



FARELLA BRAUN + MARTEL LLP

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Employment Issues For Troubled Companies and Companies In Transition

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Program Outline

- Managing Down-Sizing And Wind-Down Issues
- WARN Act Issues And Traps For The Unwary
- Managing Employment Issues In An Asset Sale
- Liability For Unpaid Wage And Vacation Pay
- Trust Fund Tax Liability Issues
- Severance And Employee Termination Liability

Managing Down-Sizing & Wind-Down Issues

- Identifying and retaining critical employees needed during transition
 - Retention (“stay”) agreements
 - Driven by incentive pay clearly triggered by either:
 - Date
 - Event
 - Employer may opt-out early with bonus paid
 - Not enforced to prevent departures
 - Might not be enforceable in employer bankruptcy
 - Non-solicitation of employee agreements

Managing Down-Sizing & Wind-Down Issues

- Minimize “poaching” of employees
 - Effective
 - Current employees owe duty of loyalty not to solicit your employees away behind your back
 - Do not retain employees who have given notice that they are moving to a competitor
 - Ineffective
 - Anti-poaching suits are otherwise rarely potent absent exclusively predatory intent
 - The law generally prohibits no-hire agreements among competitors

Managing Down-Sizing & Wind-Down Issues

- Maximize intellectual assets
 - Assure current employees have signed NDAs which specifically define your confidential info
 - Remind terminating employees of that duty
 - Notify any competitors of your intention to enforce your rights

WARN Act Issues And Traps For the Unwary

- Worker Adjustment and Retraining Notification Act (U.S labor law), 29 U.S.C. §§ 2101 et seq.
- Many states (e.g., CA Labor Code §§ 1400) have companion provisions
- Employers w/ 100+ employees must give 60 days notice of plant closings & mass layoffs
- Triggered by employee loss of 50+ by plant closing, layoffs of 500+ employees or layoffs of 50-499 employees (if 33%+ work force)

WARN Act Issues And Traps For the Unwary

- Doesn't include employees who worked less than 6 months in last 12 month period or who work average of less than 20 hours per week (but still must get notice)
- CA WARN applies to employers with 75+ employees; no exception for part-time workers
- CA WARN requires notice of layoffs of 50+ employees
- Applies to managers and supervisors, as well as hourly wage, and salaried workers
- Also requires notice to employee representative (e.g. labor union) & local chief elected official (e.g. mayor)

WARN Act Issues And Traps For the Unwary

- Exceptions from notice requirements
 - Close temporary facility or complete temporary project if employees hired with clear understanding of temporary nature of work
 - Closes facility or operating unit due to strike or lock-out, if no intent to evade WARN Act
 - If plant closing or layoff results in loss of less than 50 jobs at site
 - Layoffs within 90 days for same reason count as one
 - If within 90 days, presumed to be for same reason
 - If a layoff is for 6 months or less
 - If work hours not reduced 50% in each month of any 6-month period

WARN Act Issues And Traps For the Unwary

- Less than 60 days' notice required if:
 - **Faltering company**-employer actively seeking capital or business to avoid or postpone shutdown for reasonable period and reasonably, in good faith believes advance notice would preclude ability to obtain such capital or business
 - **Unforeseeable business circumstances**-plant closing or mass layoff caused by business circumstances not reasonably foreseeable at time 60-day notice would be required (e.g. unexpected cancellation of major order)
 - **Not provided under California WARN Act**
 - **Natural disaster**- plant closing or mass layoff directly results from natural disaster (e.g., flood, earthquake, drought)
- In such event, notice required as soon as practicable and must explain shortened period

WARN Act Issues And Traps For the Unwary

- Liability for WARN Act non-compliance:
 - Employer liable to employees for unpaid back pay & benefits for violation period up to 60 days
 - Employer liable for civil penalties up to \$500/day if fail to give notice to local government
 - Avoid penalty if satisfy liability to all employees within 3 weeks after closing or layoff ordered
- Asset sales agreements should assign WARN duties between purchaser and seller

Employment Issues In An Asset Sale

- Cal. Civ. Proc. CCP §1204: Priority claim of \$4,300/employee for unpaid wages w/i 90 days & unpaid employee benefits earned w/i 180 days of business cessation or formal proceeding (e.g. receivership, assignment for benefit creditors)
- §1205: Unpaid employee wage claims earned w/i 90 days prior to sale or transfer of substantial portion of business outside ordinary course of business = priority claims/liens; must be paid first from sale proceeds

Employment Issues In An Asset Sale

- Seller advice regarding hiring decisions may result in liability for:
 - Aiding & abetting discrimination
 - Defamation (qualified privilege)
- Seller should obtain waivers from each employee before:
 - Revealing personnel file
 - Transferring vacation accrual bank
- Buyer have difficulty obtaining assurances that employees will remain
 - Beyond non-competes from selling principals

Liability For Unpaid Employee Wage And Vacation Pay

- Statutory liability for unpaid wages and vacation pay of terminated employees
 - Cal: Managers and corporate owners not liable for unpaid wages
 - absent piercing of corporate veil
 - Fed (9th Cir.): Controlling managers may be liable for wages after bankruptcy
- Potential penalties for non-compliance
 - Cal: Unclear whether manager may be liable

Trust Fund Tax Liability Issues

- “Responsible person” liable for willful failure to pay trust fund taxes (e.g., payroll taxes collected by employer from employee)
- Internal Revenue Code (26 U.S.C.) § 6672: 100% penalty for responsible person’s willful failure to collect & pay taxes owed to IRS
 - “Responsible person“ = power to control decision-making process by which company allocates funds to pay creditors vs. paying withholding tax obligations to government
 - Focus on duty to oversee, manage, or administer financial affairs of company, particularly re paying creditors and taxes
 - Willfulness shown by voluntary, conscious and intentional decision to prefer other creditors over taxing authority

Trust Fund Tax Liability Issues

- Comparable state law provisions (payroll & sales & use taxes)
- No liability for persons with nominal rather than actual authority to decide who is paid (e.g., bookkeeper who prepares and signs checks at direction of company officer)
- Trust fund tax liability generally not dischargeable in bankruptcy

Severance And Employee Termination Liability

- Obligations under employment agreements for control change
- Liability under severance agreements and company policies for employee termination
- Layoffs should be analyzed for disproportionate impact on protected employee classifications
 - Including recent medical leaves

Severance And Employee Termination Liability

- Fiduciaries of ERISA-covered plans potentially liable for non-compliance with plan terms & statutory obligations
 - ERISA (29 U.S.C.) §§ 1001 et sq. = federal law setting standards for private sector employment based pension & welfare benefit plans
 - Fiduciary = named persons or have discretionary authority/control/responsibility over plan assets, administration

Severance And Employee Termination Liability

- Must file reports (Form 5500) & forward contributions to plan administrator
- Must comply with plan termination provisions (usually need formal resolution)
- Potential liability for plan termination (e.g., pension)
 - Standard vs. distress termination
 - Deal with PBGC

Prior Webinars

- **Buying Hotels (and Other Commercial Real Estate) Out of Bankruptcy**
(Date: 03.17.10)
- **Guaranties of Debt in Default: What to Do Now (for Guarantors and Their Creditors)**
(Date: 03.31.10)
- **Working Out Problem Hotel Loans**
(Date: 04.14.10)
- **Tax Aspects of Debt Restructuring and Foreclosure: Using Tax Savings and Motivations to Make Better Deals**
(Date: 05.19.10)
- **Insurance in Bankruptcy: Preserving and Maximizing Insurance Assets of a Bankrupt Entity**
(Date: 06.02.10)
- **Strategies and Opportunities in Acquiring Distressed Assets Webinar**
(Date: 06.23.10)
- **Best Under Stress: Surviving and Thriving in the Wine Industry During Difficult Economic Times**
(Date: 09.15.10)

To listen to the following webinars, please go to www.fbm.com, click on Media, then click on Webinars for the listings.

Future Webinars

- 11/03/10 – “Restart Techniques for Technology and IP-Driven Companies Webinar”

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