

DIE KUNDIGUNG, LICENCIEMENT, RECESSO DAL CONTRATO, 'FIRING', OR 'SACKING': COMPARING EUROPEAN AND AMERICAN LAWS ON MANAGEMENT PREROGATIVES AND DISCRETION IN TERMINATION DECISIONS

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My bills are all due, and the babies need shoes, but I'm busted....

- Ray Charles, American blues singer, 1963¹

An oft-used statement in American and Canadian legal writings is that an employer's unilateral termination of a worker is the capital punishment of industrial relations.² The employment-at-will rule prevalent in most American states is the antithesis to the law in most European countries, where job security laws abound. This rule permits either the employer or employee to terminate the employment relationship at any time, with or without cause.

Domestic legislation in Europe consistently requires the employer not only to show good cause but also to tender statutory notice to a worker who is to be terminated. Moreover, these laws usually require the company to pay the affected worker severance pay, generally gauged by his period of service. The American at-will rule, the absence of statutory severance pay, and the dearth of pre-termination notice are anomalous to worker protections common in Europe.

This article will compare and contrast American law with the usual European laws regarding restrictions on employers and rights of employees in termination cases. Part I addresses relevant supranational conventions and treaties that have instigated much domestic employment legislation in Europe. In particular, the International Labor Organization and the European Commission have been significant in this area.

Part II has two sub-sections. First, an elaboration of Irish law exemplifies the myriad of worker protections and management obligations in termination decisions. The second section includes more summary treatment of some other European countries: four pre-2004 European Union member states (Austria,

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1. "Busted," lyrics by American composer Harlan Howard.

2. See, e.g., Ontario Superior Court Justice Isaac's opinion in *Keays v. Honda*, 2005 C.L. 230-013, 40 C.C.E.L. (930) 268, aff'd 2006 C.L.L.C. 230-030, 52 C.C.E.L. (3d) 165, 260 A.C. 3, 82 O.R.3d 161; ROBERT A. COVINGTON & KURT H. DECKER, *EMPLOYMENT LAW IN A NUTSHELL* 323 (2002).

France, Germany and Greece); four of the new member states with the expansion in May 2004 (the Czech Republic, Hungary, Slovakia and Slovenia); and two candidates for EU membership (Croatia and Turkey).

Part III explains the employment-at-will rule, its origins in American law, and the more usual exceptions to that rule. Court-created exceptions imply a sense of judicial frustration over the fundamental inequity inherent in the underlying legal principle.

Finally, Part IV discusses and contrasts this area of American law with European domestic legislation. Of especial note are provisions related to the reason(s) for which termination is permitted: statutory notification periods, financial obligations of the employer to the discharged employee, and any special provisions relating to collective redundancies (or, in American terminology, mass layoffs) and plant closures.

The purposes of this article are both practical and scholarly. The first is to present a guide for international businesses regarding these diametrically different commitments and rights under the applicable laws. The second is to provide a foundation for continued research on this issue for legal academics on both sides of the Atlantic. Addressed herein is the law, rather than any "law of the shop" — that is, any contractual agreement between worker and management, whether individual or collectively bargained.

I. AN INTERNATIONAL PERSPECTIVE: THE INTERNATIONAL LABOR ORGANIZATION AND THE EUROPEAN COMMISSION

A. *International Labor Organization*

Founded in 1919, the International Labor Organization (ILO) is the only remaining entity from the Treaty of Versailles, which gave rise to the failed League of Nations. As the first United Nations specialized agency, the purpose of the ILO is to further social justice and human rights for labor.

In addition to propagating legal protections for workers, the ILO also tracks international labor legislation and provides a summary of domestic laws affecting worker termination. A helpful ILO resource is the *Termination of Employment Legislation Digest*,³ an on-line resource with a comparative law perspective of termination legislation in more than seventy countries.

The first international recognition that workers must have legal protections from unjustified and arbitrary termination was the ILO Termination of Employment Recommendation, 1963.⁴ This recommendation was the first step in the adoption in 1982 of the Termination of Employment Convention,⁵

3. ILO, Termination of Employment Legislation Digest, <http://www.ilo.org/public/english/dialogue/ifpdial/info/termination/> (last visited Dec. 22, 2007).

4. ILO, Termination of Employment Recommendation, June 5, 1963, No. 119.

5. ILO, Termination of Employment Convention, June 2, 1982, No. 158 [hereinafter

enacted with a supplementary recommendation (No. 166). Conventions bind signatory nations, and recommendations generally contain guidelines as aids to implementation of conventions or treaties. ILO Convention 158, which became effective in 2006, has been ratified by only thirty-four countries.⁶ From within the European Union, only Finland, France, Latvia, Luxembourg, Portugal, Slovenia, Spain and Sweden have signed. Notably, the two Scandinavian countries (Finland and Sweden) arguably have the most sweeping social legislation in Europe.

The thesis of this convention is job security. Convention 158 directs subscribing countries to assure a reasonable period of pre-termination notice, or cash payments to the worker in lieu of notice. The ILO also tracks international labour legislation and provides a summary of domestic laws affecting worker termination. A helpful ILO resource is the *Termination of Employment Legislation Digest*,⁷ an on-line resource with a comparative law perspective of termination legislation in more than 70 countries. Recommendation 166 favors a domestic law provision for a reasonable paid time off work to allow sufficient time for the worker to seek new employment.

Convention 158 also requires legislation obligating the employer to notify, inform and consult with a workers council, if any. The ILO adopted a workers council treaty in 1971,⁸ which directs that domestic law be enacted to require the employer to notify the designated federal labor authority if termination is based on business reasons. Convention 158 also stipulates that severance pay, based on length of time worked for the terminating company and the amount of his wage or salary, be required by law to be paid by the employer or that the worker be entitled to unemployment insurance payments, or a combination of severance pay and insurance payments.⁹ If the worker is terminated for his own serious misconduct, he is not entitled to severance pay.¹⁰ Recommendation 166 suggests requiring the employer to avoid the harshness of layoff for business reasons and to use suggested criteria to consider which workers are chosen (such as length of employment, skills, and family obligations).

Although Convention 158 is obligatory only upon signatory countries, it is nonetheless a model for what workers regard as ideal legal protections.¹¹

Convention 158].

6. Brazil, one of the thirty-four signatories, has since retracted its ratification.

7. <http://www.ilo.org/public/English/dialogue/ifpdial/info/termination>.

8. ILO, Workers' Representatives Convention, June 2, 1971, No. 135.

9. Art. 12, Convention 158.

10. For an elaborate survey on the treaty in practice, see ILO, 1995, "Protection against unjustified dismissal," *General Survey on the Termination of Employment Convention (No. 158) and (No. 166)*, 1982, Report III (4B), 82nd Session, 1995, ¶ 274.

11. The author is grateful to Angelika Muller, Labour Legislation and Labour Administration Branch, ILO, for her presentation at the annual *Internationaler Arbeitsrechtlicher Dialog* (International Employment Law Dialogue) [hereinafter *Dialog*] in Graz, Austria, October 24-25, 2006, for her remarks explaining the role of the ILO and the conventions and recommendations incorporated into this section.

B. European Commission

The European Union (EU), the geographic entity governed by the European Commission (EC) and the European Court of Justice, began as an economic conglomerate of only six countries. Since January 1, 2007, the date of formal admission to new member states Bulgaria and Romania, it has increased in size to its current twenty-seven members.

The EC has a paucity of directives regarding job security. Prof. Dr. Frank Hendrickx of the University of Leuven Law School has posed two reasons for this: (1) the EU had economic beginnings, and its social directions commenced relatively recently; and (2) there is a stark lack of consensus among member states.¹² The three directives addressing layoffs are the directive on collective redundancies¹³; portions of the Transfer of Undertakings Directive¹⁴; and the directive addressing job rights upon the insolvency of the employer.¹⁵ It is reflective of the economic foundation of the EU that all of the directives are primarily in the context of marketing operations, corporate restructuring, and maintaining competitiveness, rather than employee protections.

As a rule, the domestic law within Europe has not encroached upon the prerogative of the employer in economic decision-making, but rather has provided procedures for notifying (and sometimes consulting with) workers and workers' representatives about such decisions. The exception is the Transfer of Undertakings Directive, in which the worker is to retain his job, absent any material change in the business that affects employment duties, either qualitatively or quantitatively.¹⁶

The Single European Act of 1986¹⁷ required a qualified majority vote by the Commission on issues regarding health and safety in general.¹⁸ At the Strasbourg Summit in December 1989, the Heads of State of eleven member states of the then-twelve member states (only the United Kingdom was not in favor) signed the Charter of Fundamental Social Rights for Workers.¹⁹ Interestingly, the Charter did not address rights in termination situations.

The EU social policy initiatives that included provisions on job loss protections, began with the 1993 Maastricht Treaty.²⁰ In 1997, this agreement

12. Presentation of Dr. Frank Hendrickx of the University of Leuven, *Dialog*, *supra* note 11.

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

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

15. Council Directive 80/87 1980 O.J. (L 283) 23-27 (EEC).

16. Hendrickx, *supra* note 12.

17. The Single European Act, Feb. 28, 1986, 1986 O.J. (L169).

18. *Id.* Art. 148, at 205. The more usual rule for voting in the Council, comprised of heads of state of all member states, is by qualified majority, although some subject matter requires unanimity. Qualified voting is a statistical weighting of votes so as to allot greater strength to the larger countries.

19. 2000 O.J. (C 364) 1.

20. Treaty for European Union, Feb. 7, 1992, 1992 O.J. (C 191) [hereinafter TEU]. An excellent primer on the drafting and approval of TEU is R. CORBETT, THE TREATY OF

was subsumed into the Amsterdam Treaty.²¹ Notably, the social charter empowered the Commission and the Council to address the “protection of workers where their employment contract is terminated.”²² The most significant post-Amsterdam directives affecting job security have been the two 2000 non-discrimination directives, the so-called race directive²³ and the framework directive.²⁴ The race directive is the broader of the two in that it applies not only to the work setting, but also to transportation, accommodations, and discrimination in general. On the other hand, the breadth of the framework directive, albeit limited to employment issues, prohibits discrimination on many grounds other than race and/or ethnicity (for example, religion, political beliefs, sex and sexual orientation). Although the EC has required member states to adopt laws prohibiting discrimination in the workplace, it has not addressed dismissal law in a comprehensive fashion.

Professor Hendrickx predicts that the EC’s current ongoing discussions on the concept of “flexicurity”²⁵ will initiate a more aggressive European activity in the area. “Flexicurity” is the term referring to a palliative ideal for both labor and management, providing workers with job *security* (“-curity”), but for an undetermined time by permitting management the *flexibility* (“flexi-”) of using fixed-term employment contracts and/or temporary placements. For apparent reasons, this concept is more acceptable to employers than the workers, workers’ representatives and unions.²⁶

The ILO has adopted potent language embracing worker protections from unfair terminations, but subscribing nations are relatively few among the countries that are the subject of this article. European mandates to member states with respect to employee terminations have been limited to collective redundancies, transfers of ownership of businesses, employer insolvency regarding several terminations, and workplace discrimination on stated grounds regarding individual terminations. The legal task has been delegated for the most part to individual member states that have devised disparate job protections.

MAASTRICHT (1993).

21. Treaty of Amsterdam, Oct. 2, 1997, 1997 O.J. (C 340). The sole purpose of the Amsterdam Treaty was to incorporate amendments into existing treaty law. It is likely that European legal scholars perceived another purpose: making useless much information they had committed to memory. Amsterdam re-numbered all sections of the treaty.

22. *Id.* at Article 137.

23. Council Directive 2000/43, 2000 O.J. (L 180) 22 (EC).

24. Council Directive 2000/78, 2000 O.J. (L 303) 16 (EC).

25. See *Commission White Paper on Growth, Competitiveness and Employment: The Challenges and Ways Forward into the 21st Century*, COM (1993), 7000 final (Dec. 5 1993); *Commission Green Paper*, COM (1997) 128 final (Apr. 16, 1997).

26. See *From the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions Taking Stock of Five Years of the European Employment Strategy*, at 15, COM (2002), 416 final (May 17, 2002) (Reports surveys showing only twenty-eight percent employee approval, as compared with seventy-eight percent employer approval).

II. EUROPEAN DOMESTIC LAWS RESTRICTING MANAGEMENT'S TERMINATION RIGHTS

A. *Irish Law on Employment Termination*

1. *The Unfair Dismissals Acts 1977-1993*

Post-“Celtic Tiger” Ireland — the late 1990’s economic boom — enjoys a commendably low unemployment rate of 4.4 percent.²⁷ Prior to this time, businesses suffered economically, and for this reason, governmental constraints upon companies’ employment decisions were unusual. An exception to this generality was the enactment of the first Unfair Dismissals Act in 1977.²⁸ This legislation may appear to have been before its time, but that time rapidly came in its aftermath, with the economic strides that Ireland has made.

Many employment statutes in Ireland were triggered by EC dictates, so in this sense, the Unfair Dismissals Act is somewhat unusual. The framework used by the *Dail* was legislation in the United Kingdom.²⁹ Interestingly, ILO Convention 158³⁰ was not adopted until 1982, after the passage of Ireland’s Unfair Dismissal Act.

The underlying principle of the Irish unfair dismissals legislation is the assurance of job security unless the employer has good reason to terminate. It also provides for fair procedures in dismissals. A prerequisite for this protection is a minimum of one year’s service with the employer.³¹ Computation of time worked is established in the Minimum Notice and Terms of Employment Acts, 1973-1991,³² and judicial law has excluded all time not

27. The term “Celtic Tiger” refers to the period of economic boom in Ireland from 1995 to 2000. For each of the past 15 years, Ireland’s economy grew by more than 7%. “Top of the Money,” October 18, 2007, Economist.com. Moreover, Ireland’s unemployment rate of 4.4% in 2007 was third among the 27 European Union member states, behind only Denmark (3.4%) and the Netherlands (3.5%). Eurostat, *Eurozone unemployment fell to 7.3% in February; Lowest rates were in Denmark and the Netherlands*, Mar. 30, 2007, available at www.finfacts.com/irelandbusinessnews/publish/printer_1000/article_10009621.shtml.

28. Unfair Dismissals Act 1977 (Act No. 10/1977) (Ir.) available at <http://www.irishstatutebook.ie/1977/en/act/pub/0010/index.html>.

29. 293 *Dail Deb* (Nov. 4, 1976). The British statutes that served as the model were the Industrial Relations Act, 1971, c. 72, (Eng.); and the Trade Union and Labour Relations Act, 1974, c. 52. The author thanks Dr. Darius Whelan of the law faculty, University College Cork and President Ferdinand VonProndynski, Professor Law and President, Dublin City University, for this background on the Irish statute.

30. See *supra* notes 3-11 and accompanying text.

31. Minimum Notice and Terms of Employment Act, 1973 (Act No. 4/1973) (Ir.), at First Schedule, available at <http://www.irishstatutebook.ie/1973/en/act/pub/0004/index.html> (last visited Jan. 4, 2008, 2007).

32. *Id.*

worked because of statutory holidays.³³ Inexplicably, such time is included in determining the two-year service requirement for redundancy legislation coverage.³⁴ Similar to redundancy legislation, only workers age sixteen to sixty-six are protected by the Unfair Dismissals Acts.³⁵

Excluded from this one-year service requirement are terminations that are allegedly retaliatory because of the worker's membership in trade union activities, pregnancy or request for maternity or parental or *force majeure* leave.³⁶ A recent case is explanatory; a store manager for Five Star Foods, Ltd. in Dublin replaced a pregnant worker to the employer's peril. Upon learning of her pregnancy, the worker asked for a reduction of hours. After having exercised her statutory right to time off for medical treatment,³⁷ she returned to work, but was informed by the manager that she had been replaced. He explained that he had interpreted her request for time off as a resignation. She filed an unfair dismissals charge, and the Employment Appeals Tribunal (EAT) awarded her €14,500 (and an additional €388 for having received neither one week's notice nor an explicit reason for her dismissal).³⁸

An important distinction between unfair dismissals law and redundancy legislation is that all dismissals are presumed to be unfair, and the burden of proving its reasonableness and/or fairness is upon the employer.³⁹ Conversely, the burden is on the worker to prove that a business situation is not, in fact, a redundancy.

A 2005 decision by the EAT exemplifies the importance of the employer's use of fair procedures in termination cases. In *James Mulcahy v. H.C. Cahill Ltd t/a Cahill Quality Foods*,⁴⁰ the worker was discharged because he had been stopped by police while driving a company truck with illegal drugs in his possession. In a meeting shortly after the incident, he openly admitted to the employer's general manager and two other employer representatives that he

33. See *Twomey v. O'Leary Office Supplies Ltd.*, [2000] E.L.R. 42 (Ir.).

34. Redundancy Payments Act, 1967 (Act No. 21/1967) (Ir.) at Schedule 3, available at <http://www.irishstatutebook.ie/1967/en/act/pub/0021/index.html> (last visited Oct. 18, 2007).

35. Redundancy Payments Act 1971, (Act No. 20/1971) (Ir.), sec. 3, as amended by sec. 5 Redundancy Payments Act 1979, as amended by sec. 46(c) (d) Equality Act, 2004 (Act No. 24/2004) (Ir.) available at <http://www.irishstatutebook.ie/2004/en/act/pub/0024/sec0046.html#partii-sec46> (last visited Oct. 18, 2007).

36. Unfair Dismissals (Amendment) Act, 1993 (Act No. 22/1993) (Ir.), sec. 14, Unfair Dismissals Act, 1977, *supra* note 28, sec. 6(2)(f), as amended by Maternity Protection Act, 1994 (Act No. 34/1994) (Ir.), sec. 38(5), available at <http://www.irishstatutebook.ie/1994/en/act/pub/0034/index.html> (last visited Oct. 18, 2007) and by Parental Leave Act 1998 (Act No. 30/1998) (Ir.), sec. 25(2), available at <http://www.irishstatutebook.ie/1998/en/act/pub/0030/index.html> (last visited Oct. 18, 2007).

37. Maternity Protection Act 1994, *supra* note 36, sec. 15, entitles pregnant workers paid time off for pre- and post-natal care.

38. Conor Feehan, *Worker Sacked for Being Pregnant*, WEEKEND HERALD, Apr. 29, 2006, at 1.

39. See FRANCES MEENAN, WORKING WITHIN THE LAW 398 (1999).

40. [2004] M.N. 769 (Ir.) and [2004] U.D. 969, May 5, 2005.

had also possessed and used drugs in the workplace. Understandably (at least to most management personnel), he was instantly terminated. However, because the employee had not been informed prior to the meeting of the purpose and the procedures to be used, the EAT awarded him €4,000. This decision arguably lends true meaning to the reverse of an old adage that no bad deed goes unrewarded. The same necessity to utilize fair procedures applies in redundancy cases.

The Irish courts have often found that the employer has met its burden of proving reasonableness in unfair dismissal claims. This concept of "reasonableness" encompasses both the substantive reason for the termination and the adherence to fair procedures. A dismissal will be fair under the statute if it is based upon the "capability, competence, or qualifications" of the employee in the performance of tasks involved in the job for which he had been hired; his unacceptable conduct; his redundancy; or the existence of a statutory prohibition on one party to the employment contract.⁴¹ In determining whether the employer acted fairly, the courts have required the employer to have completed an adequate investigation of the cause leading to the dismissal. Otherwise, the dismissal will be found unfair.⁴²

Part-time workers are fully protected under the Unfair Dismissals Acts. Prior to December 20, 2001, a part-time worker was expected to work a minimum of eight hours per week in order to be protected.⁴³ This proviso has been repealed.⁴⁴

For any dismissal that is not a redundancy, a worker with at least thirteen weeks of service must be given a statutory period of notice. The minimum length of the notice is based upon the length of service.⁴⁵

41. Unfair Dismissals Act, 1977, *supra* note 28, sec. 6(6).

42. *See, e.g., Hennessey v. Read and Write Shop, Ltd.*, [1978] U.D. 192 (Ir.).

43. Worker Protection (Regular Part-Time Employees Act), 1991 (Act No. 5/1991) (Ir.) available at <http://www.irishstatutebook.ie/1991/en/act/pub/0005/index.html> (last visited Oct. 18, 2007).

44. Protection of Employment (Part-Time Work) Act, 2001 (Act No. 45/2001) (Ir.) available at <http://acts.oireachtas.ie/en.act.2001.0045.1.html> (last visited Jan. 4, 2008).

45. Minimum Notice and Term of Employment Act 1973 (Act No. 4/1973) (Ir.), sec. 4(2), available at <http://acts.oireachtas.ie/zza4y1973.1.html> (last visited Jan. 4, 2008).

<i>Length of Service</i>	<i>Notice</i>
Thirteen weeks to two years	One week
Two to five years	Two weeks
Five to ten years	Four weeks
Ten to fifteen years	Six weeks
Fifteen plus years	Eight weeks

Significantly, the courts have at times literally construed the statutory word “minimum.” For example, a worker with many years of service might be regarded as equitably entitled to more than the minimum as stated in the Act. Unlike many courts, the EAT is empowered to require only the statutory minimum.⁴⁶

Another limitation on the EAT is the amount of compensation that can be awarded to a victorious unfair dismissals claimant. The maximum this body might grant is 104 weeks’ wage or salary,⁴⁷ whereas a court might award more.

An anomaly in Irish legislation is that a fixed-term or specified purpose worker might also file an unfair dismissal claim when the employment ends without notice at the conclusion of the contract. Such workers are protected by the legislation unless the contract of employment is (i) signed by both parties and (ii) specifies that the Unfair Dismissals Act is inapplicable to this employment relationship.⁴⁸ However, in the event either of these requirements has not been met, the employer might nonetheless prevail. The effect of this notice requirement is to shift to the employer the burden of proving the parties intended to limit the employment for the specified period of time. For example, the legendary luck of the Irish was with the employer in *O’Mahony v. Trinity College*.⁴⁹ The EAT held that, despite the absence of evidence that the two statutory requirements had been met, the evidence substantiated that temporary employment had been the clear intent of both parties. The claimant had accepted a fixed-term temporary position, and his subjective hope or expectation that this contract might be renewed did not alter or affect the mutual understanding with respect to the fixed and temporary nature.

A case in which the employer was not as fortunate as the one in *O’Mahony* was *Fitzgerald v. St. Patrick’s College, Maynooth*.⁵⁰ This claimant had a fixed-term contract as lecturer at one of the national universities of Ireland, pending the college’s implementation of required procedures to advertise and fill the position on a permanent basis. Because of intervening

46. MEENAN, *supra* note 39, at 374.

47. Unfair Dismissals Act, *supra* note 28, sec. 7(1)(c), as amended by Unfair Dismissals Act 1993, *supra* note 36, sec. 6(a).

48. Unfair Dismissals Act 1977, *supra* note 28, sec. 2(2)(b).

49. [1998] E.L.R. 15 (Ir.).

50. [1978] U.D. 244, reported in KERR & MADDEN, CASES AND COMMENTARIES ON UNFAIR DISMISSALS 86.

delays in completing these procedures, she was offered and accepted a second fixed-term contract. When the second contract was not renewed, the employee filed an unfair dismissals claim. The EAT held for the employee, finding that the college had not met its burden of proving any commercial justification for having entered the first contract on a fixed-term basis. This decision illustrates how an employer might avoid liability simply by fulfilling the two simple requisites in the statute.

Because some companies apparently endeavored to use fixed-term contracts in a manner to evade the necessity of complying with the Unfair Dismissals Acts, the law was amended in 1993. Prior to this amendment, an employer might have hired all workers for fixed-terms of less than one year and re-hire them after a brief hiatus. This would preclude such workers from attaining the necessary one year of service. The law as amended prevents an employer from avoiding compliance if he rehires a fixed-term worker within three months after the expiration of his term.⁵¹

The concept of constructive dismissal applies to both the Unfair Dismissals Acts and the Redundancy Payments Act. A worker will be regarded as having been unilaterally terminated if he proves that his working conditions had become too intolerable for a reasonable person to continue working. A recent case is illustrative. In *MBNA Ireland v. A Worker*,⁵² a worker resigned because of management personnel's circulation of false rumors about her mental health (specifically, that her mother had once had her admitted to a mental hospital). She had asked to have the false information removed from her file, but the company refused. Her claim was filed under the Industrial Relations Act, and, in a non-binding recommendation, the Labor Court agreed the refusal had been unreasonable. Nonetheless, the Court also held that she had other available alternatives short of resigning, and that she had not proven constructive discharge.⁵³ The recommendation was that the company tender her a written apology, remove the false information from her files, and donate €5,000 to a charity of the worker's choice. Unless this claimant was particularly altruistic, her victory was a Pyrrhic one indeed.

2. Statutory Redundancies in Ireland: The Redundancy Payments Acts 1967-2003: The Concept of "Redundancy"

Closely related to the Unfair Dismissals Acts is legislative protection for workers in redundancy situations. "Redundancy" is defined in the statute as a termination caused by something beyond the control of the affected worker that is necessitated by business or economic reasons.⁵³ The statute lists five grounds that will justify a redundancy, and two factors are reflected in each. First, the

51. Unfair Dismissals Act, 1993, *supra* note 36, sec. 22(b).

52. [2005] C.D.140 recommendation No. 18300, 23 August 2005.

53. Redundancy Payments Act 1967, *supra* note 34, sec. 7(2), as amended by Redundancy Payments Act 1971, *supra* note 35, sec. 4.

reason must be impersonal and unrelated to the worker himself. For example, if he is being terminated because of inability to perform the duties inherent in the job, the termination is a dismissal rather than a redundancy. Second, the courts have interpreted a redundancy as always involving some intra-business change.⁵⁴

Within the concept of redundancy is a short-term layoff, provided it is at least four weeks in duration, or six weeks within a thirteen-week period with no four of these weeks having been consecutive.⁵⁵ At the option of the worker, redundancy also might include so-called “short-time,” defined as a diminution of the worker’s workload such that his remuneration is decreased to less than one-half his usual wage or salary.⁵⁶ For example, assume that Seamus has worked for eight years as a quality control checker for Baits ‘n’ Hooks Ltd., a manufacturer of fishing paraphernalia. His usual workweek is forty hours, and his hourly wage is €10.50. Thus, Seamus’ weekly wage is €420. If his supervisor has told him that necessary economic downsizing by the company requires his workweek to be reduced to a twenty-four-hours and his hourly rate of pay lowered to €7.70, these changes will result in diminishing his weekly pay from €420 to €184.80. Since this amount is less than one-half his prior earnings, Seamus has been given notice of “short time.” He has the option of declaring his situation a redundancy, and, in such case, he would be entitled to redundancy payments.

Once a termination or short-time is determined to be a redundancy, it cannot be an unfair dismissal, since the two concepts are mutually exclusive. Significantly, the redundancy must be impersonal and unrelated to the worker, but rather to the functions of the job itself.⁵⁷ Conversely, if the root cause of a statutory dismissal is the worker himself, then it is presumed to be unfair, unless the employer can prove otherwise.

3. Which Workers Are Protected Under Redundancy Legislation?

A worker who is protected is entitled to notice and redundancy payments as specified in the legislation. First, only those between the ages of sixteen and sixty-five are protected.⁵⁸ Second, only workers with at least two years of service with the company who have made contributions to the state social insurance fund are covered.⁵⁹ Third, a worker must work a minimum of twenty-one hours per week.⁶⁰ Finally, one is not protected if his employer is his parent, step-parent, son or daughter, grandson or granddaughter, sibling or half-

54. See, e.g., *St. Ledger v. Frontline Distribution Ltd.*, [1994] U.D. 56 (Ir.).

55. Redundancy Payments Act 1967, *supra* note 34, sec. 12(2)(a)(b).

56. *Id.* sec. 11(2).

57. *Moloney v. Deacon & Sons*, [1996] E.L.R. 230 (Ir.).

58. Redundancy Payments Act, 1967, *supra* note 34, sec. 7(5) and Redundancy Payments Act, 1971, *supra* note 35, sec. 3(1).

59. Redundancy Payments Act, 1967, *supra* note 34, sec. 7(9)(a)(b).

60. *Id.* sec 4(2).

sibling with whom the worker lives.⁶¹ Despite the existence of a redundancy, a worker is not protected if the reason for the dismissal was his misconduct.⁶²

In the second requirement, that is, the two-year service rule, the time must have been continuous. Thus, one who worked eight months for a company, after which he left and later returned, with a service record of one and a half years since resumption, does not have the required two years. Continuity is presumed,⁶³ and, unlike the Unfair Dismissals Act's one-year requirement, much time not actually worked is included in the calculation. For example, continuity is not broken because of time not worked because of a strike or lockout, statutory leave, or statutory holidays.

Importantly, if a worker challenges the termination as not being a redundancy, but rather a dismissal, he has the burden of proving the dismissal.⁶⁴

Even if a redundancy exists, the affected worker might raise a second issue:⁶⁵ that of his selection for redundancy.

The statute does not establish which factors an employer must consider in selection, such as the worker's age, length of service, or family obligations. However, the Unfair Dismissals Act lists unlawful grounds for dismissals. This infers that redundancy determinations also might not be based on these factors. In order to prevail, the worker must prove that he was selected for redundancy because of his trade union membership or activities; religion or political opinion or position; any connection with or participation in civil or criminal proceedings against the employer; race; sex; pregnancy; sexual orientation; age; membership in the traveling community; or denial of maternity rights.⁶⁶ Most employment law experts concur that such cases are rare because of the difficulty of the burden of proof.⁶⁶ However, at least one decision was against the employer for having singled out part-time workers (all female) rather than full-time (all male) workers when redundancies became necessary. In *Michael O'Neill and Sons Ltd. v. Two Female Employees*,⁶⁷ this was found to be unlawful sex discrimination.

If such a claim is successful, the worker might have one of several types of remedies. He might be (i) compensated; (ii) awarded reinstatement with back pay and any missed benefits; or (iii) re-engaged. The latter resembles, but is not identical to, reinstatement. Re-engagement is usually not re-employment in the same position, but in a different position that is suitable for the claimant/plaintiff. Also, re-engagement generally does not include back pay

61. *Id.*

62. *Id.* sec 14.

63. *Id.* at Schedule 2 ¶ 4.

64. Redundancy Payments Act, 1971, *supra* note 35, sec. 10(b), states the presumption that a redundancy exists.

65. Unfair Dismissals Act, 1977, *supra* note 28, secs. 5 and 6, as amended by Unfair Dismissals Act, 1993, *supra* note 36, secs. 4 and 6.

66. *See* Meenan, *supra* note 39, at 418.

67. [1988] D.E.E. 1.

and lost benefits.⁶⁸

An employer usually might defend a selection process based solely on seniority. Additionally, the general rule is that it might lawfully justify a decision to retain a more efficient, productive worker in favor of a less productive one.⁶⁹ In the latter situation, the company must be prudent in following correct procedure. The EAT has imposed an additional non-statutory obligation on the employer. In *Kirwan v. Iona National Airways*,⁷⁰ the worker successfully challenged his selection for redundancy because the employer had never discussed with him any problems with inadequate productivity.

Moreover, the employer must follow any procedure contained in a collective bargaining agreement or any other agreement with workers and/or a worker representative. Irish law also imposes upon the employer the obligation to inform the workforce of the method being used for selection of which workers will be made redundant, and failure to have done so has been held by the EAT to result in an unfair dismissal.⁷¹ In *Roche v. Richmon Earthworks Ltd.*,⁷² the EAT held that notification of redundancy without any prior consultation and discussion with the affected worker was tantamount to an unfair dismissal.

A summary of selection rules in Irish redundancy law shows that selection based on any of the prohibited grounds is patently unlawful; the employer must comply with any collective bargaining or other workers' representative agreement procedure, or any procedure that is the norm in the workplace by reason of custom; the method of selection must be explained to workers prior to notification; and any deficiencies in the employee's work performance must be discussed with him prior to notification. An employer will generally avoid unfair dismissal liability if he uses the "last-in-first-out" seniority rule of thumb in redundancy selections, and a decision to keep a better worker and to choose a less proficient one for redundancy is acceptable, provided that the unsatisfactory work performance had earlier been discussed with the one chosen for redundancy. In such cases, the employer should be able to present objective proof of the selected worker's inferiority to the one being retained.

4. *Employer's Statutory Obligations to the Redundant Worker*

The employer has two obligations in a statutory redundancy. First, it must give the requisite notice to those workers to be made redundant. Second, it must pay statutory severance money to each entitled worker.

68. Unfair Dismissals Act, 1977, *supra* note 28, sec. 2, as amended by Unfair Dismissals Act, 1993, *supra* note 36, sec. 7.

69. *See, e.g.*, *Cassidy v. Smith and Nephew Southalls (Ireland) Ltd.*, [1983] U.D. 35.

70. [1987] U.D. 156.

71. *See, e.g.*, *Boucher and Others v. Irish Production Centre* [1995] E.L.R. 205.

72. [1997] U.D. 329.

The notice is similar to that required for a dismissal, except that the worker's entitlement begins at two years of service.⁷³

<i>Length of service</i>	<i>Required notice</i>
Two to five years	Two weeks
Five to ten years	Four weeks
Ten to fifteen years	Six weeks
Over twenty-five years	Eight weeks

The two years includes holidays and annual time leave. Thus, the time frame is two calendar years.

Length of tenure with the business also governs the required amount of redundancy payments. The worker is entitled to two weeks' pay for each year worked (presuming that he has the requisite two years of minimum service), subject to a maximum of €600 per week, plus one week's pay as a bonus.⁷⁴ For example, a worker with eight years of service would be entitled to seventeen weeks of pay.

Before the redundant worker has the right to redundancy payments, he must notify the employer in writing of his intent to claim this money. This notice must be no later than one month from the end of the employment relationship, or one month from his having been notified of the EAT's decision to deny his claim, if he had filed an unfair dismissal claim.⁷⁵

Payments are the obligation of the employer, but the Social Insurance Fund will reimburse 55% of the amount paid if the lump sum paid to the redundant worker is not in excess of twenty times his normal weekly wage.⁷⁶ Mathematically, this would apply to workers with at least ten years of service. For payments that exceed this amount, the employer's reimbursement will be in the amount of 55% of payments made, plus the entire amount payments exceeded this 55% figure.⁷⁷ The company must claim this rebate within one year of the payment to the worker, or within two years, upon a showing of reasonable cause for the delay.⁷⁸ This rebate is increased 2.5%, provided that it does not exceed 70%, if the employer provides the Minister of Enterprise, Trade and Employment a copy of the notice to the worker(s) at least three weeks prior to the date of the end of employment.⁷⁹ Additionally, the employer must apply for the rebate within six months of payment to the worker(s).⁸⁰

73. Minimum Notice and Terms of Employment Acts, 1973, (Act No. 4/1973) (Ir.), sec. 4, available at <http://www.irishstatutebook.ie/1973/en/act/pub/0004/index.html> (last visited Jan. 4, 2008).

74. Redundancy Payments Act, 1971, *supra* note 35, sec. 17(1).

75. Redundancy Payments Act, 1967, *supra* note 34, sec. 12(2).

76. Redundancy Payments Act, 1971, *supra* note 35, sec. 1.

77. *Id.* sec. 13, amending Redundancy Payments Act, 1967, *supra* note 34, sec. 29(1)(b).

78. *Id.* sec. 12, amending Redundancy Payments Act, 1967, *supra* note 34, sec. 24.

79. *Id.* sec. 13, amending Redundancy Payments Act, 1967, *supra* note 34, sec. 29(2).

80. DEPARTMENT OF ENTERPRISE, TRADE, AND EMPLOYMENT, GUIDE TO THE REDUNDANCY

There is a statutory maximum for redundancy lump-sum payments. Formerly 250 Irish punt per week, or 13,000 punt maximum; these ceilings were increased in 1994 to 300 punt per week, or 15,600 punt maximum, respectively. The current maximum of €600 per week reflects Ireland's 2002 conversion to the Euro as her monetary unit.⁸¹

Despite these provisions, in Ireland, it is customary for the employer and trade union to have agreed upon a determined amount of redundancy payments that generally contain no maximum.⁸² It is of significance that union membership in Ireland is on the decline. The overall national percentage of unionized workers was 45.8% in 1994. As of 2004, this percentage had fallen to 34.6%. Among private sector workers, union membership is only about 20%.⁸³

A conscientious employer might make an effort (but is not legally required) to find alternate work within the business for the employee who is made redundant, since this may result in relieving the employer of the redundancy payment obligation. If the employer makes a written offer to the worker who has received notice of redundancy, the offered work should not differ substantially from the worker's prior job. If the worker declines, he will lose his right to redundancy payment. This rule applies if the employer's offer was made within two weeks of the notified termination date and if the employer's proposed renewal of the work contract or re-engagement of the employee would be effective within four weeks of the end of the employment relationship.⁸⁴ Similarly, his right to redundancy might be relinquished if the offer within the same time frames were for re-employment in a position suitable for the employee, although it would differ with regard to terms and conditions of employment.⁸⁵ An example would be the same work to be performed at a different location or during a different shift.

5. *Collective Redundancies*

The European Commission has required the enactment of domestic legislation that imposes additional duties on the employer in the event of a collective redundancy, as defined by member state law.⁸⁶ The Irish implementing legislation is the Protection of Employment Act 1977, amended by the Protection of Employment Order.⁸⁷ These directives expressly exclude

PAYMENTS SCHEME 28 & 67 (2005).

81. Redundancy Payments (Lump Sum) Regulations 1994 (S.I. No. 64 of 1994), available at <http://www.irishstatutebook.ie/1994/en/si/0064.html> (last visited Jan. 4, 2008).

82. GARY BYRNE ET AL., LAW SOCIETY OF IRELAND: EMPLOYMENT LAW 140 (2003).

83. Chris Dooley, *Unions Succeed in Forcing Their Issues to the Top of the Agenda*, THE IRISH TIMES, Feb. 1, 2006, at 16.

84. Redundancy Payments Act, 1967, *supra* note 34, sec. 15(1)(a), (b).

85. *Id.* sec. 15(2)(a)-(e).

86. Council Directive 75/129, *supra* note 13, as amended by Council Directive 92/56, 1992 O.J. (L 245) 92 (EEC). These two directives were consolidated in 1998 into Council Directive 98/59, 1998 O.J. (L 225) 16 (EC).

87. Protection of Employment Order 1996 (S.I. No. 370 of 1996) (Ir.), available at

contracts for a fixed-term or a specified purpose, public workers, and sea-going vessel crews.

“Collective redundancy” is defined in the Order according to the number of workers made redundant within a thirty-day period, gauged by the total number of workers in the business:

- (i) five workers for a company with twenty-one to forty-nine workers;
- (ii) ten workers for a company with fifty to ninety-nine workers;
- (iii) 10% of the workforce for a company with 100-299 employers;
- (iv) thirty workers for a company with 300 plus workers.⁸⁸

There are two additional duties imposed upon the employer in a collective redundancy. First, it must consult with the employee representative.⁸⁹ This representative might be a trade union or a person or person(s) chosen by workers to represent them. Notably, there are no statutory works councils in Ireland. The goal of this consultation, as expressed in the legislation, is the reaching of an agreement that might reduce or entirely avoid the redundancies. Second, the employer must notify the Minister for Enterprise, Trade and Employment no later than thirty days prior to the terminations.⁹⁰

The employer’s failure to comply with these requirements in a statutory redundancy is punishable by fine.⁹¹ Because of the avoidable nature of such noncompliance and intra-company administrative oversight, there is no substantial body of law in Ireland on collective redundancies.

6. *The Common Law of Wrongful Termination*

A worker cannot file both a claim under the Unfair Dismissals Act and a common law action for wrongful termination, and there are several significant factors in determining his choice. First, the statute of limitations for an Unfair Dismissals Act claim is six months, a period that might be extended up to twelve months if a Rights Commissioner or the EAT decides that “exceptional circumstances” prevented a timely filing.⁹² Once this claim has been filed with a Rights Commissioner or the EAT, the worker is precluded from filing an

<http://www.irishstatutebook.ie/1996/en/si/0370.html> (last visited Jan. 4, 2008).

88. *Id.* ¶ 4..

89. Protection of Employment Act, 1977 (Act No. 7/1977) (Ir.) sec. 9(2), as amended by paragraph 8 of the 1996 Order, *available at* <http://www.irishstatutebook.ie/1977/en/act/pub/0007/index.html> (last visited Jan. 5, 2008).

90. Protection of Employment Act, 1997, (Notification of Proposed Collective Redundancies) Regulations 1977 (S.I. No. 140 of 1977) (Ir.), *available at* <http://www.irishstatutebook.ie/1977/en/si/0140.html> (last visited Jan. 5, 2008).

91. Protection of Employment Act, 1977, *supra* note 89, secs. 11, 13.

92. Unfair Dismissal Act, 1993, *supra* note 36, sec. 8(2).

action at common law.⁹³ The same rule applies if he has filed a lawsuit. This would prohibit his filing an Unfair Dismissals Act claim.

Regarding the statute of limitations in an action at law, the plaintiff might base his charge upon breach of contract, for which the statute is six years,⁹⁴ or on tort, for which the limitations period is three years.⁹⁵ Clearly, the statute will have run on an unfair dismissals claim before the time period for an action at common law.

Drawbacks to pursuing a judicial remedy are the relatively longer time involved for dispensation and the relatively higher costs. One benefit to the action at common law is the court's capacity to award a greater amount in damages. Neither a Rights Commissioner nor the EAT is authorized to award more than two years' pay.⁹⁶ Another positive feature is that the court might be a forum for redress for the plaintiff with less than one year's service with the defending employer.

There had been some doubt regarding whether the constructive dismissal theory was also available in a common law action for wrongful termination. This doubt was laid to rest when the High Court held in *Pickering v. Microsoft*⁹⁷ that constructive discharge counts are alive and well in the Irish courts. The plaintiff in *Pickering* based her action on both contract and tort. On the tort claim, she was awarded €60,000 for pain and suffering to date and €20,000 for future pain and suffering; on the contract claim, she was awarded €20,000 for future loss of earnings.

7. *Transfer of Business*

In 1977, the European Commission adopted a directive requiring domestic legislation to ensure job security upon the transfer of a business or part of a business.⁹⁸ Irish compliance came in the form of statutory regulations.⁹⁹

The regulations are operable any time the identity of the business changes. A business might transfer in its entirety, or in part, regardless of any change in actual ownership.¹⁰⁰ In such cases, the directive provides a defense

93. Unfair Dismissal Act, 1977, *supra* note 28, sec. 15.

94. Statute of Limitations Act, 1957 (Act No. 6/1957), (Ir.) sec. 11(a), *available at* <http://www.irishstatutebook.ie/1957/en/act/pub/0006/index.html> (last visited Jan. 5, 2008).

95. Statute of Limitations (Amendment) Act, 1991 (Act No. 18/1991) (Ir.), sec. 3(1), *available at* <http://www.irishstatutebook.ie/1991/en/act/pub/0018/index.html> (last visited Jan. 5, 2008).

96. Unfair Dismissals Act, 1977, *supra* note 28, sec. 7(1)(c), as amended by Unfair Dismissals Act, 1993, *supra* note 36, sec. 6(a).

97. *Pickering v. Microsoft*, [2005] U.D. 21 (December 2005) (H.Ct.)(Ir.).

98. Council Directive 77/187, 1987 O.J. (L 61) 26 (EEC).

99. European Communities (Safeguarding of Employees' Rights on Transfer of Undertakings) Regulations, 1980 (S.I. No. 306 of 1980) (Ir.), *available at* <http://www.irishstatutebook.ie/1980/en/si/0306.html> (last visited Jan. 5, 2008).

100. *See* *Redmond Stitching v. Bartol*, [1992] I.R.L.R. 366. The European Court of Justice

for the employer that challenges its applicability, the so-called ETO defense ("economic, technical or organizational reasons").¹⁰¹ Ireland has looked to English courts for guidance in the absence of Irish precedent, and the English judiciary has upheld non-hires of pre-transfer workers if the workers would have become redundant absent the transfer.¹⁰²

In order for the ETO defense to succeed, the new company must present objective proof that the actual motive for a decision not to rehire a worker was based on bona fide changes in the workplace. This requirement is identical to the requirement in a challenged redundancy in a non-transfer situation,¹⁰³ and Irish courts have consistently applied the same rule to the ETO defense. In *Morris v. Smart Brothers Ltd.*,¹⁰⁴ a company (Smart Brothers) sold some of its eight retail clothing stores to various purchasers because of business difficulties. The EAT approved some non-hires on redundancy grounds. One such new owner in particular had reduced its workforce by becoming only 50% retail, altering its sales to one-half wholesale. *Smart Brothers* is an illustrative case in point because different circumstances led to the holding that some non-hires were unfair dismissals and some were proven redundancies, depending upon the natures of the particular transferee's business.

The only contractual rights of a worker that do not transfer are any right to pension contributions by the earlier employer and any right to health or survivors' benefits funded by that employer. The directive expressly excludes any right to benefits that are not under the domestic social security obligations,¹⁰⁵ and there is no legal mandate in Ireland that the employer must provide its workers with a pension plan or health coverage.¹⁰⁶

8. Employer's Insolvency

European law precipitated Irish legislation involving workers' rights in the event of insolvency of the employer.¹⁰⁷ Other relevant Irish statutory law is the Bankruptcy Act 1988, which effectively transfers all property belonging to the insolvent business to an Assignee in Bankruptcy contemporaneously with the adjudication of bankruptcy.

held the directive applied to a change by the Groningen local authority in the Netherlands of the grantee of charitable funding for drug addicts from one institution, the Redmond Foundation, to another, the Sigma Foundation. This decision applied the directive to non-profit-making bodies. The Court held that the directive might apply regardless of any change in ownership, requiring only that the identity of the entity remained the same subsequent to the transfer.

101. Council Directive 77/187, *supra* note 98, at art. 4.

102. *See, e.g.*, the English cases of *Gorietree Ltd. v. Jenkinson*, [1984] I.R.L.R. 391 and *Trafford v. Sharpe & Fisher (Building Supplies) Ltd.*, [1994] R.R. 325.

103. Redundancy Payments Act, 1967, *supra* note 34, sec. 7(2).

104. *Morris v. Smart Brothers Ltd.*, [1993] U.D. 688.

105. Council Directive 77/187, *supra* note 98, at art. 3(3).

106. If the employer did have a pension plan, the worker might have rights under the Pensions Acts 1990-2003, but there is no obligation on the part of the transferee company in this regard.

107. Council Directive 80/87, *supra* note 15.

Clearly, automatic termination of the employment relationships occurs upon the company's insolvency and liquidation, since it is no longer a viable business for which the affected employees might work. The Bankruptcy Act's list of priority of creditor payments from the company's assets is (1) liquidation fees (including Revenue Commissioner, if there are any unpaid taxes); (2) secured creditors (these refer to fixed charges, such as a mortgage on land); and (3) preferred creditors.¹⁰⁸

Unpaid wages and salary are included in the third category provided that it was earned during the last four months prior to adjudication and up to a statutory maximum. Other employee rights as creditors of the employer are arrearages in holiday and/or sick pay and any unpaid money because of unfair dismissal.¹⁰⁹ It should be noted that redundancy payments in insolvency situations are paid by the Social Welfare Fund,¹¹⁰ rather than from the employer's assets.

In order to attain this preferred creditor status, the worker must meet the same requirement for redundancy payments, that is, he must have two years of continuous service with the employer¹¹¹ and be between the ages of sixteen and sixty-six. Those workers who have reached the age of sixty-six will be within this class of creditors if they have no social insurance. Significantly, workers who have been away from Ireland during the past year or longer are excluded.¹¹²

B. Summaries of Other Selected European Countries' Laws

1. Austria, France, Germany, and Greece: Examples of Four Pre-2004 expansion European Union Member States

Austria

Employment law in the lovely land of Mozart and Strauss has developed quite similarly to employment law in Germany, Austria's neighbor to the west. Both bodies of law in general have strong social state philosophies with solid worker protection features. The works council in Austria, however, has a much more substantial role than does its counterpart in Germany.

Austria distinguishes between *Arbeiter* ("blue collar" workers) and *Angestellten* ("white collar" employees). In general, the major statute

108. Sec. 81 Bankruptcy Act 1988.

109. Unfair Dismissals Acts 1977-1991 and Redundancy Payments Acts 1967-1992.

110. Sec 39 Social Welfare (Consolidation) Act, 1981 (Act No. 1/1981) (Ir.), sec. 39, available at <http://www.irishstatutebook.ie/1981/en/act/pub/0001/index.html> (last visited Jan. 5, 2008).

111. Sec 2 Social Welfare Act, 1982 (Act No. 2/1982) (Ir.), sec. 2, available at <http://www.irishstatutebook.ie/1982/en/act/pub/0002/index.html> (last visited Jan. 5, 2008).

112. See *Kenny v. Minister for Trade and Employment*, [1999] E.L.R. 163.

applicable to white-collar employees is the *Angestelltengesetz*.¹¹³ Within that statute, however, is an elaborate network of cross-referencing to a legion of statutes that define with some specificity which workers fall into which category and sub-category. White-collar employees include some people who work for merchants, provided they work a designated number of hours according to a detailed mathematical formula; bankers; attorneys; and some employees for commercial companies. Austria is perhaps unique in its classification of private sector workers that are quasi-*Angestellten*, but who are subject to special rules in separate statutes. For example, there are rural workers (*Bauerarbeiter-Schlechtwetterentscheidungsgesetz und Landarbeitergesetz*), mountain workers and miners (*Bergarbeitergesetz*), bakers (*Bäckereiarbeitergesetz*), journalists (*Journalistengesetz*), domestic workers (*Hausgehilfen-und Hausangestelltengesetz*), construction workers (*Bauarbeiter-Urlaubs-und Abfertigungsgesetz*), and actors (*Schauspielergesetz*), to name a few. These separately classified workers are treated generally as white-collar workers. All others not specified in these statutes constitute the blue-collar group.¹¹⁴ The law on termination of the employment relationship differs only according to the two major classifications of blue- and white-collar workers.

The Austrian statutes, as do those in most continental of Europe, refer to dismissals as ordinary, meaning with the notice required by statute, or extraordinary meaning immediate termination.¹¹⁵ For fixed-term contracts, Austrian law does not require the employer to give notice of termination, unlike Irish law. However, similar to Irish law is the court-imposed prohibition on successive fixed-term contracts used implicitly to avoid compliance with statutory notification and termination payment requirements.¹¹⁶

Dismissal must be for cause, either (i) related to the business (for example, downsizing), (ii) inability, or (iii) misconduct.¹¹⁷ In the law applicable to white-collar workers, for "ordinary" termination, statutory notice measured by the length of the worker's service with the employer is required.¹¹⁸

113. *Angestelltengesetz* [AngG], Bundesgesetzblatt Teil, [BGBl] No. 292/1921 (Austria).

114. See Gottfried Winkler, *The Employment Concept and Groups of Employees*, in A BRIEF OUTLINE OF AUSTRIAN LABOUR LAW (Tomandl and Winkler, eds., 1990).

115. Sec 27 *Angestelltengesetz* [AngG] BGBl. 292/192.

116. FRANZ SCHRANK, ON THE DURATION AND TERMINATION OF EMPLOYMENT CONTRACTS 48-49.

117. *Arbeitsverfassungsgesetz* [ArbVG] Bundesgesetzblatt Teil [BGBl] No. 22/1974, § 105 Abs. 3.

118. AngG, *supra* note 115, § 20 Abs. 2.

<i>Length of service</i>	<i>Notice</i>
Less than two years	Six weeks
Two to five years	Two months
Five to fifteen years	Three months
Fifteen to twenty-five years	Four months
More than twenty-five years	Five months

The notice can be written or verbal, and only in stated exceptions (for example, for actors and performers covered by the *Schauspielergesetz*), there is no specified statutory form.¹¹⁹

For the blue-collar worker, the minimum notice is fourteen days, regardless of the length of service.¹²⁰ Inexplicably, this relatively short notice has not been changed since it was first enacted in 1859, during the reign of the Austrian-Hungarian Empire. For the blue-collar worker, this statutory notice might be lengthened through collective bargaining. This is not the case for the white-collar employee.¹²¹

Austrian law is perhaps as strict as any within Europe regarding the establishment of works councils. Every company with at least five workers must have a *Betriebsrat*, or works council.¹²² In addition to the requirement that this body be consulted prior to any management change, its consent is required for an employee's termination.¹²³ A statutory process involving the works council and the employer must precede any notification to the worker to be terminated. Although notification to the works council need not be in writing, most Austrian labor lawyers advise written notification to avoid any lack of clarity regarding the employer's reasons.¹²⁴ If the works council objects to the termination within five working days,¹²⁵ the burden shifts to the employer to show that its reason was one of the three broad statutory grounds.¹²⁶

For an immediately effective termination, the employer must show that it is impossible to continue the relationship by reason of the worker's action. There are six statutory grounds, much more specific than the three grounds listed for a termination with notice: (i) the worker's unfaithfulness, or

119. WALTER SCHWARZ AND GUENTHER LOESCHNIGG, *ARBEITSRECHT* 389 (9th ed. 2001).

120. *Gewerbeordnung* [GewO] Reichsgesetzblatt [RGBl] No. 227/1859, § 77.

121. SCHARZ AND LOESCHNIGG, *supra* note 119, at 390.

122. ArbVG, *supra* note 117, at § 40.

123. *Id.* § 105 Abs. 1.

124. Conversation with Professor Dr. Reinhard Resch of the Labor and Social Law Institute at Johannes-Kepler Universitaet in Linz, January 15, 2008. See also Carol Daugherty Rasnic, *Balancing Rights in the Employment Contract*, 4 JOURNAL OF INTERNATIONAL LAW AND PRACTICE 441, 462 (fall 1995) [hereinafter Rasnic, *Balancing Rights*]

125. *Id.* § 105 Abs. 3.

126. See JOSEF CZERNY, *ARBEITSVERFASSUNGSGESETZ: GESETZ UND KOMMENTARE* 499 (8th ed. 1987).

divulgence of confidential or inappropriate business information; (ii) his permanent inability to perform work duties; (iii) his having engaged in competition with the employer; (iv) his substantial neglect of work; (v) his unreasonably long absence from work for reason(s) other than illness; or (vi) his having caused injury at the workplace or his commission of an offense repugnant to the morals and honor of the employer, any management personnel, his co-workers, or any of their families.¹²⁷ If the employer has discharged a worker without notice, it must be prepared to present evidence of one of these six grounds, or it will be liable to the discharged worker in damages. Although an earlier statute that gave the worker the right to reinstatement has not been repealed, several later laws have limited recovery to damages.¹²⁸

The omnipresent works council also plays a significant role in this extraordinary termination without notice. Both this body and the affected worker are notified simultaneously, and the procedure is thereafter the same as for the ordinary termination with notice. There are two distinctions. First, the time for the works council to object to an ordinary termination is five working days. For the extraordinary termination, it is only three working days.¹²⁹ Second, a works council objection to an ordinary termination can be by simple majority vote. For the extraordinary termination without notice, this works council objection vote must be by two-thirds majority.¹³⁰

A collective redundancy is defined under the Austrian statute according to the total number of workers and the number being laid off within any thirty-day period. A collective layoff for the company with twenty to ninety-nine workers is five workers; for a company with 100-600 workers, a layoff of 5% of all workers; and for the company with more than 600 workers, a layoff of thirty workers.

Notice to the affected workers and to the works council must be no later than thirty days prior to termination,¹³¹ and the employer must consider "social reasons" in selecting which workers are to be made redundant (for example, seniority, age of the worker, number of dependents, or family responsibilities, etc.).¹³² According to Dr. Franz Schrank, Professor of the Economic Council of Styria (*Wirtschaftskammer Steiermark*) and Professor of Labor Law at Universität Wien, the courts will intervene only with regard to the selection issue, whether the company appropriately considered these social factors, but they will not address the employer's decision regarding the redundancies.¹³³

Severance pay is the same for the blue-collar and white-collar worker, calculated according to the worker's time of service with the employer and the

127. AngG, *supra* note 115, at § 27.

128. The unrepealed statute is *Allgemeines Bürgerliches Gesetzbuch* [ABGB], § 1162a.

129. ArbVG, *supra* note 117, § 106 Abs. 1.

130. *Id.* § 106 Abs. 2.

131. Arbeitsmarktförderungsgesetz [AMFG] Bundesgesetzblatt Teil [BGB1] No. 31/1969, §§ 45, 45a.

132. Sec 97 Abs. 1 Z 4 ArbVG.

133. *Dialog*, *supra* note 11.

worker's earnings (computed according to his last month of work):¹³⁴

<i>Length of service</i>	<i>Amount of pay</i>
Three to five years	Two months' wage / salary
Five to ten years	Three months' wage / salary
Ten to fifteen years	Four months' wage / salary
Fifteen to twenty years	Six months' wage / salary
Twenty to twenty-five years	Nine months' wage / salary
More than twenty-five years	Twelve months' wage / salary

The employee who has voluntarily quit is entitled to the same statutory severance pay, provided (i) his resignation was with statutory good cause and (ii) he has given the required one month's notice to the employer.¹³⁵

France

French law has been a vanguard in worker protections and the establishment of the thirty-five-hour workweek, notably shorter than the European norm. Three sections of the French Labor Code (*Code du Travail*) apply to worker terminations.¹³⁶ A worker might resign at any time and for any reason. To the contrary, the employer must have an objectively substantial reason to dismiss a worker. The relevant statutes lists these reasons as incompetence of the worker; a serious breakdown of the employment relationship that has led to the employer's loss of confidence in the worker; the worker's prolonged absence (even if by reason of illness); the worker's physical inability (provided it did not result from an industrial accident or occupational illness); the advanced age of the employee (that is, forced retirement); or the worker's negligence or misconduct. The law requires the company to consider social factors (age of the worker, his number of dependents, and any special status such as being a personal with a disability or single parenthood). In redundancy cases, the employer must obtain a permit from the French authorities.

This requirement that the employer have good cause for termination applies only to employment contracts of unlimited duration. A separate part of the *Code du Travail* applies to contracts of specified duration.¹³⁷ In France, a fixed-term position may not exceed eighteen months, and limited term hires are lawful only if there are justifying reasons (such as the need to fill a position temporarily for a worker who is ill, a temporary increase in production, or seasonal employment).

Unlike other European countries, France has a relatively new statute of limited application similar to the American employment-at-will rule. The

134. Arbeitsabfertigungsgesetz [ArbAbfG] Bundesgesetzblatt Teil [BGBl] No. 107/1979, § 2; AngG, *supra* note 115, § 23.

135. AngG, *supra* note 115, § 23 Abs. 7.

136. Act of 13 July 1967, Law of 13 July 1973, and Act of 3 Jan. 1975.

137. Act of 12 July 1990.

Contrat Nouvelles Embaucheries (“New Hiring Contract,” or CNE)¹³⁸ provides an exception to the general rule requiring “real and serious” cause to terminate a worker after a short trial period, which under French law cannot exceed six months. This ordinance, applicable only to employers with twenty or fewer workers, permits termination without cause. If hired under a CNE, an employee may be discharged without good reason during his first two years of work, provided the employer: (i) sends him a termination letter by registered mail; (ii) complies with the notice period; (iii) pays the employee an indemnity equal to 8% of all remuneration due to him up to termination date; and (iv) pays the unemployment fund an indemnity equal to 2%, the same remuneration figure paid to the worker. The May 6, 2007, elections and change of government might affect the future of the CNE, which is now somewhat dubious. Moreover, it has been challenged as a violation of ILO Convention 158, the outcome of which is still in the French courts. Also, procedures on compliance are still pending while an ordinance might be superseded by subsequent legislation.

Government statistics show that as of March, 2007, 850,000 CNEs had been signed since the effective date of the ordinance, and 460,000 workers had current CNE status. These same statistics reveal that the employment of one of two CNE workers has been terminated during the first year of employment. This is somewhat misleading, however, since one-half of these terminations were resignations by the worker.¹³⁹

French law requires a minimum notice of one month by registered mail to a worker who is to be terminated, provided he has six months’ uninterrupted service with the employer. If he has two or more years of service, this notice is two months. In reality, collective bargaining agreements in heavily unionized France establish longer periods of notification. Summary dismissal is permitted only in those rare cases in which the worker has been guilty of gross misconduct, an issue generally settled by a court or tribunal. The initial notice is simple, informing the worker only of the date of his termination and summoning him to a hearing (with a co-worker, if the worker so chooses) during which he will be given the reason(s) for termination. Within one day after this meeting, the employer sends a second registered letter to the worker, confirming the decision to terminate for the reasons given at the meeting, beginning the statutory period of notification. If the worker desires to challenge the dismissal, he must respond within ten days of receipt of the second letter. The employer then must respond by registered letter within ten days.

The employer is required to retain the worker if at all possible, including providing further training for a possible different position with the company.

138. Ordinance of Aug. 2, 2005. An ordinance in French legal terminology is a governmental mandate under parliamentary authorization. It is somewhat comparable to the executive order under American federal law.

139. Jerome Debois, *The New Hiring Contract*, MONDAQ BUS. BRIEFING, Aug. 18, 2007, http://www.mondaq.com/article.asp?article_id=47750.

Indeed, a company with at least fifty workers must have a written employment retention plan. The company might even offer a position for the worker in its offices in another country, but if the worker refuses an alternate position, he does not forfeit his rights. Resolution might be in an industrial tribunal or a conciliation board (*Conseil des Prud'hommes*) or the Court of Appeal, and, ultimately, the Supreme Court (*Cour de Cassation*). Should the court or tribunal determine the termination was unlawful, it might propose reinstatement, which either the worker or the employer may decline. In such case, the remedy is damages in the minimum amount of six months of the worker's remuneration.

The relevant French statute¹⁴⁰ requires all companies with fifty or more workers to have a works council (*comite d'entreprise*). This body must be informed, but not consulted, regarding the employer's decision to terminate. For businesses with eleven to forty-nine workers, this same statute requires a workers' representative, without any of the participatory functions of the works council.

A collective redundancy is defined under French law as one in which ten workers will be terminated within any thirty-day period. The employer is then required to consult with the works council.

Severance pay is only paid to those workers who have at least two years of service with the employer. This amount is a relatively meager 10% of the wage or salary for the white-collar worker or twenty hours wages for the blue-collar worker for each year of service.¹⁴¹

According to Professor Gerard Vachet of the University of Toulon, the French view is contrary to international developments. First, the EU model is a market economy model, but the French do not support the market-led principle. In Professor Vachet's opinion, this is problematic for France. Second, 80% of French workers prefer working in civil service because of its near-absolute job security. He distinguishes job security (that is, the desire of the worker to retain his job) and employment insecurity (that is, the unemployed are usually in two groups: older workers with qualifications that do not fit today's market and younger worker with qualifications that are simply not useful). He further notes that twelve of the finest institutions of higher education in France are business schools, indicative of the trend to remedy the insufficiency in pragmatic training and skills.¹⁴²

Professor Frank Hendrickx of the University of Leuven in Belgium refers to France as "swimming against the European stream," since workers refuse to work longer hours, and France in general has reduced the usual age for retirement.¹⁴³ Moreover, French law protects the position, not the employment

140. Law of 28 Oct. 1990.

141. Law of 19 Jan. 1978.

142. *Dialog*, *supra* note 11 (remarks by Professor Vachet translated from the French into English by Professor Frank Hendrickx, University of Leuven).

143. The foregoing French law is in scattered sections of Ordinance of 13 July, 1973 and

of the individual worker. Both Professor Hendrickx and Professor Vachet support the more traditional European view of protecting the person rather the job.¹⁴⁴

Germany

German law is replete with social considerations and benefits. This is no coincidence, since the first recorded comprehensive social security laws were the brain child of late nineteenth-century Chancellor Otto von Bismarck.¹⁴⁵ Germany's elaborate and historically developed social benefit structure, a model for much of Europe, is a philosophy imbedded in her labor law statutes.

The statutory blue- white-collar worker distinction has always prevailed in Germany. Unlike Austria, the legislation, albeit massive, is not complex. The general line of demarcation is the element of discretionary judgment in job functions for the white-collar worker.¹⁴⁶

For an employee with at least six months' service with the employer, good cause is imperative in justifying any termination of the employment relationship in Germany.¹⁴⁷ Another difference from Austrian law is that Germany imposes identical requirements for "good cause" for the blue-collar and white-collar worker.¹⁴⁸ German law previously required a minimum of six weeks notice for white collar workers¹⁴⁹ and only two weeks for the blue-collar worker.¹⁵⁰ In 1990, the *Bundesverfassungsgericht* (Federal Constitutional Court) held this unconstitutional under the *Grundgesetz* [GG] (Basic Law) Article 3, which assures to all equality before the law.¹⁵¹ Thus, the *Bundestag* (federal legislature) amended the law and adopted a statute identical to that in the former *Deutsche Demokratische Republic* (Republic of East Germany), using a six-week to seven month notice period, based upon length of service, for all workers.¹⁵²

Act of January, 1975, on Termination of Workers.

144. *Id.*

145. Germany's social legislation, the first in the world, was the *Gesetz betreffend die Krankenversicherung der Arbeiter* (statute for Health Insurance for the Worker) (1883). See Social Security Programs Throughout the World, in 1989 Research Report No. 62 U.S. Dept. of Health & Human Services (Social Security Administration), Office of International Policy, Office of Research and Studies) (May 1990), which provides an in-depth universal look at programs then in effect. For example, Belgium's first federal pension law was enacted in 1924, Austria's in 1906, France's in 1910, Ireland's in 1908, Italy's in 1919, the Netherlands' in 1913, Spain's in 1919, Sweden's in 1913, and Great Britain's in 1908.

146. See Reinhard Richardi, "Kommentar zur Bürgerliches Gesetzbuch mit Einführungsgesetz und Nebensetzen," *Recht der Schuldverhältnisse* 334 (Julius von Staudinger ed., 12th ed., 1957).

147. Sec 1 *Kündigungsschutzgesetz* [KSchG] 1969 BGBl. I 1317.

148. [KundFG], 7 October, 1993 (BGBl. I 1668).

149. *Gesetz über die Fristen für die Kündigung von Angestellten* 1926 RGBl. I 399, ber. 412, geändert durch Gesetz vom Dez. 1989, BGBl. I S. 226.

150. Sec 622 *Bürgerliches Gesetzbuch* [BGB 1896 RGBl]. Sec. 195, zuletzt geändert 1983 BGBl. 195.

151. The decision was *Bundesverfassungsgericht* [BverfG' Entscheidung] 82 S.126=AP Nr. 28 zu sec. 622 BGB, 30 May, 1990.

152. Secs. 621 and 622 BGB, *Gesetz zur Vereinheitlichung der Kündigungsfristen von Arbeitern und Angestellten* [Kündigungsfristgesetz].

Fixed-term contracts simply end on the designated date, without any obligation on the employer to notify the worker. However, not unlike landlord-tenant laws, if the employer permits the worker to continue working after the termination date, the presumption is that the relationship has converted into one for an indefinite term¹⁵³

The German statute contains the three general causes for termination: (i) economic concerns related to the business (*betriebsbedingt*); (ii) inability or lack of capacity beyond the worker's control (*personensbedingt*); or (iii) the employee's deliberately inferior work or misconduct at the workplace (*verhaltensbedingt*).¹⁵⁴ The work-related concept is sacrosanct under German employment law. For example, a worker's immoral, or even unlawful or criminal, conduct may well be abhorrent to the employer, but unless it affects his work, it will not constitute sufficient cause to terminate the employment contract.¹⁵⁵

Under the first cause, *betriebsbedingt*, if the employer relies upon an economic or business related ground, the social factors recurring throughout European domestic law regarding the selection of which workers will be made redundant are statutory in Germany. The express factors the company must consider are the worker's age, seniority, and number of dependents.¹⁵⁶

With respect to the second cause — *personensbedingt* — if the employee's prolonged absence because of illness is the triggering cause, the German courts have imposed upon the employer the duty of hindsight. That is, the employer must rely on a medical prognosis. Moreover, if a prognosis that was reasonable at the time the employer gave the employee notice of termination changes, the notice must be revoked.¹⁵⁷ This requirement that the employer exercise continuing due diligence can indeed be problematic. The German courts have generally deferred to the employer's judgment in such cases, applying an objective standard. For example, the *Bundesarbeitsgericht* (Federal Labor Court) sustained a dismissal of an employee suffering from AIDS who had attempted suicide because of his despondence over the illness. The attending physician had certified the employee's mental and physical state rendered him incapable of fulfilling his work responsibilities.¹⁵⁸ In another case, the Court approved the termination of an orchestra concertmaster whom

153. Secs 620, Abs. 1 u. 625 *Bürgerliches Gesetzbuch* [BGB] 1896 RGBI. 195, 1995 BGBI. I S 1668.

154. KSchG, *supra* note 147, §§ 1 Abs. 2, 1, 2, and 3.

155. See Wilfred Berkowsky, *Die Personen und Verhältnensbedingte Kündigung* 107, 46. On 23 February 1979, the *Bundesarbeitsgericht* (BAG) (Supreme Labour Court) held that the instigating cause must affect the work.

156. Manfred Weiss, *The Role of Neutrals in the Resolution of Labor Disputes in the Federal Republic of Germany*, 10 COMP. LAB. L. 339, 352 (1989) (a good discussion in the English language of how the tribunals and courts have applied this duty). Prof. Weiss is Professor of Labor Law at Johann Wolfgang Goethe Universität in Frankfurt.

157. Berkowsky, *supra* note 155, at 89.

158. BAG Feb. 16, 1989.

the employer had assessed as lacking the requisite leadership ability.¹⁵⁹

Somewhat enigmatically, the employer seems not to have the same degree of discretion in terminations because of the worker's conduct. In determining whether to terminate an employee for his deliberate conduct, the standard the courts have imposed on the German employer is one of a "calm, understanding and non-judgmental employer" (*ruhig und verständiger Arbeitgeber*), rather than one of a "reasonable employer."¹⁶⁰ This patient-and-tolerant yardstick is consistent, even if the person making employment decisions has a particularly demanding or idiosyncratic temperament. Even a dismissal on this ground when the employer has proven that the employee's work output is well below his capability will not be sustained if the employee measures well in comparison to his co-workers.¹⁶¹ Additionally, the Court has consistently held that any decision to terminate is premature if the worker had not first been warned of his inferior performance.¹⁶²

An interesting by-product of German unification in 1991 resolved the discriminatory minimum time for notification of dismissal as between blue- and white-collar workers. Previously, white-collar employees were assured at least six weeks' notice,¹⁶³ whereas the blue-collar workers were entitled to only two weeks' notice.¹⁶⁴ Because the German Constitution requires equality before the law,¹⁶⁵ the *Bundesverfassungsgesetz* (Federal Constitutional Court) held this differing treatment to be unconstitutional.¹⁶⁶ Official reunification soon followed, and the *Bundestag* (Federal Parliament) simply repealed the law in 1993, simultaneously adopting the same notification periods used in the former *Deutsche Demokratische Republik* (German Democratic Republic, or East Germany). The current minimum notice is the same for white- and blue-collar workers.¹⁶⁷

159. BAG July 29, 1976.

160. [BAG] Nov. 2, 1961 AP Nr. 3 zu Verhaltungsbedingte Kündigung [NJW] 1962, 556; [BAG] Mar. 13, 1987 AP Nr. 18 Sec 1 KSchG 1969, Verhaltungsbedingte Kündigung [NA] 1987, 518.

161. Berkowsky, *supra* note 155, at 89.

162. BAG 28 September 1961 AP Nr. 1 zu sec KSchG *Verhaltensbedingte Kündigung*; BAG 29 July 1976; BAG 18 Jan. 1980; and BAG 12 Nov. 1985.

163. Gesetz über die Fristen für Kündigung von Angestellten (Statute on Termination of White Collar Workers), 192 RGBl. I 399, ber. 412, geaendert durch Gesetz vom (amended by law of) Dec. 1989, BGBl. I S 2261.

164. BGB, *supra* note 153, § 622 Abs. 2.

165. *Grundgesetz* [GG] (Basic Law) Article 3.

166. Bundesverfassungsgericht [BverfG] (Federal Constitutional Court) Entscheidung 82 S. 126=AP Nr. 28 zu sec 622 BGB, 30 Mar. 1990.

167. Kündigungsfristengesetz (Statute for Employment Termination Protection) vom 7 Oct. 1993 (BGBl. 1668), sec 622 (1) BGB.

<i>Length of service</i>	<i>Minimum notice</i>
Less than two years	Interval between pay period (unless worker is paid quarterly, in which case notice is six weeks)
Two to five years	One month
Five to eight years	Two months
Eight to ten years	Three months
Ten to twelve years	Four months
Twelve to fifteen years	Five months
Fifteen to twenty years	Six months
Twenty plus years	Seven months

The employer might require as an entitlement to notice that the affected worker be at least twenty-six years of age. At each interval, the month is rounded off to the end of the calendar month. Notice must in written form.¹⁶⁸ The employer might (but is not required by law to) give the worker the option of continuing work, but subject to different terms of employment. The employee has three weeks to decide whether to accept the offer.¹⁶⁹

The German statutory works council, although a requirement for all businesses with five or more workers,¹⁷⁰ is not as prevalent as in Austria. Many smaller businesses simply do not comply with this mandate.¹⁷¹

In one respect, Austrian law is much stricter with regard to works councils, for the statutory compliance with the works council requirement is absolutely enforced. In another, the works council in Germany is considerably more significant. In larger businesses in Germany, this body possesses much more managerial power.

First, the German employer must notify the works council before implementation of most management decisions, including determining workplace rules.¹⁷² For companies with 2,000 or more workers, the *Mitbestimmungsgesetz*,¹⁷³ an employer's nemesis, applies. In such cases, worker representatives are required to be among the members of the *Vorstand* (Board of Directors).¹⁷⁴ Indeed, employee representatives (including white- and blue-collar workers proportionate to their inclusion in the company) must constitute 50% of the Board. This is a basic version of worker co-

168. BGB, *supra* note 153, §§ 623 and 120.

169. KSchG, *supra* note 147, § 2.

170. Sec 1 Betriebsverfassungsgesetz [BetrVG] (Basic Statute on the Workplace), 1988 BGBl. I 2261.

171. Weiss, *supra* note 156, at 83.

172. BetrVG, *supra* note 170, §§ 90, 99, and 102.

173. Mitbestimmungsgesetz [MitbG] (Statute of Worker's Right to Consult in Management Decisions) 1976, BGBl. I 1153.

174. *Id.* § 7(1), (3).

determination in the broadest sense.

In dismissal cases, the works council is notified prior to the worker. This body has one week to object on one of five grounds listed in the works council legislation.¹⁷⁵ First, if the termination were work-related, the works council can object regarding the choice of the particular worker(s). Second, if the business has 1,000 or more employees, the employer is required to take into account demographics (such as average age of workers and percentage of women workers). Third, the works council might contend that a worker might plausibly be placed in another position within the company. Fourth, it might insist that such alternate employment would be appropriate, provided only that the worker be properly trained. In such cases, it is the employer's obligation to provide such training. Finally, the works council might insist that the worker be retained in his current position, provided he is willing to agree to some changes, which might in fact be advantageous to the company. The works council must first have the worker's consent before it may object on the final ground.¹⁷⁶

Once the affected worker has been notified, he must notify the works council. This body then has one week to make objections.¹⁷⁷ The works council often chooses to intervene and try to mediate a settlement. Notably, in an ordinary dismissal the works council is notified after the worker has been informed of his dismissal, but in the extraordinary (immediate) dismissal, the works council is notified concurrently with the worker. If the works council objects and the issue is not resolved, the worker may file a petition with the local *Arbeitsgericht* (Labor Court) within three weeks after his initial notification.¹⁷⁸

German law includes the same ordinary and extraordinary termination distinctions as the Austrian legislation. The extraordinary dismissal is without notice. The procedural difference is simply that the employer must notify the worker and the works council concurrently, and the works council is given only three days, rather than the usual week to object. From that stage, the steps are identical to ordinary termination.¹⁷⁹

The evidentiary burden upon the employer to justify an extraordinary discharge is a heavy one. The worker's conduct must be shown to be of such severity that the result is a permanent negative effect on the atmosphere of the workplace. One example of this would be sexual harassment of co-workers. Two judicial decisions in the employer's favor on this issue are instructive.

175. The procedural provisions regarding the works council are included in BetrVG, *supra* note 170, § 102 Abs. 2, 3.

176. *Id.*

177. Sec. 102 abs. 2 *Betriebsverfassungsgesetz* [BetrVG], 1988 BGB. I 2261.

178. Sec. 52 U Br, 3 kut b, 5I, 1 ArbGG, ortliche Zuständigkeit (secs. 46 II ArbGG, 17ZPO, 161 II, 124 I, HGB des ArbG Reutlingen als Sitz den XKKG, nach sec I ArbGG; Arbeitsgericht; and sec. 4 KSchG.

179. See Rasnic, *Balancing Rights*, *supra* note 124, at 475-476 for detailed procedures in Germany.

One local labor court held that there had been cause for immediate termination of a worker who had stated to a non-citizen colleague that “[f]oreigners and Turks ought to be burned to death.”¹⁸⁰ Another local court sided with the employer who dismissed a worker because of the worker’s persistence, despite warnings, in using working hours to attempt to proselyte fellow workers into the Church of Scientology.¹⁸¹

German legislation contains the usual additional protections against termination for persons with a disability, who are entitled to at least four (4) weeks’ notice, regardless of length of service.¹⁸²

Severance pay is assured to all terminated workers, regardless of cause, including those dismissed without notice. The amount is one-half the monthly earnings for each year worked, calculated according to the last year worked. This calculation includes not only monetary wages or salaries, but also payments in kind. Any time worked that exceeds six months is rounded off to a full year.¹⁸³

A mass layoff, or collective redundancy,¹⁸⁴ is determined according to the following scale of number laid off within a one-month period:

<i>Total Number of Workers</i>	<i>Number Dismissed Within One Month</i>
Twenty to fifty-nine	Five
Sixty to 499	Ten percent or more than twenty-five, whichever is less
500 plus	Thirty or more

In a collective redundancy, the employer must inform in writing both the works council and the *Agentur für Arbeit* (Federal Office of Employment).¹⁸⁵ Then, someone from this public office must be given a tour of the business, accompanied by one representative for each two workers, an employer representative, and any other public officials determined by the Federal Office of Employment to be appropriate. These federal officials take into account the interests of the company and the workers, as well as any effect on the labor market and the economy, before making a written statement as to whether the

180. ArbG Siegburg (Labor Court in Siegburg), Nov. 4, 1993.

181. ArbG Ludwigshafen (Labor Court in Ludwigshafen), May 12, 1993.

182. Sec 86 Sozialgesetzbuch [SGB] (Federal Social Act) 1 x, June 19, 2001 (BGBl. I, S. 1046). According to Prof. Dr. Gerhard Ring of the law faculty at University of Freiburg, the employer must also consider any physical or mental impediments that might negatively affect re-employment. Gerhard Ring, *Kündigung und Ihre allgemeine Beschränkungen im deutschen Recht* to be published in INTERNATIONALES UND VERGLEICHENDES ARBEITS- UND SOZIALRECHT, BAND II (International and Comparative Employment and Labour Law, Vol. II) (Verlag des OeGB, Vienna, 2007) at 14 [hereinafter *Vergleich*].

183. KSchG, *supra* note 147, § 1a Abs. 2.

184. *Id.* §§ 17 *et seq.*

185. Sec. 17 abs. 1 KSchG.

layoff is necessary.¹⁸⁶ At least one month must follow the publication of this statement, a period that is extended to two months if the Federal Office of Employment has determined it advisable.¹⁸⁷ Consequently, the implementation of most collective redundancies is postponed.

Greece

As in Austria and Germany, Greece also distinguishes between blue-collar and white-collar workers, in particular, with regard to notice before termination and amount of severance pay.¹⁸⁸ The blue-collar worker has no statutory entitlement to any notice whatsoever, a drastic contrast to white-collar protections. Before a termination for a member of this latter group with at least two months' service is legally effective, he must be given at least two months' notice. There is a twenty-eight-step increase in the length of required notice, culminating with twenty-four months.¹⁸⁹ Two years is an unusually long period of notification by usual European standards, particularly in view of the absence of required notice for blue-collar workers.

The *Aeropag* (the Greek legislature) has provided that the employer might "buy-out" the notice period by paying the employee his salary in lieu of notice.¹⁹⁰ This section also provides that the employer might give a reduced notice and pay a minimum of one-half the employee's wage during the notice period. According to Dr. Nikos Gavalas, practicing attorney and member of the law faculty at University Demokritus in Thrace, in the vast majority of cases¹⁹¹ employers do not exercise this option, but choose rather simply to give no notice and pay the worker for the time not worked. Additionally, this notice period might be less if the reason for dismissal is economic. In such cases, although the notification must be in written form, there is no necessity for the employer to state its reason. Dr. Gavalas explains that statutory notice thus has little relevance in Greek law.¹⁹²

The Greek Civil Code applies a nebulous objective test regarding what constitutes grounds for termination.¹⁹³ In practice, this usually is based upon the worker's incompetence or misconduct or other economic, business or technical reasons.¹⁹⁴ The national legislature has been more conservative than the courts. Notably, the Supreme Court of Greece has held that the employer must not have acted arbitrarily in deciding whether to terminate a worker.

186. *Id.*

187. *Id.*

188. Nomos (1920:2112) [Greek Employment Statute]

189. Nomos (1920:2112) Art. 1.

190. Nomos (1920:2112) Art. 3.

191. In an estimated 95% of all cases, companies in Greece choose simply to give no notice of termination and to pay the worker for entire notice period. See Nikalaos Gavalas, *Aspekte der Kündigung aus wirtschaftlichen Gründen im griechischen Arbeitsrecht*, to be published in *Vergleich*, *supra* note 182, at 3.

192. *Id.* at 2.

193. Astikos Kodikas [Greek Civil Code] Art. 28.

194. Gavalas, *supra* note 191, at n.4. Thus, Dr. Gavalas refers to the statutory objective test as "quasi-objective" in practice.

Moreover, even though the courts have also required companies to take into consideration social factors in redundancy situations, they generally have deferred to the employer's discretion.¹⁹⁵ These "social considerations" are of little regard, since Greece has ratified neither ILO Convention 158 nor the Article 24 revisions to the European Social Charter. It is somewhat anomalous that Greek statutory law has essentially no protections against arbitrary termination, contrary to the overall legal climate among European Union member states.¹⁹⁶

There is also no requirement for an employer to report a termination to any federal office or authority. Although a 1988 statute provides for works councils, they are not required. Consequently, there are few such bodies in Greece.¹⁹⁷ Courts only apply the "ultimate ratio principle," requiring the employer to endeavor to place the worker in an alternate position within the company if at all possible, only when layoffs occur for economic reasons. The courts have directed employers to consider factors such as age, length of employment, and family responsibilities in selecting which workers are to be made redundant when this type of layoff occurs.¹⁹⁸

Since enactment of a 1920 statute, white-collar workers have been entitled to severance pay, whereas the source of blue-collar workers' severance rights is the union bargaining process.¹⁹⁹ However, the distinction between the respective rights of the two groups is strikingly evident:

White-Collar Severance Entitlement

<i>Length of service</i>	<i>Amount of pay</i>
Two months to one year	One month's pay
One to four years (amount gradually increases up to)	Two month's pay
Twenty-eight plus years	Twenty four months' pay

* The statutory maximum is €6,500.

Blue-Collar Severance Entitlement

<i>Length of service</i>	<i>Amount of pay</i>
Two months to one year	Five days' wages
One to two years	Seven days' wages
Two to five years	Fifteen days' wages

195. *Id.* at 8. Greece has not ratified ILO Convention 158.

196. There are, to be sure, the protections that are typical in Europe of specific groups, for example, mothers (Nomos 1984:1418), union representative (Nomos 1982:1264), disabled workers (Nomos 1998:2643), and those protection under the 2000 European Commission directives. The Greek statute complying with these directives is Nomos (2005:3304).

197. Gavalas, *supra* note 191, at 10-11.

198. *Id.* at 9, 10.

199. Nomos (1920) (Severance statute) and Nomos (2006) (Collective Bargaining Agreement statute).

Five to ten years	Thirty days' wages
Ten to fifteen years	Sixty days' wages
Fifteen to twenty years	100 days' wages
Twenty to twenty-five years	120 days' wages
Twenty-five to thirty years	145 days' wages
Thirty plus years	165 days' wages

The disparity is patent. The white collar worker is entitled to severance pay of an entire month's earnings, whereas his blue-collar counterpart is entitled to wages for a mere five days. This discrepancy and the white-collar right to notice have been adamantly criticized by labor as discriminatory and unconstitutional. Since the time of Aristophanes, Sophocles, and Plato, great Greek minds have questioned the logic of subordinating women, and dramatist Alcidamas deplored slavery. However, the moral lamentations against these discriminations seem not to have been transferred into the lower level of workers in Greek law. Similar to the United Kingdom, Greece — although often referred to as the “cradle of western civilization” — has no written constitution, and courts decide what rises to the level of constitutional law on an ad hoc basis.²⁰⁰

A mass layoff, or collective redundancy, is defined by statutory law as applying only to companies with at least twenty workers.²⁰¹ For the company with twenty to two hundred workers, a layoff of at least five workers within one calendar month is collective. For the company with 201 or more workers, a collective redundancy is a layoff of at least 2 percent of the total workforce. The same statute applies to closures. In such cases, the employer must consult with the representative chosen by the workers. For redundancies (but not for business closings), failure to reach agreement with this representative (which occurs in most instances) will require the company to obtain permission of the competent governmental authority, a step that is purely protocol.

2. The Czech Republic, Hungary, Slovakia and Slovenia: Examples of Four New EU Member States

Czech Republic

The Czech Republic is one of the most stable and economically productive of the former communist Eastern European countries. The indomitable spirit of former Czechoslovakians, as reflected in the temporary liberalization achieved in the Prague Spring of 1968 (the so-called “Velvet Revolution”), might likely be credited with this status. After finally overthrowing the Soviet presence in Czechoslovakia in 1989, the small country was again peacefully divided politically just four years later (the “Velvet

200. Gavalas, *supra* note 191, at 11.

201. Nomos (1983:1387).

Divorce”). Both countries — the Czech Republic and Slovakia — are among the ten EU member states admitted on May 1, 2004.

The Czech legislature adopted a comprehensive labor law statute in 2006 that made some revisions to the former 1965 law.²⁰² Other statutes apply in specific sectors, for example, local, regional, and federal governments, and the shipping industry, but the 2006 legislation applies to all except these limited areas. The changes, although numerous, are substantively minor. Slight revisions were enacted to the notification periods, instances when dismissal is justified on business-related grounds, definition of collective redundancy, significance of the collective bargaining agreement, and amount of severance pay.²⁰³ Unless expressly repealed, sections of the former statute are still in effect.

Czech statutory law has an unusual provision regarding temporary workers hired to perform a designated job. The general rule is that they remain technically employed for fifteen days after this work has been completed.²⁰⁴

The statutory period of notice is the same for white- and blue-collar workers, and there are no sliding scales according to length of service. The worker must be given two months’ written notice of his dismissal, regardless of other factors.²⁰⁵ This period commences on the last day of the calendar month when notice is proffered. Moreover, the Supreme Administrative Court of the Czech Republic has decided that this notification period is strictly enforced and cannot be altered by a collective bargaining agreement.²⁰⁶

Identical sections in both the former and the new statute list grounds for termination, which are the usual inability or misconduct of the worker or business/economic reasons.²⁰⁷ The employer might cite one or more reasons, but once this written notice is given, it is not subject to change. Additionally, a union contract cannot effectively add or delete from these statutory grounds for discharge.²⁰⁸

The works council in the Czech Republic has little function in termination proceedings. The company is obligated to notify the union, if any, before the worker is given his written notice. The union might object to the dismissal within fifteen days of its notification, and its response must be written. In economic terminations, the employer has the duty to attempt to place the worker in an alternate position within the company. Regardless of whether the union consents, the dismissal proceeds. Nevertheless, the company

202. Zákon č. 65/1965 Sb., zákonic prace. The new statute is § 44 *et seq.* zákon, č. 262/2006 Sb. zákonic prace, in effect since January 1, 2007.

203. Martin Stefko, *Kündigung und ihre allgemeine Beschränkungen in der Tschechischen Republik*, to be published in *Vergleich*, *supra* note 182, at 2.

204. Zákon č. 65/1965 Sb., sec 70b (former law).

205. Zákon č. 65/1965 Sb., sec 45 (former law).

206. Decision from Mar. 10, 1976, Cpj 42/76, Bulletin Nr. 3, 1977, at 11.

207. Zákon č. 65/1965 Sb., sec 46 (former law); zákon, č. 262/2006 Sb, sec 52. (new law).

208. By decision of the Supreme Administrative Court, 16 Co 331/99, Oct. 11, 1999, *Soundnick rozhledech*, Nr. 1, at 18-20.

must continue to meet with union representatives for a one-year period to attempt to resolve the issue, which may be a unique example of a legally-required union/company negotiation in Europe. Without this continued negotiation, the termination will be automatically revoked.²⁰⁹ The only recourse for the union is to challenge the dismissal in court. However, courts only have jurisdiction over the issue of whether there is indeed another job in the company for this worker. In certain situations (for example, the worker is a single parent caring for a child under the age of fifteen years or supports a disabled person), the employer must report the dismissal to the designated federal administrative office. This office will use its resources to work with the employer to help the terminated worker find new gainful employment.²¹⁰

The law determining which layoffs are considered collective redundancies is similar to other European statutes: for a company with 20 to 100 workers, ten layoffs within a thirty day period; for a company with 101 to 300 workers, 10 percent the total workforce; and for one with 300 plus workers, a layoff of thirty are mass layoffs.²¹¹ In these cases, the employer must give affected workers, the union, and the works council, if any, thirty days' written notice. The contents must include the reason(s) for the layoffs; total number to be terminated; names and work categories of those affected; criteria used in selecting those made redundant; and the amount of severance pay for each.

Statutory severance pay in the Czech Republic is three times the workers' average wage or salary as calculated from last quarter of the year during which he is dismissed, an amount that might be increased through collective bargaining. Essentially, the worker is paid the amount he earned during that time, plus any other benefits or bonuses.²¹²

Hungary

The Hungarians, similar to the independent-minded Czechoslovakians only twelve years later, engaged in a peaceful but forceful revolution in 1956. Predictably, invading Soviet forces defeated the rebels, whose unilateral withdrawal from the Warsaw Pact was only temporarily effective.²¹³ The determined Hungarians finally achieved independence in 1989, and Hungary is now a member of the EU.

The Hungarian statute regulating employment terminations was first

209. Zákon č. 65/1965 Sb., sec. 59 (former law).

210. Zákon č. 65/1965 Sb., sec. 47 II (former law).

211. Zákon č. 65/1965 Sb., sec. 52(1) (former law); zákon, č. 262/2006 Sb., secs 46(1), 62, 63 and 64 (new law).

212. Zákon, č. 262/2006 Sb., secs. 67 and 68 (new law).

213. The Warsaw Pact was a Soviet institutionalization of its Eastern European countries (*viz.*, Albania, Bulgaria, Czechoslovakia, Eastern Germany, Hungary, Poland, Romania and the Soviet Union) through a multilateral Treaty on Friendship, Cooperation and Mutual Assistance. A complex convention in effect from 1955 until 1970, one part of the Warsaw Pact solidified the U.S.S.R.'s power as leader of this communist bloc. *Czechoslovakia: A Country Study*, Glenn E. Curtis, ed. (Washington, D.C.: Federal Research Division of the Library of Congress, 1992).

adopted in 1950 and has been changed sparsely.²¹⁴ Unlike the laws of Germany and Austria, the massive Civil Code is inapplicable to the employment relationship. The statute has the usual provisions distinguishing dismissals because of the employee himself from those for business-related reasons, and according to Dr. Lajos Pal of the law faculty at the University of Budapest, these provisions closely follow the Austrian statute.²¹⁵ Because of these similarities, only distinctions from Austrian law are herein noted.

The statute expressly permits augmenting workers' rights to pre-termination notification through the collective bargaining process or by an individual contract of employment, provided the provision does not designate a notice period that exceeds one year.²¹⁶ The same statutory notification duty attaches without regard to which party — employer or worker — has made the decision to terminate the employment relationship.²¹⁷ This notice is a minimum of thirty days without any required minimum period of service. It increases slightly for the worker who has three years of service with the employer in gradations up to the maximum required notice total of ninety calendar days for one with twenty or more years of service.

The worker might unilaterally shorten the period until the contract terminates, but there is no corresponding right for the employer.²¹⁸ The Hungarian statute imposes a duty on the employer that does not exist in any of the other countries surveyed. It must permit the notified worker to be absent for at least one-half of his work time for the purpose of seeking new employment, without any decrease in pay.²¹⁹ The remedy for a wrongfully discharged worker or one who has not been given the statutory or contractual notice is limited to damages, rather than reinstatement.²²⁰

Unlike the usual administrative procedures, the statute provides only for judicial resolution of disputes. Typical of continental European countries, Hungary has a special Labor Court, which is the forum for such disputes.²²¹ The statute of limitations for a worker to commence such proceedings is short. He has only thirty days from notification of dismissal,²²² and this challenge does not stay the termination. Although the court cannot order reinstatement, it can recommend it. In general, companies choose to pay damages in the form of severance pay. This statutory amount is between two (2) to twelve months' the worker's wage/salary. In such decisions, the court considers factors such as the worker's age, the prospect for him of new employment, and the personal

214. Munka Torvenyverol szalo 1992. evi XXII. Torveny (Nr. IIXX/1992).

215. Lajos Pal, *Dialog*, *supra* note 11 (remarks on Hungarian law of dismissal). For Austrian law, see *supra* notes 112-132 and accompanying text.

216. Secs. 30 and 76(4), respectively.

217. *Id.* sec. 92.

218. *Id.* sec. 94.

219. *Id.* sec. 93.

220. *Id.* sec. 101.

221. *Id.*

222. *Id.* sec. 202.

difficulties that unemployment likely will impose.²²³ The works council plays no role under the Hungarian law of dismissal.

The provision determining whether a layoff of several workers for economic or business-related reasons is a collective redundancy is exactly the same as the Czech statute (that is, for businesses with a minimum of twenty workers, ten to thirty workers are affected). It is germane that there is no duty upon the employer to factor into its choice of which workers are to be made redundant any special characteristics (seniority, age, number of dependents), and that the court does not have jurisdiction to address this decision.²²⁴

Hungarian law essentially enforces a mandatory retirement age. A worker who has reached the age at which he is entitled to pension payments may be terminated without reason.²²⁵

Slovakia

Slovakia is the eastern part of the area comprising Czechoslovakia prior to the political separation in 1993. Since the 1919 Treaty of St. Germaine and until the end of World War II, Czechoslovakia was among those countries that comprised the German-ruled Sudetenland. The survival mentality and pride of the Slovakian people achieved EU membership in 2004. Slovakia now has the lowest labor costs in Europe.

Dismissal must be founded on good cause.²²⁶ Within the EU, the potential impact upon the labor market is always pertinent, but perhaps especially so in Slovakia, second only to Poland in high unemployment. A comparison with the EU average of 7.5% is instructive. These two member states had rates exceeding 15% in the early part of the new millennium, even though the unemployment rate in Slovakia had decreased to 12% by the end of 2006.²²⁷ The significance is that, with such high unemployment, discharging a worker takes on a special meaning. Slovakia is representative of the relatively depressed economies of the ten new EU member states.

As is typical of civil law countries, the statute specifies the events that will end the employment relationship, including the usual grounds of business-related hardships, worker's lack of ability, and worker misconduct.²²⁸ The legislation expressly prohibits dismissal for reasons of a worker's absence for illness or accident; service in military or civil service; pregnancy or child rearing responsibilities for a child under the age of fifteen years; or

223. *Id.* sec 100(4)

224. For the Czech statutory provisions, *see supra* note 195 and accompanying text.

225. Sec 82(2).

226. Art. 36 Social Basic Rights Law.

227. This compares with 4.5% in the United Kingdom, 4.17% in Japan, and 4.7% in the United States. Wikipedia, *Economy of the European Union*, en.wikipedia.org/wiki/Economy_of_the_European_Union (last visited Aug. 24, 2007). Because of its relative size, the Union States merits special mention. The state with the highest rate is Mississippi, with 7.5%. The lowest rate is in Hawaii, only 2%. Bureau of Labor Statistics, www.bls.gov (last visited Jan. 4, 2008) (hereinafter "Bureau of Labor Statics").

228. Sec. 59 General Civil Code of Slovakia.

responsibility for a person with a disability. The statutory notice is two months for the worker with less than five months' service, and three months for a worker with a longer tenure with the company, except for immediate dismissal for extraordinary reasons.²²⁹ Before a business-based termination is effective, the employer must attempt to find suitable alternate work for the worker within the company.²³⁰

If there is a works council and/or union representing the worker, either (or both) must be notified of the impending termination before notification to the worker. These bodies must also be notified if the worker has given notice of his resignation. Unless the works council or union consents, or if it objects in a timely fashion, the dismissal is ineffective.²³¹ The employer must meet with the worker and discuss the reasons, and if the works council or union does not object within ten days of notice to the worker, it is presumed the dismissal was lawful.²³²

The two-month notice requirement does not apply to the part-time worker, who is entitled only to fifteen days notice.²³³ Nor does the statute require the employer to take into account any special social factors, an oddity in view of the high rate of unemployment in Slovakia. However, termination of a worker with a disability presents an additional procedural hurdle for the company. It must first obtain the consents of both the employee representative and the Department of Labor, Social Security and Family Affairs. The latter requirement is not imposed if the affected worker is sixty-five years of age or older. Additionally, a worker cannot be terminated during pregnancy or during parental leave (which can be taken until the third birthday of the child).²³⁴

Statutory severance pay is only twice the worker's average monthly wage, regardless of his length of service.²³⁵

The mass layoff (collective redundancy) provision applies to all businesses with at least twenty workers,²³⁶ but unless there is a closure, those affected are only somewhat larger companies. A layoff is considered collective if at least twenty are dismissed for business-related grounds within a ninety-day period, irrespective of the total number of workers.²³⁷ The employer must then consult with the works council or workers' representative and the union, if any, in an effort to avoid or decrease the number of layoffs.²³⁸

229. Art. 36 Social Basic Rights Law, sec 63(1).

230. *Id.* sec. 63(2).

231. *Id.* secs. 74, 240. Note the notice period begins the first day after the end of the month written notice was given. *Id.* sec. 18. For termination of a part-time worker (those who work fewer than twenty hours per week), notice begins at the exact time given. *Id.* Notice for part-time workers is only fifteen calendar days. *Id.* sec. 49.

232. *Id.* sec. 240(7).

233. *Id.* sec. 49.

234. *Id.* secs. 66 and 74.

235. *Id.* sec. 74(1).

236. Sec. 73 General Civil Code of Slovakia.

237. *Id.*

238. *Id.* sec. 73.

Professor Helena Barancova of the University of Trnava Faculty of Law has perceived a prevailing distrust of unions and little interest for works councils among Slovakian workers, a situation that seems commonplace throughout the ten new EU member nations.²³⁹ Poland, Slovakia's neighbor to the North, exemplifies this truism. It has been more than twenty years since Solidarity union leader and 1983 Nobel Peace Prize winner Lech Walesa was so revered in Poland. Although he was resoundingly elected President of Poland in 1990, Walesa lost both his strong initial public support and his bid for re-election in 1995. Perhaps Walesa's fate is reflective of the distrust of unions within Eastern Europe to which Professor Barancova refers. Because of Slovakia's new affiliation with the EU, this absence of social partners will likely change.²⁴⁰ The result is a current system with strong statutory protections against groundless worker dismissals, but one that usually is not supported by a strong network of worker representatives.

Slovenia

Of the seven countries that were part of the former Yugoslavia, Slovenia is the only one that is a member state of the EU. It is also the only one that has adopted the Euro as its official currency. The necessary legislative efforts that preceded this membership included substantial additions to the law affecting the social structure and the working sector.

Slovenian social system changes in 2002 included the first comprehensive labor and employment law statute.²⁴¹ A contract of employment terminates upon any of the following events: expiration of the designated time for fixed-term employment; death of either employee or employer; mutual agreement of the parties (in which case the agreement to termination must be signed by both and must include a provision whereby the worker waives the right to unemployment insurance payments); end of statutory notice from the employer; immediate termination in extraordinary cases; or the order of a court in disputed cases.²⁴²

The legislators recognized the relatively weak status of the worker by enacting a law replete with worker protections. A business cannot dismiss an employee during his absence from work due to illness or injury, statutory parental leave, care for an immediate family member, or membership or participation in union activities. The period of absence that cannot justify a dismissal is six months, and this refers also to a worker's prison sentence. Any termination must be for serious and well-founded reasons that make any continued employment virtually impossible. The company must make a

239. Helena Barancova, *Die Kündigung aus wirtschaftlichen Gründen und ihre Beschränkungen in der Slowakischen Republik*, to be published in *Vergleich, supra* note 182, at 22-13.

240. FRANZ MARHOLD, *EUROPAISCHES ARBEITSRECHT* 130 (Vienna, 2004).

241. Employment Relations Act (Official Gazette RS, No. 40/2002), effective Jan. 1, 2003, as amended 2007 (the Official Gazette of the Republic of Slovenia (OGRS), No 42/2002 and 103/2007).

242. Art. 75.

genuine effort to determine whether there is an alternate position for the worker, and is obligated to train him for such a job if he lacks the necessary skills. If this offered job is unsuitable for this employee at the time of its offer, he has the right to decline. According to Professor Etelka Korplic-Horvat of the University of Maribor, the Slovenian legislation imposes a more detailed and exhaustive duty upon the business in this regard than do most European statutes.²⁴³ Slovenia is a signatory to ILO Convention 158 and the amended European Social Charter,²⁴⁴ and the new law also incorporated the broad social dimensions of ILO Recommendation 166 that accompanied Convention 158. Thus, the Slovenian worker is assured substantial job security.

The period of pre-termination notice for ordinary dismissals varies from thirty days to 150 days, according to a sliding scale based upon the length of service.²⁴⁵ The thirty-day minimum notice provision applies to all workers with less than five years of service, and the maximum 150 days applies to those with twenty-five or more years of service with the employer. A collective bargaining agreement might lengthen, but not reduce, these statutory minimums. The worker is insured at least two hours each week during working hours to seek new employment without any pay reduction.²⁴⁶ It is germane that even a discharge because of the fault of the worker requires thirty days notice (regardless of length of service).²⁴⁷ In accordance with ILO Convention 158,²⁴⁸ the worker might agree in writing to waive this right and accept full compensation for the statutory period in lieu of notice.²⁴⁹

If the termination was generated by the worker's fault, the employer must have preceded the notice with a written warning that an additional contractual violation or unacceptable act will result in dismissal, giving him a legally enforceable second chance. These "fault" reasons include slight negligence.²⁵⁰ Slovenian law is quite paternalistic in this respect, and the law is somewhat unique in addressing a dismissal for fault of the worker in the same manner as one for business organizational or economic reasons.

Only in cases of gross negligence or inexcusable intentional conduct is immediate termination permissible. The employer bears a heavy burden of proof to substantiate the gravity of the act, which must be one among those in a lengthy list in the statute.²⁵¹ In general, the action of the worker in these situations has nuances of criminality. Another ground for immediate dismissal

243. Etelka Korplic-Horvat, *Termination of Employment Contracts at the Initiative of the Employer in the Republic of Slovenia*, to be published in *Vergleich*, supra note 182, at 4.

244. Council of Europe, *European Social Charter*, art. 24.

245. Article 92, sec. 2 *Employment Relationships Act* [hereinafter "ERA"].

246. *Id.* art. 95.

247. *Id.* art. 92, sec. 1.

248. *Termination of Employment Convention*, International Labor Organization 158, art.

11.

249. ERA, supra note 245, art. 94.

250. *Id.* art. 83, sec. 2.

251. *Id.* art. 111, sec. 1.

is the worker's failure to have returned to work within five days after the expiration of a disciplinary suspension.²⁵² This additional five days leniency reflects the worker protections that prevail under Slovenian legislation. Even in particularly serious fault cases, the company must act expeditiously. It will be considered to have waived the right to terminate if it has not notified the worker within thirty days after learning of the infraction or within six months of the occurrence, whichever comes first.²⁵³ The latter can make fault dismissals impossible in some instances. Additionally, there is the typical European prohibition of terminating a member of the works council,²⁵⁴ an "older" worker (defined as those fifty-five years of age and older),²⁵⁵ a pregnant or breast-feeding worker,²⁵⁶ one on parental leave,²⁵⁷ or a person with a disability.²⁵⁸ The latter is harsh indeed and one that conceivably might have the inherent effect of dissuading a company from employing a person with a disability.

Slovenian law also differs slightly from the norm within Europe regarding required notice to the worker's union because union notification is required only if the worker requests.²⁵⁹ Thus, even though notification to the union will be subsequent to notice to the worker himself, it carries with it a potential detriment to the company: union objection will suspend the implementation of the dismissal, or, in the alternative, the employer might refuse to permit him from working, but it must continue to pay his usual wage or salary.²⁶⁰ This rule regarding union notice applies both to ordinary dismissals and dismissals without notice. The union must respond with any objections within eight days, upon which time the resolution process (usually arbitration) begins. Since the termination is suspended in the interim, Slovenian unions carry a proverbial big stick. Although Slovenia has statutory works councils,²⁶¹ for an individual dismissal, no notice to the works council is required.²⁶²

Another body that might suspend a termination is the Labor Inspectorate, a governmental administrative body. In addition to its duties and powers of inspections, if notified by a worker of his termination, the Inspectorate can stay

252. *Id.* art. 111, sec. 1, para. 3.

253. *Id.* art. 110, sec. 2.

254. *Id.* art. 133.

255. It is somewhat puzzling that this "older person" protection attaches only to male workers. Perhaps it is due to Slovenia's new membership in the EU that the legislature has adopted some discrimination laws that may be incompatible with this provision.

256. *Id.* art. 115.

257. *Id.*

258. *Id.* art. 116, secs. 1, 2.

259. *Id.* art. 84, sec. 1.

260. *Id.* art. 85. Sec. 2. Note that this section specifies that termination will not be effective until the court-imposed term for arbitration has terminated or judicial decision has occurred.

261. Worker Participation in Management Act RS, Nos. 42/93 and 56/01 (Official Gazette).

262. Address by Dr. Etelka Korpic-Horvat, Professor of Labor Law, University of Maribor, at *Dialog* in Graz, Austria, *supra* n. 11.

the termination until resolution before a court or arbitration body.²⁶³

The provisions applicable to collective redundancies apply to any business-related layoff of 10 or more workers within a 30-day period by a business with 21-99 workers, or of 20 or more workers by a business with 100 or more workers within a 3 month period.²⁶⁴ In such a case, the employer must notify the trade union and the works council (the statutory language is that this must be done “as soon as possible”). Before such terminations can be effective, the company is obligated to consult with both bodies in an attempt to reach agreement.²⁶⁵ (There is no provision addressing any possible conflict between the union and the works council.) If the parties do not resolve by reaching agreement on the avoidance or reduction of the number of layoffs, or on the employers selection among workers,²⁶⁶ the usual approach is for an arbitrator to decide.²⁶⁷ Thus, either the union or the works council might effectively suspend, or even abrogate, a collective redundancy, an encroachment upon management’s authority that is likely the most extreme among EU member nations.

Severance pay is relatively meager. The highest entitlement is one-third of the average monthly pay during the prior three months for a worker who has more than fifteen years of service.²⁶⁸ With five to fifteen years of service, the entitlement is one-quarter of this amount.²⁶⁹ The minimum amount for the worker with at least one year but no more than five years of service is only one-fifth this amount.²⁷⁰ However, the right to unemployment benefits complements severance pay and might continue for as long as two years after termination, depending upon the worker’s length of service with this immediate past employer.²⁷¹

The relatively considerable encroachment on employers’ rights in termination decisions under Slovenian law is intended to curb the high rate of unemployment. At the end of 2004 (the first year of EU membership), this rate was 10.6%.²⁷²

263. Labour Inspectorate Act, RS, Nos. 38/94, 32/97 and 36/2000 (Official Gazette).

264. ERA, *supra* note 245, art. 96, secs. 1, 2.

265. *Id.* art. 97, secs. 1, 2.

266. The 2002 employment statute mandates that the employer to consider the usual social factors: the worker’s years of service, educational or qualifications, additional skills, and work experience.

267. Communication from Dr. Etelka Korpic-Horvat, Professor of Labor Law, University of Maribor, February 5, 2008.

268. ERA, *supra* note 245, art. 109, secs. 1, 2.

269. *Id.*

270. *Id.*

271. Art. 25 Slovene Employment and Unemployment Insurance Act (1991, as amended 2006), (OGRS) No. 107/2006.

272. Annual Report of the Employment Service of Slovenia (2004).

3. Croatia and Turkey: Examples of Two Aspiring EU Member States

Croatia

The employment statute in Croatia²⁷³ adheres to the worker protection philosophy, recognizing that the worker is the subordinate party in the employment contract. The legislature used German statutory law as its model, and this part of Croatian legislation conforms to ILO Convention 158 and all relevant EU directives.²⁷⁴ Thus, the same German statutory requirement for cause appears in the law of Croatia.²⁷⁵

The statutory minimum notice is two weeks for workers with less than one year of service, a period that gradually increases to three months notice for one with more than twenty years of service.²⁷⁶ This required notice is augmented by an additional one month if the worker has a disability.²⁷⁷ Additionally, the notification period is extended by one week if the worker is between the ages of fifty and fifty-five years and has more than twenty years of service and by an additional month if he is older than fifty-five and has worked for the company for more than twenty years.²⁷⁸ These notice periods were actually reduced by one-half in 2003. According to Ivana Vukorepa of the faculty of law at the University of Zagreb, the purpose was to lower costs to the company in termination cases and to increase its ability to remain competitive.²⁷⁹

Several groups are protected from notification of dismissal, including (1) the pregnant worker or one on parental leave (for this group, notification cannot be prior to fifteen days subsequent to the birth of the child or end of the leave, whichever comes later);²⁸⁰ (2) the worker who is temporarily disabled by reason of an occupational disease or industrial accident;²⁸¹ and (3) one who is absent from work in order to complete the legally obligatory civil or military service.²⁸²

Unlike Slovakia and Poland, the works council constitutes a strong component in the Croatian workplace. Each business with at least twenty workers²⁸³ must have a works council, and this body must be notified in detail before a planned

273. Narodne novine 38/95, 54/95 (1995), Nr. 68/05 (2005). See Zeljko Potocnjak and Ivana Vukorepa, *Betriebsbedingte Kündigung in der Republik Kroatia*, to be published in *Vergleich*, *supra* note 182.

274. MANFRED WEISS, *DIE ARBEITNEHMER MITWERKUNG IN EINER GLOBALISIERENDE ARBEIT: LIBER AMERICORUM* 403-414 (Hoeland, Armin et al., 2005).

275. Croatia Labour, art. 106(1), discussed *supra* note 227.

276. Art. 113, sec. 1 Narodne novine.

277. Art. 113(1), 113(3), Narodne novine Nr. 14/02i 33/05.

278. Art. 113(1).

279. Magister Ivana Vukorepa, Address (Oct. 24-25, 2006), *Dialog*, *supra* note 11.

280. Croatia Labour, *supra* note 275, art. 70.

281. Art. 73.

282. Art. 225(7)-(9).

283. Arts. 117, 145 and 146. Before the 2003 amendment, employers with ten or more workers were required to have works councils.

termination. This notice must contain the name, age, date of employment, duties and job classification, and status of the worker's health, and must precede notice to the worker.²⁸⁴ The works council must communicate any objections to the employer within a strictly enforced eight day period, and objections are confined to the refutations not among those listed in the statute.²⁸⁵ If there is no works council, this function is fulfilled by the union.²⁸⁶ Resolution of the issue is by a court, rather than an administrative body or arbitrator.²⁸⁷

If the dismissal is business related, the employer has the obligation to place the worker in a different position, if possible.²⁸⁸ During the notice period, the worker is entitled to a minimum of four hours paid leave per week, so that he might use the time to seek new employment.²⁸⁹

The collective redundancy provisions apply if twenty or more workers are notified of dismissal within a ninety-day period.²⁹⁰ In such case, the company must have an elaborate written social plan to be used in determining which workers are chosen for the layoffs, and this plan must be approved by both the works council and the State Employment Department.²⁹¹

The severance pay requirement is limited to workers with a minimum of two years' service with the company,²⁹² but the amount is unusually low. For each year worked, he is paid one-third his monthly wage or salary, which is averaged over the prior three months and increased to six times this base amount (that is, two months' remuneration), in accordance with length of service.²⁹³ For the disabled worker, this severance entitlement is doubled.²⁹⁴ Prior to the 2003 amendments, this pay was an entire one month's pay. Presumably the rationale was the same as Ms. Vukorepa's explanation of the reduction of notice periods, two instances that reflect exceptions to the general statutory stance in Croatia that favors the employee.

Turkey

This aspiring EU member state is much like a former commercial for an American automobile rental company. The frequently seen advertisement for the Avis company, then consistently second to Hertz in total rentals, stated "We try harder." Despite the enactment of Turkey's first comprehensive employment rights legislation in 2002,²⁹⁵ much more legislative activity in the

284. *Id.*

285. *Id.*

286. Art. 148(3).

287. Art. 145(1), (5), (6), (7).

288. Art. 106(3).

289. Art. 113(4).

290. OGHK Rev 615/00.

291. Croatia Labour, *supra* note 275, arts. 120(1), 119(2).

292. Article 118 Narodne novine.

293. Croatia Labour, *supra* note 275, art. 118(3).

294. Art. 79(1).

295. Is Guvencesi Yasasi Nr. 4473, 15 Aug. 2002. This law took effect Mar. 15, 2003.

collective worker area will be necessary in order to meet EU requirements. According to Dr. Alpay Hekimler Director of the Social Science Institute at Namik Kemal University,²⁹⁶ an abundance of new legislation is necessary, and the federal legislature has not even begun discussions on addressing changes in the labor and employment area. Turkey indeed must “try harder” if it hopes to be among the EU member states.

The current law contains much of what is usual in European statutes, such as the requirements for cause and minimum notice before a dismissal is lawful. Additionally, any immediate termination must be for a sufficient reason.²⁹⁷ There is nonetheless paucity in the statute regarding some pertinent issues, and some provisions have limited application so as to result in relatively little worker protection.

The 2002 statute applies to all workers in companies with at least thirty workers, and all permanent workers (that is, not fixed-term) are covered.²⁹⁸ This thirty-worker minimum is a distinct variation from the European norm, since it sharply reduces protection for workers of smaller businesses.

The minimum notice period required for ordinary dismissals follows the usual structure that increases the length according to time in service.²⁹⁹

<i>Length of service</i>	<i>Minimum notice</i>
Less than six months	Two weeks
Six months to one and one-half years	Four weeks
One and one half years to three years	Six weeks
More than three years	Eight weeks

Without notice in an ordinary termination, the employer must pay the affected worker his remuneration during the statutory period. These periods can be extended to four months through collective bargaining, but typically the bargaining process results in a reduction of the statutory period, oddly permissible under the law. During the notification period, the employer must permit the worker to have two hours paid leave per week in order to search for new employment.³⁰⁰

The worker is protected from termination if the ground is his membership or activities in a trade union, his work as a worker representative, his race, color, sex, family status, pregnancy or pre-natal absence, religion, or political

296. *Dialog*, *supra* note 11.

297. The the worker's physical attack upon a co-worker provides an example of a judicially determined permissible immediate termination. Yargutay 9 HD 4302/16781, Oct. 10, 2003.

298. Article 18, sec. 1 Turkish Labor Law Statute of June 10, 002 (Nr. 4857).

299. Art. 17.

300. Art. 27(1).

opinion.³⁰¹ However, the worker does not have blanket protection *from* discharge for these reasons. Rather, these reasons simply cannot be the *basis* of the decision to discharge, a substantive difference. This is much like American law in that the burden of proof is upon the employee to prove that his dismissal was in fact based upon one of the grounds prohibited by statute. Another difference from the usual European domestic law, with the exception of Ireland, is that there is no required consideration in a redundancy of social factors such as the worker's age, length of service, or family circumstances. Indeed, according to Dr. Hekimler, Turkish law approaches effects of employment decisions on the marketplace more than any other country within Europe, making the economy, rather than the worker, the focus of protection.³⁰² There is one demographic consideration, that of older workers. However, the reason is not altruistic, but rather economic. Since enactment of a 1936 statute, Turkey has had a social security payment system. Because the older worker might indeed find re-employment relatively more difficult than his younger counterparts, he likely will receive government-funded unemployment benefits for a longer period of time. Thus, he receives this indirect protection not for his own benefit, but rather to result in savings to the federal economy.³⁰³ Moreover, this "protection" of the older worker does not address seniority or loyalty to the company. For the same reason, special attention is given to a worker who is married and has as many as two children. Social payments to such an unemployed person equal 42.7% of his former gross wage or salary, a figure that is recomputed monthly according to the negative impact on the economy.³⁰⁴

There is a mass layoff provision that applies to redundancies within a one-month period of ten or more workers for the company with twenty to 100 workers; 10% of all workers for the company with 101-300 workers; or thirty workers for the company with more than 300 workers.³⁰⁵ Two comments are germane. First, the statute applies in general only to companies with thirty or more workers, so this is an aberration from that general coverage of smaller businesses. Second, the only additional requirement for a collective redundancy is notification from the employer to the Minister for Employment and Social Security, the Employment Office and the union, if any.³⁰⁶ This notice must be written and must include reasons for the redundancies, the number of layoffs, and the departments or sections of the business affected. The sole role of the union is to meet with the employer's representative to discuss a possible retraction of the redundancy or a decrease in the number of

301. Arts. 18, 47(9).

302. Alpay Hekimler, *Die Lage des türkischen Arbeitsmarktes und die Leistungen bei Arbeitslosigkeit in der Türkei*; ZFSH/SGB Sozialrecht in Deutschland und Europa 8/2005 SS. 453-452, referring to Baru Askin *Das Sozialversicherungssystem der Türkei*, address in Marburg, Germany, January, 2004.

303. *Id.* "Older worker" is not defined.

304. This computation is statutory. *See* Art. 14.

305. Art. 29.

306. *Id.*

workers dismissed. Whatever the period of notification due to the worker, a collective redundancy cannot be effective until thirty days after notice has been given to these three bodies.

This union notification has little significance, since the role of unions in the Turkish labor setting is nearly inconsequential, except preemptively through collective bargaining. One example of such rare effective bargaining was the achievement of the metal industry's worker-favorable contract in 2005.³⁰⁷ It also merits mention that Turkish law contains no provisions for works councils.

To be sure, according to Dr. Hekimler, such worker representative councils exist in Turkey, but they have no relevancy in dismissals. Most economists and legal scholars predict that they will not likely evolve into the strong worker support entities such as those in the Austrian and German models.³⁰⁸

To borrow from another 1970's American commercial, one for Virginia Slims cigarettes, Turkey must "come a long way, baby" before its labor legislation will meet EU standards. If she is to be a member state, the employment legislation must be substantially amended so as to view dismissals from the human rights, worker protection, and social perspectives, rather than from the perspective of the national economy.

III. THE AMERICAN EMPLOYMENT-AT-WILL RULE

Any alterations to the common law, that is, the body of English law inherited by the former British colonies that comprise common law jurisdictions, must be by statute.

One such rule of law which most American states have tenaciously retained is the employment-at-will rule that permits either party to the employment contract to terminate at any time, with or without reason. Although England has abandoned the employment-at-will rule, it persists in American states.

It is somewhat anomalous that English law was originally more sympathetic to workers than is the current American employment-at-will rule. British statutory law responded to the drastic shortage of workers in the aftermath of the tragic Black Death in the fourteenth century by designating all employment contracts that did not specify otherwise to be for a one-year term.³⁰⁹ Since an employer could terminate a fixed-term worker only for good cause, this gave those in the workforce a more stable employment status, albeit one with a brief shelf-life.³¹⁰ Although some early American courts adopted this fixed-term one-year presumption³¹¹, by the late nineteenth century these

307. Metal Industrie Manteltarifvertrag, 2004, MESS.

308. See, e.g., *Die Beendigung des Arbeitsverhältnisses durch Kündigung und ihre Beschränkungen in der Türkei*, at 10 (forthcoming in *Vergleich*, supra note 182).

309. W. BLACKSTONE, COMMENTARIES 425 (1765).

310. *Id.* See *infra* note 260 for same rule in American fixed-term employment contracts.

311. See, e.g., *Adams v. Fitzpatrick*, 26 N.E. 143 (N.Y. 1891).

same courts gradually began to adopt the employment-at-will rule.³¹² The rationalization that the rule was fair since it applied equally to both parties in the employment contract was disingenuous. The relative harshness such a rule imposes upon the worker is patently evident, particularly if the business is a large one.

The actual American source that assumed the rule that English law had forgotten was neither a legislature nor a court. Rather, New York lawyer H.G. Wood published a treatise on master and servant law in 1877, anachronistically announcing this rule without any legal authority.³¹³ In 1884, the Tennessee Supreme Court, citing Wood, became the first state court to apply the employment-at-will rule.³¹⁴ Other states followed,³¹⁵ and it soon became established law throughout the country.

A. *Exceptions to the Rule*

As with any general rule of law, there are exceptions. United States federal law paved the way for what has become the norm, prohibiting employment discrimination if based on any of several listed grounds, and most European legislatures followed this lead. These laws prohibit employment discrimination if based on the worker's race, color, religion, national origin, or sex,³¹⁶ age,³¹⁷ or disability.³¹⁸

The United States Congress enacted a lengthy statute in the wake of the Enron corporate scandals in an effort to lessen the likelihood that such corporate graft would recur. Among the provisions of the Sarbanes-Oxley Act³¹⁹ is one that makes retaliatory discharges of officers, employees, contractors, and/or subcontractors because of their "whistleblowing" illegal activities.³²⁰ This term "whistleblowing" refers to an employee's reporting of any illegal employer activity to the appropriate government official. There are many state laws with similar proscriptions for those companies not covered by these federal statutes.³²¹

312. ROBERT COVINGTON AND KURT DECKER, *EMPLOYMENT LAW* 325-26 (2d Ed. 2002).

313. H. WOOD, *MASTER AND SERVANT* § 134 (1877, 3d ed. 1886).

314. *Payne v. Western & Athletic R.R.*, 81 Tenn. 507, 518-520 (1884).

315. *See, e.g., McCullough Iron Co. v. Carpenter*, 11 A. 176 (Md. 1887); *see also, Martin v. New York Life Ins. Co.*, 42 N.E. 416 (N.Y. 1895).

316. 42 U.S.C. §§ 200e-200h (1964).

317. 29 U.S.C. § 623(a)(1) (1967).

318. Pub. L. No. 101-336, 104 Stat. 327 (codified in 42 U.S.C. §§ 12101-12213).

319. Sarbanes-Oxley Act of 2002 (Public Company Accounting Reform and Investor Protection Act) (hereinafter "Sarbanes-Oxley Act"), 15 U.S.C. §§ 7201-7266.

320. 18 U.S.C. §§ 1514(A), 1107, 1513.

321. For listing of such states as of 1995, see DAWN BENNETT-ALEXANDER AND LAURA PINCUS, *EMPLOYMENT LAW FOR BUSINESS* 12-13 (Richard D. Irwin, Inc., 1995).

B. Plant Closings and Mass Layoffs

The concept of legislatively required minimum notice for a termination is generally alien to American law. The primary exception is a 1988 federal statute, the Workers Adjustment and Retraining Act (WARN), commonly referenced as the Plant Closing Act.³²² This law is implemented largely through Department of Labor regulations.³²³

WARN mandates at least sixty days written notice to workers affected by a plant closing or mass layoff, an American neologism for collective redundancies. Significantly, this statute applies only to larger companies with no fewer than 100 full-time employees or its equivalent,³²⁴ in contrast to the usual European counterpart legislation affecting businesses with twenty or more workers. To clarify the concept of "equivalent," American workers work an average of forty hours per week, so 100 full-time workers would work a minimum total of 4,000 hours. Similarly, 200 part-time workers, each working twenty hours per week, would work 4,000 hours per week, an equivalency to 100 full-time workers. Implementing regulations include among the definition of "employee" one who is on temporary layoff or leave provided he has a "reasonable expectation of recall."³²⁵ "Mass layoff" is defined in the Act as one within a thirty-day period that results in an employment loss for (i) one-third of the total work force, or (ii) at least 500 workers, without regard to the number of employees.³²⁶

An alternate statutory trigger for coverage is an employment loss for two or more groups of employees at a single site during a ninety-day period, when neither group reaches the minimum number (*i.e.*, one-third the total workforce or 500 employees), but the aggregate is the statutory minimum.³²⁷ Regulations provide that the employer might rebut the presumption of aggregation of workers in such case if it can show that the layoffs were the "rule of separate and distinct actions and causes . . . and . . . not an attempt to evade the requirements of WARN."³²⁸ An example of proof of such separate and distinct causes was *Michigan Region Council of Carpenters Employee Benefit Fund v. Holcroft, L.L.C.*³²⁹ In this case, the first layoff during the ninety-day period was the result of lack of production because the employer had completed two manufacturing contracts but was not awarded a third, as it had anticipated. The second layoff was subsequent to the company's sale of the business.

With regard to a sale of business, American law markedly contrasts with

322. 29 U.S.C. §§ 2101-2109 (2007).

323. 29 U.S.C. § 2107; *see* 20 C.F.R. 639 (2007).

324. 29 U.S.C. § 2101(1)(A)(B) (2007).

325. 29 C.F.R. § 639.3(a)(1)(ii) (2007).

326. 29 U.S.C. § 2101(a)(3)(i), (ii).

327. 29 U.S.C. § 2102(d).

328. 29 C.F.R. § 639.5.

329. 171 F.Supp. 2d 693 (E.D. Mich. 2001), *vacated on other grounds*, 195 F.Supp. 2d 1908 (E.D. Mich. 2002).

European Commission law,³³⁰ which requires EC member states to enact domestic legislation protecting workers from job losses in the event of a business transfer. The only issue in such instances under WARN is the determination of which party — seller or buyer — is responsible for tendering the statutory notice to workers that they will be laid off. If the closing or layoff occurs up to and including the date of the sale, the seller has the sixty-day written notification duty. Should the actual layoff occur after that date, the obligation falls to the purchaser.³³¹

There are two exemptions from the notification obligations of WARN. First, the company need not give workers notice of their termination if the closing were that of a temporary facility or the result of completion of a project, and the workers had been hired with the understanding that the jobs would continue only until the facility closed or the project were completed.³³² Second, the notice obligation does not apply if the closing were caused by a strike or lockout in a bona fide labor dispute not intended to serve as a subterfuge to avoid WARN requirements.³³³

Significantly, those employees who do not participate in a called strike are not within the exemption.³³⁴ An example would be one likely to occur in a right-to-work state. Federal labor legislation permits so-called union shop agreements, i.e., a collective bargaining agreement between union and management in which the employer agrees that it will dismiss any worker who does not join the union within a minimum of thirty days' employment.³³⁵ This same statute permits the individual states to adopt state legislation making such agreements unenforceable.³³⁶ Most of the Southern states, for example Virginia,³³⁷ have adopted such legislation and are referred to as "right-to-work" states. That is, one has the right to employment with or without joining the union. Thus, assume that the Newport News Shipbuilding and Dry-Dock Company in Newport News, Virginia, a heavily unionized company, had been unable to reach consensus with its union, Peninsula Shipbuilders Association, and the agreement expired last week. The union voted by a majority to strike as of that date if the parties had still not reached agreement. Suppose that forty-six workers are not union members, and as such are ready and willing to continue working. However, with nearly 20,000 workers on strike, the company has no alternative other than to close during the labor dispute. The forty-six non-strikers are entitled to statutory notice sixty days prior to the closing.

Federal regulations have established four mandatory inclusions in the written notice. The written notice sent or given to each employee must include

330. Council Directive, 77/187, Feb. 14, 1977 O.J. 061, 26.

331. 29 U.S.C. § 2101(b)(1).

332. 29 U.S.C. § 2103(1).

333. 29 U.S.C. § 2103(2).

334. 29 C.F.R. § 2103(2).

335. 29 U.S.C. § 158(a)(3).

336. 29 U.S.C. § 14(b); Taft-Hartley Act, 29 U.S.C. § 164(b).

337. VA. CODE ANN. § 40.1-59-61. (1947).

(1) the name and address of the site where the closure or layoff will occur and the name and telephone number of the company official who is to be contacted for information; (2) the status of the planned closure or layoff, i.e., whether it is intended to be temporary or permanent; (3) the expected date of the first termination of employment and the anticipated schedule for additional terminations; and (4) job titles and names of all employees affected.³³⁸

The statute expressly states that its provisions do not change or affect contractual or state statutory remedies.³³⁹ Examples of states with such plant closing acts are the New England states of Connecticut, Maine, and Massachusetts.³⁴⁰

There is no statute of limitations in WARN, and the United States Supreme Court has held that the applicable limitations period will be the most analogous one in the state where the violation occurred.³⁴¹ For example, in states other than those with plant closing legislation, a court might imply that the employer had the contractual duty to give notice on a duty-implied-by-statute theory. In such cases, the statute of limitations for breach of contract would apply.

The notification might be shorter than sixty days in three instances.³⁴² These are affirmative defenses for an employer charged with having violated the duty to give notice, and, as such, the burden of proving that it falls within one of these three exceptions is on the employer. First, the employer might have anticipated receipt of capital resources (money or additional business) that would have kept the business operating, and the one in charge reasonably and in good faith believed that giving notice would have adversely affected the possibility of obtaining this capital. Second, the business circumstances that led to the closing or layoffs were not "reasonably foreseeable" when the sixty-day period began. To exemplify the strictness of this standard, a federal district court held in *IAM District Lodge 776 v. General Dynamics Corporation* that a company's failure to meet a deadline and cost overruns that resulted in loss of a major contract did not constitute such "unforeseeable circumstances."³⁴³ Third, shorter notice is permissible if closure resulted from a natural disaster. Recent examples are the many companies demolished in September of 2005 by Hurricane Katrina in the New Orleans, Louisiana and coastal Mississippi regions, and the October 2006 earthquake in Hawaii. For each of these exceptions, notice must be "as much as practicable."³⁴⁴

There are several cumulative remedies and penalties. The employer who has failed to give notice according to WARN might be subject to a civil penalty

338. 20 C.F.R. § 639.7(c).

339. 29 U.S.C. § 2105.

340. COVINGTON & DECKER, *supra* note 2, at 363.

341. *North Star Steel Co. v. Thomas*, 515 U.S. 29 (1995).

342. 29 U.S.C. § 2102(b).

343. 821 F.Supp. 1306, 1313 (E.D. Mo. 1993).

344. 29 U.S.C. § 2102(b)(3).

up to \$500 for each day of the violation. Each aggrieved employee can be awarded back pay for each day that he did not receive the notice to which he was entitled. This actually would result in double pay, since he would have worked on those days and would have received his usual remuneration. Finally, the court has the discretion to award costs, including the worker's attorney fees.³⁴⁵

The primary defense is a claim of "good faith."³⁴⁶ The employer must prove this good faith from both subjective and objective perspectives,³⁴⁷ and objective good faith can be difficult to prove. For example, the employer did not show objective good faith in *Jones v. Kayser-Roth Hosiery, Inc.*³⁴⁸ In that instance, the employer contended that there had been a possibility that it would not close, and based on this possibility it did not give notice. The court found this likelihood so remote that it decided the failure to notify was not based on good faith.

This law stands out as the only legislation similar to the European concept of redundancy, that is, termination of employees for business reasons. However, the word "similar" should not be perceived to mean "identical." For the appropriate perspective, the reader should bear in mind that the Plant Closing Act requires *only* a minimum notice. It has *no effect on the employer's right* to close a plant or to lay off any number of workers, for whatever reason, or even without a reason other than the employer's desire. Indeed, the statute expressly precludes any right of action for injunctive relief to prevent or delay a closing or mass layoff.³⁴⁹ Thus, American law has no true counterpart to the European "redundancy" with respect to statutory duties on the employer.

C. State Common Law and Statutory Exceptions

The employment-at-will rule has been defended as being patently fair, although it permits the employer to terminate the employment relationship without cause, it also permits a worker to resign without cause.³⁵⁰ Nonetheless, it is obvious that the rule in practice operates much more harshly upon the worker than on the employer. A worker who suddenly quits is replaceable, but one who is told without any warning that his employment is to end is without money for subsistence for him and his dependents.

A worker might challenge his discharge by claiming it is unlawful under either contract or tort theory. Because the at-will rule is presumed, the burden is upon the terminated employee to prove that the circumstances rendered his dismissal unlawful.

345. 29 U.S.C. § 2104(a)(6).

346. 29 U.S.C. § 2104(a)(4).

347. See *Saxion v. Titan-C-Manufacturing Inc.*, 86 F.3d 553 (6th Cir. 1996).

348. 748 F.Supp. 1276 (E.D. Tenn. 1990).

349. 29 U.S.C. § 2104(b).

350. COVINGTON & DECKER, *supra* note 2, at 328.

D. Contract

1. Express Contract

The employer may communicate to the worker an express commitment to only discharge the worker for good cause. Such promise may be communicated to either an individual worker or to the entire workforce, either orally or in writing.

In a unionized setting, the collective bargaining agreement generally will contain a job security clause, i.e., an assurance that workers will be discharged only for good cause. In such case, the company might nonetheless be victorious, but it must produce evidence of objective good cause.

2. Implied Contract

In the early 1980s, some state courts began to recognize an implied promise on the part of the employer from provisions in employee handbooks or written personnel policies. Language that stated, or even inferred, that a worker would be retained unless there were good cause to terminate the employment contract was first to be held contractually binding on the employer by the Michigan Supreme Court in *Toussaint v. Blue Cross & Blue Shield of Michigan*.³⁵¹ The handbook that was given to the employee-plaintiff at the time of hire stated that it was the employer's policy to terminate only for good cause, and the court held the manual to be a part of the employee's contract by implication.³⁵² Interestingly, this court found no significance in the plaintiff's admission that he had not read the handbook provisions until subsequent to his termination. Thus, there was no evidence of any reliance on his part, nor did the court require such.

Essentially, the plaintiff's position in such cases will be that such employee handbook language simply takes this employment contract out of the at-will variety. Some courts that have held such manuals to be contractual have required, however, that the language be lucid and clear enough to have instilled in the employee the reasonable expectation of employment that would continue absent good cause for termination. This line of reasoning also required a showing of reliance by the employee on the handbook provisions, as the Illinois Supreme Court held in *Duldulao v. St. Mary of Nazareth Hospital Center*.³⁵³ Likewise, the Minnesota Supreme Court applied strict contract reasoning by viewing such a manual as an offer, which the employee had accepted upon

351. 292 N.W.2d 880 (Mich. 1980).

352. *Id.* at 905.

353. 505 N.E.2d 314 (Ill. 1987).

assuming his position in *Pine River State Bank v. Metille*.³⁵⁴ This is a classic unilateral contract, acceptance by the worker having been his continued performance of services for the employer. Interestingly, the court in *Pine River Bank* found the handbook's provision titled "Job Security" was only internal company policy, rather than an offer to the plaintiff. However, the "Disciplinary Policy" section was held to be a different matter indeed. This section set forth with clarity the sequence of steps that would be followed in the event of a termination, and the court held that whether the employer's failure to follow these procedures and to have summarily dismissed the plaintiff might have been a breach of its agreement with the employee was a question of fact that was appropriate for jury determination.³⁵⁵ The Minnesota Supreme Court then affirmed a jury verdict for the plaintiff in excess of \$24,000.

The advice generally given to companies by employment lawyers is simply not to distribute such handbooks. For the employer that insists upon doing so, it would be advisable to include at the bottom of each page a highlighted disclaimer, reminding that the book is not a contract, and that the employment is at-will. Some courts have been adamant in holding that in order to effectively remove the contract from the presumption that the employer is bound, these disclaimers must be prominent, usually in bold type.³⁵⁶

In a 1987 case, *Miller v. SEVAMP, Inc.*,³⁵⁷ the Supreme Court of Virginia circumvented having to address the issue of whether handbook provisions are contractual in nature when handbook language stating that the employment contract would be terminated only for cause conflicted with unrefuted testimony regarding the employer's contrary statement to the employee at the time of hire.³⁵⁸ More recently, a federal district court applying Virginia state law held that termination because of a reduction in force was valid despite handbook language that the employment relationship would be ended only for cause. The court held that, despite conflicting statements in the handbook, the principle of at-will employment prevailed, any language to the contrary was not enough to overcome the common law presumption.³⁵⁹

Regarding the reliance requirement in *Duldalao*, some courts have held this to be immaterial. In *Woolley v. Hoffmann-LaRoche, Inc.*,³⁶⁰ the New Jersey Supreme Court held that even though the plaintiff did not receive the manual until after he had accepted the offer of employment, nor had he been aware of its contents until subsequent to his sudden dismissal, it would nonetheless be regarded contractual unless the defending employer could produce evidence of a prominent disclaimer in the manual.³⁶¹ (Only portions of

354. 333 N.W.2d 622 (Minn. 1983).

355. *Id.* at 630.

356. *See, e.g.*, *Jimenez v. Colorado Interstate Gas Co.*, 690 F.Supp. 977 (D.Wyo. 1988).

357. 362 S.E.2d 915 (Va. 1987).

358. *Id.* at 916.

359. *Willey v. County of Roanoke*, 2005 WL 1719948 (W.D. Va. 2005 Jul. 21, 2005).

360. 491 A.2d 1257 (N.J. 1985), *modified* 499 A.2d 515 (N.J. 1985).

361. *Id.* at 1269-1270.

the manual had been introduced at trial, and the appellate court remanded to allow the employer the opportunity to show such a disclaimer.)

Many courts have not followed the lead of the Michigan and New Jersey decisions. For example, the Montana Supreme Court held in *Gates v. Life of Montana Ins. Co.*³⁶² that no contractual obligations flow from an employer's distribution of such manuals or handbooks to workers.

During the 1980s, nearly three-fourths of the states recognized some type of handbook exceptions.³⁶³ However, some legal scholars have pointed out that these state courts have not established with precision the pivotal question regarding whether and under what circumstances and/or conditions the employer might unilaterally alter the terms of such handbooks, especially those addressing job security. Because of this, some have viewed this fact as one that will ultimately lead to a "dwindl[ing] away" of the handbook exception.³⁶⁴

3. *Defined Term*

Generally regarded as beyond the scope of the employment-at-will rule are employment contracts for a specified term.³⁶⁵ This does not mean that a worker with a defined-term contract cannot be discharged, but rather that he might be terminated only for objective cause. The employer has the burden of proving such good cause.

4. *Consideration from Employee in Addition to Performance of Services*

A rather unusual situation might exist in which an employee might have made a commitment to his employer to do something for the employer other than and in addition to the expected performance of services inherent in the job.

One example was *Bondi v. Jewels by Edwar, Ltd.*,³⁶⁶ in which the employee had been required by his employer to sell his own business before commencing work. In another case, *Bussard v. College of St. Thomas, Inc.*,³⁶⁷ the employee had been required by the employer to sell his stock in the employing company's predecessor in exchange for the company's agreement to retain him. This additional consideration from the employee was held to imply a reciprocal promise on the part of the employer to terminate him only for good cause.³⁶⁸

The rationale underlying this rule is based upon the additional

362. 638 P.2d 1063 (Mont. 1982).

363. MARK A. ROTHSTEIN *ET AL.*, EMPLOYMENT LAW § 8.3 at 229-243.

364. Elinor Schroeder, *Handbooks, Disclaimers and Harassment Policies: Another Look at Clark County School District v. Breeden*, 42 BRANDEIS L.J. 581 (2003-2004).

365. *See, e.g.*, *Rochester Capital Leasing Corp. v. McCracken*, 295 N.W.2d 375 (Ind. 1973).

366. *Bondi v. Jewels by Edwar, Ltd.*, 73 Cal. Rept. 494 (1968).

367. *Brussard v. College of St. Thomas, Inc.*, 200 N.W.2d 155 (Minn. 1972).

368. *Id.* at 162.

consideration given by the worker. In exchange for this “extra” from the employee, courts have implied that there must be a corresponding “extra” from the employer. An example would be the simultaneous hire by Acme Company of two draftsmen, Bob and Sam. Their duties are identical, as are their salaries, benefits, and hours of work. However, the company requests from Bob a commitment to play on the company softball team, a task he willingly accepts. This additional “duty” on Bob’s part would entitle him to something additional from the company. A court could imply the promise to terminate his employment only for good cause.

5. *Covenant of Good Faith and Fair Dealing*

A “covenant” is by definition a promise, and, at times by inference, a contract. While the broad employment-at-will doctrine is judicially-created law, i.e. common law, some state courts have created a narrow exception by implying a mutual covenant of good faith and fair dealing.³⁶⁹ Although the general at-will doctrine applies, the plaintiff-employee might prove that he comes within this narrow exception if he can show that the employer acted in bad faith, deceitfully, and/or maliciously. One state that has recognized this exception is Delaware. Just four years after its application of this exception,³⁷⁰ the Delaware Supreme Court in *E.I. DuPont de Nemours and Company v. Pressman*³⁷¹ agreed that the covenant has characteristics of a tort cause of action. In the 1992 decision, the Court had awarded punitive damages for breach of that covenant. However, in *Pressman* the Court held that the trial court’s instructions to the jury overstated the exception. The *Pressman* court emphasized that a showing of the actor’s malice and intentional bad faith directed toward the plaintiff must be causally linked to his termination. The plaintiff was a highly regarded Ph.D. in Biomedical Engineering who had been “courted” by DuPont and literally hired away from Johns Hopkins Medical School in 1986. About one year after he was hired, his supervisor terminated him. The plaintiff had discussed a possible conflict of interests arising from the supervisor’s paid advisory involvement with another company. The plaintiff presented evidence of the supervisor’s retaliatory campaign to persuade higher management to terminate him, including evidence of the supervisor’s placing false and negative information about the plaintiff in his personnel file. However, the Supreme Court of Delaware reversed a jury verdict for the plaintiff that included punitive damages solely because of the trial court’s overly-broad instructions to the jury regarding facts to support a breach of the covenant verdict. This decision exemplifies the narrowness of this covenant in the employment setting.

In 1991, the Model Employment Termination Act (META) was approved

369. See RESTATEMENT (SECOND) OF CONTRACTS 205.

370. *Merrill v. Crothall-American, Inc.*, 606 A.2d 96 (Del. 1992).

371. 679 A.2d 436 (Del. 1996).

by the National Conference of Commissioners on Uniform State Laws. This body was first organized in the late twentieth century by the American Bar Association to draft statutes suggested for adoption by state legislatures (even in an altered form) in areas of the law where some uniformity is desirable.³⁷² These model or uniform acts are then presented to the states and recommended for adoption. State legislatures have no co-existing duty to pass, or even to consider passage of, such proposed statutes.

META is a model law that is not a likely candidate for adoption by legislative bodies in business-minded states. It would require good cause for any termination of an employee with at least one year's service with a company, provided that he had worked a minimum of 520 hours during the prior twenty-six weeks, an average of twenty hours per week, in order to provide protection for part-time workers. A worker could waive such protection, but only if the contract contained a provision permitting waiver on the condition that the worker would receive severance pay of no less than one month's wage or salary for each one year worked. Remedies would include reinstatement with back pay or a lump-sum severance pay of up to thirty-six months the worker's wage or salary. Debates during the drafting of META, a legislative package that is common in European domestic law, were contentious and controversial. Indeed, designation as a "model" rather than a "uniform" act is indicative of the strong opposition to its proposal.³⁷³ Montana is the only state that has adopted a statute embracing the provisions of META.³⁷⁴

The precursor of the passage of the Montana statute emphasizes the temperament of both the state legislature and the state courts as an aberration in American employment law. Although most American state courts had refused to imply the covenant of good faith and fair dealing to employment contracts,³⁷⁵ the Montana Supreme Court held otherwise in *Stark v. Circle K Corp.*³⁷⁶ Shortly after the decision in *Stark v. Circle K*, the Montana state legislature became the first state to follow the Commissioners' recommendation by enacting a quite comprehensive wrongful discharge statute. The essence of the Montana statute follows the preclusion in META of an employer's unilateral termination of the employment relationship without "good cause."³⁷⁷ "Good cause" might be in the form of intentional or negligent acts of the worker, the inability of the worker to perform his duties, or the needs of the business. Note

372. By the late 1990s, this conference had drafted nearly 100 uniform acts and twenty-four model acts. PATRICK CIHON & JAMES OTTAVIO CASTAGNERA, *Employment and Labor Law 20* (West Publishing Co. 3d ed., 1999).

373. COVINGTON & DECKER, *supra* note 2, at 353.

374. Montana Wrongful Discharge in Employment Act, MONT. CODE ANN. §§ 39-1 901 through 39-2-915.

375. For example, the federal district court for the Eastern District of Virginia recently reaffirmed the principle Virginia does not recognize the employment covenant of good faith and fair dealing. *Devnew v. Brown & Brown, Inc.*, 396 F.Supp.2d 665 (E.D. Va. 2005).

376. 751 P.2d 162 (Mont. 1988).

377. Model Employment Termination Act (META) § 3(a).

that, even under META, an employer would nonetheless be given wide latitude regarding the best interests of the company.

E. Common Law Tort

Two comments are germane. First, a terminated employee may plead in the cumulative or in the alternative. That is, he may claim that the employer breached a contractual commitment *and* that it committed the tort of wrongful discharge. Second, the most significant distinction between the two is the element of damages. In a breach of contract case, the successful plaintiff is awarded the difference between what he would have earned but for the breach and what he actually earned. For example, suppose that a worker earned \$72,000 per year (i.e., \$6,000 per month). If he were discharged on November 1, 2005 and obtained other employment on January 1, 2006, at a salary of \$72,000 per year, his loss would be \$12,000 (two months' earnings). On a tort theory, the employer would be charged with having committed an *intentional* tort, for which punitive damages may be awarded. Usually these damages have no relation to the actual injury sustained and indeed are often much in excess of actual damages.

1. Retaliation Against Employee for Exercise of Constitutional Right

The seminal case for retaliation against an employee for exercising a constitutional right is *Perry v. Sindamann*.³⁷⁸ The plaintiff was an instructor in a Texas public community college whose contract was not renewed after he publicly criticized college administration. As president of the teachers union, he addressed contentious issues on behalf of other teachers. The United States Supreme Court held that this retaliatory non-renewal of a contract that normally would be routinely re-offered annually violated his constitutional guarantee of free speech.³⁷⁹ It should be noted that constitutional protection attaches only in a public setting. Thus, had the employer been a private college, it might have been able to act in the same manner with impunity.

2. Retaliation for Exercise of Statutory Right

Similar to the wrongful discharge of a public sector employee in retaliation for the exercise of his constitutional right is the principle of retaliation against any worker — public or private — by termination because of acts that are in accordance with a right guaranteed by statute. One of the first such cases was the Indiana Supreme Court's decision in *Frampton v. Central Indiana Gas Co.*³⁸⁰ The Court held unlawful the discharge of an employee

378. 408 U.S. 561 (1972).

379. U.S. CONST. amend. 1.

380. 297 N.E.2d 425 (Ind. 1973).

because he had filed a worker's compensation claim against his employer.³⁸¹

The Supreme Court of Virginia, which is generally considered to be among the more conservative of state courts, also upheld such an exception to the employment-at-will rule in *Bowman v. State Bank of Keysville*.³⁸² The two plaintiffs in *Bowman* had participated in an employee stock-option plan and thus held shares in their employer bank. They were terminated after they had voted against the bank's board of directors' proposal to merge with another institution. The vote had been quite close, and the plaintiffs' collective shares had been decisive in the proposal's defeat. They had initially voted in favor of the proposal after having been told by two of the bank's officers that a negative vote might adversely affect their employment. The proposal barely carried, but they asked for a revote, charging the bank of violations of federal and state statutory proxy requirements. As expected, the second vote resulted in a "no" vote for the merger, and the plaintiff-employees consequently were dismissed. A Court that was unanimous on this issue repeated the state's strong adherence to the employment-at-will rule, but approved this narrow exception. The Virginia corporation code³⁸³ vested in shareholders the right to vote their shares according to their own volition, and retributive action against them for having done so was held to be unlawful. Significantly, the *Bowman* opinion emphasized that this exception was a very narrow one indeed and that Virginia still adheres strictly to the employment-at-will rule.³⁸⁴

3. Retaliation for Employee's Refusal to Violate Statutory Law

This theory first arose in *Peterman v. Teamsters*.³⁸⁵ The facts evolved from a Congressional investigation into allegations of corruption within the International Teamsters Union in the 1950's. The plaintiff was an executive employee of the union who had been subpoenaed to testify before the federal legislative commission. He was terminated as a result of his refusal to comply with his employer-union's demand that he falsely testify under oath. Perjury is a felony in all states, and he challenged his dismissal on wrongful discharge grounds. The California court upheld his claim that the employer's reason was unlawful under the tort of wrongful discharge.

A similar decision was *Sheets v. Teddy's Frosted Foods, Inc.*³⁸⁶ In this case the highest court of Connecticut held unlawful the termination of a worker because he had insisted that his employer comply with state law applicable to

381. See also *Harless v. First National Bank of Fairmont*, 246 S.E.2d 270 (W.Va. 1978), *Nees v. Hocks*, 536 P.2d 512 (Ore. 1970) and *Sabine Pilot Services, Inc. v. Hauck*, 687 S.W.2d 733 (Tex. 1985).

382. 331 S.E.2d 797 (Va. 1985).

383. VA.CODE ANN. § 13.1-32.

384. 331 S.E.2d at 800.

385. *Peterman v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 396*, 344 P.2d 25 (Cal. Dist. Ct. App. 1959).

386. 427 A.2d 385, 389 (Conn. 1980).

labeling of retail foods, judicially affirming the legality of “whistle-blowing,” as explained in (e) below.

4. Retaliation for “Whistle Blowing”

Several state legislatures have adopted statutes protecting workers who report wrongdoing on the part of their employers. These states include California, Connecticut, Florida, Hawaii, Louisiana, Maine, New Jersey, New York, and Ohio.³⁸⁷ The New York State Court of Appeals has held that such protection extends to the employee who was mistaken in his belief that his employer was in violation of a health and safety law, provided his belief was honest.³⁸⁸

The primary focus of the much-discussed Sarbanes-Oxley Act³⁸⁹ was the prevention of insider profiting and dishonest misuse of funds at the expense of general workers whose pension plans had been depleted by companies such as the scandalized Enron Corporation in late 2001. However, it is also necessary that employment lawyers heed this legislation, since it extends “whistle-blower” protection to officers, employees, contractors, subcontractors, and agents who report any such wrongdoing.³⁹⁰ This law applies to any company with a class of securities required to be reported under section 12 and 15(d) of the Securities Exchange Act of 1934.³⁹¹ Penalties against companies that retaliate against such protected persons include criminal sanctions.³⁹²

5. The Judicial Public Policy Exception

Some courts have taken a liberal stance as to what constitutes “public policy” and which body (or bodies) may determine the public policy of a state. Representative of more judicially conservative states, the Virginia Supreme Court has held that such determination lies solely with the legislature. In *Lawrence Chrysler-Plymouth v. Brooks*,³⁹³ the Court reversed a jury verdict for a plaintiff who had been terminated after he refused his superiors’ instruction to repair a motor vehicle in a manner the plaintiff, who was the chief mechanic for the defendant car dealership, deemed unsafe. The floor of the chassis of the car was split, and he believed it should be replaced. Although replacement would have been much more costly for the company than a fusion of the existing chassis, the mechanic explained welding the split part together to be patently unsafe. The mechanic’s refusal resulted in his discharge. In his lawsuit, he charged that this was in violation of the Virginia automobile salvage

387. CIHON & CASTAGNERA, *supra* note 372, at 232-33.

388. *Bordell v. General Electric Co.*, 667 N.E.2d 922 (N.Y. 1996).

389. Sarbanes-Oxley Act, 15 U.S.C. §§ 7201-7266; 18 U.S.C. § 1514.

390. Sarbanes-Oxley Act, 1 U.S.C. § 806; 18 U.S.C. § 1514A(a).

391. 15 U.S.C. § 781.

392. 18 U.S.C. § 1514(A)(a).

393. 465 S.E.2d 806 (Va. 1996).

and consumer protection laws. However, the Court viewed the language in those statutes too general to address this precise method of repair and held the termination did not violate public policy. In holding the narrow *Bowman* exception³⁹⁴ did not apply, the highest court in Virginia implicitly declared the state legislature as the single decider of what constitutes specific state public policy.³⁹⁵

An interesting case illustrating the broader view that courts may take in determining public policy is *Wagenseller v. Scottsdale Memorial Hospital*.³⁹⁶ In what may be a unique set of facts, the plaintiff, a nurse who became good friends with her supervisor, the head nurse, had consistently received excellent work appraisals. This suddenly changed after a hospital employees' eight-day rafting trip on the Colorado River. Shortly following this social gathering, her former friend-supervisor starkly criticized her work and terminated her employment in summary fashion.

The plaintiff had been one of the few at the picnic who did not become inebriated. She described their actions as including urinating and defecating openly. Most the other employees began to perform in a skit, with background music from the movie "Breakfast at Tiffany's." The song was "Moon River," and all those who participated would "moon" the audience, that is, expose their naked buttocks to viewers. The plaintiff later testified that she found this repugnant, and she refused to participate. Her supervisor then allegedly harassed her and used abusive language toward her in the presence of fellow workers. This was confirmed at trial by testimony from other employees.

Although an Arizona statute³⁹⁷ penalized public nudity, it applied to "offensive" behavior. Since none of those participating found it offensive, there was arguably no statutory violation. Nonetheless, the Arizona Supreme Court held her termination to have been in violation of public policy in general. Necessary for this finding was the Court's statement that "[p]ublic policy is usually defined by . . . something that the legislature has forbidden. But the legislature is not the only source of such policy. In common-law jurisdictions, the courts too have been sources of law."³⁹⁸ In this more liberal state court, public policy, then, is not limited to directives from the legislature, but includes mandates formulated by the courts.

It is submitted that had the facts of *Wagenseller* been submitted to the Supreme Court of Virginia, the plaintiff would not have been victorious. Similarly, had the Arizona Supreme Court heard the appeal in *Brooks*, it is quite probable that the plaintiff would have prevailed.

Even those courts that have adopted the public-policy exception to the

394. *Bowman v. State Bank of Keysville*, 331 S.E.2d 797 (Va. 1985).

395. 465 S.E.2d 809.

396. 710 P.2d 1025 (Ariz. 1985).

397. ARIZ. REV. STAT. § 13-1402.

398. *Wagenseller*, 710 P.2d at 1033 (quoting *Lucas v. Brown & Root*, 736 F.2d 1202, 1205 (Ark. Ct. App. 1984)).

employment-at-will rule have narrowly applied it. A prime example is *Geary v. United States Steel Corp.*³⁹⁹ In this case that preceded the *Lawrence* decision in Virginia and which had similar facts to *Lawrence*, an employee had been terminated because of his refusal to sell a product that he had determined to be unsafe. The plaintiff presented no evidence that he had any expert qualifications in making such judgments, and the state's highest court upheld the lower court's judgment for the employer. The Supreme Court of Pennsylvania, although recognizing that there may indeed be some situations in which a strong public policy exception prohibits a worker's termination, expressly refused to "define in comprehensive fashion the perimeters" of the public policy exception, and it did not agree that . . . the time has come to impose judicial restraints on an employer's power of discharge."⁴⁰⁰

A final comment about a recent business closure in Virginia merits mention. In September 2006, the union, Local 67, filed an unfair labor practice charge⁴⁰¹ with the National Labor Relations Board against J.W. Ferguson & Sons Co., a business established in Virginia before the Civil War (1861-1865).⁴⁰² Failure to give notice would violate WARN,⁴⁰³ unless the company could prove a statutory justification for such failure. However, most lawyers would concede that the employer did not commit an unfair labor practice when it instantly terminated these workers on September 14, 2006, without notice and without severance pay, when it closed allegedly because of financial necessity. The reason for the closure is actually irrelevant, since the Supreme Court of the United States has held that a business might close completely for whatever reason without being in violation of federal labor laws.⁴⁰⁴ Consequently, the only possible positive outcome for the union would be proof that the closure was only a partial closure motivated by union hostility⁴⁰⁵ and was affected in order to avoid union activity, which had not even been alleged. This exemplifies a fundamental distinction between American and European laws

399. 319 A.2d 174 (Pa. 1974).

400. *Id.* at 180.

401. A 1935 statute, commonly referred to as the Wagner Act, as amended by the 1947 Taft-Hartley Act, 29 U.S.C. §§ 151 *et seq.*, contains five unfair labor practices for employers and seven unfair labor practices for unions. This charge was likely filed under § 8(a)(3) (29 U.S.C. § 158(a)(3)), an alleged unlawful refusal by the employer to bargain with the union.

402. Gregory J. Gilligan, *Union battles Henrico label firm*, RICHMOND TIMES-DISPATCH, Sept. 19, 2006, at B-1, col. 1.

403. *Supra* notes 265-92 and accompanying text.

404. *Textile Workers Union of America v. Darlington Mfg. Co.*, 380 U.S. 263, 269 (1965).

405. *Id.* In *Textile Workers*, the Supreme Court held that the employer had acted unlawfully, since it had closed only a part of its business, a closure motivated by union hostility. The National Labor Relations Board presented on behalf of the union ample proof that this was a variation of the so-called "runaway shop," a move of one plant to another geographical area to avoid the necessity of bargaining with a union. In this case, the employer had closed only one factory of an entire network of plants constituting a single company for bargaining purposes. Thus, the closure was partial, not total. This was held to be a discriminatory action against workers because of their union affiliations, an unfair labor practice under § 8(a)(3) of the Taft-Hartley Act. 29 U.S.C. § 158(a)(3).

with regard to job protection for workers.

IV. COMPARISONS AND CONTRASTS

The tables below provide matrices of characteristics of most European laws of dismissal.

TABLE 1: TERMINATIONS IN SELECTED PRE-2004 EU MEMBER STATES

Country	Good cause required?	Notice to employee	Notice to WC and / or union	Time off to look for work?	Statutory severance pay?
Austria	Yes	14 days – 6 weeks for BC. 6 weeks – 5 mos. for WC.	WCou (if 5+ employees)	No	Beginning at 3 mos. Service – 2 mos.-12mos. wage/salary
France	Yes	1-2 mos. if 1 yr. service	If 50+ employees	No	1/10 mo. wage/salary for each yr. worked (provided 2yrs. Service) for WC; 20hrs. pay for WC.
Germany	Yes	Up to 7 mos.	WCou (if 5+ employees)	No	½ mo. pay for each yr. worked
Greece	Yes	None for BC; 2 mos. – 24 mos. for WC	No	NO	WC only (1-24 mos. pay, maximum €6500; for BC, national CBA 5 days – 165 days pay
Ireland	Yes	1-8 weeks (provided 13 wks. of service)	No Wcou	No	2 wks. Pay per each yr. worked plus one week bonus w/ €600/week maximum (only if 2 yrs. Service)

(* Works Council in France has no right of consultation in terminations.)

Legend: WC=white collar worker / BC=blue collar worker / WCou=works council

TABLE 2: TERMINATIONS IN SELECTED NEW (2004) EU MEMBER STATES

Country	Good cause required?	Notice to employee	Notice to Wcou and/or union?	Time off to look for work?	Statutory severance pay?
Czech Republic	Yes	2 mos.	No to Wcou Yes to union	No	3x average mo. wage/salary
Hungary	Yes	30 – 90 days	No	½ work time during notice period	2 – 12 mos. wage/salary
Slovakia	Yes	2 mos.	Yes (both)	No	2x monthly wage/salary
Slovenia	yes	30 – 150 days	No to Wcou Yes to union (but only if employee requests)	2 hrs /week	1/5 to 1/3 one month wage/salary

Legend: WCou=works council

TABLE 3: TERMINATIONS IN TWO EU APPLICANTS FOR MEMBERSHIP

Country	Good cause required?	Notice to employee	Notice to WCou and/or union?	Time off to look for work?	Statutory severance pay?
Croatia	Yes	2 weeks – 1 mo. (more if employee is over 55 and has 20 yrs. Service)	Yes to both (WCou if 20+ employees)	4 hrs. / week	1/3 wage/salary for each year of service (double amount if employee disabled)
Turkey	Yes	2 wks. – 8 wks.	No	2 hrs/wk	No (only social unemployment benefits)

Legend: WCou=works council

For purposes of comparison, a fourth table indicates the same characteristics under American employment law.

TABLE 4: AMERICAN STATES AND US FEDERAL LAW

Country	Good cause required?	Notice to employee?	Notice to WCou or union?	Time off to look for work?	Statutory severance pay?
USA	Only in Montana (statute)	Only if plant closing or mass layoff	No (and no statutory WCou)	No	No

* See WARN, a 1988 federal statute. This law applies only to business with at least 100 full-time employees or the equivalency.

The contrasts are stark. Even the American concept of collective redundancy/mass layoff provides considerably less basic protection for the affected worker. The typical European statute applies to a collective job loss for twenty workers. The number of job losses is ten in the Czech Republic, Hungary, Slovenia, and Turkey. In Ireland, Austria, Germany, and Greece, a layoff of as few as five is considered collective. The number of layoffs required for the mass layoff concept under United States federal law is one-third of the total workforce or 500 workers, whichever is less. The difference becomes even more vivid under the limited employer coverage of the mass layoff legislation in the United States, which applies only to businesses with 100 or more full-time workers. The threshold for coverage in European legislation is for companies with a total of only twenty workers.

Prior or contemporaneous notice to a works council is required in most European states with statutory works councils, and in Austria and Germany, these bodies also have the right of consultation before a dismissal is effective. In Slovenia, the union or the federal office of the Labor Inspectorate might even suspend a collective redundancy, an intrusion into management prerogative that is unknown under American law. There is no counterpart to the European works council in American legislation. An additional requirement in a typical European requirement is statutory notification to the worker's union, which would be a management duty under American federal labor law only if it had been agreed upon through collective bargaining. In addition to the absence of any such statutory requirement under American law, the diminishment of the role of unions is noteworthy. In 2007, only 7.4% of American private sector workers were members of unions.⁴⁰⁶

Many laws in Eastern Europe impose upon the employer the obligation to permit the worker paid time off during the notification period. This period is two hours per week in Slovenia and Turkey, four hours per week in Croatia, and one-half the total working hours in Hungary. Only mass layoffs require the

406. George Will, *Desperate Unions Ask Congress to OK Shortcut*, RICHMOND TIMES-DISPATCH (WASHINGTON POST WRITERS GROUP), Feb. 27, 2007, at A-13, col. 1-3.

employer to give notice to the American worker, and there is no parallel statutory duty to provide the employee with any paid time off work during the notification period.

Recurring in European domestic employment laws is the obligation of the employer to place a worker to be terminated in an alternate position if possible (see, for example, France, the Czech Republic, Slovenia, and Croatia), and there is often the requirement that social factors such as the worker's age and number of dependents, be considered (see, for example, Austria, Germany, Greece, and Croatia). Both the American courts and the legislatures have deferred to managerial discretion in such decisions.

The general rule in Europe is that the employer must provide statutory severance pay to the affected worker. American legislation does not address such a duty. Indeed, the only post-dismissal compensation that a worker might lawfully claim is state unemployment pay. Each company pays a federal and state imposed tax contribution to this overall fund, and its tax rate rises proportionately to the number of workers who have received benefits during the period designated by statute. The general rule among the states is that, regardless of the length of unemployment, state unemployment benefits continue for a maximum of six months.⁴⁰⁷ The duration subject to this maximum is generally gauged according to the claimant's length of employment, not only for this employer, but also for others, during the most recent two years or so. The weekly benefit amount usually is calculated according to his earnings during that time. These amounts are always subject to a maximum, and some states are fairly parsimonious in determining limits on these benefits.⁴⁰⁸ The indirect expense to the employer of increased unemployment taxation does not amount to what the European employer must bear by paying direct severance money. Additionally, if a worker were terminated by reason of his own deliberate conduct, which is tantamount to work-related misconduct, or his resignation had been without good cause, he would not be entitled to receipt of unemployment benefits. As such, there would be no consequential effect on the company's taxation rate.

Irrespective of those differences, however fundamental they may be, the most striking distinction between European and American laws of dismissal is the American employer's unilateral right to terminate the employment relationship at-will without good cause. This results in a management-dominated hegemony and a continued employment relationship that is subject entirely to the discretion of the employer.

It may well be that there is no causal effect of worker protections upon unemployment statistics, but if such a causal impact does exist, it is perhaps

407. See, e.g., VA. CODE ANN. § 60.2-602.

408. *Id.* The current maximum in Virginia is \$367. The state with the highest weekly maximum is Maine, with \$860, and the lowest is Mississippi, with a maximum of only \$210. The maximum in most states ranges from \$300 to \$400. United States Department of Labor <http://www.doleta.gov> (last visited Jan. 7, 2008).

surprising. Unemployment in the European Union as a whole is approximately 7.5%, and in the United States, 4.7%. The EU member states with the lowest unemployment are Austria, Denmark, Ireland, the Netherlands, and the United Kingdom, each with a rate of approximately 4.5%. The highest, Poland and Slovakia, are between 12% and 13%.⁴⁰⁹ In comparison, the overall unemployment rate in the United States is substantially lower at 4.7%. The currently highest rate is in Mississippi, with 7.5%, precisely that of the EU, while the state with the most impressive rate is Hawaii at only 2%.⁴¹⁰ Whatever ill effect the comparatively unfettered management powers of American employers, employment levels remain nonetheless, and perhaps inexplicably, high.

CONCLUSION

Statutory job protection for the non-union American worker is dramatically inferior to the employment securities characteristic of European domestic laws. Domestic legislation in Europe has consistent requirements for minimum notice prior to any ordinary dismissal, and the general rule is that the company must make an exhaustive effort to find an alternate position within the company for a business-related termination. Additionally, many statutes require notice to the works council, the union, or a federal office, particularly in cases of collective redundancies. Every country among those surveyed, with the exception of Turkey, assures the dismissed worker severance pay from the employer. American federal and state law is quite the reverse.

The employment-at-will rule has long been the legal bedrock of the workplace under the American common law, a rule that contrasts markedly with the pro-worker European stance in which the employer has the burden of proving good cause for any dismissal. When strictly applied, this American rule leaves little, if any, remedy for the worker who may have been unfairly, but not unlawfully, discharged. Even when taking into account the exceptions to this rule by some courts (broader in some states than in those with more conservative judiciaries), the evidentiary burden rests squarely upon the worker to prove that he falls within an exception.

Within the United States, only Montana has enacted a wrongful discharge statute that compares with European statutory protections. Absent proof by an American worker that his employer has breached the employment contract or has terminated him on a wrongful ground that falls into a "public policy" exception, he has no cause of action against the employer. Moreover, what constitutes public policy has been construed by many states is only that explicitly stated in legislation. Even in those states where courts have determined that the judiciary is also authorized to determine public policy, the concept is so nebulous as to make this determination inconsistent and thereby

409. See United States Bureau of Labor Statistics, <http://www.bls.gov>.

410. *Id.*

unpredictable.

The only significant American legislation mandating a minimum notice before termination is the federal Workers Adjustment Retraining and Notification Act, a statute that applies only to larger companies. Therefore, dismissal is often harsh and immediate. Additionally, the American workplace does not have the works council that is so omnipresent in Europe (with the exception of Ireland), and the power of organized labor has diminished proportionately with its drastically decreasing membership. The consequence is that the American worker generally does not have the legal support system characteristic of the European workforce.

Generally, the American employee might be terminated without cause and without notice. Since he might be dismissed without cause, any implied duty of the employer to find another position for him would be contradictory. Moreover, he has no right to severance pay. Loss of work for the American worker portends bleak days indeed, much more so than for his European counterpart who enjoys beneficent statutory protections and recourse.

