as used in a different statute. (*Id.* at p. 879.) The Court of Appeal said "the terms 'separate' and 'dismissed,' when used generally in employment law, are not necessarily interchangeable terms" because "either the employer or the employee may initiate a 'separation' from that employee's employment" whereas a "'dismissal' from employment typically refers to an involuntary termination of an employee's employment." (*Ibid.*) The Court nevertheless held that, as used in Government Code section 31721, subdivision (a), "separated" means the same as "dismissed" because the provision focuses on the "*employer's act* of terminating employment." (*Mooney, supra*, 212 Cal.App.4th at p. 880, italics added.) *Mooney* stands for the proposition that for an *employer's* act to constitute a separation, it must "terminat[e] employment," severing the employment relationship. (*Ibid.*) In the absence of such a termination, no separation — and thus no layoff — occurs.

focuses on the "separation *from a position*," not the separation "from a particular *employer*." (*Id.* at p. 1086.) The employees in that case — truck drivers who worked for a company operating under a contract with the City of Santa Rosa — had not been separated from their positions, but merely had those positions "shifted" to a new employer. (*Id.* at p. 1087.) The employees "continued to serve the City under [the] same contract," "perform[ed] the same functions," "drove the same routes, using the same trucks, which were serviced by the same mechanic," received the "same pay, with the same benefits . . . at the same level of seniority," and "lost not even a minute of work." (*Ibid*.)

By recognizing that the employment relationship may be transferred from one employer to another without being terminated, *MacIsaac* did not suggest the term "separation" as used in the WARN Act should be given something other than its ordinary meaning as a termination or severance of the employment relationship. *MacIsaac* did not hold that all the factors supporting the finding in that case were required to prevent the severance of an employment relationship. Although NASSCO's employees could not report to work for several weeks, that does not in itself mean they were separated from their employment — they were not. They were given a contractual right to return to work and they maintained their status as NASSCO employees, accruing seniority and receiving health insurance and other benefits. Just as the fact that an employee's truck was "serviced" by a different "mechanic" presumably would not mean he had been "separate[ed] from a position," the fact that an employee might lose a "minute of work" or more would not by itself mean a separation had occurred. (*MacIsaac*, *supra*, 134 Cal.App.4th at pp. 1087, 1088.)

C. The California WARN ACT requires a loss of employment.

As explained above, the WARN Act's use of "layoff" and its definition of that term as a "separation from a position" demonstrates that the Act's notice requirement is triggered only by termination of the employment relationship. The Act's liability provision, section 1402, subdivision (a), confirms that conclusion by providing that an employer who fails to give the required notice "before ordering a mass layoff, relocation, or termination is liable to each employee entitled to notice who *lost his or her employment*." (§ 1402, subd. (a), italics added.) In plain English, section 1402, subdivision (a), says an employer cannot violate the notice provision and is not "liable" to its employees unless the employees have "lost [their] employment." Put another way, no "mass layoff" triggers the notice requirement without a loss of employment.

Section 1402, subdivision (a), confirms that NASSCO's furloughs did not trigger the Act's notice provisions. Its employees have not "lost [their] employment" because they were simply directed not to work for a specified period of time, during which they remained on NASSCO's payroll and maintained all of their benefits. Unless workers are discharged without any guarantee of return, the employment relationship is maintained. (*Campos, supra*, 132 Cal.App.3d at p. 973; cf. 20 C.F.R. § 639.3(a) [for purposes of federal WARN Act, workers "on temporary layoff or on leave who have a reasonable expectation of recall are counted as employees"].) Employees who have a return date and who retain the benefits of employment are simply furloughed. Even if they work less and receive correspondingly lower wages, they remain employees. If they remain employees, the California WARN Act is not triggered.

III. THE LEGISLATIVE HISTORY OF THE CALIFORNIA WARN ACT CONFIRMS THAT IT WAS NOT INTENDED TO APPLY IN THESE CIRCUMSTANCES.

NASSCO submits the plain text of the California WARN Act is clear and does not apply in this case. But assuming ambiguity, the result would be the same. (*Fluor Corp., supra*, 61 Cal.4th at p. 1198, [when statute is ambiguous, court may consider various extrinsic aids, including the purpose of the statute, the evils to be remedied, the legislative history, public policy, and the statutory scheme encompassing the statute].) Here, the extrinsic evidence confirms that the WARN Act means what it says — notice is required for a "mass layoff," not for a mass *furlough*.

A. The primary purpose of the California WARN Act is to reduce the number of affected employees whose layoff would trigger a notice requirement.

In 2002, when the California WARN Act was enacted, the federal WARN Act had been on the books for 14 years, during which time some California legislators became concerned that substantial layoffs causing major impacts on small communities did not trigger the notice requirement under federal law. (2JA:491.) Because a layoff affecting less than a third of the workforce would not qualify as a "mass layoff" under the federal Act unless "at least 500 employees" were affected (29 U.S.C. § 2101(a)(3)), the concern was that there could be a "mass layoff of 499 or fewer with no notice to the community" (2JA:500) — a layoff that could have a dramatic impact in a small or medium-sized community. (2JA:491.)

For this reason, the California WARN Act was enacted to lower the threshold for a layoff to qualify as a "mass" layoff, from 500 employees down to 50. (§ 1400, subd. (d).). In this manner, the Act supplements the

federal plant closure law by requiring notice of layoffs, terminations, and relocations affecting 499 or fewer employees. (2JA:500.) This was the principal purpose of the California WARN Act. (*MacIsaac*, *supra*, 134 Cal.App.4th at p. 1090; 2JA:500, 491.)

B. There is no evidence of Legislative intent to otherwise expand the definition of "mass layoff" beyond the federal WARN Act.

Nowhere in the legislative history of the California WARN Act is there any indication that the Legislature intended to otherwise expand the types of "mass layoff" that would trigger the notice requirements. Absent such Legislative intent, NASSCO's furloughs cannot have triggered any notice requirement.

Nothing in the legislative history of the California WARN Act suggests an intent to require notice for shorter periods away from work. To the contrary, apart from the change in the number of affected employees triggering the notice requirement, the legislative materials describe the California WARN Act as one modeled on the federal WARN Act. (2JA:612.) When the state Act deviated from the federal Act, those minor changes were specifically noted. For example, various Committee reports acknowledged that whereas the federal Act authorizes an award of attorneys' fees for a "prevailing party" (29 U.S.C. § 2104(a)(6)), the California Act authorizes fees only for a prevailing "plaintiff." (2JA:745, 488.) As another example, there are differences in the way the two Acts define covered employees and apply to certain relocations, both of which are described in the legislative history materials. (2JA:577.) No one noted any change about what would constitute a notice-triggering layoff.

Clearly, the Legislature intended that, aside from the change in the number of affected employees, the California WARN Act would incorporate the same definition of "mass layoff" as used in the federal Act. Under the federal Act, a notice-triggering layoff does not occur unless there is an "employment loss," meaning a "layoff *exceeding 6 months.*" (29 U.S.C. §§ 2101(a)(3)(B), 2101(a)(6), italics added.) That is nearly five months longer than the furloughs NASSCO imposed in this case. Knowing how the federal Act operated, NASSCO believed the California Act operated in the same manner and concluded it was not required to give WARN notices. (2RT:115; 4JA:1149.)

C. The fact that the California WARN Act does not expressly condition the notice requirement on the absence from work exceeding six months does not suggest a Legislative intent to abandon the federal Act's requirement.

The trial court rejected the proposition that the California WARN Act incorporates the federal Act's six-month "employment loss" threshold, noting that the California Act does not include an express "time period for layoffs" and concluding that, presumably, "notice may be required even where the employer plans to and does rehire the affected employees within a few weeks or months." (5JA:1873.) The trial court erred.

Although it is generally true that when the Legislature models a statute on a federal Act but omits a specific provision of that Act, the omission likely is not inadvertent (*J.R. Norton Co. v. General Teamsters, Warehousemen & Helpers Union* (1989) 208 Cal.App.3d 430, 442), there is no such omission here — because the California WARN Act is not structured in the same manner as the federal Act. Here, the omission simply reflects the differing terms and structure of the California and federal WARN Acts. (*MacIsaac*, *supra*, 134 Cal.App.4th at p. 1088

[rejecting the argument that the state Act intentionally omitted the "employment loss" provision because that argument "fails to account for differences in the language of the two statutory schemes"].)

The federal WARN Act does not specifically define "layoff" as a "separation from a position." Instead, the federal Act defines the term "mass layoff" to include actions causing an "employment loss," then separately defines "employment loss." (29 U.S.C. §§ 2101(a)(3)(B), 2101(a)(6).) Departing from this structure, the California Act defines both "layoff" and "mass layoff," but does not incorporate the phrase "employment loss" in either definition and does not otherwise provide any definition of that term. (§ 1400.)

These differences in phraseology mask a commonality of substance. As *MacIsaac* recognized, by using the phrase "separation from a position" to define "layoff" in the California Act, the Legislature invoked the same concept of "employment loss" used in the federal Act. (*MacIsaac*, *supra*, 134 Cal.App.4th at p. 1089.) As discussed above, "layoff" and "separation" refer to the severance of the employment relationship causing a loss of employment. The Legislature "did not need to state specifically that notice was required only in instances of employment loss, because the requirement of an employment loss (separation from a position) was built into the definition of 'layoff' and 'mass layoff'" used in the state Act. (*Id.* at p. 1089.) The Legislature confirmed its requirement of "employment loss" by conditioning liability on the employee's loss of his or her employment. (§ 1402, subd. (a).)

Although the Legislature did not, in defining "employment loss," include the six-month durational limit mentioned in the federal Act, that omission does not suggest an intent to depart from the federal definition

because the California Act was structured in a way that did not require a definition of "employment loss" at all. "Given the differences in the terms chosen by Congress and our Legislature," the trial court should not have "draw[n] any inference" from what it saw as "the omission of an explicit requirement" contained in the federal Act but not in the California Act. (*MacIsaac*, *supra*, 134 Cal.App.4th at p. 1089.)

Indeed, the trial court apparently agreed with *MacIsaac*'s description of the linkage between the California and federal WARN Acts — declaring that "'separation from a position' is the same as 'employment loss' as used in the federal WARN Act." (5JA:1875.) But the trial court seemingly failed to appreciate the necessary implication of this conclusion — that because a break in work of less than six months is not an "employment loss" under the federal WARN Act, NASSCO's three-to-five-week furlough of its employees was not a "separation from a position" within the meaning of the California WARN Act.

D. At a minimum, the Legislature did not intend relatively brief absences to trigger the notice requirement.

Even assuming the California WARN Act did not incorporate the precise six-month threshold contained in the federal Act, the Legislature clearly did not intend to depart entirely from the federal Act's concept of "layoff" — which did not include a mandatory yet relatively short term away from work that does not sever the original employment relationship between employer and employee. (29 U.S.C. § 2101(a)(6).)

The trial court's reading of the California WARN Act entirely upends the distinction between a long-term layoff and a brief furlough. Focusing on the omission of the federal Act's time requirement and

stressing the undisputed fact that a layoff may be temporary, the trial court carried these two propositions to what it saw as their logical conclusion — "***any*** length of an unpaid shutdown" may constitute a "layoff" under the California WARN Act. (5JA:1876, emphasis added.)

If correct, this interpretation greatly expands the scope of the Act's notice requirement yet it did not prompt any comment anywhere by any Legislator. Given the Legislature's attention to every other minor departure from the federal Act, that makes no sense. The Legislature could not have meant that *any* amount of time away from work could trigger the notice requirement — and that every day, hour, or minute of unpaid time off would be instantly transformed into a "layoff." Had the Legislature intended such a dramatic departure from the federal WARN Act's requirements, it surely would have said so. (*Cox v. Superior Court* (2002) 98 Cal.App.4th 670, 676.)

E. The trial court's interpretation of the California WARN Act would produce absurd results the Legislature could not possibly have intended.

The trial court's expansive reading of the statute is by no means necessary to achieve the Legislature's stated goals — to give employees and the communities in which they work time to prepare for a major economic event. *MacIsaac* identified the three benefits of prior notice highlighted by the Legislature — it would place local governments and other concerned entities in a better position to retrain and offer placement services to those affected, give affected employees greater ability to make plans and adjustments to their new situation as well as seek other employment and educational opportunities, and allow the use of local resources to help ease the strain caused by a layoff or plant closure on the community. (*MacIsaac*, *supra*, 134 Cal.App.4th at p. 1090.)

Most of these goals do not apply to employee furloughs. Few employees who retain their benefits and have definite return-to-work dates need retraining or placement services or other employment or educational opportunities. No prior planning is needed to ensure the availability of local resources. (*MacIsaac*, *supra*, 134 Cal.App.4th at p. 1090.) We do not mean to minimize the financial strain furloughs may cause (*Professional Engineers*, *supra*, 50 Cal.4th at p. 1037) but the point is that the California WARN Act cannot be read more expansively than the Legislature intended without frustrating, rather than effectuating, the statute's primary purpose. (*County of Sonoma v. Cohen* (2015) 235 Cal.App.4th 42, 48.) Here, the notice requirement for a "mass layoff" targets only those employer actions with a "dramatic impact" on the local community (2JA:491), and there is nothing in the statute or its Legislative history to suggest the Legislature believed a small number of short-term furloughs would affect the furloughed employees' ability to pay their mortgages or support their families.

Significantly, the trial court's expansive interpretation would do more harm than good by encouraging employers to provide near-constant, "rolling" WARN notices, crying wolf so often that a true cry of distress would ultimately be ignored. (2RT:84.) As the trial court acknowledged, its reading of the California WARN Act triggers the notice requirement when an employer shuts down "for long holiday weekends or for the week between Christmas and New Year's Day." (5JA:1876.) Although some employers might avoid this result by paying employees for the days they are absent, not every employer can be so magnanimous, and their failure to give the required notice could subject them to liability for every affected employee. This is absurd.

Unfortunately, it could get worse. What if an employer shuts down or delays opening for a few hours, because of a local event? (§ 1401, subd. (c) [excusing employers otherwise subject to the Act's notice requirement only if the "mass layoff, relocation or termination is necessitated by a physical calamity or act of war"].) What if a key supervisor is sick or injured and workers are sent home a few hours early? What if a business closes down for a few hours or a full day due to lack of inventory? To state the obvious, a statute should not be given a meaning resulting in extreme consequences the Legislature did not intend. (*Holland v. Assessment Appeals Bd. No. 1* (2014) 58 Cal.4th 482, 490.) The trial court's reading of the WARN Act's "mass layoff" definition would do just that.

IV. AS A MATTER OF LAW, NASSCO IS ENTITLED TO JUDGMENT.

This is not a close question. NASSCO never severed its employment relationship with any of the furloughed workers, all of whom remained employees on NASSCO's payroll and received benefits plus a guaranteed right to return to work in a matter of weeks. The brief furlough periods did not approach the six months necessary to constitute a layoff under the federal Act and, under any reasonable construction of the California WARN Act's "mass layoff" provision, NASSCO's temporary furlough did not qualify. NASSCO is entitled to judgment as a matter of law.

CONCLUSION

For any or all of the reasons explained above and supported by the record, the judgment should be reversed and the cause remanded to the trial court with directions to enter a judgment in favor of NASSCO. NASSCO is entitled to its costs of appeal.

Dated: December 6, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.204(c) of the California Rules of Court and in reliance on the word count of the computer program used to prepare this brief, counsel certifies that this brief was produced using at least 13 point font and contains 6,355 words.

Dated December 6, 2016

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