

FROM ACQUIRED RIGHTS TO REVERSE TUPE: EMPLOYMENT LAW ISSUES IN GLOBAL OUTSOURCING TRANSACTIONS

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INTRODUCTION

About 500 workers at Briggs & Stratton's Rolla, Missouri, plant lost their jobs when their employer closed its engine-making plant and offshored the operations to China.¹ At the same time, Briggs & Stratton's plant in Chongqing, a sprawling port city situated in the upper reaches of the Yangtze River in southwest China, was looking for new workers, at substantially lower wages than their American counterparts.² A young American Rolla worker bitterly complained about losing her job to a worker overseas. But during the same interview, she admitted shopping in the aisles of a local Wal-Mart for discount products, most of them made in China.³ The woman who is now doing her work also shops at Wal-Mart. In fact, the Wal-Mart Supercenter in Chongqing is the biggest store in town, favored by many members of China's new middle class.⁴

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¹ *Koppel on Discovery: The People's Republic of Consumerism* (Discovery television broadcast July 9, 2008).

² *Id.* The monthly minimum wage in Sichuan province was raised from 400 yuan to 450 yuan (about USD 65) effective December 26, 2007. See Vivian Ye, *Brief: Sichuan Raises Minimum Wage*, EMERGING CHINA, Jan. 18, 2008, available at <http://www.emerging-china.com/articles/519700.html>. The minimum hourly wage in Missouri is USD 6.65, and will rise to USD 7.05, effective January 1, 2009. See Missouri Department of Labor and Industrial Relations, Division of Labor Standards, <http://www.dolir.mo.gov/LS/minimumwage/index.asp> (last visited Dec. 8, 2008).

³ See *supra* note 1.

⁴ *Id.*

The complaint that Chinese companies are taking work away from their American counterparts is often true. According to a report published by the Economic Policy Institute in Washington, D.C., China's exports to the United States of \$288 billion in 2006 were six times greater than U.S. exports to China, which were only \$52 billion, leading to an enormous trade deficit.⁵ According to the same report, since 2001, when China was admitted to the World Trade Organization, about 353,000 U.S. employees per year have lost their jobs to China.⁶

Still, some American economists estimate that the United States is as much as \$70 billion a year richer because of its relationship with China.⁷ When Apple sells a \$299 iPod (designed in California, assembled in China), for instance, it makes an \$80 profit, while the Chinese assembly plant makes \$4.⁸

Whether its benefits are real or only perceived, in the wake of the now confirmed U.S. recession, industry experts expect that outsourcing will only become more common.⁹ In light of tighter budgets and possible layoffs, it is not surprising that companies look at alternative ways of saving costs, one of them outsourcing. In fact, according to a 1998 survey by the Outsourcing Institute, the desire to reduce and control costs is the top reason why companies outsource.¹⁰

⁵ Scott, Robert E., *Costly Trade With China: Millions of U.S. Jobs Displaced with Net Job Loss in Every State*, ECONOMIC POLICY INSTITUTE, Oct. 9, 2007, available at <http://www.epi.org/content.cfm/bp188> (last visited Apr. 29, 2009).

⁶ *Id.*

⁷ See Scott Wilson, *U.S.-China Gap Widening*, L.A. TIMES, May 1, 1997, at C12 (quoting a report by Bates Gill from the Center for Strategic and International Studies).

⁸ See Justin Berka, *iPod Production Truly a Global Affair*, INFINITE LOOP, June 28, 2007, available at <http://arstechnica.com/apple/news//2007/06/ipod-manufacturing-is-valuable-to-many-countries> (last visited Apr. 29, 2009).

⁹ See Marian Grace S. Ramos, *Recession-prompted Outsourcing Could Bypass RP Electronics Firms*, BUSINESSWORLD, Mar. 17, 2008. For example, in the Philippines, despite the appreciation of the peso, the Business Process Outsourcing (BPO) players in the Philippines are continuing to expand, projecting an annual growth of 40 percent to \$ 7 billion this year from the 2006 level of \$ 5 billion. Emmie V. Abadilla, *U.S. Recession Seen to Drive Demand for BPO Facilities Here*, MANILA BULLETIN, Feb. 1, 2008, at B2, available at http://www.neda.gov.ph/n-online/exp_details.asp?idn=5&sa=915233885059158 (last visited Apr. 29, 2009).

¹⁰ The Outsourcing Institute, *Top Ten Outsourcing Survey*, 1998, http://www.outsourcing.com/content.asp?page=01b/articles/intelligence/oi_top_ten_survey.html&nonav=true (last visited Dec. 5, 2008).

While outsourcing used to focus on IT services, it is now a common practice in many fields, including finance and accounting, customer support, research and development, manufacturing, engineering and HR services, just to name a few.¹¹ So, why wait?

There are many reasons. Most importantly, outsourcing is not always the right solution to a company's problems. For instance, studies have shown that in some instances, outsourcing does not lead to the desired cost savings.¹² Other studies have suggested that outsourcing may lead to a decrease in customer loyalty.¹³ But even after a company has gone through the assessment phase and has determined that outsourcing is desirable, it is crucial that the provider be carefully selected, the deal agreements successfully negotiated, and the work smoothly

¹¹ See Alexa Michael, *Outsourcing the Finance Function*, FINANCIAL MANAGEMENT, Apr. 1, 2008, at 32 (finance and accounting); *Middle Eastern Call Center Positions Predicted to Increase by 30%*, MIDDLE EAST COMPANY NEWS, Apr. 18, 2007, <http://www.ameinfo.com/117121.html> (last visited Dec. 8, 2008) (customer support); *Stream Named to Third Consecutive Global Services 100, Global Outsourcer Among Top 10 Best Performing Contact Centers*, PR NEWswire, Feb. 14, 2008, available at <http://www.reuters.com/article/pressRelease/idUS226157+14-Feb-2008+PRN20080214> (last visited Apr. 29, 2009), (customer support); *Philippines the New Hotspot for Indian IT Firms*, INDIAN BUSINESS INSIGHT, Feb. 29, 2008 (customer support); *GMD Plans US\$3mm Investment in Data Center*, BUSINESS NEWS AMERICAS, Feb. 12 2008 (customer support); *Annual Global Research and Development (R&D) Report Reveals Growing Equalization of R&D Activity, Reduction of U.S. Dominance, Outsourcing and Offshoring Trends Growing in Significance*, PR NEWswire, Oct. 3, 2007 (research and development); *Outsource Partners International Opens Office in Delhi, India to Support Research & Analytics Outsourcing*, BUSINESS WIRE, Mar. 25, 2008 (research and development); *Industry News - AstraZeneca Outsourcing Manufacturing*, BUSINESS MONITOR INTERNATIONAL, Sept. 17, 2007 (manufacturing); *Manufacturing Decelerates in August*, THE CHINA PERSPECTIVE - DAILY BRIEFING, Sept. 2, 2008 (manufacturing); *Watson Receives First FDA Approval for Manufacturing Product at Its Goa, India Facility*, PR NEWswire (U.S.), Sept. 4, 2007 (manufacturing); *Harman International and Wipro Form Engineering Partnership in India*, BUSINESS WIRE, Sept. 2, 2008 (engineering); *Dextrys to Market and Implement eBaoTech's Leading-Edge Software to U.S. Insurance Providers, Dextrys Helps eBaoTech Capitalize on U.S. Market Opportunity, Assists Insurance Companies Seeking Gateway to China*, PR NEWswire, Sept. 2, 2008 (engineering); *Wipro Tech Announces Joint Dev Centre with US-based Company*, THE PRESS TRUST OF INDIA LIMITED, Sept. 2, 2008 (engineering); *INCAT Ranks Number Two in Engineering Services Outsourcing in India Says DATAQUEST Survey*, PR NEWswire, Sept. 25, 2007 (engineering); *Financial Express: World comes to Indian HR*, FINANCIAL EXPRESS, Sept. 27, 2007 (HR services); *More Indian Mid-Market Firms to Adopt HR Outsourcing*, ASIA PULSE, Sept. 1, 2008 (HR services); *'2008 RPO Relationship of the Year' Awarded to RPOworldwide and TalentBridge International by Human Resources Outsourcing Association (HROA)*, PR NEWswire, Apr. 29, 2008 (HR services).

¹² See Denise Dubie, *Outsourcing Savings Lost to Poor Processes*, NETWORK WORLD, Sept. 13, 2007; Ed Frauenheim, *Newsmaker: Clearing up the Confusion over Outsourcing*, CNET NEWS, Aug. 9, 2004, available at http://news.cnet.com/Clearing-up-the-confusion-over-outsourcing/2008-1011_3-5301870.html (last visited Apr. 29, 2009); Andy McCue, *Outsourcing 'Increases IT costs'*, SILICON.COM, Jan. 31, 2008; *Deloitte Report: Outsourcing Programs Hampered By Poor Planning and Narrow Focus on Cost Savings*, PR NEWswire, Feb. 14, 2008; Andy McCue, *Cost-cutting Still Top Reason for Outsourcing*, ZDNET UK, Nov. 22, 2007.

¹³ Jonathan Whitaker, Mayuram S. Krishnan & Claes Fornell, *Does Offshoring Impact Customer Satisfaction?*, SOCIAL SCIENCE RESEARCH NETWORK, May 28, 2008, available at

transitioned to the service provider.¹⁴

Often, however, the parties forget that ultimately, it is all about people. What matters to those people is that when outsourcing occurs, jobs disappear and are moved to another provider or even offshore, such as the positions of the workers in the Rolla plant. On the flipside, outsourcing creates jobs for other people with the provider, such as the positions of the Chongqing employees. Sometimes it takes a curious incident to (literally) give a human face to outsourcing. In summer 2008, for instance, a British internet user said that when he opened his iPhone, he found a photo of a girl on the screen.¹⁵ He posted the pictures online, leading to an internet frenzy.¹⁶ As it turns out, the smiling Chinese girl, dressed in a striped uniform, was assembling Apple iPhones in Foxconn's factory in Shenzhen, in southern China.¹⁷

For lawyers, however, it is less the human face of outsourcing that matters, but the fact that all these “people movements” trigger employment law issues. The issues range from employment law compliance for redundancies to questions on how to transfer employees from the customer to the service provider, just to name a few. In today’s global economy and specifically in the outsourcing context, which often closely involves offshoring services to less developed jurisdictions, these issues are global issues, spanning countries and often continents.

The purpose of this article is to address these employment law issues as they come up in global outsourcing transactions. Unfortunately, just as there is no one-size-fits-all strategy to outsourcing, there is no one-size-fits-all strategy for handling the employment law issues that

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1010457 (last visited Apr. 29, 2009).

¹⁴ George Kimball, Michael Mensik, Samuel Kramer & Peter George: Outsourcing - Frequently Asked Questions, http://www.bakerinfo.com/NR/rdonlyres/BE2471D4-FB0B-4C86-9DD8-982D7BF91C7B/0/na_outsourcing_ca_mar08.pdf (last visited Dec. 5, 2008).

¹⁵ *Smiling Chinese Girl a Hit on New iPhone*, CHINA DAILY, Aug. 26, 2008, http://www.chinadaily.com.cn/life/2008-08/26/content_6972433.htm (last visited on Dec. 5, 2008).

¹⁶ See Min Lee, *Who is the Mystery iPhone Girl?*, Aug. 27, 2008, <http://www.msnbc.msn.com/id/26421622/> (last visited on Dec. 5, 2008).

arise in global outsourcing transactions. There are, however, common areas of concern that need to be worked through in every outsourcing transaction, and those issues are the focus of this article.

Section I of this Article discusses the labor and employment issues raised by an outsourcing transaction, most importantly as they relate to employee transfers, employee terminations, and notification and consultation obligations. How employees transfer from customer to supplier depends on numerous factors, most importantly on whether the jurisdiction in question is a so-called “termination-and-rehire” jurisdiction, or an “automatic-transfer” jurisdiction. Employee termination requirements internationally are far more onerous than the “at-will” rule in the U.S. Notification and consultation obligations are often triggered, both in the case of employee transfers and in the case of employee terminations. The obligations generally depend on whether the company has a union, a works council, or another employee representative body, but even in the absence of such employee groups, there may be obligations to notify or consult ad-hoc committees or employees directly. Section II of this Article summarizes the steps that typically occur in a global outsourcing transaction. While each outsourcing transaction is different, there is a list of steps that every company should consider when implementing a global outsourcing transaction, which are briefly explained in this Section. The conclusion emphasizes the importance of carefully planning and implementing the “people” issues of a global outsourcing transaction.

¹⁷ *Id.*

I. LEGAL ISSUES RAISED BY A GLOBAL OUTSOURCING TRANSACTION

Any global outsourcing transaction triggers a myriad of legal issues, from taxation, corporate compliance, and intellectual property protection to limitation of liability, privacy, and dispute resolution issues, just to name a few.¹⁸ In addition, there are an increasing number of laws or proposed laws imposing certain limitations on outsourcing transactions, typically when they involve the offshoring of activities abroad.¹⁹ But “people issues,” and related labor and employment law considerations, should not be ignored. In fact, a poorly planned human resources strategy can lead to the failure of the outsourcing transaction.²⁰

Understandably, there are numerous labor and employment issues that need to be considered in implementing a global outsourcing transaction, and the work is not finished once the deal has been implemented. Accordingly, the planning and implementation phases of an outsourcing transaction are crucial stepping stones for a successful outsourcing transaction. It is crucial that labor and employment issues be considered as early as possible. Unfortunately, many executives appear to be blissfully unaware of the costs and complexities of these issues, all of which may affect timing and even feasibility.

¹⁸ See Rob Petershack, *Consider the Legal Issues Before Outsourcing Offshore*, WISCONSIN TECHNOLOGY NEWS, Jul. 18, 2005, available at <http://wistechnology.com/articles/2007> (last visited Apr. 29, 2009); John Covaleski, *Outsourcing of Work Means Influx of Legal Issues*, NEW JERSEY LAW JOURNAL, May 20, 2004, available at <http://www.law.com/jsp/article.jsp?id=1084824762314>; Joel R. Merkin, *Litigating Outsourced Patents: How Offshoring May Affect the Attorney-Client Privilege*, 2006 U. ILL. J.L. TECH. & POL’Y 215 (2006); Colleen Walsh Schultz, *To Offshore or Not to Offshore: Which Nations Will Win a Disproportionate Share of the Economic Value Generated From The Globalization of White Collar Jobs?*, 29 HOUS. J. INT’L L. 231 (2006-2007); George S. Geis, *Business Outsourcing and the Agency Cost Problem*, 82 NOTRE DAME L. REV. 955 (2006-2007).

¹⁹ See 108th Congress H.R. 3816 (proposed), which would require employers at call centers to disclose the physical location of employees; 109th Congress H.R. 1653 (proposed), which would prohibit transfer of personal information without notice and consent unless specific safeguards are taken; 109th Congress H.R. 829 (proposed), which would restrict federal agencies from contracting with entities that have offshored jobs in past five years; see also Section 2188.5 of the California Elections Code, which prohibits voter information from being transferred outside the U.S. (Cal. Elec. Code § 2188.5 (West Supp. 2008)).

²⁰ Brian Becker & Barry Gerhart, *The Impact of Human Resource Management on Organizational Performance: Progress and Prospects*, 39 ACAD. MGMT. J. 779 (1996); David P. Lepak & Scott A. Snell, *The Human Resource*

While outsourcing is often linked to the customer making its workforce redundant and replacing it with a (typically cheaper) service provider workforce, from an employment perspective, an employee will typically fall within one of three groups: retained employee, rebadged (i.e., transferred) employee, or RIF'd employee (i.e., an employee subject to a reduction in force, terminated employee) – the “Three Rs.”

Retained employees usually cause few labor and employment law issues, and are therefore not addressed in detail in this article, although from a general human resources perspective, how to in fact retain the so-called retained workforce is an important issue.²¹ Rebadged employees, however, trigger numerous labor and employment law issues, which are outlined in section A below, as are the complicated questions connected to terminating employees, which are addressed in section B. Furthermore, for both the transferring and terminating workforce, issues relating to the notification of and/or consultation with unions and other employee representative bodies, such as works councils in Europe, can add significant cost and time to the implementation process, and are addressed in section C below.

A. Employee Transfer Issues

One of the trickiest issues in implementing a global outsourcing transaction is the question of how to transfer employees from the customer to the service provider. While in many circumstances, all, or at least some of the customer employees will be made redundant and

Architecture: Toward a Theory of Human Capital Allocation and Development, 24 ACAD. MGMT. REV. 31 (1999).

²¹ Gary Thompson, Mark Arian & Towers Perrin, *Three KEYS to Outsourcing Success*, SYNNOVATION MAGAZINE, June 25, 2007, available at <http://www.eds.com/news/features/3792/>; Craig D. Nelson, *Optimizing Value from the Start*, OUTSOURCING LEADERSHIP NEWS, available at <http://www.outsourcingleadership.com/optimizing-value.shtml>.

replaced by (typically) lower-cost service provider employees, it is common for at least some of the customer employees to be transferred to the service provider (i.e., rebadged), at least for an interim transition period or if some services will continue to be performed onsite or in a similar location. If the service provider has agreed to employ all or some of the customer's employees, it will need to consider the mechanism by which "wanted" employees can be transferred, the legal requirements regarding terms and conditions of employment and the necessary procedures for implementing the employee transfers.

These issues must be considered on a country-by-country basis. Nonetheless, while much simplified, it is possible to divide the world into groups of jurisdictions that generally follow similar rules. There are two major types: termination-and-rehire jurisdictions, and automatic-transfer jurisdictions.

1. Termination-and-Rehire Jurisdictions

Most jurisdictions in the Americas and the Asia Pacific region qualify as so-called termination-and-rehire jurisdictions. They include, among others, countries ranging from Argentina, Canada, and the United States of America in the Americas, to Australia, Hong Kong, Japan, South Korea, or Taiwan in the Asia Pacific region.

a. Notice and Severance Obligations when Transferring Employees

The transfer of employees in a termination-and-rehire jurisdiction requires an act by the customer terminating existing employment, followed by an act by the service provider offering

new employment. While this is generally a straightforward process involving issuance of a termination notice by the customer, and a new employment agreement or offer letter by the supplier, it is not without pitfalls.

As part of the termination-and-rehire process, it is crucial to determine whether the terminating act triggers any notice or severance obligations and, if so, whether these can be waived by transferring employees.

In the United States, this is usually not a major concern, assuming employees are at-will employees and there is no severance policy, plan, or practice in place at the customer. If there is such a severance policy, plan, or practice,²² however, the termination-and-rehire may trigger severance benefits. Also, while the U.S. federal Workers' Adjustment and Retraining Notification Act (the "WARN Act")²³ contains an exception for the sale of a business,²⁴ to date there is no definitive answer as to whether the WARN Act applies to situations in which employees are transferred as part of an outsourcing transaction. Arguably, WARN notice may be required even if employees are rebadged.²⁵ The transfer may also trigger notice requirements under state "mini-WARN" laws.²⁶ Typically, however, the WARN issue will come up in the context of redundancies implemented as part of an outsourcing transaction, and it is therefore discussed in detail under section B below. Although WARN also applies to union-represented employees, union contract language may impose additional notice and/or other requirements.

²² California companies need to be aware of the well-known Ninth Circuit case of *Blau v. Del Monte Corp.*, 748 F.2d 1348 (9th Cir. 1984), in which the court found that employees were entitled to severance benefits under the seller's severance practice, even though employees were transferred to the acquirer of their employer's business and did not lose a day of work. This issue could have been easily avoided by adopting an ERISA severance benefit plan overriding the prior practice that carves out situations in which the employee is offered other employment.

²³ 29 U.S.C. §§ 2101-2109 (2008).

²⁴ 29 U.S.C. § 2101(b)(1) (2008).

²⁵ See *infra* notes 77-84 and accompanying text.

²⁶ See *infra* notes 101-106 and accompanying text.

Outside the United States, however, at-will employment is virtually nonexistent. In those jurisdictions, any act of termination, even if followed by immediate hire through the service provider, likely triggers notice and/or severance pay obligations. For instance, Canadian employees are entitled to statutory or “reasonable” notice of termination (or payment in lieu thereof), which is based on various factors, including age, years of service, and level of responsibility.²⁷ German employees are entitled to four weeks of notice if they have fewer than two years of service, up to seven months of notice if they have 20 years of service or more.²⁸ Russian employees are entitled to two months of notice and up to three months of statutory severance.²⁹ The most common way of handling the termination and hire in these jurisdictions is to have employees waive their rights to notice and severance in exchange for obtaining an offer of employment from the service provider. Certain groups of employees, however, are unable to waive their rights, such as employees covered by the Employment Act in Malaysia. These employees must receive their statutory notice of termination (or be paid in lieu thereof) and severance pay.³⁰ Also, since severance pay increases by seniority in most foreign jurisdictions, these types of waivers will typically require the service provider to recognize prior service, and, in practice, employees are likely to be unwilling to waive their rights unless the new offers are on the same terms as the employees currently enjoy or at least comparable in the aggregate.

Finally, there are specific rules in some jurisdictions requiring new offers to be made at a specific time and/or subject to specific conditions in order to avoid triggering severance. In Hong Kong, for instance, offers have to be made at least seven days before the employee transfer and

²⁷Jillian M. Swartz, *Canada Outsourcing: A Canadian Perspective*, FINDLAW, 2005, <http://library.findlaw.com/2005/Jun/2/246681.html> (last visited Dec. 8, 2008).

²⁸Bürgerliches Gesetzbuch [BGB][Civil Code] Aug. 18, 1896, Reichsgesetzblatt [RGBl] § 621.

²⁹Trudovoi Kodeks [TK] [Labor Code] art. 178 (Russ.).

³⁰Section 12(3)(f) of the Employment Act 1955 regarding the non-waiver of Employment Act prescribed notice entitlements. The general rule relating to non-enforceability of agreements seeking to impose less more favorable benefits than Employment Act prescribed ones can be found in Section 7 of the Employment Act.

have to be on “no less favorable” terms in order to avoid triggering statutory severance.³¹ In Malaysia, offers on “comparable terms in the aggregate” have to be made to employees not governed by the Employment Act on the day of transfer or within seven days of it taking place.³² In Australia, most industrial instruments provide that redundancy benefits do not arise in the transmission of a business where the employees are offered the same or no less favorable terms and conditions of employment, and the purchaser (here: service provider) agrees to treat service as continuous.³³

b. Implementation of Employee Transfers

Even after the parties have gone through their respective legal analysis and have struck a deal on which employees will transfer, the terms under which the transfers will take place, and which party will ultimately be responsible for any notice and/or severance pay obligations, the parties will still need to agree on how to effectuate the employee transfers.

One issue that often arises relates to the question of whether the service provider will “interview and pick” the employees it wishes to engage and whether the customer will determine which employees need to receive an offer of employment from the service provider, for instance, because of its interest in effective knowledge transfer. In practice, commercial considerations usually drive this decision, but it will have legal implications as well. For instance, an “interview and pick” approach usually triggers fewer discrimination concerns for the customer, but potentially higher risks for the service provider that will need to make decisions on which

³¹ Employment Ordinance (1968).

³² Regulation 8 Employment (Termination and Lay-off Benefits) Regulations 1980.

³³ CCH Australia, Australian Master Human Resources Guide, *Issues on the Transfer of Employees in the Sale of a Business*, 68-030 (2008).

employees to engage. Discrimination issues are outlined in more detail in section B below. In addition, the parties also will have to agree whether the service provider will be permitted to conduct its own reference and background checks,³⁴ and whether the customer will share existing information (performance data, background check data) with the service provider. In the jurisdictions outside the United States with developed data privacy laws (in the termination-and-rehire jurisdictions, which include Argentina, Canada and Hong Kong), this can lead to data privacy concerns, all of which need to be considered.³⁵

After all these decisions have been made, the appropriate documents must be drafted. In termination-and-rehire jurisdictions, such documents usually consist of a termination letter from the customer accompanied by an employment agreement or offer letter from the service provider.³⁶ The termination letter should address issues such as whether vacation will be carried over and whether severance will be paid out or seniority recognized, and should include appropriate waiver and release language. Also, the employment agreement or offer letter may need to be on specific terms negotiated in the deal agreement.

Another issue to consider is that numerous foreign jurisdictions have language requirements. With respect to the termination-and-rehire jurisdictions, this is the case, for instance, in Guatemala³⁷ and Russia.³⁸ In the automatic-transfer jurisdictions (explained in detail

³⁴ In the U.S., if the background checks are performed through a “consumer reporting agency,” they are subject to restrictions pursuant to the federal Fair Credit Reporting Act (“FCRA”), 15 U.S.C. § 1681 et seq. Many states have stronger laws, such as California’s Investigative Consumer Reporting Agencies Act (Civil Code §1786) and the California Consumer Credit Reporting Agency Act (Civil Code §1785). Outside the U.S., reference and background checks are generally subject to far more onerous restrictions or may not even be permissible at all.

³⁵ See GLOBAL PRIVACY HANDBOOK (Ruth Hill Bro et al. eds. 2008).

³⁶ While in the U.S., with the exception of executive employees, it is common to issue simple “offer letters”; outside the U.S., employment agreements are far more common, and in many jurisdictions, are required because specific terms need to be indicated in an employee’s offer of employment. See Council Directive 91/533, 1991 O.J. (L 288) 32-35 (EEC).

³⁷ Governmental Accord 22-2004 of Jan. 12, 2004 (Guat.).

³⁸ Law No. 53-FZ of June 1, 2005 (Russ.).

Copyright © 2009, Chicago-Kent Journal of International & Comparative Law in section 2 below), there are language requirements in Belgium (Dutch and/or French),³⁹ Quebec (French),⁴⁰ and France (French),⁴¹ just to name a few. In virtually all other jurisdictions, translations or bilingual documents are recommended in case employees are not fluent in English. Even if employees are fluent in English, translations may be recommended because, in case of a dispute, courts will generally insist on having the documents translated into local language by a court-appointed translator.

Finally, before any of these documents can be presented, the company may have to comply with notification and/or consultation obligations, which are discussed in detail in section C of this article.

2. Automatic-Transfer Jurisdictions

Automatic-transfer jurisdictions are those where employees automatically transfer from the customer to the service provider. While at first sight, this appears to be a very straightforward and almost desirable result if the service provider wishes to engage the customer's workforce, in most outsourcing transactions, economies of scale and pricing are based on the understanding that all or the majority of the customer's workforce will be made redundant and the work will be offshored to lower-cost employees in lower-cost jurisdictions. In these circumstances, the automatic-transfer principles can turn into a human resources nightmare.

³⁹ Law of 18 July 1966 on the Use of Language in Administration (Belg.)

⁴⁰ Art. 10 Charter of the French Language (Loi 101).

⁴¹ Law No. 94-665 of Aug. 4, 1994, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Aug. 5, 1994, p. 11392.

a. European Union Acquired Rights Directive

The European Union (“EU”) jurisdictions are the prime examples of automatic-transfer jurisdictions, based on local laws implementing the so-called EU Acquired Rights Directive.⁴² The Acquired Rights Directive protects employees in the event of the transfer of a business. Unfortunately, a significant amount of uncertainty surrounds the question of whether an outsourcing transaction triggers what is called a “business transfer” under the rules of the EU Acquired Rights Directive. While the European Court of Justice has given some guidance on factors to be considered to determine whether or not there is a business transfer,⁴³ at this point it is far from settled whether or not the Acquired Rights Directive applies to an outsourcing transaction.

Curiously enough, however, some of the first cases discussing the concept of a business transfer under the Acquired Rights Directive were cases involving outsourcing transactions. An example is the *Christel Schmidt* case,⁴⁴ where the European Court of Justice held that a cleaning lady working for a German bank was entitled to the protection of the Acquired Rights Directive where her job was outsourced to a third-party cleaning service, Spiegelblank. Subsequent decisions, however, have adopted a narrower definition of what is required for a transfer of

⁴² EEC Council Directive No. 77/187, O.J. L61/26 (1977), as amended by EC Council Directive No. 98/50, O.J. L 201/88 (1998) and codified in EC Council Directive 2001/21, 201 O.J. L 82/16 (2001) (“Acquired Rights Directive”). There are automatic-transfer principles outside the EU as well, for instance in Korea in certain types of transactions and in Singapore for certain types of employees, but it appears that these have, to date, not been interpreted to apply to outsourcing transactions. South African courts, on the other hand, like the European Court of Justice, have had to grapple with the question as to what constitutes a transfer pursuant to Labor Relations Act 66 of 1995 Section 197. See Craig Bosch, *Transfers of Contracts of Employment in the Outsourcing Context*, 22 INDUS. L.J. JUTA 840 (2001).

⁴³ According to European Court of Justice jurisprudence, the following factors are relevant: type of business, the tangible and intangible assets transferred, the value of the intangible assets, the number of employees transferred, the client companies that were transferred, and the degree of similarity of the activities before and after the transfer, and the period, if any, for which business activities were suspended as a result of the transfer. See Joined Cases C-127/96, C-229/96 and C-74/97 *Hernández Vidal and Others* [1998] ECR I-8179, paragraph 26.

⁴⁴ Case C-392/92, *Christel Schmidt v. Spar- und Leihkasse der früheren Ämter Bordesholm, Kiel und Conshagen*,

undertaking. In the *Ayse Süzen* case,⁴⁵ another case involving the transfer of cleaning services to a third-party provider, the European Court of Justice stated that the “transfer must relate to a stable economic entity whose activity is not limited to performing one specific works contract. . . . The term entity thus refers to an organized grouping of persons and assets facilitating the exercise of an economic activity which pursues a specific objective.”⁴⁶ The Court also indicated that the following factors are relevant in this determination:

- Type of undertaking or business;
- Whether or not its tangible assets, such as buildings and movable property, are transferred;
- The value of its intangible assets at the time of the transfer;
- Whether or not the majority of its employees are taken over by the new employer;
- Whether or not its client companies are transferred;
- The degree of similarity between the activities carried on before and after the transfer; and
- The period, if any, for which those activities were suspended.⁴⁷

While there is some guidance on the factors the European Court of Justice looks at in an outsourcing transaction, it comes as no surprise that there is no certainty under the jurisprudence of the EU member states on the scope of application of the business transfer rules in an

1994 E.C.R. I-237.

⁴⁵ Case C-13/95, *Ayse Süzen v. Zehnacker Gebäudereinigung GmbH Krankenhausservice*, 1997 E.C.R. I-662.

⁴⁶ *Id.* at para. 13.

⁴⁷ *Id.* at para. 14.

outsourcing transaction.

To complicate matters further, while the Acquired Rights Directive has tried to achieve some uniformity in the rules relating to business transfers, EU directives are not directly binding, but instead have to be implemented into local law. In the process of implementation, some jurisdictions have broadly interpreted the Acquired Rights Directive to include outsourcing transactions, whereas other jurisdictions narrowly define the scope of the Acquired Rights Directive. For instance, the French Supreme Court has found the French law implementing the Acquired Rights Directive⁴⁸ to apply in case of the outsourcing of a computer assistance hotline to a service provider,⁴⁹ but has refused the application of the Acquired Rights Directive to other outsourcing transactions.⁵⁰ The jurisdiction with the broadest application of the Acquired Rights Directive appears to be the United Kingdom, which in 2006 extended the Transfer of Undertakings (Protection of Employees) (“TUPE”) legislation to expressly apply to service provider changes (i.e., outsourcing situations).⁵¹ In fact, the UK Employment Appeal Tribunal has recently indicated that it is possible that TUPE applies where the particular business transfers from the UK outside the UK (in the case at hand, to Israel).⁵² In other EU jurisdictions, however, it is far less clear whether the Acquired Rights Directive applies if services are nearshored⁵³ within the EU or even offshored⁵⁴ outside the EU. In fact, in offshoring situations, it is usually

⁴⁸ C. TRAV. art. L. 122-12-2.

⁴⁹ Employment Division, Supreme Court, January 21, 2002, #02-17.642; see Nouel, *Outsourcing and Transfer of Undertakings under French Law: Protection of Employee Rights and Obligations Towards the Works Council*, FOCUS EUROPE, 42 (Winter 2008).

⁵⁰ Employment Division, Supreme Court, May 9, 1989, #85-43.623 (where a different undertaking is run by the transferee) or Employment Division, Supreme Court, May 28, 2003, #02-41.9999, and #02-42.008 (where the transferred undertaking is run in a totally different manner by the transferee); see Nouel, *supra* note 49, at 43.

⁵¹ See John Evason & Monica Kurnatowska, *Employment Issues on Outsourcing*, www.practicallaw.com/8-204-4041 (last visited on Dec. 5, 2008).

⁵² *Holis Metal Industries Ltd. v. (1) GMB (2) Newell Ltd.*, [2007] UK EAT/0171/07.

⁵³ Nearshoring is “the term for setting up operations and jobs just across the border instead of sending them overseas.” Jane Larson, *Nearshoring’: Sort of like next-dooring*, ASSOCIATED PRESS NEWSWIRES, Sept. 20, 2005.

⁵⁴ “Offshoring is the movement of work from within the United States to locations outside the United States. ‘Offshoring’ can occur within the same company and involve movement of work to a different location of that

safe to assume that the Acquired Rights Directive does not apply because most of the various factors outlined by the European Court of Justice will typically not be fulfilled. That said, in practice, the more conservative and sensitive approach may be to assume that the Acquired Rights Directive does apply, at least to the extent services are outsourced or nearsourced, unless the law in a particular EU member state is quite clearly to the contrary. Taking a more aggressive position that may prove to be wrong may cause substantial liability for failure to comply with local laws implementing the Acquired Rights Directive.

b. Principles under the EU Acquired Rights Directive

If an outsourcing transaction triggers the application of the Acquired Rights Directive, the customer and service provider need to be aware of the following principles:

- (1) Employees engaged in the transferring business transfer automatically to the service provider;
- (2) Employees transfer on the same terms and conditions of employment that applied when they were employed by the client company;
- (3) The outsourcing triggers notification and/or consultation obligations with employees and/or employee representative groups such as works councils, unions or employee delegates; and
- (4) Terminations “because of” the business transfer are invalid.⁵⁵

company outside the United States, or to a different company altogether (offshoring/outsourcing).” Sharon P. Brown and Lewis B. Siegel, *Mass Layoff Data Indicate Outsourcing and Offshoring Work*, 128 MONTHLY LAB. REV. 3, 5 (2005).

⁵⁵ Acquired Rights Directive, *supra* note 42.

The concept of automatic transfer of employment is a challenging concept in the outsourcing context, because it makes any type of cherry-picking of employees used to gain economies of scale impossible. Particularly if read together with the fourth concept outlined above, i.e., the prohibition of terminations “because of” a business transfer, a customer trying to outsource operations would probably prefer taking the position that the Acquired Rights Directive does not apply. This may not be a safe approach to take, however, for either the customer or for the service provider. For instance, if the customer implemented redundancies, and a court later found them to be connected to a business transfer, the termination may be deemed to have been invalid, which in some jurisdictions can even put the effectiveness of an already entered-into release in question.⁵⁶

Even if the parties have made a decision that the outsourcing transaction constitutes a business transfer, it is not always a clear-cut case to determine whether an employee is in fact primarily engaged with the transferring business. For instance, employees referred to as “shared services” employees may perform work both for a business unit that is being outsourced and a business unit that is not affected by the outsourcing. If that is the case, the law of the EU countries is unclear as to whether employment has transferred or not. As a practical matter, the common approach among the EU member states is to follow the 50% rule, where the employees go or remain with the business for which the employee performs the majority of his or her services, although in some countries (e.g., France) the prevailing trend is that the employment of

⁵⁶ Under French law, redundancies due to (or arising out of) an acquisition are not permitted. Any such redundancy implemented in violation of these regulations will be deemed to be either an “unfair dismissal” (if the company cannot show sufficient economic grounds, which is a very high standard) or “null and void” (if the company cannot show that the terminations were unrelated to a business transfer). If the redundancies are deemed to be null and void, the employees will be reinstated, and will be entitled to receive all back wages and benefits that they would have been entitled to receive had the employees not been terminated. Additionally, if the company previously negotiated a settlement (and release) with a reinstated employee, the settlement will no longer be enforceable and, although the reinstated employee will likely be ordered to repay the settlement indemnity, the company will need to file a claim (or counterclaim in an ongoing employment lawsuit) and obtain a separate court order against the employee.

human beings is divisible.⁵⁷

Furthermore, the concept of a transfer on the same terms and conditions of employment may be problematic in practice. “Same” in the context of the Acquired Rights Directive does in fact mean exactly the same or identical, i.e., not substantially similar or comparable in the aggregate.⁵⁸ Accordingly, if the service provider wanted to fully comply with the law, it would need to replicate each and every benefit provided by the customer before the transfer (with very few exceptions permitted by the Acquired Rights Directive for pensions and, potentially, equity awards), which can be extremely costly and difficult in practice.

Finally, extensive notification and/or consultation obligations take time. Time periods vary considerably among the EU member states, and meetings with works councils, unions, and employee representatives require time and attention from busy managers and HR professionals. For instance, in France, the works council would not only need to be presented with detailed information about the economics of the proposed transfer, but it would also be able in practice to significantly delay the transaction by not giving the required “advice” that would allow the company to proceed with the outsourcing, and in fact, might even, under certain circumstances, appoint an appraiser (at company cost!) to second-guess the company’s economic justifications for the outsourcing transaction.⁵⁹ Similarly, in the United Kingdom, even if there is no employee

⁵⁷ See *Chambre sociale* [Cass. Soc.] May 2, 2001, n° 2083 FS-P, *Evenas-Baro c/ SA Sonauto*.

⁵⁸ Article 3(1) of the Acquired Rights Directive, states that “the transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement, until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement.” *Id.* The only exceptions permitted under the Acquired Rights Directive relate to employees’ rights to old-age, invalidity or survivors’ benefits under supplementary company or inter-company pension schemes outside the statutory social security schemes in Member States. See Acquired Rights Directive, *supra* note 42, art. 4(b).

⁵⁹ C. TRAV. art. L. 2323-78. In the event the Works Council is concerned about the economic situation of the company due to the outsourcing, the Works Council could implement a specific procedure known as an alert procedure (“*Droit d’alerte*”) and appoint a chartered accountant to review the company’s accounts and the contemplated outsourcing. In this framework, the Works Council drafts a report, which would be transmitted to the statutory auditor and could also be communicated to the board of directors, which would then have to give a substantiated response within a one-month period.

representative group, the customer would need to take affirmative steps to elect employee representatives, which would then need to be notified and consulted with about the transfer.⁶⁰

These notification and consultation obligations are outlined in more detail in section C below.

c. Reverse Transfers under the EU Acquired Rights Directive

Even after a customer has navigated these complexities and completed the outsourcing transaction (perhaps without triggering the Acquired Rights Directive), it might face acquired rights issues again when the contract expires or terminates and operations either return to the customer or transfer to another outside supplier (also referred to as “second-generation outsourcing”). In particular, under the concept referred to as “reverse Acquired Rights Directive” or “reverse TUPE,” the customer will need to analyze whether the transfer of services back in-house constitutes a business transfer, with all the implications outlined above.⁶¹

B. Employee Termination Issues

Depending upon the terms agreed upon in the services agreement, the service provider may wish to employ some or even all of the in-scope⁶² employees of the customer. Common reasons for transferring in-scope employees to the service provider include knowledge transfer, continuity, and localized services. If only a certain number of in-scope employees will be “rebadged” to the service provider, the customer will need to consider the legal implications

⁶⁰ Transfer of Undertakings (Protection of Employment) Regulations 2006 (“TUPE”), sec. 13.

⁶¹ Evason & Kurnatowska, *supra* note 51.

⁶² “In-scope” is a term generally used to describe employees who are primarily dedicated to the business unit or job function, as the case may be, that is being outsourced.

associated with the employees who will not transfer employment upon the execution of the service agreement (“non-transferring employees”). In some circumstances, the customer may decide to redeploy the non-transferring employees into different job functions or roles. However, it is unlikely that the customer will be able (or will want) to redeploy all of the non-transferring employees. Thus, terminations as a result of outsourcing are inevitable. The legal risks associated with such terminations can vary greatly depending on the jurisdictions involved.

1. Terminations in the United States

In the United States, there are generally very few restrictions on a customer’s ability to terminate non-union, non-transferring employees. This is mainly due to the U.S. employment at-will rule. The employment at-will rule is simple: all employment is at-will unless a specific contractual provision provides to the contrary.⁶³ Unlike most countries, U.S. employees generally are not employed pursuant to a written employment contract, and only 7.5% of private sector employees are union represented.⁶⁴ If there is no employment contract, an employee may be dismissed at any time, for any reason, (even for what is arguably a bad reason, or for no reason at all.⁶⁵ Moreover, the termination can be made without any financial obligation, such as severance, to the dismissed employee.

As a result of the employment at-will rule, customers and service providers generally do not face major obstacles in terminating non-transferring employees in the United States. There

⁶³ Clyde W. Summers, *Worker Dislocation: Who Bears the Burden? A Comparative Study of Social Values in Five Countries*, 70 NOTRE DAME L. REV. 1033, 1035 (1995).

⁶⁴ Bureau of Labor Statistics Annual Union Membership Report, <http://www.bls.gov/news.release/union2.nr0.htm> (last visited on Dec. 5, 2008). According to this report, the share of unionized workforce rose to 7.5 percent in 2007, from 7.4 percent in 2006. *Id.*

⁶⁵ Summers, *supra* note 63, at 1035.

are, however, a few exceptions to the employment at-will rule that customers (as employers) should keep in mind. Specifically, terminating non-transferring employees may be problematic or even prohibited where: (a) a discriminatory act is involved; (b) a certain number of employees will be terminated within a ninety-day time period; or (c) a union is in place.

a. Discrimination and Selection Procedures

First and foremost, a customer must ensure that the termination of non-transferring employees does not occur in a discriminatory manner. In particular, it is important to ensure that the decisions as to which in-scope employees will be rebadged or terminated are non-discriminatory. The actual party making such decisions depends upon the commercial agreement. For example, the customer and the service provider may choose to make the hiring decisions together. This is generally the case when the service provider strongly desires the benefit of the customer's knowledge of the in-scope employees' skills and job performance. In another scenario, the service provider alone may decide, after conducting interviews with the in-scope employees, which employees to rebadge and which employees to terminate. Although less common, it is even possible that the customer alone decides which employees will be retained, rebadged, or terminated.

From the customer's perspective, it is generally preferable for the service provider to make the rebadging and termination decisions alone, although the customer should encourage the service provider to use proper selection criteria for selecting which employees will be rebadged. While selection criteria may be objective or subjective, using objective criteria, such as

seniority⁶⁶ or classes of jobs tends to be the more conservative approach because one can argue that the choices were not discretionary (and thus not discriminatory).⁶⁷ However, most service providers will not use seniority because this method fails to account for employee performance. Likewise, eliminating an entire class of jobs does not generally work in the outsourcing context, because it is usually that class of jobs that is being transferred to the service provider.

Because objective criteria generally do not work in the outsourcing context, most service providers will need to use subjective criteria when choosing which employees to rebadge. The most common subjective criterion is job performance. When using the subjective method, the decision-maker should consider which skills are most critical to the transferring role, and rebadge employees that perform well in these areas. However, there should be sufficient documentation of the job performance assessments. For example, if a dismissed employee claims that he or she possessed above-average skills in a task that was deemed critical to the outsourcing arrangement, the decision-maker must be able to demonstrate that the employee was below average, and that the rebadged employees were above-average performers in this area. In order to gain a complete picture of each potential employee's skill set, the individuals in charge of choosing the rebadged employees should not only review performance reviews and job descriptions, but also, with the agreement of the customer, interview the managers who can best speak to each employee's performance.⁶⁸

⁶⁶ The Age Discrimination in Employment Act exempts actions by employers who observe the terms of a bona fide seniority system. *See* 29 U.S.C. § 623(f) (2008).

⁶⁷ However, using objective criteria in a reduction-in-force does not shield an employer from discrimination claims. Employees may challenge the criteria themselves, on the grounds that they conceal intentional discrimination. *See Hill v. Spiegel, Inc.*, 708 F.2d 233, 237 (6th Cir. 1983) (employer was liable for age discrimination where it eliminated an entire division that was regarded as "old, inbred [and] overpaid"); *Polstorff v. Fletcher*, 452 F. Supp. 17, 25 (N.D. Ala. 1978) (agency was liable for age discrimination because it revised the job descriptions of younger employees to ensure that they would not be included in the reduction-in-force).

⁶⁸ Note that this approach is not without risk, as it can create joint employer liability, among others. *See* George Kimball, *Outsourcing Agreements Handbook*, 9.6.2.1 (Apr. 20, 2009) (unpublished manuscript, on file with the authors).

b. The WARN Act and Notice

In addition to discrimination concerns, a customer must understand its legal obligations in the event that a certain number of employees will not be rebadged, and thus will be terminated. Importantly, the customer must determine whether advance notice of termination is required under the WARN Act and/or state mini-WARN Acts.

The WARN Act requires 60 days advance written notice when an employer plans to conduct a “plant closing”⁶⁹ or a “mass layoff.”⁷⁰ The WARN Act applies to any business enterprise that employs: (1) 100 or more employees, not including part-time employees; or (2) 100 or more employees (including part-time employees), who, in the aggregate, work at least 4,000 straight-time hours per week.⁷¹

In the outsourcing context, the customer must therefore determine whether the proposed terminations of non-transferring employees will constitute a mass layoff or plant closing under the Act. A mass layoff is an employment loss⁷² at a single site of employment of: (1) at least 33% of the active employees, excluding part-time employees; and (2) at least 50 employees,

⁶⁹ 29 U.S.C. § 2101(a)(2) (2008). Portions of the discussion in this section are adapted from a prior law review article by Ms. Spink. See Carole A. Scott, *Money Talks: The Influence of Economic Power on the Employment Laws and Policies in the United States and France*, 7 SAN DIEGO INT’L. L.J. 341, 372-75 (2006).

⁷⁰ 29 U.S.C. § 2101(a)(3) (2008); notably, legislation is pending considering extending the notice period to 90 days, H.R. 3796: Early Warning and Health Care for Workers Affected by Globalization Act.

⁷¹ 29 U.S.C. § 2101(a)(3) (2008). For example, with respect to the second scenario, a customer with 90 full-time employees working 40 straight-time hours per week and 30 part-time employees working 15 straight-time hours per week would be covered under WARN. In the case of a multi-national corporation, non-U.S. citizens employed outside the United States are not counted for purposes of determining whether the customer has 100 or more employees. However, all U.S. citizens employed abroad should be counted when determining WARN coverage. Thus, a multi-national customer with 80 employees in the United States and 25 citizens working in Europe would be a covered employer under WARN.

⁷² The WARN Act regulations define an “employment loss” as: (1) an employment termination other than a discharge for cause, voluntary departure, or retirement; (2) a layoff exceeding six months in duration; or (3) a reduction in hours of work of individual employees of more than 50% during each month of any six month period. 29 U.S.C. § 2101(a)(3) (2008).

excluding part-time employees.⁷³ If 500 or more employees (excluding part-time employees) are affected by a mass layoff, the 33% requirement does not apply.⁷⁴ On the other hand, a plant closing is a permanent or temporary shutdown of: (1) a single site of employment; or (2) one or more facilities or operating units within a single site of employment.⁷⁵ To constitute a plant closing, the event must result in an employment loss of 50 or more employees (excluding part-time employees).⁷⁶

To date, only one court has addressed whether a transfer of employees in the outsourcing context may trigger WARN Act obligations.⁷⁷ In *Finley v. M.W. Kellogg Co.*, a federal district court held that the outsourcing of secretarial and clerical employees did not constitute a plant closing under the WARN Act.⁷⁸ In this case, the service provider, Norrell Services, was not required to hire all of the Kellogg secretarial and clerical employees, although Kellogg did encourage Norrell Services to do so.⁷⁹ Norrell Services ultimately offered jobs to all of the Kellogg employees who applied.⁸⁰ The Kellogg employees began their employment with Norrell Services the next business day after their termination from Kellogg.⁸¹ The plaintiffs alleged that Kellogg violated the WARN Act because it failed to give them written notice of the intention to terminate them at least 60 days before the outsourcing.⁸² The court held that no violation of the WARN Act occurred because the secretarial and clerical staff were not part of an “operating unit” within the Department of Labor’s regulations.⁸³ Since the secretaries and clerical staff

⁷³ 29 U.S.C. § 2101(a)(3) (2008).

⁷⁴ *Id.*

⁷⁵ 29 U.S.C. § 2101(a)(2) (2008).

⁷⁶ 29 U.S.C. § 2101(a)(3) (2008).

⁷⁷ *Finley v. M.W. Kellogg Co.*, No. H-96-0314, 1998 U.S. Dist. LEXIS 23506 (S.D. Tex. March 26, 1998).

⁷⁸ *Id.* at *69.

⁷⁹ *Id.* at *8.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at *63.

⁸³ *Id.* at *69.

worked for several different departments and were not part of a separate, distinct department, the court held that there was no operating unit and, therefore, no plant closing occurred.⁸⁴

The *Finley* case suggests that there could be a plant closing under the WARN Act if a separate, distinct department is transferred as part of an outsourcing. Thus, for example, the transfer of an entire data center could be considered a plant closing under the holding of this case. However, the *Finley* case did not address the sale of a business exception to the WARN Act.⁸⁵ Section 2101(b) of the Act excludes from the definition of “employment loss” the case of the sale of part or all of an employer’s business.⁸⁶ The accompanying regulation explains that “[a]lthough a technical termination of the seller’s employees may be deemed to have occurred when a sale becomes effective, WARN notice is only required where the employees, in fact, experience a covered employment loss.”⁸⁷ Numerous cases have held that WARN notice is not required where an appropriate number of employees (i.e., less than what would constitute a “mass layoff”) are employed by the seller once a business is transferred.⁸⁸ Given the limited case law regarding the WARN Act in the outsourcing context, customers will need to carefully consider the particular situation and weigh the potential risks if a decision is made not to provide notice according to the requirements of the WARN Act.

Provided the terminations of the non-transferring employees will result in either a plant closing or mass layoff, the customer must review a ninety-day rolling period of time to assess whether a sufficient number of employees have been terminated or laid off in that time period to

⁸⁴ *Id.* The plaintiffs argued that they were part of an operating unit because they performed similar jobs. The court found that this argument was inconsistent with the Department of Labor’s regulations, which focus on whether the dismissed employees operated as a unit. *Id.* at **68-69.

⁸⁵ See 29 U.S.C. § 2101(b) (2008).

⁸⁶ *Id.*

⁸⁷ See 20 C.F.R. § 639.6.

⁸⁸ See *Smullin v. Mity Enters.*, 420 F.3d 836 (8th Cir. 2005); *Int’l Alliance of the Theatrical and State Employees and Moving Picture Machine Operators, AFL-CIO v. Compact Video Services, Inc.*, 50 F.3d 1464 (9th Cir. 1995); *Headric v. Rockwell Int’l Corp.*, 24 F.3d 1272 (10th Cir. 1994).

constitute a plant closing or mass layoff. If the requisite number of employees have been or will be dismissed, the customer then must provide advance written notice of the plant closing or mass layoff to⁸⁹: (1) any representative of the employees affected by the action; (2) each affected employee, if there is no employee representative; (3) the chief elected official of the unit of local government where the job losses are planned to occur; and (4) the dislocated worker unit in each state where the job losses will occur.⁹⁰ The WARN Act provides that notice may be delivered by any method, provided that the method is designed to ensure that the affected parties receive notice at least sixty days before the terminations begin.⁹¹

Violations of the WARN Act can have serious financial consequences. A company that violates the WARN Act is liable to each non-transferring employee who did not receive proper notice for back pay and benefits, including the cost of medical expenses that would have been covered under an employee benefit plan, for each day of the violation, for a maximum of 60 days.⁹² These amounts can be reduced by: (1) wages paid by the customer to the non-transferring employee during the period of the violation; (2) voluntary payments to non-transferring employees not otherwise required by any legal obligation; or (3) payments to third parties or trustees on behalf of non-transferring employees.⁹³

Moreover, the WARN Act may be enforced by a lawsuit filed by a non-transferring employee in the federal district court where the violations occurred or in any jurisdiction where

⁸⁹ There are specific items that must be included in a WARN Act notice. 20 C.F.R. § 6397. First, the notice must contain the anticipated date of the mass layoff or plant closing. *Id.* The date may be either a specific day or a 14-day period during which the separations are to begin. *Id.* The notice should also indicate whether the action is temporary or permanent, and if the entire plant is to be affected. *Id.* It may also specify whether layoffs are conditional based on the occurrence or non-occurrence of a particular event. *Id.* Finally, the notice should include the name and telephone number of the person to contact for additional information. *Id.*

⁹⁰ 29 U.S.C. § 2102(b) (2008).

⁹¹ *Id.*

⁹² 29 U.S.C. § 2104(a) (2008).

⁹³ *Id.* § 2104(a)(4).

the customer conducts business.⁹⁴ A union or local government may also sue on behalf of individual non-transferring employees or on behalf of all affected non-transferring employees collectively.⁹⁵ The remedies specified in the WARN Act are exclusive.⁹⁶ Courts have discretion to award attorneys' fees to prevailing parties, although they are not permitted to bar a plant closing or mass layoff that violates the statute.⁹⁷

Finally, a customer may also be liable to the local government for fines up to \$500 for each day of the violation, for a maximum of sixty days.⁹⁸ However, these fines are not instituted if the customer pays each of the affected non-transferring employees what it is liable for under the statute within three weeks of the date of the plant closing or mass layoff.⁹⁹ If the customer is able to show that it acted in good faith and that it had reasonable grounds for believing its actions did not violate the statute, the court has discretion to reduce penalties and fines.¹⁰⁰

In addition to federal requirements under the WARN Act, many states have statutory requirements applicable to plant closings and mass layoffs.¹⁰¹ If any in-scope employees will be terminated, the customer must be careful not to overlook any applicable state mini-WARN acts. Many state statutes may be more expansive than the requirements in the WARN Act. For example, the Illinois and California WARN acts apply to companies with seventy-five or more employees¹⁰² whereas the federal WARN Act only applies to companies with 100 or more employees.¹⁰³ Moreover, Illinois employers must provide notice of a mass layoff if there is an

⁹⁴ *Id.* § 2104(a)(5).

⁹⁵ *Id.*

⁹⁶ *Id.* § 2104(b).

⁹⁷ *Id.* §§ 2104(a)(6), 2104(b).

⁹⁸ 29 U.S.C. § 2104 (2008).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ See CONN. GEN. STAT. § 31-50 (1999); MASS. GEN. LAWS ch. 175, § 110D (2000); and N.J. ADMIN. CODE § 12:17-3.5 (1999).

¹⁰² 820 ILL. COMP. STAT. 65/5 (2005); CAL. LAB. CODE §§ 1400(a), (h) (West 2003).

¹⁰³ 29 U.S.C. § 2101(a)(1) (2008).

employment loss of at least 33% of total employees, consisting of at least twenty-five employees during a thirty-day period, or at least 250 employees regardless of the percentage.¹⁰⁴ In contrast, the WARN Act only requires notice if at least 33% of employees consisting of at least fifty employees are laid off, or at least 500 employees during a thirty-day period.¹⁰⁵ Similarly, California employers must provide notice of a layoff during any thirty-day period consisting of fifty or more employees at a covered establishment.¹⁰⁶

c. Unions and Decision/Effects Bargaining

Another scenario where the proposed termination of employees may prove problematic is where a union is involved. Specifically, if any in-scope employees will be terminated as a result of the outsourcing arrangement, the parties may be required to bargain with each respective union over the decision to transfer, where the decision is predicted on labor cost savings. In every case, the parties must bargain over the effects of the transfer, if requested by the union after learning of the transfer decision, unless the applicable contract expressly waives the union's rights to bargain over outsourcing decisions.¹⁰⁷ In order to permit a meaningful opportunity for such effects bargaining to take place, the union must be notified of the outsourcing and any contemplated terminations sufficiently in advance to permit a reasonable time for bargaining.¹⁰⁸ A union is entitled upon request to information relevant to the effects of the outsourcing, such as

¹⁰⁴ 820 ILL. COMP. STAT. 65/5-(d).

¹⁰⁵ 29 U.S.C. § 2101(a)(3) (2008).

¹⁰⁶ CAL. LAB. CODE § 1400(d), 1401; *see* Cynthia L. Jackson & Ashley H. Kimball, *Reductions in Force and Plant Closings*, ADVISING CALIFORNIA EMPLOYERS AND EMPLOYEES, 18.20 et seq. (David Peyerwold ed. 2008).

¹⁰⁷ *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666 (1981); *Dubuque Packing Co.*, 303 N.L.R.B. 386 (1991), enf'd in rel. part 1 F. 3d 24, 31-33 (D.C. Cir. 1997); *See also* NLRB General Counsel Advice Memorandum, April 28, 1997, Case No. 4-CA-25444.

¹⁰⁸ *Willamette Tug & Barge*, 300 N.L.R.B. 282, 283 n.3 (1990).

succession of layoffs or new job opportunities within the employer. Finally, a decision to outsource is unlawful to avoid union organizing.¹⁰⁹

2. Terminations Outside the United States

As explained above, there are several circumstances where the customer (and in some instances the service provider) will need to take extra precautions before terminating a non-transferring employee. Nevertheless, due to the nature of the employment-at-will rule, the termination of non-transferring employees generally does not trigger any major obstacles for the proposed outsourcing arrangement.

The situation is quite different outside the United States. Although the goal of rebadging a certain number of in-scope employees while terminating others can be achieved rather easily in the United States, concepts such as at-will employment or cherry-picking generally do not “translate” internationally.

a. Prohibited Terminations

In some countries, the termination of in-scope but unwanted employees is strictly prohibited. For example, in the European Union, the Acquired Rights Directive prohibits the termination of employees “because of” a business transfer.¹¹⁰ As explained in Section B above, it is not clear whether an outsourcing constitutes a business transfer under the Directive. Assuming it does, the Acquired Rights Directive would prevent the customer from terminating unwanted

¹⁰⁹ *Joy Recovery Tech. Corp.*, 320 N.L.R.B. 356 (1995).

¹¹⁰ See *supra* note 55 and accompanying text.

employees unless the termination is due to “economic, technical or organizational reasons entailing changes in the work force,” which has become generally known as an “ETO defense.”¹¹¹ Some countries, like the United Kingdom, go so far as to hold that *any* termination in connection with a business transfer is deemed unfair unless the employer can demonstrate an ETO defense.¹¹²

In the outsourcing context, it would be difficult to demonstrate an ETO defense if one of the service provider’s employees performs the same job as the non-transferring employee once the outsourcing arrangement begins. This is because one of the factors that the European Court of Justice found to be relevant in favor of automatic transfer is the degree of similarity between the activities carried on before and after the transfer.¹¹³ For this reason, it is generally in the customer’s best interest to have all of the in-scope employees transfer to the service provider, and require the service provider to terminate any unwanted employees. In this situation, the customer may reimburse the service provider for the costs associated with the termination of some or all unwanted employees. When the Acquired Rights Directive applies, terminations before the transfer date are not recommended. Such terminations will likely be deemed to be illegal, and as a result will expose the customer to greater liabilities and costs than if the unwanted employees had just transferred to the service provider and subsequently terminated. Nonetheless, it is not uncommon that the customer is required to make employees redundant, since the service provider does not wish to deal with the cost and effort of bringing employees on board only to make them redundant in the future.

¹¹¹ Acquired Rights Directive, *supra* note 42, art. 4(1).

¹¹² TUPE, *supra* note 60, sec. 7.

b. Mandatory Termination Procedures

Even if the termination of non-transferring employees is not strictly prohibited, local law may require the customer to follow detailed procedures before terminating the employees. It is important to analyze whether such procedures are required, as they may take several weeks, if not months, to conduct. Such timing requirements are critical because any proposed terminations cannot be effectuated before the necessary procedures are complete.

For example, in the United Kingdom, TUPE requires that the employer first select a pool of potential redundancy candidates and establish objective criteria for determining which individuals ultimately will be made redundant.¹¹⁴ Once the potential candidates for redundancy have been selected, TUPE requires that the employer engage in a consultation process with the candidates.¹¹⁵ The consultation process requires that at least two meetings be held with the candidates.¹¹⁶ At the first meeting (and any subsequent meetings that take place prior to the final meeting) it is important that the employer not explicitly state that a decision has been made regarding the terminations. Instead, the message should be that redundancies may occur and that the candidates have been initially identified as potential candidates. Further, before a final meeting can be held, the employees must be given ample time in which to consider the situation and request additional information.¹¹⁷

Similarly, in France, the customer is required to follow strict procedures when dismissing non-transferring employees. Under the French Labor Code, dismissals must be for legitimate

¹¹³ See *supra* note 47 and accompanying text.

¹¹⁴ TUPE, *supra* note 60, sec. 13.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

reasons, either for cause or for economic grounds.¹¹⁸ Moreover, dismissals based on economic grounds are governed by strict regulations. In order to be valid, the economic dismissal must result from the elimination or transformation of a position or from a substantial modification resulting from economic difficulties, technological changes, or a reorganization of the employer.¹¹⁹ The economic justification best received by the French courts is that of financial losses making the elimination of the positions necessary for the survival of the employer.¹²⁰

Assuming a customer can demonstrate valid economic grounds for the termination of non-transferring employees, French law imposes strict guidelines as to which in-scope employees may be dismissed. Where a selection must be made among potential candidates for dismissal who hold the same post, for example, if two of ten in-scope IT administrators are to be dismissed, objective criteria must be used to select those who are to be terminated.¹²¹ The French Labor Code provides a list of criteria to be taken into account, which includes the number of dependant persons in the employee's household, the characteristics that would make the employee's reemployment difficult (for example, age or disability), seniority, and professional qualities.¹²² This list is not considered by the courts to be exhaustive nor must the criteria be considered in any particular order. A customer may give more weight to one or more of these criteria, or add other criteria to the list, such as where the employee lives, provided, however, that it takes at least one of the statutory criteria into consideration and has given consideration to all of them.¹²³ Once the order of criteria has been determined, it must be applied consistently to all of the employees dismissed, in each case where more than one person holds the same post.

¹¹⁸ C. TRAV. arts. L 1232-2 and sub., art. L. 1233-3.

¹¹⁹ C. TRAV. art. L 1233-3.

¹²⁰ *Id.*

¹²¹ C. TRAV. art. L. 1233-5.

¹²² *Id.*

¹²³ *Id.*

Even outside the European Union, terminations in the context of an outsourcing may prove problematic. For example, in Japan, the employer must show that it made every effort to avoid a termination.¹²⁴ This requires that the employer eliminate overtime, reassign employees to another department, transfer employees to related companies, solicit voluntary retirement, lay off employees temporarily with pay and place employees in a training program.¹²⁵ Thus, it may not be easy for a customer to justify the termination of non-transferring employees as a result of the outsourcing arrangement. Japanese law also requires that the employer demonstrate the necessity for the termination, the reasonable standards for selecting the employees to be terminated, and the fair application of such standards.¹²⁶ In practice, most terminations in Japan are therefore negotiated resignations.

c. EU Collective Redundancies Directive

In addition to any local law requirements, the customer must consider whether local laws implementing the EU Collective Redundancies Directive¹²⁷ will apply to the proposed terminations of non-transferring employees. The Collective Redundancies Directive sets minimum standards to ensure that major redundancies are properly consulted with worker representatives and that the particular public entity is notified prior to dismissal.¹²⁸ The Collective Redundancies Directive applies when the customer has twenty or more employees and

¹²⁴ Clyde W. Summers, *Propter Honoris Respectum: Worker Dislocation: Who Bears the Burden? A Comparative Study of Social Values in Five Countries*, 70 NOTRE DAME L. REV. 1033, 1053-54 (1995).

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ Council Directive 98/59, 1998 O.J. (L 225) 16 (“Collective Redundancies Directive”). Note that the Collective Redundancies Directive applies even where a workforce reduction decision is made not by the immediate employer but by a parent company located in another Member State. *Id.*

¹²⁸ CATHERINE BARNARD, *EC EMPLOYMENT LAW* 454 (2d ed. 2000).

a certain number of employees are dismissed for economic reasons within a thirty-day period.¹²⁹ If the customer employs fewer than 100 employees, the Directive applies for dismissals of ten or more persons.¹³⁰ If the customer employs between 100 and 300 employees, the Directive applies when at least 10% of employees will be dismissed.¹³¹ Finally, if the customer employs more than 300 employees, the Directive applies when thirty or more employees will be dismissed.¹³² Alternatively, a member state may simplify matters by requiring the Directive to apply whenever twenty or more employees are dismissed during a period of ninety days.¹³³

If the Collective Redundancies Directive applies, the customer must provide a minimum of thirty days notice of the proposed dismissals to the employee representatives and the local labor authorities.¹³⁴ The notice must contain “all relevant information” concerning the dismissals, particularly the number of employees to be dismissed.¹³⁵ The customer also is required to consult with employee representatives and to try and reach an agreement on ways to avoid the redundancies or reduce the number of redundancies.¹³⁶

d. Notice and Severance Payments

In addition to complying with detailed termination procedures, the customer will likely be required to make notice and severance payments to the non-transferring employees. Unlike the United States, where such payments are generally not required, notice and severance are very common and usually mandatory within non-U.S. jurisdictions. Such payments can be quite

¹²⁹ *Id.* at art. 1.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at arts. 3, 4.

¹³⁵ *Id.*

significant, particularly if an individual has been employed by the customer for a long period of time.

For example, in the United Kingdom, employees who are terminated by reason of redundancy are entitled to salary in lieu of notice, a statutory severance payment, and, if applicable, compensation for unfair dismissal.¹³⁷ Notice periods generally are provided in the individual's employment contract, although there is a minimum statutory calculation in absence of such provision, or common law notice periods may be deemed to apply. Statutory severance payments are calculated according to the employee's age, salary, and length of service. Most importantly, unfair dismissal payments can be quite high, particularly if the employer has failed to follow a fair procedure before terminating employees. Compensation for unfair dismissal can be up to a maximum of £72,900 per employee.¹³⁸

Likewise, French law provides generous severance benefits to terminated employees.¹³⁹ For employees with up to ten years of service, the mandatory severance payment is 1/5th of a month's salary per year of service, and employees with ten or more years of service with 1/3rd of a month's salary per year of service.¹⁴⁰ Employees are also entitled to advance notice of the layoff, the amount of which is also determined by the employees' years of service with the company. If an employee has worked at least six months but less than two years, the company must provide one month's notice of the dismissal.¹⁴¹ If an employee has worked more than two years, the company must provide him or her with at least two months' notice.¹⁴² If the company is unable to provide such notice (or prefers not to), the employee is entitled to an equivalent

¹³⁶ *Id.* at art. 2(2).

¹³⁷ Employment Rights Act § 112 (1996), sec. 112.

¹³⁸ *Id.*

¹³⁹ C. TRAV. art. L. 1234-9.

¹⁴⁰ *Id.* (citing Decree No. 2002-785 of May 3, 2002, J.O., May 5, 2002).

¹⁴¹ C. TRAV. art. L. 1234-1.

¹⁴² *Id.*

notice payment.¹⁴³ It is common practice for employers to provide a notice payment in lieu of actual notice. Industry-wide collective bargaining agreements that apply to virtually all employers in France typically contain additional requirements.¹⁴⁴

C. Employee Notification and Consultation Issues

In addition to any employee transfer or termination issues, a proposed outsourcing may trigger notification or consultation requirements with employees and/or work councils, unions, or other employee representative groups. Accordingly, the customer and the service provider will need to determine whether such obligations exist in each of the jurisdictions involved. Since notification and consultation procedures take some time, it is important to determine whether any obligations exist early on in the transaction. Moreover, it is necessary to determine whether it is the decision to outsource itself that requires notification or consultation, or whether it is a proposed measure taken with respect to the in-scope employees that triggers such rules.

1. Decision to Outsource

The decision to outsource may trigger notification and/or consultation obligations with works councils, unions, or other employee representatives. This is particularly true in Europe. This means that any required notification or consultation steps must take place before a decision is made in respect to the issue to be consulted, i.e., the decision to outsource. Thus, if local law mandates notification or consultation, the customer and service provider cannot sign an

¹⁴³ C. TRAV. art. L. 1234-5.

¹⁴⁴ For instance, the collective bargaining agreement for the metallurgy industry provides for increased dismissal

agreement to outsource services in that jurisdiction, or take steps which imply that a decision has already been made to outsource services in that jurisdiction, until the notification or consultation procedures are complete.

Notification and consultation requirements vary, depending upon the jurisdictions involved, the presence of any unions or works councils, the number of in-scope employees, and the job functions to be transferred.

In the U.S., only 7.5% of the private sector workforce is unionized, so notification and consultation are often not an issue.¹⁴⁵ If there is a union, decision bargaining might be required if the outsourcing decision turns on labor costs, which affects bargaining in all cases unless specifically waived by contract language.

In the Asia Pacific jurisdictions, notification or consultation obligations are common. For instance, many companies in Korea have a labor management council whose rights are governed by an agreement with the employer, which might prescribe notification or consultation in certain situations. Such agreements may even require consultations about the decision to outsource itself.¹⁴⁶ Other companies are unionized, so the applicable collective bargaining agreement must be reviewed to determine any applicable obligations. Finally, even a company that does not have a company-internal employee representative group, such as a labor management council, or is unionized, might be subject to cumbersome notification and/or consultation obligations. For example, under the revised People's Republic of China Employment Contract Law that entered into effect on January 1, 2008, matters that have a bearing on "significant interests of employees" require a process of consultation with employee congresses or employees, followed

indemnities and longer notice periods.

¹⁴⁵ See *supra* note 64.

¹⁴⁶ Labor Standards Act, No. 5309, March 13, 1997, as amended by Act. No. 6974, Sept. 15, 2003, ch. IX, art. 96-97 (S. Korea).

by input from unions and/or employee representatives.¹⁴⁷ While the Employment Contract Law is currently interpreted not to require consent of any of these groups, the process can be cumbersome and time-consuming.¹⁴⁸

Notification and consultation obligations are most likely to arise in Europe.¹⁴⁹ In some EU jurisdictions, such as France and the Netherlands, the decision to outsource automatically triggers consultation requirements if there is a works council.¹⁵⁰ In other jurisdictions, like Germany, the decision to outsource only triggers consultation requirements if there will be a substantial change in the company's operations.¹⁵¹ In other countries, including Italy, the decision to outsource will only trigger consultation requirements if the Acquired Rights Directive applies to the particular situation.¹⁵² This is not necessarily a straightforward inquiry, as it is possible that the Acquired Rights Directive may not apply, depending on exactly what is being outsourced and the structure of the business. Moreover, it also remains uncertain whether the Acquired Rights Directive applies where services are offshored or near-shored.

¹⁴⁷ See Andreas Lauffs, Jonathan Isaacs, Susan Eandi & Ute Krudewagen, *China's New Employment Contract Law: Anticipating the Impact on M&As*, THE GLOBAL EMPLOYER, Sept. 2007, http://www.bakernet.com/NR/rdonlyres/0E3F1333-3384-497B-BD5A-53A74C34DE83/0/ma_chinasnewemploymentcontractlaw_article_sep07.pdf (last visited on Dec. 5, 2008); Andreas Lauffs, *EMPLOYMENT LAW & PRACTICE IN CHINA*, 4.082 (2008).

¹⁴⁸ See LAUFFS, *supra* note 147, at 4.085.

¹⁴⁹ While there are different country rules, the new draft European Works Council Directive is helpful insofar as it provides some common ground. See *Proposal for a Directive of the European Parliament and of the Council on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees*, 2008/0141 (COD), available at <http://ec.europa.eu/social/main.jsp?catId=549&langId=en> (last visited Dec. 8, 2008). In particular, the Directive defines information as the "transmission of data by the employer to the employees' representatives in order to enable them to acquaint themselves with the subject matter and to examine it; information shall take place at such time, in such fashion and with such content as are appropriate and which will enable employees' representatives, in particular, to carry out an appropriate examination and to prepare the consultation where necessary." Consultation is defined as "the establishment of a dialogue and exchange of views between employees' representatives and ... management ... at such time, in such fashion, and with such content that, on the basis of the information provided employee representatives are enabled to express an opinion to the competent organ of the undertaking ..."

¹⁵⁰ See C. TRAV. art. L. 2323-6 (Fr.); Works Councils Act, art. 25 (Neth.).

¹⁵¹ BetrVG [Works Constitution Act] § 111 (F.R.G.).

¹⁵² C.C. 2112 (Italy).

If consultation is required, it is usually recommended to start such consultation as soon as the customer is in a position to undertake meaningful consultation. This necessarily requires at least enough clarity about the proposed employment aspects of the arrangement to enable sensible consultation to take place. The issue of timing also needs to be weighed against any possible negative HR impact of starting consultation too early, which can create poor morale. Thus, for example, if there has only been limited conversation with the service provider regarding the proposed employment consequences of the outsourcing (for example, whether all the in-scope employees will transfer or whether some or all of such employees will be made redundant), it may not be advisable to begin consultations until such decisions are probable, even imminent, or the company has decided to outsource elsewhere, outside the EU, and has reached some preliminary understanding with the proposed outsourcer on employment issues in the EU (even though technically speaking, this may be in violation of the laws requiring consultations before a decision has been made). Of course, any local laws regarding the timing of such consultations should always be followed.

The extent of consultation depends on the jurisdiction. For example, in France, detailed procedures must be followed when consulting with the works council. The customer is required to provide the works council with a written economic note, which must describe: (i) the customer and the service provider, including each entity's business activity, number of employees, and financial situation; (ii) the proposal to transfer the activities; (iii) the phases relating to the proposed transfer; and (iv) the impact on employees, including the in-scope employees and the employees currently employed by the service provider.¹⁵³ The economic note must be submitted to the works council in advance of a meeting, a minimum of three days or up to one week

¹⁵³ C. TRAV. art. L. 2323-4.

depending on the customer's practice.¹⁵⁴

In other jurisdictions, the consultation process may not be as detailed as in France. In Sweden, consultation on the decision to outsource is required if a union is involved.¹⁵⁵ However, unlike the rules in France, the customer is not required to submit a formal economic note to the union.¹⁵⁶ Instead, the customer should simply request consultation with the union in a letter.¹⁵⁷ During the consultation meeting, the customer should provide the union with information about the proposed outsourcing.¹⁵⁸ Normally, it is sufficient to provide this information orally, although the union may request the information be provided in writing.¹⁵⁹

The situation in the United Kingdom is more complicated than Sweden, but less burdensome than in France. In the United Kingdom, consultation on the decision to outsource is required if the Acquired Rights Directive applies or there is a union involved.¹⁶⁰ Although the information is not as extensive as that required in France, the customer should consult in good faith and provide the employee representatives/union (whichever the case may be) with adequate information for the purpose of the consultation.¹⁶¹ The information is provided in the form of a letter, inviting the employee representatives/union to a meeting on the issue.¹⁶² The letter should indicate that the customer is considering the possibility of outsourcing the particular job function, as well as the proposed date of the transfer, the proposed reasons for the transfer, and any other implications of the proposed transfer.¹⁶³ From a practical perspective, the consultation will go a

¹⁵⁴ *Id.*

¹⁵⁵ Lagen (1976:580) om medbestämmande i arbetslivet (§§ 11 and 13 of the Co-Determination in the Workplace Act) (Swed.).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at § 15.

¹⁵⁹ *Id.* at § 18.

¹⁶⁰ TUPE, *supra* note 60, at § 13.

¹⁶¹ *Id.*

¹⁶² TUPE, *supra* note 60, at § 13(5).

¹⁶³ TUPE, *supra* note 60, at § 13(2).

lot smoother if there are no measures, i.e., changes, proposed with respect to the employment situation of the in-scope employees. If material changes are proposed, the consultations will likely be more difficult and lengthy.

In some jurisdictions, such as France and the Netherlands, the proposed outsourcing cannot proceed until the works council has given its opinion (whether positive or negative).¹⁶⁴ If a vote can be obtained at the first meeting with the works council, the consultation process is complete at that time. Otherwise, the works council may request additional information in order to give an opinion.¹⁶⁵ From a practical perspective, it is important to ensure that the economic note contains all the necessary information and details regarding the proposal to outsource, otherwise the works council undoubtedly will request additional meetings and the process will be delayed.

Finally, it is important for the customer to monitor internal and external communications, including communications to employees, while the consultation process is ongoing. It is critical that nothing is said in such communications that suggests that decisions have already been made before the consultation process is complete. It is generally advisable for legal counsel to review internal and external communications to ensure a conflicting message is not inadvertently made.

Notification and consultation requirements should be taken seriously, as non-compliance can result in fines or even criminal sanctions. In France, the failure to consult with a works council regarding the decision to outsource can subject the local manager to a criminal sentence of up to one year imprisonment and/or a fine of up to €3,750.¹⁶⁶ The company may be subject to a higher fine of up to fifteen times the individual €3,750 amount.¹⁶⁷ Moreover, in France, the

¹⁶⁴ C. TRAV. art. L. 2323-3 (Fr.); Works Council Act, art. 25 (Neth.).

¹⁶⁵ *Id.* C. TRAV. art. L. 2323-3 (Fr.); Works Council Act, art. 25 (Neth.)

¹⁶⁶ C. TRAV. art. L. 2323-8.

¹⁶⁷ C. PEN. art. 121-2.

Netherlands, Germany, and Italy, the works council may bring a civil lawsuit requesting a court order barring the company from implementing the outsourcing until such time that the works council has been properly informed and consulted.¹⁶⁸ In the United Kingdom, the sanction is financial.¹⁶⁹ In-scope employees may obtain a “protective” award of up to thirteen weeks’ pay if the customer fails to inform and consult under the Acquired Rights Directive.¹⁷⁰ Further, in all jurisdictions, and particularly those with works councils or unions, an important consequence of the failure to comply with such requirements is the probably adverse industrial relations impact.

2. Proposed Measures

Works councils, unions, or other employee representatives may also need to be consulted if any “measures” will be taken with respect to the in-scope employees.¹⁷¹ Measures can mean relocations, changes to terms and conditions of employment, and, of course, proposed redundancies. If any measures will occur, it is important to determine whether they will trigger any notification or consultation requirements in the particular jurisdictions at issue.

The most common “measure” to trigger consultation requirements is the dismissal of a number of employees. Outside the United States, such dismissals are generally referred to as “mass dismissals” or “collective redundancies.” Not surprisingly, what constitutes a mass dismissal or collective redundancy can vary greatly from jurisdiction to jurisdiction, even within Europe where the Collective Redundancy Directive sets some minimum common requirements.

¹⁶⁸ Chambre sociale [Cass. Soc.] June 25, 2002, n° 00-20.939 (n° 2130 FS-P), *SA Honeywell c/Comité central d'entreprise de la SA Honeywell et al.*

¹⁶⁹ TUPE, *supra* note 60, at § 15.

¹⁷⁰ TUPE, *supra* note 60, at § 16.

¹⁷¹ Acquired Rights Directive, *supra* note 42, Art. 7(2).

For example, in the Netherlands, a collective dismissal applies if twenty or more employees will be dismissed within one particular region in a three-month period.¹⁷² In contrast, a collective dismissal applies in France if only two or more employees will be dismissed within a thirty-day period.¹⁷³ In Italy, a dismissal of five or more employees within the same province in a 120-day time period triggers collective dismissal requirements.¹⁷⁴

There may also be differences in timing requirements. For example, in the United Kingdom, if at least twenty employees will be made redundant within a ninety-day period, consultation must occur at least thirty days in advance of the proposed dismissals.¹⁷⁵ This time period increases to ninety days if 100 or more employees will be made redundant within the ninety-day time period.¹⁷⁶ In Italy, the timing requirement is twenty-five days prior to the proposed dismissals.¹⁷⁷ However, in Germany, local law does not contain a time limit for consultations; rather, consultation must be made in good time, which is defined as “sufficient time for suggestions and objections to be taken into account at the planning stage.”¹⁷⁸ In practice, such consultations may last from several weeks to many months, depending on how the negotiations proceed and the legal means the works council is willing to exhaust.

As with the decision to outsource, the extent of consultations will depend upon the local laws of the particular jurisdictions. Generally speaking, the works council or employee representative group must be informed about the reasons for the proposed redundancies, the number of categories of employees to be made redundant, the number and categories of employees normally employed, the period over which the proposed redundancies are to be

¹⁷² Wet Melding Collectief Ontslag, art. 3 (Neth.).

¹⁷³ C. TRAV. arts. L. 1233-8 and sub.

¹⁷⁴ Law 223, art. 24 (1991) (Italy).

¹⁷⁵ Trade Union & Labour Relations (Consolidation) Act 1992, §sec. 188.

¹⁷⁶ *Id.*

¹⁷⁷ Law 223, art. 24 (1991) (Italy).

¹⁷⁸ BetrVG [Works Constitution Act] § 106 (F.R.G.).

effected, the criteria proposed for the selection of the employees to be made redundant, and the proposed method for calculating any enhanced redundancy payments.¹⁷⁹

Finally, as described above, the failure to notify or consult with employee representatives may result in fines or criminal sanctions. Accordingly, it is advisable to determine whether any such notice or consultation requirements apply as soon as it is reasonably clear as to the number of in-scope employees that may be made redundant.

II. STEPS FOR IMPLEMENTING A GLOBAL OUTSOURCING TRANSACTION

After having outlined the legal issues that are triggered in implementing an outsourcing transaction, from employee transfers to employee terminations and notification and consultation obligations, this section of the article summarizes the implementation steps that typically occur in a global outsourcing transaction.

Not surprisingly, each outsourcing transaction is unique. Accordingly, while the following summary indicates the typical employment steps that often occur in an outsourcing transaction, in a specific case some steps might not take place at all, or they might occur in a different order, or other steps might be added.

A. *Assessment*

The first step in an outsourcing transaction is the assessment as to whether to outsource. While outsourcing was typically connected to a desire to save costs, today many outsourcing transactions are driven by other factors. For example, outsourcing can be an “agent of change”

¹⁷⁹ Collective Redundancies Directive, *supra* note 127, Art. 2(3).

for a customer.¹⁸⁰ If a customer decides to outsource a function to an outside service provider that has significant expertise in such area, this not only can lead to increased efficiency and service, but also allows the customer to focus on other areas for growth or development.¹⁸¹ For the service provider, the goals are to deliver service (profitably) and to recoup costs through a long-term relationship with the customer.¹⁸²

Before a decision to outsource is made, the customer should take preparatory actions.¹⁸³ One obvious task is to conduct a thorough assessment of the operations that the customer is considering to outsource, including the possibilities, costs (often referred to as “base case”), potential outside suppliers, and destinations.¹⁸⁴ Other recommended actions are to: (i) appoint a team responsible for managing the outsourced operations; and (ii) examine the various legal and contractual compliance issues presented by the outsourcing, including those employment issues discussed in the prior sections of this article.¹⁸⁵

B. Request for Proposal

The assessment as to whether to outsource is typically followed by a Request for Proposal (“RFP”). The RFP will generally outline the services and functions the customer wishes to outsource, and invite third parties to submit bids within specific parameters. The process can encompass either competitive bidding or one-on-one negotiation. Generally, competitive bidding provides the customer with leverage, which usually results in lower prices and favorable

¹⁸⁰ BAKER & MCKENZIE, GLOBAL SOURCING PRACTICE GROUP, INTRODUCTION TO OUTSOURCING 4 (2006).

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.* at 9.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 10.

terms.¹⁸⁶ On the other hand, competitive bidding can take more time and involves increased costs – actual costs in terms of consultant and legal fees, and also indirect costs in terms of management time.¹⁸⁷ Moreover, formal bidding usually leads to a focus on price, rather than creativity in possible technologies and solutions.¹⁸⁸ There is no right answer for every scenario, rather, the customer will need to assess its situation, needs, and timing, and decide the appropriate manner for proceeding.

C. Due Diligence Process

The due diligence process is a crucial step for both parties to conduct a legal analysis, formulate a negotiation position, and finally implement an outsourcing transaction. Initial due diligence should take place very early in the process, such as when the provider determines whether to respond to an RFP, and when the customer determines whether to enter into more thorough negotiations with a specific provider. Due diligence is crucial for determining the legal implications raised by the potential outsourcing. From an employment/human resources perspective, the parties would need the following information in order to implement the outsourcing transaction:

- Information on the total employee headcount and affected/displaced employee headcount per jurisdiction and employing entity;
- Job roles to be displaced, employees performing those roles as well as any shared services employees;

¹⁸⁶ *Id.* at 8.

¹⁸⁷ *Id.*

- Whether there are any works councils, unions or employee representatives per jurisdiction and employing entity;
- Employee plans, including whether employees will be retained/reassigned, RIF'd or rehired; and
- How services will be provided by the service provider (e.g., on-site, local dispatch, nearshored or offshored).

D. Legal Analysis and Formulation of Negotiation Position

Based on the information gathered during due diligence, the parties will next conduct a thorough legal analysis about the employment law considerations triggered by the outsourcing, taking into account the various issues discussed in this article. This will allow the parties to formulate a negotiation position, which should consider the following questions:

- Have the company and the supplier agreed to a specific number of rebadged employees (e.g., for knowledge transfer)?
- Will the rebadged employees need to be offered the same terms and conditions of employment as a matter of local law?
- What post-hire commitments does the company want the service provider to assume with respect to the rebadged/transferred employees (e.g., will the company impose certain requirements on terms and conditions of rebadged employees)?

¹⁸⁸ *Id.*

- Does local law place constraints (e.g., process, non-discrimination) on soliciting certain employees for rebadging?
- Will the company bear redundancy payments for the non-rebadged employees?
- What rights may the displaced employees claim for automatic transfer under local law?
- What consultation requirements apply; what is needed to begin formal consultation; and what time periods of consultation are required?

E. Negotiation of Master Agreement and Local Agreements

The next step is for the companies to negotiate the master agreement and any local agreements. The contract documents to be negotiated should include, among other things, provisions detailing the business decisions made with respect to the affected employees, including any related legal risks.

Depending on the number of employees and specific circumstances involved, it may be appropriate to execute not only a master services agreement, but also local agreements for specific jurisdictions. Such local agreements cannot only be helpful insofar as they offer a forum to address country-specific peculiarities, but they also can be helpful when, as mentioned above, the Acquired Rights Directive requires meaningful consultations, and having a local agreement that has not yet been signed reduces the likelihood of a successful challenge that the outsourcing already was a “fait accompli.”¹⁸⁹

¹⁸⁹ Kimball, *supra* note 68, at 9.6.2.

F. Monitoring of Internal and External Communications

Throughout the entire process, internal and external communications, as well as communications to employees, should be strictly monitored by counsel. As outlined above and particularly in Europe, the outsourcing typically triggers the requirement for meaningful notification and consultation obligations with works councils, unions, or other employee representatives.¹⁹⁰ While there often is a well-intentioned desire to communicate as much as possible as early as possible, messages indicating how many employees will be made redundant, when this will happen, etc., can be dangerous as they appear to indicate that any consultation is only a sham.

G. Management of Local Consultation Process

Managing the local consultation process is one of the challenges of successfully implementing an outsourcing transaction. This process can take anywhere from several weeks to several months, depending upon the complexity of the transaction, employee plans, and possibly “pre-tainted” relationships with works councils or unions. Typically, the process commences by gathering and then providing detailed information required to start consultations, and is then followed by various meetings, requests for additional information, etc. Throughout this process, it is important that the local HR team conducting the consultations stay in communication with the deal team.

¹⁹⁰ See *supra* notes 145-179 and accompanying text.

H. Implementation of Employee Transfers and/or Terminations

Consultations are followed by the implementation of the employee plans, typically terminations and/or transfers. This will require the preparation of the appropriate documentation (e.g., termination notices and releases, transfer letters or termination & rehire letters, etc.), followed by delivery of these documents, various administrative steps (including benefits, payroll, administrative notification, etc.) all of which can be time-consuming.

I. Assistance in the Transition Process

Typically, after the foregoing steps have been completed, services can finally be transitioned to the service provider. For the company, it is finally time to focus again on the retained workforce. The client's outsourcing management team should also monitor the performance of the services by the service provider.

J. Monitoring of Ongoing Service Delivery

Transition is followed by ongoing service delivery. While at this point, the outsourcing will likely appear to be commonplace, it is important to continue to focus on the employment law considerations of the outsourcing, including joint and several liability issues.

K. Termination of the Outsourcing Contract

At the end of the contract term (typically five years), the company has various choices, ranging from renewing the contract to insourcing (i.e., taking the services back in-house), or entering into a contract with a different provider. Whatever the decision may be, employment law issues will need to be reconsidered.

CONCLUSION

Due to the U.S. economic recession,¹⁹¹ there is no doubt that companies will be actively investigating cost-savings measures. One attractive measure for companies to consider is outsourcing. However, outsourcing does not always lead to the desired cost savings, and there are other issues for a company to consider, such as the expertise of the various service providers. If a customer decides to proceed with an outsourcing, there are numerous legal matters to consider, in particular the “people issues.”

The people issues can be quite complicated, especially if the outsourcing transaction will be a global one. The method in which the rebadged employees in each jurisdiction will be transferred to the service provider is an initial consideration. In some countries, the rebadged employees will transfer by operation of law to the service provider, even if this is not the commercial intent of the parties. In these circumstances, the parties will need to make strategic decisions on what to do with any “unwanted” employees who would otherwise transfer automatically upon the transfer of the services. Even in termination-and-rehire jurisdictions, pre-

¹⁹¹ See Chris Isidore, *It's Official: Recession since Dec. 07*, CNNMONEY.COM, available at <http://money.cnn.com/2008/12/01/news/economy/recession/index.htm> (2008).

transfer decisions may need to be made by the client customer and the service provider, such as who will pick up the cost of severance if local law provides for such payments upon the termination of employment.

Similarly, the decision to terminate any “unwanted” employees is also important. As with the transfer scenario, an automatic-transfer jurisdiction tends to complicate termination issues even more. A termination solely due to the transfer is invalid under the EU Acquired Rights Directive. Accordingly, the parties will need to decide whether the unwanted employees will stay employed by the customer (which usually is not practical), or transfer to the service provider, and then, at a later date, be terminated by the service provider (with the customer usually reimbursing the service provider for such termination costs). The appropriate strategy will depend upon the facts of each case and ultimately will involve commercial considerations.

In addition to any transfer or termination issues, outsourcing transactions may trigger local notification or consultation requirements with unions, works councils, or other employee representatives groups. It is very important for the parties to determine as soon as possible whether any such requirements are triggered by the facts of the case, and, if so, when such notifications or consultations need to take place. Indeed, in many circumstances, local law requires that the parties consult with employee representatives *before* a final decision is made regarding the outsourcing. Equally important, the parties should closely monitor internal and external communications while each consultation process is ongoing in order to ensure that nothing is said that suggests that any conclusions have already been made.

Customers and service providers should carefully plan and implement any global outsourcing transaction. If the transaction is adequately planned, a proper legal analysis is conducted, decisions are made or a deal negotiated based on the legal analysis, and the decisions

are carefully implemented, then an international outsourcing transaction does not need to turn into a legal nightmare. In this entire process, companies should keep in mind that they are dealing with people's lives and careers. Outsourcing can be disconcerting, and generosity and candor with employees may buy goodwill and prevent issues down the line.