

EMPLOYEE AND LABOR RELATIONS

What is the function of the National Labor Relations Act (NLRA)?

The NLRA grants employees two basic rights: (a) the right to form, join, or assist a union and (b) the right to engage in concerted activities for mutual aid or protection, which is any effort by two or more employees to improve pay, benefits, or working conditions. The NLRA of 1935 is commonly referred to as the Wagner Act. Senator Robert Wagner was the principal author of the initial statute. The Wagner Act also did the following:

- Allowed employees the right to organize
- Required employers to bargain with employees collectively
- Gave employees the right to engage in concerted activities
- Created the National Labor Relations Board (NLRB) as the regulatory agency

Under the NLRA, an employer cannot legally take any adverse employment action against employees who engage in union activities.

What are employers required to do under the Labor Management Relations Act?

The Labor Management Relations Act (LMRA), commonly referred to as the Taft-Hartley Act, had two primary purposes: (a) to lessen industrial disputes and (b) to place employers in a more equal position with the unions in bargaining and labor relations procedures. The LMRA shifted the emphasis in federal labor law from an attitude of federal protection for the rights of employees to a more balanced statutory scheme that added restrictions on unions, while guaranteeing certain freedoms of speech and conduct to employers and individual employees.

The purpose and policy of the LMRA is as follows:

- To prescribe the legitimate rights of both employees and employers in their relations affecting commerce
- To provide orderly and peaceful procedures for preventing employees and employers from interfering with each other's legitimate rights
- To protect the rights of individual employees in their relations with labor organizations whose activities affect commerce
- To define and proscribe the labor and management practices that affect commerce
- To protect the public's rights in connection with labor disputes affecting commerce

Congress amended the Wagner Act in 1947 with the passage of the LMRA. Problems with the Wagner Act included (a) violent strikes and picketing, (b) secondary boycotts that injured third parties, (c) the NLRB's manner of determining appropriate bargaining units, (d) union corruption, and (e) frequent work-assignment disputes among unions.

What are employers required to do under the Norris-LaGuardia Act?

The Norris-LaGuardia Act of 1932 restricts federal courts' intervention in labor disputes by limiting the courts' ability to issue restraining orders and injunctions. For a federal court to issue an injunction in a labor dispute, an employer must prove the following:

- Unlawful acts, usually of a violent or fraudulent nature, have been threatened and will be committed, or they have taken place and will continue.

- The employer will suffer irreparable damage unless these acts are prevented or halted.
- Continued picketing would cause the employer more harm than the union would suffer if the picketing were halted.
- The employer has no legal remedy other than to seek an injunction.
- Local police authorities and officials are either unable or unwilling to protect the company's property.
- The employer comes to court having satisfied every legal obligation imposed on it in connection with the labor dispute.

A federal court can issue a temporary restraining order for a period of up to 5 days if the employer does the following:

- Claims that picketing will cause the employer to suffer irreparable damage if the picketing is not stopped
- Posts security in an amount fixed by the court in case the employer's claims later are proven false

How are union campaigns initiated?

Union campaigns can be initiated by an employee or by a union organizer. Unions sometimes target specific industries or companies. The logic is that if a union is successful at targeting a portion of an industry or one company, then more employees may be willing to unionize. When an employee approaches a union, the union usually will look at what size the employee population is, how much it will cost to unionize, and whether the complaints made by the employee are shared by other employees before the union decides to approach the company. Several steps may occur when unionization takes place.

1. The union and employees will make contact to see what the possibility of unionizing is. This contact can take place by having group meetings outside the place of employment, through individual meetings, and by mailing materials to employees' homes. The main purpose of this initial contact is for union officials to gather information on the employees' grievances, needs, and concerns and to seek the employer's financial information, policies, and practices. In addition to obtaining this information, this is the union's first opportunity to win employee support and to build a case against the employer.
2. Union officials and the employees schedule an initial meeting. This meeting is the union's opportunity to gauge how much employee support it has and to explain how the union can help employees. It also gives the union an opportunity to see which employees can be counted on to provide the leadership that will be needed during the union campaign.
3. The union seeks employee support by forming an employee committee to gain additional support. Another method of gaining support is by handbilling whereby union organizers distribute literature to employees. The handbills discuss the reasons to join the union. Such handbills are usually distributed to employees as they leave work, or the handbills are mailed to their homes. It is extremely important for the union to gain momentum at this point. For an election to occur, the union will need 30% of the employees to sign authorization cards that indicate their willingness to be represented by a union.

What percentage of employees who have signed authorization cards is required under the NLRB to proceed with a union election? What percentage of employees must vote for the union to win?

During an organizing campaign, union representatives seek employee interest by having the employees sign authorization cards to indicate that the employees want union representation. At least 30% of the eligible employees in a prospective bargaining unit must sign authorization cards before the NLRB will order an election. A simple majority of 50% plus one person must vote in favor of union representation in order to win the election.

What employee categories are excluded from the bargaining unit?

Employees excluded from coverage under the NLRA include supervisors, managers, confidential employees, and others. Under NLRA,

- A supervisor is defined as someone who uses independent judgment to make personnel decisions or to recommend personnel decisions. Personnel decisions include hiring, promoting, transferring, rewarding, and terminating employees.
- A managerial employee is defined as someone who makes, executes, and exercises independent judgment about management policies. Managerial employees normally do not manage people.
- A confidential employee is defined as someone who assists and acts in a confidential capacity to the management personnel who make and implement labor relations policies, or as someone who has regular access to confidential information about future bargaining strategy or changes that the employer anticipates may result from collective bargaining.
- Other employees who are excluded from the bargaining unit include independent contractors, agricultural laborers, domestic servants, people employed by a parent or a spouse, and public employees.

What can management do during a union campaign?

During a union campaign, employers are permitted to engage in activities that will not interfere with an employee's ability to make a free choice in a union election. If threats of reprisal, promises of benefits, or other actions would serve to coerce employees, an unfair labor practice charge will be brought against the employer. If the NLRB finds violations, the union essentially wins without the election. Here are some important guidelines (Collier, 1998) that a supervisor may legally follow:

- Tell employees that the supervisors and the company are opposed to unionization.
- Tell employees that the employees do not have to sign union cards and that the law says that they have the absolute right to refrain from joining a union.
- Tell employees that they do not have to speak to union organizers or to admit organizers into their homes.
- Tell employees about the benefits that they enjoy, and compare those benefits with those in unionized companies.
- Tell employees that with a union they may have to bring their problems to a shop steward instead of dealing with their supervisor.
- Tell employees of the disadvantages of belonging to a union, such as the payment of dues and initiation fees and the possibility of fines and assessments.
- Tell employees that, if they engage in an economic strike, they may be permanently replaced and will be reinstated only if an opening occurs.
- Tell employees that they may be required to picket other employers, even when they are not on strike.
- Tell employees that a union can always out-promise an employer, but the union can guarantee nothing.
- Tell employees about any arrest records of union officials.
- Urge employees to vote against the union; suggest that they encourage others to do the same.
- Tell employees that merely signing a union authorization card or application for membership does not mean they must vote for the union in an election.

- Tell employees about any untrue or misleading statements made through an organizer, by handbill, or through any union propaganda.

A supervisor should not legally (Collier, 1998) do the following:

- Promise employees pay increases, promotions, improved working conditions, additional benefits, or special favors on the condition that the employees vote against or refuse to join the union.
- Threaten employees with loss of job or reduction in wages, or use threatening or intimidating language calculated to influence employees in the exercise of their right to support a union.
- Tell employees that they would have received a wage increase except for the start of the union campaign.
- Tell employees that the union will have to strike to obtain concessions from the employer.
- Discriminate against employees who are taking part in union activities by separating them from other employees and by transferring them to undesirable tasks in retaliation for their union activities.
- Ask employees to inform a supervisor if, while working, they are pressured to sign an authorization card while the supervisor is not enforcing a valid no-solicitation rule.
- Solicit employees to request the return of their authorization cards.
- Visit employees at their homes to urge them to vote against the union.
- Prohibit the wearing of union buttons or insignia.

What is the process to decertify a union?

The process to decertify a union starts with filing a petition at the regional NLRB office. The petitioners for decertification can be any employee or group of employees, except supervisors; any nonemployee, except the employer; or any labor organization.

If 30% of the employees sign the petition, the NLRB may hold a hearing and authorize an election to decertify the union. A decertification election is an election held following the filing of a petition by employees who allege that the union previously certified or currently recognized by the employer as the bargaining representative no longer represents a majority of the unit employees. A union that wins a decertification election will be certified by the NLRB as a bargaining agent, just as if the union had won a certification election. A recognized or certified union that loses will be decertified. Decertification occurs if a majority of the employees votes against the union. A tie vote will result in decertification because the union has received less than a majority of the votes cast.

Employers need to be careful if employees inquire about the decertification of a union. An employer's initiating or even encouraging a petition for decertification can be considered interference and an unfair labor practice. Decertification is a matter between the employees and the union—any impetus for decertification must come from the workers rather than the employer. An employer can lawfully provide accurate information to its employees regarding the decertification procedures, as long as the company does so without threatening its employees or promising them benefits. The safest course of action for an employer is simply to provide the employees with accurate factual information regarding the decertification procedure.

Can employers form employee participation committees without violating the NLRA? What kinds of issues can such committees discuss?

While not every employee involvement committee formed by an employer will be considered to be a labor organization as defined by the NLRA, employers should be cautious when forming such employee involvement groups. The definition of a labor organization as defined by the NLRA is any organization, agency, or employee representation committee or plan in which employees participate and that exists for the purpose, in whole or in part, of "dealing with employers concerning

grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." The NLRB will then evaluate the amount of employer domination and support given to the committee so it can determine if the employer is superseding any of the functions of a union and, therefore, is engaging in unfair labor practices. Two notable court cases have addressed this issue.

The first case to test the legality of employee participation committees was the Electromation case in 1988. Electromation Inc. created "action" committees composed of selected employees to address issues such as absenteeism, pay progressions, and attendance policies. The committees were disbanded before the Teamsters Union election at the Electromation Plant. The Teamsters still filed an unfair labor practice stating that the committees were actually labor organizations in violation of the NLRA.

The NLRB's final determination agreed with the Teamsters that the sole purpose of the participation committees was to address employee's dissatisfaction with conditions of employment. The NLRB did clearly state that it was not totally banning participation committees and could see circumstances in which such committees would not violate the NLRA.

The second notable case, which was the first to address labor management participation committees in a union environment, was against E. I. du Pont. In this particular case, management set up seven committees to address issues such as recreation, safety, and fitness matters. A manager was assigned to each committee to develop an agenda and to facilitate the meeting. The NLRB found that the committees were, in fact, discussing mandatory bargaining subjects and were primarily dominated by management. Therefore, they were in violation of the NLRA.

Learning from these two cases, employers find some guidelines that they can follow when forming employee participation committees. First, they should make sure that issues typically discussed at the collective bargaining table are not topics addressed by employee committees. Second, management should not have a majority of the members nor dominate the committee.

Safe issues for employee committees to address include social and athletic activities. Those topics are not typically viewed as mandatory bargaining subjects. There have been other instances where committees have addressed various other subjects with varying committee structures, and those instances have not been viewed as violations of the NLRA. The safest route when contemplating the formation of such employee involvement committees is to discuss the details with a knowledgeable employment law attorney who can provide sound legal advice.

[Editor's Note: See legal report entitled [*New Guidelines From the National Labor Relations Board Regarding Participative Management Initiatives and Employee Committees*](#) for recent NLRB decision.

Express Request:

To receive additional resources on *safety* committees, please use key word **SAFETY** to complete [this form](#).

What subjects are to be considered during collective bargaining?

Collective bargaining is the process by which conditions of employment are negotiated between management and the labor organization representing employees in the bargaining unit.

Collective bargaining activities are governed by the National Labor Relations Act (NLRA). The NLRA requires bargaining parties to "meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment" (Section 8[d]). Because the NLRA does not list specific topics to be bargained, the National Labor Relations Board (NLRB) and courts determine which subjects fall under the NLRA stipulation. As a result of this, bargaining subjects are divided into three distinct categories: mandatory, voluntary or permissive, and illegal.

Mandatory bargaining subjects are those that directly relate to the NLRA stipulation. A refusal to bargain regarding a mandatory bargaining subject is a violation of the NLRA. Negotiations may continue to the point of impasse (mediation or strike). Mandatory bargaining subjects include wages, hours, merit increases, bonuses, pensions, profit-sharing, health and welfare plans, discharges, grievance procedures, disciplinary procedures, drug testing, seniority, promotions, transfers, health and safety, work assignments and plant closings.

Voluntary or permissive bargaining subjects are those for which an employer or labor organization may choose to bargain, but are not required to do so. A refusal to address a voluntary or permissive bargaining subject is not a violation of the NLRA. Examples of these issues include the following: internal union business, inclusion of supervisors in contract, designation of negotiators, marketing strategies, price of employer's product, use of union labels and taping or making transcripts of negotiations.

Illegal subjects of bargaining are unlawful under the NLRA. These include the following: closed-shop clauses, union-shop clauses in right-to-work states, "hot cargo" clauses and provisions that violate the NLRA or federal or state employment laws.

These lists are by no means exhaustive. Rulings by the NLRB and the courts continue to expand items considered to be mandatory subjects of bargaining. It is important to check with state law as well as a labor attorney when beginning the collective bargaining process

Our company is in the process of negotiating a collective bargaining agreement for the first time, and the union is asking for information that we would normally not disclose to a third party. What information are we legally required to provide to the union?

Once a union is elected as the exclusive bargaining representative, it has the right to request from the employer information that will help it understand collective bargaining issues. However, a request for information from the union must be made in good faith and for the sole purpose of helping it perform its bargaining duties.

An employer's obligation to bargain under the NLRA includes the requirement to confer in "good faith" with the employee representative on issues such as wages, hours of work and other terms and conditions of employment. Here are some of the areas about which a company may be required to supply information to the union for purposes of collective bargaining negotiations:

- Wages and related matters, such as incentive pay plans and merit increases.
- Benefits.
- Seniority data, such as dates of hire for all the employees in a particular unit, if it is necessary for the negotiation of seniority clauses.
- Health and safety data.
- Names and addresses of employees in the bargaining unit.
- Information regarding subcontracting.
- Information regarding the sale of business.

An employer may refuse to give the union data that is considered confidential and detrimental to the employer's security, such as confidential trade secret information. During collective bargaining, the union may request information relating to the employer's financial position. While financial information generally is considered to be proprietary, there may be times when the employer will be required to provide it. However, the union must first demonstrate that such information will be relevant to the collective bargaining process.

If an employer fails to comply with union requests for information that is deemed necessary for collective bargaining negotiations, the NLRB may find the employer to be in violation of the NLRA's good-faith bargaining requirements.

What are employees' rights during a union campaign?

The NLRA provides employees the right to organize and to engage in concerted activities. Therefore, solicitation to join the union, distribution of union material, and attendance at meetings held at nonwork places or during nonwork hours are all

permissible. However, to be covered under NLRA, the employees' activity must be a protected activity. A protected activity must be reasonably seen as affecting the terms and conditions of employment.

What is an unfair labor practice by management?

The NLRB has created an extensive listing of employer actions that it considers would unduly interfere with an individual employee's labor rights. The NLRA has defined five categories of unfair labor practices that are prohibited for employers. Below is a summary of the five categories of unfair labor practices, along with a brief explanation of each category.

1. Interference, restraint, or coercion. An employer cannot interfere with, restrain, or coerce employees in the exercise of their rights. Most violations of this section include supervisors who (a) make threatening statements, (b) question employees who assert their labor rights, or (c) make false statements to workers seeking unionization.
2. Employer domination or support of a labor organization. An employer may not try to dominate or interfere with the formation or administration of any labor organization, or to contribute financial or other support to such an organization.
3. Discrimination on the basis of labor activity. An employer may not discriminate against an employee in hiring, or tenure of employment, or any term or condition of employment in order to encourage or to discourage membership in any labor organization.
4. Discrimination in retaliation for going to the NLRB. An employer may not discharge or otherwise discriminate against an employee in terms and conditions of employment because he or she has filed charges or given testimony.
5. Refusal to bargain. An employer will be in violation of the NLRA if the company (a) refuses to bargain collectively with the representatives of the employees, (b) refuses to recognize a majority union, (c) takes unilateral actions, (d) refuses to provide necessary information to union representatives, (e) refuses to sign a written contract once an agreement is reached, (e) or imposes conditions on its willingness to bargain.

As the federal agency charged with the enforcement of the NLRA, the NLRB has procedures in place for investigating, hearing, and remedying unfair labor practices once a charge is received. Employers who are unionized or in the process of unionization are advised to familiarize themselves with the various NLRA labor laws in place if they are to avoid unfair labor practice charges. Additional information regarding labor laws can be obtained from the NLRB at www.nlr.gov.

What is an unfair labor practice by the union?

The NLRA outlaws several union activities. Examples of union unfair labor practices (ULP) follow:

- Coercing the employer
- Coercing the employees
- Causing the employer to discriminate against employees
- Refusing to bargain in good faith
- Inducing strikes for forbidden reasons such as secondary boycotts
- Forcing the employer to make certain work assignments
- Forcing the employer to bargain with an uncertified union
- Charging excessive initiation fees

- Forcing or attempting to force employers to pay for workers the employer does not need

Forcing or attempting to force employers to pay for work that is not or will not be done.

Our managers hate to do performance appraisals. What can HR do to smooth this process and make it more acceptable to the managers?

Performance appraisal is one of the most universally hated tasks that managers undertake, and one of the most important tasks they have. In the crush of time that is the workplace, many managers do not make the effort to give timely feedback to their staff. At performance appraisal time, feedback is given that is out of date and often a big unwelcome surprise to the employee. Both parties are tense and uncomfortable with this sort of appraisal.

Performance feedback once a year is just not good enough; the performance appraisal process should be happening all year long. HR can bring managers into the performance process and make annual performance reviews less onerous by conditioning them to believe that managing performance is a continuous process that is built into their job every day.

Train the managers to give performance feedback to their employees on a regular basis. A weekly, or monthly, chat with each individual on how things are going would not be too much.

Train them to have brief informal exchanges, where managers can let staff know how they are doing and review any critical incidents that occurred recently. The manager can discuss both those things that went badly and those things that went well, and the role the employee played in both productive and nonproductive incidents, while the time period is still fresh in everyone's mind.

The discussion of critical incidents and why they occurred could indicate the need for training or career development for the employee and give that person an opportunity to improve poor performance. It also can give managers an opportunity to take note of excellent performance that may lead to bonuses, awards or merit increases; or to document poor performance that may lead ultimately to disciplinary action.

These brief and informal discussions are a great time for managers to get feedback from their staff as well. Employees have good ideas about processes and products, and how things could be improved at work if they are given an opportunity to contribute. An atmosphere of open two-way communications makes employees feel comfortable with making suggestions or bringing problems to the managers' attention.

Managers dislike having discussions with employees when poor performance occurs because most people neither give nor respond well to criticism. Train them to present objective performance facts openly and positively, and not to attack employees on a personal level. Employees respond more positively when they are presented with facts and asked for suggestions for how the situation can improve, rather than being told they are "problem employees."

If managers keep a simple log of conversations held with employees each week or month, over the year a record develops with examples of each employee's progress or lack thereof. When that dreaded annual performance review day arrives, the managers have documentation readily available that already has been discussed with employees. The record will show improvement or the lack of improvement, training opportunities pursued and whether goals were met or missed. There won't be any surprises for either party, and the performance discussion can be smooth and productive.

Express Request:

To receive additional resources on this topic, please use key word **PERFORMANCE** to complete [this form](#).

Can you explain the difference between a furlough, a layoff and a reduction in force?

All three of these terms describe actions that are intended to achieve cost savings by reducing a company's payroll costs. Even though the words have been used interchangeably, their true meanings are quite different.

A furlough is considered to be an alternative to layoff. When an employer furloughs its employees, it requires them to work *fewer hours* or to take a certain amount of unpaid time off. For example, an employer may furlough its employees one day a

week for the remainder of the year, and pay them for only 32 instead of their normal 40 hours each week. Another method of furlough is to require all employees to take a week or two without pay sometime during the year.

An employer may require all employees to go on furlough, or it may exempt some employees who provide essential services. Generally, though, the theory is to have the majority of employees share some hardship as opposed to a few employees losing their jobs completely. Employers must be careful when furloughing exempt employees, so that they continue to pay them on a salary basis and do not jeopardize their exempt status under the Fair Labor Standards Act (FLSA). A furlough that encompasses a full workweek is one way to accomplish this, since the FLSA states that exempt employees do not have to be paid for any week in which they perform no work.

A layoff is a *temporary* separation from payroll. An employee is laid off because there is not enough work for him to perform; his employer, however, believes that this condition will change and intends to recall him when work again becomes available. Employees generally are able to collect unemployment benefits while laid off without pay, and frequently an employer will allow them to maintain benefits coverage as an incentive to remain available for recall.

Once management has determined that an employee will not be recalled to work, the layoff becomes *permanent* and is more accurately called a reduction in force, or a termination. A reduction in force (RIF, pronounced “rif”) involves a permanent cut in head count that also can be accomplished by means of attrition. When an employee is terminated pursuant to a reduction in force, it is sometimes referred to as being “rified.” However, some employers use layoff as a euphemism for what is actually a permanent separation. This may be confusing to the affected employee, allowing him to believe that recall is a possibility, and preventing him from devoting his full energies toward locating a new position.

One of our employees has threatened to commit suicide. What should we do?

Comments about suicide should always be taken seriously. If an employee appears to be planning to take action and the employer knows where the individual is at the time, it is best to contact 911 or other local emergency authorities immediately. Employers usually are not qualified to handle such a situation directly and should refrain from giving advice or trying to counsel the employee. They can, however, contact local services such as an employee assistance program, suicide hotline or hospital if they have doubts as to whether there is an immediate threat or not. Given the risks of failing to take action, however, it is best to get help sooner rather than later.

The employer should also resist the urge to force the employee to take time off or to require fitness-for-duty certification in response to remarks involving suicide. That is more likely to make a bad situation worse. Though it’s possible the employee has a condition that would fall under the coverage of the Americans with Disabilities Act, the employer should refrain from making such assumptions and instead should focus on the situation at hand.

If the threat becomes known through second-hand information the employer may need to discreetly investigate the circumstances before taking any action. Though unlikely, it’s possible the comment was a casual remark, made in poor taste, in reaction to excessive work-related demands that can be addressed between the employee and the supervisor. Assure the person who provided the information that the employee’s safety is more important than maintaining confidentiality. Where it is not possible to obtain confirmation it is better to seek professional intervention through one of the sources suggested above than to delay action.

For more information, check the following web pages:

- White papers and articles on [mental health](#).

[Crisis centers](#) in your area.

- General [suicide-prevention](#) resources

Express Request:

To receive additional resources on this topic, please use key word **SUICIDE** to complete [this form](#).

I have heard that it is a bad idea to have a “probationary period.” Why is that?

Having a probationary period can weaken an employer's claim that employment is at-will. Probationary periods are commonly thought of as a specified period during a new employee's first few months in which the employee can be terminated at any time. At-will employment is a common law concept that allows employees and employers to terminate the employment relationship at any time for any reason, except for reasons that are specifically prohibited by law or by contract.

However, some courts have found a problem with employers with probationary periods. The employers imply that while employees can be terminated for any lawful reason during the probationary period, employees are entitled to retain employment after that period unless the employer can show just cause for the termination.

Employers can avoid this implication by removing all references to probationary periods and including at-will disclaimers in employment applications, offer letters and the employee handbook.

Some employers have a practice or policy of having an "introductory period" or an "orientation period" during which the employee is being trained and is continuing to be assimilated into the organization through formal and informal means. Often, the employee and the supervisor meet to establish performance goals at the end of the orientation period. Employers who use introductory periods need to avoid implying that it will be harder for employees to be terminated after the designated period is over.

An employee we involuntarily terminated recently is sending mass e-mails to our employees, stating that the termination was wrong and that the company doesn't treat employees fairly. These messages are disturbing employees and causing loss of productivity. What can we do to stop this and prevent similar conduct by other former employees?

It may be possible to use technological means to block these e-mails. This would be an option to explore with the company's IT specialists. Also determine if the employee signed a separation/severance agreement that includes a clause that prohibits disparagement or defamation against the employer. If such a non-disparagement agreement exists, contact the former employee to remind him of this and request that the messages stop immediately. If the former employee continues sending messages, check with your attorney regarding legal remedies.

If there is no signed separation agreement that includes a non-disparagement clause, you still may want to discuss this situation with the corporate legal counsel. The company may be able to file a lawsuit against the former employee for defamation (false or misleading statements that damage reputation).

In a recent court case, an employer facing similar conduct from a former employee filed a lawsuit against the individual citing violation of a type of trespass, called trespass to chattel, which involves damaging but not actually intruding on real property. The initial decision favorable to the employer, however, was overturned by the state supreme court, which cited freedom of speech protection for the former employee.

As with other employee relation situations, employers need to focus on prevention strategies. For example, whenever an involuntary termination occurs and a separation/severance agreement is used, consider including a non-disparagement clause in the agreement. Also, the May/June issue of SHRM's Legal Report, "[Protecting Your Organization's Reputation Against Cybersmear](#)," includes 10 recommendations for preventing cybersmear.

As with any binding agreement, check with your attorney for definitive guidance.

Employees are complaining that their manager constantly yells and degrades them in front of co-workers or clients. Could this type of behavior be considered workplace bullying, and if so, what is our obligation as an employer?

Bullying comes in many forms but normally involves any repeated behavior meant to intimidate, humiliate or degrade another individual. A few examples of behavior that may be considered bullying are alienating or isolating an employee, harassing or intimidating an employee, or providing an employee with unreasonable or impossible work assignments, as well as any form of verbal abuse such as name calling, etc.

There is currently no existing legislation specifically addressing this issue. However, if the offending behavior is pervasive enough to be considered threatening, intimidating and creating an environment full of hostility, then the potential for hostile

work environment harassment or claims of constructive discharge when employees quit is certainly worth taking into consideration. Employers that choose not to take measures to identify and prevent such abuses of power are allowing bullying to occur within their workplaces and may be exposing themselves to some legal risk. In addition to possible legal exposure, allowing such behavior to occur will eventually result in significant costs to the employer due to lowered employee morale, reduced productivity, increased absenteeism and turnover, not to mention possible filings of stress-related disability or workers compensation claims. Employers are encouraged to take this matter very seriously and consider it as intolerable as any other type of harassment within their workplaces.

When employees come forward with complaints of bullying by either a manager/supervisor or another co-worker, employers should address the matter by initiating an investigation to determine if there is in fact evidence of bullying between the alleged victim and perpetrator. Developing and communicating policies that clearly define what is considered bullying and that the behavior will not be tolerated, as well as what disciplinary action will be taken for violators of the policy, is also critical to ensure an organization's culture is based on mutual respect. Additionally, employers have an obligation to properly train managers/supervisors and employees on what is and is not considered appropriate behavior for the workplace to help promote a more harmonious environment for all and minimize any associated legal risks, which can arise when such behaviors are known but not dealt with appropriately.

Express Request:

To receive additional resources on this topic, please use key word **BULLY** to complete [this form](#).

I noticed that some of our employees started appearing stressed or depressed a few weeks ago. As this change in behavior coincides with the holiday season, I am thinking that these employees may be experiencing “holiday blues.” So I can be sure of this, what are some of the symptoms? Also, this is affecting the employees’ performance and working relationship with co-workers. If this is holiday-related, what can HR do to help?

Changes in an employee's performance and behavior at this time of the year may indeed be linked to the burden of extra responsibilities and unrealistic expectations for the holidays. Extra responsibilities take the form of holiday shopping, parties, family reunions and houseguests. Unrealistic expectations lead to disappointment when holidays—portrayed in popular culture as a time of joy, cheer and festive gatherings—become, for many people, a time of loneliness, depressing memories, and feelings of hopelessness and anxiety.

Some on-the-job symptoms of holiday blues may be a lack of mental energy, anxiety, frustration and loss of temper. Other symptoms include a marked shift from a positive to a negative frame of mind, lack of focus, and an inability to deal with distractions or challenges.

Employers can help employees reduce and cope with holiday stress and depression that results from several major factors. The first is financial. Keep employee costs for holiday activities to a minimum. Set low dollar limits on any departmental gift exchanges between co-workers. Consider polling employees to see whether they would prefer, instead of a holiday party, a gift certificate or cash payment in the amount of a party's per-employee cost. (If you take this route, try to distribute the certificate or cash early enough in the season so employees can count on it in their holiday budget.)

If you do have a party, establish a casual dress code so employees will not have to buy special clothing. Have the party catered instead of asking employees for food donations. If you give door prizes, choose gift certificates that employees can use for holiday purchases.

Think carefully about serving alcoholic beverages; alcohol can intensify “down” feelings and stress. (For resources on office parties and alcohol, “mocktail” recipes, and an easy and free way for employees to help others around the holidays, members can visit the December link on the Touching Lives Calendar at www.shrm.org/whitepapers.)

Employers also can help with time management. Remind employees to submit and managers to approve requests for holiday time off as far in advance as possible. An unexpected denial of leave will add to holiday stress. Recognize and thank employees who do work during the holiday period—especially those who fill in for others or have a larger volume of work due to staff absences. Schedule activities such as holiday volunteer events or parties during regular working hours. After-hours events may create conflicts with occasions involving family and friends.

Sharing and sensitivity

For many individuals, doing something for others is an important part of the holiday season. Employers can assist by providing opportunities to participate in a community “Adopt a Family” program, make food or toy donations to community groups, or volunteer at homeless shelters, for example. If possible, schedule volunteer activities during the workday and keep the costs to a minimum so they do not add to the demands on employees’ time and money.

Keeping emotions at a reasonable level during this charged time is another way employers can help. Distribute company policy or rules on holiday decorations and music well in advance. No one—especially HR—wants to become the Office Grinch by having to ask employees to remove decorations or turn off music that may generate religious or cultural objections. Be sensitive to some employees’ preference not to participate in holiday events for religious or personal reasons. Make sure all employees understand that holiday events are voluntary and counsel them not to pressure those who do not wish to participate.

If you have an employee assistance program, remind managers and supervisors to bring this resource to the attention of all employees during the holiday season and to appropriately refer employees who appear to need professional counseling.

Express Request:

To receive additional resources on this topic, please use key word **BLUES** to complete [this form](#).

An employee recently was promoted from a production environment to an office position. While he possesses the necessary qualifications to perform the job successfully, he lacks basic office etiquette skills. Are there some office etiquette tips we can share with him?

Just as there are guidelines for proper conduct at social events and in the home, there also are guidelines for proper behavior in the workplace. To work successfully with others, it is necessary to conduct oneself according to certain long-standing conventions such as being courteous and respectful to others.

Below are some basic tips. This is not an all-inclusive list and never can replace the benefits of a formal training program.

Mind manners

Some rules of office etiquette simply are matters of common courtesy: Answer the telephone promptly when it rings; be polite, pleasant and courteous when answering the telephone and try to return phone calls in a timely manner. Practice tact and teamwork.

Try to avoid interrupting people at work. Be courteous of common space; clean up after using it.

Be mindful and respectful of others’ time. Do not keep people waiting, or fail to show up for a scheduled meeting without advance notice. In other words, be reliable and punctual.

Try to display a positive attitude toward work and co-workers no matter how bad a day it may be. Remember: Co-workers are not punching bags.

Cubicle crimes

It’s important to respect co-workers’ personal workspaces and to occupy one’s own space in a way that does not offend. Avoid borrowing things from a co-worker’s desk without first asking. Do not snoop into co-workers’ cubicles or offices when walking by and never drop in without first saying hello and waiting to be invited.

Use good judgment when decorating an office or cubicle. Keep noise levels down when talking to others or listening to a personal desktop radio. Do not apply make-up at your desk.

Unseemly sights and sounds

Some behaviors, while rude and irritating in any context, in a workplace actually can affect morale and productivity. Avoid things that may annoy your co-workers, such as snapping or chewing gum loudly in the office, or eating while talking to someone on the telephone.

Try to avoid overpowering perfumes or colognes, keeping in mind that not everyone enjoys the same fragrances. Be discrete and conscientious when coughing or yawning. Avoid annoying or distracting habits such as tapping a pen or cracking knuckles during a meeting or presentation.

The basic rule is the golden rule: treat others the way you wish to be treated.

Express Request:

To receive additional resources on this topic, please use key word **MANNERS** to complete [this form](#).

What is the difference between a *consent election* and a *directed election*?

An election conducted by the NLRB is one of the ways that employees can select or reject a particular labor union to bargain on their behalf with their employer. Elections serve various purposes: some are purely representational, some are procedural, and some are based on certain statutory requirements.

Once an appropriate bargaining unit has been designated, an NLRB regional director will order an election. The regional director will then hold a prehearing conference to attempt to resolve bargaining unit issues and questions of voter eligibility without having to resort to a full hearing. This election is known as a *consent election*. This type of election eliminates the need for a formal hearing.

If all parties voluntarily reach an agreement, the parties will enter into and sign a written agreement (“Agreement for Consent Election”) that will set forth the details of the election. The “Agreement for Consent Election” form is then presented to the NLRB for approval. Under this type of agreement, the parties agree to the following:

The employer is engaged in commerce.

An appropriate bargaining unit exists.

An election will be conducted.

A specific payroll will be used to determine eligibility.

The rights to hearings at any stage are waived.

The rulings of the regional director on all questions relating to the election will be final and binding.

The NLRB regional director will conduct investigations and rule on any challenged ballots if they are sufficient enough to affect the results.

The regional director will rule on any objections to the conduct of the election. If it is found that they have merit, the director may set aside the election and conduct a new election.

The regional director will issue to the parties involved (a) a certificate of the results if the employees voted against representation or (b) a certification of representation if the union received a majority vote.

The regional director will make all of the necessary arrangements to conduct an election. In the absence of a consent election agreement, the regional director will proceed to a hearing. When the parties are unable to reach an agreement regarding basic election issues such as (a) the appropriateness of a bargaining unit, (b) an eligibility date, and (c) the time and place for elections, the result is a *contested election*.

If evidence presented at a hearing establishes the existence of questions regarding representation and appropriateness of the bargaining unit sought by the petitioning party, the regional director will issue a "Decision and Direction of Election," which is also known as a *directed election*. *Directed elections* are simply another name for *contested elections*. This type of election is expressed in terms of agency personnel participating rather than the parties' choice of consenting to or contesting certain details. Directed elections may also be conducted by an NLRB regional director in accordance with an NLRB-directed election, or they may be issued by a regional director after a formal hearing.

What is the excelsior list?

Excelsior Underwear, Inc., was the first company that the NLRB required to provide a list of the names and addresses of all the employees who were eligible to vote in a consent election. Now all employers are required to provide this list to the NLRB within 7 days after a consent election is ordered. The NLRB then provides the list to the union. In this manner, the union is given access to employees who will be the voters in the upcoming election. The NLRB views this as a way to ensure that employees are informed about the arguments both for and against electing a particular bargaining representative.

What types of strikes are protected by the NLRA?

The NLRA protects the following types of strikes:

A *primary strike* is protected by the NLRA. A primary strike is a planned work stoppage to force a demand on the workers' employer.

An *economic strike* is designed to enforce employees' economic demands (e.g., wages, hours, terms and conditions of employment) on the employer. If a contractual agreement does not waive the right to engage in an economic strike, the strike is protected by NLRA. The employer can hire *permanent* replacements. Employers are under no obligation to reinstate a striker until his or her former job becomes available.

An *unfair labor practice strike* is protected by NLRA. Employees engage in an unfair labor practice strike if they feel that their employer has committed unfair labor practices as defined by the NLRA. The employer can hire replacements but cannot hire permanent replacements. Strikers are guaranteed reinstatement.

The NLRA protects certain related activities including the following:

Picketing in the form of walking or standing near the entrance to a business to inform the public about a labor dispute is protected.

Area standards picketing to inform the public that an employer offers lower wages and fewer benefits than union employers in the area is protected.

Common-situs picketing is picketing an employer at a site shared by other employers and is protected if it falls within the guidelines established by *Sailors Union of the Pacific v. Moore Dry Dock Co.* in 1950.

Handbilling is posting or handing out printed materials that inform the public of a labor dispute and is protected.

Consumer boycotting that requests the public to refrain from the purchase of an employer's products because of a labor dispute is protected. However, picketing related to the boycott is not protected.

What are the steps of the arbitration process?

Arbitration is a binding agreement determined by a third party. The main advantage of arbitration from the employer's perspective is that it is faster and less expensive than going to court. However, employees have complained that arbitration (a) allows no way to challenge an unpopular decision, (b) favors employers, and (c) does not offer the same remedies that a court may offer.

There are three main components of an arbitration process:

1. **Prehearing briefs.** At this point, management and union representatives have the chance to present their views and describe their evidence to the arbitrator. The briefs are used to assist the arbitrator and the two parties to focus on the issue at hand.

2. **Arbitration hearing.** This hearing is when both parties have the chance to present their case and evidence. During this hearing, it is very common to call witnesses who have observed particular events. Important evidence that may be presented by the employee or management could help prove past practices. Some examples of evidence that could be used are time cards, performance appraisals, customer or co-worker complaints, and warnings. It is possible that closing statements could take place at this hearing. This hearing is an opportunity for both parties to summarize key aspects. However, closing statements are normally skipped if both parties plan to submit posthearing briefs.

3. **Arbitrator's decision.** It is common for labor contracts to require that a decision be made within a certain time period. However, if no clause is in the contract, the arbitrator can make the decision within 30 minutes of the close of the hearing, or he or she could take a few months. When making a decision, an arbitrator will discuss (a) the issue presented, (b) the statement of facts, (c) the positions of the parties, (d) the analysis or discussion, and (e) the award.

For more information on arbitration, contact the American Arbitration Association at (212) 484-4000 or at www.adr.org and www.arb-forum.com.

What steps should an employer take when presented with union authorization cards?

Union authorization cards are usually the official beginning of a labor drive. To gain the right to conduct an election, a union must prove that it has the support of at least 30 percent of the employees to be their representative in a collective bargaining unit.

When a union presents authorization cards to an employer, the employer can voluntarily recognize the union as the bargaining representative of its employees, provided that the union can demonstrate that it has been designated by more than 50 percent of employees. If the union has cards from more than 50 percent of the unit members, an election is not required. The U.S. Supreme Court ruled that union authorization cards, obtained from a majority of employees without misrepresentation or coercion, are often reliable enough in proving majority support.

The second option that an employer may take once presented with union authorization cards is to refuse to recognize the card majority and insist on a recognition election conducted by the National Labor Relations Board (NLRB). The election in this case is sought to prove the union's majority count. An employer must not attempt to break up the union's card-based majority by engaging in unfair labor practices that are in violation of Section § 8(a)(1) of the National Labor Relations Act (NLRA). For information on ways to communicate to employees about unions, [click here](#).

MERGERS & ACQUISITIONS: HR TRANSITION MODEL AND ISSUES TO BE CONSIDERED WHEN COMPANIES INTEGRATE

By Al Himegarner

May 1998

Reviewed November 2002

Philosophy

As organizations expand through integration with other companies, a human resource transition plan needs to be implemented to assure successful integration of the facilities.

Purpose

The transition plan should include strategies for:

1. Effective communication between integrating facilities so that the information required for the integration is obtained in a timely manner.
2. Orientation of managers and employees at each facility about the history, mission and culture of the other facility.
3. Recognizing and addressing fears, hopes and concerns of employees at each facility.
4. Ongoing support at each facility to address emerging issues related to the integration.

Plan

Responsibilities of Leadership for the Acquiring Facilities:

1. Define nature of integration by acquisition, merger, lease, reorganization or transfer.
2. Define and clearly communicate timetable for integration to the leadership groups for each facility.
3. Establish a transition team with members from each facility to include areas such as: human resources, finance, operations, public relations, organizational development & training and facility leadership. Appoint a transition team leader and key contact(s) at each facility and involve these groups in the integration as soon as the decision is made.
4. Announce the integration in a joint letter from the CEOs of each facility to all employees with information about the transition team and the time frame for integration.
5. Sponsor scripted "welcome" meeting for all employees at each facility with the facility leader and the transition team. Follow-up the meeting with a question and answer session and an informal social event.
6. With input from transition team, send regular updates on the status of the integration to all employees.

Responsibilities of Transition Team:

1. Be visible and actively participate in "welcome" meeting and informal social event when integration is announced at each facility.
2. Identify as a group the key activities and key information necessary for a successful integration and assign responsibility for obtaining this information within an agreed-upon time frame.
3. Consider the impact of the integration on other departments at each facility and immediately notify the leadership group of any potential problems.

4. Coordinate the schedule of visits by the transition team members (or their designee) to each facility so that neither feels overwhelmed or abandoned.
5. Provide a general orientation to the acquiring facility employees other than transition team members who will spend time at the new facility as part of the integration.
6. Distribute a "who's who" directory of key contacts at the acquiring facility to managers of the new facility so they know who to go to if they have questions about processes or procedures during the integration.
7. As a follow-up to distribution of the acquiring facilities directory, plan brief orientation and "how to" sessions for staff at new facility with whom they will immediately interact.
8. Identify a human resources representative to implement plan to address individual employee concerns at new facility, in cooperation with new facility's human resources department as appropriate.
9. Develop and distribute a question and answer communication to employees and/or conduct monthly information meetings at new facility.
10. Provide regular progress reports on integration to both leadership groups

Responsibilities of Leadership at New Facility:

1. Either participate as members or appoint "role models" from the new facility to be members of the transition team.
2. Be visible and actively participate in "welcome" meeting and informal social event when integration is announced at new facility.
3. Orient transition team to the history, mission and culture of the new facility.
4. Provide timely, accurate and complete information upon request of transition team and assign someone to be responsible for missing information.
5. Keep promises and meet deadlines and ask for help if needed.
6. Openly communicate questions or concerns about integration process to transition team leader.

Responsibilities of Acquiring Facilities Human Resources Department (includes OD&T and EAP)

1. Actively participate as member of transition team.
2. Sponsor programs for employees at new facility to address resistance to change, grief processes, team building and consensus.

3. Work cooperatively with the human resources department at the new facility to provide separate orientation sessions for employees at the new facility so that their questions/concerns can be addressed outside the general employee orientation.
4. Provide "who's who" list of key human resource contacts, with phone/beeper numbers, to employees at new facility.
5. Sponsor separate orientation session for managers and supervisors at new facility to explain human resource policies and practices.
6. Assign a human resources representative for new facility, to address emerging employee issues and remain involved through integration process.
7. Provide ambassador training for members of transition team and their designees who will be spending time at the new facility.

Thanks to Al Himegarner, a member of SHRM's Employee and Labor Relations Committee, for contributing this paper. It is intended as information, and is not a substitute for legal or other professional advice.

For more information on the role of HR in mergers and acquisitions, please see the SHRM Foundation book ["Making Mergers Work"](#)

BALANCED SCORECARD BASICS ON IMPLEMENTATION

By Valerie E. Pike, MBA

December 2000
Reviewed November 2002

Executive Summary

The balanced scorecard is a management tool designed for organizational development that provides a concise picture of the overall organization in four quadrants: **financial goals, customer perspective, internal processes** and **learning and innovation**. All metrics should link back to key success factors and represent a balance among all stakeholders.

Because a balanced scorecard initiates a change process, many stumbling blocks can occur in implementation without strong leadership and top-down support. Experts suggest that organizations focus first upon results-based measures and then evolve into a "change-ready" culture. Identification of drivers and cause and effect relationships is essential to link short and long-term goals. Ongoing efforts to examine and re-examine strategies in an "if-then" format will help align strategies.

The most successful programs have involved use of carefully planned scorecards for projects or units of manageable size and scope. Scorecards should be well understood by all employees and backed by strong leaders. Best practices identified include: 1) the human resources scorecard design and implementation process designed by GTE, 2) Washington State's human resources scorecard and their

understandable, inexpensive power point employee training presentation, 3) an HR assessment for decentralized HR offices designed by the U.S. Department of Transportation and 4) the Texas State Auditor's Office draft guide to scorecard development containing excellent models and their ongoing real-time training.

Organizations must develop the scorecard to fit their needs. Major challenges occur when developing measures, simplifying the process, handling resistance to change, building in flexibility, communicating organizational weaknesses, gathering data, adapting technology to the process and benchmarking. Considerable time and expense is customarily invested to maintain top management support, keep the scorecard current, train staff and to maintain a positive organizational culture. Organizations that have not involved employees have not achieved desired results.

Background

The balanced scorecard is a management tool for organizational development and incentive programs developed by Robert Kaplan and David Norton in 1992. It is designed to give managers a fast, concise and comprehensive picture of both financial and operational measures. Ideally, a small number of critical measures are summarized in one management report. The process simultaneously allows significant operational areas to be examined to see whether one result may have been achieved at the expense of another.

Business consultants on organizational change, management and organizational development advocate that the scorecard is the only method for survival in today's environment. They claim that businesses must develop an overall method of measuring up to the competition and of adapting quickly to environmental conditions (e.g., demographics, economy, technology). Detailed environmental scanning, competitive analysis and meticulous ongoing scorecard planning is encouraged.

The scorecard presents the big picture while allowing managers to view critical operational factors and their interrelationships with current and future performance in mind. Emphasis is on the organizational vision and long-term success. (Robert Kaplan and David P. Norton, "The Balanced Scorecard-- Measures that Drive Performance," *Harvard Business Review*, January-February, 1992.)

The balanced scorecard contains four main measurement categories or quadrants as follows:

Category	Key Concepts & Basic Measures
Financial Goals	<i>How do we look to stakeholders?</i> A range of measures from traditional accounting measures to sophisticated value-added measures linking managerial goals to stakeholder interests.
Customer Perspective	<i>How do customers see us?</i> Responsiveness, quality, value added to customers through services or products, number of repeat customers, fewer errors, etc. See that surveys and questionnaires have an acceptable rate of return and validity.
Internal Processes	<i>What must we excel at?</i> Performance in operations or production.

Learning and Growth Or Innovation	<p><i>Can we continue to improve and create value?</i></p> <p>How the organization develops and improves employee skills, knowledge, technology and information systems.</p>
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Balanced scorecards are being used successfully to measure performance on both a broad and narrow scope in the public and private sectors. Scorecards are being designed and implemented for varied purposes, for example:

- The State of Washington uses scorecards to measure overall organizational progress in line with strategic targets for the entire state.
- The Texas State Auditor's Office uses scorecards to measure progress on project management.
- GTE Power Systems uses a scorecard to measure web site usage and business conducted over the Internet at GE Power Systems. (Michelle Neely Martinez, "Get Job Seekers to Come to You," *HR Magazine*, August 2000.)

Identification of Drivers and “Cause and Effect” Relationships

True drivers for organizational performance should be identified for each category. Determination of drivers can be difficult. It is critical to expose key performance drivers because they provide insight as to what is at the heart of the organization. After key drivers are identified, cause and effect relationships must be pinpointed. Customized scorecards can be developed for all business levels right down to each individual. (McKenzie & Shilling, "Avoiding Performance Measurement Traps: Ensuring Effective, Incentive Design and Implementation," *American Management Association*, July/Aug., 1998.)

In 1996 Kaplan and Norton set forth a vision and strategy model for the scorecard. After constructing over 100 scorecards, they concluded that financial and non-financial measures should originate with the unique strategy of a business unit for future success. Measures should relate specifically to desired results. The scorecard must provide a clear picture of what is needed for long-term success.

Norton and Kaplan stress the benefits of organizational learning and growth that can be achieved through use of the innovative quadrant on the scorecard. Continuing to examine cause and effect relationships and continually examining alignment with strategy are also recommended as best practices. Strategy may be set forth in an "if/then" format. For example, we could strategize that if we train headquarters staff about the employee suggestion award program, then they can teach the regional staff. If regional staff knows more about the suggestion program, then they will submit more suggestions. If we receive more suggestions, then the organization will save more money. In this case, measurements on training headquarters staff, the knowledge of regional staff about the program, the number of suggestions submitted and the amount of money saved can be taken for the scorecard. An innovative target measure may be to develop an educational web page, paperless process or a new focus group. Measures on drivers of performance unique to a business unit are essential for short-term review of progress. Kaplan & Norton also encourage forecasting a link from long-term to short-term financial measures so that the staff does not become discouraged by a long-term financial goal that may not reflect improvement over the short run. Subjectively and qualitatively building links from each non-financial measure to a financial measure can test the anticipated chain of drivers and outcomes. In this way strategies can keep pace with the external environment and the scorecard

becomes a learning process. (Robert S. Kaplan and David P. Norton, "Linking the Balanced Scorecard to Strategy," *California Management Review*, Vol. 39, No. I, Fall, 1996.)

In *Keeping Score*, Mark Graham Brown states that the most important point to remember is that all metrics link back to key success factors and business fundamentals necessary for organizational success. All measures should represent a balance between the needs of stakeholders, customers and employees. In addition, measures should link the past and the future to demonstrate how well progress is being made towards the long-term vision. (Mark Graham Brown, *Keeping Score*, AMACOM, Quality Resources, 1996: 41-52.) Mr. Brown's Macro Process Model illustrates how to tie processes to performance. This illustrates how to be certain that all aspects of inputs, processing systems, outputs and outcomes relate to each long-term goal (*Keeping Score*: 96.)

Implementation Dos and Don'ts

In 1996, KPMG and a European professor engaged in a study of seven European companies that had implemented scorecards. Only 30 percent had achieved their original stated goals; however, the majority of them were satisfied with the results. KPMG concluded that a balanced scorecard is an expensive way to raise awareness. As a result, KPMG designed "The Ten Commandments of Scorecard Implementation." The commandments may be summarized in a do/don't format as follows:

Do:

- Know what you hope to achieve.
- Use the scorecard for implementation of strategic goals.
- Ensure goals are in place before the scorecard is implemented.
- Ensure that at least one top-level non-financial sponsor and line managers back the project.
- Implement a pilot before introduction.
- Carry out a pilot for each business unit before implementation for customization.

Don't:

- Use the scorecard for top-down control.
- Standardize the project with ready-made scorecards.
- Ignore training and communication.
- Overcomplicate the process or strive for perfection.
- Underestimate the extra administrative workload and cost.
- Leave the process to accountants or without top-down support.

(Liz Fisher, "Thou Shalt Not Fail, Balanced Scorecard Implementation, 10 commandments from KPMG," *Accountancy International*, September 1998.)

Avoid Balanced Scorecard Traps

All expert opinions agree that an organization must be clear on what it plans to achieve and the benefits that will be gained before beginning the process. (Paul McCunn, "The Balanced Scorecard . . . The Eleventh Commandment," *Management Accounting: Magazine for Chartered Management Accountants*, Vol. 76, Issue 11, December 1998.)

Managers must:

- Be certain that goals are consistent and compatible. For example, goals for fast production and developing more innovations may confuse staff. See that long-term and short-term goals are consistent.
- Allow time for communicating goals and measures. Allow time for obtaining feedback from employees. Basic scorecard structure may take five-six months to develop with total completion in about one year.
- Correctly determine weights and leverage for each measure.
- Combine implementation with interaction, communication and good management.
- Measure the root of the issue that is within the control of program participants; for example, to measure customer satisfaction, use number of repeat customers, fewer errors, etc. Satisfied customers may not always complete a survey.
- Focus on fewer overall measures.

(McKenzie & Shilling, "Avoiding Performance Measurement Traps: Ensuring Effective Incentive Design and Implementation," *American Management Association*, July/Aug. 1998.)

Scorecard Implementation in Government

Jonathan Walters, author and editor of *Governing Magazine*, points out that most governmental agencies must measure performance to comply with the federal Government Performance and Results Act (GPRA). Measures are essential to attain federal funding, to attain more flexible laws or regulations, to attain staffing and for survival of any organization in today's environment. (Jonathan Walters, *Measuring Up*, Washington, D.C.: Governing Books, 1998.)

Walters discovered that while regular and targeted training and technology upgrades are crucial, many jurisdictions have applied the scorecard concept minus the innovation dimension due to lack of funds. One example is found with the City of Seattle where a performance framework has been developed to provide a big picture triangle. Its dimensions include customer satisfaction, good business practice and working environment (City of Seattle, *Creating a High Performance Program: The Performance Framework, Performance Perspective*, November 8, 1996, <http://www.ci.seattle.wa.us/audit/pp5.htm>.)

When public agencies try to implement the scorecard, they develop their own philosophy on how to do it. This is why some claim that it is a highly valuable management tool while others see it as a complex and redundant measure of internal operations.

Walters sets forth the following as examples of public sector success with the scorecard:

- Washington State recently applied and rendered successful results where multiple agencies were required to reach agreement about fundamental goals and measures on a salmon recovery effort. To get the team on track the question was asked, "If you were one agency devoted to recovering salmon, what would your internal performance measures look like?"
- Minnesota's Department of Revenue set voluntary compliance with state tax laws as a departmental goal. They wanted to encourage and support ways to reach out to taxpayers. They reviewed the basic tax policy and internal processes to determine if they encouraged compliance. The department also examined whether the staff felt equipped to respond to the new goal.
- Charlotte, North Carolina's city manager warns that the scorecard is not a new way of doing business, but should identify what you want done and how to accomplish it. Charlotte has now connected bottom-line results with whether citizens feel well served with the way departments were organized and with whether staff felt that they have the necessary skills to meet customer satisfaction goals to run smooth departments. These results are in line with the city's basic performance goals.
- The City of Charlotte's Department of Transportation designed a scorecard that covers customer, finance, internal processes and HR development. The city surveyed customers about service and measured commute times. Financially it compared costs to other jurisdictions and internally instituted activity-based costing analysis for jobs and projects. In human resources, a survey of employees explored whether the employees felt they had the skills and management support to do their jobs well and to accomplish goals.
- The Texas State Auditor's Office is implementing a scorecard approach to management. The scorecard encourages consistency in management in alignment with the office's mission.

Government models for the scorecard often emphasize customer satisfaction in lieu of a concentration on profits in private industry models. This complicates the standard scorecard process for public sector implementation. Consideration of financial and social cost can make implementation more difficult in law enforcement or regulatory agencies.

The balanced scorecard must be well understood throughout the organization. The tendency to focus upon internal processes must be avoided. Results should be communicated to all employees to achieve understanding and real value-added. To add value and avoid pitfalls, governmental organizations are advised to focus upon results-based measures first then evolve into a scorecard culture. (Jonathan Walters, "The Buzz Over Balance," *Governing Magazine*, May 2000.)

Best Practice Research: Applying the Balanced Scorecard

In July and August of 2000, this writer contacted managers and project leaders implementing or considering implementation of a balanced scorecard. GTE was contacted because they won the 1999

Optimas award for HR scorecard implementation. We then searched for public sector implementation of scorecards in human resources.

Each contact was asked if they would recommend a best practice model, in particular, a best practice balanced scorecard that could be customized to HR needs. Additional questions asked were as follows:

- How did they offset the cost of a balanced scorecard project?
- Whether numbers were compared historically, through benchmarking, or both?
- Whether customer surveys were relied upon and how were they examined for errors? Who conducted and interpreted surveys & how they were conducted, e.g., online, etc.?
- Whether balanced scorecard software was used and if they recommend a vendor or consultant?
- What results were achieved in human resources with their scorecard?
- Whether incentives or employee performance was/will be tied to the scorecard?
- What is the single most important thing someone should remember in implementation of a scorecard?

Few complete public sector examples were found that could be considered best practices in human resources. The projects outlined below have been selected as best practice examples for the following reasons:

- GTE's private industry HR award-winning scorecard has rendered the most positive results. GTE easily offset the costs of the project by offsetting dollars saved on retention, hiring, grievances and has experienced value-added in human resource management. The corporation uses Panorama PbViews software and a continual process for strategic alignment with quarterly reviews and updates. This system tracks benchmarks and historical data. In addition it is capable of applying weights to measures.
- Washington State's HR scorecard was developed quickly, offered simplified training for staff and achieved positive results using existing Office 97 software. The scorecard was implemented statewide due to a governor's initiative in a very efficient and economic manner. Staff was trained with an understandable and inexpensive Power Point example. Washington verifies validity on survey reports with a state college. Results have been achieved in reduction in hiring time, flexibility of the classification plan and fewer grievances.
- The U.S. Department of Transportation, Office of the Secretary, Department of HR Management project is included as a best practice example due to an HR self-assessment they have developed for decentralized HR offices.
- The Texas Office of the State Auditor has vast experience with performance audits. This office has extensively studied the balanced scorecard process in line with governmental goals and organizational need. They have compiled a useful booklet with excellent models explaining the organizational scorecard process adapted to the public sector that may be regarded as a best

practice approach for both employees and managers as a comprehensive tool for implementation.

Advantages/Disadvantages to Scorecard Implementation in the Public Sector

The following key points set forth as advantages and disadvantages were identified as a result of this project:

Advantages	Disadvantages
Measures can be designed to compare to other organizations for benchmarking.	Scorecard development, continuous identification of drivers and establishing connections between financial and nonfinancial measures is time-consuming and creates an additional workload.
A scorecard provides stability and adaptability for an organization to sustain political and leadership transitions.	Offsetting the cost of implementation may be difficult over the short term.
Linking financial and non-financial measures together aligns strategies to common goals.	The scorecard process is complex. It may take two or three training sessions to fully understand it. Materials must be understandable to employees at all levels.
Builds and strengthens culture where staff, unions and management need to work toward common goals.	Scorecards initiate organizational change; thus there is resistance. This necessitates communication and involvement of all staff. A communication plan is recommended.
Strategies and measures are clear and communicated to staff at all levels.	How the scorecard is put together and how it is utilized is unique to each individual organization. Learning and growth or innovation is a desired quadrant. Flexibility when selecting measures is imperative.
Managers and staff are able to identify issues and form solutions before matters are out of control or too large to tackle.	Exposes organizational weaknesses and communicates them for all to see.
Scorecard process continually examines the external environment adapting organization/unit to external changes rapidly.	Top management must be supportive of the process, the costs, the time and the workload involved. Managers must maintain communication with staff.
Strategic learning/knowledge networks are built within the organization. Those closest to the customer have been found to achieve breakthroughs in customer service and process improvements.	Private industry scorecard models are based upon profits. Public organizations must base them on a mission, e.g., customer service.
Computerized scorecards or dashboards can reach all employees quickly.	Computer capability for all employees to view scorecards at least quarterly is recommended as a "best scorecard practice." Employees should have ability to access updated data quickly and regularly to avoid discouragement.
Benchmarking with other states/public departments in similarly situated or best-	Benchmarking comparisons must be made upon reliable data with standard data definitions. Government

performing states allows comparative analysis for setting targets.	organizations such as the International Personnel Management Association now keep benchmarking information on states and some standard data definitions. Consultants are recommended to help compare "apples to apples" when benchmarking.
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Conclusion

Success of the scorecard process requires strong leadership and organizational acceptance, communication and innovation. Scorecard goals must be customized and drivers and links between cause and effect relationships must be carefully examined on a regular schedule. Flexibility must be exercised to establish proper measures to drive appropriate behavior. Organizational culture and top management commitment determine the degree of success an organization will achieve to implement the scorecard concept. One former federal director of strategic planning who now implements balanced scorecard systems as a consultant advises: "It's about management, strategy and organizational change first; measurement and technology are second." (Howard Rohm, e-mail hroh@mindspring.com, Aug. 3, 2000.)

Major obstacles to implementation include the variety of activities in state government, the complex nature of the scorecard process, management reluctance or attitude that the scorecard is "just another management fad" and the failure of employees to see "what's in it for me." Considerable time and expense must be invested to maintain top management support, to develop a successful scorecard and to train staff and managers at their own levels to achieve understanding. Because the scorecard will effectuate change, it is also essential to involve and communicate with managers and staff. Training and communication plans are recommended. Organizations that have not managed change with employee involvement have not achieved desired results.

In summary, it may be concluded that actions that contributed to success were as follows:

1. Strong leadership supporting the process.
2. Top-down support.
3. Identifying key areas, drivers and strategies that will lead to cost savings or otherwise fulfill the mission of the organization.
4. Facilitating review of surveys and data by experienced statisticians to demonstrate credibility of the process.
5. Establishing meaningful comparison of historical data.
6. Comparing accurate figures to benchmarks.
7. Keeping initial balanced scorecard training simple to achieve understanding by all employees.
8. Sharing scorecard targets and information with all staff at all levels.
9. Using Baldrige assessments or customized HR assessments.

10. Implementing change management techniques with scorecard implementation, e.g., over-communicating, ongoing, real-time training and employee involvement.
11. Understanding that the scorecard elicits resistance and knowing that resistance to change is bound to occur.
12. Expecting a culture change first then numerical results second.
13. Building flexibility into the system to adjust targets after implementation.

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<http://www.nwlink.com/~donclark/hrd/hrdlink2.html>

<http://www.qpr-tools.com/>

<http://www.ergometrics.com/>

<http://www.em.doe.gov/bch/balance.html>

<http://www.c3i.osd.mil/org/bpr.html>

<http://www.pbviews.com/>

http://www.btnonline.com/db_area/archives/2000/06/00062612.htm

<http://w3.corvu.com/>

http://www.windnet.com/mki/books/business/the_balanced_scorecard.html

<http://scorecardsolutions.com/>

<http://www.management.mcgill.ca/course/policy/276637/BALCARD4/tsld007.htm>

<http://oamweb.osec.doc.gov/bsc/>

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Thanks to Valerie E. Pike, MBA for contributing this article. It is intended as information only and is not a substitute for legal or professional advice.

QUALIFIED DOMESTIC RELATIONS ORDERS

By Mary Moriarty

October 1998
Reviewed May 2001

What is a QDRO?

Normally, all tax qualified retirement plans, such as pension plans and 401(k) plans, cannot be assigned, sold, transferred, pledged or garnished. However, there is an exception to this. A qualified domestic relations order, or QDRO as it is commonly called, can provide that a portion of the

participant's retirement benefit be paid to someone else. A qualified domestic relations order is a court order that provides for a separation of pension plan/retirement plan assets for the benefit of an individual other than the participant. Within the context of QDROs, this individual is referred to as the "alternate payee." Normally, the alternate payee is the spouse or, more likely, the ex-spouse of an employee. (But a QDRO can provide for payment to someone else such as children.)

Created initially with the passage of the Retirement Equity Act of 1984, a QDRO basically recognizes that certain marital property (in this case, pension/retirement assets) are set up for the benefit of both the participant and the spouse and that, in the event of a divorce, these assets can be viewed as belonging to both the participant and ex-spouse. A "qualified" domestic relations order stems from a domestic relations order or DRO. Technically, a domestic relations order is a judgment, decree, or order that: 1) relates to providing child support, alimony payments or marital property rights to the spouse, ex-spouse, child or other dependent and 2) is made pursuant to state domestic relations law. [Source: Internal Revenue Code subsection 414(p)]. A DRO is normally issued due to divorce or a court order for support payments.

A qualified domestic relations order is a court-approved domestic relations order that requires the plan administrator to segregate assets in accordance with the order. Under federal law, it is the plan administrator who is the party responsible for determining whether a DRO is a QDRO. Therefore, it is crucial that a plan administrator be familiar with the requirements of a qualified domestic relations order. (Simply because an attorney has drafted it and a court has approved it does not make it a qualified domestic relations order.) For the order to be qualified, it must meet statutory requirements. To assist in this determination, there should be administrative procedures in place that provide for a systematic approach to handling such orders. This will minimize the possibility of processing a "nonqualified" domestic relations order—that is, determining that a domestic relations order is qualified when, in reality, it is not. Processing a non-qualified order can be considered grounds for disqualifying the plan from its tax-qualified status. Even if this does not come about, the improper implementing of an order would result in the plan improperly paying benefits and can also lead to litigation by the participant and alternate payee.

QDRO Provisions

Unfortunately, there is little guidance from the IRS on the administration of QDROs. However, there are specific guidelines as to what is considered a qualified domestic relations order. For a domestic relations order to be considered a qualified domestic relations order under Section 414(p) of the Internal Revenue Code, it must state:

- The name and last known mailing address of the participant and of each alternate payee covered by the order.
- The amount or percentage of the participant's benefits to be paid or the manner in which that amount or percentage is to be determined.
- The number of payments or period to which the order applies.
- Each plan to which the order applies.

In defined benefit plans, the QDRO should also address whether the alternate payee will have rights of a spouse with respect to a qualified joint and survivor annuity—that is, whether the alternate payee will

have rights of a surviving spouse if the participant dies prior to the commencement of the participant's benefits.

The QDRO cannot:

- Require a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan.
- Require a plan to provide increased benefits.
- Require the payment of benefits to an alternate payee that are required to be paid to another alternate payee.

Keep in mind that, from a plan administrator's perspective, it may prove beneficial that the plan allow alternate payees to receive their benefits as soon as possible (assuming that the QDRO provides for that form of payment). Some plans only provide that benefits be paid at the time the participant becomes eligible to receive payments. However, it may help minimize record keeping and administration by paying out alternate payees as soon as possible. A plan can be amended to allow an alternate payee to receive a distribution as early as possible. This can assist in the administration of the plan by allowing distributions to begin without having to monitor the retirement or separation date of the participant to commence benefits to the alternate payee.

Sample Language

In December 1996, the IRS issued Notice 97-11 providing sample language for qualified domestic relations orders. While the notice does not provide a model or template, a plan sponsor who does not have its own model QDRO could distribute the notice when inquiries are received. The IRS did not provide specific model language due, in part, to the fact that there are differences in types of plans and specific plan features. The Notice did provide guidance and some basic concepts. It identified two methods to divide a benefit: A "separate interest" QDRO gives the alternate payee a separate interest from that of the participant. This can provide for the alternate payee to determine how and when the benefits are to be paid. A "shared interest" QDRO provides for a split of benefit—meaning that the alternate payee can only receive benefits in the same form as elected by the participant and only at the same time as the participant.

Tax Treatment

A QDRO cannot change the tax treatment of plan distributions—the alternate payee who is a spouse or former spouse is responsible for taxes upon payment. (Generally, the participant is responsible for taxes on distributions to any other qualified alternate payee.) However, the alternate payee is exempt from the 10 percent penalty tax that is normally attached to premature distributions from a plan; that is, distributions made before age 59. The alternate payee who is the spouse or ex-spouse can also choose to have the distribution rolled over into an IRA or to another employer plan that accepts rollovers.

****Administrative Costs**

Prior to 1994, a number of plans were charging the administrative costs associated with processing a QDRO to individual participants. However, in 1994, the issue of fees was addressed by the Department of Labor which stated that "the Department has taken the position that pension plans may not impose a

fee or charge on a participant or alternate payee (either directly or as a charge against a plan account) in connection with a determination of the status of a domestic relations order or the administration of a QDRO."

Further Resources

"Divorce Orders & PBGC"—can be obtained by calling the PBGC at 1-800-400-PBGC or via the PBGC Internet site www.pbgc.gov

"Looking Out for #2"—can be obtained by calling the Internal Revenue Service at 1-800-TAX-FORM and asking for Publication 1565 (for defined contribution plans) or Publication 1566 (defined benefit plans).

"QDROs: The Division of Pensions Through Qualified Domestic Relations Orders"—can be obtained through the Department of Labor's Pension & Welfare Benefits Administration at 1-800-998-7542 or <http://www.dol.gov/ebsa/>.

****Editors note:** On May 1, 2003, the Department of Labor issued Field Assistance Bulletin 2003-3 which stated the following regarding administration fees for Qualified Domestic Relations Orders (QDRO) determinations:

“ERISA does not, in our view, preclude the allocation of reasonable expenses attendant to QDRO or QMCSO determinations to the account of the participant or beneficiary seeking the determination.

It should be noted that, pursuant to 29 CFR § 2520.102-3(l), plans are required to include in the Summary Plan Description a summary of any provisions that may result in the imposition of a fee or charge on a participant or beneficiary, or the individual account thereof, the payment of which is a condition to the receipt of benefits under the plan. In addition, § 2520.102-3(l) provides that Summary Plan Descriptions must include a statement identifying the circumstances that may result in the “. . . offset, [or] reduction . . . of any benefits that a participant or beneficiary might otherwise reasonably expect the plan to provide on the basis of the description of benefits . . .” These requirements are intended to ensure that participants and beneficiaries are apprised of fees and charges that may affect their benefit entitlements.”

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Reviewed May 2001

Thanks to Mary Moriarty of the SHRM Compensation and Benefits Committee, for contributing this paper. It is intended as general information, and is not a substitute for legal or other professional advice.

For more information on this subject, send an e-mail to the SHRM Information Center at , please [click here](#) to ask the Information Center for help.

THE WORKER ADJUSTMENT AND RETRAINING NOTIFICATION ACT (WARN)

Jose de la Cruz, JD and Robert Walters, SPHR

October 1992

Reviewed November 2002

The Worker Adjustment and Retraining Notification Act (WARN) took effect February 4, 1989. It offers protection to hourly, salaried and management employees and their families by requiring employers to give 60-day written notice before implementing actions involving mass layoffs or plant closings.

Not all plant closings or layoffs are subject to WARN's provisions. Certain thresholds must be met before the Act applies to a particular situation.

WARN is more than a simple procedural notice mechanism. There are notice requirements beyond those to affected employee groups. Plus, the Act contains complex definitions, exemptions and exceptions.

This practical guide is designed as a reference source for human resource practitioners. It contains a general explanation of the pertinent provisions of the Act, along with some examples to explain the more complex sections. This guide is not intended to serve as legal advice. Consult with an attorney before taking any action.

Who Is Covered?

The coverage provisions of the Act are some of the most simple to understand. WARN covers:

- Any employer employing 100 or more full-time employees, or
- Any employer employing 100 or more full-time and part-time employees who in the aggregate work at least 4000 hours or more per week on all employment sites.

The Act defines part-time employee as a worker who works 19 or less hours per week or who has been employed for five or less of the 12 months preceding the date on which notice is required. The 4000-hour threshold is exclusive of overtime hours.

What Events Trigger WARN's Provisions?

The triggering events of the Act are more complex than the coverage provisions. A series of calculations and analysis are generally necessary to determine if the anticipated action triggers the act's provisions under one of the exceptions.

The Act generally applies to most plant closings and mass layoff situations. WARN defines a plant closing as a shutdown, either temporary or permanent, of an entire single employment site, or one or more facilities or operating units within a single employment site, that results in the termination of employment or layoff of more than six months for 50 or more full-time employees during any 30-day period.

For example, suppose you are an employer with over 100 full-time employees. You have a warehouse operation employing 75 full-time employees within a single employment site. A plant closing occurs if during a 30-day period at least 50 employees are either permanently terminated or laid off for at least six months.

Note two things about a plant closing. First, there is no minimum workforce number requirement to consider. Second, part-time employees are excluded by definition and are not counted in the magic "50" number.

Mass layoff situations are a bit more complex. WARN defines a mass layoff as a reduction in force, not a plant closing, during any 30-day period that results in the employment loss at a single employment site for either:

- 50 or more full-time employees, if they comprise 33 percent of the workforce at the employment site; OR
- 500 or more full-time employees.

Under this definition, a reduction in workforce of 499 or fewer full-time workers is not a mass layoff if the number of laid-off workers does not equal 33 percent of the workforce at that single employment site.

Likewise, a reduction in force of at least 500 full-time workers constitutes a mass layoff, even if the number of employees affected does not represent 33 percent of the workforce at that single employment site.

Again, as in the case of a plant closing, part-time employees are excluded from the calculations in a mass layoff situation. Also take note that large employers are more susceptible to risk under the Act, because they would be more likely to lay off 500 employees.

What Constitutes an "Employment Loss"?

The term "employment loss" as used in the definition of mass layoff is a significant term to consider under the Act. Employment loss is defined as a termination of employment other than a discharge for cause, retirement or voluntary separation or a layoff exceeding six months or a reduction in work hours equal to 50 percent during each month of any six-month period.

What about situations involving relocations or mergers? Are these considered to be employment loss situations? The answer is, it depends.

Under the Act, employment loss excludes a plant closing or layoff resulting from the relocation and consolidation of all or part of the business if:

- Prior to the closing or layoff the employer offers to transfer the employee to a different site of employment within a reasonable commuting distance with no more than a six-month break in employment; OR

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

In regard to determinations with respect to employment losses, human resource practitioners beware! The Act also addresses situations involving a series of employer actions within a relatively short period of time.

Under the Act, in determining whether a mass layoff or plant closing has occurred, the employer will have to aggregate all of the employment losses at a single employment site which occur within a 90-day period. If the total layoffs exceed the minimum number under the law, they are considered to be a mass layoff or plant closing.

The only way for an employer to defend against the aforementioned presumption is to show that the employment losses are the result of distinct and separate actions and causes and are not an attempt by the employer to avoid the requirements of the Act.

The following example illustrates the above provision. Suppose you have a single site employer with 2500 workers who lays off 450 laborers on February 1. The employer next lays off 35 technicians on February 15. Thus far, the employer's actions do not invoke WARN's notice requirements because the total of 485 laid off workers is less than the 500 or 33 percent thresholds under the definition of mass layoff.

Further suppose that on March 25, the employer lays off another group of 20 employees, bringing to 505 the number of workers laid off within a 53-day period. Unless the employer can show that its actions are not related to the same cause(s) and are not an attempt to evade the law, the employer may be found to have caused an employment loss sufficient to activate coverage of the Act under the second definition of mass layoff.

Exceptions to the Law

WARN provides for situations where either no notice is required or less than 60-day notice is allowed. These situations are unique in nature and can get complicated from a practicable and legal perspective.

The Act explicitly identifies two situations under which no notice is required. These are:

o Temporary Facilities and Undertakings of Limited Duration. Closings of temporary facilities and layoff or closings resulting from the completion of a specific undertaking or project are explicitly exempted from the Act. This exemption applies **ONLY IF** the affected workers were hired **WITH THE UNDERSTANDING** that their employment was limited to the duration of the facility or project or undertaking.

o Strikes and Lockouts. A layoff or closing that amounts to a strike or a lockout is not subject to the provisions of the Act unless the strike or lockout results from an effort to avoid the Act's requirements. An employer need not provide notice of a layoff or closing when permanently replacing an employee considered to be an economic striker under the National Labor Relations Act.

WARN also stipulates three scenarios under which the 60-day notice requirement may be reduced. These are:

- o **Natural Disasters.** No 60-day notice is required if the triggering event results from natural disasters like floods, earthquakes or droughts. However, the Act also states that notice shall be given as early as practicable under the circumstances, along with a brief statement explaining why less than 60-day notice is being given.

- o **Unforeseen Business Circumstances.** The notice period requirement can also be reduced if the triggering event is a consequence of business circumstances that were not reasonably foreseeable as of the time notice would have been required. Here too, WARN requires notice as early as practicable along with an explanatory statement.

- o **Faltering Company.** The 60-day notice period requirement can also be reduced for plant closings (but not for mass layoffs) by what is called the Faltering Company exception. A faltering company is one which, at the time notice is required, is "actively seeking capital or business which, if obtained, would enable [it] to avoid or postpone the [triggering event] and [it] reasonably and in good faith believes that giving notice would preclude [it] from obtaining the needed capital or business." Again, WARN prescribes the practicable notice standard with an accompanying explanatory statement.

Examples under these three exceptions may include shutdown of part or all of an employment site due to destruction/damage resulting from an electrical storm, exorbitant and unexpected increases in raw material costs and sudden decreases in product orders, just to name a few.

A word of caution is in order. While some of the aforementioned situations are simple, others are more ambiguous. The circumstances that are more subjective in nature are more susceptible to legal risk.

Language such as "good faith belief," "actively seeking," "reasonable belief" and "reasonably foreseeable" are laced in legalese and subject to legal tests. Undoubtedly, employers availing themselves of these exceptions are likely to face judicial scrutiny of their actions.

Notice Required Upon the Sale of a Business

In the case of the sale of all or part of a business, the seller is responsible for giving notice for any mass layoff or plant closing up to and including the date of the sale. After the date of the sale, the purchaser is responsible for providing notice under the Act. WARN provides that a person who is an employee of the seller, other than a part-time employee, as of the date of the sale is considered an employee of the purchaser immediately after the date of the sale.

Who Has to Receive Notice and How?

Employers must give 60-days written notice of a plant closing or mass layoff to:

- o The union of affected employees or individual employees if not represented by a union AND

- o The state's dislocated worker units created under Title VII of the Job Training Partnership Act AND

- o The local government. If more than one unit of local government is involved, the notice must be provided to the chief elected official of the unit to which the company paid the highest taxes in the previous year.

Acceptable methods for fulfilling the notice requirement to employees include:

- o Mailing notice to an employee's last known address OR
- o Inclusion of the notice in the employee's paycheck.

The Secretary of Labor's Rules and Regulations require that notice contain the following information for notice to be effective:

- o The name and address of the affected employment site.
- o A statement whether the proposed action is a plant closing or mass layoff and whether the action is permanent or temporary.
- o Expected dates when the plant closing or mass layoff will occur.
- o Statement regarding seniority bumping rights.
- o The name, address and telephone number of a company official to call for further information.

Notice to the state's dislocated worker unit and the local unit of government should also include:

- o A list of the job classifications that may be affected by the plant closing or mass layoff and the number of employees affected AND
- o The names of the union(s) representing the affected employees.

When giving notice to the union(s) representing the affected employees, the notice should also contain the names of the employees in each job classification affected by the company action.

Extension of the Layoff Period

The Act also addresses situations where the layoff period extends for a period of time longer than originally anticipated. Under the Act, a layoff of more than six months, which at its outset was announced to be for six months or less, shall be treated as an employment loss UNLESS:

- o The extension beyond six months is caused by business circumstances (including unforeseeable changes in price or cost) not reasonably foreseeable at the time of the initial layoff AND
- o Notice is given at the time it becomes reasonably foreseeable that the extension beyond six months will be required.

Here again, you run into the legal risk of subjective tests with terms like "reasonable," "foreseeable," "unforeseeable," etc.

Enforcement of the Act

Violations of the Act may result in liability for employee's loss of pay and benefits, including the cost of medical expenses, for a period of up to 60 days, plus attorney fees and costs. This remedy is in addition to other contractual or statutory rights and remedies available to employees.

Employers also may be liable to local governments in an amount up to \$500 per day up to the ceiling of 60 days.

Conclusion

The Worker Adjustment and Retraining Notification Act places on employers a high duty of social responsibility. Its net affect is to force human resource practitioners and other corporate officials to carefully analyze and plan for the consequences of their actions.

The plant closing measure constitutes a giant step in protecting workers, families and public interests. It aims to avoid psychological trauma to workers by giving them an opportunity to seek other employment and/or training for new jobs. The law also strives to give cities and states an opportunity to explore ways of keeping companies in business, presumably to the benefit of all concerned.

Only 49 percent of employees in the total U.S. labor force are covered by WARN's provisions because of the Act's 100-employee threshold. But even with its limitations, failure to comply with the law is sure to result in disruptive encounters, if not costly litigation.

This article is intended to provide information, and is not a substitute for legal advice. Special thanks to Mr. Jose de la Cruz and Mr. Robert J. Walters, members of SHRM's Employee and Labor Relations Committee for writing this paper.

For more information on this subject, send an e-mail to the SHRM Information Center at , please [click here](#) to ask the Information Center for help.

MEDIATION AND ARBITRATION OF EMPLOYMENT LAW CLAIMS

April 2001

Reviewed August 2002

SHRM's Employee and Labor Relations Committee (ELRC) has been studying alternative dispute resolution (ADR) and its application to today's workplace. To many human resources professionals--and the organizations they serve--ADR is not a well-understood concept. However, the ELRC believes that it is good HR practice to incorporate some form of ADR into every workplace.

In an effort to make ADR more concrete for HR professionals, the ELRC has prepared the following "memorandum" from a fictional senior vice president of HR to his/her CEO describing HR's

recommendations for incorporating several forms of ADR into the "XYZ Company's" culture. The ELRC hopes this memo is helpful to HR professionals in analyzing the issues surrounding ADR in their own organizations.

To: CEO
XYZ Company

From: Senior V.P. Human Resources,
XYZ Company

Re: Why XYZ Company Should Utilize Alternative Dispute Resolution in Resolving Employment-Based Disputes

XYZ Company is a non-union employer that has experienced an increasing number of employment lawsuits and employment-related charges in the past 10 years. Many of these actions have required the company to spend hundreds of thousands of dollars in legal fees in its defense and additional monies to resolve the actions. You have asked Human Resources to assess ways to minimize the number of lawsuits and charges filed against the company and thereby minimize the costs associated with such actions.

Various civil rights laws, including the Americans with Disabilities Act of 1990 and the Civil Rights Act of 1991, along with greater press coverage and employees' awareness of their rights, led to an explosion of employment law claims over the last decade. The U.S. Equal Employment Opportunity Commission (EEOC) alone received over 75,000 discrimination charges in 1999. More significantly, the cost of settling an EEOC charge has increased by almost 79% since the early 1990s. Of course, EEOC charges are only a small fraction of the types of employment actions that may be brought against employers. Many employees file a charge with the EEOC and then file a lawsuit. The increase in XYZ Company's litigation docket is consistent with the increase in the number of discrimination lawsuits filed nationwide — it has more than tripled during the 1990s. Approximately 90% of those lawsuits are ultimately settled — but only after significant legal expenses are incurred, internal resources expended and, sometimes, negative publicity has hurt XYZ. Of the lawsuits that do not end up settling but rather proceed to jury trials, plaintiffs were successful in approximately 60% of cases. In those cases, the plaintiffs usually recovered back pay, front pay, compensation for emotional pain and suffering, punitive damages and their attorneys' fees.

In light of the rapid growth in employment discrimination claims, negative publicity from litigations and the high costs associated with such claims, companies are increasingly establishing alternative methods to resolve such claims short of litigation. The following summarizes how XYZ could avoid these costs.

Internal Appeals Procedures

Many companies institute internal appeals procedures as a means of resolving employee complaints before they end up as a charge with an agency such as EEOC or in litigation. Such procedures typically involve a tiered structure by which the employee first discusses his or her problem with his or her supervisor; then, if not resolved, appeals to a higher level of management or a committee composed of management, employees or a combination thereof. The benefits of an internal appeals procedure are numerous. Such a procedure may improve employee morale and loyalty by creating greater due process in the workplace, provide insight into employee "hot buttons" based on an evaluation of the

frequency and nature of an employee's grievances, allow for reversal of poor management decisions and often results in a successful resolution of disputes.

There are, however, drawbacks to such a procedure. First, if such procedures are not properly drafted, they may modify an employee's at-will status and create a "just cause" standard for discipline and discharge. In addition, if an employer does not follow its procedures, it can be accused of disparate treatment and its legitimate business reasons for disciplining or discharging an employee can be discredited. These concerns can be eliminated by including appropriate disclaimer language in the procedures and by following procedures. Another drawback of instituting such procedures is that it may encourage employees to file grievances they otherwise would not file due to easy access to the program. (Of course, XYZ Company's existing anti-harassment and non-discrimination policies already encourage employees to come forward with their complaints. An internal appeals procedure would just be one more step in the complaint process.) Finally, there are some costs associated with having employees take time from their work to engage in the process.

On balance, the benefits of adopting internal appeals procedures outweigh the drawbacks given the success of these procedures in identifying and resolving grievances before they become litigation, and HR recommends that we do this at XYZ.

Mediation

Mediation is typically an informal, confidential and voluntary process designed to facilitate settlement of disputes with the assistance of a neutral mediator. Many courts and administrative agencies (including the EEOC) provide mediation services as a means of assisting parties to resolve their claims. The EEOC's mediation program, which was implemented relatively recently, has been extremely successful: 65% of the charges that go to mediation are settled. Mediation is much less formal than arbitration, although most mediation programs provide a method for selecting a mutually acceptable neutral mediator, impose limited or no costs on the employee and require the parties to submit to the mediator confidential written statements presenting the merits of their respective cases and their settlement ranges before the actual day of mediation.

The major benefit of mediation is that it provides a confidential forum in which employees can air their grievances to a neutral third party and receive opinions as to the merits of their case from the mediator. This process is often just what an employee needs to feel that he or she has been afforded due process and to agree to a reasonable settlement of his or her claim. There are very few drawbacks for an employer to engage in mediation other than the minimal cost and time required to select a mediator, prepare a mediation statement and attend the mediation. Many companies that have internal appeals procedures also have a procedure whereby employees can agree to mediate their claims before a neutral third party. The relatively high success rate of mediation in resolving claims far outweighs the drawbacks, and HR recommends we should try mediation at XYZ Company.

Arbitration

Many companies also adopt arbitration programs to resolve employment law claims. A voluntary arbitration program gives employees the option -- after they have asserted a claim -- to elect binding arbitration to resolve their claims rather than proceed in court. Although the EEOC is in favor of voluntary arbitration programs, these programs generally are not effective in minimizing the number of charges and lawsuits filed against a company. The reason voluntary arbitration programs are not effective in significantly reducing the number of charges and lawsuits filed is that plaintiff's attorneys

and employees generally believe that they will have greater success before a jury than an arbitrator. In addition, plaintiff's attorneys often seek to use the leverage of negative publicity and the prospect of a jury trial in extracting larger settlements from companies -- leverage they would not have in a confidential arbitration proceeding.

Many employers have instituted arbitration programs that require employees to enter into an agreement to arbitrate employment discrimination suits as a condition of employment. The majority of courts enforce such provisions. However, such programs have come under increasing scrutiny by the courts and are strenuously opposed by the EEOC and plaintiff's attorneys principally because they require employees to forego a jury trial. In addition, legislation has been introduced in Congress and in some states that would prohibit employers from requiring arbitration as a condition of employment.

To be enforceable under current law, an arbitration program should: (1) require each employee to sign a free-standing, individual arbitration agreement that expressly states that employment claims, including claims of discrimination and harassment, will be subject to arbitration; (2) provide employees with the same length of time to file an arbitration claim as provided under applicable employment statutes; (3) permit fair and reasonable discovery, including depositions of company employees and managers; (4) provide employees with the same statutory remedies as provided under applicable employment statutes (e.g., back wages, reinstatement, compensatory and punitive damages, and recovery of attorneys' fees); (5) provide for a neutral arbitrator or arbitration panel that is familiar with employment law; (6) allow the employee to be represented by an attorney; and (7) significantly limit the arbitration expenses to be shouldered by the employee or provide that the Company will cover the costs of the arbitration.

There are significant advantages to adopting an arbitration program. Arbitration offers far greater confidentiality concerning the claim than does a public litigation: it eliminates a jury from the resolution process and all the attendant risks to defendant employers associated therewith; it offers greater potential for a speedier resolution than a court proceeding; it offers the possibility of lower legal costs in defense of employment actions; it typically has a limited appeal process, which contributes to a speedier resolution and lower defense costs; and there typically is less acrimony between the parties in an arbitration than in a litigation.

An arbitration program that provides for a mandatory internal appeals and/or mediation process preceding the arbitration combines the benefits of non-binding dispute resolution procedures discussed above with the benefits of arbitration.

Nonetheless, there are drawbacks to adopting an arbitration program. Specifically, the easy accessibility of such a program might lead to an increase in the number of employee grievances; the risk that an outside arbitrator will "split the baby" or not strictly follow the law in resolving the claim; if not carefully drafted, such a program may be construed to limit the employer's ability to terminate employees at will; and if implemented and not carefully drafted, there is the possibility that the employee will be permitted a second "bite at the apple" in court or that the program will be deemed to be unenforceable by future legislation and/or court rulings.

Most of these down-side risks can be minimized, however, through careful drafting of the arbitration program and selection of experienced arbitrators.

Conclusion

Although there are some disadvantages associated with arbitration programs, they are outweighed by the advantages of a program that includes a pre-arbitration appeals and mediation process. Accordingly, HR recommends that XYZ Company establish this type of internal dispute resolution program to minimize the number of charges and lawsuits filed against it.

This article was prepared by SHRM's Employee and Labor Relations Committee and drafted by Paul Salvatore, Esq., Proskauer Rose LLP, New York, NY. It is intended as information only and is not a substitute for legal or professional advice.

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