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## **An Analysis of Plant Closing Law: How to Protect Workers from the Effects of Cessation in Business While Preserving Employer Rights, 21 J. Marshall L. Rev. 565 (1988)**

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## COMMENT

### AN ANALYSIS OF PLANT CLOSING LAW: HOW TO PROTECT WORKERS FROM THE EFFECTS OF CESSATION IN BUSINESS WHILE PRESERVING EMPLOYER RIGHTS

In order for the United States to remain the most productive country in the world,<sup>1</sup> American employers must maintain a high level of competitiveness in a global economy.<sup>2</sup> American employers

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1. A rough measure of productivity and economic activity, in monetary terms, is the gross national product ("GNP"). V. SHOWERS, *WORLD FACTS AND FIGURES 7* (1979). When the GNP is converted into a common currency, such as the U.S. dollar, the data can be used to compare one country's productivity with another's. *Id.* On an international scale, the United States is ranked first, with a GNP of \$3,297.8 billion, the Soviet Union is ranked second, with a GNP of \$1,137.8 billion and Japan is ranked third, with a GNP of \$1,137.8 billion. U.S. BUREAU OF THE CENSUS, *STATISTICAL ABSTRACT OF THE UNITED STATES: 1987*, at 824 (107th ed.). See REPORT OF THE SECRETARY OF LABOR'S TASK FORCE ON ECONOMIC ADJUSTMENT AND WORKER DISLOCATION, *ECONOMIC ADJUSTMENT AND WORKER DISLOCATION IN A COMPETITIVE SOCIETY* (Dec. 1986, Washington, D.C.) [hereinafter *WORKER DISLOCATION REPORT*]. See also *infra* note 100 for a complete discussion of the *WORKER DISLOCATION REPORT*. The Task Force found that the United States' economy has demonstrated substantial capacity for generating jobs. *Id.* at 12. Approximately 29 million jobs were created over the past 15 years. *Id.* Between 1980 and 1986, 9.6 million jobs were created. *Id.* These new jobs reflected a 36% increase since 1970. *Id.* app. A, at 3. In comparison, Japan has produced 7 million new jobs, a 14% increase, while most European job growth has been essentially flat. *Id.* Europe is also experiencing greater long term unemployment than the United States and Japan. *Id.* Thus, the United States has created more jobs at a faster rate than our European counterparts.

2. *WORKER DISLOCATION REPORT*, *supra* note 1, at 1. See McCormick, *Labor Law Symposium on the Globalization of United States Industry*, 1986 DET. C.L. REV. 669 (1986) [hereinafter *Globalization*]. The world of manufacturing and trade is not the world of a dozen years ago. Today, manufacturing and trade is, without question, a global market place. *Id.* at 672. American management has felt the harsh results of global competition particularly in the apparel, textiles, steel, automotive, rubber, farm machinery, and consumer electronics industries. *Id.* However, the key to maintaining productivity is to become increasingly more competitive around the world. *Id.* at 685.

Global competition has led federal legislators to consider tough protectionist trade bills, which would include import quotas and other import restrictions. N.Y. Times, July 8, 1987, § Y, at 29. These trade regulations have caused considerable controversy. Labor is calling for strict trade laws. *Globalization*, *supra*, at 679 (retire the myth of free trade, correct massive trade imbalance, and block imports from countries that do not observe recognized labor standards). On the other hand, many experts agree that the trade imbalance is slowly correcting itself. Wall St. J., July 6, 1987, § 1, at 1 (the U.S. economy is reversing the national trend of consuming more than producing, importing more than exporting; the trade deficit appears to be narrowing; American products are more competitive on world markets; manufacturing industries are slowly returning to health). See also Wall St. J., June 25, 1987, § 1, at 1

face rapidly changing technology, foreign and domestic competition, fluctuations in supply and demand, mergers, acquisitions, and numerous other factors that ultimately affect the employer-employee relationship.<sup>3</sup> Many employers have met these challenges directly and maintain healthy, growing businesses. Unfortunately, a reality of the world market place is that many businesses do not survive these challenges. These businesses have failed, relocated or sold out, often with harsh results on the businesses' employees.<sup>4</sup>

In order to avoid cessation in business, employers must take certain steps to maintain a competitive edge. These steps may include mass employee layoffs, closing inefficient plants, consolidating, relocating, or selling operations.<sup>5</sup> These decisions often have a dev-

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(32% of North American manufacturers expect to increase production at home rather than abroad, a 19% increase from last year; manufacturers note that improvement in American quality, the hidden costs of global sourcing and concern over U.S. trade policy were factors influencing their decision to increase production at home); Chicago Tribune, June 30, 1987, § 1, at 11 (U.S. export volumes have risen since the third quarter of 1986; exports of good and services have grown 6.9%; imports have registered small declines; the balance of trade in goods has shown an 18.4% improvement; U.S. exporters are regaining the price competitiveness they have lost since 1980). See generally T. EDWARDS, MAINTAINING COMPETITION, REQUISITES OF A GOVERNMENTAL POLICY (1949) (setting forth a policy designed to maintain the competitive system within the United States).

3. For example, acquisitions accelerate the pace of employee relocations. Wall St. J., July 14, 1987, § 1, at 1, col. 5. Marriot Corporation's work transfers are up 50% because of acquisitions; Delta moved 1,600 workers after acquiring Western Airlines; and American's takeover of AirCal increased transfers by four percent. *Id.* The Employee Relocation Council stated that companies will relocate six percent more workers this year than last. *Id.*

According to the U.S. Bureau of the Census, the business expenditures for new plants and new equipment in 1986 reached \$395.1 billion. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1987, at 516 (107th ed.). United States industry experienced 2,543 merger and acquisition transactions in 1984. *Id.* at 524. In 1985, 77,000 patents were issued for new inventions. *Id.* at 525. The gross domestic product of corporate business for 1985 was \$2,414 billion. *Id.* at 511. Also, in 1985, 669,000 new corporations were formed. *Id.* at 509. A comparison of imports into countries can be used to measure foreign competition within the United States. In 1985, the United States imported \$345.3 billion worth of goods and services, while Germany imported \$157.6 billion, Japan imported \$131.3 billion, and the United Kingdom imported \$109.9 billion. *Id.* at 837. Foreign competition has also greatly affected the steel industry. In 1983, the United States produced 76.8 million metric tons of steel, while Japan and the Soviet Union led the world in production with 97.2 and 152.5 million metric tons respectively. *Id.* at 832. These statistics indicate the vast array of challenges confronting United States industry. Employer decisions that deal with these challenges often have a direct impact on the national employment situation.

4. In 1985, the number of business failures totalled 57,067, with a rate of 114 failures for every 10,000 concerns. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1987, at 509 (107th ed.). Also, in 1985, 364,536 bankruptcy petitions were filed. *Id.* at 510. The current data gleaned from unemployment compensation claims in seven states showed that of a total of 271 lay off events, 113 were contributed to slack work, 27 for overseas relocation, 12 for import competition, and 9 for bankruptcy. WORKER DISLOCATION REPORT, *supra* note 1, app. C, at 10.

5. Chicago Tribune, May 26, 1987, § 1, at 18. ("Faced with an onslaught of foreign competition and excess capacity . . . American manufacturers in recent years

astating effect on American workers and the communities in which they live. For example, between January of 1981 and January of 1986, 10.8 million workers lost their jobs due to these measures.<sup>6</sup> Over five million of these workers are identified as "displaced workers."<sup>7</sup> Displaced workers differ from other unemployed workers. They are workers who, after a long period of employment with the same employer, have lost their jobs due to plant closings, lack of work, or job abolishment.<sup>8</sup> The displaced worker, however, is not the only victim of changing economic conditions. Due to plant closings or relocations, whole communities and towns have lost their reason for existence.<sup>9</sup>

have moved to cut costs . . . they have closed inefficient plants and consolidated operations"). See generally Rhine, *Business Closings and Their Effects on Employees*, 8 INDUS. L.J. 362, 363-68 (1986) (for a discussion of the extent of plant closings).

6. WORKER DISLOCATION REPORT, *supra* note 1, at 3.

7. *Id.*

8. *Id.* at 11. Displaced workers are distinguished from other unemployed workers in that they have a significant attachment to their former positions. *Id.* at 13. Significant attachment is defined as at least three years of tenure with the former employer. *Id.* Displaced workers are unemployed longer than other unemployed workers. *Id.* at 15. Approximately one half of the reemployed displaced workers had to make a major occupational change, compared to only five percent for other reemployed workers. *Id.* Displaced workers, upon reemployment, show an average real loss in earnings of 10% to 15%. *Id.* at 4. Psychological adjustments are often more complicated than other unemployed workers. *Id.* at 16. The displaced worker feels that he has worked many years for one employer to achieve an especially good job. *Id.* The sudden loss of that job changes the worker's life goals and plans abruptly, which requires the worker to make extraordinary emotional adjustments. *Id.*

Other characteristics of the displaced worker are as follows: 50% of displaced workers lost jobs in manufacturing; displaced workers were disproportionately blue collar workers; the highest concentration of displaced workers was found in the Midwest region; and more than one half of the displaced workers who were reemployed were no longer a part of the industry from which they were displaced. *Id.* at 13.

9. In Alliquippa, Pennsylvania, the Jones & Laughlin Steel Corporation used to employ 17,000 people. *Globalization*, *supra* note 2, at 682. Today, the town looks like a war zone with most of the stores boarded up. *Id.* The steel plant, over five miles long, now employs only 100 people. *Id.*

The collapse of the farm equipment manufacturing industry wiped out 40% of the Quad Cities manufacturing jobs. Chicago Tribune, June 15, 1987, § 4, at 1. The Farmel plant, closed by International Harvester, caused 3,000 workers to lose their jobs. *Id.* Days later, Caterpillar Tractor moved two product lines and 600 jobs out of the area. *Id.* at 6. A few months later, Caterpillar totally shut down operations and eliminated 2,200 jobs. *Id.* J.I. Case closed two plants, eliminating 2,150 jobs. *Id.* John Deere, although the area's leading employer, has cut its work force in half since 1980. *Id.* Small and medium size companies began losing business because of the plant closings. *Id.* Relocation or out-migration to other areas of the country effected many families and neighborhoods. *Id.*

In Flint, Michigan, the city with more General Motors ("GM") factories and workers per capita than any other city in the world, is heading towards economic collapse. Moore, *In Flint, Tough Times Last*, THE NATION, June 6, 1987, at 753. In December of 1986, GM closed its Flint V-6 engine plant; at the end of May of 1987, GM shut down the Flint truck and bus line; and in the fall of 1987, GM plans to shut Flint's Fisher Body plant. *Id.* At least 9,000 people will lose their jobs. *Id.* An estimated 30,000 more will be laid off in local business as a result of lost income and tax revenue. *Id.* Accompanying the dramatic rise in unemployment is the increase of vio-

Unemployment due to plant closings or relocations is a serious and widespread problem.<sup>10</sup> State legislators, therefore, should explore methods for alleviating these problems. Any solutions to these problems should allow employers to compete effectively in the world market, and create the least amount of hardship on the American worker. Realistically, however, in a fiercely competitive world market, there are no simple solutions. There must be a medium in which the employer is free to manage his affairs and employees have a place to work.

The plight of the displaced worker is not a new problem.<sup>11</sup> However, balancing an employer's right to manage his business against the effects of employer decisions upon employees is a recent concern of state governments,<sup>12</sup> federal legislators,<sup>13</sup> and the judiciary.<sup>14</sup> Sporadic dealing with this major unemployment problem has created a confusing state of the law. This confusion may baffle an employer who needs to shut down his operation. Also, this confusion will affect the employees who are unemployed due to the shutdown.

This comment will examine the rights of employers and employees who are confronted with plant closing situations. First, this comment will analyze the current law on plant closing. Case law, current trends in various state laws, and pending federal legislation will be examined. Next, this comment will discuss social changes and strongly recommend state statutory solutions to the problem. Finally, this comment will propose guidelines for employers confronted with a plant closing situation. These guidelines will mini-

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lent crime in Flint. *Id.* Nearly, 30,000 people have left Flint in search of work; one half the downtown area is boarded up; and 70% of the city's black men are unemployed. *Id.* GM used to employ 80,000 people in Flint; at the end of 1987, only 48,000 workers will have jobs. *Id.*

10. In 1986, the Bureau of Labor statistics showed that of the 5,130,000 workers who lost their jobs due to plant closings, 143,000 resided in the New England region; 733,000 resided in the Middle Atlantic region; 1,149,000 resided in the East North Central region; 384,000 resided in the West North Central region; 744,000 resided in the South Atlantic region; 397,000 resided in the East South Central region; 610,000 resided in West South Central region; 240,000 resided in the Mountain region; and 648,000 resided in the Pacific region. WORKER DISLOCATION REPORT, *supra* note 1, app. C, at table 7.

11. See *Local 1330, United Steel Workers v. United States Steel Corp.*, 631 F.2d 1264 (6th Cir. 1980). In *Local 1330*, the court stated the problem of plant closing and plant removal from one section of the country to another is not a modern phenomenon. *Id.* at 1282. The court noted that the mill towns of New England stand as empty monuments to the textile industry's mass migration to the South. *Id.* The court further observed that Congress, state legislators and the courts did not hinder the textile industries migration. *Id.*

12. See *infra* notes 68-96 and accompanying text for a discussion of state plant closing regulations.

13. See *infra* notes 97-118 and accompanying text for a discussion of pending federal plant closing regulations.

14. See *infra* notes 15-66 and accompanying text for a discussion of court decisions regarding the plant closing issues.

mize litigation and alleviate the effects of employer decisions on the displaced worker.

## I. PLANT CLOSING LAW

### A. An Analysis of Case Law Dealing with the Plant Closing Issue

Courts have consistently stated that an employer is free to manage his business in any manner he chooses subject, of course, to public law.<sup>15</sup> This concept is derived from basic property rights.<sup>16</sup> As a result, workers are left with considerably less protection. In order to equalize this imbalance, labor organizations were formed.<sup>17</sup> In addi-

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15. See e.g., *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 549 (1964) (business owners have a rightful prerogative to rearrange their business); *United Steelworkers of Am. v. Warrior & Gulf N. Co.*, 363 U.S. 574, 583 (1960) (management hires, fires, promotes, supervises and plans; these functions may be freely exercised except as limited by public law and collective bargaining agreements); *NLRB v. Pratt & Whitney Air Craft Div., United Tech. Corp.*, 789 F.2d 121, 134 (2d Cir. 1986) (employer has a right to communicate directly with his employees but his free speech right is limited under the National Labor Relations Act ["NLRA"]); *Baker Mfg. Co. v. NLRB*, 759 F.2d 1219, 1224 (5th Cir. 1985) (violation of the NLRA does not make employer an outlaw; employer retains the right to make decisions regarding the efficient management of his business); *Hanlon & Witson Co. v. NLRB*, 738 F.2d 606, 617 (3d Cir. 1984) (there is no legal principle which prevents an employer from making hard-hearted business decisions); *Alkire v. NLRB*, 716 F.2d 1014, 1017-18 (4th Cir. 1983) (an employer may cease to be an employer for whatever reason he chooses); *NLRB v. Dough Neal Management Co.*, 620 F.2d 1133, 1136 (6th Cir. 1980) (employees' union membership did not guarantee lifetime jobs and employer was free to discharge employees to eliminate an unnecessary expense); *Sioux Quality Packers, Div. of Armour & Co. v. NLRB*, 581 F.2d 153, 156 (8th Cir. 1978) (the NLRA limits an employer's otherwise unfettered discretion); *Dreis & Krump Mfg. Co. Inc. v. NLRB*, 544 F.2d 320, 329 (7th Cir. 1976) (an employer retains the sole right to manage his business, subject to the NLRA); *Percival v. General Motors Corp.*, 539 F.2d 1126, 1130 (8th Cir. 1976) (the employer as well as the employee has rights, however, an employer must be accorded wide latitude in determining management positions).

16. The evolution of viewing the freedom to manage a business as a property right was derived from a company's real and personal property rights. See Hurvitz, *American Labor Law and the Doctrine of Entrepreneurial Property Rights: Boycotts, Courts and the Judicial Reorientation of 1886-1895*, 8 INDUS. REL. L.J. 307 (1986) (for an excellent discussion of the evolution of employer property rights). The author noted that in *Sailor's Un. of the Pacific v. Hammond Lumber Co.*, 156 F. 450, 454 (9th Cir. 1907), the court stated that the company's property was not only ships and vessels, but also the business of carrying freight and passengers. Hurvitz, *supra* at 309. The court further noted that the right to operate vessels and to conduct business was as much property as the vessels themselves. *Id.* The court concluded that all the rights that were incident to the use, enjoyment, and disposition of tangible things were property. *Id.* The author also cited *State v. Glidden*, 55 Conn. 46, 71, 8 A. 890, 894 (1887) (the liberty of the individual is to carry on his business as he pleases); *Crump v. Commonwealth*, 84 Va. 927, 941-42, 6 S.E. 620, 628 (1888) (an employer has a right to control and conduct his business free from unprovoked interference). Hurvitz, *supra* at 312.

17. Trade unions or labor organizations were formed for the purpose of securing the most favorable wages and conditions of labor for union members and for improving the member's economic status. 87 C.J.S. *Trade Unions* § 1 (1954). Through collec-

tion, The National Labor Relations Act<sup>18</sup> ("NLRA") was passed to regulate and protect employers and employees.<sup>19</sup> Much of the case law surrounding the plant closing issues, therefore, involves a union representative opposing a plant shutdown.<sup>20</sup> Consequently, unorganized employees in a plant closing situation lack even the minimal protection that a labor union may afford its members.

In the past, employees and unions have unsuccessfully attempted to establish a property right in their jobs. In *Charland v. Norge Division, Borg Warner Corp.*,<sup>21</sup> a former union member brought an action against his former union and employer, claiming that he had a property right in his job.<sup>22</sup> The employee contended that the union failed to protect this right when his job was eliminated due to a plant closing.<sup>23</sup> The United States Court of Appeals for the Sixth Circuit rejected the employee's argument that he was deprived of his property without due process of law,<sup>24</sup> holding that the employee did not have a property right in his job.<sup>25</sup>

Similarly, in *Local 1330, United States Steelworkers of America v. United States Steel Corp.*,<sup>26</sup> the union attempted to keep two steel mills from closing.<sup>27</sup> The union raised the doctrine of

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tive action for mutual aid and protection, a trade union increases the employee's bargaining power. *Id.*

18. 29 U.S.C. §§ 151-169 (1982) [hereinafter NLRA].

19. In *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956), the United States Supreme Court stated that there are two congressional policies underlying the NLRA that a court must try and reconcile in each particular labor case. The two declared policies of the NLRA are to preserve a competitive business economy and to preserve the rights of labor through concerted activity. *Id.*

20. See *infra* notes 26-66 and accompanying text for case law discussing plant closures.

21. 407 F.2d 1062 (6th Cir. 1969).

22. *Id.* at 1063. Plaintiff Charland had worked at his job for 30 years when his employer decided to relocate his business. *Id.* The union contract did not contain a plant removal clause. *Id.* The union, however, negotiated a removal agreement that retained pension benefits for employees over 60 years of age. *Id.* Charland was 51 years old and was only offered a minor lump sum benefit. *Id.* Five years later, Charland filed a complaint under section 301 of the NLRA, 29 U.S.C. § 185 (1976), claiming that he had a property right in his job through his union contract and the United States Constitution. *Charland*, 407 F.2d at 1063.

23. *Id.* at 1063. Norge officials decided to move out of Muskegon Heights, Michigan, to Fort Smith, Arkansas. *Id.*

24. *Id.* at 1065.

25. *Id.* The court reasoned that claims to job rights arose only from the collective bargaining contract. *Id.* at 1064. Charland's relief, therefore, was strictly limited to the terms of the contract and the termination agreement. *Id.*

26. 631 F.2d 1264 (6th Cir. 1980).

27. *Id.* at 1265. The United States Steel Corporation of Youngstown, Ohio, had built and operated the Ohio Works mill since 1901 and the McDonald Works mill since 1918. *Id.* At the time the company announced the closings, the two plants employed 3,500 employees. *Id.* The mills were obsolete both in the deteriorating facilities and in the outdated machinery. *Id.* New technology and marketing strategies had changed the steel-making industry. *Id.*

The city of Youngstown revolved around the steel mills. The district judge stated

promissory estoppel<sup>28</sup> and also claimed community property rights.<sup>29</sup> The United States Court of Appeals for the Sixth Circuit reluctantly rejected both theories.<sup>30</sup> The court concluded that the condition precedent of the alleged contract and promise—that the mills would become profitable—was never fulfilled.<sup>31</sup> Therefore, the court could not sustain the action in contract or for detrimental reliance because the union did not prove profitability.<sup>32</sup> Further, the court held that establishing a community property right in a private enterprise would be judicial legislation and, thus, an abuse of judicial power.<sup>33</sup>

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that everything that happened in Youngstown was happening because of steel. *Id.* The district judge further stated that to accommodate the institution of steel, the lives and destinies of the community's inhabitants were based and planned on that industry. *Id.*

In order to avert the shutdown, the two unions representing the employees sued the steel corporation. *Id.* The unions asked the courts to order the steel corporation to remain open. *Id.* Alternatively, they sought an injunction to require the steel corporation to sell the two plants to the employees. *Id.*

28. *Id.* at 1269-79. The union claimed that the company officials made proposals to the employees that if the employees were productive and rendered the mills profitable the mills would not be shut down. *Id.* at 1267. These promises were made to the employees through oral statements over a company telephone hotline system and through press releases. *Id.* at 1270.

29. *Id.* at 1279-82. The unions asserted that a property right had arisen between the company and the Youngstown community in the nature of an easement. *Id.* at 1280. The unions demanded that the court order the company to assist in the preservation of the steel industry in the community, pay the cost for rehabilitating the community, and be restrained from leaving the community in a state of waste. *Id.*

30. *Id.* at 1279, 1282. The court, throughout its opinion, was highly sympathetic to the predicament the people of Youngstown were facing. For example, the court stated "[t]hat this appeal represents a cry for help from steelworkers and townspeople in the City of Youngstown, Ohio . . . ." *id.* at 1265, and "[t]his court has examined these allegations with care and with great sympathy for the community . . . ." *Id.* at 1280. The court even went as far as vacating a portion of the district court's dismissal of the union's final antitrust claim stating they did so "out of perhaps an excess of caution." *Id.* at 1282.

31. *Id.* at 1277. The court accepted the district court's rejection of the promissory estoppel contract theory on three grounds. *Id.* First, the company officials' oral statements and press releases to the employees did not constitute a definite promise to keep the mills open if they became profitable. *Id.* Second, the employees relied on statements made by company public relations officials and not company officers. *Id.* Third, the mills never became profitable and, therefore, the condition precedent to the alleged promise was not fulfilled. *Id.*

32. *Id.* The court accepted the company's view of what constitutes profitability. *Id.* at 1278. The union claimed the mills were profitable based on a gross profit margin analysis of minimum profitability. *Id.* The company based the lack of profitability on capital expenditure, fixed costs and technical obsolescence. *Id.*

33. *Id.* at 1282. The court stated that the problem in dealing with the community property cause of action was that the union did not have any authority to support their claims. *Id.* at 1280. The union attempted to rely on *Munn v. Illinois*, 94 U.S. 113 (1877), which held that a court may restrain a corporation from taking action that is injurious to the public interest. 631 F.2d at 1281. However, the *Local 1330* court stated *Munn* was precedent that established power for state legislatures to regulate private property; *Munn* did not give the courts that same power. *Id.* But see *Farber & Matheson, Beyond Promissory Estoppel: Contract Law and the "Invisible Handshake"*, 52 U. CHI. L. REV. 903, 938-42 (1985) (for an argument that the *Local 1330* case was decided incorrectly).



The court concluded that the complex issues involved in plant closing situations were the responsibilities of state or federal legislators.<sup>34</sup>

Labor organizations have also attempted to use NLRA violations as a basis for preventing plant shutdowns. The unions, however, have met with little success. In the seminal case on plant closing, *Textile Workers Union of America v. Darlington Manufacturing Co.*,<sup>35</sup> the United States Supreme Court ruled that when an employer closes his entire business, even when his sole motivation for the shutdown is antiunion sentiment, such action is not an unfair labor practice.<sup>36</sup> The Court did note, however, that employers violate the NLRA if they open "runaway shops,"<sup>37</sup> or if

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34. *Local 1330*, 631 F.2d at 1282. In support of the concept that plant closing regulation was best left to legislators, the *Local 1330* court reprinted, in an appendix to the opinion, a synopsis of the National Priorities Act of 1979, which was pending federal legislation at that time. *Id.* The bill never left the Labor and Human Resources Committee. See *infra* note 97 for a discussion of the National Employment Priorities Act of 1979.

35. 380 U.S. 263 (1965). The Darlington Manufacturing Company ["Company"] was a South Carolina corporation operating textile mills. *Id.* at 265. The Company was controlled by Roger Milliken and his family, who operated 17 textile manufacturers, whose products were manufactured in 27 different mills. *Id.* The Textile Workers Union ["Union"] initiated a vigorous organizational campaign among the Company's employees. *Id.* The Company resisted the campaign through interrogations of employees and threats to close the mill down. *Id.* After the Union won the representation election, the Company closed operations at the mill completely. *Id.* at 266. The Union filed charges with the National Relations Labor Board ["NLRB"] against the Company. *Id.* The Union claimed the Company had violated sections 8(a)(1), 8(a)(3), and 8(a)(5) of the NLRA, 29 U.S.C. §§ 158(a)(1), 158(a)(3), 158(a)(5) (1976). 380 U.S. at 266-67. These charges alleged that through the Company's action of closing the mill, the Company had interfered with the employees' section 7 rights (a section 8(a)(3) violation). *Id.* at 268. Further, the Union claimed that the Company's refusal to bargain with the Union after the election was a violation of section 8(a)(5). *Id.* at 266-67. The NLRB found the Company guilty of a section 8(a)(3) violation, after a finding the Company's antiunion sentiment was the motive for closing the mill. *Darlington Mfg. Co.*, 139 N.L.R.B. 241 (1962). The Court of Appeals for the Fourth Circuit denied enforcement in *Darlington Mfg. Co. v. NLRB*, 325 F.2d 682 (4th Cir. 1963). The Court of Appeals held that an employer had the absolute right to close all or part of its operation, regardless of antiunion motives. *Id.* at 685. The United States Supreme Court granted certiorari. *Darlington Mfg. Co. v. NLRB*, 377 U.S. 903 (1964). See *infra* notes 36-38 and accompanying text for the court's analysis of the *Darlington* case. See also Eames, *The History of the Litigation of Darlington As An Exercise In Administrative Procedure*, 5 U. Tol. L. Rev. 595 (1974) (discussion of the *Darlington* case, which took 18 years to fully litigate).

36. *Darlington*, 380 U.S. at 268. The Court reasoned that certain business decisions will interfere with an employee's right to concerted activity. *Id.* at 269. However, when the employer interference outweighs the business justification for the action, the employer violates section 8(a)(1). *Id.* The Court analyzed the *Darlington* situation and concluded that because the Company would receive no future benefit from a total cessation of business, even though the cessation was for antiunion reasons and not business reasons, this type of discrimination was not prohibited by the NLRA. *Id.* at 272. See also *NLRB v. Bell Co., Inc.*, 561 F.2d 1264 (7th Cir. 1977) (an employer is free to close his entire business even if the closing is motivated by vindictiveness towards the union).

37. *Darlington*, 380 U.S. at 272-73. A runaway shop exists when an employer, in

multi-plant employers temporarily close their operations in one area in order to discourage or chill union membership in another area.<sup>38</sup> The employee's remedy in these situations is back pay and reinstatement.<sup>39</sup> Consequently, labor organizations and their members are left with little relief in the event of a total plant closing.

The unions have also attempted to compel employers to submit to mandatory bargaining on the decision to close their operations. Previously, labor achieved a small victory when courts held that mandatory bargaining included bargaining over the effects of a total or partial plant closing ("effects bargaining").<sup>40</sup> However, some courts refused to require employers to bargain over the decision to totally or partially shut down operations ("decision bargaining").<sup>41</sup>

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retaliation against union activities, transfers work from a closed facility to another facility or opens a new plant to replace the closed plant. *Weather Tamer, Inc. v. NLRB*, 676 F.2d 483 (11th Cir. 1982); see also *Frito-Lay, Inc. v. NLRB*, 585 F.2d 62, 67-68 (3d Cir. 1978). The *Darlington* Court remanded the case to determine whether the Company's closing of the mill had adverse effects on union activity in other mills the Milliken family owned. *Darlington*, 380 U.S. at 276-77.

38. *Darlington*, 380 U.S. at 275. See, e.g., *NLRB v. Southern Plasma Corp.*, 626 F.2d 1287 (5th Cir. 1980) (an employer cannot close his business temporarily and then reopen it in order to oust a union); *NLRB v. Fort Vancouver Plywood Co.*, 604 F.2d 596 (9th Cir. 1979) (antiunion firings that fall short of a complete cessation of business violate the NLRA), cert. denied, 445 U.S. 915 (1980); *Great Chinese Am. Sewing Co. v. NLRB*, 578 F.2d 251 (9th Cir. 1978) (a partial closing to chill unionism in other parts of the employer's operation is unlawful).

39. *Darlington*, 380 U.S. at 275. However, the remedies of back pay and reinstatement in runaway shops and partial closing situations has presented a problem for the NLRB. The NLRB is reluctant to order a business owner to reopen or relocate part of his business. See *NLRB v. Preston Feed Corp.*, 309 F.2d 346 (4th Cir. 1962) (the NLRB is without power to interfere in management where the discontinuance is prompted by legitimate business motives; if the discontinuance is unlawful, an order to compel resumption of an abandoned operation is subject to strict limitations and not within the ordinary scope of the Board's authority). However, if the owner recommences operations, the NLRB has ordered reinstatement. *Darlington*, 139 N.L.R.B. at 253. Back pay is another problem. The NLRB's customary formula is to calculate back pay from the date of the unlawful discharge until reinstatement. *Id.* at 255. If reinstatement is impossible, the NLRB would order back pay until the discharged employees obtained substantially equivalent employment. *Id.* See generally *Electrical Prods. Div. of Midland Ross v. NLRB*, 617 F.2d 977 (3d Cir.) (unlawful partial closing remedy was bargaining order, back pay, preferential hiring list, and relocation expenses for displaced employees), cert. denied, 449 U.S. 871 (1980). But see *ABC Trans-Nat'l Transp., Inc. v. NLRB*, 642 F.2d 675 (3d Cir. 1981) (although employer violated bargaining duty over freight closing, the court refused to enforce the bargaining order).

40. See, e.g., *Vitek Elec. Inc. v. NLRB*, 763 F.2d 561, 366 (3d Cir. 1985) (bargaining order properly included bargaining over the effects of a plant shutdown); *Universal Sec. Instr., Inc. v. NLRB*, 649 F.2d 247, 257 (4th Cir. 1981) (it is clear that an employer must bargain with the union over the effects of a partial closing decision); *NLRB v. North Carolina Coastal Motor Lines*, 542 F.2d 637, 638 (4th Cir. 1985) (there is a duty to bargain over the effects of a partial closing); *Royal Typewriter Co. v. NLRB*, 533 F.2d 1030, 1039 (8th Cir. 1976) (employer has a duty to bargain in good faith over the effects of a plant closing).

41. See, e.g., *NLRB v. National Car Rentals Serv.*, 672 F.2d 1182, 1188 (3d Cir. 1982) (there is no duty to bargain over the decision to close a facility); *Weather Tamer, Inc. v. NLRB*, 676 F.2d 493 (11th Cir. 1982) (failure to bargain over the deci-

An example of decision bargaining is the subcontracting situation, where an employer is required to bargain over the decision to subcontract union work to independent contractors.<sup>42</sup> Therefore, if an employer were to consider hiring subcontractors to replace union employees or subcontract union work to independent contractors, the employer would be required to submit to bargaining over the decision to do so.<sup>43</sup>

In an effort to convince courts to order decision bargaining over plant shutdowns, unions analogized the shutdown situation to the subcontracting situation.<sup>44</sup> The unions achieved some success in a few circuits.<sup>45</sup> However, most courts limited mandatory bargaining to relieving the effects of a plant shutdown on union members.<sup>46</sup> Bargaining over the effects of a decision must be conducted in a meaningful manner and at a meaningful time.<sup>47</sup> Effects bargaining

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sion to partially close a plant was not a violation of the Act); *Soule Glass and Glazing Co. v. NLRB*, 652 F.2d 1055, 1085 (5th Cir. 1981) (there is an important distinction between decision bargaining and effects bargaining, in this case, only the effects bargaining over the plant closure is at issue); *North Carolina Coastal*, 542 F.2d at 638 (there is no duty to bargain over the decision to withdraw from business); *Royal Typewriter*, 533 F.2d at 1039 (absent union animus, an employer has no duty to bargain over the decision to partially shut down its operations); *NRLB v. Thompson Trans. Co.*, 406 F.2d 698, 702 (10th Cir. 1969) (an employer, motivated by a sound economic reason, had no duty to bargain over the decision to close the terminal). *But see* *International Ladies Garment Wkrs. v. NLRB*, 463 F.2d 907, 917 (D.C. Cir. 1972) (company's decision to relocate was a mandatory subject of bargaining).

42. *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203 (1964). The *Fibreboard* Court found that decision bargaining over subcontracting union work or hiring independent contractors to perform union work should be a subject of mandatory bargaining. *Id.* at 213. The Court found the subcontracting issue was "peculiarly suitable for resolution within the collective bargaining framework." *Id.* at 214. The Court stressed the fact that the subcontracting issue did not "significantly abridge [the employer's] freedom to manage the business." *Id.* at 213. *See* Rabin, *Fibreboard and the Termination of Bargaining Unit Work: the Search for Standards in Defining the Scope of the Duty to Bargain*, 71 COLUM. L. REV. 803 (1971).

43. *Equitable Gas Co. v. NLRB*, 637 F.2d 980 (3d Cir. 1981) (there is a rebuttable presumption that the duty to bargain over the decision to subcontract is mandatory); *NLRB v. American Mfg. Co.*, 351 F.2d 74 (5th Cir. 1965) (there is a duty to bargain before engaging the services of a subcontractor).

44. *See supra* note 41 for cases in which the courts have refused to accept decision bargaining in a shut down situation.

45. *See, e.g., Brockway Motor Trucks v. NLRB*, 582 F.2d 720, 735 (3d Cir. 1978) (there is an initial presumption that a decision to partially close an operation is a mandatory subject of bargaining); *Weltronic Co. v. NLRB*, 419 F.2d 1120, 1122-23 (6th Cir. 1969) (the company had a statutory duty to bargain about the removal of plant work); *NLRB v. Winn-Dixie Stores, Inc.*, 361 F.2d 512 (5th Cir. 1965) (discontinuation of business activities was a mandatory subject of bargaining), *cert. denied*, 385 U.S. 935 (1966).

46. *See supra* note 40 and accompanying text for effects bargaining cases.

47. *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 682 (1981) (under section 8(a)(5), bargaining over the effects of a decision must be conducted in a meaningful manner and at a meaningful time and the NLRB may impose sanctions to insure its adequacy). Therefore, bargaining in a meaningful manner and time means identifying the mandatory subjects of bargaining and submitting such bargaining topics to the union for discussion before any unilateral action is taken. *Brockway*

topics could include concessions, alternatives to closing, severance, benefits and preferential hiring.<sup>48</sup>

However, mandatory effects bargaining in shutdown situations and mandatory decision bargaining in subcontracting situations has led to a conflict between the circuit courts and the National Labor Relations Board ("NLRB") when labor attempted to compel mandatory decision bargaining over partial closings.<sup>49</sup> For instance, the NLRB inconsistently applied rulings in several different cases, shifting from mandatory decision bargaining, when the shutdown decision directly affected wages, terms and condition of employment, to non-mandatory decision bargaining, when the shutdown was essentially financial and managerial in nature.<sup>50</sup> The Second and Third Circuits created a presumption in favor of mandatory decision bargaining.<sup>51</sup> This presumption is rebuttable upon a showing that

*Motors*, 582 F.2d at 725. If an employer fails to submit mandatory bargaining topics to a union, the employer violates his duty of good faith bargaining. *NLRB v. Katz*, 369 U.S. 736, 743 (1962). However, an employer need not make concessions, he is only obligated to at least discuss the bargaining topic. *Id.* See generally *Cox, The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401 (1958) for a classic treatment of the good faith bargaining requirement.

48. *NLRB v. Royal Plating*, 350 F.2d 191, 196 (3d Cir. 1965) (citing *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 554 (1964)) (severance); *Inland Steel Co. v. NLRB*, 170 F.2d 247 (7th Cir. 1948) (retirement/pension plans), *cert. denied*, 336 U.S. 960 (1949); *NLRB v. Westinghouse Air Brake Co.*, 120 F.2d 1004 (3d Cir. 1941) (grievance procedure). See generally *Brockway Motors*, 582 F.2d at 726 (citing other mandatory topics of bargaining which include: compensation, *Oughton v. NLRB*, 118 F.2d 486, 498 (3d Cir. 1941), *cert. denied*, 315 U.S. 797 (1942); pensions, *Inland Steel*, 170 F.2d at 251 (7th Cir. 1948); profit sharing plans, *Kroger Co. v. NLRB*, 401 F.2d 682, 687 (6th Cir. 1968), *cert. denied*, 395 U.S. 904 (1969); bonuses, *NLRB v. Wonder State Mfg. Co.*, 344 F.2d 210, 212-14 (8th Cir. 1965); hours, *S.S. Kresge Co. v. NLRB*, 416 F.2d 1225, 1230-31 (6th Cir. 1969); hiring practices, *Perry Rubber Co. v. NLRB*, 133 NLRB 225 (1961); employee layoffs, *Westinghouse*, 120 F.2d at 1006; promotions, *NLRB v. Century Cement Mfg. Co.*, 208 F.2d 84, 85-86 (2d Cir. 1953); transfers, *Rapid Roller Co. v. NLRB*, 126 F.2d 452, 459-60 (7th Cir. 1942), *cert. denied*, 317 U.S. 650 (1942); seniority programs, *Industrial Union of Marine & Shipbuilding Wkrs. v. NLRB*, 320 F.2d 615, 620 (3d Cir. 1963); compulsory retirement, *Inland Steel*, 170 F.2d at 251-52; and subcontracting, *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203 (1964)).

49. See *supra* note 45 for cases and discussing mandatory decision bargaining.

50. *First Nat'l*, 452 U.S. at 674 n.10. The *First National* Court noted that the NLRB refused to order bargaining over the decision to close an operation when the decision was essentially managerial and financial in nature and involved a significant investment or withdrawal of capital that affected the ultimate direction of the enterprise. *Id.* (quoting *General Motors Corp., GMC Truck & Coach Div. v. NLRB*, 191 N.L.R.B. 479, 480 (1972)). On the other hand, the NLRB had ordered bargaining over the decision to close because this decision directly affected the employee's conditions of employment and the interests of employees in this matter was of sufficient importance. 452 U.S. at 674 n.10 (quoting *Ozark Trailers, Inc. v. NLRB*, 161 N.L.R.B. 561, 567-68 (1966)).

The *First National* Court realized that the Board's analysis of the plant closing issue was confusing. The Court noted that employers "must have some degree of certainty beforehand as to when it may proceed to reach decisions without fear of later evaluations labeling its conduct an unfair labor practice." 452 U.S. at 679.

51. *First Nat'l*, 452 U.S. at 672 n.7. See, e.g., *NLRB v. First Nat'l Maintenance*

bargaining over the decision would not further the purpose of the NLRA.<sup>52</sup> The Ninth, Eighth, and Tenth Circuits refused to require bargaining over any management decision involving a major capital investment, basic operational change, or a partial closing not motivated by antiunion sentiment.<sup>53</sup> Finally, the Fifth Circuit imposed a duty to bargain over partial closings.<sup>54</sup>

In order to settle this controversy between the circuits and the NLRB, the United States Supreme Court granted certiorari<sup>55</sup> in *First National Maintenance Corp. v. NLRB*.<sup>56</sup> In *First National*,

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Corp., 627 F.2d 596, 601 (2d Cir. 1980) and Brockway Motors Trucks v. NLRB, 582 F.2d 270, 735 (3d Cir. 1978) (rebuttal presumption in favor of bargaining over the decision to close operations); Equitable Gas Co. v. NLRB, 637 F.2d 980 (3d Cir. 1981) (subcontracting); ABC Trans-Nat'l Trans, Inc. v. NLRB, 642 F.2d 675 (3d Cir. 1981) (partial closing); NLRB v. Royal Plating & Polishing Co., 350 F.2d 191 (3d Cir. 1965) (partial closing). Several other courts had agreed with the Second and Third Circuits. *First Nat'l*, 452 U.S. at 672 n.7. See Davis v. NLRB, 617 F.2d 1264 (7th Cir. 1980) (change of full service restaurant to self service cafeteria); NLRB v. Production Molded Plastics, Inc., 604 F.2d 457 (6th Cir. 1979) (plant closing).

52. *First Nat'l*, 452 U.S. at 672 n.7. The Court noted that the Second Circuit created a presumption in favor of bargaining that could be rebutted "by showing that the purposes of the statute would not be furthered by imposition of a duty to bargain." *Id.* at 672. For example, a showing that bargaining would be futile, or that an employer was faced with an emergency situation, or that industry customs showed that typical bargaining agreements did not require bargaining over plant closing situations would be enough to rebut the presumption. *Id.* However, the Third Circuit decided that the presumption could only be rebutted through a careful fact-finding analysis of competing interests of the employers and employees under the particular circumstances of the case. *Id.* at 672 n.7.

53. *Id.* at 673 n.8 (citing NLRB v. International Harvester Co., 618 F.2d 85 (9th Cir. 1980); Royal Typewriter Co. v. NLRB, 522 F.2d 1030, 1039 (8th Cir. 1976); NLRB v. Thompson Transport Co., 406 F.2d 698 (10th Cir. 1969); NLRB v. Transmarine Navigation Corp., 380 F.2d 933, 939 (9th Cir. 1967); and NLRB v. Adams Dairy, Inc., 350 F.2d 108 (8th Cir. 1965)). The Eighth Circuit imposed a duty to bargain, however, when a partial closing was motivated by antiunion sentiment. *First Nat'l*, 452 U.S. at 673 n. 9 (citing Morrison Cafeterias Consol. Inc. v. NLRB, 431 F.2d 254 (8th Cir. 1970); NLRB v. Drapery Mfg. Co., 425 F.2d 1026 (8th Cir. 1970); NLRB v. William J. Burns Int'l Detective Agency, 346 F.2d 897 (8th Cir. 1965)).

54. *First Nat'l*, 452 U.S. at 673 (citing Winn-Dixie, 361 F.2d 512 (5th Cir. 1965), *cert. denied*, 385 U.S. 935 (1966)).

55. *First Nat'l*, 449 U.S. 1076 (1981).

56. 452 U.S. 666 (1981). In *First National*, the employer was in the business of providing housekeeping, cleaning and maintenance services to commercial customers. *Id.* at 668. Due to the loss of a major client, the employer decided to close part of his operation and discharged union employees. *Id.* at 669-70. The employer refused to bargain over the decision to close and told the union that the termination was for economic reasons. *Id.* The employer further told the union that delaying the shut-down would be prohibitively expensive. *Id.* The union filed unfair labor practice charges against the employer. *Id.* at 670. The NLRB and the Court of Appeals for the Second Circuit upheld the Administrative Law Judge's finding that the employer violated the NLRA when he refused to bargain over the decision and the effects of the partial closing of operation. *Id.* at 670-72. The United States Supreme Court agreed with the NLRB and the Second Circuit that the employer had to bargain over the effects of the closing. *Id.* at 681. However, the Court reversed and remanded the case after a finding that when the employer partially closes for economic reasons, he has no duty to bargain over the decision to close. *Id.* at 686-88.

the Court held that an employer is not required to bargain over his decision to partially close any part of his operation.<sup>57</sup> The Court reasoned that the employer's need to independently decide to shut down part of its business for economic reasons, outweighed the incremental benefits that might be gained through union participation in decision making.<sup>58</sup> The Court emphasized that when Congress passed the Labor Management Relations Act of 1947,<sup>59</sup> there was no legislative intent to make union representatives equal partners in the management of a business enterprise.<sup>60</sup> The Court further reminded labor that adequate bargaining over the effects of closings would protect union members,<sup>61</sup> and that there were other remedies for partial closings motivated by union animus.<sup>62</sup>

Consequently, employees and unions representing employees have little relief or power when an employer decides to shut down, relocate or partially close his operation. Employers are free to completely shut down operations for any reason and need only bargain over the effects of the closing on the employees.<sup>63</sup> Employers are free to partially close or relocate for economic reasons.<sup>64</sup> Similarly, employers need only bargain over the effects of the partial closing and relocation.<sup>65</sup> The only restriction on partial closings and relocation is that the employer's motivation is not based on antiunion sentiment.<sup>66</sup> In contrast, employers who employ unorganized workers can

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57. *Id.* at 686. The Court narrowly limited the holding to partial closings for economic reasons. *Id.* at 687. The Court noted that the employer's sole motive for closing was to reduce his economic losses. *Id.* Further, the Court stated that the decision to halt work in this case represented a significant change in the employer's operations, a change not unlike opening a new line of business or going out of business entirely. *Id.* at 688. This narrow holding permits unions to file unfair labor practice charges against an employer if the partial closing is not for economic reasons, but for antiunion sentiment. See *supra* note 39 for a discussion of the remedies for antiunion motivated partial closings.

58. *First Nat'l*, 452 U.S. at 686.

59. 29 U.S.C. §§ 141-97 (1982).

60. *First Nat'l*, 452 U.S. at 676.

61. *Id.* at 681-82.

62. *Id.* at 682. The Court stated that "the union's legitimate interest in fair dealing is protected by § 8(a)(3), which prohibits partial closings motivated by anti-union animus. . . ." *Id.* (citing *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263 (1965)). See *supra* notes 36-38 and accompanying text for the *Darlington* Court's analysis of antiunion motivated partial closings. The *First National* Court noted that under section 8(a)(3), the NLRB may inquire into the employer's motivation behind a partial closing. *First Nat'l*, 452 U.S. at 682. An employer may not label its decision as purely economic in order to mask its desire to weaken and circumvent a union. *Id.* See generally Irving, *Closing and Sales of Businesses: A Settled Area?*, 33 LAB. L.J. 218 (1982) (thorough discussion of *First National*).

63. See *supra* note 36 and accompanying text for a discussion of a complete shut down in operations.

64. See *supra* note 57 and accompanying text for a discussion of partial closing situations.

65. See *supra* note 40 for cases discussing effects bargaining.

66. See *supra* note 62 and accompanying text for a discussion of antiunion mo-

shut down, relocate or partially close for any reason at all and need not concern themselves with the effects of the closing on the employees. An employee in this situation must seek relief from state or federal laws.<sup>67</sup>

### B. State Trends in Plant Closing Laws

Unorganized workers and union members receive some relief from the effects of plant closings if they reside in a state that has dealt with this type of unemployment problem. Generally, states promote voluntary cooperation from employers by encouraging employers to provide advance notice to employees prior to any plant relocation or shutdown.<sup>68</sup> Some states also have programs that assist displaced workers.<sup>69</sup> Advance notice, retraining assistance, relocation assistance, severance pay and unemployment compensation were found to provide the most relief to a displaced worker.<sup>70</sup> However, only two states—Maine and Wisconsin—have laws that aggressively provide relief to the displaced worker.<sup>71</sup>

The Wisconsin statute requires employers to give sixty days advance notice to the state labor department, the affected employees, the unions, and the clerk of the town or village, of any decision to merge, close, or liquidate a business operation.<sup>72</sup> Failure to comply

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tivated partial closings.

67. WORKER DISLOCATION REPORT, *supra* note 1, Appendix A, at 13, notes that unions represent less than 20% of the workforce in America. The Task Force listed several federal adjustment services which can benefit the dislocated worker. *Id.* at 19. These assistance programs include the Job Training Partnership Act, Unemployment Insurance, U.S. Employment Service, and the Trade Adjustment Act ("TAA"), which provides training and income support for workers displaced because of trade judgments. WORKER DISLOCATION REPORT, *supra* note 1, at 19. The Department of Labor has established a small Industrial Adjustment Service unit in the Bureau of Labor Management Relations and Cooperative Programs. *Id.* This unit has conducted adjustment workshops with 15 states, unions, and companies. *Id.* See *infra* notes 72 and 99 and accompanying text for a discussion of state and pending federal legislation that may provide relief to the unorganized worker.

68. WORKER DISLOCATION REPORT, *supra* note 1, at 18. See CONNECTICUT BUSINESS AND INDUSTRY ASSOCIATIONS, VOLUNTARY CODE OF CONDUCT FOR WORKFORCE REDUCTIONS (1984); PENNSYLVANIA CHAMBER OF COMMERCE, VOLUNTARY GUIDELINES FOR PLANT CLOSINGS OR SUBSTANTIAL LAYOFFS (1986).

69. WORKER DISLOCATION REPORT, *supra* note 1, at 19. The report notes that California, Delaware, Illinois, Indiana, Massachusetts, Michigan, New Jersey and New York have programs to assist displaced workers. *Id.*

70. *Id.* at 6.

71. ME. REV. STAT. ANN. tit. 26, § 625-B(6-A) (Supp. 1986-87); WIS. STAT. § 109.07 (Supp. 1986).

72. WIS. STAT. § 109.07(1) (Supp. 1986). The statute only applies to employers that employ 100 or more persons. *Id.* The employer is also required to submit, in writing, to the state labor department, all information concerning payroll and other remuneration owed to the affected employees. *Id.* Also, the state labor department may require the employer to submit a plan setting forth the manner in which these final payments are to be made to the affected employees. *Id.*

with the notice requirements subjects an employer to a misdemeanor charge, carrying a fine of fifty dollars for each employee whose employment is terminated as a result of the merger, closing, or relocation.<sup>73</sup> Wisconsin also provides relief to the displaced worker through the Economic Adjustment Program<sup>74</sup> and the Employee Ownership Assistance Loans program.<sup>75</sup> The Economic Adjustment Program allows the state department of labor to provide economic assistance to employers and employees faced with a plant closing problem.<sup>76</sup> The program also provides community response committees with assistance to avert a plant shutdown.<sup>77</sup> The department provides referrals and information to displaced workers concerning retraining programs and other public assistance.<sup>78</sup>

The Employee Ownership Assistance Loans Program provides loans to employees wishing to purchase a closing business.<sup>79</sup> The loan program allows employees to actively participate in the management of the acquired business.<sup>80</sup> Wisconsin's combination of advance notice requirements, adjustment programs and loan programs effectively balance an employer's right to manage the affairs of his business, while providing displaced workers with opportunities for new jobs.<sup>81</sup>

In contrast, Maine has passed a controversial mandatory severance pay statute.<sup>82</sup> In addition to sixty days mandatory advance no-

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73. WIS. STAT. § 109.07(2) (Supp. 1986). The employer who fails to give the prescribed notice or refuses to provide the relevant information will be found guilty of a misdemeanor and "may not be fined more than \$50 for each employee whose employment has been terminated. . . ." *Id.*

74. *Id.* § 560.15.

75. *Id.* § 560.16.

76. *Id.* § 560.15(1)(a).

77. *Id.* § 560.15(2)(a).

78. *Id.* § 560.15(3)(b).

79. *Id.* § 560.16.

80. *Id.*

81. The Wisconsin advance notice statute is a successful effort at balancing employer and employee interests. The advance notice requirement is limited to three months, with only a minor fine for failing to comply. WIS. STAT. § 109.07(2) (Supp. 1986). This allows the employer to decide if the risks involved in not pre-announcing a decision to close are more important than complying with the statute. If complying with the statute can be managed, the advance notice requirement will greatly help the affected employees take advantage of the other displaced worker programs, such as the Economic Adjustment Program. Also, the disclosure requirements are minimal when compared to pending federal disclosure requirements. See *infra* note 108 for pending federal disclosure requirements. The Wisconsin disclosure requirements are limited to pay and other benefit payments owed to the affected employees. WIS. STAT. § 109.07(2) (Supp. 1986). The Wisconsin statute does not require disclosure of books and records to prove economic instability. Finally, no mandatory consultation is required after the employer gives notice. Therefore, an employer can give advance notice of his decision to close and not experience delays in that closing because of a mandatory consultation requirement. See *infra* note 107 and accompanying text for the pending federal mandatory consultation requirements.

82. ME. REV. STAT. ANN. tit. 26, § 625-B(6-A) (Supp. 1986-87).



tice, subject to a five hundred dollar fine for failure to comply, an employer must also provide severance pay to eligible employees, calculated at one weeks wages for every year of employment at the employer's establishment.<sup>83</sup> No other economic adjustment program or information services are provided to the displaced worker.<sup>84</sup>

The United States Supreme Court recently upheld Maine's severance pay statute in *Fort Halifax Packing Co. v. Coyne*.<sup>85</sup> The Court concluded that the Employee Retirement Income Security Act<sup>86</sup> ("ERISA") does not preempt the Maine law, since the law does not relate to any employee benefit plan subject to ERISA regulations.<sup>87</sup> Furthermore, the Court held that the NLRA does not preempt Maine's law, because the law does not impermissibly intrude on the collective bargaining process and, therefore, is a valid exercise of a state's police powers.<sup>88</sup>

Although Maine's statute requires advance notice of plant closings or relocations, the law seems unnecessarily harsh on employers and only minimally aids displaced workers.<sup>89</sup> First, employees may never receive the severance pay from a bankrupt company.<sup>90</sup> Second, this law discourages employers from locating and opening businesses in Maine—businesses that would create new job opportunities for displaced workers and other unemployed people.<sup>91</sup> Third, Maine does not provide additional assistance to displaced workers.<sup>92</sup> Displaced workers need more than a lump sum severance payment,

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83. *Id.*

84. The statute does not refer to any other programs in the code that would justify the advance notice requirement imposed on employers. The statute only defines who should comply, *id.* § 625-B(1); who can bring suit against the employer, *id.* § 625-B(4)(5); to whom notice should be given, *id.* § 625-B(6)(6-A); and the powers of the Director of the Bureau of Labor, *id.* § 625-B(7). The statute does define circumstances that would mitigate the severance pay liability. *Id.* § 625-B(3). There would be no employer liability for severance pay if: (a) the closing was due to physical calamity; (b) the employee is covered by an express contract providing for severance pay; (c) the employee accepts employment at the new location; or (d) the employee has been employed with the employer for less than three years. *Id.*

85. 107 S. Ct. 2211 (1987).

86. 29 U.S.C. §§ 1001-1453 (1980).

87. *Fort Halifax*, 107 S. Ct. at 2223.

88. *Id.*

89. Employers in Maine have no choice but to comply with the severance pay requirements. This may lead to very harsh economic sanctions upon an already financially distressed company. The statute effectively punishes employers who close their operations in Maine.

90. The U.S. Bureau of the Census noted that in 1985, 364,536 bankruptcy petitions were filed, U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1987, at 510 (107th ed.), and 57,067 business failed, with a rate of 114 failures for every 10,000 concerns. *Id.* at 509.

91. Common sense would indicate that business owners would not be inclined to locate their operations in Maine, when Maine would impose punitive sanctions for business failures due to economic reasons.

92. See *supra* note 84 for a discussion of Maine's plant closing law.

they need new jobs and retraining.

Since Maine's law has passed the Supreme Court's preemption test, many states or local governments suffering from the effects of plant closings may be inclined to pass similar laws.<sup>93</sup> Conversely, states are competing against one another for businesses and jobs and, therefore, may not pass any plant closing regulations at all.<sup>94</sup> State legislators, however, should strongly consider patterning any plant closing regulations and programs after Wisconsin's regulations, which balances the rights and interests of affected employers, employees and communities.<sup>95</sup> This state law discussion may be a moot point, however, if pending federal legislation is enacted that will preempt most state laws that attempt to regulate a plant closing.<sup>96</sup>

### C. *Economic Dislocation and Worker Adjustment Assistance Act*

For the third time,<sup>97</sup> bills have been introduced into the House and the Senate that provide for reemployment assistance to dislocated workers. The companion bills would amend Title III of the Job Training Partnership Act.<sup>98</sup> These proposed amendments are

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93. See Brief of Amicus Curiae Chamber of Commerce of the United States of America in support of Appellant at 26 n.18, *Fort Halifax Packing Co. v. Coyne*, 107 S. Ct. 2211 (1987) (in 1986, three state legislatures considered bills with mandatory severance pay requirements; those states were Illinois, H.R. 2665 and H.R. 2924; Missouri, H.R.1128 and S.601; and West Virginia, S.323.).

94. The Chamber of Commerce for the United States noted that in 1986 only 18 states considered plant closing legislation. *Id.* at 26 n.17. This means that 32 states do not have plant closing legislation (the 32 state total takes into account the fact that Wisconsin and Maine have plant closing laws).

95. See *supra* note 72-81 and accompanying text for a discussion of Wisconsin's plant closing regulations.

96. See *infra* note 149 for the federal bill's preemption provision.

97. The National Employment Priorities Act of 1979 was introduced into the Senate in 1979. S.1608, 96th Cong., 1st Sess., 125 CONG. REC. 21481 (daily ed. July 31, 1979). This Senate bill called for advance notice of plant closings, investigations into the economic reasons for the employer's change of operations, and a requirement that the employer pay 52 weeks of income maintenance to affected employees. *Id.* The bill was referred to the Labor and Human Resources Committee, where it died.

In March of 1985, the Labor-Management Notification and Consultation Act of 1985 was introduced into the House of Representatives. H.R.1616, 99th Cong., 1st Sess., 131 CONG. REC. 32, H1333 (daily ed. Mar. 20, 1985). This bill called for a 90 day delay in any plant closing or layoff after advance notice was given. *Id.* During this delay, management was required to consult with employee representatives. *Id.* The bill was defeated in the House on November 21, 1985. H.R.1616, 99th Cong., 1st Sess., 131 CONG. REC. 161, H10487 (daily ed. Nov. 21, 1985). The vote was 208-203. *Id.*

On February 19, 1987, Senator Metzbaum, joined by Senators Kennedy, Simon, Matsunaga, Harkin, Mikulski, Adams, Pell and Byrd, introduced Senate bill 538. S.538, 100th Cong., 1st Sess., 133 CONG. REC. S2228 (daily ed. Feb. 19, 1987). S.538 is entitled the Economic Dislocation and Worker Adjustment Assistance Act [hereinafter the Dislocation Bill]. Representative Ford had introduced the companion House Bill 1122 on February 18, 1987. H.R.1122, 100th Cong., 1st Sess., 133 CONG. REC. 24, H694, H708 (daily ed. Feb. 18, 1987). The original bills call for advance notice of plant closings, mandatory consultation and disclosure of company records.

98. 29 U.S.C. §§ 1501-1781 (1982). The Job Training Partnership Act (JTPA)

entitled "The Economic Dislocation and Worker Adjustment Assistance Act"<sup>99</sup> ("the Bill"), and are drawn from the Secretary of Labor's Task Force Report on Economic Adjustment and Worker Dislocation.<sup>100</sup>

The Bill calls for the Secretary of Labor to create a Dislocated Worker Unit to oversee displaced worker assistance programs.<sup>101</sup> The Bill proposes a complex scheme in which the federal government would oversee and coordinate the individual state agencies, which in turn would oversee and coordinate local government programs.<sup>102</sup> These assistance programs would then be delivered to the displaced workers and communities through joint labor-management committees.<sup>103</sup> The government would fund fifty percent of the cost of the programs, while management would fund the remaining fifty percent.<sup>104</sup> The Secretary of Labor estimates that the program will need an initial funding of 900 million dollars.<sup>105</sup>

was enacted to establish programs to prepare young people and unskilled adults for entry into the labor force. *Id.* § 1501. The JTPA also provides job training to economically disadvantaged people. *Id.* The JTPA further allows persons over age 55, who are economically disadvantaged, to participate in the program. *Id.* § 1534(d).

In order to reach the average dislocated worker, The Dislocation Bill would amend the JTPA's limited eligibility requirements. *See id.* § 1603(a)(b) for the JTPA's eligibility requirements. *See also* S.538, 100th Cong., 1st Sess. § 301(1) (1987) and H.R.1122, 100th Cong. 1st Sess. § 301(3) (1987) for the Dislocation Bill's eligibility requirements.

99. S.538, 100th Cong., 1st Sess., §§ 301-392 (1987) [hereinafter S.538]; H.R.1122, 100th Cong., 1st Sess., §§ 301-358 (1987) [hereinafter H.R.1122].

100. In October of 1985, the Secretary of Labor appointed a Task Force to study the effects of plant closings on the United States workforce. WORKER DISLOCATION REPORT, *supra* note 1, at 8. The Task Force was composed of 21 members, who represented government, industry, labor, academia, and the private economic research community. *Id.* The Task Force examined the causes and effects of worker dislocations, evaluated current federal, state and local programs, studied plant closing regulations of foreign nations, and inquired into American industry's problems. *Id.* The Task Force drafted a final report of recommendations after one year of study. *Id.* at 9. A copy of the report can be obtained through the Secretary of Labor's Office, Washington, D.C.

101. S. 538, *supra* note 99, at § 304(b); H.R.1122, *supra* note 99, § 304(a).

102. H.R. 1122, *supra* note 99, § 305. In order to be eligible for federal funds for assistance programs, the Dislocation Bill requires the governor of a state to create dislocated worker units and a state job training coordinating council to oversee state and local programs. *Id.* The House bill creates state tripartite advisory committees to review state programs, *id.* § 308, and also a national tripartite advisory committee to review the state's assistance programs. *Id.* § 309. The Senate bill, however, requires a governor to designate substate grantees, who would be responsible for providing the assistance programs to communities. S.538, *supra* note 99, § 308.

103. S. 538, *supra* note 99, § 305(a)(7), H.R.1122, *supra* note 99, § 306(c)(2).

104. *See* 133 CONG. REC. H694 (daily ed. Feb. 18, 1987) (statement of Rep. Ford) ("Services are best delivered at the plant site . . . with operations funded 50-50 by management and the government").

105. THE WORKER DISLOCATION REPORT, *supra* note 1, at 6. The Task Force recommended that the preferred source of funds for the program was from general revenues. *Id.* at 36. Offsets to the program costs could be subsumed from existing programs such as, Labor Market Services, JTPA, FUTA funds and TAA training services funds. *Id.* at 37.

The Bill requires advance notice of plant shutdowns to affected employees, unions, communities and local governments.<sup>106</sup> The Bill also requires mandatory consultation with community response teams.<sup>107</sup> Further, full disclosure of certain company information is required.<sup>108</sup> Opponents of the Bill reject these legal mandates. They contend that these requirements will impede and delay plant closing rather than aid in the adjustment of workers.<sup>109</sup> Additional restrictions imposed on the private sector, opponents argue, will send businesses to other, less restrictive countries, which will inevitably result in more job losses.<sup>110</sup>

Proponents of the Bill strongly urge a national, uniform effort to aid displaced workers.<sup>111</sup> A national standard of advance notice is required to prevent states from using permissive labor standards to compete with one another to attract business. Further, proponents contend that advance notice is essential to any successful worker adjustment program.<sup>112</sup>

Although this proposed legislation is an effort towards recognizing the severe employment problem and presents programs for the displaced worker and his community, this legislation should not be enacted. The complexities involved in administering the Bill are staggering.<sup>113</sup> After the bureaucratic dust settles, the worker will

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106. S.538, *supra* note 99, § 332 and H.R.1122, *supra* note 99, § 352. Originally, both Bills required 90 days notice of a closing or layoff that involved 50-100 employees; 120 days notice of a closing or layoff which involved 100-500 employees; and 180 days notice of a closing or layoff that involved 500 or more employees. *Id.* The Senate amended the Bill to only require 60 days notice of a closing or layoff which involved 100 or more employees. 133 CONG. REC. S6735 (daily ed. May 19, 1987). Failure to give advance notice will result in back pay to the affected employees for each day of violation. S. 538, *supra* note 99, § 334(a)(1)(A) and H.R.1122, *supra* note 99, § 355(a)(1)(A).

107. H.R. 1122, *supra* note 99, § 353. The Senate Bill does not have a mandatory consultation requirement.

108. S. 1122, *supra* note 99, § 333 and H.R. 1122, *supra* note 99, § 354. According to the House Bill, full disclosure would require an employer to give the community response teams information regarding the reason for the closing, reasons why alternatives to closing were rejected, plans regarding the disposition of capital assets, and an estimate of anticipated closing costs. *Id.* The Senate Bill would require employers to provide response teams with the company's financial statements and audit reports for the last three years, employer studies or evaluations of maintaining or closing operations, plans to relocate work, and disposition of capital assets. S.538, *supra* note 99, § 333. The Senate Bill states that failure to disclose information results in a civil penalty not to exceed \$10,000. *Id.* § 334. The House Bill would require a civil penalty of \$500 per day for each day of the violation until disclosure occurs. H.R. 1122, *supra* note 99, § 355(b)(1).

109. Debate on Plant Closing Notification Requirements, 124 Lab. L. Rep. 174 (CCH) (Mar. 16, 1987).

110. *Id.*

111. *Id.* at 175.

112. *Id.*

113. See *supra* notes 101-02 and accompanying text for a discussion of the federal administrative scheme.

most likely find himself in the same position he was in before—unemployed. The cost of this expensive Bill will surely be placed on the worker.<sup>114</sup> Also, this bill's strict requirements invites litigation.<sup>115</sup> However, the most important aspect of this legislation is that it emphasizes *local* involvement in administration, development of programs, and maintenance of these programs.<sup>116</sup> Many complex, costly federal programs that originally were enacted to assist disadvantaged persons or communities have failed miserably.<sup>117</sup> Implementation of assistance programs have been more successful at state or local levels.<sup>118</sup> Therefore, plant closing unemployment problems should be solved at the local state level and not through a paternalistic federal, bureaucratic system.

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114. WORKER DISLOCATION REPORT, *supra* note 1, app. G (dissent). In a dissent to the recommendations made by the Task Force, Richard McKenzie, a professor of economics at Clemson University, noted that the members of the Task Force obscured the costs of the assistance programs. *Id.* at 2. Although the program seems to offer free benefits to workers, workers will ultimately pay through the inevitable trade offs between termination benefits and worker wages. *Id.* at 3. Further, McKenzie stated that "[t]he Task Force refuses to admit openly that its proposal amounts to just another social welfare (entitlement) program . . . preferring to create a ruse that may cause workers to believe they will not be paying for the benefits they receive." *Id.* at 2.

115. There is one exception to the strict notice requirements. An employer may order a plant closing before the end of the applicable period if an unforeseeable business circumstance prevents the employer from complying. S. 538, *supra* note 99, § 332(c) and H.R. 1122, *supra* note 99, § 352(c). The interpretation of what an "unforeseeable circumstance" is will invariably cause litigation between employee representatives and non-complying employers. Similarly, the consultation and disclosure requirements will impede management's need for speed, flexibility and secrecy in meeting business opportunities. *See, e.g., Detroit Edison Co. v. NLRB*, 440 U.S. 301, 316 (1979) (noting the danger of "leaks" in giving union confidential information). In *First Nat'l Maintenance Corp. v. NLRB* 452, U.S. 666, 683-84, the Court noted that employers may face significant tax or securities consequences that hinge on confidentiality and even good faith bargaining may be futile and cause the employer additional loss.

116. *See generally* S. 538, *supra* note 99, §§ 307, 308, 309, 316, and H.R. 1122, *supra* note 99, §§ 305, 308, 344, 352, 355 for the Dislocation Bill's requirements for local administration.

117. *See, e.g., J. PRESSMAN & A. WILDAVSKY, IMPLEMENTATION, HOW GREAT EXPECTATIONS IN WASHINGTON ARE DASHED IN OAKLAND; OR, WHY ITS AMAZING THAT FEDERAL PROGRAMS WORK AT ALL*, (1973) [hereinafter IMPLEMENTATION] (for an excellent analysis of the costly federal program implemented under the Public Works and Economic Development Act). *See also* WORKER DISLOCATION REPORT, *supra* note 1, app. G, at 1-2, dissent (the Task Force largely ignores federal retraining failures); Wall St. J., July 17, 1987, § 2, at 34 (federal agricultural subsidies program is miring rural communities in red tape, regulation and confusion).

118. In the WORKER DISLOCATION REPORT, *supra* note 1, at app. G, dissent, the author questions why the Task Force never explained why worker displacement is a federal problem as opposed to a state, local or individual problem. *See* IMPLEMENTATION, *supra* note 117, at 70-86 (discussion of two *local* programs that were highly successful in implementing assistance to a distressed community). *But see* Chicago Sun Times, June 28, 1987, § 1, at 6 (for an article discussing the failures of a state program, "Build Illinois," in which the state was the lender of last resort for business owners unable to obtain financing. The program was designed to stimulate economic activity and create jobs).

## II. SOLUTION TO THE DISLOCATED WORKER PROBLEM

Plant closings, relocations, and layoffs are inevitable.<sup>119</sup> Although painful and drastic, these actions need not have a devastating effect on workers and their communities. The goal of state government must be to institute worker dislocation programs that are effective and accessible. However, government regulation alone will not be effective unless all those involved cooperate and work together to further government policies.<sup>120</sup> Consequently, all factions—government, employers, workers, unions and communities—will have to make concessions in order for any worker dislocation program to succeed.

An example of the concessions that displaced workers may have to face are retraining and relocation. Workers will have to accept the fact that they may have to change careers, possibly more than once. Further, studies have shown that displaced workers resist relocation.<sup>121</sup> While the hardships of relocation are understandable, workers must face the fact that relocation may be inevitable. Proper state laws, however, can minimize these burdens.<sup>122</sup>

Employers must also make concessions. Employers must accept the advance notice requirements. Advance notice is crucial to workers and their communities.<sup>123</sup> Worker dislocation programs will not function without advance notice of impending plant closings. State government must make this moral obligation a legal duty. Furthermore, employers should voluntarily consult with communities and employee representatives if they believe that such consultation will avert a plant shutdown.<sup>124</sup> Employers should also retrain from within their own operations, and provide financial support to private and public assistance programs.

In addition, unions must make concessions. Unions must face the fact that loss of union membership may be a consequence of the retraining and the relocation of displaced workers. Unions should remain current with technology, and coordinate their own retraining programs. Restrictive work provisions in collective bargaining agree-

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119. WORKER DISLOCATION REPORT, *supra* note 1, at 4.

120. Brock, *Cooperation Between Labor and Management*, 1986 DET. C.L. REV. 689, 691 (1986). The Secretary of Labor stated that "cooperation will only succeed if there is a commitment to the new approach from the top leadership of both the employer and employee organizations . . ." *Id.*

121. WORKER DISLOCATION REPORT, *supra* note 1, app. A, at 19.

122. *Id.* The Task Force notes that relocation assistance programs are often difficult to administer. However, carefully tailored financial incentive programs have been successful in other countries. *Id.*

123. *Id.* at 22.

124. *Id.* at 25. The Task Force outlined responsible behavior guidelines for employers in preclosing and post announcement situations.

ments, such as work preservation, must be minimized.<sup>125</sup> Work preservation merely prolongs the inevitability of job obsolescence and impedes technological growth.<sup>126</sup>

State government and communities must also make concessions. For example, recently in Nebraska, state legislators passed corporate tax incentive laws.<sup>127</sup> Because of these tax incentive laws, ConAgra, a national corporation, decided to remain in Nebraska, build a fifty million dollar laboratory and create four hundred new jobs.<sup>128</sup> State officials believe that the loss of tax revenue will be compensated through worker's pay roll taxes, increases in the sale of goods, and general economic stimulation.<sup>129</sup> Creating incentives that encourage business to remain in the state will naturally lead to a stronger, healthier, and employed workforce.

Ultimately, carefully tailored state regulation will effectively alleviate plant closing burdens on the workforce. When developing these regulations, state legislators must balance the employer's right to manage his affairs against the employee's need to work. In order to accommodate these needs, regulations should contain advance notice requirements, accessible assistance programs and attractive business incentive plans.

First, advance notice is an essential element of dislocated worker programs. Employers must accept this burden. However, mandatory consultation and disclosure requirements should not be included in a state regulatory scheme. Voluntary cooperation and disclosure should be encouraged, but if an employer wants or needs to close down his operations, he should be free to do so as quickly and as efficiently as possible. Advance notice to employees, however, should be tailored to give them enough time to take advantage of state assistance programs.<sup>130</sup>

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125. See generally Note, *Clarifying the Work Preservation Work Acquisition Dichotomy Under Sections 8(b)(4)(B) and 8(e) of the National Labor Relations Act*, 35 CATH. U.L. REV. 1061 (1986) (discussing the evolution of the work preservation doctrine).

126. Wall St. J., June 18, 1987, § 2, at 36 (a National Academy of Sciences study concluded that rapid adoption of new industrial technology will minimize unemployment rather than expand jobless rolls; technological change was found to be essential to the maintenance of higher real earnings and the preservation of U.S. jobs). See also Bamber, *New Technology—The Challenge to Unions: A Comparative View*, 37 LAB. L.J. 502 (1986) (for an analysis of union attitudes towards technological change).

127. Wall St. J., June 23, 1987, § 2, at 66.

128. *Id.*

129. *Id.*

130. Although the federal House Bill still calls for an increase in the number of days of advance notice as the number of employees affected increases, the Senate Bill, the Maine and the Wisconsin statutes call for 60 days advance notice, no matter how many employees over 100 are affected. See *supra* note 106 (description of the House Bill advance notice requirements); *supra* note 84 (requirements of the Maine

Second, state assistance programs must be efficient, accessible and easy to administer. Administration will most likely be a difficult problem on a state wide scale. However, the creation of a special agency to coordinate programs should be effective.<sup>131</sup> Assistance programs and services should include special agency task force teams that will work with employees, communities and employers to solve their unemployment problems.<sup>132</sup> Programs to help retrain and educate should be coordinated with state schools and private organizations.<sup>133</sup> Relocation assistance should be available and could similarly be coordinated with state housing authorities and future employers.<sup>134</sup> Finally, loans should be made available to willing employers and, if feasible, to employees to rebuild failing businesses.<sup>135</sup>

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statute); *supra* note 72 and accompanying text (description of the Wisconsin advance notice requirements).

131. Wisconsin created a state Department of Development, which coordinates the Economic Adjustment Program, WIS. STAT. § 560.15 (Supp. 1986) and the Employer Ownership Assistance Loans Program. *Id.* § 560.16. The Department of Development works with the Council for Economic Adjustment and with the Community Response Committees to deliver the services provided under the program. *Id.* § 560.15(a). This administrative program effectively involves local groups in the adjustment process, without an administrative nightmare of having to deal with numerous committees, several agencies, and other bureaucratic red tape.

132. Wisconsin's community response teams may consist of: a representative of the closing business, if the business requests to participate; a representative of the affected employees; a representative of the affected town; and a representative from the local Economic Development organization. *Id.* § 560.15(3)(b). The teams may also seek further assistance from state or county officials, Universities of Wisconsin, other school systems, the county treasurer, and the small business development center. *Id.* § 560.15(3)(d).

133. One of the main functions of Wisconsin's Department of Development is to coordinate assistance from federal, state or local governmental units including other businesses, service organizations, educational institutions and financial institutions. WIS. STAT. § 560.15(2)(a) (Supp. 1986). This coordination consolidates and provides accessibility to programs that are already in place to help retrain and reeducate displaced workers.

134. A state assistance agency should be a clearinghouse of information of state assistance programs and private assistance services. Along with a list of retraining programs, the agency could gather information on state or local housing available within the state. Possibly, the agency could also coordinate an exchange of housing information between neighboring states.

Many prospective employers have relocation programs that assist new employees on obtaining mortgages and jobs for spouses. *See, e.g.,* Chicago Tribune, June 29, 1987, § 4, at 7 (for an article on private companies hiring career counseling agents to find employment for the spouses of relocated employees and assisting new employees with obtaining mortgages for housing).

135. Wisconsin's Department of Development is authorized to administer loans to employee groups considering a purchase of a closing business. WIS. STAT. § 560.16(2) (Supp. 1986). The loan is to be used for a feasibility study to consider the viability of a successful buy out. *Id.* § 560.16(2)(a)(4). Similarly, employers of a closing business may seek assistance from the Department of Redevelopment. *Id.* § 560.15(2)(a).

Another alternative to assist willing employers of a failing business is to institute an employee stock ownership plan ("ESOP") which allows employers to use stock options in the business as an incentive or to recapitalize a financially weak business. *See generally* Mishkind & Khorey, *Employee Stock Ownership Plans: Fables and*



Third, state legislators should also consider creating incentives to retain business operations and to attract new business to their state. For instance, Nebraska created an attractive tax incentive package.<sup>136</sup> Their new laws include cutting the top individual income tax rate from 9.5% to 5.9%, property tax exemptions for a limited number of years, and sales tax refunds on depreciable items.<sup>137</sup> Nebraska legislators believe that in their transitional economy, the tax incentives will create a secure future for their constituents and their state.<sup>138</sup> Creating new jobs is a positive and effective way to help the dislocated worker and should be every state's top priority.

Dislocated worker's programs and regulations must be implemented at the state or local levels to ensure that the affected worker receives the most direct and efficient assistance. Management, labor, and government must cooperate, make concessions, and work together. State laws, however, are not being enacted at pace sufficient to keep up with the unemployment problem.<sup>139</sup> Until states deal with the plant closing issue, workers, state economies, and the national economy will continue to suffer.

### III. GUIDELINES FOR EMPLOYERS INVOLVED IN A PLANT SHUTDOWN

The decision to close down an operation is a serious business matter and is not taken lightly.<sup>140</sup> The decision to close may be based on a variety of factors ranging from unprofitability to unfriendly takeovers.<sup>141</sup> Whenever possible, an employer's decision should also consider the impact the closing will have on the employees and their communities. Careful planning and knowledge of the current law will be cost-effective, will avoid litigation, and will alleviate some of the burdens placed on affected workers.

An employer considering a shutdown should be aware that there

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*Facts*, 11 EMPLOY. REL. L.J. 89 (1985) (for an excellent discussion of the advantages and disadvantages of employee stock ownership plans as a means of developing capital, as a bargaining tool, and as a defense against hostile corporate takeovers).

136. Wall St. J., June 23, 1987, § 2, at 66.

137. *Id.* If a business creates a \$10 million project and hires 100 employees, the business will be exempt from property taxes on project-connected aircraft and main-frame computers for 15 years. *Id.* If a business invests \$20 million, whether or not new jobs are created, the business will receive a sales-tax refund on all depreciable items. *Id.*

138. Nebraska's struggling economy is in a transitional state, changing from a rural, farming society to a new haven for corporate headquarters and manufacturing companies. *Id.* This state has opted to trade corporate tax breaks for jobs. *Id.*

139. See *supra* note 94 for a discussion of the number of state's that are dealing with the plant closing problem.

140. *First Nat'l*, 452 U.S. at 680-81. "Both union and management regard control of the decision to shut down an operation with utmost seriousness." *Id.*

141. See *supra* note 3 for factors that may influence an employer's decision to close.

are different rules for different actions. State and federal laws must be considered and, of course, any union contracts must be thoroughly examined. Currently, since the federal law has not yet passed, one situation is fairly certain.<sup>142</sup> If an employer's business is located in a state that does not regulate plant closing and if his employees are unorganized, that employer may shut down without any liability for his actions. Advance notice and further assistance to affected workers and communities will only be an employer's moral obligation.

The employer that employs organized workers, however, should carefully consider certain measures to minimize problems. As stated earlier, a careful examination of the contract should disclose the employer's obligations as to notice requirements, severance pay and other benefits. If a contract is silent on the obligations of an employer who is closing his plant, the employer must be aware that he has a legal duty to bargain over the effects of the shutdown.<sup>143</sup> This bargaining must take place at a meaningful time and in a meaningful manner.<sup>144</sup> Therefore, advance notice of the layoff or shutdown is required. Similarly, if an employer is only partially closing or relocating his operation, care must be taken to prove that the action is based on economic reasons, and not union animus. Further, an employer must bargain over the effects of the relocation or partial closing. Employers do not have to bargain over their decision to shut down or partially close. However, employers may bargain to seek labor concessions to avert a shutdown.<sup>145</sup>

Beside labor contracts and the duty to bargain over the effects of a closing, employers have to comply with state and federal law. If

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142. To date, the Senate Bill, S. 538, has been attached to the massive omnibus trade bill. Chicago Tribune, July 10, 1987, § 3 at 1. The Senate approved the trade bill on July 21, 1986. N.Y. Times, July 22, 1987, § 2 at 1. The House passed a version of the trade bill in April, however, that bill did not attach the plant closing bill, H.1122. Chicago Tribune, July 10, 1987, § 3 at 4. The Senate and House versions of the trade bill must go through the compromise process. However, if the trade bill remains close to its present form, the President is sure to veto it. *Id.* at 1 (Reagan threatened to veto any legislation that contains a plant closing provision). See also N.Y. Times, July 22, 1987, § 1, at 1 (quoting President Reagan, "so far the signs point straight to veto"); N.Y. Times, July 9, 1987, § Y, at 25. (plant closing provision guarantees a Presidential veto of the trade bill).

143. See *supra* note 40 for a discussion of effects bargaining.

144. See *supra* note 47 for a discussion of bargaining procedure.

145. In *First Nat'l*, 452, U.S. at 683, the Court noted the difference between permissive bargaining and mandatory bargaining. The Court noted that if labor costs were an important factor influencing the decision to close an operation, an employer will have an incentive to confer voluntarily with the union to seek concessions. *Id.* at 682. However, the Court refused to require mandatory bargaining over the decision to close an operation. *Id.* at 686. The Court stated that labeling this type of decision as mandatory would give unions a powerful tool for achieving delay. *Id.* at 683 (citing Comment, *Partial Terminations—A Choice Between Bargaining Equality and Economic Efficiency*, 14 UCLA L. REV. 1089, 1103-05 (1967)).

the Economic Dislocation and Worker Adjustment Assistance Act passes, employers will have to comply with their labor contracts as well as the federal law. Employers should be aware of the notice, consultation, and disclosure requirements and, further, the penalties for failing to comply with these requirements.<sup>146</sup> Employers should remember that the mandatory consultation requirement does not mean that the employer must concede and keep his plant open.<sup>147</sup> Similarly, there are exceptions to these requirements that may relieve an employer of liability for failing to comply.<sup>148</sup> Evidence which would prove that an employer's act falls within the exception should be carefully documented. Finally, employers may have to comply with any state regulations that the federal law does not preempt.<sup>149</sup> State laws, therefore, should be carefully scrutinized for preemption issues.<sup>150</sup>

Obviously, if the pending federal bill does not pass, employers need only comply with state laws and their contract obligations. As with the federal law, employers should be aware of the state's notice, disclosure, consultation, and possibly severance pay requirements. Multistate employers should know that these plant closing laws will vary from state to state. A multistate employer may have to comply with various requirements for a total shutdown of operations that

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146. See *supra* notes 106-108 and accompanying text for a discussion of the federal Bill requirements.

147. Section 353(a)(2) of House Bill H. 1122, *supra* note 99, requires an employer to consult in good faith for the purpose of agreeing to an alternative to a closing or layoff. However, "this requirement to consult shall not compel an employer to agree to such an alternative or modification." *Id.*

148. See *supra* note 115 for a discussion of the exception to the Federal law.

149. Section 336 of the Senate Bill S.538 and Section 356 of House Bill H.1122, *supra* note 99, provides that any employee rights and remedies found under contracts, statutory or other legal rights are *not* preempted by the rights and remedies of the Dislocation Bill.

150. Although the Dislocation Bill has a strong antipreemption provision, the Dislocation Bill may preempt a state's law if the state law is found to frustrate the purpose of the federal law. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 747 (1985). Federal law may also supercede state law if Congress intended to occupy the field and impliedly preempts supplementary state regulation. See, e.g., *Rice v. Chicago Bd. of Trade*, 331 U.S. 247 (1947) (Federal Commodity Exchange Act implied Congress intended to occupy the field of regulating trading on the contract market, however, a nonconflicting state law should be left undisturbed). Similarly, if a state law conflicts with the federal law in that compliance with both laws would be physically impossible, the state law will be preempted. See, e.g., *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 143 (1963) (although federal and state standards for avocado maturity certification were different, physical compliance with both standards was possible, and the federal law, therefore, did not preempt the state law).

When an employer is confronted with a state plant closing law and if the Dislocation Bill passed, he may have to comply with both laws or he may argue the federal law preempts the state law. For instance, if an employer decides to close down his operation in a state that has a longer advance notice provision than the federal law, the employer may argue that the state frustrates the purpose of the federal law or that physical compliance with both laws is impossible.

involves several states. For example, a multistate employer ceasing operations in three states may have mandatory requirements in one state, while the other states request only voluntary compliance. State regulations will also have exceptions to the mandatory requirements, which may vary from state to state. Liabilities may range from civil fines to back pay for the affected workers. Employers should finally check the regulations to ascertain their role in assistance programs.<sup>151</sup> As with any successful undertaking, a smooth, litigation-free shutdown that minimizes the effects on workers must be made through careful planning, advance notice, and compliance with the applicable law.

### CONCLUSION

Plant closing unemployment is a problem that can no longer be ignored. American workers need relief from the effects of employer decisions. The federal government, however, has devised a system that is complex and costly. State governments, therefore, should actively pursue solutions that can be administered at a local and direct level. Regulations will only solve part of the unemployment problem. In order to have a successful dislocated worker program, all factions involved will have to make changes in priorities and concede some personal rights. Carefully planned state regulations, incentives and programs can minimize the loss of this personal freedom. These regulations can and must balance an employer's right to manage his business affairs against the worker's very real need to work.

*Judith Gallo*

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151. For example, the Wisconsin statute on plant closing calls for voluntary employer participation on community response committees. WIS. STAT. § 560.15(3)(b)(1) (Supp. 1986). However, the federal House Bill, H. 1122, *supra* note 99, § 353 requires mandatory management participation in consultation meetings with government and employee representatives.

