

## THE UNINTENDED CONSEQUENCES OF A 90-DAY NOTIFICATION OF OFFSHORE OUTSOURCING

### SUMMARY

A new bill sponsored by Senator Tom Daschle (D-SD), which may also be a Senate floor amendment this session, would expand to a 90-day period the time companies must notify the government prior to layoffs or plant closings, increases the scope and coverage of such notifications, encourages more lawsuits against employers, since that is how the notification requirement is enforced, and mandates that U.S. companies provide 90 days advance notice to the federal government when transferring work abroad that affects the jobs of as few as 15 employees. Such requirements would likely carry significant unintended consequences: 1) This extra burden would make U.S. employers more reluctant to make permanent new hires, encouraging the use of temporary work contracts (or more offshoring in some instances) in place of new hires. 2) The requirement would move U.S. labor law closer to that of France and Germany, where difficulty in releasing workers once they are hired contributes to employer hesitation in hiring and an unemployment rate about two-thirds higher than in the United States. In fact, this bill/amendment would make U.S. labor law more restrictive than French and German labor law in this area. 3) And the measure would discourage a legitimate form of trade – trade in services – that benefits the U.S. economy and strengthens U.S. businesses, thus weakening the competitiveness of American companies in global markets. The Daschle bill/amendment would represent a significant change in U.S. law and is likely to result in unintended consequences. Whether the measure is designed as a political move to make life more difficult for George W. Bush and Congressional Republicans or is a legitimate attempt to address an economic issue, U.S. employers will feel its impact.

### WHAT DOES THE DASCHLE BILL/AMENDMENT DO?

S. 2090 (The Jobs for America Act), introduced a few days after much-publicized remarks on outsourcing by Presidential economic adviser Gregory Mankiw, would amend the Worker Adjustment and Retraining Notification (WARN) Act in several important ways. Passed in 1988 without the signature of President Reagan, who earlier vetoed the bill, the WARN Act currently states that "An employer shall not order a plant closing or mass layoff until the end of a 60-day period after the employer services written notice" to employees and state and local governments. It defines "employer" as a business enterprise with 100 or more employees.<sup>1</sup>

The provisions of the bill potentially would affect employment and companies in all sectors of the economy. The Daschle bill/amendment would make the following changes to current law:

First, in a likely little-noticed element of the bill, it would redefine downward the current definition of "mass layoff" to 50 employees from the current 500.

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Second, the bill would expand the current notification requirement for employers from 60 days to 90 days.

Third, it would require U.S. employers to provide 90 days advance notification in writing to employees, local and state governments, and the Secretary of Labor prior to "offshoring" work outside the United States that "results in an employment loss during any 30-day period for 15 or more employees."<sup>2</sup>

Fourth, companies would also be required to explain in writing to the federal government "the reasons that shifting or transferring of jobs is occurring."<sup>3</sup>

Senator John Kerry (D-MA), the presumptive Democratic Presidential nominee, is a co-sponsor of the bill. On National Public Radio's "Morning Edition" February 19, 2004, NPR reporter Robert Smith said in a report, "At the union hall yesterday in Dayton (Ohio), one man challenged Kerry to pledge that he will keep jobs in America. Kerry wouldn't do it." Senator Kerry responded, "I don't want to lie to you. If a candidate stands here and said 'yes' to you in answer to that, they're not telling you the truth. You know, we don't have the right constitutionally to stop a company from going overseas if it wants to. What we can do is not create unfair advantages and attractions to people to go do that."<sup>4</sup>

**HARMFUL UNINTENDED CONSEQUENCES**

There is no evidence that enacting the Daschle bill will increase employment prospects for American workers and professionals. On the contrary, there is evidence that these new measures would harm future job prospects for Americans, inhibit the creation of permanent jobs, encourage the use of contract labor, and move U.S. labor market regulations closer to those of the high unemployment economies of France and Germany.

The Daschle measure will significantly increase the scope and coverage of the Worker Adjustment and Retraining Notification Act. A 1993 survey by the General Accounting Office (GAO) found "More than half of the employers in our 11 state analysis with 100 or more workers that had a layoff affecting 50 or more of their workers were not required to provide notice. The major reason for excluding these layoffs was the requirement that the layoff affect one-third of the work force of 500 or more workers."<sup>5</sup> In other words, reducing the threshold to 50 employees affected by a layoff and eliminating the "one-third of the work force" provision would significantly increase the number of situations that WARN would apply.

According to the GAO survey, 29 percent of employers found that productivity suffered as a result of the law's requirements, though about half thought it may have helped employees find new jobs sooner.

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The requirements on offshoring and reducing the threshold for WARN Act notification will likely increase litigation and cause employers to fend off lawsuits in instances when they contract services abroad. "Lawsuits are the only remedy available for workers or local communities under WARN because no federal or state agency has the authority to enforce the law," noted the General Accounting Office. Penalties under the WARN Act can reach up to 60 days' back pay and benefits for workers. In other words, employees who believe there is a chance that the WARN Act applies to their situation can, if successful, receive two months salary (minus attorney fees).<sup>6</sup>

More importantly, the provisions of the Daschle bill as applied to offshore outsourcing are meant less to "protect" workers, than to add burdens to U.S. employers in the hope they will not outsource functions in the first place. The threat of litigation adds a new element to the cost-benefit equation for companies. Several studies have pointed out that U.S. companies and the U.S. economy as a whole benefit from the specialization that offshore outsourcing brings. Therefore, arbitrary restrictions such as those in the Daschle bill would interfere with these benefits.

In addition, the provisions are likely to harm the functioning of the U.S. labor market in a way more likely to increase unemployment than alleviate it. "Like other things, labor services are subject to the law of demand: if labor becomes more expensive, fewer workers will be hired," explain Ohio University economists Richard K. Vedder and Lowell E. Gallaway.<sup>7</sup>

"Some BLS unemployment data support the view that WARN has actually increased unemployment," concluded Vedder and Gallaway in a 1994 study of the WARN Act. "The BLS maintains data stating the reasons individuals give for becoming unemployed. Statistical analysis of data on both a monthly and annual basis since 1980 reveals that the number of unemployed classified as job losers actually increased significantly after WARN—even after correcting for the effects of the business cycle on that statistic. This holds even if the analysis is confined to individuals who have lost their jobs and have no prospect of reemployment at their previous job, the category of unemployment applying in WARN cases." While they note that many factors affect the labor market, Vedder and Gallaway's findings, at minimum, belie the notion that the WARN Act helped reduce unemployment.<sup>8</sup>

**MAKING U.S. LABOR LAW MORE RESTRICTIVE THAN FRENCH  
AND GERMAN LAW?**

The Daschle bill would make U.S. labor law more restrictive than French and German labor law in the areas of "mass layoff" notifications and jobs affected by offshore outsourcing. In fact, research indicates that there is no provision in Germany and France comparable to the requirement that an employer provide 90 days advance notice in advance of an "offshoring" that affects 15 or more

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employees. While both France and Germany have lower thresholds than the WARN Act (or the Daschle bill/amendment) for the number of employees that would trigger notification, French law requires a notification of "30-60 days in companies with 50 or more employees" and German law requires generally only a one month delay, according to the Organisation for Economic Co-operation and Development (OECD).<sup>1</sup> While many policies contribute to the higher unemployment rates of France and Germany compared to the United States and the United Kingdom, policies that make it more difficult to remove employees once hired are certainly a contributing factor. Moreover, such policies contribute to a large percentage of the adult age workforce in Europe that simply decides not to seek work. The more difficult to remove employees, the more reluctant employers become to hire them in the first place. While some may assume there is a connection between caring about workers and enacting "worker protection" laws, the irony is that the more such laws are enacted, the harder it may be for workers to find jobs. One recent study by London School of Economics Professor Stephen Nickell, noting that the United Kingdom has nearly half the unemployment rate of France and Germany, also added, "It is noteworthy that the United Kingdom is known to have a level of employment security consistently below that of the other countries . . . reflecting the weaker statutory protection for British workers."<sup>10</sup>

For illustration purposes, the January 2004 unemployment rates of France, Germany, the United States, and the United Kingdom are listed below."

<b>NATION</b>	<b>UNEMPLOYMENT RATE</b>
<b>FRANCE</b>	<b>9.5%</b>
<b>GERMANY</b>	<b>9.2%</b>
<b>U.S.</b>	<b>5.6%</b>
<b>U.K.</b>	<b>4.9%</b>

**CONCLUSION**

No U.S. policy maker wants America to experience the rates of unemployment seen in France, Germany, and other countries that currently have more extensive "worker protection" laws than the United States. And no one would argue that the Jobs for America Act overnight would turn the U.S. economy into the French or German labor market. Yet when elected officials of either party seek to gain political

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advantage on an issue it is possible that poorly conceived proposals with unintended consequences could become law and harm both job seekers and employers. There is no economic rationale for expanding the WARN Act to include more layoff situations or to inhibit global sourcing. The vague definition of "offshoring" in the bill and the way that global companies routinely create and eliminate jobs worldwide will make compliance difficult and discourage companies from adding U.S.-based jobs, warns the HR Policy Association. It appears the most likely impact of the Jobs for America Act will be fewer jobs for Americans.

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## APPENDIX

## TEXT OF S. 2090 (DASCHLE BILL)

2090 IS

108th CONGRESS

2d Session

S. 2090

To amend the Worker Adjustment and Retraining Notification Act to provide protections for employees relating to the offshoring of jobs.

## IN THE SENATE OF THE UNITED STATES

*February 12, 2004*

Mr. DASCHLE (for himself, Mr. KENNEDY, Mr. HARKIN, Ms. MIKULSKI, Mrs. MURRAY, Mr. EDWARDS, Mr. AKAKA, Mr. DORGAN, Mr. FEINGOLD, Mr. WYDEN, Mr. CORZINE, Ms. STABENOW, Mr. SCHUMER, Mrs. CLINTON, Mr. KERRY, and Mrs. FEINSTEIN) introduced the following bill; which was read twice and referred to the Committee on Health, Education, Labor, and Pensions

## A BILL

To amend the Worker Adjustment and Retraining Notification Act to provide protections for employees relating to the offshoring of jobs.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

**SECTION 1. SHORT TITLE.**

This Act may be cited as the 'Jobs for America Act of 2004'.

**SEC. 2. AMENDMENTS TO THE WORKER ADJUSTMENT AND RETRAINING NOTIFICATION ACT.**

(a) DEFINITION- Section 2(a) of the Worker Adjustment and Retraining Notification Act (29 U.S.C. 2101(a)) is amended—

- (i) in paragraph (3)(B), by striking 'for—' and all that follows through '500 employees' in clause (ii), and inserting 'for at least 50 employees';
- (2) in paragraph (7), by striking 'and' at the end;

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(3) in paragraph (8), by striking the period and inserting `; and'; and

(4) by adding at the end the following:

`(9) the term `offshoring of jobs' means any action taken by an employer the effect of which is to create, shift, or transfer employment positions or facilities outside the United States and which results in an employment loss during any 30 day period for 15 or more employees.'

(b) NOTICE- Section 3 of the Worker Adjustment and Retraining Notification Act (29 U.S.C. 2102) is amended—

(i) in subsection (a)—

(A) in the matter preceding paragraph (i), by striking `60-day' and inserting `90-day'; and

(B) in paragraph (i), by striking `and' at the end;

(C) in paragraph (2), by striking the period and inserting `;and'; and

(D) by inserting after paragraph (2), the following:

`(3) to the Secretary of Labor.';

(2) in subsection (b), by striking `60-day' each place that such appears and inserting `90-day'; and

(3) by adding at the end the following:

`(e) NOTICE FOR OFFSHORING OF JOBS- In the case of a notice under subsection (a) regarding the offshoring of jobs, the notice shall include, in addition to the information otherwise required by the Secretary with respect to other notices under such subsection, information concerning—

`(i) the number of jobs affected;

`(2) the location that the jobs are being shifted or transferred to; and

`(3) the reasons that such shifting or transferring of jobs is occurring.'

(c) TECHNICAL AMENDMENTS- The Worker Adjustment and Retraining Notification Act (29 U.S.C. 2101 et seq.) is amended—

(i) by striking `plant closing or mass layoff' each place that such appears and inserting `plant closing, mass layoff, or offshoring of jobs';

(2) by striking `closing or layoff' each place that such appears and inserting `closing, layoff, or offshoring'; and

(3) in section 3—

(A) in the section heading by striking `plant closings and mass layoffs' and inserting `plant closings, mass layoffs, and offshoring of jobs';

(B) in subsection (b)(2)(A), by striking `closing or mass layoff' and inserting `closing, layoff, or offshoring'; and

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(C) in subsection (d), by striking 'section 2(a)(2) or (3)' and inserting 'paragraph (2), (3), or (9) of section 2(a)';

(d) POSTING OF EMPLOYEE RIGHTS- The Worker Adjustment and Retraining Notification Act (29 U.S.C. 2101 et seq.) is amended by adding at the end the following:

*'SEC. 11. POSTING OF NOTICE OF RIGHTS.*

'(a) DEVELOPMENT- Not later than 60 days after the date of enactment of this section, the Secretary of Labor shall develop a notice of employee rights under this Act for posting by employers.

'(b) POSTING- Each employer shall post in a conspicuous place in places of employment the notice of the rights of employees as developed by the Secretary under subsection (a).'

(e) ANNUAL REPORT- The Worker Adjustment and Retraining Notification Act (29 U.S.C. 2101 et seq.), as amended by subsection (d), is further amended by adding at the end the following:

*'SEC. 12. CONTENTS OF ANNUAL REPORTS BY THE SECRETARY OF LABOR.*

'(a) IN GENERAL- The Secretary of Labor shall collect and compile statistics based on the information submitted to the Secretary under subsections (a)(3) and (e) of section 3.

'(b) REPORT- Not later than 120 days after the date on which each regular session of Congress commences, the Secretary of Labor shall prepare and submit to the President and the appropriate committees of Congress a report on the offshoring of jobs (as defined in section 2(a)(9)). Each such report shall include information concerning—

- '(1) the number of jobs affected by offshoring;
- '(2) the locations to which jobs are being shifted or transferred;
- '(3) the reasons why such shifts and transfers are occurring; and
- '(4) any other relevant data compiled under subsection (a).'

END

THE UNINTENDED CONSEQUENCES OF A 90-DAY  
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RETRAINING NOTIFICATION ACT****29 USC Sec. 2101**

TITLE 29 - LABOR

CHAPTER 23 - WORKER ADJUSTMENT AND RETRAINING NOTIFICATION

-HEAD-

Sec. 2101. Definitions; exclusions from definition of loss of employment

-STATUTE-

## (a) Definitions

As used in this chapter -

(1) the term "employer" means any business enterprise that employs -

(A) 100 or more employees, excluding part-time employees; or

(B) 100 or more employees who in the aggregate work at least 4,000 hours per week (exclusive of hours of overtime);

(2) the term "plant closing" means the permanent or temporary shutdown of a single site of employment, or one or more facilities or operating units within a single site of employment, if the shutdown results in an employment loss at the single site of employment during any 30-day period for 50 or more employees excluding any part-time employees;

(3) the term "mass layoff" means a reduction in force which -

(A) is not the result of a plant closing; and

(B) results in an employment loss at the single site of employment during any 30-day period for -

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

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

(ii) at least 500 employees (excluding any part-time employees);

(4) the term "representative" means an exclusive representative of employees within the meaning of section 159(a) or 158(f) of this title or section 152 of title 45;

(5) the term "affected employees" means employees who may

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reasonably be expected to experience an employment loss as a consequence of a proposed plant closing or mass layoff by their employer;

(6) subject to subsection (b) of this section, the term "employment loss" means (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;

(7) the term "unit of local government" means any general purpose political subdivision of a State which has the power to levy taxes and spend funds, as well as general corporate and police powers; and

(8) the term "part-time employee" means an employee who is employed for an average of fewer than 20 hours per week or who has been employed for fewer than 6 of the 12 months preceding the date on which notice is required.

(b) Exclusions from definition of employment loss

(i) In the case of a sale of part or all of an employer's business, the seller shall be responsible for providing notice for any plant closing or mass layoff in accordance with section 2102 of this title, up to and including the effective date of the sale. After the effective date of the sale of part or all of an employer's business, the purchaser shall be responsible for providing notice for any plant closing or mass layoff in accordance with section 2102 of this title. Notwithstanding any other provision of this chapter, any person who is an employee of the seller (other than a part-time employee) as of the effective date of the sale shall be considered an employee of the purchaser immediately after the effective date of the sale.

(2) Notwithstanding subsection (a)(6) of this section, an employee may not be considered to have experienced an employment loss if the closing or layoff is the result of the relocation or consolidation of part or all of the employer's business and, prior to the closing or layoff -

(A) the employer offers to transfer the employee to a different

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site of employment within a reasonable commuting distance with no more than a 6-month break in employment; or

(B) the employer offers to transfer the employee to any other site of employment regardless of distance with no more than a 6-month break in employment, and the employee accepts within 30 days of the offer or of the closing or layoff, whichever is later.

-SOURCE-

(Pub. L. 100-379, Sec. 2, Aug. 4, 1988, 102 Stat. 890.)

-MISC1-

## EFFECTIVE DATE

Section 11 of Pub. L. 100-379 provided that: "This Act (enacting this chapter) shall take effect on the date which is 6 months after the date of enactment of this Act (Aug. 4, 1988), except that the authority of the Secretary of Labor under section 8 (section 2107 of this title) is effective upon enactment."

## SHORT TITLE

Section 1(a) of Pub. L. 100-379 provided that: "This Act (enacting this chapter) may be cited as the 'Worker Adjustment and Retraining Notification Act'."

-SECFEF-

## SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 2102 of this title; title 3 section 435; title 42 section 2297h-8.

-CITE-

29 USC Sec. 2102

TITLE 29 - LABOR

CHAPTER 23 - WORKER ADJUSTMENT AND RETRAINING NOTIFICATION

-HEAD-

Sec. 2102. Notice required before plant closings and mass layoffs

-STATUTE-

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## (a) Notice to employees, State dislocated worker units, and local governments

An employer shall not order a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice of such an order -

(i) to each representative of the affected employees as of the time of the notice or, if there is no such representative at that time, to each affected employee; and

(2) to the State or entity designated by the State to carry out rapid response activities under section 2864(a)(2)(A) of this title, and the chief elected official of the unit of local government within which such closing or layoff is to occur.

If there is more than one such unit, the unit of local government which the employer shall notify is the unit of local government to which the employer pays the highest taxes for the year preceding the year for which the determination is made.

## (b) Reduction of notification period

(i) An employer may order the shutdown of a single site of employment before the conclusion of the 60-day period if as of the time that notice would have been required the employer was actively seeking capital or business which, if obtained, would have enabled the employer to avoid or postpone the shutdown and the employer reasonably and in good faith believed that giving the notice required would have precluded the employer from obtaining the needed capital or business.

(2)(A) An employer may order a plant closing or mass layoff before the conclusion of the 60-day period if the closing or mass layoff is caused by business circumstances that were not reasonably foreseeable as of the time that notice would have been required.

(B) No notice under this chapter shall be required if the plant closing or mass layoff is due to any form of natural disaster, such as a flood, earthquake, or the drought currently ravaging the farmlands of the United States.

(3) An employer relying on this subsection shall give as much notice as is practicable and at that time shall give a brief statement of the basis for reducing the notification period.

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## (c) Extension of layoff period

A layoff of more than 6 months which, at its outset, was announced to be a layoff of 6 months or less, shall be treated as an employment loss under this chapter unless -

- (1) the extension beyond 6 months is caused by business circumstances (including unforeseeable changes in price or cost) not reasonably foreseeable at the time of the initial layoff; and
- (2) notice is given at the time it becomes reasonably foreseeable that the extension beyond 6 months will be required.

## (d) Determinations with respect to employment loss

For purposes of this section, in determining whether a plant closing or mass layoff has occurred or will occur, employment losses for 2 or more groups at a single site of employment, each of which is less than the minimum number of employees specified in section 2101(a)(2) or (3) of this title but which in the aggregate exceed that minimum number, and which occur within any 90-day period shall be considered to be a plant closing or mass layoff unless the employer demonstrates that the employment losses are the result of separate and distinct actions and causes and are not an attempt by the employer to evade the requirements of this chapter.

-SOURCE-

(Pub. L. 100-379, Sec. 3, Aug. 4, 1988, 102 Stat. 891; Pub. L. 105-277, div. A, Sec. 101(f) (title VIII, Sec. 405(d)(26), (f)(18)), Oct. 21, 1998, 112 Stat. 2681-337, 2681-424, 2681-432.)

-MISC1-

## AMENDMENTS

1998 - Subsec. (a)(2). Pub. L. 105-277, Sec. 101(f) (title VIII, Sec. 405(f)(18)), struck out "the State dislocated worker unit or office (referred to in section 1661(b)(2) of this title), or" before "the State or entity".

Pub. L. 105-277, Sec. 101(f) (title VIII, Sec. 405(d)(26)), substituted "to the State dislocated worker unit or office (referred to in section 1661(b)(2) of this title), or the State or

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entity designated by the State to carry out rapid response activities under section 2864(a)(2)(A) of this title, and the chief" for "to the State dislocated worker unit (designated or created under title III of the Job Training Partnership Act) and the chief".

## EFFECTIVE DATE OF 1998 AMENDMENT

Amendment by section 101(f) (title VIII, Sec. 405(d)(26)) of Pub. L. 105-277 effective Oct. 21, 1998, and amendment by section 101(f) (title VIII, Sec. 405(f)(18)) of Pub. L. 105-277 effective July 1, 2000, see section 101(f) (title VIII, Sec. 405(g)(1), (2)(B)) of Pub. L. 105-277, set out as a note under section 3502 of Title 5, Government Organization and Employees.

-SECRET-

## SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 2101, 2103, 2104, 2106 of this title; title 2 section 1315; title 3 section 415.

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## ENDNOTES

<sup>1</sup> 29 USC, Sections 2101 and 2102.

<sup>2</sup> Text of S. 2090.

<sup>3</sup> Ibid.

<sup>4</sup> "AFL-CIO Expected to Back Kerry," National Public Radio's "Morning Edition," February 19, 2004.

<sup>5</sup> *Dislocated Workers: Implementation of the Worker Adjustment and Retraining Notification Act*, Summary and Statement of Linda G. Morra, Director, Education and Employment Issues, Human Resources Division, General Accounting Office, before the Subcommittee on Labor, Committee on Labor and Human Resources, U.S. Senate, February 23, 1993.

<sup>6</sup> Ibid.

<sup>7</sup> Richard K. Vedder and Lowell E. Gallaway, *Jobs and Plant-Closing Legislation: What to Expect*, The Independent Institute, January/February 1994.

<sup>8</sup> Ibid.

<sup>9</sup> OECD, *Employment Outlook 1999*, Chapter 2, June 24, 1999.

<sup>10</sup> Stephen Nickell, *A Picture of European Unemployment: Success and Failure*, Centre for Economic Performance, London School of Economics and Political Science, July 2003.

<sup>11</sup> OECD.

**THE UNINTENDED CONSEQUENCES OF A 90-DAY  
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