ALLEN & OVERY

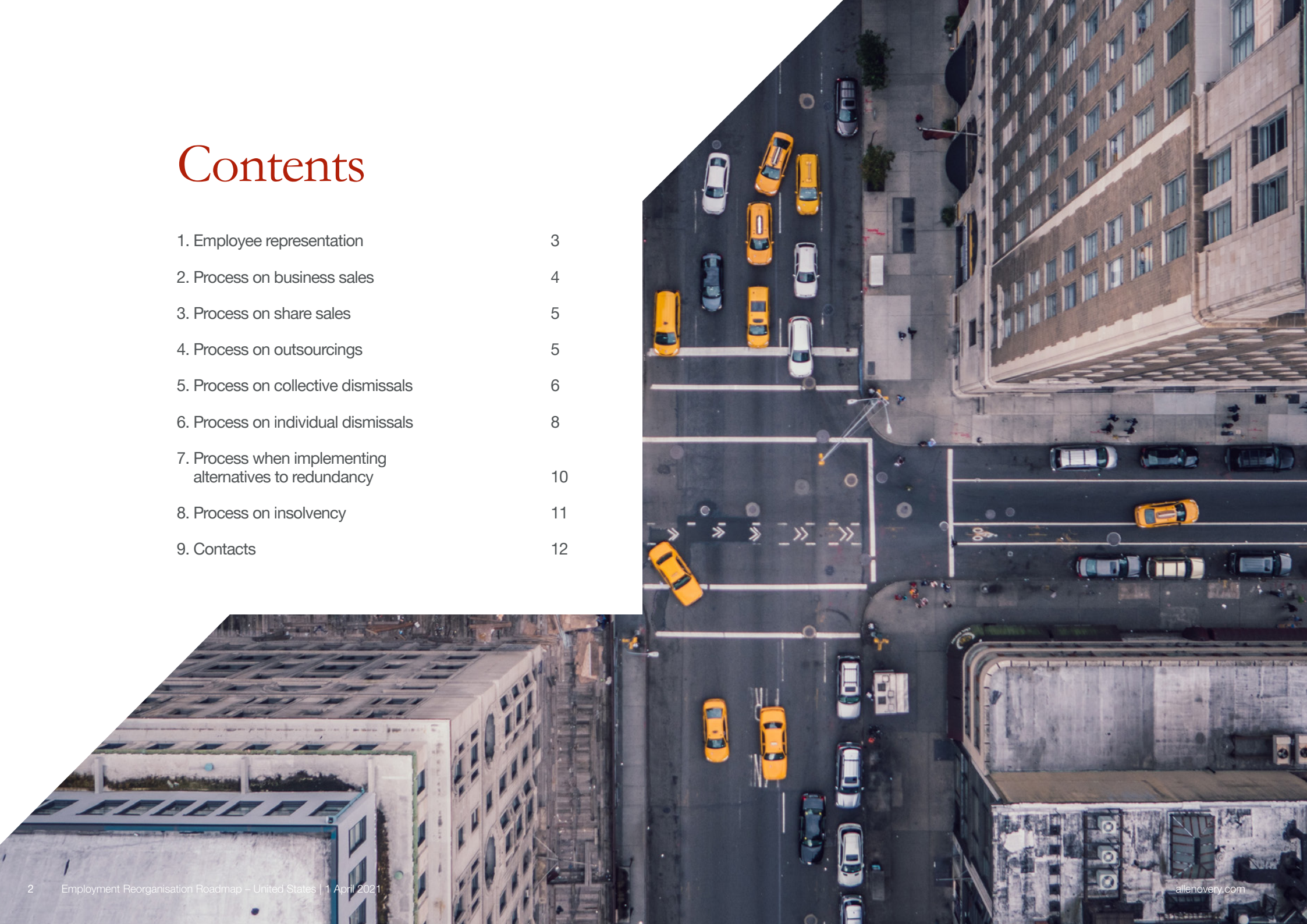
Employment Reorganisation Roadmap

United States

1 April 2021

allenovery.com

Contents



1. Employee representation

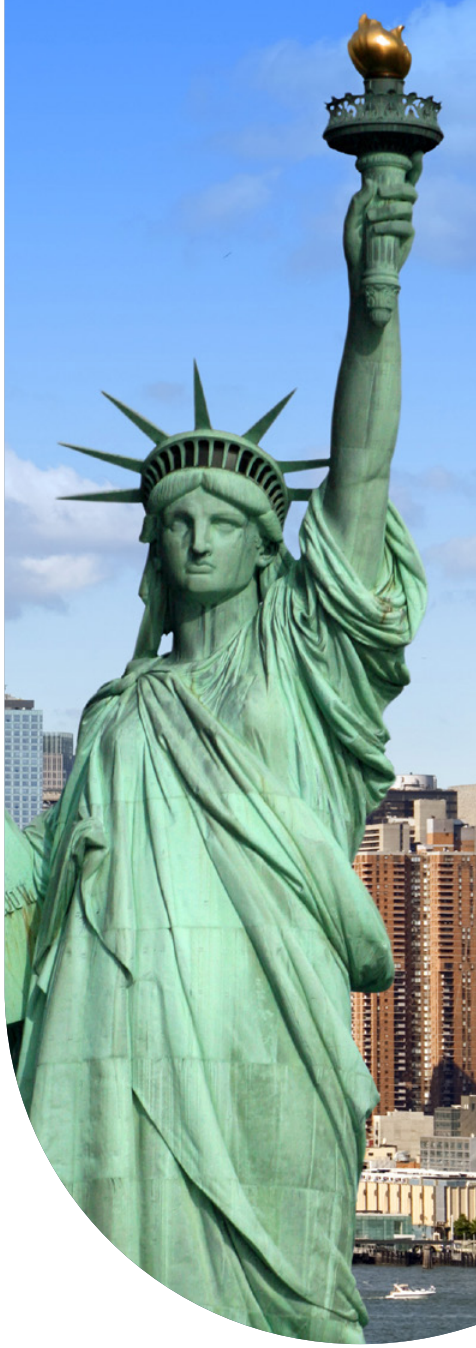
1.1 What are the main forms of employee representation involved in restructurings?

The main form of employee representation involved in restructurings is via trade union representatives (if a trade union is recognised by the employer).

1.2. Is there a system of employee participation rights?

Employees have no right to management or board representation.

2. Process on business sales



2.1 Are employees automatically transferred to a buyer by operation of law on a business sale?

If a business sale takes place, employees are not automatically transferred by law. If the buyer wants to hire the employees, it must then make an offer of employment to the employees, which will need to take effect as of the transfer. The employees' agreement to the new offer of employment is required if the seller seeks to transfer them with the business. While it is preferable to make the offer in writing, this is not legally required.

2.2. If so, in broad terms, what is the legal test for identifying which employees transfer?

There is no automatic transfer of employees on a business sale.

2.3. Can employees object to the automatic transfer of their employment and what are the consequences of an objection?

On a business sale, employees may choose to reject the offer of employment made by the buyer. The employees' current employer would then need to decide whether to continue or terminate the employee's employment, noting that many U.S. employees are employed "at will".

2.4. Do obligations to inform and consult employees or employee representatives arise on a business sale?

There are generally no requirements to inform/consult employees or employee representatives in relation to a business sale, unless a collective agreement provides otherwise. However, if any employees are represented by a trade union, the seller will normally be obliged to inform the union of the proposed transaction and to bargain in good faith over the effects of the proposed transaction on employees and their compensation and benefits. Since collective agreements do not transfer automatically (unless expressly provided for by the agreement), the seller may seek to require the buyer expressly to assume the collective agreement. In that case, it may be necessary to inform trade union representatives and obtain their consent to the buyer becoming a signatory to the collective agreement. In any event, a buyer will generally step into the seller's shoes vis-à-vis an existing collective bargaining agreement, and will be required to bargain in good faith any proposed changes to such existing terms.

2.5. What are the penalties for non-compliance with information and consultation obligations on a business sale?

There are no penalties in relation to failure to inform/consult, unless the parties have contracted for them (in which case breach of contract and related remedies may result). It is uncommon to contract for such obligations.

If the seller/buyer does not obtain employee consent to the transfer, or if the buyer does not wish to employ any or all of the seller's employees, the employees will not transfer with the business from seller to buyer. In this case, notification obligations under the federal Worker Adjustment and Retraining Notification Act (WARN) and severance rights may be triggered if the seller has to terminate the employment of those employees (see **section 5 – Process on collective dismissals**).

3. Process on share sales

3.1. Do obligations to inform and consult employee representatives arise on a direct share sale (ie on the sale of the company itself)?

There is generally no obligation to inform/consult employees or employee representatives in relation to a share sale, unless a collective agreement provides otherwise. A collective agreement affecting target company employees will transfer automatically to the buyer, unless otherwise provided. If the buyer contemplates workforce reorganisations or changes in collective terms and conditions, it will be required to consult any recognised trade union, and possibly comply with notification obligations under WARN (see **section 5 – Process on collective dismissals**).

3.2. Do obligations to inform and consult employee representatives arise on an indirect share sale (on the sale of a company's direct or indirect holding company)?

There is no obligation to inform/consult employees or employee representatives on an indirect share sale, unless a collective agreement provides otherwise. In the indirect share sale context, notice or consultation obligations are unlikely to be triggered.

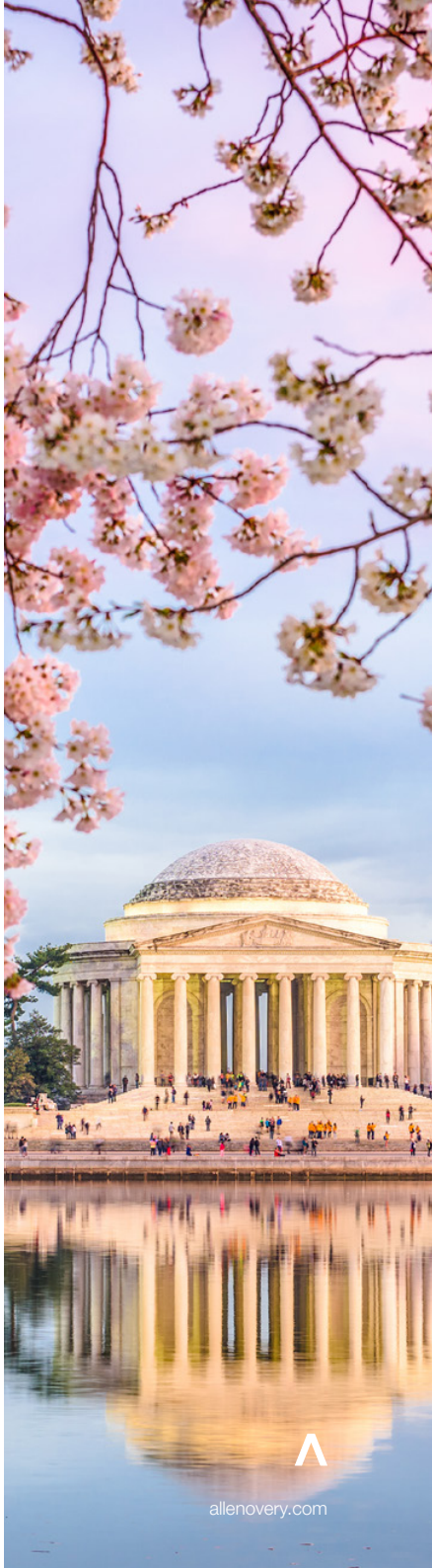
4. Process on outsourcings

4.1. Are employees transferred by operation of law in the following scenarios: (i) on an initial outsourcing of processes/services; (ii) on a change of supplier; or (iii) on an insourcing of processes/services?

Employees do not transfer by operation of law in any of these scenarios.

4.2. Do obligations to inform and consult employees or employee representatives apply in any of these scenarios?

No, there are no obligations to inform/consult employees or employee representatives in these scenarios, unless a collective agreement provides otherwise.



5. Process on collective dismissals

5.1. Is a "collective dismissal" (or "mass layoff") defined by law?

A mass lay-off, and a workforce reduction resulting from a plant closure, is defined for the purposes of the federal law, WARN. This applies where an employer has 100 or more employees (excluding employees who have worked fewer than six months in the preceding 12-month period and excluding employees who work an average of less than 20-hours per week) and either:

i. an employment site (or one or more operating units within an employment site) will be shut down resulting in the termination of employment of 50 or more employees within a 30-day period; or

ii. the employer is to implement a mass layoff resulting in the termination of employment during any 30-day period of:

– 500 or more employees, or

– 50 - 499 employees if they comprise a minimum of 33% of the active workforce.

There are provisions aggregating dismissals over a 90-day period, so that procedures may also be triggered if there is a series of smaller-scale dismissals during a 90-day period.

In additional to the federal obligations, several states have additional obligations under state legislation that must be followed.

5.2. Do obligations to inform and consult employee representatives arise on a collective dismissal?

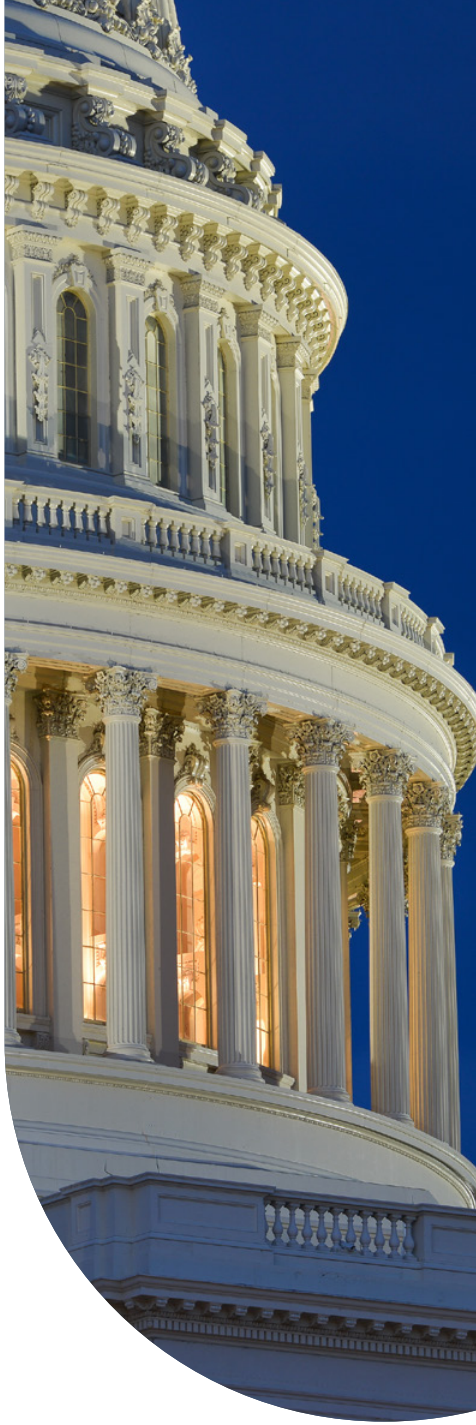
Where WARN applies, an employer must give affected employees at least 60 days' advance written notice of a plant closure or mass layoff. This must be provided before employees are dismissed (other than in exceptional cases, eg unforeseeable business circumstances).

5.3. Do obligations to inform and consult the competent authorities arise on a collective dismissal?

Yes, the employer must (at the same time as notifying the union and employees) give notice to:

– the state dislocated worker unit, and

– the chief elected official of the local government under which the layoffs will take place.



5.4. When are these obligations triggered?

WARN notification obligations arise once the decision to make a plant closure or implement a mass layoff has been taken, but notifications must be provided before employees are dismissed (other than in exceptional cases, eg unforeseeable business circumstances).

5.5. What are the penalties for non-compliance with information and consultation obligations on a collective dismissal?

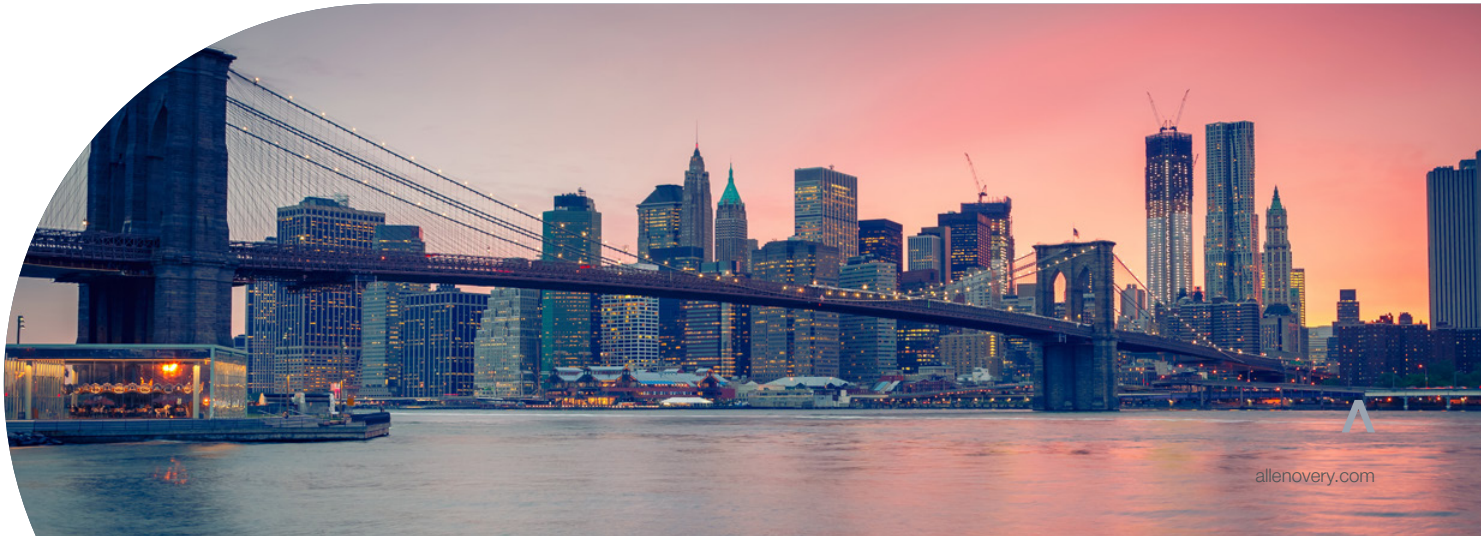
Failure to provide notice as required by WARN entitles each aggrieved employee to an amount, including back pay and benefits, over the period of violation up to 60 days. The employer's liability may be reduced by any wages paid and any voluntary and unconditional payments made by the employer to the employee.

5.6. Do obligations to inform and consult employee representatives and/or competent authorities arise in the context of multiple dismissals, which do not qualify as a collective dismissal, as defined by law?

Unless a collective bargaining agreement prescribes specific procedures and notice obligations the employer must follow, there are no obligations to inform and consult employee representatives in the context of multiple dismissals which do not qualify as a collective dismissal.

5.7. Does an employer have options/alternatives when it has been unable to reach agreement with employee representatives during the negotiation period?

There is no duty on the employer to reach agreement with employee representatives, unless specified in a collective bargaining agreement.



6. Process on individual dismissals

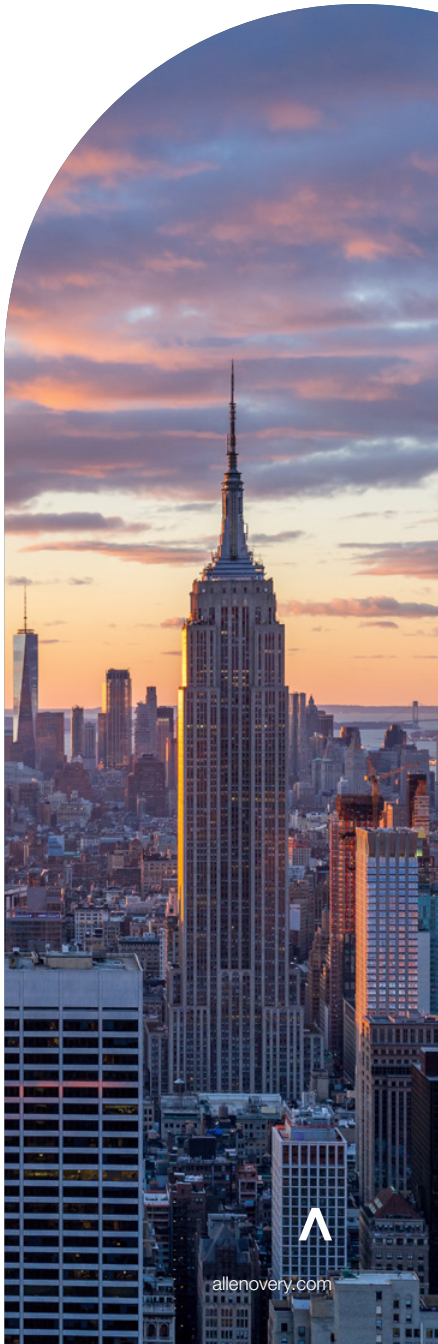
6.1. Are employees entitled to a minimum period of notice on dismissal on redundancy or economic grounds?

Most employment relationships in the U.S. are “at will” (unless an employment agreement provides otherwise). This means that an employer can terminate the employment at any time without notice or cause. If there is an employment agreement or there is an applicable severance policy, this may specify a notice period or provide for a payment in lieu of notice. Otherwise, there are no minimum notice period requirements. However, applicable state law should be checked to ensure that there are no state-specific limitations or requirements.

6.2. Does any special procedure apply when proposing to implement an individual dismissal on redundancy or economic grounds?

Most employment relationships in the U.S. are “at will” (unless an employment agreement or severance policy provides otherwise). This means that an employer can terminate the employment at any time without notice or cause (ie no redundancy justification is required). Generally, the only procedural requirements relating to dismissal are set out in the employer’s policies. If there is an employment contract or collective agreement, this may also set out dismissal procedures.

Note that, in all cases, dismissals must not be based on impermissible discrimination (eg based upon race, age, gender or national origin). An employer is generally free to select whomever it wants for redundancy, provided it does not act in bad faith or breach anti-discrimination statutes.



6.3. Does special dismissal protection apply where dismissals are to be implemented following or in connection with a business transfer?

Most employment relations in the U.S. are “at will” (unless an employment agreement or severance policy provides otherwise). This means that an employer can terminate the employment at any time without notice or cause.

6.4. Are employees entitled to a minimum severance payment on dismissal for redundancy or economic grounds?

An employer does not have to offer minimum severance or redundancy pay. However, if there is a collective agreement, employment or severance agreement or other employment or severance policy, this may specify severance entitlements which must be observed.

6.5. What are the penalties for non-compliance with individual dismissal procedure?

Generally, employees have no protection against wrongful or unfair dismissal since most employment relationships are (unless an employment agreement or severance policy provides otherwise) “at will”. However, there is significant protection for employees who are dismissed in breach of discrimination laws, or upon other unlawful grounds (such as being a protected whistleblower).

6.6. Is there any special legal protection or does any special treatment apply for particular groups of workers?

A termination of employment may be found unlawful in several situations, which include a termination which violates public policy, such as a termination of employment for military service or jury duty, or a termination of employment which amounts to retaliation. Federal, state and local discrimination laws also prohibit the termination of an employment relationship based on a protected characteristic or being a protected whistleblower.

7. Process when implementing alternatives to redundancy

7.1. Can changes to employment terms be made with or without express employee consent?

An employer may change most terms of an "at will" employee's employment, including job duties, schedule or work location, without their consent or prior notice. An employment contract or collective bargaining agreement may provide that express consent is required, or may provide an employee with the right to severance pay if they have "good reason" (which may include reductions in compensation or status). Employers must notify and receive consent from employees prior to reducing an employee's salary. Applicable state law should be consulted, as many states require that notice be given in a certain format (such as in writing) and provide different notice timing requirements.

7.2. Must an employer consult individually or collectively with affected employees or their representatives (if any) before making changes to employment terms?

There is no obligation to consult collectively about changes, unless provided in a collective agreement. There may be obligations to consult individually depending on the relevant employment term to be changed.

7.3. Do additional restrictions apply if changes are proposed in connection with or following a business transfer?

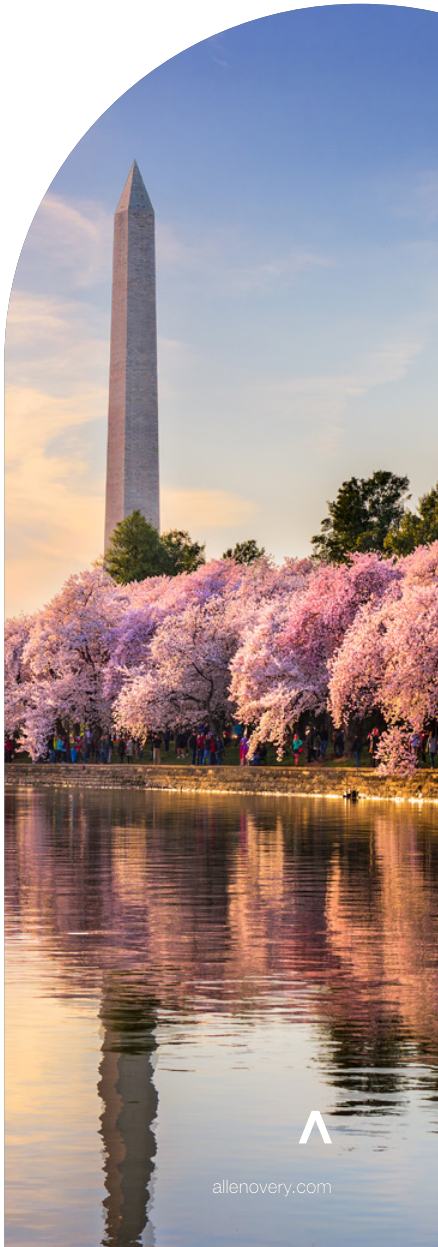
There are no additional restrictions if changes are proposed in connection with or following a business transfer.

7.4. What are the penalties for non-compliance with these procedures?

There is a potential claim for breach of contract or right to severance pay from an affected employee.

7.5. Do national laws promote or permit any alternatives to redundancy (eg layoff or short-time working)?

Furlough may be permitted for certain U.S. employees depending on their status and employment agreement.



8. Process on insolvency

8.1. Do obligations to inform and consult employee representatives arise on the sale of an insolvent business (whether share sale or business sale)?

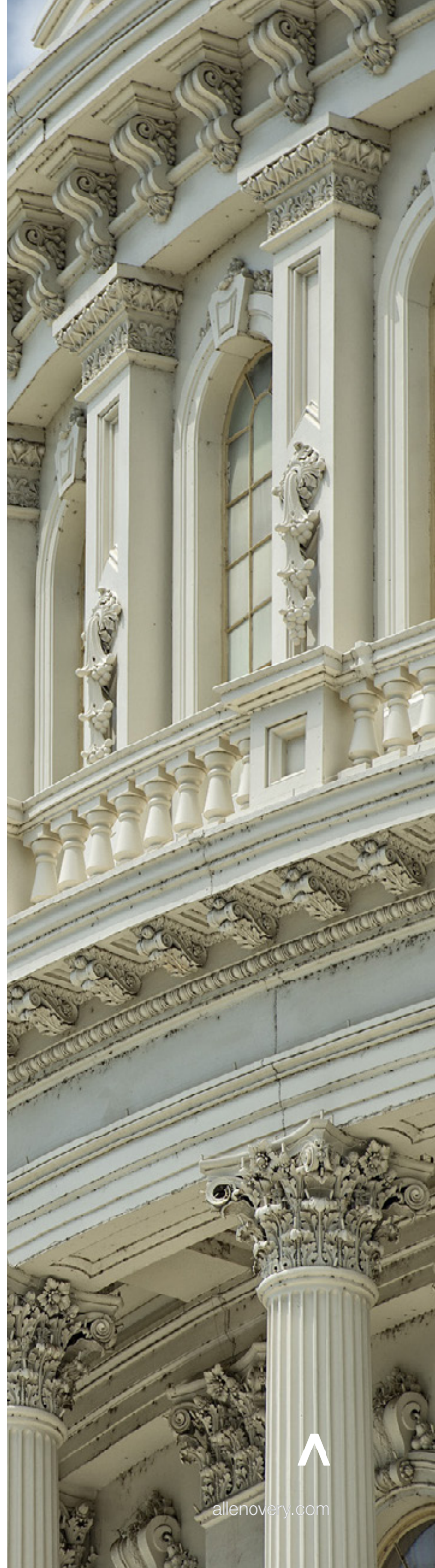
The same rules apply as in the case of the sale of a solvent business (see **section 2 – Process on business sales**). There are generally no requirements to inform/consult employees in relation to the sale of an insolvent business, unless a collective agreement provides otherwise, which is rare. However, if the sale of an insolvent business takes place, employees are not automatically transferred by law, and employee consent is required in order to transfer them with the business.

8.2. Does the buyer of an insolvent business inherit employees and/or employee liabilities by operation of law?

On the sale of an insolvent business, employees and employee liabilities are not automatically transferred by law. Employee consent is required in order for employees to transfer with the business (see **section 2 – Process on business sales**). If employees do consent to transfer with the business, whether their period of employment with the seller shall count as a period of employment with the buyer is a matter of negotiation between buyer and seller. A buyer can choose whether or not to count an employee's service with the seller for the purposes of employee entitlements under the buyer's benefit plans. Whether employee liabilities are transferred is also subject to negotiation between the parties. The buyer will typically want to leave such employee liabilities behind with the seller and be solely responsible for liabilities arising after the completion of the sale. Special rules may apply if the insolvent business has filed for bankruptcy protection.

8.3. Do obligations to inform and consult employee representatives arise where collective dismissals are to be implemented in an insolvent business?

Where WARN applies, an employer must give affected employees and other relevant entities at least 60 days' advance written notice of a plant closure or mass lay-off (see **section 5 – Process on collective dismissals**). This notice must generally be provided before employees are dismissed other than in exceptional circumstances. For example, there is an exception for "unforeseeable business circumstances", which occurs when a closure or mass lay-off is caused by business circumstances that were not reasonably foreseeable at the time that the 60-day notice would have been required. There is also an exception for "faltering companies" which applies if, before a plant closure only, a company is actively seeking capital or business and reasonably in good faith believes that advance notice would preclude its ability to obtain such capital or business, and this new capital or business would allow the employer to avoid or postpone a shutdown for a reasonable period. Even if these circumstances exist, notice must be provided as soon as practicable and the employer must provide a statement of the reason for reducing the notice requirement, in addition to fulfilling other notice information requirements as described in **section 5 – Process on collective dismissals**. Special rules may apply if the insolvent business has filed for bankruptcy protection.



9. Contacts

Brian Jebb
Partner
Tel +1 212 610 6354
brian.jebb@allenovery.com

Shira Selengut
Senior Counsel
Tel +1 212 756 1141
shira.selengut@allenovery.com

Amanda Albert
Senior Counsel
Tel +1 212 610 6438
amanda.albert@allenovery.com

Los Angeles

Allen & Overy LLP
1925 Century Park E
Los Angeles
CA 90067

Tel +1 424 512 7150

New York

Allen & Overy LLP
1221 Avenue of the Americas
New York
NY 10020

Tel +1 212 610 6300

Washington, D.C.

Allen & Overy LLP
1101 New York Avenue, NW
Washington, D.C.
20005

Tel +1 202 683 3800

GLOBAL PRESENCE

ROW
CS2102_CDD-63181_ADD-95006

allenovery.com