I. **INTRODUCTION**

There is an old saying: “the only thing constant is change”. The quote is attributed to Heraclitus, an ancient Greek Philosopher. Heraclitus believed that the human condition is characterized by strife through the coming together and pulling apart of opposing forces\(^1\). While Heraclitus’ commentary may seem pessimistic, his philosophical statement remains poignant today because of its simple truth. In business, we are bombarded with forces we simply do not control, some positive and some negative. Our purpose here is to discuss some of the legal concerns that can arise when change forces us to transition employees.

Transition may not necessarily mean downsizing and terminations. It may also mean growth and hiring. We will discuss issues that arise with terminations, whether *en mass* or individual, as well as hiring in the following pages.

II. **TERMINATIONS**

Ending someone’s employment is often a stressful task, both for the decision-maker and the employee facing the loss of employment. Assuming you are terminating an employee, or several employees, whom you would otherwise keep but for changed circumstances, there are several factors you will want to consider. This first section assumes the need has arisen to terminate one employee out of several. You will first want to consider how you will select that employee. Many of the employers I have seen in the practice of employment law

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\(^1\) Heraclitus of Ephesus, Ancient History Encyclopedia, Joshua Mark, 2010.
over the years simply go to their subordinate leaders and ask that they pick an employee that should be terminated. Doing this could be a recipe for disaster.

No one can keep a former employee from filing a lawsuit. What you can do is take steps that will quickly and effectively end the lawsuit if it is brought. Claims of discrimination are commonplace in the termination scenario. The dismissed employee is no doubt thinking “why me . . .”. This sentiment often leads the employee to conclude that his/her protected class must be the reason for the selection. Once you have identified the portion of your organization where the reduction is warranted, you should identify all of the employees within that section of the organization who are eligible for the reduction\(^2\). The employees you select should hold the same or similar positions to ensure that your company is comparing apples to apples. Next, you should select the criteria which could be applied to eligible employees. Examples of criteria may include productivity, performance, attendance, discipline and education. You would then apply the criteria to each employee assigning a numerical value to each criterion.

<table>
<thead>
<tr>
<th></th>
<th>J. Smith</th>
<th>I. Jones</th>
<th>K. Johnson</th>
</tr>
</thead>
<tbody>
<tr>
<td>Performance</td>
<td>4</td>
<td>5</td>
<td>5</td>
</tr>
<tr>
<td>Education</td>
<td>6</td>
<td>3</td>
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<td>Attendance</td>
<td>3</td>
<td>1</td>
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<tr>
<td>Productivity</td>
<td>1</td>
<td>4</td>
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<td>14</td>
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In the example above, we assigned numbers from 1 to 5 in each category, with 1 being good and 5 being bad. From the matrix, we can see that K. Johnson is the employee with the highest numbers and would likely be the employee selected for discharge in this group of three employees. This is a highly-simplified matrix, but you can clearly see the value of creating certain criteria that you can point to when a discrimination claim arises based on your decision. The criteria you select for your own purposes must be empirically measurable and must relate to the jobs in question. If you pick criteria slanted in favor of a particular choice, it will likely be easily noticed.

A. Group Layoffs

Thus far, we have only discussed individual or small group layoffs. When larger layoff groups are required you may have certain federal laws that apply. The Workers Investment and Retraining and Notification Act (WARN) is a federal law that was passed in 1988\(^3\). It requires the majority of employers with 100 or more employees to provide sixty (60) calendared days of mass layoffs and plant closings. Under WARN, plant closing means the permanent or temporary shutdown of a single site of employment, or one or more facilities or operating units within a single site of employment, if the shutdown results in the employment loss at the single site of employment during any thirty (30) day period for fifty (50) or more fulltime employees\(^4\). The term mass layoff means a reduction in force which is not the result of a plant closing. The plant closing must result in a loss of employment at a single site during a thirty (30) day period.

\(^3\) 29 U.S.C. § 2100, et seq.
\(^4\) 29 U.S.C. § 2101(a)(2)
for at least 33% of the plants fulltime employees, and at least fifty (50) employees. If the layoff does not reach the 32% mark, an employer may still be covered if at least 500 employees are affected.

Notice must be delivered to the employees’ representative, (e.g. Union Steward), or to the employee if there is no representative. Notice must also be provided to the State’s Rapid Response Section and the Chief elected official of the unit of local government where the closing occurs\(^5\). In some cases, an employer can close a plant, without penalty, prior to the end of the applicable notice period in the event of exigent circumstances where the employer was actively seeking financing before going out of the business.

Under WARN, a layoff of more than six (6) months, which was originally planned to be less than six (6) months, will be considered a plant closing. Some states have adopted their own mini-WARN Acts that will have varying levels of employees required for eligibility as well as various periods of notice. Be sure to check your own state laws for the plants where closings may occur.

One purpose of WARN is to ensure that there is sufficient notice to the governmental entities that will be affected by the closing. Your local Unemployment Office, for example, would be seriously affected by 100 newly unemployed individuals simply showing up at their doorstep. Because of the advance notice, you may be the subject of news reports and requests for comment on the strength of the company after the layoff. We strongly advise you to seek the help of a professional public relations operation to assist in the transition process.

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\(^5\) 29 U.S.C. § 2102(a)(1-2)
B. Severance Agreements

We have seen employers provide severance payments to employees without asking for a release. In many cases, that employee has used the payment to obtain counsel. In order to retain a valid separation agreement and general release, you must provide the employee with something to which he or she would not have otherwise been entitled. We wholeheartedly endorse requiring an employee to sign a separation agreement prior to paying any separation payments. Federal law requires that certain language be included in separation agreements which are provided to persons who are forty (40) years of age and older. The Older Workers’ Benefits Protection Act (OWBPA) requires employers to provide employees with twenty-one (21) days to review and seven (7) days to revoke their agreement to any severance. The agreement itself must specifically release the employer from liability under the Age Discrimination in Employment Act. In the case of a group of employees, the employees must have at least forty-five (45) days to consider the value of signing the agreement.

III. HIRING

The act of hiring itself seems like a very simple task. In reality, employers in crisis can find it very difficult to take the time to hire with care. Hiring is your first and best opportunity to seriously consider whether the person you are interviewing is truly a good fit for your organization. Properly crafted hiring practices can save you a great deal of pain in the long run. Complaints of failure

6 29 U.S.C. § 626(f)
to hire under Title VII of the Civil Rights Act (as amended) as well as under State Anti-discrimination laws remain a real issue for employers in the modern age.

A. Job Posting

While there is no law that generally requires employers to post job vacancy announcements either internally or externally,7 strategically placed job postings may be the best way to attract qualified candidates. When an employer does recruit through job postings, the posting should include the following:

1. Equal Employment Opportunity statement
2. Minimum job requirements
3. Opening and closing date for applicants to submit application

Job postings should avoid language that may constitute discrimination on the basis of national origin or immigration/citizenship status.

B. The Employment Application

The employment application must elicit as much useful information as possible about the applicant to assist the employer in not only selecting the proper candidate but also structuring the employment relationship that will follow if the applicant is hired. For example, the application is the appropriate place to inform the applicant that if hired, he or she will be an employee at-will whose employment may be terminated with or without notice and with or without cause. While the application can therefore work to the employer’s advantage, care must be taken to avoid asking inappropriate or even illegal questions.

Applications should provide for the following:

7 The affirmative action obligations of the Vietnam Era Veterans’ Readjustment Assistance Act (VEVRAA) require federal contractors to post open positions in a particular manner.
1. A statement that completion of the application does not constitute a guarantee of eventual employment.

2. A statement by the applicant that, if selected for employment, he or she agrees that his or her employment is at-will, *i.e.*, can be terminated at any time for any reason.

3. A statement by the applicant acknowledging that misstatements on the application form are grounds for discharge, even if the misstatement is not discovered until after the applicant has been hired and has begun to work.

4. If applicable, notification to the applicant that a physical examination will be required, including testing for drugs and alcohol, and a statement by the applicant that he or she consents to such testing. Of course, this notification is only necessary if the employer has already decided that it would be desirable to screen applicants for current drug/alcohol abuse.

5. A statement by the applicant that he or she authorizes the employer to check the applicant's references by contacting former employers or schools listed on the application, and that he or she consents to the release of information to the employer by those former employers or schools.

6. A statement that the application will only remain active for a limited period of time (e.g., 60 days).

Employment applications should **not** ask for the following information:
1. Questions which identify the applicant as a member of a class which is protected from discrimination under federal or state law. Questions concerning race, color, religious creed, ancestry, age, sex, national origin, or disability or medical condition should be deleted from an employment application.

2. Questions which, while they do not specifically identify an applicant as a member of a protected class, nevertheless inquire about certain characteristics which might be associated with a protected class. Examples of such questions are those regarding date of birth, height and weight, marital status, pregnancy, number of children, color of eyes/hair, dates of school attendance, prior medical treatment, and financial status of the applicant.

Employers must take care when making inquiries concerning the following matters:

1. United States Citizenship - Employers may not ask applicants to state whether they are a citizen of the United States or to provide their national origin. However, federal law requires employers to verify the legal status and right to work of all new hires. Thus, employers may ask whether an applicant has the legal right to work in the United States. If an employer asks any applicants this question, all applicants should be asked.

2. English Language Skills - While some English skill is probably required for most jobs, fluency or absence of an accent is most
likely not relevant. If English language skill is not a requirement of the work to be performed, using it as a criterion may have an effect of unfairly eliminating certain minority groups.

3. Military Service - Questions relevant to experience or training received while in the military, or to determine eligibility for any veteran’s preference required by law, are acceptable. Moreover, employers may consider the type of discharge an applicant received from the military. A dishonorable discharge should not, however, be an absolute bar to employment. If questions about discharge status are asked, the applicant should be told that the dishonorable discharge or general discharge is not an absolute bar to employment and that other factors will affect the final decision of whether or not to hire the individual.

C. Verification and Reference Checks.

Once an applicant has authorized the employer to check personal references such as former employers or schools, an employer may do so. Such background checks may enable an employer to detect and avoid "problem employees." An employer should not misrepresent its identity when conducting reference checks.

If an employer desires to use a third party to obtain a criminal history check, a credit report, or other background information, the employer must comply with the Fair Credit Reporting Act ("FCRA"). The FCRA requires that the employer obtain written authorization from the applicant before requesting a
consumer report from a third party. Prior to taking any adverse action based upon the information contained in a consumer report, the employer is required to provide the applicant with a copy of the report and written notice of his or her rights under the FCRA. The employer must also provide written notice to the applicant if it decides to reject the applicant because of information in the consumer report.

Employers must remember that, with regard to criminal record history, Pennsylvania law provides that only felony and misdemeanor convictions may be used in deciding whether or not to hire an applicant. Moreover, such convictions may be relied upon only to the extent that they relate to the applicant's suitability for employment. Finally, an employer must notify an applicant in writing if its decision not to hire the applicant is based, in whole or in part, upon criminal history record information. 19 P.S. §9125. Some jurisdictions prohibit employers from requesting criminal history information until later in the process.

D. Employment Interviews

The employer must be familiar with the legally permissible and legally impermissible areas of inquiry during the employment interview. During interviews, avoid asking the questions which would be impermissible on an employment application (See above). It is important to script the questions you ask in an interview. Stick to the script as much as possible. Employers should keep the following guidelines in mind during the interview process:

- Do not ask questions which reflect sexual stereotyping (i.e., "If you had to work weekends, who would take care of your children?").
• Do not ask about the applicant's religious background, or whether he or she would be comfortable working in an office that is "Christian," "Jewish," etc.

• Do not make interview notes or records that could indicate bias (i.e., "too old," "too militant," etc.).

• Do not ask questions that would reveal an applicant's disability (i.e., "How many days were you sick last year?"); "What prescription drugs are you currently taking?").

Employers should base their employment decisions on the strength of the individual’s resume, interview, and references. Employers should refrain from seeking additional information about a candidate on the Internet, including on social media and networking websites, as this may reveal protected information.

IV. CONCLUSION

Business is fraught with difficulty and perhaps Heraclitus was right in suggesting that strife is the human condition. Handling transitions cleanly and efficiently should not be a stressor in our lives however. Following the tips above should help to put you one step ahead of your peers and your competition in times of transition.