I. INITIAL CONSIDERATIONS

A. Nature of transaction(s)
   1. Stock purchase
   2. Merger
   3. Asset purchase

B. Nature of parties
   1. Public or private
   2. Unionized workforce
      a. Extent of any duty to consult or bargain with employee representatives
   3. Government contractor
   4. Employee immigration visa/industry licensure/export control

C. Locations/jurisdictions at issue
   1. Any requirements that documents, agreements be prepared in local language?
   2. Be mindful of differing laws regarding data privacy

D. Redundancies or layoffs likely
   1. Who, buyer or seller, will terminate employees?
2. Under federal WARN Act, seller is responsible for providing notice of any qualifying plant closing or mass layoff that occurs up to and including the effective date of the sale; buyer is responsible after the sale. See 29 CFR §639.4(c).

E. Negotiating goals/approach

F. Timing

G. Successorship issues
   1. See further discussion in Appendix 1.

II. DUE DILIGENCE CONSIDERATIONS

A. General Questions Regarding Workforce
   1. Number of employees at each location?
   2. “At-will”?
   3. Offer letters
   4. Employment agreements

B. Number of non-employee workers at each location?
   1. Positions?
   2. What services do they perform?
   3. Contracts?
   4. Duration of service?

C. Union issues
   1. Unionized workforce?
      a. Collective bargaining agreements
   2. Union organizing activity?
   3. Work councils
   4. Transfer of Undertaking
a. Certain countries outside the U.S., e.g., European Union and Asia, have the concept of a transfer of undertaking, in which upon the sale of a business, all employees of seller may be deemed to transfer to buyer automatically upon closing under the same terms and conditions of employment of seller. In the U.K., for example, this is known as “TUPE” -- Transfer of Undertakings (Protection of Employment).

D. Employment-related litigation and administrative charges

1. Identify any and all lawsuits; status
2. Identify federal or state administrative charges (e.g., EEOC, Department of Labor, State Department of Labor, Other state agencies); status
3. Review settlement agreements
   a. Continuing obligations
   b. Effective waivers

E. Employer obligations to employees

1. Contractual payment obligations triggered by transaction (e.g., “change of control” provisions)
2. Review employment-related agreements and policies for express or implied employee rights and employer obligations

F. EEO issues

1. Statistical analysis of workforce
   a. Disparities in expected compensation/positions?
2. Review of personnel policies and procedures
3. Reporting obligations
   a. Does employer complete EEO-1 forms?
   b. Affirmative action requirements for government contractors?

G. Employee benefits issues

1. Pension Plans (“Qualified Plans”)
   a. Defined Benefit
b. 401(k)/Profit Sharing

c. Tax-sheltered Annuity (403(b))

d. Eligible Plans (457(b))

e. Others (money purchase, ESOP)

2. Welfare Plans

a. Medical/Dental/Vision

b. 125/FSA/Cafeteria Plan

c. Other Plans:
   (i) Disability
   (ii) EAP

d. Group Life Insurance

e. Severance

3. Nonqualified Plans

a. SERPs

b. Excess Benefit Plans

c. Deferred Compensation

d. Ineligible Plans (457(f))

4. Other Programs

a. Equity Compensation (Options, ESPP, Restricted Stock, etc.)

b. Bonuses

c. Commissions

d. SEPs & SIMPLEs

5. “Controlled Group” Liabilities: ERISA Affiliates

6. COBRA & HIPAA Administration

7. Other Employee Benefits Considerations
a. Confirm funding status of pension and benefit plans to avoid liability for underfunded plans

b. Compliance with IRS filing requirements (Form 5500)

c. Any claims, litigation, allegations regarding entitlement to benefits?

d. What have employees been told (or will they be told) about benefits upon the acquisition?

(i) Will seniority continue to accrue for purposes of severance, vacation benefits, etc.?

III. KEY EMPLOYMENT ISSUES

A. If unionized workforce, extent of duty to bargain with employee representatives

B. Key employee/executive agreements (e.g., employment, retention)

C. Statutory severance obligations

1. Federal WARN Act

a. Employer must have at least 100 employees.

b. 60 day advance notice (or pay in lieu of notice).

c. Plant closings -- shutdown of facility -- involving 50 or more employees during a 30-day period.

d. Mass layoffs – termination of at least 50 full-time employees constituting at least 33% of the full-time workforce at a single site of employment within a 30-day; or layoff of 500 or more employees regardless of percentage of workforce. See 29 USC, et seq., 2101; 20 CFR 639.3.

(i) Where two or more mass layoffs occur within 90 days, neither of which alone would trigger WARN, they can be combined (“aggregation principle”).

2. California WARN Act

a. Employer must have at least 75 employees.

b. 60 day advance notice (or pay in lieu of notice).
c. Plant closing, layoff or relocation of 50 or more employees within a 30-day period regardless of percentage of work force. See California Labor Code Section 1400.

(i) No aggregation principle mentioned.

(ii) Relocation is a move to a different location more than 100 miles away. See California Labor Code Section 1400.


4. Illinois WARN Act
   a. Employer must have at least 75 employees.
   b. 60 day advance notice (or pay in lieu of notice).
   c. Plant closings -- shutdown of facility -- involving 50 or more employees during a 30-day period.
   d. Mass layoffs – termination of at least 25 full-time employees constituting at least 33% of the full-time workforce at a single site of employment within a 30-day; or layoff of 250 or more employees regardless of percentage of workforce.

   (i) Aggregation principle observed.

5. New Jersey WARN Act
   a. Employer must have at least 100 employees.
   b. 60 day advance notice (or pay in lieu of notice).
   c. Plant closings or relocation (50 or more miles) involving at least 50 full-time employees.
   d. Mass layoffs – termination of at least 50 full-time employees constituting at least 33% of the full-time workforce at a single site of employment within a 30-day; or layoff of 500 or more employees regardless of percentage of workforce.

   (i) Aggregation principle observed.

6. New York WARN Act
   a. Employer must have at least 50 employees.
   b. 90 day advance notice (or pay in lieu of notice).
c. Plant closings or relocation (50 or more miles) involving at least 25 full-time employees.

d. Mass layoffs – termination of at least 25 full-time employees constituting at least 33% of the full-time workforce at a single site of employment within a 30-day; or layoff of 250 or more employees regardless of percentage of workforce.

(i) Aggregation principle observed.

D. Contractual severance obligations

1. ERISA severance plans
   a. Federal court jurisdiction
   b. No jury trial
   c. Preemption of state law
   d. “abuse of discretion” review standard
   e. No punitive damages, only equitable remedies

2. Employment agreements
   a. Change of control provisions
      (i) Single trigger
      (ii) Double trigger
   b. Release as a condition of receipt of any payments or benefits

E. Exempt/Non-exempt employee classification

1. Fair Labor Standards Act
   a. “Primary duty” must be exempt in nature.

2. California law
   a. Exempt employee must be “primarily” engaged in exempt duties, which means more than 50% of the time.

F. Independent contractor/employee classification

1. I.R.S. 20 factors
G. Statutory tax considerations

1. 409A
   a. Deferred compensation
   b. “Good Reason” safe harbor definition

2. 280G
   a. Under 280G, a golden parachute payment is triggered upon a change of control and equals or exceeds three times the recipient’s “base amount,” i.e., average annual compensation over the five taxable years ending before the year in which the change of control occurs.
   b. Legal effect is that company denied compensation deduction for parachute payments. See 26 CFR 1.280G-1. In addition, Section 4999 imposes a substantial 20% excise tax on “excess parachute payments.”

H. Restrictive covenants

1. In the United States, post-termination non-competition and non-solicitation agreements generally are enforceable under the rule of reason.

2. Handful of states, e.g., California, generally do not enforce post-termination restrictive covenants.
   a. In California, for example, post-termination restrictive covenants generally are void and unenforceable except when entered into in the context of a sale of business and subject to other requirements (individual bound must be a partner in a partnership, a member in an LLC, or a “capital stockholder”). See Business & Professions Code section 16600, et seq.
   b. In California, post-termination no hire provisions are unenforceable. Recent court decisions question extent to which customer non-solicitation agreements enforceable. No decisions regarding continuing enforceability of employee non-solicitation agreements.
Appendix 1

Successorship Doctrine – Overview (Employment) ³

I. SUCCESSORSHIP GENERALLY

General Rule — Successor Not Liable. When one company sells or transfers some or all of its assets to another, the purchaser does not become liable for the debts and liabilities, including torts, of the seller.

Exceptions to General Rule — Generally, state common law recognizes four main exceptions to the standard of insulating the buyer of assets from the liabilities or obligations of the seller. ⁴

A purchaser may be liable for the obligations of the selling corporation in any one of the following four situations:

1. Agreement — where the purchaser expressly or impliedly agrees, to assume the liabilities of the predecessor;

2. De Facto Merger — where the transaction amounts to a consolidation or merger of the seller and the purchaser, as evidenced by: similar operation of business, same location of business, same shareholders before and after the transaction, ⁵ dissolution of the predecessor corporation, or where the sale of assets leave the parties in much the same position as if a formal merger had taken place;

3. Mere Continuation — where the purchaser simply resembles a reorganized version of its predecessor rather than an entirely new corporate entity or where there are only negligible differences between the predecessor and successor companies, their shareholders, officers, or management;

4. Fraudulent Transfer — where the transaction has been entered into fraudulently or in an attempt to avoid successor liability.

These four exceptions creating successor liability have received wide application throughout the law, both at the state and federal levels. ⁶ Such doctrines have been applied to a variety of substantive areas of law. ⁷

---

³ © 2011 Morrison & Foerster All Rights Reserved
⁵ This usually occurs when the purchasing corporation pays for the assets of the seller corporation with its own stock, leaving the predecessor’s shareholders becoming owners of the successor corporation.
⁶ Blumberg, supra n.1 at 370.
⁷ Id. at 366.
II. EMPLOYMENT AND LABOR LAW

A. The Growing Extension of Successor Liability Doctrine to Labor Law

In the employment context, courts in recent years have begun to take a more employee-protective view of the kinds of operational changes that normally preclude a finding of successorship.\(^8\) Virtually all employment law statutes do not discuss whether the liabilities it creates may be passed on to innocent successor employers. Thus, the courts have recognized that extending liability to successors will sometimes be necessary in order to vindicate important statutory policies favoring employee protection.\(^9\)

Federal courts have followed a growing trend of extending successor liability in the employment context. In the seminal case, \textit{Golden State Bottling Co. v. NLRB}, the U.S. Supreme Court held that an employer or buyer who acquires substantial assets of a seller, and continues the seller’s business without substantial change, and who has notice of a violation of the National Labor Relations Act (NLRA), can be required under the successor doctrine to remedy the violations.\(^10\) This case opened the floodgates for federal courts to find successor liability in the employment context. In \textit{EEOC v. MacMillan}, the Sixth Circuit extended the rationale set forth in \textit{Golden State Bottling Co.} to the field of Title VII cases and also presented a nine-factor list for courts to use in determining successor liability for labor violations.\(^11\) The court in \textit{Musikiwamba v. Essi, Inc.} extended the successor liability into the realm of 42 U.S.C. § 1981 claims.\(^12\) In 1989, the Ninth Circuit extended successor liability under the Age Discrimination in Employment Act (ADEA) in \textit{Criswell v. Delta Air Lines, Inc.} \(^13\) In \textit{Steinbach}, the Ninth Circuit extended successorship liability doctrine to the Federal Labor Standards Act (FLSA).\(^14\) Most recently, in \textit{Grimm v. Healthmont, Inc.}, the court extended Employee Retirement Income Security Act (ERISA) liability to successor employers under federal common law.\(^15\)

The Ninth Circuit made clear that “federal courts have developed a federal common law successorship doctrine that now extends to almost every employment law statute.”\(^16\) At this point successor liability for employment violations has grown even broader than the traditional state

---

\(^9\) \textit{Steinbach}, 51 F.3d at 845; \textit{Wheeler v. Snyder Buick, Inc.}, 794 F.2d 1228, 1237 (7th Cir. 1986). (stating that where employee protections are concerned, "judicial importation of the concept of successor liability is essential to avoid undercutting Congressional purpose by parsimony in provision of effective remedies").
\(^11\) \textit{EEOC v. MacMillan}, 503 F.2d 1086 (6th Cir. 1974) (These factors are: (1) whether the successor company had notice of the charge; (2) the predecessor's ability to provide relief; (3) whether there has been substantial continuity of business operations; (4) whether the successor uses the same facility; (5) whether the successor uses the same or substantially the same work force; (6) whether the successor uses the same or substantially the same supervisory personnel; (7) whether the same jobs exist under substantially the same working conditions; (8) whether the successor uses the same machinery, equipment, and methods of production; and (9) whether the successor produces the same product).
\(^12\) \textit{Musikiwamba v. Essi, Inc.}, 760 F.2d 740, 750 (7th Cir. 1985).
\(^13\) \textit{Criswell v. Delta Air Lines, Inc.}, 868 F.2d 1093, 1094 (9th Cir. 1989).
\(^14\) \textit{Steinbach}, 51 F.3d 843.
\(^16\) \textit{Steinbach}, 51 F.3d at 845.
common law exceptions. In fact, few courts have applied state common law successor liability doctrine for state labor law claims. Instead, in cases concerning state or federal labor law claims most courts have adopted the federal common law approach to successor liability for labor violations.

B. Federal Common Law Successor Liability for Labor Law Claims

The Ninth Circuit created a widely accepted three-part balancing test under which successor liability may attach in the employment context:

- Bona Fide Successor – whether the subsequent employer was a bona fide successor;
- Notice – whether the subsequent employer had notice of the potential liability;
- Adequate Relief – whether the predecessor is able to provide adequate relief.

1. Bona Fide Successor

Whether an employer qualifies as a bona fide successor hinges primarily upon the degree of business continuity between the successor and predecessor. Courts primarily look at the internal workings of the business to determine whether the successor retained the essential elements of the seller’s business. Successor liability in these cases often depends on factors such as:

- whether there has been a substantial continuity of business operations;
- whether the new employer uses the same plant;
- whether he uses the same or substantially the same work force;
- whether he uses the same or substantially the same supervisory personnel;
- whether the same jobs exist under substantially the same working conditions;
- whether he uses the same machinery, equipment, and methods of production; and

---

17 EEOC v. SWP, Inc., 153 F.Supp. 2d 911 (N.D. Ind. 2001); Wheeler, 794 F.2d at 1237 (holding that Congressional intent to eliminate employment violations justified the "liberalization" of common law successorship rules "in favor of victims of . . .employment violations).  
20 Steinbach, F.3d at 846.  
21 MacMillan, 503 F.2d at 1094; Wheeler, 794 F.2d at 1236.
whether he produces the same product.

This test is extremely fact specific and must be conducted in light of the facts of each case and the particular legal obligation at issue. Thus, an employer may be a successor for some violations and not for others.\(^{22}\) If these factors are present, the courts have imposed successor liability even when there was no continuity in ownership.\(^{23}\)

### 2. Notice

Notice may be met by “actual notice, constructive notice or implied notice, or be inferred by operation of law.”\(^{24}\) The courts, however, remain unresolved as to the weight notice should have in successorship claims. Some courts have held that successorship liability is inapplicable where no employment charges were pending on acquisition and the acquiring company was unaware of any grievances.\(^{25}\) Other courts have concluded that notice may be a factor, but it is not essential.\(^{26}\) Regardless, in all cases the plaintiff has the burden of alleging that the successor had notice of the claim.\(^ {27}\)

### 3. Adequate Relief

The Ninth Circuit in *Criswell* held that “it would be grossly unfair, except in most exceptional circumstance, to impose liability on an innocent purchaser when the predecessor is fully capable of providing relief.”\(^{28}\) However, the same court, in *Bates v. Pacific Maritime Assoc.*, extended successor liability even though the predecessor may have been able to provide adequate relief.\(^{29}\)

Similar to the notice prong, courts disagree on the weight of the adequate relief prong. However, oftentimes when the seller dissolves or liquidates, courts find that “fairness requires that the successor be liable for its predecessor’s discriminatory acts, for otherwise the injured employee may be left without a party against whom the employee may assert his claim.”\(^ {30}\)

### C. Successor Liability for Employment Violations as an Equitable Doctrine

Successorship doctrine is derived from equitable principles such that fairness is the prime consideration.\(^{31}\) In the employment arena, “successor liability is applied only when necessary to further some fundamental policy in regulation of the industry or work place affected.”\(^ {32}\) In

---


\(^{23}\) Continuity in ownership may be found in cases where the composition of the shareholders of the seller is substantially the same as the composition of the shareholders of the buyer.

\(^{24}\) *EEOC v. Local 638*, 1988 U.S. Dist. LEXIS 1862 (S.D.N.Y. 1989); *Goldberg v. Rainbow Path, Inc.*, 1997 U.S. Dist. LEXIS 17082 (N.D. Ill. 1997) (stating that “a successor will not be found to have notice if it has exercised due diligence and failed to uncover the plaintiff’s lawsuit”).

\(^{25}\) Rabidue *v.* Osceola Beef Co., 805 F.2d 611, 616 (6th Cir. 1986); Desporte-Bryan 147 F.Supp. 2d 1356 (holding that the lack of notice of the employees claims at the time of the acquisition established that imposing successor liability upon the employee would be fundamentally unfair); Stevens, 433 Mich. 365.


\(^{28}\) *Criswell*, 868 F.2d at 1094.

\(^{29}\) *Bates v. Pacific Maritime Assoc.*, 744 F.2d 705, 710 (9th Cir. 1984).

\(^{30}\) *Rego v. ARC Water Treatment Co.*, 181 F.3d 396, 402 (3d Cir. 1999).

\(^{31}\) *Baker v. Delta Air Lines*, 6 F.3d 632, 637 (9th Cir. 1993).

\(^{32}\) *Bates*, 744 F.2d at 708.
assessing whether successor liability should apply in the labor context, courts place great emphases on weighing and balancing the underlying labor policies surrounding the particular statutes with the interests of the affected parties. 33

Rather than imposing a broad absolute rule, successorship liability rests on the myriad of factual circumstances and the legal contexts of each employment case. 34 Therefore, though a court will most likely use the three-part test to analyze successorship, successor liability will be determined on a case by case basis by balancing the equities of each case.

33 Steinbach, 51 F.2d at 846 (refusing to find successor liability for $100,000 in unpaid wages for a purchaser who merely leased predecessor’s assets at $600/month for 4 months).
34 Howard Johnson Co., 417 U.S. 249.
### Appendix 2

**General Provisions of the Federal and California WARN Laws**

<table>
<thead>
<tr>
<th>Federal WARN Provisions</th>
<th>California WARN Provisions (Assembly Bill 2957, Koretz)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Covered Employers</strong></td>
<td><strong>Covered Employers</strong></td>
</tr>
<tr>
<td>Applicable only to employers with 100 or more full-time employees who must have been employed for at least 6 months of the 12 months preceding the date of required notice in order to be counted. (29 USC 2101 and 20 CFR 639.3)</td>
<td>Applicable to a &quot;covered establishment&quot; with 75 or more employees full or part-time. As under the federal WARN, employees must have been employed for at least 6 months of the 12 months preceding the date of required notice in order to be counted. [California Labor Code Section 1400 (a) and (h)]</td>
</tr>
<tr>
<td><strong>Plant Closing or Layoff Requiring Notice</strong></td>
<td><strong>Plant Closing or Layoff Requiring Notice</strong></td>
</tr>
<tr>
<td>Plant closings involving 50 or more employees during a 30-day period. Layoffs within a 30-day period involving 50 to 499 full-time employees constituting at least 33% of the full-time workforce at a single site of employment. Layoffs of 500 or more are covered regardless of percentage of workforce. (29 USC, et seq., 2101 and 20 CFR 639.3)</td>
<td>Plant closing, layoff or relocation of 50 or more employees within a 30-day period regardless of percentage of work force. Relocation is defined as a move to a different location more than 100 miles away. [California Labor Code Section 1400 (c)and (d)]</td>
</tr>
<tr>
<td><strong>Legal Jurisdiction</strong></td>
<td><strong>Legal Jurisdiction</strong></td>
</tr>
<tr>
<td>Enforcement of WARN requirements through United States district courts. The court, in its discretion, may allow the prevailing party a reasonable attorney’s fee as part of the costs. (29 USC 2101, et seq)</td>
<td>Suit may be brought in &quot;any court of competent jurisdiction&quot;. The court may award reasonable attorney’s fees as part of costs to any prevailing plaintiff. The California WARN law is in the Labor Code and the authority to investigate through the examination of books and records is delegated to the Labor Commissioner. (California Labor Code Sections 1404 and 1406)</td>
</tr>
<tr>
<td><strong>Employer Liability</strong></td>
<td><strong>Employer Liability</strong></td>
</tr>
<tr>
<td>An employer who violates the WARN provisions is liable to each employee for an amount equal to back pay and benefits for the period of the violation, up to 60 days, but no more than half the number of days the employee was employed by the employer. [29 USC; 2104 (a)].</td>
<td>A possible civil penalty of $500 a day for each day of violation. Employees may receive back pay to be paid at employee’s final rate or 3 year average rate of compensation, whichever is higher. In addition, employer is liable for cost of any medical expenses incurred by employees that would have been covered under an employee benefit plan. The employer is liable for period of violation up to 60 days or one-half the number of days the employee was employed whichever period is smaller. (California Labor Code Section 1403)</td>
</tr>
<tr>
<td><strong>Notice Requirements</strong></td>
<td><strong>Notice Requirements</strong></td>
</tr>
<tr>
<td>An Employer must provide written notice 60-days prior to a plant closing or mass layoff to employees or their representative, the State dislocated worker unit (the Employment Development Department, Workforce Services Division in California), and the chief elected official of local government within which such closing</td>
<td>An employer must give notice 60-days prior to a plant closing, layoff or relocation. In addition to the notifications required under federal WARN, notice must also be given to the Local Workforce Investment Board, and the chief elected official of each city and county government within which the termination,</td>
</tr>
</tbody>
</table>

---

35 Taken from the California Employment Development Department website last visited July 4, 2011, http://www.edd.ca.gov/Jobs_and_Training/Layoff_Services_WARN.htm

sf-3016327
or layoff is to occur. (29 USC, 2102; 20 CFR 639.5) relocation or mass layoff occurs. (California Labor Code Section 1401)

**Exceptions and Exemptions to Notice Requirements**

| Regular Federal, State, local and federally recognized Indian tribal governments are not covered. (29 USC, 2102 (a); 20 CFR 639.3) | California WARN does not apply when the closing or layoff is the result of the completion of a particular project or undertaking of an employer subject to Wage Orders 11, 12 or 16, regulating the Motion Picture Industry, or Construction, Drilling, Logging and Mining Industries, and the employees were hired with the understanding that their employment was limited to the duration of that project or undertaking. [California Labor Code Section 1400 (g)] |
| The following situations are exempt from notice: | The notice requirements do not apply to employees involved in seasonal employment where the employees were hired with the understanding that their employment was seasonal and temporary. [California Labor Code Section 1400 (g)(2)] |
| There is an offer to transfer employee to a different site within a reasonable commuting distance. (29 USC, 2101 (b) (2); 20 CFR 639.5) | Notice is not required if a mass layoff, relocation or plant closure is necessitated by a physical calamity or act of war. [California Labor Code Section 1401 (c)] |
| The closure is due to unforeseeable business circumstances, a natural disaster. (29 USC, 2103; 20 CFR 639.9) | Notice of a relocation or termination is not required where, under multiple and specific conditions, the employer submits documents to the Department of Industrial Relations (DIR) and the DIR determines that the employer was actively seeking capital or business, and a WARN notice would have precluded the employer from obtaining the capital or business. (California Labor Code Section 1402.5) This exception does not apply to notice of a mass layoff as defined in California Labor Code Section 1400 (d). [California Labor Code Section 1402.5 (d)] |
| The closing or layoff constitutes a strike or constitutes a lockout not intended to evade the requirement of this chapter. [29 USC, 2103 (2)] | |