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Plant Closing Checklist (United States)

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This checklist outlines the best practices for private employers to consider when closing a plant or other facility having employees in the United States. It addresses federal law and does not cover all state and local law distinctions.

For information on the federal WARN Act, which requires covered employers to provide at least 60 days' notice to employees of a mass layoff or a plant closing (29 U.S.C. §§ 2101 et seq.), see Implementing a Reduction in Force and Complying with WARN and WARN Act Compliance Checklist. Also see WARN Notice to Affected Non-union Employees, WARN Notice to the Chief Elected Official of the Unit of Local Government, WARN Notice to the State Dislocated Worker Unit, and WARN Notice to Union Representatives of Affected Employees.

For information on state laws concerning mass layoffs and plant closings, see the Mass Layoff and Plant Closing Laws column of Chart – State Practice Notes (Investigations, Discipline, and Terminations).

Consider Alternatives to Plant Closing

Employers need to first determine whether there are any alternatives to the plant closing. Alternatives to plant closings include the following:

- Reductions in non-personnel expenses
- Reductions in pay or hours
- Work sharing
- Furloughs
- Temporary shutdowns
- Forced vacations, either paid or unpaid

For more information on potential alternatives to plant closings, see Alternatives to Reductions in Force (RIFs).

Plan the Plant Closing Process

If the employer determines that the only alternative is to close the plant, employers should begin the plant closing planning process. Advise the employer to consider the following measures:

- **As a preliminary step in the plant closing planning process, confirm there are no contractual or other legal obstacles to closing the plant. Employers must be sure that they can close the plant.** Evaluate the following factors to determine if there are contractual or other legal issues preventing or inhibiting the closure of the plant:
    - **If a union is involved, consider the employer's bargaining obligations regarding plant closure.** If a union is in the picture, assess the employer's bargaining obligations. If there is an existing collective bargaining agreement, review the agreement

to determine whether the employer has the right to close the plant. See Blue Circle Cement, 319 NLRB 661, n. 4 (1995) (there must be a "clear and unmistakable waiver"); Exxon Research & Engineering Co., 317 NLRB 675 (1995); but see NLRB v. U.S. Postal Service, 8 F.3d 832 (D.C. Cir. 1993) (if the agreement indicates that the issue of plant closing has been addressed by the parties, no duty to bargain about unilateral change).

- **Consider risks when the employer has the right to close the plant.** If the employer has the right to close the plant, weigh the risk of damages associated with a union claim asserting that employees have a right to damages due to the plant closing.
- **Collective bargaining agreement has lifetime job guarantee.** While rare, some collective bargaining agreements contain what purport to be lifetime job guarantees (given in exchange for implementing automation). Assess the risk of whether a union could make a claim of lifetime job guarantees.
- **Union has bargaining rights, but no union agreement.** If the union has bargaining rights, but there is no union agreement, determine whether you must first engage in bargaining about the decision to close the plant. See First National Maintenance v. NLRB, 452 U.S. 666 (1981).
- **Union has right to bargain about plant closing.** If the union has not waived its right to have the employer bargain about the decision to close the plant, determine the timing for that bargaining process. The employer should prepare for bargaining and factor the bargaining process and time delay as additional time associated with, and part of the cost of, closing the plant. For more information on bargaining about a plant closing, see the section below entitled "Prepare for Union Bargaining If an Obligation Exists."
- **If there is no agreement regarding plant closing, prepare to bargain.** Unless an agreement addresses the consequences of a plant closing, prepare to bargain with the union about the effects of the plant closing. See Transmarine Navigation Corp., 170 NLRB 389 (1968); see also Melody Toyota, 325 NLRB 846 (1998).
- **Provide sufficient notice of plant closing.** The employer must provide sufficient advance notice of the plant closing so that meaningful bargaining can take place. The amount of advance notice required varies from situation to situation. See Gitano Group Inc., 308 NLRB 1172 (1992) (two weeks sufficient); Creasey Co., 268 NLRB 1425 (1984) (three days sufficient); National Terminal Baking Corp., 190 NLRB 465 (1971) (no notice sufficient in light of economic emergency). According to the National Labor Relations Board (NLRB), the objective is for the employer to give notice "sufficiently before its actual implementation so that a union is not confronted at the bargaining table with . . . a fait accompli." Willamette Tug & Barge Co., 300 NLRB 282, 283 (1990).
- **If a union is involved, ensure there are no unfair labor practices.** If a union is in the picture, the employer should consider whether the NLRB would deem a plant closing as an unfair labor practice (apart from bargaining concerns, identified above). See Darlington Mfg. Co. v. NLRB, 380 U.S. 263, 273 (1965). The employer should assess whether the employer could be accused of closing the plant as a means of punishing the employees or the union for engaging in protected activity. Compare Cub Branch Mining, 300 NLRB 57 (1990), with Coyne International Enterprises Corp., 326 NLRB 1187 (1998). If there is a determination that the employer closed the plant due to a punishment for a protected activity, the NLRB could order the plant to be reopened, with full back pay for union members laid off.
- **If union is involved, avoid a runaway shop situation.** If a union is in the picture, the employer should determine whether the plant closing will result in the work that was performed at that plant being transferred elsewhere, such that a union could claim that the situation is a runaway shop. See Dubuque Packing, 303 NLRB 386 (1991), enf. sub nom. UFCW Local 150-A v. NLRB, 1 F.3d 24 (D.C. Cir. 1993) (addressing whether the plant closing decision involves a change in the scope of the enterprise, as opposed to having as a factor direct or indirect labor costs).
- **If union is involved, evaluate employee benefits issues.** If the union agreement requires contributions to a multi-employer defined benefit pension plan, consider whether the closing would trigger complete or partial withdrawal liability. 29 U.S.C. §§ 1381 et seq. See Multiemployer Pension Plans Overview and Responding to Multiemployer Plan Withdrawal Liability Notices Checklist. Factor the cost of that liability into the cost of closing the plant. Also, assess the risk of whether there might be a mass withdrawal from the plan involved. 29 U.S.C. § 1341a(a)(2).

- **Review employment agreements.** Consider whether the employer in any of its employment agreements made a contractual commitment to not close the plant in question. If there are such agreements, weigh the risk of damages associated with the breach of contract.
- **Investigate any local government commitments for tax incentives.** Employers should investigate whether they made any local government commitments for a tax incentive. Explore consequences of a plant closing associated with those incentives.

- **Plant closing process involves moving targets.** Many variables will affect the plant closing. Operating management will likely make many changes in decisions. The process will require reassessment and changes of plans.
- **Create a plant closing team.** Employers should create a plant closing team and divide team responsibilities.
- **Consider public relations issues.** Employers should consider public relations issues associated with the plant closing. They should develop a public relations strategy for internal communications pre-announcement, internal and external communications at announcement, and internal and external communications post-announcement.

Prepare for Union Bargaining If an Obligation Exists

If there is an obligation to bargain with a union about the decision to close the plant, prepare for bargaining. When engaging in bargaining, try to either reach an agreement or reach an impasse. Consider these factors:

- **Allow time for meaningful bargaining.**
- **Determine whether the union can strike and whether it is unlikely that the union would strike.** Remember these considerations:
    - If there is mid-agreement, an injunction is likely available (if there is an arbitration clause that would apply to the decision to close the plant)
    - If the agreement has expired, factor a possible strike into the planning (which could accelerate the closing process, making a strike highly unlikely)

Organize and Implement Layoffs

It is unlikely that the employer will lay off everyone on the same day. There will likely be at the very least a skeletal crew of some kind to ensure an orderly wind down, mothballing, and dismantling of the plant. The crew will need to prepare the site for sale or return to the landlord. Finally, someone will need to literally turn off the lights as the last measure of closing.

Consider these factors when implementing layoffs:

- **Selection criteria.** The employer should analyze the selection criteria to be used for the earlier wave(s) of layoff(s) to ensure there is no risk of future litigation due to discrimination (see below).
- **Employees will be leaving before the plant closes.** When plans for a layoff or plant closing become obvious, employees who are most able to find a new job (i.e., the best employees) will begin leaving as soon as they can. The employer should identify who it wants to keep in place for the closing crew. The employer should offer incentives, usually in the form of a "stay" agreement. The stay agreement provides a cash benefit that is paid after the closing process is completed. Again, because the employer will treat these much better than everyone else, there should be an analysis to make sure that there is no risk of discrimination litigation (see below).
- **Punitive damages are possible due to discrimination claims.** The selection criteria should be done in a way that does not cause risk of discrimination claims. While economic damages would be minimal in a plant closing situation (because the backpay period would be short), there is risk of punitive damages under Title VII and some state and local laws. See Complying with Title VII.
- **There are defenses to discrimination claims.** There are three basic ways an employer can defend itself depending on the type of discrimination claims involved:
    - **Disparate treatment.** Under disparate treatment, the employer must articulate a legitimate reason for picking one employee over another employee, leaving the employee(s) to prove discrimination. See McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). See also Understanding Disparate Treatment — Marshaling Defenses to Disparate Treatment Claims.
    - **Disparate impact, age (under the Age Discrimination in Employment Act).** Under disparate impact and age under the Age Discrimination in Employment Act (ADEA), an employer with bad statistics for the selection must prove that there were "reasonable factors other than age," and the reasonableness of those factors. Meacham v. Knolls Atomic Power Laboratory, 128 S. Ct. 2395 (2008); Smith v. City of Jackson, 544 U.S. 228 (2005). See Navigating Disparate Impact Claims

— Understanding Defenses to Disparate Impact Claims and Age Discrimination Claims Under the Age Discrimination in Employment Act (Defending Checklist) Age Employment Discrimination Claims Defense Checklist (ADEA Claims).

- **Disparate impact, Title VII.** Under disparate impact and Title VII, the employer must prove that there was a "business necessity" for its selection criteria. See 42 U.S.C. § 2000e 2(k). This is the hardest defense to meet in discrimination litigation. See Navigating Disparate Impact Claims — Understanding Defenses to Disparate Impact Claims, Complying with Title VII, and Race, Color, and National Origin Discrimination Defenses Checklist (Title VII and Section 1981).

- **Conduct statistical review of the selection process.** Consider conducting a statistical review of the selection process (but recognize that discrimination litigation is low risk in a plant closing context). See Disparate Impact Analysis: Key Steps and Tests.

- **Examine additional concerns.** There are other areas of concern during the layoff process. Consider the following:

  - **Leaves of absence.** Help the employer determine if there are any employees to be selected for an early wave of layoffs who are on leaves of absence for medical reasons under the Family and Medical Leave Act (FMLA), Americans with Disabilities Act (ADA) or workers' compensation. For information on the FMLA, see the Attendance, Leaves, and Disabilities / FMLA Leave Administration practice note page and the Attendance, Leaves, and Disabilities / FMLA Leave Administration forms page. Also see the Attendance, Leaves, and Disabilities / The ADA and Disability Management practice note page and the Attendance, Leaves, and Disabilities /ADA and Disability Management forms page.

  - **Parental leave concerns.** The employer should determine if there are any employees to be selected for an early wave of layoffs who are on parental leave, or recently returned from parental leave. See Checklist – Key Considerations for Pregnancy and Parental Leave Policies and Pregnancy and Parental Leave Policy (with Acknowledgment).

  - **Recently filed employee complaints.** The employer should investigate whether there are any employees to be selected for an early wave of layoff that filed recent complaints or charges (external or internal) against the employer. See Crawford v. Metropolitan Government of Nashville, 555 U.S. 271 (2009). See also Understanding the Elements of Retaliation Claims and Evaluating Risks of Potential Retaliation Claims.

  - **Contract and tort issues.** Think about contract and tort issues (state law issues). Ask these questions:

    — Are there any new hires?

    — Has anyone recently relocated from a long distance to the affected plant?

    — Have any managers, supervisors, or recruiters been giving assurances that the plant will not close? See Implementing Strategies to Avoid Implied Contract Claims.

    — Will the layoffs associated with the plant closing deprive anyone of imminent accrual of a bonus, vesting of stock options, or earning a commission? See Drafting Bonus Agreements; Understanding, Negotiating, and Drafting Commission Agreements; and Understanding Types and Taxation of Equity Compensation.

Review Worker Adjustment and Retraining Notification Act (WARN)

Advise employers to review the federal WARN Act and state mini-WARN Acts. As stated above, the federal WARN Act mandates that covered employers provide at least 60 days' notice to employees of a mass layoff or a plant closing. 29 U.S.C. §§ 2101 et seq.

For more information on WARN, see Implementing a Reduction in Force and Complying with WARN and WARN Act Compliance Checklist. Some states have mini-WARN acts that provide additional corresponding protections to employees. For more information on state mini-WARN laws, see the Mass Layoff and Plant Closing Laws column of Chart – State Practice Notes (Investigations, Discipline, and Terminations).

- **Determine whether the employer closing the plant is covered by federal WARN and/or a local version of WARN.**

  - **If it is obvious that the employer has well over 100 employees, not counting so-called "part-time employees" assume the employer is covered.** 20 C.F.R. § 639.3(a)(4). Conduct the same exercise for applicable state WARN law (e.g., New York covers employers with 50 or more employees, not counting "part-time employees.")

  - **Remember that under federal WARN, there are two ways an employer can be covered.**

    — First, the employer is covered if it has 100 or more employees who are not "part-time." 29 U.S.C. § 2101(a)(1).

    — Second, the employer is covered if it has 100 or more employees, regardless of part-time status, who work in the aggregate more than 4,000 hours in a week. Id.

  - Perform these calculations as of the date that is 60 days prior to the first layoff date (assume a notice is required for this exercise). If there is a fluctuating workforce, determine whether there is a "more representative" date than the notice date.

- **Determine whether the plant closing will require compliance with the federal WARN law, and any applicable local law.**
  - **Create an employee census.** It should include everyone working at, or reporting to, the plant or facility with name, job title, most recent hire date, prior termination date(s), prior rehire date(s), and birth date on the census—while not related to WARN, this information will be used for releases. It is more efficient to create this census once. Ensure that remotely working employees are included on this census.
  - **Determine who is and who is not a "part-time employee," using counter-intuitive WARN regulations for guidance.** There are two different kinds of "part-time" employees, as defined by the statute. One type of "part-time employee" is "an employee who is employed for an average of fewer than 20 hours per week." 29 U.S.C. § 2101(a)(8). The other type of "part-time employee" is one "who has been employed for fewer than six of the 12 months preceding the date on which notice is required." 29 U.S.C. § 2101(a)(8).
  - **Assess whether there will be 50 or more employment losses at the plant—smaller threshold under some state WARN laws—within a 30 or 90 day period).** 29 U.S.C. § 2101(a)(2).
  - **If the count of employment losses is close to 50 (or a lower state threshold), consider whether the employer can take any actions to eliminate the need for a WARN notice.** See, e.g., Ellis v. DHL Express Inc., 633 F.3d 522 (7th Cir. 2011).
- **If the employer must give notice, determine the proper recipients of the notice.**
  - The **state dislocated worker unit**. 29 U.S.C. § 2102(a)(2). Check the DOL Employment and Training Administrate website listing state dislocated worker units and contact information, but confirm in each state that the information is correct. For more information on state dislocated workers units, see WARN Notice to the State Dislocated Worker Unit and WARN Act Compliance Checklist.
  - The **local government** (if more than one, such as town and county, the notice goes to the government receiving more in taxes from the employer—most companies will provide notice to both town and county to be safe). 20 C.F.R. § 639.3(g). For more information notice to the local government, see WARN Notice to the Chief Elected Official of the Unit of Local Government and WARN Act Compliance Checklist.
  - If there are **unions** on the scene, a notice must go to the highest elected official of the union for the employees represented by each union. 20 C.F.R. § 639.7(e). Note that all local WARN laws require notices to the employees as well. For more information notice to union representatives, see WARN Notice to Union Representatives of Affected Employees and WARN Act Compliance Checklist.
  - Prepare notices for all **non-union employees**. 20 C.F.R. § 639.7(d). For more information notice to union representatives, see WARN Notice to Union Representatives of Affected Employees and WARN Act Compliance Checklist.
- **Draft the required notices.** Make sure that each recipient is receiving all the information and statements required by both the federal and state WARN laws (local laws often require more information, and some states, like New York, requires specific text within notices).
- **Determine the timing of the notice.** Examine whether provisions allowing a reduction in the normal 60-day notice period are applicable, including **(1) the faltering company provisions** (29 U.S.C. § 2102(b)(1); 20 C.F.R. § 639.9(a)); **(2) the unforeseeable business circumstances provisions** (29 U.S.C. § 2102(b)(2)(A); 20 C.F.R. § 639.9(b)); or **(3) the natural disaster provisions** (29 U.S.C. § 2102(b)(2)(B); 20 C.F.R. § 639.9(c)) apply. If any of these conditions apply make sure that the notice explains why less than 60 days' notice is being given. 20 C.F.R. § 639.9. For more information on the faltering company, unforeseeable business circumstances, and natural disaster provisions, see "Exceptions that Shorten the Period of Required Notice" section of Implementing a Reduction in Force and Complying with WARN.
- **If events are such that the employer cannot give 60 days of notice, consider putting employees out on paid leave for what would be a full 60-day period (combined wind-down of plant, and paid leave after the plant is closed).** This would limit damages, particularly within the Third Circuit Court of Appeals.
  - **In the Third Circuit Court of Appeals, the calculation for a WARN event where the employer gave no notice, but the employer should have given 60 days' notice, is a computation of one day's pay multiplied by 60.** Ciarlante v. Brown &

Williamson Tobacco Corp., 143 F.3d 139, 150 (3d Cir. 1998); United Steelworkers of America v. North Star Steel Co., 5 F.3d 39, 41-44 (3d Cir. 1993). There are typically 42 days in any given 60-day period.

- **A way to reduce the cost of not providing a WARN notice is to place employees on leave.** Courts routinely recognize that employees placed on paid leave do not suffer an employment loss until the end of the leave, and placing the employee on leave is not the same as a constructive discharge. E.g., Long v. Dunlop Sports Group Ams., Inc., 506 F.3d 299 (4th Cir. 2007).

Consider Employee Benefits and Employee Retirement Income Security Act (ERISA) Implications

Analyze the following benefits and ERISA issues:

- **Evaluate whether the employer will pay separation benefits.**
- **If the employer is paying separation benefits, consider adopting an ERISA-compliant severance plan.** Compare Wallace v. Firestone Tire & Rubber Co., 882 F.2d 1327 (8th Cir. 1989) (termination benefits subject to ERISA), with Fort Halifax Packaging Co. v. Coyne, 482 U.S. 1 (1987) (termination benefits not subject to ERISA). See also Fundamentals of ERISA Title I, Identifying ERISA Employee Benefit Plans, Understanding and Drafting Severance Plans.
- **Determine whether the closing will be deemed a termination or partial termination of a pension plan.** If the plant closing will trigger either a complete or partial termination of a pension plan, such as a 401k plan, plan participants have certain rights, which may include accelerated vesting. 26 C.F.R. § 1.411(d)-2. See also Freezing Defined Benefit Plan Benefits and Options for Dealing With Benefits Plans in Corporate Transactions—Corporate Acquisitions and Mergers § 32.02.
- **Avoid Varity type claims (i.e., do not mislead employees).** See Varity Corp. v. Howe, 516 U.S. 489 (1996). Make no commitments to employees seeking retirement advice in advance of the plant closing.
- **Prepare to give Consolidated Omnibus Budget Reconciliation Act (COBRA) notices.** See 29 C.F.R. Part 2590. If the employer, because it is closing in its entirety or for other reasons, is abandoning its group health insurance plan, determine whether the employer is part of a "control group" and whether COBRA applies because of control group status. See Understanding COBRA Obligations and Potential Penalties.
- **If the employer is ceasing its group health insurance plans, make sure that the employer is following state requirements for possible conversion rights.**
- **Determine if outplacement benefits will be provided.** If so, have outplacement representatives on site and visible so employees know this support will be given.

Evaluate Immigration Issues

There are several immigration visa issues to consider, including the following:

- **Some non-immigrant employees (H1-B) may have to be provided transportation home. 8 C.F.R. § 214.2(h)(4)(iii)(E).** See Understanding the H-1B Visa.
- **Measure impact on employees with pending green cards.** Determine whether accommodations of some kind will be made, if employer is sponsor.
- **Gauge impact on employees with non-immigrant status (E, H, L and TN) and plan accordingly.** See Understanding Nonimmigrant (Temporary) Worker Visa Classifications.

Review State Obligations Other than WARN

Consider the following state-specific issues related to the plant closing.

- Determine if the state in which the plant is located (1) has **special notification rights** because of the size of the layoff (some, like Ohio, require that a special number be called, for example); (2) requires **special benefits for the closing**; or (3) has **special state requirements for notice and/or service letters**. See the Mass Layoff and Plant Closing Laws column of Chart – State Practice Notes (Investigations, Discipline, and Terminations).

- Calculate **final paycheck requirements** and **whether vacation must be included in final paycheck**. See the Pay Timing, Frequency, Methods, and Deductions column of Chart – State Practice Notes (Wage and Hour) and State Paid Vacation and PTO Laws Chart.

Address Security Concerns

Plant closings are very stressful for all involved, and give rise to the possibility of violent reactions. Sadly, shootings have occurred after employers have announced layoffs. Security measures should be in place to deal with the possibility of violence. Employers should take the following measures to handle security concerns.

- **Employers should secure physical facilities.** Make sure access limited for persons not needing to be in specific work areas.
- **Take all potential threats of violence seriously.** Involve police as appropriate.
- **Increase steps to secure the physical plant against vandalism and theft.**
- **Keep employees fully informed.** There should be transparency about dates of events, and what future expectations are.

Determine Need for Releases and Create Plan for Implementation

Assess whether the employer would like to have the benefit of employee releases. A release of claims gives the employer comfort of knowing that there are no lingering claims.

- **Determine whether the employer would like releases of claims under the Age Discrimination in Employment Act (ADEA)** (where everyone is being terminated in a plant closing, it is unlikely that there are age claims for the closing itself, but there may be residual age claims for which the employer would want a release).
- **If the employer will seek releases, make sure that there will be separate consideration supporting the release.** This would be articulated in a severance plan, if the employer adopts one. See Understanding and Drafting Severance Plans.
- **Draft plain language releases, and comply with local law requirements, making reference to specific local laws where required (e.g., New Jersey).** See the Special Release Issues column of Chart – State Practice Notes (Investigations, Discipline, and Terminations). See also Chart – State Expert Forms (Investigations, Discipline, and Terminations).
- **If releases of age claims are sought, ensure compliance with the Older Workers Benefit Protection Act (OWBPA).** 29 C.F.R. Part 1625. See Complying with the Heightened Waiver Requirements Under the Older Workers Benefit Protection Act.
    - **Make sure the release agreement is in plain language.** See 29 C.F.R. § 1625.22(b)(3) ("Waiver agreements must be drafted in plain language geared to the level of understanding of the … individuals eligible to participate.").
    - **Make sure release references ADEA by name.** 29 C.F.R. § 1625.22(b)(6)
    - **Determine the "decisional unit" (plant closings are used as an example in the regulations).** 29 C.F.R. § 1625.22(f)(3).
    - **Make sure that job title and age data that must be provided to employees from whom ADEA waivers are sought are accurate.** 29 C.F.R. § 1625.22(f).
    - **Make sure that the selection factors are disclosed.** See Pagliolo v. Guidant Corp., 483 F. Supp. 2d 847, 861 (D. Minn. 2007) (eligibility factors should be short statement disclosing all eligibility factors considered in the reduction in force (RIF)).
    - **Make sure that employees have 45 days to consider the release form, and then seven days to revoke it after signing it.** 29 C.F.R. § 1625.22(e).
    - **Make sure the agreement recites that employee is advised to consult with counsel of employee's choosing before signing the agreement.** 29 C.F.R. § 1625.22(b)(7). Williams v. Disco Hi-Tec, 2005 U.S. Dist. Lexis 20322 (N.D. Tex. 2005) (language that "[e]mployee understands that he should consult with an attorney prior to signing this agreement" was insufficient); Cole v. Gaming Entertainment, L.L.C., 199 F. Supp. 2d 208, 214 (D. Del. 2002) (holding language reciting that "[e]mployee acknowledges that he/she has been advised to consult with an attorney prior to executing this Agreement" was insufficient to meet statutory requirement that employer must advise employee in writing to consult an attorney prior to signing the waiver).

- For all releases, make sure that:
    - **Employee still has right to file an EEOC charge**, and may cooperate in EEOC proceedings. See EEOC Enforcement Guidance on Non-Waivable Employee Rights Under EEOC Enforced Statutes (April 1997).
    - **Employee still has right to file an NLRB charge** (there is a high standard for waiving the right to file NLRB charges. See BP Amoco Chemical – Chocolate Bayou, 351 NLRB No. 39 (2007)), and may cooperate in NLRB proceedings.
    - **Releases are limited to rights that can be released** (e.g., not workers' compensation claims; not Fair Labor Standards Act (FLSA) claims).
    - There is an assessment as to whether current **Securities Exchange Commission (SEC)** determinations prohibit a waiver of damages for **whistleblower claims**.

Consider Restrictive Covenant and Intellectual Property (IP) Protections

Evaluate the following issues concerning non-compete, non-solicitation, and non-disclosure agreements.

- Assess whether in a plant closing situation, where employees are being terminated without cause, the jurisdiction in which the plant is located would enforce a **non-compete agreement**. Also determine whether even if enforceable, the employer wants to seek enforcement. Conduct the same review for **non-solicitation obligations** (customers, vendors, and employees).
- Assess whether **non-disclosure agreements** will survive a plant closing. Determine whether IP is such that tighter non-disclosure language should be put into separation agreements.
    - For more information on non-compete, non-solicitation, and non-disclosure agreements, see Chart – State Practice Notes (Non-competes and Trade Secret Protection) and Chart – State Expert Forms (Non-competes and Trade Secret Protection).