

FROM SALE TO SEPARATION: NAVIGATING HR ISSUES THROUGH TRANSITIONS

By Mariel G. Newhouse, Esq.

I. KEY CONSIDERATIONS IN REDUCTIONS IN FORCE (RIFs)

A. **Worker Adjustment Retraining Notification (WARN) Act**

1. **Basic Premise – covered employers must provide 60 days’ advance notice of a covered plant closing and mass layoffs.**

2. **Definitions:**

a. Covered Employer

i. Employer with at least 100 full-time employees

ii. Part-time employees may be included under certain circumstances

b. Covered Employees

i. Full-time employees and some part-time employees

ii. Does NOT include

(A) Employees who have worked less than 6 months in the last 12 months;

(B) Workers who perform, on average, less than 20 hours of work per week;

(C) Workers who are on strike or those affected by a lockout as part of a labor dispute;

(D) Temporary workers who do not have a reasonable belief that work was anything but temporary;

(E) Contractors, consultants, or other workers who may work at a given site but have an independent business relationship with the company.

c. Plant Closing: permanent or temporary shutdown of a single site of employment, one or more facilities or operating units within a single site of employment, if the shutdown results in an employment loss at a single site of employment during any 30-day period for 50 or more employees, excluding part-time employees.

- d. Mass layoff: reduction in force that is not the result of a plant closing and that results in an employment loss at a single site of employment during any 30-day period for either: (1) at least 33% of employees, excluding part-time employees, and at least 50 employees; or (2) at least 500 employees, excluding part-time employees.
- e. Employment loss may include:
 - i. Termination, other than discharge for cause, voluntary departure, or retirement
 - ii. Layoff exceeding six months in duration
 - iii. Reduction in hours of work of more than 50% during each month of any six-month period

3. Exceptions

- a. Unforeseen business circumstances
- b. Faltering companies
- c. Natural Disasters
- d. Pay in lieu of notice
- e. Note: exceptions may allow for less than 60 days' notice, but do not eliminate the notice requirement entirely.

4. Other Details:

- a. Small events can be aggregated
- b. Counting Remote Employees
- c. Mini-Warn Laws

5. The WARN Act Notice

- a. Written in clear and specific language that employees can easily understand
- b. Contain an indication as to whether the planned action is expected to be temporary or permanent
- c. Anticipated date of pending closure/layoff
- d. Name and telephone number of the company official who can provide further information

- e. Reasonable method of delivery

6. Penalties

- a. Backpay and benefits for the period of violation up to 60 days
- b. Civil penalty of up to \$500 per day
- c. Reasonable attorneys' fees.

B. Who do you choose?

1. Seniority, status, merit, skills

- a. Document legitimate, non-discriminatory business reasons for selection criteria

2. Adverse Impact Analysis

- a. Review selections for disparate impact on protected classes before finalizing decisions

C. Release Agreements

1. Older Worker Protection Benefits Act (“OWBPA”)/Age Discrimination in Employment Act (“ADEA”)

- i. 21- versus 45-Day Review Period

2. Severance

- a. Salary continuation
- b. Lump sum
- c. Healthcare continuation

3. Released Parties

- a. Are there parent companies and/or subsidiaries that should be included

4. Governing Law

- a. Where is company located?
- b. Do you have remote employees?

5. Reaffirmation

- a. Are you asking key employees to stay on for a certain period of time during a transition?

- b. Will you offer the severance in multiple payments or after the reaffirmation is signed?

II. PERSONNEL CONSIDERATIONS WHEN SELLING A BUSINESS

A. **Consolidated Omnibus Budget Reconciliation (“COBRA”)**

1. **What is it?**

- a. Provides temporary continuation of group health coverage

2. **Covered Employer**

- a. Generally applies to all private-sector group health plans maintained by employers that have at least 20 employees on more than 50% of their typical business days in the previous calendar year.
- b. Full-time and part-time employees are counted; however, part-time employees are counted as a fraction of full-time employees.

3. **Qualified Beneficiary**

- a. An employee who was covered by a group health plan on the day before a qualifying event occurred; or
- b. That employee’s spouse, former spouse, or dependent child

4. **Qualifying Event**

- a. Events that cause an individual to lose group health coverage
- b. Covered employee:
 - i. Termination of employment for any reason other than “gross misconduct”; or
 - ii. Reduction in covered employee’s hours of employment.
- c. Spouse and dependent child:
 - i. Termination of covered employee’s employment for any reason other than “gross misconduct”;
 - ii. Reduction in hours worked by covered employee;
 - iii. Covered employee becomes entitled to Medicare;
 - iv. Divorce or legal separation from covered employee; or

- v. Death of covered employee.
- d. Dependent child:
 - i. Loss of “dependent child” status (i.e., child turns 26)

5. Who pays for COBRA?

- a. The qualified beneficiaries must pay for COBRA continuation coverage; however, plans can choose to provide continuation coverage at reduced or no cost.
- b. Maximum amount charged to qualified beneficiaries cannot exceed 102% of the cost to the plan for similarly situated individuals

B. Effects of a Sale on Employees

1. Types of Transactions:

- a. Stock Purchase – Buyer purchases all of the stock in a company; seller does not retain any employees or benefit plans.
- b. Asset Purchase – Buyer chooses which assets and liabilities to purchase, including employees.

2. Employees:

- a. Stock Purchase –The buyer takes over the entire business entity and the employees typically remain employed unless the buyer chooses to terminate.
- b. Asset Purchase –The employment relationship does not necessarily transfer in the asset purchase. To the extent employees are retained by the buyer, they will need to be re-hired by the new entity.

3. Prior Policies

- a. Stock Purchase – All existing employment agreements, handbooks, benefits, and other employment documents remain in play after the transaction; therefore, the purchaser must ensure it understands and reads these documents.
 - i. Ex: certain contracts/benefit plans may contain severance obligations that apply to the new entity.
- b. Asset Purchase – The buyer will have to ensure new employment agreements are issued and distribute handbooks, benefit information to the employees.

4. Payroll

- a. Stock Purchase –The FEIN does not change, so payroll does not need to be transitioned.
- b. Asset Purchase - There is a new FEIN; therefore, a transition service agreement may be needed to allow the seller to continue to process payroll on behalf of the buyer.

5. Culture

- a. Culture shocks are often one of the biggest transition issues.
- b. Even if there is a stock purchase and the existing policies remain in place, management has likely changed and the implementation of policies may look different.
- c. Consider retention bonuses for key employees critical to business continuity.

III. OTHER COMMON TRANSITION ISSUES

A. SUTA Dumping

1. What is it?

- a. State Unemployment Tax Act (“SUTA”)
- b. Tax evasion tactic in which an employer manipulates the unemployment insurance to receive a lower tax rate
- c. Typically occurs when a business transfers payroll tax out of an existing organization into a new organization.

2. Types of SUTA dumping

- a. Vertical – create a “new” employer that is assigned a “new” tax rate, then transfer payroll to the new employer
- b. Horizontal – transfer payroll to a subsidiary with a lower tax rate
- c. Acquired – find an employer with a lower tax rate and transfer payroll to that employer

3. Penalty

- a. If intentional - penalty of up to four times any savings you would have received
- b. UI tax rate increase to maximum tax rate for the year determined you engaged in intentional SUTA dumping and for the next three years
- c. Civil penalty up to \$5,000 for a person who advises another business to participate in SUTA dumping

B. New Employment Documents

1. Handbooks

- a. Key policies to review and update
- b. Obtaining handbook acknowledgments
- c. State-specific policies for remote employees

2. Employment Agreements

- a. Review existing agreements for surviving provisions
- b. consider whether new agreements are needed

3. Non-Compete Agreements

- a. Ensuring your new hire is not subject to a non-compete
- b. Consider whether the non-compete is enforceable where the employee is located

4. Confidentiality and Non-Disclosure Agreements

- a. Consider whether new hire is subject to existing confidentiality agreements
- b. Consider what information you want to specifically include