

# Money Talks: The Influence of Economic Power on the Employment Laws and Policies in the United States and France

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## I. INTRODUCTION

Money talks. Money changes everything. There is nothing money cannot buy. These are all familiar phrases used to describe the desirable, and undesirable, effects of money. Money can also mean power, and more specifically, economic power. Indeed, economic power is becoming an increasingly important concept for a wide range of academic disciplines. For example, the concept of economic power has heavily influenced a new theory of international relations, namely globalization.<sup>1</sup> Many globalization theorists argue that economic power is replacing military power in global politics.<sup>2</sup> Other scholars contend that

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1. There is a wide variety of literature analyzing the theory of globalization. For an overview of globalization, see GLOBAL TRANSFORMATIONS: POLITICS, ECONOMICS AND CULTURE (David Held et al. eds., Stanford Univ. Press 1999) [hereinafter GLOBAL TRANSFORMATIONS]; THE GLOBAL TRANSFORMATIONS READER (David Held & Anthony McGrew eds., 2000); GLOBALIZATION: THEORY AND PRACTICE (Eleonore Kofman & Gillian Youngs eds., 1996); GLOBAL TRANSFORMATION: CHALLENGES TO THE STATE SYSTEM (Yoshikazu Sakamoto ed., 1994). The effects of globalization have stirred a debate on the future of international relations. The Hyperglobalist school argues that globalization is the end of the nation-state. See GLOBAL TRANSFORMATIONS, *supra*, at 2-5. They believe that globalization is creating a new world order that privileges economic issues and ultimately is creating a borderless economy. *Id.* Other globalization theorists, namely the transformationalists, concede that globalization is transforming state power and world politics, but argue this has encouraged a more activist state. See *id.* at 7-9. The transformationalists contend that governments are reacting strongly to globalization and are transforming to preserve their power. *Id.*

2. See generally GLOBAL TRANSFORMATIONS, *supra* note 1, at 2-5.

globalization is creating a new world order where economics are the central focus.<sup>3</sup>

Economic power not only shapes international relations, but it also influences national employment laws and policies. For example, economic power can be measured by comparing a country's employment and unemployment rates. Generally speaking, if a country's economy is strong, the employment rate rises and the unemployment rate falls. Conversely, if an economy is faltering, the employment rate falls and the unemployment rate rises.

By way of illustration, consider economic power in the United States. Economic power has dramatically affected the unemployment rate. In March of 2006, the unemployment rate was 4.7%, the lowest rate since the September 11 terrorist attacks.<sup>4</sup> The growing U.S. economy is responsible. Indeed, since May of 2003, the U.S. economy has created nearly four million new jobs.<sup>5</sup> The Commerce Department recently released figures that demonstrate that the American economy grew at a solid 3.4% rate in the second quarter of 2005, and this growth is expected to continue at the same rate in 2006.<sup>6</sup> Moreover, the report showed that the Gross Domestic Product (GDP) has increased at a rate above 3% for the past nine quarters.<sup>7</sup>

The economic situation is not as positive in France. The 2005 unemployment rate in France was a gloomy 9.5%.<sup>8</sup> The current number

3. See generally *id.*

4. U.S. Dep't of Labor, Bureau of Labor Statistics, *Employment Situation Summary*, <http://data.bls.gov/news.release/empsit.nr0.htm> (last visited on Apr. 7, 2006) [hereinafter Dep't of Labor]. Between 1995-2005 the unemployment rates were respectively: 5.6, 5.6, 5.3, 4.6, 4.3, 4.0, 4.2, 5.7, 5.8, 5.7, and 5.2. U.S. Dep't of Labor, Bureau of Labor Statistics, *Seasonal Unemployment Rate 1995-2005*, [http://data.bls.gov/PDQ/servlet/SurveyOutputServlet?data\\_tool=latest\\_numbers&series\\_id](http://data.bls.gov/PDQ/servlet/SurveyOutputServlet?data_tool=latest_numbers&series_id) (last visited Jan. 3, 2006).

5. *President Bush's Agenda for Job Creation and Economic Opportunity*, THE WHITE HOUSE, <http://www.whitehouse.gov/infocus/economy> (last visited on Jan. 7, 2006).

6. *Press Briefing by Dr. Katherine Baicker and Dr. Matthew J. Slaughter on the 2006 Economic Report by the President*, THE WHITE HOUSE, <http://www.whitehouse.gov/news/releases/2006/02/20060213-5.html> (last visited on Feb. 17, 2006).

7. *Fact Sheet: Economic Growth Continues, Unemployment Falls Below 5 Percent*, THE WHITE HOUSE, <http://www.whitehouse.gov/news/releases/2006/01/20060106.html> (last visited Jan. 10, 2006).

8. *Total Unemployment Rate*, EUROSTAT, [http://epp.eurostat.cec.eu.int/portal/page?\\_pageid=1996,39140985&\\_dad=portal&\\_schema=PORTAL&screen=detailref&language=en&product=STRIND\\_EMPLOI&root=STRIND\\_EMPLOI/emploi/em071](http://epp.eurostat.cec.eu.int/portal/page?_pageid=1996,39140985&_dad=portal&_schema=PORTAL&screen=detailref&language=en&product=STRIND_EMPLOI&root=STRIND_EMPLOI/emploi/em071) (last visited Feb. 17, 2006). The unemployment rate represents unemployed persons as a

of unemployed persons in France is 2.31 million,<sup>9</sup> and recent figures suggest that France's economy will continue to weaken. Indeed, the economy grew by only .1% in the second quarter of 2005, compared to .4% in the first quarter.<sup>10</sup> France's high unemployment rate and weakening economy are unfortunate developments for French Prime Minister, Dominique de Villepin, who pledged to make unemployment reduction the government's top priority.<sup>11</sup>

Following through on this pledge, the French government recently passed a new law, the First Employment Contract, as a way to reduce France's high unemployment rate.<sup>12</sup> Another goal of the legislation was to promote employment for young individuals residing in economically disadvantaged urban areas.<sup>13</sup> The First Employment Contract Law allows employers to hire individuals younger than 26 under a "first-job" contract.<sup>14</sup> Under the first-job contract, an employee is subject to a two-year trial period.<sup>15</sup> During this trial period, an employee may be dismissed at any time.<sup>16</sup> Indeed, the 2-year trial period is much longer than the regular trial period of 1 to 3 months.<sup>17</sup> However, any employee who is dismissed during the trial period will receive unemployment benefits for a period of 2 years, and compensation for the contract termination.<sup>18</sup> Dismissed employees are also entitled to other benefits, including a state program that provides assistance with security deposit payments for rented housing.<sup>19</sup> Thus, on balance, the Law provides some security for younger individuals even though they are subject to a longer trial period than older workers.

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percentage of the labor force. Unemployed persons are those between the ages of 15 to 74 who are out of work and actively seek work. *Id.* The respective unemployment rates for the 10-year period from 1995-2005 were: 11.1, 11.6, 11.5, 11.1, 10.5, 9.1, 8.4, 8.9, 9.5, 9.6, and 9.5. *Id.*

9. *Jobless Rate Drops But Numbers Don't Add Up*, EXPATICA, Jan. 31, 2006, [http://www.expatica.com/source/site\\_article.asp?subchannel\\_id=25&story\\_id=27241&name=Jobless+rate+drops+but+numbers+don't+add+up](http://www.expatica.com/source/site_article.asp?subchannel_id=25&story_id=27241&name=Jobless+rate+drops+but+numbers+don't+add+up) (last visited Feb. 17, 2006).

10. EUROPEAN COMMISSION, 5 EUROPEAN ECONOMY 58 (2005), [http://europe.eu.int/comm/economy\\_finance/publications/european\\_economy/2005/ee505en.pdf](http://europe.eu.int/comm/economy_finance/publications/european_economy/2005/ee505en.pdf) (last visited on Apr. 14, 2006).

11. *French Economy Grinds to a Halt*, BBC NEWS, Aug. 12, 2005, <http://news.bbc.co.uk/2/hi/business/4144680.stm>.

12. *See "First-job" Contract: Equal opportunity law passed*, PRIME MINISTER, Mar. 9, 2006, [http://www.premier-ministre.gouv.fr/en/information/latest-news\\_97/first-job-contract-equal\\_55563.html](http://www.premier-ministre.gouv.fr/en/information/latest-news_97/first-job-contract-equal_55563.html).

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *See id.*; see also *infra* note 283 and accompanying text.

18. "First-job contract: Equal opportunity law passed, *supra* note 12.

19. *Id.*

Unfortunately, the new Law sparked violent protests in France, particularly in Paris.<sup>20</sup> Nationwide, approximately 250,000 persons protested the new Law, with at least 120,000 individuals participating in Paris alone.<sup>21</sup> Protesters set newspaper stands and cars on fire, looted shops, and threw stones and bottles at police.<sup>22</sup> Moreover, union leaders gave the French government until Easter weekend to withdraw the Law, or promised that strikes would occur.<sup>23</sup> Although the Law became effective on April 2, 2006, amendments are expected and employers are being asked not to apply the Law for now.<sup>24</sup> Indeed, President Chirac promised to shorten the trial period from 2 years to 1 year, and to require employers to give a reason for termination.<sup>25</sup> It is uncertain whether the government's attempt to improve unemployment through the Law will become effective in the end.

In addition to unemployment levels, another way to measure economic power is to evaluate the level of foreign direct investment (FDI) and cross-border acquisitions. For the most part, countries with great economic power also generate high numbers of FDI outflows and cross-border acquisitions. The reverse is usually true for countries with moderate or weak economic power. These numbers are important to a country's employment numbers because high FDI outflows and acquisitions usually mean that companies are financially stable and growing.

Under these measures, American companies are enjoying a higher level of economic power than their French counterparts. Despite economic troubles in the United States, five of the largest 25 cross-border acquisitions in 2004 had an American based company as the buyer.<sup>26</sup> Moreover, FDI outflows from the United States reached an all-

20. See *Violence Flares at French Rallies*, BBC NEWS, Mar. 16, 2006, <http://news.bbc.co.uk/go/pr/fr/-/2/hi/europe/4812132.stm>.

21. *Id.*

22. *Id.*

23. See Dan Thomas, *French PM Stands by Controversial First Employment Contract Despite Threat of More Riots*, PERSONNEL TODAY, Apr. 6, 2006, <http://www.personneltoday.com/Articles/2006/04/06/34824/French+PM+stands+by+controversial+First+Employment+Contract+despite+threat+of+more.htm>.

24. *Id.*

25. See *French Unions Give Law Deadline*, BBC NEWS, Apr. 5, 2006, <http://news.bbc.co.uk/go/pr/fr/-/1/hi/world/europe/4878236.stm>.

26. See *FDI outflows from U.S. Hit Record USD 252 Billion in 2004*, ORG. FOR ECON. CO-OPERATION AND DEV. [OECD] [http://www.oecd.org/document/54/0,2340,en\\_2649\\_201185\\_35033718\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/54/0,2340,en_2649_201185_35033718_1_1_1_1,00.html) (last visited Jan. 12, 2006) [hereinafter OECD].

time high of \$252 billion in 2004, up from \$141 billion in 2003.<sup>27</sup> Mergers and acquisitions are expected to continue to grow in 2005 by an estimated 10 to 15 percent.<sup>28</sup> Moreover, corporate transactions have not been as active in France—acquisitions decreased by 50% in 2004.<sup>29</sup> Instead, the majority of acquisitions made by countries in the Organisation for Economic Co-Operation and Development (OECD) were investments in developing countries, such as Brazil, India and China.<sup>30</sup>

Corporate transactions are important to a country's employment numbers because they create new jobs. As demonstrated in the figures above, mergers and acquisitions stimulate a country's economy, which is good news for employers and employees. It is not surprising that the FDI outflows for the United States increased by 50% in 2004, while the unemployment rate fell from 5.7% in January of 2004 to 5.2% by the end of 2004, and is now only 5%.<sup>31</sup> Along those lines, it is logical that the number of acquisitions in France decreased by 50% in 2004, while the unemployment rate rose to 9.7% in 2004, and now stands at 10.1%.<sup>32</sup> To be sure, economic power has dramatically affected employment conditions in France and the United States.

This article explores the influence of economic power on employment laws and policies in the United States and in France. First, the article provides an historical background and outlines the development of the employer-employee relationship in both jurisdictions. It shows how French and U.S. employment laws were quite similar in the century leading up to World War I, and how they dramatically changed after that point. Today, the divergent policies underlying each country's employment laws highlight the differences in the two systems. Additionally, the article analyzes the similarities and differences between U.S. and French laws, with an emphasis on how the laws affect a company's economic power. First, it demonstrates the striking differences in the nature of the employment relationship and the essential benefits employees are entitled to under each jurisdiction's laws. It also analyzes the laws implicated when a corporate acquisition and a reduction-in-force occurs. For the most part, American employers are under few restrictions when transferring employees pursuant to a corporate acquisition, or dismissing employees when implementing a reduction-in-force. In sharp contrast, French employers are subject to numerous laws dictating the manner in which they may transfer or dismiss employees.

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27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. See Dep't of Labor, *supra* note 4; OECD, *supra* note 26.

32. See OECD, *supra* note 26.

In order to further demonstrate the differences between French and U.S. employment laws in the context of a corporate acquisition and reduction-in-force, the article provides two hypothetical examples. The examples tell the story of an American employee and a similarly situated French employee. In the first example, a corporation is faced with the task of retaining the American and French employees at the close of an asset acquisition. The strategy for retaining each employee is different, and it illustrates the strengths and weaknesses of each country's laws. The second example presents a corporation suffering economic difficulties. Here, the company is forced to dismiss a number of employees, including the French and American employees. Like the asset acquisition scenario, the manner in which the company dismisses the employees highlights the divergence of French and U.S. law.

Although this article demonstrates how employment laws in France and the United States protect employees in a number of situations, neither country's system is without problems. With respect to France, economic power is mostly in the hands of employees. Accordingly, French employment laws generally favor employees over employers. Although this means that French employees enjoy generous benefits and other protections, these come at a cost for French employers and the French economy as a whole. This article suggests ways that these high employment costs may be lowered in order to stimulate job growth.

Likewise, the United States has its own employment problems. In America, employers predominately have more economic power than employees. As such, U.S. laws generally favor employers. This is due in large part to the ideal of individualism in the United States. Because American society expects individuals to take care of themselves, there are few employment protections, particularly for dismissed employees. This does not immunize American companies from serious employment liabilities. Because dismissed employees often feel that they are left "holding the bag," they readily file employment discrimination and retaliation claims. This article recommends that the United States make certain changes to assist displaced workers.

Part II of this article provides an overview of the historical background and modern development of French and U.S. employment laws. With respect to both jurisdictions, Part III analyzes employment laws that relate to the economic situations commonly faced by corporations, including the basis for the employment relationship, the benefits provided to employees, the requirements for transferring

employees in a corporate acquisition, and the rules for dismissing employees in connection with a reduction-in-force. Part IV illustrates the differences in these laws in two hypothetical examples involving a French and an American employee. Part V suggests areas for improving various aspects of French and U.S. employment laws. It further emphasizes the influence of national economic power and its ultimate effects on employment conditions in each country.

## II. THE HISTORICAL BACKGROUND AND MODERN DEVELOPMENT OF FRENCH AND U.S. EMPLOYMENT LAWS

Employment laws, like most other laws, are heavily influenced by a country's history and culture. In order to understand the similarities and differences between French and U.S. employment law, a brief review of the historical background and modern development of these laws is useful. Although French and U.S. employment laws were similar in the century leading up to World War I, they have diverged from that point forward.

### A. France

Modern employer-employee relations in France were first shaped by the conclusion of the French Revolution and the subsequent drafting of the Napoleonic Civil Code.<sup>33</sup> Heavily influenced by the principle of individual liberty, the drafters of the Civil Code protected the rights of individuals to enter freely into service contracts.<sup>34</sup> As a result, employment relationships in early modern France favored the party with more bargaining power, usually the employer. The employment relationship remained largely unregulated for 100 years.<sup>35</sup>

However, in 1926, the employment relationship in France began to change in favor of the employee. That year, the Supreme Court of France (*Cour de Cassation*) recognized a cause of action for abusive discharge when dismissal was based on malicious intent.<sup>36</sup> The abusive discharge claim, or *abus de droit*, soon developed in the French courts. If the facts provided clear evidence that an employer discharged an employee for personal reasons, the courts readily found the employer

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33. Madeline M. Plasencia, Comment, *Employment-at-will: The French Experience as a Basis for Reform*, 9 COMP. LAB. L.J. 294, 296 (1988). The Code Napoleon was voted into law on March 21, 1804. For an overview of the Code Napoleon, see THE CODE NAPOLEON AND THE COMMON LAW WORLD (Bernard Schwartz ed., 1998).

34. Plasencia, *supra* note 33 (quoting CODE CIVIL [C. CIV.] art. 1134 (Fr.)).

35. *Id.* at 297.

36. *Id.* at 299.



liable.<sup>37</sup> Two years later, the Law of 1928 codified the *abus de droit* principle for individual employment relationships.<sup>38</sup> After the Law of 1928, French labor law continued to grant more protection to employees,<sup>39</sup> providing employees with greater economic power through the new protective laws.

Today, the relationship between employers and employees in France remains highly regulated. The Labor Code provides the French government with significant power to regulate the employment relationship. Due to a perceived inequality in the bargaining power of employees *vis a vis* employers, the state sets limits on the terms to which parties to an employment agreement may agree.<sup>40</sup> The state justifies its intervention in the employment relationship by arguing that employees give up some of their civil rights when they enter into a contract, and thus the state owes them added protection in exchange for this sacrifice.<sup>41</sup> For public policy reasons, the state also seeks to establish a standard social public order.<sup>42</sup>

The main sources of law that govern employment relationships in France are provisions of the French Labor Code (*Code du Travail*), collective bargaining agreements, and cases from the French Supreme Court. In addition to the mandatory rules resulting from these sources of law, employment relationships are ruled by internal company regulations and individual employment contracts. French Labor Law applies to all employment relationships arising from an employment contract that is performed in France, regardless of the nationalities of the parties.<sup>43</sup>

National law is not the only source governing the employment relationship in France. Because France is a member of the European Union<sup>44</sup> (EU), it is subject to EU directives and regulations and the

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37. *Id.*

38. *Id.*

39. *See id.* at 299-300.

40. ALAIN SUPLOT, BEYOND EMPLOYMENT: CHANGES IN WORK AND THE FUTURE OF LABOUR LAW IN EUROPE 156-57 (2001).

41. *Id.* at 157.

42. *Id.*

43. *See* David Greene, *Conflicts of Law and Choice of Law Issues in Crossborder Employment Disputes*, in INTERNATIONAL EMPLOYMENT LAW: THE MULTINATIONAL EMPLOYER AND THE GLOBAL WORKFORCE 53-54 (Christian T. Campbell & Donald C. Dowling, Jr. eds., 1999).

44. Prior to 1993, the European Union (EU) was known as the European Economic Community. By passage of the Treaty on European Union on November 1, 1997, the EEC became the EU. Treaty on European Union, art. A, 1992 O.J. (C 191/4). The 6 original states of the EEC were Belgium, France, Germany, Italy, Luxembourg,

decisions of the European Court of Justice. Some examples of EU employment law directives are the European Works Councils Directive,<sup>45</sup> the Collective Redundancies Directive,<sup>46</sup> the Transfer of Undertakings Directive,<sup>47</sup> and the Employee Information and Consultation Directive.<sup>48</sup> These directives contain protections for employees in numerous corporate situations. As required by the EU, France has incorporated the mandates of these directives into its national law.

As demonstrated above, French employment law changed dramatically after World War I. Prior to World War I, French employment law was largely unregulated. The relationship between employer and employee was governed by basic contract law principles. As such, it was the employers who had economic power during this time. However, after World War I, the French government became intimately involved in employer-employee relations and economic power began to shift in favor of employees. Today, the relationship is highly regulated by European directives, national law, and local collective bargaining agreements. As explained below, the French system is vastly different from the employment structure in the United States.

### B. United States

As in France, the early modern employment relationship in the United States was heavily influenced by the concept of individual liberty. Until World War I, state law was the primary source governing the employment

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and the Netherlands. Roger J. Goebel, *The European Union Grows: The Constitutional Impact of the Accession of Austria, Finland and Sweden*, 18 FORDHAM INT'L L.J. 1092, 1094 (1995). The EU has increased in size to 25 members, including Austria, Denmark, Finland, Greece, Ireland, Portugal, Spain, Sweden, the United Kingdom, Czech Republic, Cyprus, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovenia and Slovakia. The latter 10 countries were admitted to the EU on May 1, 2004 under the Treaty of Accession in Athens on April 16, 2003. See TREATY OF ACCESSION 2003, EUROPA, [http://europa.eu.int/comm/enlargement/negotiations/treaty\\_of\\_accession\\_2003/table\\_of\\_content\\_en.htm](http://europa.eu.int/comm/enlargement/negotiations/treaty_of_accession_2003/table_of_content_en.htm) (last visited on Feb. 17, 2006). In 2007, Bulgaria and Romania may join the EU.

45. Council Directive 94/74, 1994 O.J. (L 254) 56 (EC).

46. Council Directive 98/59, 1998 O.J. (L 225) 16 (EC). The original version of the Collective Redundancies Directive was enacted in 1975. See Council Directive 75/129, 1975 O.J. (L 48) 29 (EEC). It was then amended in 1992. See Council Directive 92/56, 1992 O.J. (L 245) 3 (EEC). The current version, issued in 1998, consolidated the directives.

47. Council Directive 2001/23, 2002 O.J. (L 82) 16 (EC). Like the Collective Redundancies Directive, the Acquired Rights Directive has been updated several times. The first directive was issued in 1977. See Council Directive 77/187, 1977 O.J. (L 61) 26 (EEC). It was amended in 1998 to incorporate case law from the European Court of Justice and recent economic changes in Europe. See Council Directive 98/50, 1998 O.J. (L 201) 88 (EC). The current version was enacted in 2001.

48. Council Directive 2002/14, 2002 O.J. (L 80) 29 (EC).

relationship.<sup>49</sup> Most state laws during this time were limited in scope, and upheld the rights of individuals to enter freely into contracts for the hiring of service. The focus of state law during early modern times was the common law doctrine of at-will employment.<sup>50</sup>

The employment at-will doctrine dates back to the nineteenth century. The rule was announced by a legal commentator in 1877,<sup>51</sup> and thereafter state courts soon began to cite the rule in holding that employers could dismiss their employees for any cause, or no cause at all.<sup>52</sup> The at-will rule gained ultimate authority in 1908 when the Supreme Court provided a constitutional basis for the doctrine.<sup>53</sup>

The employment at-will rule is simple: "All employment is at-will unless a specific contractual provision provides to the contrary."<sup>54</sup> Unfortunately, most employees do not enjoy the protections of an employment contract. If there is no employment contract, an employee may be dismissed at any time, for any reason, for bad reason, or for no reason at all.<sup>55</sup> The termination can be made without any financial obligation, such as severance, to the dismissed employee. As long as the employer complies with wage payment obligations and does not discriminate against employees, employers are generally free to terminate employees if they so desire.

However, employment law in the United States became more regulated after World War I.<sup>56</sup> First, Congress passed the Railway Labor Act,<sup>57</sup> which allowed collective bargaining between railroad companies and their employees.<sup>58</sup> Significant employment-related legislation followed between 1935 and 1938, with the passage of the National Labor Relations

49. See AMERICAN BAR ASSOCIATION, 1 INTERNATIONAL LABOR AND EMPLOYMENT LAWS 23a-2 (William L. Keller et al. eds., 2d ed. 2003).

50. *Id.* at 23b-1.

51. See H. G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT 272 (1877).

52. See *Perry v. Wheeler*, 12 Bush 541 (1877); *Payne v. W. & Atl. R.R.*, 81 Tenn. 507 (Tenn. 1884); *Martin v. N.Y. Life Ins. Co.*, 42 N.E. 416 (N.Y. 1895).

53. See *Adair v. United States*, 208 U.S. 161 (1908).

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

55. *Id.*

56. See 1 INTERNATIONAL LABOR AND EMPLOYMENT LAWS, *supra* note 49, at 23a-3.

57. See 45 U.S.C. § 155 (2000).

58. See *id.*

Act, the Social Security Act, the Federal Unemployment Tax Act,<sup>59</sup> and the Fair Labor Standards Act.<sup>60</sup>

In the last seventy years, the United States has enacted numerous employment-related laws, particularly in the areas of employment discrimination, harassment and retaliation. The first federal anti-discrimination law was passed in 1964. Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, religion, sex and national origin.<sup>61</sup> Congress soon added protection to older workers in the Age Discrimination in Employment Act, which bars discrimination against individuals who are over the age of 40.<sup>62</sup> The Americans with Disabilities Act, enacted in 1990, prohibits discrimination on the basis of a person's disability or perceived disability.<sup>63</sup>

States and local governments also have enacted their own anti-discrimination laws. Indeed, in many cases state and local laws provide greater protection than the federal anti-discrimination laws. For example, many state and local laws prohibit discrimination on the basis of marital status or sexual orientation. In addition, state and local laws may apply to smaller employers who are otherwise exempt from federal law. In large cities, it is common for federal, state and local law all to apply to a particular employment situation.

Despite these protections, individual employment relationships in the United States remain heavily influenced by the employment at-will doctrine.<sup>64</sup> The at-will doctrine is universally accepted in the United States and has been described as the "very foundation of the free enterprise system."<sup>65</sup> This is quite different from the situation in France. The section below provides an analysis of how the employment relationship is governed today in France and the United States.

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59. 26 U.S.C. §§ 3301-3311 (2005).

60. 29 U.S.C. § 201 (2000).

61. 42 U.S.C. §§ 2000e *et seq.* (2000). In 1978, Congress amended Title VII to prohibit discrimination on the basis of pregnancy. The Civil Rights Act of 1991 enhanced Title VII's remedies by allowing recovery for both compensatory and punitive damages, and provided for trial by jury. 42 U.S.C. § 1981 (2000).

62. 29 U.S.C. §§ 621 *et seq.* (2002).

63. *See* 42 U.S.C. § 12101 (2005).

64. 1 INTERNATIONAL LABOR AND EMPLOYMENT LAWS, *supra* note 49, at 23b-1.

65. D. Bruce Shine, *An Analysis of the Terms and Level of Implementation of the European Union's Collective Dismissal Directive and the United States' WARN ACT. Another Example for the European Union on the Relative Merits of Political Federation over Confederation?* 12 FLA. J. INT'L L. 183, 185 (1998) (*quoting* the Tennessee Court of Appeals in *Whittaker v. Care-More, Inc.*, 621 S.W.2d 395, 396 (Tenn. Ct. App. 1981)).

### III. ANALYSIS OF CERTAIN FRENCH AND U.S. EMPLOYMENT LAWS

Both the United States and France have enacted numerous laws governing the employer-employee relationship. An analysis of all employment laws would require numerous volumes and is outside the scope of this article. This paper focuses on employment laws relating to corporate acquisitions and reductions-in-force, which are commonly implemented by companies in today's global world.

Part A analyzes the basis for the employment relationship in France and the United States. Part B discusses the basic benefits French and American employees are entitled to under each jurisdiction's laws. Part C explains the laws involved with respect to a corporate acquisition. It also includes a discussion of an additional source of law in France, the European Union's Acquired Rights Directive.<sup>66</sup> Part D evaluates the requirements for employers contemplating a reduction-in-force, including an assessment of the EU's Collective Redundancies Directive,<sup>67</sup> another law applicable to France.

#### *A. The Legal Basis for the Employment Relationship*

In order to better understand how employees are affected by corporate acquisitions or reductions-in-force, it is necessary to understand the basis for the employment relationship in France and the United States. The difference in the employment relationship between the countries has serious consequences when a company is contemplating a sale of its business, or is forced to dismiss employees due to economic hardship.

##### *1. France: Presumption of Indefinite Term Contract*

Under French law, there is a presumption that employment is indefinite in term. This is due to the fact that fixed term employment is only allowed in certain circumstances and for a limited period of time.<sup>68</sup> Although indefinite term employment need not be confirmed in writing, fixed term contracts must be written.<sup>69</sup> In fact, if the essential terms of

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66. Council Directive 98/50, 1998 O.J. (L 201) 88 (EC).

67. Council Directive 98/59, 1998 O.J. (L 225) 16 (EC).

68. See C. TRAV. art. L. 122-3-1 (Fr.).

69. See 1 INTERNATIONAL LABOR AND EMPLOYMENT LAWS, *supra* note 49, at 3-5. Employment contracts, which are a form of civil contract, are governed by Article 1108

the fixed term contract are not specified in writing, the employment relationship will be deemed to be indefinite.<sup>70</sup>

Fixed term contracts also are limited in scope. An employer may only enter into a fixed term contract with an employee under the following circumstances: to perform a precise and temporary task; to replace an employee who is temporarily absent; to assist with a temporary increase in work; or to fill a seasonal job.<sup>71</sup> Fixed term contracts generally are limited to 18 months.<sup>72</sup> Under very specific and strict conditions, an employer also may enter into fixed term contracts with long-unemployed or non-qualified employees in order to provide such individuals with access to the workplace.<sup>73</sup>

In sum, the majority of French employees enjoy the presumption that their employment is indefinite in duration. Fixed term contracts are limited in scope and duration, as described above. Because most employees are employed indefinitely, it is common for French employees to work for companies for long periods of time. The opposite is true in the United States.

## 2. United States: Presumption of Employment "At-Will"

Unlike France, there is no presumption of indefinite term employment in the United States. To be sure, U.S. law generally provides no property rights in a job.<sup>74</sup> Under the at-will employment doctrine, there are few legal restrictions on an employer's ability to terminate an employee. As courts have begun to grant additional rights to employees, the at-will employment rule is becoming narrower, and wrongful termination litigation is becoming more prevalent.

The most common exception to the at-will employment doctrine is the existence of an employment contract limiting the employer's right to terminate an employee. However, unlike France, the United States does not require employment contracts, and most employees do not enjoy the protection of an employment contract. In the United States, these documents are usually reserved for executive-level employees. If there is an employment contract in place, employers are usually limited to terminating an employee for "just cause." Collective bargaining agreements may also contain similar restrictions for terminating unionized employees.

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of the French Civil Code. The essential elements are not different from those in the United States: mutual consent, legal capacity, and legal cause and purpose. *Id.*

70. *Id.*

71. *Id.* at 3-6.

72. *Id.*

73. See C. TRAV. art. L. 122-1-2; see also C. TRAV. art. D 121-1.

74. Summers, *supra* note 54, at 1063.

Verbal statements made by an employer to an employee may create an implied contract, and may restrict an employer's ability to terminate an employee.<sup>75</sup> For example, if a supervisor tells an employee that he does not need to worry about his job even though the company is conducting a reduction-in-force, the employee may argue that these words created an indefinite term of employment. However, if the work cannot be performed within one year, a state's statute of frauds may render the oral agreement unenforceable.<sup>76</sup>

In addition, employers also may be subject to contractual liability under a promissory estoppel theory.<sup>77</sup> A claim of promissory estoppel is often alleged by a worker as an alternative to a breach of an oral contract claim. To recover under promissory estoppel, an employee must show that an employer made a clear oral promise upon which the employee relied to his or her detriment, and that it would be unjust to allow the employer to escape its promise.<sup>78</sup> A typical example arises when an individual moves to another state in reliance on an employer's promise of a job.<sup>79</sup>

Case law has added additional restrictions on an employer's right to terminate an employee. In most states, the common law provides that an employee who has been terminated in violation of well-established public policy can recover damages against an employer.<sup>80</sup> The most common example of this restriction is when an employee is terminated in retaliation for filing a claim for worker's compensation benefits,<sup>81</sup> or for reporting alleged illegal activities of a company to law enforcement agencies.<sup>82</sup>

In addition to the public policy exception, most states permit implied-in-fact contract claims if an employee handbook or manual sets out procedures for termination that are not followed.<sup>83</sup> For example, if an

75. See *Wagner v. City of Globe*, 722 P.2d 250, 254 (Ariz. 1986).

76. CHARLES G. BAKALY, JR. & JOEL M. GROSSMAN, *MODERN LAW OF EMPLOYMENT CONTRACTS: FORMATION, OPERATION AND REMEDIES FOR BREACH* 53 (1985).

77. *Id.* at 55.

78. *Id.*

79. See *O'Neill v. ARA Servs., Inc.*, 457 F. Supp. 182, 183 (E.D. Pa. 1978).

80. Summers, *supra* note 54, at 1035.

81. Some states have codified this prohibition. See, e.g., CAL. LAB. CODE § 132a (West 2003); OKLA. STAT. ANN. tit. 85, §§ 5-7 (West 2005).

82. See generally *Harless v. First Nat'l Bank*, 246 S.E.2d 270 (W. Va. 1978).

83. See *Strass v. Kaiser Found. Health Plan*, 744 A.2d 1000, 1011 (D.C. 2000); *Alexander v. Phillips Oil Co.*, 707 P.2d 1385, 1388-89 (Wyo. 1985).

employee handbook provides for progressive discipline, the employee may argue that his termination was unlawful if the employer terminated him for a first-time violation. To avoid this situation, many employers include at-will language in their employee manuals and handbooks, and require employees to sign an acknowledgment of their at-will employment status. This strategy has defeated numerous implied contract claims.<sup>84</sup>

Furthermore, Congress recently provided an additional basis for wrongful termination claims, based on whistleblowing. The Sarbanes-Oxley Act,<sup>85</sup> passed in 2002 as a result of the recent scandals involving corporate executives applies to public companies, the subsidiaries of public companies, and private companies that have filed a registration statement for a public offering under the Securities Act.<sup>86</sup> Under the Act, employees may file a complaint with the Secretary of Labor if they believe they were discharged in retaliation for reporting corporate fraud.<sup>87</sup>

The Sarbanes-Oxley Act contains an administrative exhaustion requirement. First, the complaint must be filed within 90 days of the termination.<sup>88</sup> In addition, an employee cannot file a complaint in federal court unless the Secretary of Labor fails to issue a final determination within 180 days of the filing of the administrative complaint.<sup>89</sup> If successful, employees may recover compensatory damages, including back pay with interest, reinstatement, and special damages such as attorney fees.<sup>90</sup> To date, most judgments issued under the Sarbanes-Oxley Act have favored the employer.<sup>91</sup> However, because the statute is so new, it is unclear whether employers will continue to prevail under the Act.

Although there are various methods for American employees to challenge a dismissal, the presumption remains that they are employed at-will and can be terminated at any time and for any reason. Thus, if an employee is terminated, he must overcome this presumption and prove that one of the exceptions to the at-will doctrine applies. Moreover, in order to make this case, he must file a lawsuit in state or federal court, which can be very costly. He also must obtain a good lawyer in order to

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84. See generally *Wade v. Kessler Inst.*, 798 A.2d 1251, 1259, 1261 (N.J. 2002); *Kerrigan v. Britches of Georgetowne*, 705 A.2d 624 (D.C. 1997); *Ferrara v. Nielsen*, 799 P.2d 458, 461 (Colo. Ct. App. 1990).

85. 18 U.S.C. § 1514A (2005).

86. See *id.* § 1514A(a).

87. *Id.* § 1514A(b).

88. *Id.*

89. *Id.*

90. *Id.* § 1514A(c).

91. See *Boss v. Salomon Smith Barney, Inc.*, 263 F. Supp. 2d 684 (S.D.N.Y. 2003); *Murray v. TXU Corp.*, 279 F. Supp. 2d 799 (N.D. Tex. 2003).



bring his claim because it can require some creativity to fit an employee's situation within one of the exceptions defined above. Finally, there is no guarantee that the employee will prevail in his lawsuit, which may take several years to conclude. In most instances, the employee finds it prudent to simply move on and find another job.

The differences in the employment relationship in France and the United States are indicative of the differences in corporate power in both countries. In France, fixed term contracts are rare because the Labor Code severely restricts the situations in which they are allowed. Instead, most employees are deemed to be employed indefinitely under French law. The basis for the employment relationship provides French employees with significant economic power. In contrast, American employees are employed at-will, and can be terminated for any reason (or no reason), provided that there is no discrimination involved. The presumption of at-will employment is so strong that there are only a few exceptions to the common law doctrine. As such, American employers possess more economic power than their employees. This trend continues with respect to employee benefits.

### *B. Employee Benefits*

Both French and American employees enjoy numerous benefits as a result of the employment relationship. However, French employers are required by law to provide numerous benefits, while American employers are legally required to provide only a few.

The discussion of employee benefits below is limited to those benefits a company would deem critical in a corporate acquisition or a reduction-in-force.

#### *1. France*

Employees in France enjoy numerous statutory benefits, and French employers bear great costs in providing these benefits to their employees. Moreover, many collective bargaining agreements require that employers provide additional benefits. For U.S. companies operating in France, the variety and level of benefits they are required to provide employees can be quite a shock. Benefits that are "fringe" in the United States, such as profit sharing, paid maternity and paternity leave, severance pay, and vacation pay, have come to be expected by French employees.

For example, French law requires that companies with 50 or more employees create a profit sharing fund (*plan de participation*).<sup>92</sup> The profit sharing fund must be provided to all employees.<sup>93</sup> A French company has little choice in determining the amounts provided to the fund. Instead, the contributions to the fund must be determined by the net profit of the company.<sup>94</sup> French law requires that a special formula be followed in order to determine the profit sharing funds.<sup>95</sup> Moreover, in order to protect the profit sharing assets, a special reserve account must be established. Each employee then receives his own account, and may choose investment options such as bonds or securities.<sup>96</sup>

The French Labor Code also provides employees with generous paid leave.<sup>97</sup> After one year of service,<sup>98</sup> employees are entitled to five weeks of paid annual leave.<sup>99</sup> It is common practice in France, and throughout Europe, for employees to take their annual leave in the late summer months, usually in August. French law also governs the minimum amount of paid vacation an employee may take at one time. Employees must take at least 12 consecutive days of vacation between May 1 and October 31, and they may take as much as four weeks in a row.<sup>100</sup> Furthermore, actual time off from work is important in French society. As such, an employer cannot make a cash payment in lieu of leave, unless the employment contract has been terminated.<sup>101</sup>

Another generous benefit afforded to French employees is maternity leave. Maternity leave and pay requirements under French law are liberal. The Labor Code provides that pregnant employees are entitled to leave work beginning from six weeks before the expected date of delivery until ten weeks after the actual date of delivery.<sup>102</sup> Employees, male or female, adopting a child are entitled to the same leave as employees on maternity leave.<sup>103</sup> Although French law does not require

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92. Law No. 90-1002 of Nov. 7, 1990, *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], Nov. 11, 1990. It is common for employers to provide employees with additional voluntary profit-sharing plans and stock option plans.

93. However, the employees must have at least three months of service with the company to be eligible for the statutory profit sharing. *Id.*

94. *Id.*

95. The formula is: Reserve +  $\frac{1}{2}$  (B-5C/100) \* (S/VA), where B equals after-tax profit, C equals the company's own capital (which is equity plus legal reserves plus carry-over profits), S equals wages paid, and VA equals value added to the company. *Id.*

96. *Id.*

97. C. TRAV. art. L. 223.

98. However, employees aged 18 to 21 are entitled to 30 days of paid annual leave regardless of the amount of time they have worked for a company. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. C. TRAV. art. L. 122-26.

103. *Id.*

an employer to continue the employee's salary while the employee is on maternity leave, most collective bargaining agreements provide for paid leave. Whether or not paid leave is required by a collective bargaining agreement, employees receive payments from the social security fund in the amount of their net salary, subject to a tax deduction of 10 to 20%.<sup>104</sup>

Fathers are not left out when a child is born. France enacted a paternity leave law in 2001, which provides leave for every employee who becomes a father. The paternity leave amounts to 11 consecutive days to be taken within four months after the birth or adoption of a child.<sup>105</sup> If there are multiple births or health problems, the number of days may be increased.<sup>106</sup>

In the event an employee is laid off, French law requires that employers provide notice of termination and severance payments. First, the Labor Code provides minimum notice periods for employees.<sup>107</sup> For employees with less than two years of service, the minimum notice period is one month, and employees with two or more years of service receive two months.<sup>108</sup> Executives are generally entitled to three months notice, regardless of length of service.<sup>109</sup> Payment may be made of lieu in notice, which is a fairly common practice.

Perhaps more importantly, French employees are entitled to mandatory severance payments if they are dismissed. The minimum dismissal indemnity amounts to 1/10th of the average monthly remuneration per year of service for employees with two or more years of service, and an additional payment of 1/15th remuneration per year of service after ten years of service.<sup>110</sup> If the dismissal is for economic reasons, the severance payment is twice that described above.<sup>111</sup> Employees are also entitled to any accrued vacation payment if they have not exhausted their

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104. See *Mutual Information System on Social Protection in the EU Member States and EEA*, EUROPA, [http://europa.eu.int/comm/employment\\_social/missoc2001/f\\_part4\\_en.htm](http://europa.eu.int/comm/employment_social/missoc2001/f_part4_en.htm) (last visited on Apr. 14, 2006).

105. Law No. 2001-1246 of Dec. 21, 2001, *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], Dec. 26, 2001, at 20552.

106. *Id.*

107. C. TRAV. art. L. 122-8.

108. *Id.*

109. *Id.*

110. C. TRAV. art. L. 122-2.

111. C. TRAV. art. L. 122-9.

yearly right to vacation.<sup>112</sup> However, if a dismissal is justified by an employee's gross misconduct, notice and severance are not required.<sup>113</sup>

Finally, the French government provides dismissed employees with unemployment compensation. The level of unemployment benefits is determined at the national level in defined agreements. The current national agreement provides unemployment benefits from 122 to 1825 days, depending on the employee's age and length of service.<sup>114</sup> Thus, an employee in France may receive unemployment compensation for a period of up to five years.<sup>115</sup> Moreover, French employees are entitled to more generous unemployment payments than their American counterparts. French employees receive 40.4% of their salary plus 9.79 euros per day.<sup>116</sup>

In France, once a benefit is provided to an employee, the employer may not unilaterally withdraw the benefit. This is sometimes referred to as an employee's "acquired rights." The unilateral cancellation of a benefit by the employer may give rise to the employee's claim to a compensatory payment or damages for constructive discharge. Likewise, if the employer wishes to modify an existing benefit, it must first obtain the employee's consent. If the employer fails to obtain such consent, an employee may claim that his employment contract has been modified to his detriment, and thus claim constructive discharge.

## 2. *United States*

Compared to France, American employees are not legally entitled to a significant number of benefits, such as paid vacation, severance, or mandatory pension schemes. However, that does not mean that they do not receive these benefits. Indeed, many companies provide their employees with these and other generous benefits. The distinction is that American companies are not required by law to provide them.

The few statutory benefits American employees enjoy are family and medical leave, social security and disability payments, and unemployment compensation. The first is governed by the Family and Medical Leave Act of 1993 (FMLA).<sup>117</sup> The FMLA provides employees with limited,

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112. C. TRAV. art. L. 223-14.

113. See Jack Stieber, *Protection Against Unfair Dismissal: A Comparative View*, 3 COMP. LAB. L.J. 229, 232 (1980).

114. Law No. 2000-601 of June 30, 2000, Journal Officiel de la République Française [J.O.] [Official Gazette of France], July 1, 2000, at 9963.

115. See Bruce D. Fisher & Francois Lengart, *Employee Reductions in Force: A Comparative Study of French and U.S. Legal Protections for Employees Downsized Out of Their Jobs*, 26 LOY. L.A. INT'L & COMP. L. REV. 181, 197 (2003).

116. *Id.*

117. 29 U.S.C. §§ 2601 *et seq.* (2000).

unpaid leave for certain health or family reasons.<sup>118</sup> Public and private employers with 50 or more employees must provide eligible employees with up to 12 weeks of unpaid leave during a 12 month period.<sup>119</sup> During FMLA leave, an employer must provide the same health benefits that the employee enjoyed while the employee was working.<sup>120</sup> Moreover, upon returning to work, the employee retains any benefits that accrued during the leave.<sup>121</sup>

Not all employees are entitled to FMLA leave. To be eligible for unpaid leave, an employee must have worked for an employer for at least 12 months and must have worked at least 1250 hours in the prior year.<sup>122</sup> The employee must also demonstrate the leave is for one of the following reasons: giving birth; adopting or fostering a child; caring for a serious health condition of the employee;<sup>123</sup> or caring for a serious health condition of the employee's spouse, child or parent that causes the employee to be unable to perform the functions of the job.<sup>124</sup>

Another benefit afforded to American employees is social security and disability benefits. In 1935, Congress enacted the Social Security Act to provide pension benefits to employees upon retirement.<sup>125</sup> In 1956, Congress added disability benefits to the Act.<sup>126</sup> Employers are required to withhold Social Security taxes from employees' wages.<sup>127</sup> Employers also are required to match these withholdings.<sup>128</sup> To become eligible for Social Security benefits, employees earn credits each year from the Social Security taxes withheld from their paychecks.<sup>129</sup> An employee who earns 40 credits is eligible to receive Social Security retirement

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118. *Id.* § 2612.

119. *Id.*

120. *Id.* § 2614(c).

121. *Id.* § 2614(a).

122. *Id.* § 2611(2)(A).

123. A serious health condition is defined as an illness, injury, impairment, or physical or mental condition that requires hospital care or continuing treatment by a health care provider. *Id.* § 2611(11). The Department of Labor has drafted extensive regulations to describe what types of health conditions qualify as serious. A serious health condition need not be a disability. 29 C.F.R. § 825.114 (2004).

124. 29 U.S.C. § 2612(a)(1).

125. *See* 42 U.S.C. § 401 (2005). The Social Security Act also provides certain family benefits and survivor benefits.

126. *See id.* § 401(b).

127. 26 U.S.C. § 3102 (2005).

128. *See id.* § 3111(a).

129. *See* 42 U.S.C. § 402 (2000).

benefits.<sup>130</sup> In order to receive disability benefits under the Social Security scheme, an employee must be unable to perform any substantial work as the result of a severe mental or physical condition that has lasted or will last 12 or more months.<sup>131</sup> Like retirement benefits, an employee must have earned a minimum amount of credits in order to receive disability benefits.<sup>132</sup>

The main benefit afforded to employees who are dismissed is unemployment compensation. In 1935, Congress enacted the Federal Unemployment Tax Act<sup>133</sup> as part of the Social Security Act.<sup>134</sup> Today, unemployment insurance is administered by a federal-state program.<sup>135</sup> Employers are taxed at both the state and federal level for unemployment insurance benefits.<sup>136</sup> Terminated employees receive about 35 to 40 percent of their wages in unemployment compensation.<sup>137</sup> Most displaced employees can expect to receive benefits for six months, except in areas of high unemployment, where payments may continue for up to one year.<sup>138</sup>

Although there are few statutory benefits in the United States, a majority of private employers voluntarily provide their employees with a variety of fringe benefit plans, including health insurance, retirement benefits, and retirement plans. In a survey recently conducted by the United States Department of Labor,<sup>139</sup> 69% of employees in private companies had access to medical plans, and 53% of these employees participated in such plans.<sup>140</sup> Moreover, the study found that 60% of private companies offered health insurance to employees.<sup>141</sup> The survey also found that 59% of employees had access to retirement benefits, and 50% participated in at least one type of retirement plan.<sup>142</sup>

The most common benefit offered by private companies to employees is paid leave.<sup>143</sup> Over 75% of employers provide paid holidays and paid

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130. *Id.* § 414(a).

131. *Id.* § 423(d).

132. *Id.* § 423(c).

133. 26 U.S.C. §§ 3301-3311 (2005).

134. Fisher & Lengart, *supra* note 115, at 195.

135. *Id.*

136. *Id.*

137. Summers, *supra* note 54, at 1036. Unemployment benefits are usually not available if an employee is dismissed for misconduct.

138. *Id.*

139. See U.S. Dep't of Labor, Bureau of Labor Statistics, *National Compensation Survey: Employee Benefits in Private Industry in the United States*, Mar. 2004, <http://www.bls.gov/ncs/ebs/sp/ebsm0002.pdf> (last visited Apr. 14, 2006).

140. *Id.* at 1.

141. *Id.*

142. *Id.*

143. *Id.*

vacations.<sup>144</sup> In addition, 70% of employers provide paid jury duty leave, and approximately 50% of employers provide paid sick leave and paid military leave.<sup>145</sup> On average, private industry employers provide eight paid holidays a year, and eight days of vacation after one year of service.<sup>146</sup>

Private employers commonly provide other benefits, such as life insurance, short- and long-term disability insurance, and non-production bonuses.<sup>147</sup> For example, the Department of Labor survey found that over 50% of employers provided employees with life insurance, and 48% of these workers participated in such plans.<sup>148</sup> Many employers provide more than life and medical insurance. Approximately 39% of employees receive short-term disability benefits, and 30% receive long-term disability coverage.<sup>149</sup>

Non-production bonuses and stock options are also common fringe benefits provided by U.S. employers. The survey found that 47% of employees received some type of bonus not related to their performance, such as profit sharing, end-of-year or holiday bonuses, or stock options.<sup>150</sup> In total, the survey demonstrates that although American employers are not required to provide fringe benefits, a majority of employers do so.

With respect to benefits, it again appears that economic power in the United States is invested in employers, while in France, it is invested in employees. Although the findings in the Department of Labor survey are encouraging, U.S. employers do not provide fringe benefits for perpetuity, nor are they required to do so. Under U.S. law, employers are not prohibited from unilaterally changing the terms and conditions of employment, including any fringe benefits, unless an individual employment agreement or collective bargaining agreement provides otherwise.<sup>151</sup> The opposite is true in France, where the acquired rights doctrine precludes an employer from changing the terms and conditions of employment without an employee's consent. The issue of acquired rights is particularly important in the context of corporate acquisitions.

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144. *Id.*

145. *Id.*

146. *Id.* at 3.

147. *Id.* at 1.

148. *Id.* at 16-17.

149. *Id.* at 16.

150. *Id.* at 24.

151. However, an employer is required to honor any accrued benefits.

### C. Employment Laws Related to Corporate Acquisitions

The employment laws related to corporate acquisitions in France and the United States are as different as the numbers of acquisitions occurring in both countries. Business transfers in France are subject to a specific EU directive and to French law. In contrast, the United States has few legal restrictions dealing with the transfer of employees in the context of a corporate acquisition.

#### 1. France

Companies concluding an acquisition involving a French entity are subject to strict legal requirements. First, the EU has adopted the Acquired Rights Directive, as explained below, to protect employees in the event of a business transfer.

##### a. The Acquired Rights Directive

Before analyzing the Acquired Rights Directive, it is important to explain what a directive is, and how it relates to national law. Professor Stone explains that an “EU directive is a regulation enacted by the EU Council that the member states must then enact into their domestic law.”<sup>152</sup> The directive sets minimum standards for a particular area of law that the member states must “transpose” into their own legal systems.<sup>153</sup>

In 1977, the EU enacted the Acquired Rights Directive, which protects the rights of employees in connection with business transfers,<sup>154</sup> such as

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152. Katherine Van Wezel Stone, *Labor and the Global Economy: Four Approaches to Transnational Labor Regulation*, 16 MICH. J. INT’L L. 987, 1001 (1995).

153. *Id.*

154. When the Acquired Rights Directive was first enacted, the definition of a business transfer was limited to legal transfers, those where a contractual relationship was present. See CATHERINE BARNARD, *EC EMPLOYMENT LAW* 454 (2d ed. 2000). The European Court of Justice [hereinafter the ECJ] has since adopted a broader interpretation of a business transfer. *Id.* In *Allen v. Amalgamated Constr. Co. Ltd.*, the ECJ held that the Directive covers any legal change in the person of the employer. Case C-234/98, *Allen v. Amalgamated Constr. Co. Ltd.*, 2000 E.C.R. 97 (1999). Thus, a business transfer may result from contract, administrative or legislative act, or court decision. BARNARD, *supra*, at 454. Factors to be considered are: the type of business, the tangible and intangible assets transferred, the value of intangible assets, the number of employees transferred, the customers that were transferred, the degree of similarity of the activities before and after the transfer, and the period, if any, for which business activities were suspended as a result of the transfer. See Case 24/85, *Spijkers v. Gebroeders Benedik Abattoir CV and Alfred Benedik en Zonen BV*, 1986 E.C.R. 1119, 1122-28. The national court must decide, using these factors, whether a transfer has occurred. BARNARD, *supra*, at 462.



mergers, acquisitions or out-sourcing.<sup>155</sup> The Acquired Rights Directive incorporates the EU's "corporate transparency" objective, which gives employees the right to access information about proposed corporate actions.<sup>156</sup> Member states of the EU are required to adopt independent procedures for incorporating the directives, including the Acquired Rights Directive, into their national laws.<sup>157</sup>

The main purpose of the Acquired Rights Directive is "to safeguard the rights of workers in the event of a *change of employer* by making it possible for them to work for the *new employer* under the same conditions as those agreed with the transferor."<sup>158</sup> Thus, employees enjoy the right to continued employment on substantially equal terms and conditions of employment in the event of a business transfer.<sup>159</sup> In other words, the transferee "stands in the shoes of the transferor and the [employment] contract continues without a break."<sup>160</sup> Thus, the transferee by law must honor the employment agreements entered into with the transferor.<sup>161</sup>

The Directive also guarantees employees certain information and consultation rights prior to a business transfer.<sup>162</sup> The transferor and the transferee must provide the employee representatives with the date of the proposed transfer, the reasons for the transfer, the ways in which

155. See Council Directive 77/187, 1977 O.J. (L 61) 26 (EEC). In 1998, the EU amended Articles 1-7 of the Acquired Rights Directive. Council Directive 98/50, 1998 O.J. (L 201) 88 (EC). Then, in 2001, the EU clarified the Directive and codified it in Council Directive 2001/23, 2001 O.J. (L 82) 16 (EC). For an overview of the Acquired Rights Directive, see Roger J. Goebel, *Employee Rights in the European Community: A Panorama from the 1974 Social Action Program to the Social Charter of 1989*, 17 HASTINGS INT'L & COMP. L. REV. 1, 22-25 (1993).

156. Council Directive 77/187, art. 6(1) 1977 O.J. (L 61) (EEC); Janice R. Bellace, *The European Works Council Directive: Transnational Information and Consultation in the European Union*, 18 COMP. LAB. L.J. 325, 339 (1997).

157. See Joshua Henderson, *The Institutional and Normative Significance of the European Union's Acquired Rights Directive*, 29 GEO. WASH. J. INT'L L. & ECON. 803, 814 (1997) (The Treaty on European Union (TEU) provides that Member States shall adopt independent procedures for incorporating directives into their national laws).

158. See Bob Hepple, *The Legal Consequences of Cross Border Transfers of Undertakings Within the European Union 3* (May 1998), available at [http://europa.eu.int/comm/employment\\_social/labour\\_law/docs/transfer\\_crossborder\\_study\\_hepple\\_en.pdf](http://europa.eu.int/comm/employment_social/labour_law/docs/transfer_crossborder_study_hepple_en.pdf) (quoting Case C-305/94 *Rotsart de Heraing v. J Benoidt SA*, 1995 E.C.R. I-6965 (1997)).

159. Council Directive 2001/23, art. 3(1)-3(2), 2001 O.J. (L 82) 16 (EC).

160. Roger Steel, *Recent Employment Law Developments Affecting UK Business Transfers*, INT'L CO & COM. L. REV. 6(9), 313 (1995).

161. Henderson, *supra* note 157, at 810.

162. See Goebel, *supra* note 155, at 23.

employees will be affected, and the measures envisaged with respect to the employees.<sup>163</sup> The information must be given to the employee representatives in good time before the transfer is affected.<sup>164</sup> If measures are envisaged, the employer must consult with the employee representatives with a view to seeking agreement on how the change will occur, and the consequences for the change.<sup>165</sup> If there are no employee representatives, the employer must inform the employees in advance when the transfer is to take place.<sup>166</sup> The Directive allows member states to define consultation and worker representatives in order to allow the measure to be made compatible with local laws and procedures.<sup>167</sup>

In addition to providing employees with notice of the transfer, the Transfer of Undertakings Directive prohibits the transferor and the transferee from dismissing employees because of, or in anticipation of, a business transfer.<sup>168</sup> Likewise, employees cannot suffer a detrimental change in the terms and conditions of employment by virtue of the business transfer.<sup>169</sup> If this occurs, employees may bring constructive dismissal claims against the transferee, and in many circumstances, the transferor.<sup>170</sup> Although employers may dismiss an employee for “economic, technical or organizational reasons entailing changes in the workforce,”<sup>171</sup> many courts have essentially nullified this provision and found in favor of the employee if a dismissal occurred in connection with a business transfer.<sup>172</sup>

In sum, the Acquired Rights Directive provides the basis for French law regarding the transfer of employees in an acquisition context. France has implemented the Directive into its national law, and has developed its own requirements for protecting employees in a business transfer situation.

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163. Council Directive 2001/23, art. 7(1), 2001 O.J. (L 82) 16 (EC). In the corporate acquisitions context, measures generally include redundancies or changes to terms and conditions of employment.

164. *Id.*

165. *Id.* at art. 7(2)-(3).

166. *Id.* at art. 7(6).

167. Jill R. Whitelaw, *Duties to Employees Affected by a Transfer of the Enterprise: United States, Europe and Japan*, 9 COMP. LAB. L.J. 558, 573 (1988).

168. Council Directive 2001/23, art. 4(1), 2001 O.J. (L 82) 16 (EC); *see also* Henderson, *supra* note 157, at 810.

169. Council Directive 2001/23, art. 4(2), 2001 O.J. (L 82) 16 (EC).

170. *See id.* National courts may also allow a cause of action for unlawful dismissal against both the transferor and the transferee. ROGER BLANPAIN, *EUROPEAN LABOUR LAW* 479 (2002).

171. Council Directive 2001/23, art. 4(1), 2001 O.J. (L 82) 16 (EC).

172. *See* Henderson, *supra* note 157, at 810.

*b. French Law on Employment Transfers*

The French Labor Code contains several strict requirements governing the transfer of employees in a corporate acquisition. Most of the provisions are found in Article L 122-12 of the Labor Code.<sup>173</sup> The Labor Code requires that the transferor and the transferee engage in formal notice and consultation requirements in advance of the transfer.<sup>174</sup> The notice and consultation must be made with any employee representatives, such as a works council, or if there is no representative group, with the employees themselves.<sup>175</sup> French law also includes detailed requirements for transferring employees from the transferor company to the transferee company.

*1. Notice and Consultation Requirements*

The Labor Code requires both the transferor and the transferee to engage in formal notice and consultation with employees, and if applicable, their representatives.<sup>176</sup> This means that employees have a right to receive information about proposed corporate transactions, a privilege not generally given to employees in the United States.<sup>177</sup>

Depending on the size of the employer, there are various employee representatives that must be consulted in connection with a transfer of business. When consulting with these groups, the employer must follow specific requirements. In addition, a collective bargaining agreement may also require notice and/or consultation with employees.

First, if there are a significant number of employees involved in the sale of the business, companies may be required to consult across national borders. In situations where the employer employs 1000 employees within the European Union, and employs 150 employees in at least two member states, the European Works Council Directive applies.<sup>178</sup> Under the Works Council Directive, the employer must negotiate with employee representatives regarding the establishment, power and organization of a European Works Council.<sup>179</sup> For example,

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173. C. TRAV. L. 122-12.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. Council Directive 94/45, art. 2, 1994 O.J. (L 254) 64, 66 (EC).

179. *Id.* art. 5.

if a company employs 1000 employees in the EU, with 200 employees in France and 150 employees in Germany, the company must establish a European Works Council.<sup>180</sup> Consultation with the subsequent European Works Council must be made by the company of the member state where the central management is located. Thus, in the example above, if the central management is located in the company's French office, the French company is responsible for notifying and consulting with the European Works Council. If there is a European Works Council, the company must provide information regarding the proposed transaction. If "exceptional circumstances affecting the employees' interests" will occur, the company must also consult with the group regarding these circumstances.<sup>181</sup> A transfer of employees is generally deemed to be an exceptional circumstance affecting the employees' interests.<sup>182</sup>

Another employee representative group that must be consulted in the event of a business transfer is the local works council. If a French employer has at least 50 employees, the Labor Code requires that the company organize a works council election.<sup>183</sup> Where there is a works council, the transferor and the transferee must consult with the works council prior to executing a transaction that affects the employer's economic or legal structure.<sup>184</sup>

Required consultation is quite detailed. The employer must first submit to the works council precise information, in writing, concerning the transaction.<sup>185</sup> The written memorandum must include the basic terms and conditions of the proposed transaction, including any particular employment consequences.<sup>186</sup> The works council is then allowed a sufficient period of time to consider the proposed transaction.<sup>187</sup> After considering the proposal, the works council provides the company with its initial observations regarding the proposed transaction, to which the employer provides a reasoned response.<sup>188</sup> Subsequently, the works

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180. A works council is a body that represents employees, usually mandated by law, and limited to one company or workplace. See Janice R. Bellace, *The European Works Council Directive: Transnational Information and Consultation in the European Union*, 18 COMP. LAB. L. & POL'Y J. 325, 326 n.5 (1997).

181. Council Directive 94/45, art. 7, 1994 O.J. (L 254) 64 (EC) (this provision is made explicit under the subsidiary requirements noted in article 7; the subsidiary requirements are listed in the annex).

182. *Id.*

183. C. TRAV. art. L. 431-1. The employer is considered to employ 50 employees (or more) when this minimum number has been reached for 12 months, whether consecutive or not, in the last three years. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

council gives its official position with regard to the transaction.<sup>189</sup> Although the works council's official position is not binding on the company, the employer must nevertheless engage in this consultation process.<sup>190</sup> Moreover, the transferor and the transferee cannot sign the purchase agreement before the consultation procedure has occurred.<sup>191</sup> If the employer fails to consult with the works council, the employer's sanction may include 12 months' imprisonment and/or a fine of up to 25,000 euros.<sup>192</sup>

If a French company employs between 11 and 49 people, employee representatives elected by employees must be consulted with respect to a transfer of business.<sup>193</sup> As required when a works council exists, an employer must notify and consult with the employee representatives regarding the proposed transaction.<sup>194</sup> However, unlike the works council scenario, the employer is not required to obtain the opinion of the employee representatives.<sup>195</sup>

If there are no employee representatives, the transferor must still provide the employees with information regarding the business transfer.<sup>196</sup> The notice usually takes place during a meeting with employees. At this meeting, the transferor provides employees with a written notice of the transfer, which includes the proposed date of the transfer, the name of the transferee, and an assurance that the terms and conditions of employment will remain the same.<sup>197</sup>

As demonstrated above, French law contains strict requirements for providing employees with advance notice of a business transfer. Generally speaking, the larger the company, the more detailed the procedures are for notifying employees. French law also dictates the manner in which employees may be transferred from the transferor to the transferee once a corporate acquisition is complete.

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189. *Id.*

190. *Id.*

191. In practice, this does not always occur. Many companies do not wish to make the terms of a purchase, or even the fact that a purchase may occur, public until after the parties have signed the purchase agreement. Consultation with the works council generally occurs after the initial purchase agreement is signed, but before the employees are actually transferred.

192. C. TRAV. art. L. 431-1.

193. C. TRAV. art. L. 423-16.

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

## 2. Method of Transfer

“Since 1928, French law has required that if there is a change in the juridical situation of an employer . . . all contracts of employment in effect on the date of the transfer will continue between the new employer and the employees of the enterprise.”<sup>198</sup> Because the employment contracts transfer automatically to the transferee, all of the terms and conditions of employment remain the same. In addition, all of the employees’ rights concerning seniority are preserved. The transferee is very limited in its ability to amend the existing terms and conditions of employment, and may only do so with employees’ prior consent.<sup>199</sup> In fact, if the transferee revises the terms and conditions of employment without employee consent, the employee is considered to have been constructively discharged. As a result, the employer may be held liable for unfair dismissal.<sup>200</sup>

Some employers find it difficult to harmonize benefits when transferring employees. Nevertheless, they are well advised to do their best to maintain the identical benefits in existence at the time of the transfer. For example, the author has worked on cross-border transactions where employees threatened to sue if they did not receive the exact same cell phone plan they were previously entitled to. Other employees have complained if a private health insurance plan does not include the same physicians. In these scenarios, the transferee discussed the situation with the transferring employees, and they were able to reach a compromise. However, the technical right to identical benefits is real, and transferring employees usually know this.

However, transferring employees cannot complain if the transferee maintains the same terms and conditions of employment. Under these circumstances, the employees have no right to object to their transfer of employment. If an employee refuses to transfer, he will be considered to have resigned. For example, the author experienced a situation where an employee did not want to transfer from a French-owned company to a U.S.-owned company with a large office in Paris. The employee argued that he would suffer as a result of the transfer because his industry would not respect him if he worked for a foreign company. The employee’s argument was legally without merit. His employment transferred

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198. BARNARD, *supra* note 154, at 446 (citing C. TRAV. art. L. 122-12).

199. *See id.*

200. C. TRAV. arts. L. 122-14-4, L. 122-14-5. The employer would be required to provide the employee with an indemnity, which is usually a minimum of 6 months’ salary. In addition, the employer would be liable to the employee for damages for failing to comply with the dismissal procedure. Damages are generally equal to at least one month’s salary. *Id.*

automatically upon conclusion of the transaction. The employee chose to transfer employment, but if he had refused the transfer, he would have been deemed to have voluntarily resigned from the transferor. In this situation, the employee would be eligible for severance payments.

Because French social policy mandates that employees continue their employment with the transferee company, valid terminations in connection with a transfer are severely limited. If an employer decides to terminate an employee in connection with the transfer of business, the termination must be based on valid reasons and comply with detailed procedures, including the payment of severance.<sup>201</sup> A valid economic reason for terminating employees is defined by the Labor Code as “a non-personal reason stemming from the suppression or the transformation of the employee’s position or from a substantial modification of the employee’s employment contract, that are themselves induced by, inter alia, economic difficulties or technological mutations.”<sup>202</sup> Although there is no specific statutory rule prohibiting the dismissal of employees in connection with a transfer of business, such dismissals are not recommended; employees dismissed prior to, or in connection with, a business transfer may, notwithstanding their dismissals, make a claim for reinstatement with the transferee or obtain damages from the transferor.

As demonstrated above, the notice, consultation and transfer requirements under French law are meticulous. The Acquired Rights Directive and French law strongly favor the employee’s position in a corporate acquisition. Both laws protect the rights of employees, ensuring they are informed of the transfer, consulted with regarding any measures affecting employment, and transferred without any changes to the terms and conditions of their employment. Thus, as in the area of employee benefits, French employees enjoy significant economic power in the event of a business transfer. In contrast, American employees do not fare as well as their French counterparts in the event of a corporate acquisition.

## 2. *United States*

Compared to France, the United States has relatively few requirements governing the transfer of employees in a corporate acquisition. For the

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201. C. TRAV. art. L. 122-14.

202. C. TRAV. art. L. 321-1.

most part, advance notice of a transfer is not required unless a certain number of employees will be terminated prior to the transfer, or a union is involved. In addition, employees are not transferred automatically, as is the case in France. Instead, they must first receive formal offers of employment from the transferee, and then accept the employment offer in order to transfer employment.<sup>203</sup> If employees do not receive an offer of employment from the transferee, they remain employed by the transferor unless the transferor terminates their employment.<sup>204</sup> Unlike France, such terminations are not prohibited unless they are discriminatory.<sup>205</sup>

### *a. Notice and Consultation Requirements*

For the most part, American companies need not provide formal notice of the proposed transaction, since most employees are employed at-will. The employment at-will doctrine allows employers to terminate employees at any time, for any reason, without severance pay or notice. There are two exceptions to this rule: (a) where a certain number of employees will be terminated within a 90 day time period; and (b) where a union is involved.

#### *1. The WARN Act*

The Workers Adjustment and Retraining Notification Act (WARN Act)<sup>206</sup> is a statute designed to protect employees by requiring an employer to give advance written notice when it plans to conduct a “plant closing”<sup>207</sup> or “mass lay-off.”<sup>208</sup> The WARN Act requires employers to give employees at least 60 days’ notice of such an employment action.<sup>209</sup> The WARN Act applies to any business enterprise that employs: (1) 100 or more employees, not including part-time employees; or (2) 100 or more employees (including part-time employees), who in the aggregate

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203. See Marley S. Weiss, *The Impact of the European Community on Labor Law: Some American Comparisons*, 68 CHI.-KENT L. REV. 1427, 1457 (1993).

204. *Id.*

205. *Id.*

206. 29 U.S.C. § 2101-2109 (2005).

207. *Id.* § 2101(a)(2). A plant closing is defined as a “permanent or temporary shutdown of a single site of employment, or one or more facilities or operating units within a single site of employment, if the shutdown results in an employment loss at the single site of employment during any 30-day period for 50 or more employees excluding any part-time employees.” *Id.*

208. *Id.* § 2101(a)(3).

209. *Id.* § 2102(a).



work at least 4000 straight time hours per week.<sup>210</sup> Before determining whether WARN notice is required, a company must determine whether its actions constitute a plant closing or mass lay-off as defined by the WARN Act. The statute provides specific definitions of these terms. A plant closing is a permanent or temporary shutdown of: (1) a single site of employment; or (2) one or more facilities or operating units within a single site of employment.<sup>211</sup> To constitute a plant closing, the event must result in loss of employment for 50 or more employees (excluding part-time employees).<sup>212</sup> However, if a company's action does not amount to a plant closing, it may still constitute a mass lay-off as defined by the WARN Act. A mass lay-off is an employment loss<sup>213</sup> (not including a plant closing) at a single site of employment of: (1) at least 33% of the active employees, excluding part-time employees; and (2) at least 50 employees, excluding part-time employees.<sup>214</sup> If 500 or more employees (excluding part-time employees) are affected by a mass lay-off, the 33% requirement does not apply.<sup>215</sup>

In determining whether the WARN Act has been triggered, companies must review a 90 day period of time to assess whether a sufficient number of employees have been or will be terminated or laid off in that time period to constitute either a plant closing or a mass lay-off under the Act.<sup>216</sup> If the requisite number of employees have been or will be dismissed, the company then must provide written notice of the plant closing or mass lay-off to: (1) any representative of the employees affected by the action; (2) each affected employee, if there is no

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

211. *Id.* § 2101(a)(2).

212. *Id.*

213. The WARN Act regulations define an "employment loss" as: (1) an employment termination other than a discharge for cause, voluntary departure, or retirement; (2) a lay-off exceeding six months in duration; or (3) a reduction in hours of work of individual employees of more than 50% during each month of any six month period. *Id.* § 2101(a)(6).

214. *Id.* § 2101(a)(3).

215. *Id.*

216. *Id.* § 2102(d).

employee representative; (3) the chief elected official of the unit of local government where the job losses are scheduled to occur; and (4) the dislocated worker unit in each state where the job losses will occur.<sup>217</sup> The WARN Act regulations provide that notice may be delivered by any method, provided that the method is designed to ensure that the affected parties receive notice at least 60 days before the separations begin.<sup>218</sup>

There are specific items that must be included in a WARN Act notice. First, the notice must contain the anticipated date of the mass lay-off or plant closing.<sup>219</sup> The date may be either a specific day or a 14-day period during which the separations are to begin.<sup>220</sup> The notice should also indicate whether the action is temporary or permanent, and whether the entire plant is to be affected.<sup>221</sup> The notice may also specify whether lay-offs are conditioned on the occurrence or non-occurrence of a particular event.<sup>222</sup> Finally, the notice should include the name and telephone number of the person to contact for additional information.<sup>223</sup>

Employers that violate the WARN Act are liable to each employee who did not receive proper notice for back pay and benefits, including the cost of medical expenses that would have been covered under an employee benefit plan, for each day of the violation, up to the maximum of 60 days.<sup>224</sup> These amounts can be reduced by: (1) wages paid by the employer to the employee during the period of the violation; (2) voluntary payments to employees not otherwise required by any legal obligation; or (3) payments to third parties or trustees on behalf of employees.<sup>225</sup>

The WARN Act may be enforced by a lawsuit filed by an employee in the federal district court where the violations occurred, or in any jurisdiction where the employer conducts business.<sup>226</sup> In addition, a union or the local government may sue on behalf of individual employees or on behalf of all of the affected employees collectively.<sup>227</sup> The remedies specified in the WARN Act are exclusive.<sup>228</sup> Courts have discretion to award attorneys' fees to prevailing parties.<sup>229</sup> However,

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217. *Id.* § 2102(a).

218. *Id.*

219. 20 C.F.R. § 639.7 (2005).

220. *Id.*

221. 29 C.F.R. § 639.7(d).

222. *Id.*

223. *Id.*

224. 29 U.S.C. § 2104(a) (2000).

225. *Id.* § 2104(a)(2).

226. *Id.* § 2104(a)(5).

227. *Id.*

228. *Id.* § 2104(b).

229. *Id.* § 2104(a)(6).

courts are not permitted to bar a plant closing or mass lay-off that violates the statute.<sup>230</sup>

Finally, an employer also may be liable to the local government for fines up to \$500 for each day of the violation, up to a maximum of 60 days.<sup>231</sup> However, employers can avoid these fines by paying each of the affected employees the amount for which the employer is liable under the statute within three weeks of the date of the plant closing or a mass lay-off.<sup>232</sup> Where an employer is able to show that it acted in good faith and that it had reasonable grounds for believing its actions did not violate the statute, the court has discretion to reduce penalties and fines.<sup>233</sup>

In addition to the federal requirements of the WARN Act, many states have statutory requirements applicable to plant closings and mass lay-offs.<sup>234</sup> An employer must be careful not to overlook them because state statutes may be more expansive than the requirements in WARN. For example, Illinois enacted a statute similar to the WARN Act, but the Illinois law covers more employers.<sup>235</sup> The Illinois WARN Act applies to companies with 75 or more employees,<sup>236</sup> whereas the WARN Act only applies to companies with 100 or more employees.<sup>237</sup> Moreover, Illinois employers must provide notice of a mass lay-off if there is an employment loss during a 30-day period of at least 33% of employees and at least 25 employees, or at least 250 employees regardless of the percentage.<sup>238</sup> In contrast, The WARN Act only requires notice if during a 30-day period at least 33% of employees and at least 50 employees, or at least 500 employees will be laid off.<sup>239</sup>

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230. *Id.* § 2104(b).

231. *Id.* § 2104(a)(3).

232. *Id.*

233. *Id.* § 2104(a)(4).

234. See CONN. GEN. STAT. ANN. § 31-51 (West 2005); MASS. GEN. LAWS ANN. ch. 175, § 110D (2005); N.J. ADMIN. CODE § 12:17-3.5 (2003).

235. The Illinois statute is named Worker Adjustment and Retraining Notification Act. 820 Ill. Comp. Stat. 65/1-65/99 (2005).

236. *Id.* § 65/5.

237. See 29 U.S.C. § 2101(a)(1) (2005).

238. 820 Ill. Comp. Stat. § 65/5(d) (2005).

239. 29 U.S.C. § 2101(a)(3).

## 2. Unions

Prior notice of a transaction may also be required when a union is involved in these situations. However, the notice requirements are limited.<sup>240</sup> As a preliminary matter, a transferor is not required, nor is it customary, to consult with a union regarding a decision to sell the business, absent a notice or consent provision in the transferor's collective bargaining agreement with the union.<sup>241</sup> Moreover, a transferee is not required to consult with its own union regarding a decision to purchase a business, absent such a notice or consent provision.<sup>242</sup> All the transferor and the transferee are required to do is bargain with each respective union over the effects of the transfer, if requested to do so by the union after it learns of the transfer.<sup>243</sup>

In order to permit a meaningful opportunity for bargaining to take place, the union should be notified of the transfer a reasonable time before the transfer is to occur.<sup>244</sup> Furthermore, the union is entitled to information relevant to the effects of the transfer, such as a succession of layoffs or new job opportunities offered by the employer.<sup>245</sup>

A successorship clause in a collective bargaining agreement does not improve the situation for the unionized employees to any great degree. Even if the transferor's collective bargaining agreement includes a successorship clause, the transferee nevertheless need not adopt the terms of the collective bargaining agreement.<sup>246</sup> Moreover, the transferee

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240. See Whitelaw, *supra* note 167, at 563.

241. *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 676-77, 686 (1981) (reasoning that absent a contract clause for mandatory bargaining, the harm caused to the seller deciding whether to dismiss employees for purely economic reasons outweighs the union's minimal benefit in partaking in any such decision); *Fibreboard Paper Prod. Corp. v. NLRB*, 379 U.S. 203, 223 (1964) (Stewart, J., concurring) (stating that although this type of decision directly involved employment, it had an economic focus, distinguished from the employment relationship).

242. *First Nat'l Maint. Corp.*, 452 U.S. at 676-77 (finding that although certain issues must be submitted to the union to permit bargaining, Congress did not intend for the union to become, in effect, an equal partner with the employing business entity).

243. *Id.* at 666-67 (while there is no *per se* rule governing an employer's decision to close part of its business or terminate a contract, the employer is required to bargain over the effects of a decision).

244. *Reidel Int'l D/B/A Willamette Tug & Barge Co.*, 300 N.L.R.B. 282 (1990) (holding that in a purchase and sale context, the union must be notified at some point between the time the sale is "under active consideration" and when it has become a *fait accompli*).

245. See *Otis Elevator Co.*, 269 N.L.R.B. 891 (1984) (finding that when the employer's decision to transfer was based on a redirection of its business and thus not subject to bargaining with the union, the employer need not provide information requested by the union).

246. *Howard Johnson Co. v. Detroit Local Joint Executive Bd.*, 417 U.S. 249, 249-50 (1974) (because many factors create a successor, there can be no single definition of

only is required to bargain with the union if it hires a majority of the transferor's workforce.<sup>247</sup> In general, the transferor and the transferee are not required to extensively engage in consultation with a union. For the most part, the parties are able to do as they wish with respect to a business transfer.<sup>248</sup>

### b. Method of Transfer

Unlike French employees, American employees do not automatically transfer employment from the transferor company to the transferee company.<sup>249</sup> In the United States, employees only transfer if the transferee formally offers them employment. Moreover, unlike automatic transfer jurisdictions, it is not possible to assign or transfer an individual's employment without the individual's consent. A transferee must offer employment to the employees, and the employees accept the offer of employment. This is commonly referred to as "offer and acceptance." Also, because the employees do not transfer automatically, the transferor must terminate the employees prior to the transfer of business.<sup>250</sup>

Because it is not possible to transfer an individuals' employment without their acceptance, it is imperative that the transferee company communicate an offer of employment to the individuals it wishes to retain as soon as possible. Of course, if the transferee does not wish to employ all the transferor's employees, it is not required to do so. The number of employees to be transferred is a business decision made between the two parties prior to executing the purchase agreement.

The offer and acceptance concept is even more significant with respect to key employees, those deemed to be crucial to the business. The transferee may need to negotiate "stay put" agreements or more generous compensation packages to ensure that key employees remain

successor to be applied to every case; therefore, a new employer may be a successor for some purposes and not others).

247. *Id.* at 263-64. However, the purchaser cannot base its hiring decision on the basis of employees' union status. See 29 U.S.C. § 158(a)(3) (2005); *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 47 (1987); see also Leslie Braginsky, *How Changes in Employer Identity Affect Employment Continuity: A Comparison of the United States and the United Kingdom*, 16 COMP. LAB. L.J. 231, 242-43 (1995).

248. For an overview of U.S. law and the protection of unionized employees in relation to a transfer of business see Braginsky, *supra* note 247, at 233-47.

249. The exception is that in the case of a merger, employees transfer automatically because the only change has been a transfer of stock. See 1 INTERNATIONAL LABOR AND EMPLOYMENT LAWS, *supra* note 49, at 23e-22.

250. See Weiss, *supra* note 203, at 1457.

with the transferor company during the transition period<sup>251</sup> instead of quitting at the first hint of upheaval. Otherwise, the transferee may find itself without adequate staff on the closing date. For example, in the software industry, salespersons can be as important to the company's bottom line as the product itself. Moreover, where the product is complex or highly technical, the company must strive to retain sales associates who are knowledgeable about the product and experienced in selling it. Otherwise, the company must bear the costs associated with training new employees. Thus, it is extremely important for a transferee to take all necessary steps to retain employees, especially those employees who are crucial to the target company's business. At the very least, the transferee should inform the key employees as soon as possible of the proposed acquisition, and may want to offer the key employees a bonus payment in exchange for entering into a retention agreement.

In a corporate acquisition, not every employee is guaranteed a job with the transferee company, since the transferee is under no obligation to hire the transferor's employees.<sup>252</sup> This is the case regardless of whether the transferor's employees are employed at-will or under an employment agreement.<sup>253</sup> Thus, unlike the situation in France, the transferee may offer employment on vastly different terms than those of the transferor.<sup>254</sup> Because most employees are employed at-will, the transferor may terminate employees who did not receive an offer of employment from the transferee for any reason<sup>255</sup> and generally without any severance payment.<sup>256</sup> The only exceptions to this rule involve employment agreements that require notice and severance, or terminations that are made in violation of statute or public policy.<sup>257</sup>

In sum, the United States has few statutory requirements governing the transfer of employees in a corporate acquisition. Unless a certain number of employees are terminated as a result of the transaction, or a union is involved, American companies are not required to provide employees with any notice of the transfer. Moreover, employees do not transfer automatically in the United States—the transferee is allowed to

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251. The transition period generally encompasses the time from when the purchase agreement is signed and the date the business and employees are actually transferred to the new company.

252. Weiss, *supra* note 203, at 1457.

253. *Id.* at 1457 n.150.

254. *Id.* at 1457.

255. However, the employer may not violate anti-discrimination or anti-retaliation laws.

256. Weiss, *supra* note 203, at 1457.

257. See *id.* at 1457; see generally Peter Linzer, *The Decline of Assent: At-Will Employment as a Case Study of the Breakdown of Private Law Theory*, 20 GA. L. REV. 323, 335-68 (1986).

pick and choose the employees it wishes to hire. As a result, American employees do not possess much economic power in the context of a corporate transaction. In contrast, French employees enjoy significant economic power. French employment laws are very restrictive with regard to the notice provided to employees in advance of a transfer, and employers are required to consult with employee representatives in several situations. Further, the transferee company is required to employ all the transferor's employees under the same terms and conditions of employment.

*D. Employment Laws Governing French and U.S. Reductions-in-Force*

Employment laws governing reductions-in-force in France and the United States are as different as the laws concerning corporate acquisitions. Reductions-in-force (or collective redundancies as they are commonly known in Europe) that occur in France are subject to a specific EU directive and French law. In contrast, U.S. law contains few legal restrictions on employers terminating a large number of employees in the event of economic difficulties.

*1. France*

French companies contemplating a collective redundancy must comply with stringent regulations adopted by the EU and the French government. First, the EU adopted a specific directive, the Collective Redundancies Directive,<sup>258</sup> to protect employees in the event of a large scale dismissal of employees.

*a. The Collective Redundancies Directive*

The first Community employee rights measure in the labor context dealt with the protection of employees dismissed or made redundant for economic reasons.<sup>259</sup> The Collective Redundancies Directive sets minimum standards to ensure that companies consult with worker representatives prior to implementing major redundancies, and that the particular public entity is notified prior to dismissal.<sup>260</sup> The Directive has two purposes: first, "that greater protection should be afforded to workers in the event

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258. Council Directive 98/59, 1998 O.J. (L 225) 16 (EC).

259. Goebel, *supra* note 155, at 20.

260. Barnard, *supra* note 154, at 488.

of collective redundancies, while taking into account the need for balanced economic and social development within the Community;<sup>261</sup> and second, “to promote approximation . . . while the improvement (in living and working conditions) is being maintained within the meaning of Article 117 of the Treaty.”<sup>262</sup> However, the Directive is not designed to harmonize national practices and procedures or to affect an employer’s freedom to implement large-scale redundancies.<sup>263</sup>

The Collective Redundancies Directive applies to employers with 20 or more employees.<sup>264</sup> The Directive applies when a certain number of employees are dismissed for economic, not performance, reasons within a 30-day period of time.<sup>265</sup> If the company employs less than 100 employees, the Directive applies for dismissals of 10 or more persons.<sup>266</sup> If the company employs between 100 and 300 employees, the Directive applies when at least 10% of employees will be dismissed.<sup>267</sup> Finally, where the company employs more than 300 employees, the Directive applies when 30 or more employees are dismissed.<sup>268</sup> Alternatively, a member state may simplify matters by requiring the Directive to apply whenever 20 or more employees are dismissed during a period of 90 days.<sup>269</sup>

When the Collective Redundancies Directive applies, the employer must provide a minimum of 30 days notice of the proposed dismissals to the employee representatives and the local labor authorities.<sup>270</sup> The notice must contain “all relevant information” concerning the dismissals, particularly the number of employees to be dismissed.<sup>271</sup> An employer is also required to consult with employee representatives and try to reach an agreement on ways to avoid the redundancies or reduce the number of redundancies.<sup>272</sup>

In 1992, the EU amended the Collective Redundancies Directive to address the situation where a workforce reduction decision is made not by the immediate employer but by a parent company located in another Member State.<sup>273</sup> Prior to the amendment, the Directive only required consultation between local management and employee representatives.<sup>274</sup>

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261. *Id.* (quoting Case 215/83 Commission v. Belgium, 1985 E.C.R. 103).

262. *Id.*

263. *Id.*

264. Council Directive 75/129, art. 1, 1975 O.J. (L 48) 29 (EEC).

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.* art. 3.

271. *Id.*

272. *Id.* art. 2(2).

273. Goebel, *supra* note 155, at 84-85.

274. *Id.*



After the amendment, the information and consultation obligations apply “irrespective of whether the decision regarding collective redundancies is being taken by the employer or by an undertaking controlling the employer.”<sup>275</sup> The amendment also expands the scope of information the employer must provide to employees. Under the new law, an employer now must provide the reasons for the proposed dismissals, the criteria used for choosing the employees to be dismissed, and the application of any redundancy benefits.<sup>276</sup> Finally, if an employer is found to have violated the Directive, the new remedy is nullification of the collective redundancy.<sup>277</sup> For clarity purposes, in 1998 the EU consolidated and repealed the 1975 and 1992 Directives.<sup>278</sup> Today, the 1998 version is the applicable Directive on Collective Redundancies.<sup>279</sup>

*b. French Law on Reductions-in-Force*

France enhanced the requirements contained in the Collective Redundancies Directive when it incorporated the Directive into the Labor Code. The Labor Code contains the Directive’s strict notice and consultation requirements, but also provides other protections for employees. For example, French employers must prepare a detailed downsizing proposal and present it to the employees.<sup>280</sup> If redeployment to another position is possible, the employer is required to place employees in an alternate position instead of dismissing them.<sup>281</sup> French law also provides generous severance benefits to employees who are dismissed.<sup>282</sup> As long as employees are eligible for these protections, they cannot be easily dismissed.

The restrictions on dismissing employees under French law do not apply the first day an employee begins employment with a new company. When an employee begins employment, it is for a trial period (*période d’essai*), which normally runs for one to three months.<sup>283</sup>

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275. Council Directive 92/56, art. 2(4), 1992 O.J. (L 245) 3 (EC) (Amending Directive 75/129 on the Approximation of the Laws of the Member States Relating to Collective Redundancies).

276. *Id.* art. 2(3).

277. Goebel, *supra* note 155, at 85.

278. *Id.*

279. Council Directive 98/59, 1998 O.J. (L 225) 16 (EC).

280. C. TRAV. art. L. 431-5-1.

281. C. TRAV. art. L. 321-4.

282. C. TRAV. art. L. 122-9.

283. 1 INTERNATIONAL LABOR AND EMPLOYMENT LAWS, *supra* note 49, at 3-9.

During the trial period, the employer can dismiss the employee for any reason and without any formalities.<sup>284</sup>

However, once the trial period has elapsed, the employer must follow strict procedures in order to dismiss an employee.<sup>285</sup> Dismissals must be for legitimate reasons, either for cause or due to a reduction in force.<sup>286</sup> In the former situation, the dismissal is related to the behavior of the employee, and thus is designated a dismissal for personal reasons (*licenciement pour motif personnel*).<sup>287</sup> A dismissal arising from a reduction in force (*licenciement économique*) is due to economic conditions and not the employee's performance.<sup>288</sup> In both cases, the dismissal must be based on reasons that are real, serious and objective.<sup>289</sup> The employer must prove the reasons are valid and that borderline cases are decided in favor of the employee.<sup>290</sup>

Dismissals based on economic grounds are governed by strict regulations. In order to be valid, the economic dismissal must result from the elimination or transformation of a position or from a substantial modification resulting from economic difficulties, technological changes or a reorganization of the employer.<sup>291</sup> The economic justification best received by the French courts is that of financial losses, making elimination of the positions necessary for the survival of the employer.<sup>292</sup> In the absence of such financial losses, another argument could be that the employer is suffering global losses that necessitate downsizing in France.

In 2002, a new definition of economic downsizing was added to the Labor Code. The new provision sets forth strict requirements for downsizing, requiring that it be based on one of the following criteria: serious economic troubles that cannot be avoided by any other means; technological changes creating serious questions on the survival of the company; or reorganization necessary to assure the survival of the company.<sup>293</sup> However, "[t]he Constitutional Court declared the new definition null and void, holding that the provision was too strict and

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284. *Id.*

285. C. TRAV. art. L. 122-14.

286. *See* C. TRAV. arts. L. 122-14, L. 321-1.

287. *Id.*

288. *Id.*

289. *Id.*

290. *See* 1 INTERNATIONAL LABOR AND EMPLOYMENT LAWS, *supra* note 49, at 3-9 (citing C. TRAV. art. L. 122-14-3(2)).

291. C. TRAV. art. L. 321-1.

292. *Id.*

293. Fisher & Lengart, *supra* note 115, at 202 (citing C. TRAV. art. L. 321-1).

contrary to the free enterprise principle that is in the [French] Constitution.”<sup>294</sup>

Nevertheless, other restrictive provisions of the new labor law remain valid. For example, the new law significantly increases the severance payments made to dismissed workers. Under the old law, severance payments amounted to 1/10 of a month’s salary per year of service for employees who worked less than 10 years, and an extra 1/15th of a month’s salary per year of service for employees with more than 10 years of service.<sup>295</sup> “The new law increases the indemnification amount to one-fifth of a month’s salary per year of employment for those who have worked fewer than ten years, and one third of a month’s salary for those who worked more than ten years.”<sup>296</sup>

Moreover, under the new law, a company must offer displaced workers future jobs in the company or any companies affiliated with it.<sup>297</sup> In addition, French law requires that the employer make serious efforts to find alternative positions for the employees to be dismissed, often referred to as a “redeployment obligation.”<sup>298</sup>

Employees are also entitled to advance notice of the layoff, which is also determined by the number of years of service with the company. If an employee has worked at least six months but less than two years, the company must provide one month’s notice of the dismissal.<sup>299</sup> If an employee has worked more than two years, the company must provide at least two months’ notice.<sup>300</sup> If the company is unable to provide such notice (or prefers not to), the employee is entitled to an equivalent notice payment.<sup>301</sup> It is common practice for employers to provide a notice payment in lieu of actual notice.

Before a company may implement a reduction-in-force, it must prepare a downsizing proposal for the employees and present it to them.<sup>302</sup> The new law also requires the company to discuss the proposal with the union representing its employees, and with national and

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294. *Id.*

295. *Id.* at 203.

296. *Id.* (citing Decree No. 2002-785 of May 3, 2002, Journal Officiel de la République Française [J.O.] [Official Gazette of France], May 5, 2002).

297. *Id.*

298. See C. TRAV. art. L. 321-4.

299. C. TRAV. art. L. 122-6.

300. *Id.*

301. C. TRAV. art. L. 122-8.

302. Fisher & Lengart, *supra* note 115, at 204.

local authorities.<sup>303</sup> The proposal must include the reasons for the redundancies and a plan for re-employing dismissed workers if the economic situation improves.<sup>304</sup> If a court subsequently finds the proposal to be insufficient, it can be declared null and void.<sup>305</sup> If this occurs, the dismissals are deemed invalid and the employees continue their employment.<sup>306</sup>

After providing the downsizing proposal to the employees, the union, and the national and local authorities, the employer must follow strict guidelines as to which employees are dismissed. Where a selection must be made among potential candidates for dismissal who hold the same post (e.g., if two sales executives are to be dismissed out of 10) objective criteria must be used to select those who will remain.<sup>307</sup> The Labor Code provides a list of criteria to be taken into account, which includes the number of dependant persons in the employee's household, the characteristics that would make the employee's re-employment difficult (for example, age or disability), seniority, and professional qualities.<sup>308</sup> This list is not considered by the courts to be exhaustive, nor must the criteria be considered in any particular order. An employer may give more weight to one or more of these criteria, or add other criteria to the list. An employer may also consider where the employee lives, provided, however, that it takes at least one of the statutory criteria into consideration and has given consideration to all of them.<sup>309</sup> Once the order of criteria has been determined, it must be applied consistently to all employees dismissed whenever more than one person holds the same post.

As discussed in Section III B, French law provides for notice and severance benefits for dismissed employees.<sup>310</sup> These payments can be quite costly, particularly with regard to employees who have worked for the employer for a long period of time. It is interesting to point out that it has become customary for employers to add the value of fringe payments to the employee's base salary for the purpose of calculating severance. Thus, benefits-in-kind, such as housing, private use of an employer car, and other fringe benefits, must be included in the severance calculation. Moreover, if stock options are deemed to be included in the

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303. *Id.* (citing C. TRAV. art. L. 431-5-1).

304. *Id.* at 202.

305. *Id.*

306. *Id.*

307. C. TRAV. art. L. 321-1.

308. *Id.*

309. *Id.*

310. *Id.*

employee's remuneration, any gain realized by exercising the stock options must be included in the severance calculation.

In addition to severance pay, French employees are entitled to unemployment compensation.<sup>311</sup> France determines unemployment benefits at a national level in defined agreements.<sup>312</sup> The current national agreement provides unemployment benefits from 122 to 1825 days, or up to five years, depending on the employee's age and length of service.<sup>313</sup> As discussed in Section III B, French employees are entitled to generous unemployment payments of 40.4% of their salary plus 9.79 euros per day.<sup>314</sup>

Not surprisingly, French employees have the right to contest their dismissal in labor court. If the French labor court determines that an employer's economic reason for the dismissal was not necessary to keep the employer's business competitive, the dismissal will be considered unjustified and invalid for economic reasons,<sup>315</sup> and the employer could be ordered to pay the employees damages.<sup>316</sup> For employees with two or more years of service, such damages would amount to a minimum of six months' salary.<sup>317</sup> For employees with less than two years of service, the award depends on the damage suffered by the loss of employment.<sup>318</sup>

As shown above, French employers must follow strict requirements when contemplating a collective redundancy. The Collective Redundancies Directive and the French Labor Code require detailed notice and consultation requirements when implementing a reduction-in-force. As where a transfer of business is involved, these laws ensure that affected employees and their representatives are informed and consulted with on the proposed collective redundancy.

## 2. *United States*

Compared to France, American companies suffering from economic difficulties face fewer impediments to implementing a reduction-in-

311. See Fisher & Lengart, *supra* note 115, at 197.

312. *Id.*

313. Law No. 2000-601 of June 30, 2000, Journal Officiel de la République Française [J.O.] [Official Gazette of France], July 1, 2000, at 9963.

314. *Id.*

315. C. TRAV. arts. L 122-14-4, L 122-14-5.

316. *Id.*

317. *Id.*

318. *Id.* In addition to these damages, the Labor Court may order that the employer reimburse the government for up to 6 months of unemployment payments.

force. As explained in Section III C, the WARN Act requires employers to provide notice of a mass lay-off or plant closing to employees and any unions representing those employees if the employers plan to terminate a certain number of employees within a 90 day time period. Most employers also obtain legal advice prior to executing a reduction-in-force. Such legal advice is not required, but is highly recommended due to the high incidence of employment discrimination claims that arise out of reductions-in-force.

Although not specifically required by U.S. law, employers should first consider the purpose of the proposed reduction-in-force. For example, the reduction-in-force may be necessary to reduce costs, improve efficiency, eliminate a department, or any other legitimate, non-discriminatory business reason. Whatever the reason, however, the employer should be sure to document the reduction-in-force and provide a legitimate basis for it.<sup>319</sup>

If a reduction-in-force is unavoidable, an employer should first determine the criteria for selecting affected employees. The criteria may be objective or subjective. Using objective criteria, such as seniority<sup>320</sup> or classes of jobs, tends to be the more conservative approach because companies can argue that the choices were not discretionary (and thus not discriminatory).<sup>321</sup> However, employers may reject the use of seniority because this method fails to account for employee performance. Likewise, eliminating an entire class of jobs is rarely possible. Usually an employer has too many employees in a particular job, not too many job classifications.

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319. David A. Cathcart & Kathleen Vanderziel, *Employment Options for the Employer in Transition: Age Discrimination, OWBPA, WARN Act, and NLRA*, in EMPLOYMENT AND LABOR LAW, SB36 ALI-ABA 1171, (1997) (Cathcart and Vanderziel's research cite the following cases as instances where a legitimate basis existed: *Zick v. Verson Allsteel Press Co.*, 644 F. Supp. 906 (N.D. Ill. 1986) (economic documentation to office closure and staff reductions); *Tice v. Lampert Yards, Inc.*, 761 F.2d 1210 (7th Cir. 1985) (facility closure); *Clutterham v. Coachmen Industries, Inc.*, 169 Cal. App. 3d 1223 (1985) (depressed conditions in industry, relocation of corporate headquarters and changes in market strategy); *Parcinski v. Outlet Co.*, 673 F.2d 34 (2d Cir. 1982), *cert. denied*, 459 U.S. 1103 (1983) (elimination of staff of acquired company in weak financial condition)).

320. The Age Discrimination in Employment Act exempts actions by employers who observe the terms of a bona fide seniority system. See 29 U.S.C. § 623(f) (2000).

321. However, using objective criteria in a reduction-in-force does not shield an employer from discrimination claims. Employees may challenge the criteria themselves, on the grounds that they conceal intentional discrimination. See Cathcart & Vanderziel, *supra* note 319, at 1236 (citing *Hill v. Spiegel, Inc.*, 708 F.2d 233, 237 (6th Cir. 1983) (employer was liable for age discrimination where it eliminated an entire division that was regarded as "old, inbred [and] overpaid"); *Polstorff v. Fletcher*, 452 F. Supp. 17, 25 (N.D. Ala. 1978) (agency was liable for age discrimination because it revised the job descriptions of younger employees to ensure that they would not be included in the reduction-in-force)).

Alternatively, an employer may select employees to be included in a reduction-in-force based on subjective criteria. The most common subjective criterion is job performance.<sup>322</sup> When using the subjective method, an employer should consider which job functions are most critical to the business, and retain employees that perform well in these areas. However, the employer should make sure it has sufficient documentation to support the job performance assessments. For example, if a dismissed employee claims to have possessed above-average skills in a job function deemed critical, the employer must be able to demonstrate that the employee was below-average, and that retained employees were above-average performers in this area. In order to gain a complete picture of each potential employee's job performance, the individuals in charge of choosing the affected employees should interview the managers who can best speak to each employee's performance.

Under the employment at-will doctrine, an employer in the United States is free to terminate or lay off its workers as long as such terminations are not discriminatory. Nevertheless, it is common practice for employers to attempt to obtain a release of potential claims from employees who are terminated due to a reduction-in-force. In order for the release of claims to be valid, the employer must provide consideration to the dismissed employees.<sup>323</sup> Consideration in most circumstances involves the payment of money. However, consideration is not limited to money; for example, it can include a letter of recommendation, payment of the employee's insurance premiums, or waiving the repayment of a loan.<sup>324</sup>

Generally, the validity of a release of claims is determined by state contract law principles. However, if an employer seeks a release of potential claims for age discrimination arising under federal law, it must meet the requirements of the Older Workers Benefit Protection Act of 1990<sup>325</sup> (OWBPA). The primary purpose of the OWBPA is to ensure that employees over the age of 40 do not waive any potential age discrimination claims unless they do so knowingly and voluntarily.

The OWBPA specifies minimum conditions that must be met before a release agreement is valid and enforceable, including: (1) the release agreement must be written in clear language; (2) the release must refer to rights or claims specifically arising under the Age Discrimination in

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322. See ETHAN LIPSIG, *DOWNSIZING* 65 (1996).

323. *Id.* at 111-12.

324. *Id.*

325. 29 U.S.C. § 626(f) (2000).

Employment Act of 1967 (ADEA); (3) the employee cannot be asked to waive future claims that may arise after the date the release is executed; (4) in return for signing the release, the employer must provide the employee with consideration; (5) the employee must be advised in writing of the right to consult with an attorney prior to executing the agreement; (6) the employee must be given a period of at least 21 days to consider the terms of the agreement; and (7) the release must provide that for a period of seven days following the execution of the agreement, the employee has the right to revoke the agreement for any reason.<sup>326</sup> The release does not become effective until after the revocation period has expired.<sup>327</sup>

The OWBPA is even more burdensome if the release is proposed to a group of older employees. In this situation, each employee in the group must be given a period of at least 45 days to consider the release agreement.<sup>328</sup> OWBPA further obligates employers to inform employees about the ages and job titles of all persons affected by the group lay-off.<sup>329</sup> This "required information must be provided to each person in the decisional unit who is asked to sign a waiver agreement."<sup>330</sup>

Unlike France, the United States does not require employers to provide dismissed employees with severance pay. Nevertheless, it is common practice for an employer to offer severance pay in exchange for a full release of claims against the employer.<sup>331</sup> One month's pay for employees who execute releases is customary, although severance pay practices vary by industry and depend on the employer's size, profitability and generous nature.<sup>332</sup>

Moreover, dismissed employees may file unemployment insurance claims. As explained in Section III B, employees may receive around 35 to 40 percent of their wages in unemployment compensation.<sup>333</sup> However, because these payments may only last for approximately six months, most dismissed employees begin looking for a new job soon after they are dismissed.<sup>334</sup>

French employees therefore hold more economic power than their American counterparts in the event of a reduction-in-force. Under most circumstances, they must be notified,<sup>335</sup> consulted with,<sup>336</sup> and paid<sup>337</sup> if

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326. *Id.*

327. *Id.*

328. 29 C.F.R. § 1625.22(e)(1)(ii) (2005).

329. *Id.* § 1625.22(f)(1).

330. *Id.* § 1625.22(f)(2).

331. See LIPSIG, *supra* note 322, at 105.

332. *Id.*

333. Summers, *supra* note 54, at 1036.

334. *Id.*

335. See *supra* notes 299-301 and accompanying text.



they are being dismissed because of their employer's economic difficulties. In contrast, American employees do not have to be notified, unless a certain number of employees will be dismissed or if a union is involved, nor are they consulted about the reason for the reduction-in-force. Finally, American employers are not required to pay severance as a result of the involuntary termination of their employees. Yet, after considering the employment situation in the United States versus France as a whole, American employees may prefer that their employers hold the economic power.

#### IV. TWO HYPOTHETICAL EXAMPLES

The easiest way to envisage the differences between French and U.S. employment law, and therefore to understand the influence of economic power, is to provide an illustration of the differences. The hypothetical examples below provide a clear picture of the consequences for employees facing a corporate acquisition and a reduction-in-force.

First, consider Jennifer Jones. She is a 30-year old software engineer who began working for X Corporation in August 2002. Ms. Jones works in X Corporation's Chicago office. She earns \$70,000 a year, and is eligible for a non-production bonus depending upon company profits. X Corporation provides Ms. Jones with health insurance, life insurance in the amount of her yearly salary, short-term and long-term disability insurance, and a cell phone. She is employed at-will.

Ms. Jones's French counterpart is Brigitte Smith. Like Ms. Jones, Ms. Smith is a 30-year old software engineer. She began working for X Corporation's Paris office in August of 2002. She earns 70,000 euros a year. In addition to mandatory benefits provided under French law, X Corporation provides Ms. Smith with private health insurance, life insurance, and a cell phone. Like most French employees, Ms. Smith has an employment contract with X Corporation.

In August of 2005, Y Corporation enters into an asset purchase agreement with X Corporation. X Corporation agrees to sell its software business to Y Corporation for \$1 billion. Through due diligence, Y Corporation learns that Jennifer Jones and Brigitte Smith are excellent engineers, and the company determines that their continued employment is vital to the research and development functions of its business. Thus,

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336. See *supra* note 302 and accompanying text.

337. See *supra* note 310 and accompanying text.

Y Corporation's Chief Executive Officer instructs his American and French Human Resource managers to do all that is necessary to retain Ms. Jones and Ms. Smith upon the transfer of the assets on September 1, 2005.

The strategy for retaining the American and the French employee are quite different. First, with respect to the American employee, Jennifer Jones, Y Corporation must make a formal offer of employment to her as soon as possible, and definitely prior to September 1. This is because American employees do not transfer automatically from X Corporation to Y Corporation at the closing of the transaction. Although Y Corporation is not required to offer Ms. Jones the same benefits that she enjoyed at X Corporation, it will want to do so if it hopes to retain Ms. Jones. In fact, Y Corporation should offer her a comparable salary package, including fringe benefits. Since Y Corporation determined that Ms. Jones's talents are critical to the company's future research and development, the company should also provide her with a signing bonus, in exchange for her signing a retention agreement.

The French Human Resource manager is not under as much pressure to retain Brigitte Smith because Ms. Smith's employment transfers automatically from X Corporation to Y Corporation at the closing of the transaction. Under the provisions of the Acquired Rights Directive and the French Labor Code, Corporation Y is required to employ Ms. Smith under the same terms and conditions of employment that she enjoyed with X Corporation.<sup>338</sup> In addition to providing her with the same salary, bonus, and non-mandatory benefits, her three years of service with X Corporation will continue with Y Corporation. Moreover, as long as Y Corporation provides the same terms and conditions of employment, Ms. Smith cannot object to her transfer and she will be automatically employed by Y Corporation on September 1.

However, all is not simple for the French Human Resources manager. She must work with X Corporation to make sure all the necessary notice and consultation requirements are met prior to the transfer. First, X Corporation must deliver notice of the transfer to its employee representatives.<sup>339</sup> If there is a European Works Council or a local works council, the notice must contain precise information regarding the transaction, including any employment consequences.<sup>340</sup> The notice must be given with sufficient time remaining before the transfer to allow the works council to provide a reasoned response to the notice.<sup>341</sup> In

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338. See *supra* notes 199-200 and accompanying text.

339. See *supra* note 175 and accompanying text.

340. See *supra* notes 185-86 and accompanying text.

341. See *supra* note 187 and accompanying text.

addition, either X Corporation or Y Corporation must also deliver a transfer letter to all employees, confirming the date of the transfer and that the employees will continue employment under the same terms and conditions.<sup>342</sup>

In contrast, in the United States neither X Corporation nor Y Corporation is required to provide any formal notice of the transfer to employees or government agencies. Unless X Corporation is planning to lay off a certain number of employees, the WARN Act does not require any notice of the transfer.<sup>343</sup> Likewise, it is unlikely that the employees at X Corporation are unionized. As such, the transfer of the U.S. employees is significantly less complicated than the transfer of the French employees.

This example provides a nice illustration of the employment consequences in France and the United States in the context of a corporate acquisition. The following hypothetical provides the consequences for Ms. Jones and Ms. Smith in the event of a reduction-in-force.

Despite having developed innovative software products, X Corporation's business is deteriorating. In the past two years, the company has suffered significant losses, and the forecast for 2006 looks even bleaker. In addition, since 2000, X Corporation has hired too many software engineers when compared to the software products it has sold. As a result, X Corporation's senior management has decided that it has no choice but to implement a reduction-in-force. In the United States, Ms. Jones has been identified as a candidate for dismissal, and in France, Ms. Smith has been selected for redundancy.

The legal procedures for implementing a reduction-in-force in the United States are not complicated. First, X Corporation needs to determine whether WARN notice will be required. If there is a plant closing or mass lay-off, X Corporation will need to provide WARN notice.<sup>344</sup> Because X Corporation is not contemplating a permanent or temporary shutdown of its business, a plant closing is not involved.<sup>345</sup> However, the reduction-in-force may constitute a mass lay-off. Assume X Corporation is contemplating a dismissal of 60 employees. Under the WARN Act, a mass lay-off is present and notice is required.<sup>346</sup> Thus, X Corporation

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342. See *supra* note 197 and accompanying text.

343. See *supra* note 239 and accompanying text.

344. See *supra* notes 207-08 and accompanying text.

345. See *supra* note 211 and accompanying text.

346. See *supra* note 214 and accompanying text.

must provide each affected employee, including Ms. Jones, with written notice of the mass lay-off.<sup>347</sup> The notice must include the anticipated date of the mass lay-off, whether lay-offs are conditionally based on the occurrence or non-occurrence of a particular event, and the contact information of the person to contact for additional information.<sup>348</sup> Because X Corporation employees are not unionized, there are no other mandatory notice requirements.

Although it is not specifically required to do so by law, X Corporation should document the criteria for choosing employees to be included in the reduction-in-force. The safest method is to choose objective criteria, such as seniority or the elimination of certain jobs. However, it may not be possible for X Corporation to eliminate an entire classification of jobs, such as the software engineer position. To be sure, X Corporation will need to retain some software engineers in order to develop future products. Actually, the problem for X Corporation is that it hired too many software engineers. In this situation, X Corporation will need to use subjective criteria for eliminating employees. The most common subjective criterion is job performance.

Assume X Corporation determines that Ms. Jones's job performance is weaker than other software engineers, and therefore it decides to include her in the reduction-in-force. The company needs to be careful, however, because Ms. Jones may claim that she was dismissed not for performance reasons but because she is female. In order to protect itself, X Corporation should ensure that dismissed employees include a balanced number of men and women, both young and old, as well as Caucasians and minorities. It also should offer Ms. Jones a severance payment of one month's pay in exchange for her executing a release of potential claims.

Ms. Jones may also file for unemployment compensation, which will amount to approximately \$2333 a month before taxes. This is far less than the monthly salary she earned while working for X Corporation, which was approximately \$5833 before taxes. Moreover, Ms. Jones should begin looking for a new job as soon as possible because her unemployment benefits will only last for six months.

The requirements for X Corporation to implement the reduction-in-force in France are more detailed. First, X Corporation must identify potential candidates for dismissal. When deciding which software engineers to lay-off, the company must make the selection using objective criteria for each employee, including the number of dependents in the employee's

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347. The company should also determine whether state or local law requires notice in the event of a mass lay-off.

348. See *supra* notes 219-23 and accompanying text.

household, the age of the employee, any disability the employee has, the employee's seniority, and the employee's professional qualifications. After selecting the potential employees, X Corporation must send a letter to each employee and invite them to a pre-dismissal meeting.<sup>349</sup> At the pre-dismissal meeting, the company must explain the economic reasons for the contemplated dismissal, including the possibility for re-employment.<sup>350</sup> The company should also listen to each employee's concerns.

After the pre-dismissal meeting, X Corporation must deliver a dismissal letter to the employees who are selected for termination. After the dismissal letter is delivered, X Corporation may negotiate a settlement indemnity with the terminated employees. In addition to the settlement indemnity, the dismissed employees may receive a notice payment, paid holidays, and a severance payment.<sup>351</sup>

Specifically, Ms. Smith will receive a severance payment of 1/5th of her monthly salary for each year of service.<sup>352</sup> This will amount to approximately 3498 euros, less applicable taxes. She will also receive payment in lieu of notice, which will amount to 11,666 euros.<sup>353</sup> Finally, Ms. Smith will be eligible for unemployment compensation, which amounts to 40% of her salary plus 9.79 euros a day.<sup>354</sup> Thus, she will receive approximately 2623 euros a month in unemployment compensation. As discussed in Section III B, she may receive unemployment compensation for up to five years.<sup>355</sup> As such, Ms. Smith will not be under financial pressure to find a new job soon after her dismissal.

As demonstrated above, the financial liability for dismissing employees in connection with a reduction-in-force vary greatly between France and the United States. Moreover, the procedures an employer must take before implementing a collective redundancy are vastly different in the two jurisdictions. In practice, many companies decide not to implement a reduction-in-force in France because the costs are too high. As a result, French companies face more difficulties in taking cost-saving measures in order to become more competitive with their American counterparts. As argued below, this has a detrimental affect on French

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349. See *supra* note 302 and accompanying text.

350. *Id.*

351. See *supra* notes 296, 300 and accompanying text.

352. See *supra* note 296 and accompanying text.

353. See *supra* note 301 and accompanying text.

354. See *supra* note 314 and accompanying text.

355. See *supra* note 313 and accompanying text.

businesses. Perhaps the American scenario, where economic power rests with the employer, is preferable.

## V. SUGGESTIONS FOR IMPROVEMENT

Although employment laws in France and the United States protect employees in a number of situations, neither country's system is without problems. For the most part, French employment laws favor the employee. Although this means that French employees enjoy generous benefits and protections, French employers and the French economy as a whole pay the price. The French economy is suffering major setbacks. The high unemployment rate is expected to continue in the coming years.<sup>356</sup> Part of the problem is the high labor cost that results from the application of several provisions of the French Labor Code. Likewise, the Labor Code produces roadblocks for companies implementing a reduction-in-force because of financial difficulties.<sup>357</sup> Companies already in financial trouble are required to pay hefty notice, severance and settlement indemnities to dismissed employees. It is not surprising that the French economic situation is tenuous.

The United States has its own employment problems. Although U.S. laws generally favor the employer in the event of a corporate acquisition or reduction-in-force, American companies are not immune from serious employment liabilities. Many dismissed employees feel they are left "holding the bag," and often sue for employment discrimination or retaliation. Even if there is no evidence of discriminatory or retaliatory conduct, American employers often settle such claims in order to avoid high litigation costs and attorney fees. One reason for this situation is the high value placed on individualism in the United States. Because American society expects individuals to take care of themselves, there are few protections provided to dismissed employees. The United States should consider additional ways to help displaced workers.

The problems in France and the United States are different and thus require an individualized assessment. A one size fits all approach will not benefit either country. For this reason, the article proposes several areas for improving the employment situations in France and the United States.

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356. See EUROPEAN ECONOMY, *supra* note 10, at 59.

357. See William N. Cooke, *The Influence of Industrial Relations on U.S. Foreign Direct Investment Abroad*, 51 INDUS. & LAB. REL. REV. 3, 15 n.9 (1997).

### *A. France: Relax Rigid Employment Laws*

In order for French companies to be more competitive with U.S. businesses, the French government should moderate its rigid employment laws. In particular, France should consider amending some of its more protective laws, such as those dealing with corporate transactions or reductions-in-force, in order to allow companies more flexibility in conducting their day-to-day affairs. This need for moderation is not new to the French legal community. In fact, scholars and practitioners have been analyzing the issue with the goal of finding a “viable compromise between flexibility and job security under the acronym ‘flexicurity.’”<sup>358</sup> However, the flexicurity project is being met with strong resistance because historically, French labor law is not flexible; rather, its aim is to restrict the employer’s ability to take advantage of employees.<sup>359</sup> Yet, if France and Europe do not become more flexible, they will continue to face intense competition from the United States, and also from developing nations, including India and China.

One way France can allow employers more flexibility is to reconsider its generous unemployment benefits. To be sure, unemployment benefits are excessively high in France. For example, in the hypothetical provided in Section IV, Ms. Smith received 2623 euros a month in unemployment compensation, and a one time severance payment of 3498 euros, in addition to 11,666 euros for payment in lieu of notice. This amounts to a one time payment of 15,164 euros for notice and severance, as well as a 2623 euro payment each month for unemployment. The one time payment of 15,164 euros alone should be sufficient to support Ms. Smith during the time it will take her to obtain a new software engineer position. Because French employees already receive such generous one-time dismissal payments, an additional 40% unemployment compensation benefit seems excessive. Accordingly, the French government should consider whether providing an additional monthly unemployment compensation payment is necessary.

Unemployment compensation is a fact of life, and French society may not support eliminating it in its entirety. At the very least, the French government should limit the duration for which an employee is eligible

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358. Rolf Birk, *Labor Law Scholarship in France, Germany, and Italy: Some Remarks on a Difficult Question*, 23 COMP. LAB. L. & POL’Y J. 679, 690 (2002).

359. *Id.*

to receive unemployment compensation. Currently, French employees may receive unemployment compensation for up to five years.<sup>360</sup> This lengthy period may encourage employees to stay out of work, which undermines the policy of providing unemployment benefits in order to assist employees to return to work.

In contrast, American employees only receive unemployment compensation for six months.<sup>361</sup> As such, there is no incentive in America for employees to remain unemployed for a long period of time. Indeed, statistics show that American employees find new jobs more rapidly than workers in France.<sup>362</sup> For example, the number of American workers who have been out of work for one year or longer is only 13%, but in France the rate is an alarming 41%.<sup>363</sup> Although some U.S. employees may have to accept pay cuts to obtain new employment, the overall economy benefits when the unemployment rate is low. France should motivate its employees to return to work by not providing unemployment benefits for an extended period of time.

France should also consider lowering the period of notice required when dismissing employees. In the hypothetical above, Ms. Smith worked for X Corporation for three years. Under French law, she was entitled to one month's notice for each year of service.<sup>364</sup> Since a majority of companies are not able (or do not wish) to provide long periods of advance notice, dismissed employees are entitled to one month's pay for each year of service.<sup>365</sup> In the example above, Ms. Smith was eligible for three months' notice pay, which amounted to 11,666 euros. This was in addition to the generous severance, settlement indemnity and unemployment payments she was entitled to receive. In order to prompt employees to find new jobs, a lower notice period would be beneficial.

If lowering the notice period is not feasible, the French government should at least amend the Labor Code to limit the payment of settlement indemnities to dismissals that are unfair or procedurally deficient. From a fairness perspective, this would provide a good middle ground. If an employer dismisses an employee in an unfair manner, i.e., for a prohibited reason, such as race or gender, or without due process, the employee should receive compensation for the dismissal, and the employer should be punished for acting improperly. However, if an employer

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360. Law No. 2000-601 of June 30, 2000, Journal Officiel de la République Française [J.O.] [Official Gazette of France], July 1, 2000, at 9963.

361. See *supra* note 138 and accompanying text.

362. *Employment Outlook 2005, How does the United States Compare?*, ORG. FOR ECON. AND CO-OPERATION DEV. [OECD], <http://www.oecd.org/dataoecd/32/33/35051183.pdf> (last visited on Apr. 14, 2006).

363. *Id.*

364. C. TRAV. art. L. 122-8.

365. *Id.*



dismisses an employee (or employees) due to economic difficulties, it seems unfair to require the employer to provide a settlement indemnity in addition to notice and severance. In other words, if the French employer can demonstrate that it is suffering from economic difficulties as strictly defined by the Labor Code, it should be allowed to take action to remedy the situation, including dismissing employees. Of course, the employer must follow the rigid requirements for dismissing employees such as those required by the Collective Redundancies Directive and the Labor Code. Limiting the settlement indemnity to situations where a dismissal is unfair or procedurally improper would be a just compromise.

Another problem with the French Labor Code is its strict interpretation of the acquired rights doctrine, particularly in the context of a corporate acquisition. As explained in Section III C, in the event of a business transfer, French law requires that the employment contracts of the transferor automatically transfer to the transferee.<sup>366</sup> Since the employment contracts transfer automatically, all of the terms and conditions of employment must be preserved.<sup>367</sup>

In practice, it is often difficult for transferee employers to duplicate the benefits provided by the transferor employers. For example, many supplemental health insurance plans cannot actually be transferred because the consent of the health insurance company is required. Although transferee employers take great care to provide similar health insurance plans, it is often impossible to provide the identical benefits. Sometimes this works in the favor of the transferring employees, because the new employer provides a health insurance plan that is more generous than the plan the previous employer provided. In this situation, employees do not usually object to the change.

However, most employers cannot provide the same benefits to transferring employees. Instead, they provide benefits that are comparable overall, but are slightly different. The benefits may be more beneficial in some areas, but less beneficial in others. For example, if the transferee employer is an existing company, it probably has existing benefit plans in place. Nevertheless, the Labor Code provides transferring employees with the technical right to object if any provision of a plan is not exactly the same as the prior employer's plan.<sup>368</sup> Unless the new employer provides a

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366. C. TRAV. art. L. 122-12.

367. *Id.*

368. *See supra* note 199 and accompanying text.

new plan that has the same provisions as the previous plan, it is vulnerable to constructive discharge claims.

The French government should consider this practical issue and amend the Labor Code to simply require that the transferring employees' terms and conditions of employment be *comparable* when considered as a whole. This change would be consistent with the Acquired Rights Doctrine, which only requires that the transferring employees enjoy the right to continued employment on substantially equal terms and conditions of employment.<sup>369</sup> Moreover, a change to comparable terms and conditions would be allowed because the Acquired Rights Directive does not preclude the transferee from altering the terms and conditions of employment if the national law allows such an alteration in other situations.<sup>370</sup>

None of these suggestions are easy to implement. To be sure, unions, works councils and employee representatives will not welcome any significant changes to the employment relationship unless the changes are beneficial for employees. Indeed, it was recently reported that French unions plan to challenge any plan that the Prime Minister proposes if the plan relaxes employment laws in order to increase the number of jobs in France.<sup>371</sup> The recent riots in response to the passing of the First Employment Contract Law are an excellent example of the pressure unions and employees are willing to exert on the French government.<sup>372</sup> Nevertheless, the Prime Minister is addressing the negative employment situation, which is a positive first step. The French government will likely be required to have numerous conversations with national and local unions, works councils and employee representatives, and it may take some time for progress to occur. On the other hand, with a bleak economy and a high unemployment rate, the French government cannot afford to delay the process any longer.

### *B. United States: Don't Leave Employees Holding the Bag*

That the United States strongly adheres to free market economy principles is evident in its employment laws. One scholar recently argued that the United States "treats labor as a commodity traded on the market with no continuing obligations of the employer to its employees."<sup>373</sup>

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369. See Council Directive 2001/23, art. 3, 2001 O.J. (L 82) 16 (EC).

370. See Memorandum on Rights of Workers in Cases of Transfers of Undertakings 1, 7, EUROPA (2004) (Commission Services' working document) (citing Case C-343/98 *Collino*), [http://www.europa.eu.int/comm/employment\\_social/labour\\_law/docs/transfer\\_memorandum\\_2004\\_en.pdf](http://www.europa.eu.int/comm/employment_social/labour_law/docs/transfer_memorandum_2004_en.pdf) (last visited Apr. 14, 2006).

371. *French Economy Grinds to a Halt*, *supra* note 11.

372. See *supra* notes 21-24 and accompanying text.

373. Summers, *supra* note 54, at 1066.

Undeniably, the dominant social value in the United States is individualism, which has been characterized as “the belief that the citizen should be free to pursue his or her own self-interest so long as that pursuit does not unlawfully prevent others from doing the same.”<sup>374</sup> Not only are individuals free to pursue their own self-interest, they are also required to rely on their own efforts to survive.<sup>375</sup> As a result, American society takes only minimal responsibility for the well-being of the individual.<sup>376</sup>

Because American society does not undertake much responsibility for the well-being of individual members, employees can feel like they are left “holding the bag” when faced with dismissal. For example, to secure relief from a dismissal in a reduction-in-force, employees must show either that they were not employed at-will, or that there was some discriminatory reason for the termination.<sup>377</sup> Most of the time, it is difficult for employees to make this showing.

Likewise, in a corporate acquisition, employees may suffer feelings of loss and uncertainty, which can lead to reduced commitment, loss of productivity and high staff turnover.<sup>378</sup> There is no employment law that compensates an employee for this loss, and yet many American employees “wildly” overestimate the legal protections against dismissals.<sup>379</sup>

On the other hand, there is a perception among companies that employment laws in the United States are less complex and more “employer friendly” than those in Europe. Although this may be the case, U.S. employers are not off the hook when it comes to potential employment liability, as demonstrated by dramatic increases in discrimination and retaliation suits over the last 10 years. For example, the EEOC filed 11% more claims in 2005 than in 1995.<sup>380</sup> This number

374. *Id.* at 1071 (quoting Richard N. Block, *The Legal and Institutional Framework for Employment Security in the United States: An Overview*, in EMPLOYMENT SECURITY AND LABOR MARKET FLEXIBILITY: AN INTERNATIONAL PERSPECTIVE 127, 129 (Kazutoshi Kosiro ed., 1992)). For example, compared to France, the public in the United States assumes a smaller portion of the burden of displacement. The main public burden is unemployment compensation, and these benefits are of a smaller portion of lost wages than in France. *Id.*

375. Block, *supra* note 374, at 129.

376. *Id.*

377. Richard Michael Fischl, ‘A domain into which the King’s writ does not seek to run’: *Workplace Justice in the Shadow of Employment-at-Will*, in LABOUR LAW IN AN ERA OF GLOBALIZATION 261 (Joanne Conaghan *et al.* eds., 2002).

378. Hepple, *supra* note 158, at 14.

379. Fischl, *supra* note 377, at 265.

380. See EEOC Litigation Statistics, FY 1992 to FY 2005, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <http://www.eeoc.gov/stats/litigation.html> (last visited Apr. 14,

will certainly increase, as the EEOC recently announced that its top priority is to fight against systemic discrimination.<sup>381</sup> In a press release issued on April 4, 2006, the Agency adopted a recommendation from an internal task force report that favored the EEOC aggressively investigating and litigating systemic cases.<sup>382</sup>

Damage awards have likewise been increasing. In a 2004 study, the United States Department of Justice determined that the average jury awards for employment discrimination cases was \$218,000.<sup>383</sup> Likewise, in 2005 the EEOC recovered \$ 107.7 million dollars in monetary damages.<sup>384</sup> This is vastly greater than the figures in 1995, where the EEOC only obtained \$18.9 million dollars in monetary benefits.<sup>385</sup> This increase is expected to continue.

Many companies do not like to “roll the dice” and go to trial on employment discrimination claims. Nor do they like to pay their attorneys several hundreds of thousands of dollars to defend them at trial. As a result, most companies settle employment claims before trial, and consider their settlements as a cost of doing business. Because employers essentially provide a severance-type payment when they settle employment claims, the United States should consider requiring severance payments to dismissed employees, particularly employees who are dismissed for economic reasons.

If employers provide severance payments, their employment liabilities in connection with a dismissal or corporate acquisition may be more predictable. Severance payments do not need to be as generous as those provided in France. A reasonable formula could be the one already commonly used by many employers, one week’s pay per year of service, or perhaps the payment could be raised to two weeks pay per year of service. The formula could be limited to employers of a particular size, like the requirements found in Title VII, the ADEA, and the ADA. For example, limiting the obligation to provide severance pay to employers with 15 or more employees would decrease the adverse affect on small businesses. Providing severance to dismissed employees may cause the number of employment and discrimination claims to fall because

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2006). In 1992, the EEOC filed 373 claims, and in 2005 the agency brought 417 claims. *Id.*

381. See EEOC Makes Fight Against Systemic Discrimination a Top Priority, U.S. EQUAL EMP. OPPORTUNITY COMM’N, Apr. 4, 2006, <http://www.eeoc.gov/press/4-4-06.html>.

382. *Id.*

383. Chad Shultz, *The Jury’s Still Out—Way Out: Subtracting the Jury from the Equation Decreases Uncertainty in Employment Cases*, Soc. for Hum. Resources Mgmt. [SHRM], Jan. 2005, available at [www.shrm.org/hrmagazine/articles/0105/0105shultz.asp](http://www.shrm.org/hrmagazine/articles/0105/0105shultz.asp) (membership subscription service required).

384. See EEOC Litigation Statistics, *supra* note 381.

385. *Id.*

employees will feel that they are receiving something from their employer. Of course, employees with strong discrimination and retaliation claims will bring suit regardless, but the number of these claims is generally low.

American companies may react strongly against the imposition of mandatory severance payments, and view these as undermining the employment-at-will doctrine and free market economic principles. For sure, companies will not readily give up their economic power. Moreover, if a company is facing economic difficulties and is contemplating a sale of its assets or a reduction-in-force, a mandatory severance payment may hinder its ability to implement cost-saving measures. As such, dismissed employees essentially pay the price for their employer's difficulties and are left to fend for themselves.

The burden displaced workers bear for corporate difficulties may increase in the near future. Although the current unemployment rate is 4.7%, the number may soon rise because the percentage of employees who have been out of work for one year or longer has doubled since 2001.<sup>386</sup> In 2001, only 6.5% of employees were out of work for longer than one year, but in 2004 this number increased to 13%.<sup>387</sup> If this rate continues to rise, the number of unemployed workers in America is also likely to increase. This will have a major effect on the U.S. economy, and, ultimately, on American companies' economic power. Other countries, including France, may take advantage of a downturn in the U.S. economy, which would further decrease the economic power of U.S. employers. For that reason, the United States should do more to assist unemployed workers in finding new employment.

One way to decrease the long-term unemployment rate is to provide displaced workers with adequate outplacement assistance. Unemployment offices should do more than provide employees with a database of potential jobs. First, an outplacement assistance program should provide training on interview skills, including mock-interviews. It should also provide assistance on writing effective cover letters and drafting resumes. Some workers may benefit from seminars on corporate etiquette and professionalism. Moreover, a skills assessment may steer workers towards other jobs for which they may be eligible. Furthermore, outplacement assistance could raise a displaced worker's confidence. Losing a job is

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386. *Employment Outlook 2005, How does the United States Compare?*, *supra* note 362.

387. *Id.*

one of the most stressful events in a person's life. An outplacement assistance office could provide a safe haven for individuals desperately trying to get back on their feet.

## VI. CONCLUSION

This article explores the influence of economic power on the employment laws and policies in the United States and in France. The article begins by providing an historical background of the employer-employee relationship in both jurisdictions, showing how French and U.S. employment laws were similar up until World War I, when they diverged. Today, U.S. and French employment laws and policies are very different.

Additionally, the article analyzes the differences in U.S. and French employment laws, with an emphasis on how the laws increase or decrease an entity's economic power. Further, the article explores the differences in the basis of the employment relationship and of the employee benefits provided under each jurisdiction's laws. It also analyzes the laws involved with respect to corporate acquisitions and reductions-in-force, and demonstrates that while American employers face few restrictions when transferring employees at the close of a corporate acquisition or dismissing employees in the implementation of a reduction-in-force, French employers are subject to numerous laws on the manner in which they may transfer or dismiss employees.

The article next provides two hypothetical examples, involving an asset acquisition and a reduction-in-force, in order to illustrate differences between French and U.S. employment law. In the first example, a corporation is faced with the task of retaining an American and a French employee at the close of an asset acquisition. The hypothetical describes the different strategies for retaining each employee. The second example involves a corporation implementing a reduction-in-force, which is forced to dismiss a number of employees, including the hypothetical French and American employees. Like the asset acquisition scenario, the manner in which the company dismisses the employees highlights the divergence of French and U.S. law.

Although this article demonstrates how employment laws in France and the United States protect employees in a number of situations, neither country's system is without problems. With respect to France, economic power is mostly in the hands of employees, due in large part to French employment laws that generally favor the employee at the expense of the employer. Although French employees are protected from the arbitrary actions of their employers, the laws detrimentally affect French employers and the French economy. This article suggests

ways that the French government can lower employment costs in order to stimulate job growth.

The article also discusses employment problems in the United States, where employers have greater economic power than employees. U.S. employment laws generally favor employers, due in large part to the high value placed on individualism in the United States. However, American employers should not ignore lurking employment liabilities. Because dismissed employees feel that they are left "holding the bag," they frequently bring employment discrimination and retaliation claims. This article recommends that the United States take certain actions to assist displaced workers.

All in all, economics is power, and the entity that holds economic power usually enjoys a privileged place in society. In France, economic power tends to follow employees, due mainly to France's strict employment laws. In the United States, economic power remains with employers. Which is preferable? Both systems have their strengths and their weaknesses. Perhaps the best solution is a compromise between the two.

