

BY

Robert Loewer, Jerae Carlson, Tiffany Hawkins,
Janet Strelvel Hayes, Joseph M. (Mark) Hough and Kim Moore

&

BEFORE

AFTER INC

R

C



Virtually every employment law needs to be considered when businesses combine, including policies governing employee compensation and retention, noncompete agreements, executive agreements, employee benefit plans, collective bargaining agreements, federal and state leave-of-absence statutes and notices to be given to employees under the Worker Adjustment and Retraining Notification (WARN) Act and related state laws. The surviving entity must merge two workforces with duplicative benefit plans and employees, and risk

post-closing liability for pre-closing employment-related claims. This article highlights some of the employment issues that warrant due consideration, but is not intended to be comprehensive. The significant impact that these laws may have on the future of the surviving business underscores the importance of pre-closing due diligence of these and other employment-related matters. Care should be taken to consider how the surviving business would address known problems before closing, given the impact an adverse outcome could have.

ADDING SPACES

Through Mergers and Acquisitions—

**HOW THE
NEW NAME
ON THE BUILDING
AFFECTS THE OFFICE**

A. Post-Transaction Liability for Pre-Transaction Discrimination Claims

“Whether there will be liability on the part of an acquiring entity for discrimination claims against the target company is often one of the first questions that is asked in a merger or acquisition, at least when employment issues are considered.”¹ The surviving entity must evaluate potential liability under various legal theories, including the following:

1. “Successor Employer” Liability

Courts have held a subsequent employer, which was not named in a pending Equal Employment Opportunity Commission (EEOC) charge, liable for discriminatory practices of its predecessor when (a) such successor employer had notice of the charge, (b) the predecessor had no ability to provide relief; and (c) there was a significant continuity of business operations, including use of the same or substantially the same business facility, workforce, supervisory personnel, machinery and equipment, and production of the same product.² However, courts have refused to impose successor liability when no charges had been filed with the EEOC and the successor had no notice of the discrimination claims.³

2. “Joint Employers” Liability

The surviving entity can incur liability for discriminatory acts of its predecessor where they are “joint employers” (i.e., “they share or co-determine those matters involving essential forms and conditions of employment”).⁴ Such liability will be found when the entities share authority to hire, discipline and fire employees; promulgate work rules and assignments; set conditions of employment, including compensation, benefits and hours; supervise employees on a day-to-day basis; and control employee records, including payroll, insurance and taxes. While typically involving parent and subsidiary corporations, “joint employer” liability can also arise through a merger or acquisition where the surviving entity directs



ROBERT LOEWER is the general counsel of National Railway Equipment Co., which globally manufactures and services locomotives. Prior to joining NREC, he worked for an M&A consulting firm. He is licensed to practice law in Illinois and in England. He can be contacted at r.loewer@nationalrailway.com.



JERAE CARLSON represents businesses in employment disputes and commercial litigation. She counsels employers on statutory compliance and represents them in claims involving noncompete agreements, discrimination, harassment, and retaliation. Carlson also represents businesses in contract disputes and suits involving business torts. She can be contacted at jerae.carlson@strasburger.com.



TIFFANY HAWKINS primarily represents business clients in the area of employment law, including the defense of discrimination, harassment, and retaliation claims and the prosecution and defense of noncompetition disputes. Hawkins also counsels clients on statutory compliance and drafts employee handbook policies. She can be contacted at tiffany.hawkins@strasburger.com.



JANET STREVEL HAYES has litigation experience defending employment-related claims including sexual harassment, retaliatory discharge, discrimination and workers compensation. In addition to litigating in both the state and federal courts of Tennessee, Hayes defends employers in claims filed with state and federal administrative agencies including the Equal Employment Opportunity Commission and the Tennessee Human Rights Commission. She also has an appellate practice that includes appearances before the Tennessee Court of Appeals and the Sixth Circuit Court of Appeals. Hayes holds a BA from Carson-Newman College and a JD from the University of Tennessee. She can be contacted at jhayes@lewisking.com.



JOSEPH M. (MARK) HOUGH is general counsel for Makhteshim Agan of North America, Inc. (MANA), a manufacturer and distributor of crop protection products in North America. Prior to joining MANA, Hough was senior corporate counsel for SAS Institute Inc., and corporate counsel for Columbia/HCA Healthcare Corporation. Hough has worked on a variety of merger and acquisition projects in each of these industries. He can be contacted at mhough@manainc.com.



KIM MOORE is a board certified employment attorney representing business clients ranging from the defense of discrimination and harassment claims to the handling of Department of Labor investigations, prosecuting and defending noncompetition disputes, executive compensation agreements, and drafting policies. She can be contacted at kim.moore@strasburger.com.

its predecessor’s employment practices before closing the deal.⁵

3. “Single Integrated Enterprise” Theory

Similarly, the “single integrated enterprise” theory provides that two or more entities may be deemed to be so closely related that they will be jointly liable for the acts or omissions of the other(s) when there are interrelated operations, common management, centralized control of labor relations and common ownership or financial control.⁶

4. “Mere Instrumentality” and “Alter Ego” Theories

One entity may be considered the “mere instrumentality” of another, where one entity controls the other to such a degree that the other is its instrumentality; the first entity is perpetrating a wrong (i.e., violating a statute through the other entity and unjust

loss would result if the first entity was shielded by its separate corporate status).⁷ Courts have also found that one entity may be liable as the “alter ego” of another if the corporate separateness has been disregarded; the companies have been held out to the public as one; the policies of one company have been directed to serve the interests of the other company rather than its own; and applying the “alter ego” doctrine will “prevent fraud, illegality or injustice.”⁸

B. Executive Agreements

Employment, change of control and severance agreements are relevant to mergers and acquisitions because “often, the severance offered by these agreements is triggered on termination only after a change of control” or “is more generous if the termination occurs after a change of control.”⁹ Even in the absence of termination, some employment and change of control agreements provide that options will vest or a bonus will be paid upon a change of control. Employment agreements are also relevant if a successor entity or buyer wishes to assess the cost of potential severance obligations for executives who may be terminat-

ed during the merger or acquisition of retaining executives, for whom agreements may be negotiated.¹⁰

1. *Change of Control Provisions — “Golden Parachutes”*
“Golden Parachute” provisions are usually triggered by an asset purchase or an equity purchase and protect the employee by accelerating benefit payments immediately or upon termination if the employee is released within a certain period of time following the change of control.¹¹ An employee who receives a benefit beyond limits permitted under 26 USC § 280G will be subject to a 20 percent excise tax under 26 USC § 4999(a), and the excess benefit will be nondeductible to the employer.¹² However, the IRS has ruled that sections 280G and 4999(a) are not applicable to payments made to former officers of an acquired company by the surviving company under a merger agreement.¹³

Change of control agreements may contain a “cutback” clause, which automatically reduces the excess payment to the permitted section 280G limit, and/or a “gross-up” clause, which provides for payment of an additional amount to the employee to compensate for the 20 percent excise tax as well as regular income tax. Golden Parachutes create a potentially large liability for the selling entity without any reduction for federal income tax purposes for the excess payment. In an asset sale, change of control liability often remains with the seller, but in an equity sale transaction, the seller’s equity will be reduced to the extent of such payments and loss of tax deduction. Thus, “[t]he buyer should attempt to have the seller negotiate the cancellation of any Golden Parachute agreements or adjust the purchase price accordingly.”¹⁴

2. *Noncompetition Agreements*

State laws vary when a noncompete agreement may be enforced following a merger or acquisition. Accordingly, the parties must carefully consider the governing state law to determine the rights and liabilities of the successor entity and the employee under a noncompete agreement. Most courts have held that restrictive covenants entered into by the employee with the predecessor are enforceable by the successor, where state statutes provide that all business assets are transferred in a merger.¹⁵ However a few states, such as Alabama and California, refuse to allow either the predecessor or the successor to enforce restrictive covenants in most cases.¹⁶ While some state courts have prevented successors from enforcing noncompete agreements, reasoning that personal services contracts are not assignable without consent,¹⁷ the majority view is that such restrictive covenants are not personal service contracts.¹⁸ Some courts have enforced noncompete clauses in favor of a successor, finding it to be a third-party beneficiary of the restrictive covenant between the employee and the predecessor.¹⁹ Other courts have found an individual’s contin-

ued employment with the successor and other conduct to constitute assent to or ratification of the assignment of their noncompete agreements to the successor.²⁰ Inclusion of an assignability clause therefore enhances enforceability.²¹

3. *Assumption or Renegotiation of Executive Agreements*²²

Generally, the buyer in an equity sale deal or merger would automatically assume executive agreements. Change of control payments may reduce the equity of the seller, and the buyer should be focused on these payments. If the buyer wants to avoid assuming these obligations, the seller would have to either take responsibility or terminate and pay out the agreements prior to closing the deal. On the other hand, the buyer would not automatically assume the employment and change of control agreements in an asset sale. Very often, the buyer will assume the employment agreements — or in some cases, the buyer may be viewed as a successor employer under general successor liability principles. In many cases, employment and change of control agreements will provide that non-assumption of the agreements will be a trigger for quitting for good reason or will be considered a breach of the agreement by the seller, thereby potentially giving rise to an obligation to pay severance. Either way, the agreements could be renegotiated with the employees’ consent, which may be preferable if an agreement contains too large a parachute or allows an executive to walk away with a severance payment. There are also several tax issues that arise from severance, noncompetition and executive agreements that need to be considered when determining how to handle them in such transactions, which are outside the scope of this article.

C. *Employee Benefit Plans and ERISA Requirements*

1. *Generally*

Most employee benefit plans, such as profit-sharing, 401(k) and employee stock ownership, will be subject to the requirements of the Employee Retirement Income Security Act of 1974 (ERISA). In negotiated acquisition transactions, the importance of employee benefit plans is principally limited to:

- (1) determining the extent, if any, of unfunded pension liabilities of the acquired entity and, if possible, insulating the acquirer from those liabilities; and
- (2) determining appropriate means for merging plans of the acquired entity with those of the acquirer, continuing the plans separately or terminating the plans of the acquired entity and integrating employees of that entity into the plans of the acquirer.²⁵

In some situations, plans may be overfunded and withdrawal of excess contributions may be feasible, although such cases are likely to be less frequent.

2. *Negotiated Acquisition Transactions*

The options for dealing with a seller’s plan will usu-

ally depend on whether the transaction is an asset sale, an equity sale or a merger. The buyer automatically assumes the seller's liabilities in an equity sale or merger and would also become the sponsor of the acquired corporation's plans, "unless some affirmative action is taken to either terminate or freeze the plan, transfer the plan out of the acquired entity (e.g., to the parent prior to a sale of a subsidiary), or have the seller specifically retain the plan."²⁴ This could also lead to the successor having a dual plan.

In contrast, the buyer generally only takes on the liabilities that it specifically assumes in an asset acquisition. Therefore, the buyer only becomes the successor to the seller's plans for those that it affirmatively assumes. It may then choose to merge the plan into its own plan, transfer assets and liabilities of certain employees or adopt a clone offset plan. The seller's plan can be either left intact, frozen or terminated entirely.

"Very often the buyer in an asset acquisition will not assume the seller's plans, particularly defined benefit plans, since assuming an ongoing defined benefit plan can result in significant liabilities for prior underfunding or actions of prior fiduciaries."²⁵ Likewise, a buyer in an asset sale will often not assume the seller's defined

contribution plan. However, when the buyer does adopt the plan, it may agree only to future duties and obligations for the plan, while leaving prior violations as the responsibility of the seller.²⁶

3. *Hidden Liabilities*

Pension plans and their funding status are significant considerations in a merger or acquisition, as there are often significant unfunded liabilities associated with benefit plans, some of which may not be reflected on the financial statements at all.²⁷ Even when they are, the financial statements may reflect unreasonable or outdated assumptions.²⁸ Such "hidden liabilities" may warrant a purchase price adjustment.²⁹ Parties may also consider escrow arrangements to address such liabilities, should they arise after the transaction closes.

A primary hidden liability is underfunding of defined benefit pension plans.³⁰ The seller often retains responsibility through a purchase price adjustment or indemnification of the buyer for any underfunding, but the parties often disagree on the proper measure and calculation of underfunding for purposes of indemnifications and thus, will negotiate those terms.³¹ With an underfunded plan, the buyer typically asks the seller to contribute the under-

funded amount to the plan prior to closing or adjust the purchase price downward.³²

A seller who contributes to the plan can typically deduct the contribution, but only to the extent permitted under Internal Revenue Code (IRC) § 404, and only if contributed within the current taxable year, or under IRC § 404(a)(6) if contributed prior to the due date for filing the employer's tax return.³³ The drawback to pre-closing contributions is that contributions into pension plans are only deductible subject to the alternative limitations of IRC § 404(a)(1):

- The amount necessary to satisfy the minimum funding standard;
- The amount necessary to provide the remaining unfunded costs of past service credits and any entry age normal method current service credits distributed on a level basis; or
- The normal cost of the plan plus any supplementary cost amortized in equal payments over ten years.³⁴

Contributions in excess of these amounts are not deductible and are also generally subject to a 10 percent excise tax under IRC § 4972. Therefore, it may be preferable for the seller to indemnify the buyer or adjust the purchase price for the amount of underfunding.³⁵

D. Employees on Leave

The US Department of Labor (DOL) has taken the position that the Family and Medical Leave Act (FMLA) applies to separate entities that are found to be a single employer under “integrated employer test and successors in interest to covered employers.”³⁶ The DOL and some courts have agreed that whether or not the successor had “notice” of pending complaints against a predecessor employer is irrelevant to the successor's duty to fulfill the predecessor's FMLA obligations to employees who are on leave or for determining coverage and eligibility of employees continuing in employment.³⁷ However, notice may be relevant to the successor's liability for the predecessor's FMLA violations.

An eligible employee of a covered predecessor employer who goes out on FMLA leave before the business is sold to a “successor in interest” is entitled to be restored to employment by the successor employer, even if the successor is not a covered employer under the FMLA because, for example, it employs fewer than 50 employees. FMLA regulations also provide that a successor that meets the FMLA's coverage criteria must count periods of employment and hours worked for the predecessor for purposes of determining employee eligibility for FMLA leave.³⁸

Other leave of absence statutes may raise employment issues in a merger or acquisition, such as the Uniformed Services Employment and Re-employment Rights Act (USERRA), which provides that a covered employer includes any successor in interest to the employer.³⁹ One court applied this provision to hold that a company which had merged with a returning serviceman's pre-service employer was its successor in interest, even though it manufactured a different product at a different location, because both companies had the same owners and shared the same upper level management.⁴⁰

E. Warn Act Implications

1. Generally

The WARN Act, enacted in 1988, requires employers with 100 or more employees on a business enterprise-wide basis to provide 60 days' advance notice of plant closings or mass layoffs.⁴¹ "Plant closing" means the shutdown of a single site of employment resulting in employment loss of 50 or more employees during any 30-day period; "mass layoff" means the employment loss at a single site of employment during any 30-day period for either 50 employees who constitute at least 33 percent of the workforce, or at least 500 employees.⁴²

There are three statutory exceptions where the 60-day WARN Act notice will not be required:

- (1) if at the time the notice would have been required, the employer was actively seeking capital or business that, if obtained, would have enabled the employer to avoid or postpone the shutdown of a small site and the employer in good faith reasonably believed that giving the required notice would have precluded the employer from obtaining the needed capital or business;
- (2) if the closing or mass layoff is caused by business circumstances that were not reasonably foreseeable at the time the notice would have been required; and
- (3) when the mass layoff or plant closing is a direct result of a natural disaster such as a flood, earthquake, or drought.⁴³

The content of a WARN Act notice is mandated by federal regulation and must be provided to:

- All affected non-union employees (i.e., employees reasonably expected to experience an employment loss);
- The chief elected officer of affected unions, and if this person is not the same as the officer of the local union, a copy should be given to the local union official as well;
- The chief elected official of the unit of local government (e.g., the mayor);
- The state dislocated workers unit (typically part of the state department of labor).⁴⁴

There are many nuanced issues from both business and

legal standpoints to consider in determining whether employers are required to provide WARN Act notice and to whom. Careful consideration needs to be made, since timeframes are critical to comply with this law. There also are a number of states with state specific mini-WARN statutes, some of which are stricter than the federal statute. These state laws must be reviewed as well to ensure that full pre-merger or pre-acquisition due diligence is accomplished.

2. Penalties for Violations of the WARN Act

The penalty for failure to comply with the WARN notice requirement is liability to each employee who did not receive notice for back pay and benefits (including medical expenses) for each day of violation up to 60 days.⁴⁵ There is a split in the circuits as to whether back pay is required for each calendar day of violation or only for the number of working days encompassed in the period of violation.⁴⁶ That aside, the liability is reduced by wages paid for the period of violation, by voluntary and unconditional payments not otherwise required by any legal obligation, or by any payments made on behalf of the employee for health insurance premiums or other employee benefits for the period of violation.⁴⁷ On the other hand, if the pay is legally required (such as severance under a preexisting plan), the employer cannot use that amount as a set-off.⁴⁸

A \$500 per day penalty is payable to a unit of local government unless the amount of liability to each employee is paid within three weeks. The court may also award attorney fees.⁴⁹ The employer may petition the court for a reduction of the penalty by showing that the failure to comply with the WARN Act was in good faith and the employer had reasonable grounds to believe its actions did not violate the Act.⁵⁰ The above remedies are exclusive; no party can enforce the WARN Act by injunction and there are no punitive damages.⁵¹

3. WARN Act and Sale of a Business.

a. Generally

The WARN Act provides that "in the case of a sale of part or all of an employer's business, the seller shall be responsible for providing notice ... up to and including the effective date of the sale. After the effective date of the sale ... the purchaser shall be responsible for providing notice ..."⁵² An asset sale would generally be considered a sale of part or all of the employer's business. This is interpreted in the regulations and case law to mean that, if the seller closes the plant or lays off the workers, the seller is responsible for the notice, and if the buyer closes the plant or lays off the workers, the buyer is responsible.⁵³

b. Losses of Employment in a Merger or Acquisition

The WARN Act provides that any person who is an employee of the seller as of the effective date of the sale shall be considered an employee of the purchaser immediately thereafter. The regulations further state that

although a technical termination of the seller's employees may be deemed to have occurred when a sale becomes effective, WARN Act notices are only required where the employees in fact experience a covered employment loss.⁵⁴ Thus, in an asset sale, there may be no loss of employment as contemplated by the WARN Act. If the buyer decides not to rehire the employees, there will be a loss of employment; and the question arises as to whether notice is the seller's obligation or the buyer's obligation. The preamble to the final WARN Act regulations provides:

If a plant closing occurred as a result of the buyer's decision not to rehire the seller's workers, and the closing occurred after the effective time of the sale, the buyer is responsible for giving notice. This view is consistent with the statutory provision that the employees of the seller become the employees of the buyer immediately after the sale, with the intent of WARN that notice be given to workers who will suffer dislocations and with the reality of allocating responsibility for notice to the party to the transaction that actually makes the decision to order the plant closing or mass layoff.⁵⁵

The result should be different if the seller were to clearly terminate the employees prior to, or contemporaneous with, the asset sale. The regulations themselves provide that a termination concurrent with a sale would cause the seller to have WARN obligations.⁵⁶

The preamble should, it seems, be read to impose the liability on the buyer for employees not rehired only if the employees are not specifically terminated by the seller, pursuant to the contract of sale or otherwise, on or prior to the effective date of the sale. In such a case, it is the buyer's decision not to reemploy the workers that triggers the mass layoff. When, however, employees are specifically terminated by the seller in connection with the closing, any WARN liability for employees not rehired should fall on the seller.⁵⁷

F. The Human Factor — Avoiding People Problems

Mergers and acquisitions often make good business sense on paper, but companies must include people in the planning equation.⁵⁸ Good merger plans address questions regarding personnel management philosophies, culture, and systems, which help alleviate many problems including:

- Loss of company-wide identity and feelings of belonging;
- Power struggles among internal factions;
- Attrition due to a perceived lack of stability;
- Misunderstandings regarding performance standards, compensation and requirements for progress; and
- Employees who feel powerless to affect their own future.

Companies that do not address these issues up front are setting up the merger or acquisition for failure.⁵⁹

Most businesses have developed a list of attributes they hope to find in prospective candidates for employment. Usually the unique aspects of an organization's recruiting process are tied to past predictors of success in that company. The desired personnel attributes and recruiting process of each entity must be evaluated, and managers will want to look at a profile of their current workforce from the perspective of future demands. Merging companies should also look at the types of professional development programs each has in place, with an eye toward integrating the best elements into a new comprehensive program.⁶⁰

The best managers in each company will be critical to the success of any merger as they communicate ongoing news of the process to their employees. These professionals are also key players in recognizing and addressing signs of concern and discomfort among staff members. The companies should single out the key managers in advance and give them visible roles in assessing the impact of the proposed merger and successfully implementing it.⁶¹

The companies must also realize that each has its own nature and workplace identity. For example, one may allow casual attire while the other requires business attire; one may be noisy and the other quiet. Such factors make up a company's unique culture and should be given serious consideration before the merger or acquisition. While dissimilar cultures can exist in harmony, it is important that managers remain aware of the two cultures throughout the transition to avoid a culture "collision" that will be unpleasant for everyone.⁶²

G. Employment-Based Liabilities and the Purchase Agreement


The buyer in an asset or equity transaction can attempt to minimize the effect of employment-based successor liabilities by adequate due diligence and by obtaining representations and warranties in the purchase agreement that, if breached, provide indemnity for such liabilities. Typical categories of representations and warranties include:

- Disclosure letters, including each employee and their leave of absence or layoff status, current compensation, accrued vacation, service credited for pension, profit sharing, bonus and similar plans.
- Outside confidentiality or noncompete agreements affecting the employee.
- Copies of all collective bargaining agreements.
- Labor relations including threatened or current strike, slowdown, picketing and any proceedings before the EEOC, NLRB or similar body.
- Status of workers compensation claims and insurance and any similar regulatory schemes applying

- to certain industries, like the federal statute, FELA.
- Existence and status of executive agreements.
- OSHA or other conditions (potentially) affecting employees.
- Modification of at-will status by employee handbooks and performance evaluations.

- Existence of nonbinding oral agreements with employees for compensation or other matters, which if not continued causes loss of morale or employees.

Three main inherent limitations in the indemnification of employment-based successor liabilities are the strength of the indemnitor, the scope of the warranties and representations, and the scope of the indemnification. Simply put, an agreement to indemnify is only as strong as the party giving the indemnification. With a private company, it may prove very difficult to collect from far-flung sellers who may spend much of the sale proceeds, particularly if the indemnity is not joint. The second limitation arises when the parties must determine whether the language used in each representation and warranty is broad enough to cover the successor liability at issue or whether the disclosure schedule or knowledge qualifiers vitiate the representation and warranty. The third limitation is in the indemnification terms, meaning how long is the indemnification period, and what is the indemnification cap? Another consideration would be to fund an escrow from the closing proceeds to be used to offset such future liabilities.

Many potential employment liabilities associated with a merger or acquisition do not surface until after the deal has closed, but preclosing due diligence should minimize surprises. In considering any business combination, the successor must identify potential pitfalls and obtain representations and warranties from the target entity, as well as indemnities. There are many different methods to address these issues and consideration should be given to how such issues affect other business, legal and tax matters in these transactions. 

Have a comment on this article? Email editorinchief@acc.com.

NOTES

- 1 Paul E. Starkman, *Mergers & Acquisitions: A Checklist of Employment Issues*, 13 DEPAUL BUS. L.J. 47, 48 (2001).
- 2 *Criswell v. Delta Air Lines, Inc.*, 869 F.2d 449 (9th Cir. 1989); *Trujillo v. Longhorn Mfg. Co.*, 694 F.2d 222 (10th Cir. 1982). See also *EEOC v. G-K-G, Inc.*, 39 F.3d 740 (7th Cir. 1994) (holding successor through asset purchase liable for predecessor's discrimination where successor knew of claim and obtained indemnity from predecessor).
- 3 *Coleman v. Keebler Co.*, 997 F. Supp. 1094 (N.D. Ind. 1998); *Rabidue v. Osceola Refining Co.*, 584 F. Supp. 419 (E.D. Mich. 1984); *Stevens v. McLouth Steel Prod. Corp.*, 446 N.W.2d 95 (Mich. 1989), *reh'g denied*, 433 Mich. 1219 (1989).
- 4 *Daliesso v. DePuy, Inc.*, Civ. A. No. 96-5295, 1998 WL 24330 (E.D. Pa. 1998).
- 5 *Virgo v. Riviera Beach Assoc.*, 30 F.3d 1350 (11th Cir. 1994); *Aguirre v. McCaw RCC Communications, Inc.*, 923 F. Supp. 1431 (D. Kan. 1996).
- 6 *York v. Tennessee Crushed Stone Ass'n*, 684 F.2d 360 (6th Cir. 1982); *Zieger v. Manhattan Coffee Co.*, 445 N.E.2d 844 (Ill.

ACC Extras on... M&A Employment

ACC Docket Articles

- *Eight Tips to Prevent the Coemployment Trap During Mergers and Acquisitions* (2008). When your company is involved in an MA transaction, it is easy to focus on the typical labor issues that come about, like collective bargaining agreements, pensions, and the WARN Act. However, in-house counsel also need to concern themselves with the impact that coemployment can have on the transaction. www.acc.com/docket
- *Antitrust Investigations 501: Successfully Managing Your Relationship with Agency Staff and Increasing your Chances for Approval* (2004). Your company has announced a merger. Most counsel will immediately start to assemble their factual and economic evidence and develop their best arguments to present to the agencies. Yet, equally important is developing a strong working relationship with agency staff. Here are some practical tips on how to get started. www.acc.com/legalresources

Sample Form & Policy

- Certificate of Merger (Delaware, 2008). A certification of a merger between a Delaware LLC and a Delaware Corporation. www.acc.com/legalresources/forms

Quick Reference

- Pointers for Merging Law Departments (2004). www.acc.com/legalresources/quickreferences

Program Material

- *After the Closing: Practical Methods for When the Real Legal Work Begins Post Acquisition* (2007). Mergers and acquisitions can hit employees the hardest. Two law departments first operating separately and then merged into one can present a multitude of issues to address. Read this if you're about to be acquired or conducting a merger of your own. www.acc.com/legalresources/resource.cfm?show=20040

ACC has more material on this subject on our website. Visit www.acc.com where you can browse our resources by practice area or use our search to find documents by keyword.

- App. Ct. 1983).
- 7 *Ames v. Whitman's Chocolates*, 57 F.E.P. Cas. 1301, 1305 (E.D. Pa. 1991).
- 8 *Kamens v. Summit Stainless, Inc.*, 586 F. Supp. 324, 327 (E.D. Pa. 1984).
- 9 Charles C. Shulman, *Employee Benefit Plans in Mergers and Acquisitions: Employment, change of control and severance agreements in mergers and acquisitions*, 2 QUAL. RETIREMENT PLANS § 24:42 (2007).
- 10 *Id.*
- 11 Richard D. Nix and Timothy Verrall, *Employee Benefit Issues in Mergers and Acquisitions*, 25 OKLA. CITY U.L. REV. 435, 444 (2000).
- 12 26 U.S.C.A. § 280G(a) (1994). Section 280G(a) disallows a deduction for any "excess parachute payment" made to a "disqualified individual."
- 13 Priv. Ltr. Rul. 99-14-032 (Jan. 13, 1998).
- 14 Nix, *supra* n. 19 at 445.
- 15 *Peters v. Davidson, Inc.*, 359 N.E.2d 556 (Ind. App. 1977). See *Alexander & Alexander v. Koelz*, 722 S.W.2d 311 (Mo. Ct. App. 1986); *Abalene Pest Control Serv., Inc. v. Hall*, 220 A.2d 717 (Vt. 1966). See also *Packers Supply Co. v. Weber*, 2008 WL 1726103 (Tenn. Ct. App. 2008).
- 16 *Wyatt Safety Supply Co. v. Indus. Safety Supply Inc.*, 566 So.2d 728 (Ala. 1990).
- 17 *Sisco v. Empiregas, Inc.*, 237 So.2d 463 (Ala. 1970); *SDL Enter., Inc. v. DeReamer*, 683 N.E.2d 1347 (Ind. App. 1997); *Perthou v. Stewart*, 243 F. Supp. 655 (Or. 1965).
- 18 *Equifax Serv., Inc. v. Hitz*, 905 F.2d 1355 (10th Cir. 1990) (applying Kansas law); *Abalene Pest Control Serv., Inc. v. Powell*, 187 N.Y.2d 381 (App. Div. 1959); *A. Fink & Sons, Inc. v. Goldberg*, 139 A. 408 (N.J. Ch. 1927).
- 19 *Supplies for Industries, Inc. v. Christensen*, 659 P.2d 660 (Ariz. Ct. App. 1983).
- 20 *Id.*; *Nenow v. L. C. Cassidy & Sons, Inc.*, 141 So.2d 636 (Fla. Dist. Ct. App. 1962). See *National Linen Serv. Corp. v. Clower*, 175 S.E. 460 (Ga. 1934); *Peters v. Davidson, Inc.*, 359 N.E.2d 556 (Ind. App. 1977); *Orkin Exterminating Co. v. Burnett*, 146 N.W.2d 320 (Iowa 1967); *Abramov v. Royal Dallas, Inc.*, 536 S.W.2d 388 (Tex. Ct. App. 1976); *Abalene Pest Control Serv., Inc. v. Hall*, 220 A.2d 717 (Vt. 1966).
- 21 See e.g., *Packers Supply Co. v. Weber*, 2008 WL 1726103 (Tenn. Ct. App. 2008); *Pino v. Spanish Broad. Sys., Inc.*, 564 So. 2d 186 (Fla. Dist. Ct. App. 1990), *review dism'd*, 567 So. 2d 435 (Fla. 1990); *National Linen Serv. Corp. v. Clower*, 175 S.E. 460 (Ga. 1934); *Peters v. Davidson, Inc.*, 359 N.E.2d 556 (Ind. App. 1977); *Orkin Exterminating Co. v. Burnett*, 146 N.W.2d 320 (Iowa. 1967); *Saliterman v. Finney*, 361 N.W.2d 175 (Minn. Ct. App. 1985); *Blaser v. Linen Serv. Corp.*, 135 S.W.2d 509 (Tex. Ct. App. 1939, writ dism'd).
- 22 Charles C. Shulman, *Employee Benefit Plans in Mergers and Acquisitions: Employment, change of control and severance agreements in mergers and acquisitions — Assumption or renegotiation of agreements in transactions*, 2 QUAL. RETIREMENT PLANS § 24:43 (2007).
- 23 Simon M. Lorne & Joy Marlene Bryan, *Acquisitions and Mergers: Negotiated and Contested Transactions: Employee Benefit Plans and ERISA Requirements*, 11A Acquisitions & Mergers § 7:30 (2007).
- 24 Charles C. Shulman, *Employee Benefit Plans in Mergers and Acquisitions: Methods of dealing with pension plans in mergers and acquisitions*, 2 QUAL. RETIREMENT PLANS § 24:22 (2007).
- 25 *Id.*
- 26 *Id.*
- 27 Charles C. Shulman, *Employee Benefit Plans in Mergers and Acquisitions: Hidden pension liabilities*, 2 QUAL. RETIREMENT PLANS § 24:25 (2007).
- 28 *Id.*
- 29 *Id.*
- 30 Charles C. Shulman, *Employee Benefit Plans in Mergers and Acquisitions: Hidden pension liabilities — Pension plan underfunding and contribution to plan versus purchase price adjustment*, 2 QUAL. RETIREMENT PLANS § 24:26 (2007).
- 31 *Id.*
- 32 *Id.*
- 33 *Id.*
- 34 IRC § 404(a)(1).
- 35 Shulman, *supra* § 24:26.
- 36 29 C.F.R. §§ 825.104, 825.107 (2000).
- 37 29 C.F.R. § 825.107(a); *Horton v. Georgia-Pacific Corp.*, 114 Lab. Cas. (CCH) ¶ 12,060 (E.D. Mich. 1990).
- 38 29 C.F.R. § 825.107(c) (2000).
- 39 38 U.S.C.A. § 4303(4)(A)(iv); *Leib v. Georgia-Pacific Corp.*, 925 F.2d 240 (8th Cir. 1991) (applying multi-factor test for successor liability in USERRA case).
- 40 *Carr v. RCA Rubber Co.*, 609 F. Supp. 526 (N.D. Ohio 1985).
- 41 29 U.S.C.A. § 2102(a).
- 42 29 U.S.C.A. § 2101(a)(2)-(3).
- 43 29 U.S.C.A. §§ 2102(b)(1), (2)(A)-(B).
- 44 29 U.S.C.A. § 2102(a); 20 C.F.R. §§ 639.6, 639.7.
- 45 29 U.S.C.A. § 2104(a).
- 46 The Fifth, Sixth, Eighth and Ninth Circuits take the view that back pay is only required for working days in the period of violation. *Carpenters District Council v. Dillard Dept. Stores*, 15 F.3d 1275 (5th Cir. 1994), cert. denied, 513 U.S. 1126 (1995). The Third Circuit, however, requires back pay for each calendar day of violation. *United Steelworkers of America v. North Star Steel Co.*, 5 F.3d 39 (3d Cir. 1993), cert. denied, 510 U.S. 1114 (1994).
- 47 29 U.S.C.A. § 2104(a)(2).
- 48 *Carpenters District Council v. Dillard Dept. Stores*, 778 F.Supp. 297 (E.D.La. 1991), *rev'd in part on other grounds*, 15 F.3d 1275 (5th Cir. 1994).
- 49 29 U.S.C.A. § 2104(a)(3), (6).
- 50 29 U.S.C.A. § 2104(a)(4).
- 51 29 U.S.C.A. § 2104(b); *Finman v. L. F. Rothschild & Co.*, 726 F.Supp. 460 (S.D.N.Y. 1989).
- 52 29 U.S.C.A. § 2101(b)(1).
- 53 20 C.F.R. § 639.4(c).
- 54 20 C.F.R. § 639.6.
- 55 54 Fed.Reg. 16042, 16052 (April 20, 1989).
- 56 29 U.S.C.A. § 2101(b)(1); 20 C.F.R. § 639.4(c).
- 57 Charles C. Shulman, *Employee Benefit Plans in Mergers and Acquisitions: Warn Act and applicability to mergers and acquisitions*, 2 QUAL. RETIREMENT PLANS § 24:75.
- 58 Susan G. Manch, *Consider the Effects of Firm Mergers on your Staff*, 18 No. 4 LEGAL MGMT. 27 (July/August 1999).
- 59 *Id.* at 28.
- 60 *Id.* at 30.
- 61 *Id.* at 32.
- 62 *Id.*