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Existing and Proposed Regulation of Business Dislocations

M. THOMAS ARNOLD*

I. INTRODUCTION

The decision to locate, relocate or expand a business can be influenced by a number of factors. Some of them cannot easily be changed or created by a government simply to attract new investment. Among these factors are the availability and cost of suitable transportation, adequate raw materials, cheap and plentiful power sources, and proximity to prime markets. Additionally, cost of living, recreational facilities, school systems, medical services, level of cultural activities, and climate may all be factors.¹

It is widely believed that the right-to-work laws authorized by section 14(b) of the Taft-Hartley Act² play an important role in attracting and holding business. These laws, in essence, prohibit

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1. Biscomb, Community Considerations in Corporate Headquarters Locations, INDUS. DEV., July-August, 1979, at 8. Biscomb concludes that decisions to relocate are highly subjective and are influenced by these “quality of life” factors. Id.

involuntary unionism. Under such laws, an employee may not be forced to join a union as a condition of employment. Although in the minority, many states, mostly in the south and west, currently have right-to-work laws. The motives behind such provisions are probably mixed, including ideological as well as investment-seeking motivations. In any event, there is disagreement on whether right-to-work laws have a part in attracting business investment.

To attract new business investments, state and local governments generally offer numerous inducements to businesses. Yet state and local governments are restricted in spending public monies for purely private purposes, and this restriction influences the extent and variety of programs a government entity offers. The inducements which are offered are generally tax incentives, financing, and industrial training programs. It has been noted that "[a]ll fifty states now have central economic development agencies and extend some form of direct or indirect subsidy to maintain industrial stability and promote expansion."

Tax incentives are perhaps the most widely used state inducement for attracting and retaining business, but the wisdom of this type of incentive has been questioned. They will, however, con-

4. Violations of the South Carolina law are a misdemeanor, punishable by fine of $10-$1,000, imprisonment from 10 to 30 days, or both. Id. § 41-7-80. In addition a person adversely affected by a violation may bring an action for appropriate relief. Id. § 41-7-90.
6. See Note, Legal Limitations on Public Inducements to Industrial Location, 59 COLUM. L. REV. 618 (1959). The Note surveys various types of inducements which have been used by local governments in attempting to attract industry, including gifts of money or land, bond plan financing, and site acquisition. The author discusses limitations on the use of these inducements, particularly the public purpose doctrine.
7. See Dempsey, Primary Tax Incentives for Industrial Investment In The Southeastern United States, 26 EMORY L. J. 789 (1976); Dempsey, Legal and Economic Incentives for Foreign Direct Investment In The Southeastern United States, 9 VAND. J. TRANSNAT'L. L. 247 (1976). These two articles offer an excellent discussion of the topic of investment incentives.
BUSINESS DISLOCATIONS

Continue to be used as long as there is honest belief in their effectiveness. Tax incentives can take two forms. First, there are those business taxes which are levied on everyone, yet provide for exemptions in certain areas or processes. For example, Ohio exempts manufacturers from sales tax on purchases of packaging materials and grants credits against corporate franchise taxes for investments in personal property used in manufacturing.

The second type of tax inducement is more subtle, but potentially more important. No exemption or special consideration is shown to any particular business on the face of the statute. The incentive value only appears when the tax rate is compared to that of neighboring states. For instance, the basic sales tax rate in Mississippi is five percent, compared to two percent in Louisiana. Comparisons could also be made for other taxes.

Financing is available in the form of general obligation bonds, industrial revenue bonds, and direct loans or loan guarantees. All the Supreme Court noted that "a statute which encourages the location within the state of needed and useful industries by exempting them, though not also others, from its taxes is not arbitrary and does not violate the Equal Protection Clause of the Fourteenth Amendment." Id. at 528.

10. OHIO REV. CODE ANN. § 5739.02(B)(15) (Page 1978 Supp.).
11. Id. § 5733.06.1.
14. See generally Dempsey, supra note 7. The articles cited therein compare methods of taxation among the southeastern states, 25 EMORY L. J. at 794-809; 9 VAND. J. TRANSNAT'L. L. at 278-288. It has been suggested that the reason for industrial relocation is not one of Sunbelt versus Frostbelt, but rather Taxbelt versus Growthbelt. Taxbelt Versus Growthbelt, Wall St. J., Sept. 21, 1979, at 20, cols. 1-2. The theory is that states with high tax burdens stagnate, while those with low tax burdens grow. Id. When states within geographic areas are compared, such as Massachusetts with New Hampshire and Louisiana with Texas, a correlation appears to exist between tax burden and growth rate. Id. The question is whether this is a casual or merely a coincidental relationship. Several studies of Detroit employers indicate the answer may be somewhat more complex. The studies indicate there may be a factor which can be called "legal climate." Mandel, Quality of Life Factors in Business Location Decisions, ATLANTA ECON. REV., Jan.-Feb., 1977, at 4. It would cover "legislative acts, court interpretations, workman's compensation, environmental requirements, local taxes, local ordinances and other such things." Id. It is suggested that Detroit businesses have voted with their feet in the legal climate referendum by leaving the city, taking thousands of jobs with them. Id. This appears to have happened in other cities also. When Diamond Shamrock Corp. announced that it was moving its corporate headquarters from Cleveland to Dallas, one factor it cited as being important was the antibusiness attitude of the city administration in Cleveland. Id. This appears to have happened in other cities also. When Diamond Shamrock Corp. announced that it was moving its corporate headquarters from Cleveland to Dallas, one factor it cited as being important was the antibusiness attitude of the city administration in Cleveland. Wall St. J., May 30, 1979, at 17, cols. 2-5. See generally, 13th Annual Report-The Fifty Legislative Climates, INDUS. DEV., Jan.-Feb., 1979, at 1.
15. See Dempsey, Legal and Economic Incentives For Foreign Direct Investment in the Southeastern United States, 9 VAND. J. TRANSNAT'L. L. 247, 259-268 (1976), for a thor-
of these methods are in addition to financing obtained from conventional sources. General obligation bonds\textsuperscript{16} are generally issued by municipalities and are backed by the full faith and credit of the governmental entity issuing them. The proceeds of the bonds may be used to acquire land for construction or reconstruction of plants for lease to manufacturers. The industrial revenue bond is the primary method of financing offered.\textsuperscript{17} The proceeds of these bonds may be used in the same manner as those of general obligation bonds; however, no full faith and credit pledge is made by the local government.\textsuperscript{18} The bonds are sold on the strength of the project financed, with the interest on the bonds paid and the principal repaid from rental payments made by the manufacturer. Due to the potential for tax-exempt status under the Internal Revenue Code,\textsuperscript{19} the rental rates may be quite low.\textsuperscript{20} An important feature of both general obligation and industrial revenue bonds is that one hundred percent financing of a project may be obtained. Financial assistance also may be available in the form of direct loans or loan guarantees.\textsuperscript{21}

Many states also offer industrial training programs to attract business by providing suitable employees.\textsuperscript{22} These programs use

\textsuperscript{16}See, e.g., The Tennessee Industrial Building Bond Act of 1955, Tenn. Code Ann. § 6-2901 et seq. (1971). The procedures for issuing these bonds are quite cumbersome. In Tennessee, a community must obtain a certificate of public purpose and necessity from the state building finance committee. Id. § 6-2905. The committee must find a number of prerequisites to be present. Id. § 6-2906 (1978 Cum. Supp.). If a certificate is granted, the municipality must still put the matter before the voters, where it must be passed by a three-fourths majority of the registered voters participating in the election. Id. § 6-2907. When issued, these bonds may be backed by the full faith and credit as well as the unlimited taxing power of the municipality. Id. § 6-2911 (1971).

\textsuperscript{17}See, e.g., the Michigan Industrial Development Revenue Bond Act of 1963, Mich. Comp. Laws § 125.1251 et seq. (1970). The procedure under this Act is quite simple, with publication of a notice to issue the bonds generally being sufficient. An election is required only upon petition of five percent of the registered voters in the municipality and the bond issue need only be supported by a majority of the votes cast. Id. § 125.1262. See generally, Dempsey, Legal and Economic Incentives For Foreign Direct Investment in the Southeastern United States, 9 Vand. J. of Transnat'l. L. at 259-267.


\textsuperscript{19}I.R.C. § 103. There are limits on the availability of tax exempt status. Id.

\textsuperscript{20}In addition, the rental payments by the manufacturer are deductible from gross income under I.R.C. § 162(a).

\textsuperscript{21}The Ohio Development Financing Commission, for example, is authorized to make low interest governmental direct loans. Ohio Rev. Code Ann. § 122.43 (Page 1978 Supp.).

\textsuperscript{22}In 1972, twenty-six states had state funded worker training programs. Van Cleve & Marshall, Start-up Training and Rural Industrial Location, 99 Monthly Lab. Rev. 23, 23
existing vocational-technical schools, technical institutes and community colleges to train or retrain qualified workers for a specific job or industry. These training services are generally available to both new and expanding industries.\textsuperscript{23}

In addition, the Internal Revenue Code\textsuperscript{24} may subsidize a business relocation. Expenses incurred by the employer in relocating may be deductible from gross income as ordinary and necessary business expenses,\textsuperscript{25} and an investment tax credit may be allowable for new investments.\textsuperscript{26} The Internal Revenue Code may provide other assistance to a relocating employer,\textsuperscript{27} but these examples should be sufficient to illustrate the point.

Despite these inducements, many businesses decide to close an establishment or remove it to a new location. Once made, that decision may have an impact which goes beyond the business itself. In addition to creating, removing or eliminating jobs in that particular business, the closing or relocation may have an adverse effect on other local businesses, the local economy in general, and local government revenues. A study of the relocation of Associates Corporation of North America from South Bend to Dallas, for example, suggests that for every ten jobs exported, an additional thirty-five jobs in local goods production were lost.\textsuperscript{28} It is not clear that the impact of worker displacement is solely economic. One writer has stated that anomie, reduced social interaction, political alienation, as well as increased cholesterol levels and elevated blood pressure can result from a plant shutdown or relocation.\textsuperscript{29} Where

\begin{itemize}
\item \textsuperscript{23} See Dempsey, supra note 15, at 272-78, surveying the industrial training programs available in seven of the southern states.
\item \textsuperscript{24} 26 U.S.C. §§ 1-9042 (1976).
\item \textsuperscript{25} I.R.C. § 162(a).
\item \textsuperscript{26} I.R.C. §§ 38, 46 and 48.
\item \textsuperscript{27} See, e.g., I.R.C. §§ 65 and 165(a), which would allow an employer who has disposed of non-capital assets, such as inventory or office equipment, at a loss, to deduct the loss from ordinary income. Id. There are situations in which a relocation may have adverse tax consequences, such as the recapture of investment tax credits or depreciation. See I.R.C. §§ 47, 1245 and 1250.
\item \textsuperscript{28} Bartholomew, Joray, & Kochanowski, Corporate Relocation Impact, Indiana Bus. Rev., Jan.-Feb., 1977, at 2. After Diamond Shamrock Corporation announced plans to move its corporate headquarters from Cleveland to Dallas, Cleveland State University Professor Richard Knight estimated that each corporate headquarters job created ten supporting jobs in the community. Columbus Dispatch, June 3, 1979, § K, at 8.
\item \textsuperscript{29} Mick, Social and Personal Costs of Plant Shutdowns, 14 Indus. Rel. 203 (1975). Mick analyzed a sixteen-year period in the rubber and plastics industry in Connecticut. Id. at 205. He concluded that "[e]ven in a dynamic industrial sector enjoying continual growth,
the effect is economic hardship, the writer suggests that workers who are older, less skilled, or of a minority group suffer most.\textsuperscript{30} Furthermore, it is clear that geographic areas are disproportionately afflicted with business shutdowns and relocations. Conversely, other areas, most notably the so-called sunbelt states, are blessed with new businesses and business expansions.\textsuperscript{31}

The recent closing of more than twelve plants by United States Steel Corporation graphically illustrates that the problem is more than academic. These closings will put 13,000 of the company's 165,000 employees out of work, with still more workers threatened with the possibility of additional closings.\textsuperscript{32}

To prevent or to mitigate the effects of business closings and relocations (hereinafter referred to collectively as dislocations), a number of statutes have been passed and bills introduced. These statutes and bills provide for payment of benefits to persons adversely affected by a business dislocation, placement of restrictions or obligations on dislocating businesses, promotion of employee ownership of potentially dislocating business concerns, or a combination of these approaches. After a brief look at the role of collective bargaining agreements in this area, a discussion of existing and proposed legislation at both the state and federal levels will be undertaken. Finally, some comments will be made as to potential constitutional law problem areas.

II. COLLECTIVE BARGAINING PROVISIONS PERTAINING TO BUSINESS DISLOCATIONS

If an employer is a party to a collective bargaining agreement with an employee organization, the employees may have rights under the contract in the event of a dislocation, or the dislocation itself may be a breach of the agreement. However, the mere existence of an agreement, without pertinent provisions, will not pro-

\textsuperscript{30} Id. However, Mick states that "[t]he effects on displaced workers remain approximately the same whether . . . in small communities or large industrial cities, in areas of low or high unemployment, in highly automated plants or in labor intensive plants." Id. at 204.

\textsuperscript{31} Special Report, \textit{The Second War Between The States}, Bus. Wk., May 17, 1976, at 92-98. The movement of business also carries with it a movement of population and, ultimately, political power. It is estimated, for example, that states in the South and West will make gains at the expense of states in the North and East, in the House of Representatives. \textit{America's "Sunbelt" is Growing in People and Power}, U.S. NEWS \& WORLD REPORT, April 12, 1976, at 58-60.

\textsuperscript{32} Wall St. J., Nov. 28, 1979, at 2, col. 1.
tect employees. In *International Union v. Hamilton Beach Mfg. Co.*, a union attempted to obtain an injunction preventing an employer from relocating its plant to another state. In affirming the trial court's dismissal, the Wisconsin Supreme Court stated:

The fact that companies do move plants is a fact that in all probability is well known to the negotiators who prepare and enter into collective bargaining agreements. If the company's right to determine the location of its plant is to be forfeited or regulated it is a matter that can and should be done by express provision in the agreement. There is nothing in the agreement before us that in any way prohibits plant removal.

An interesting twist, however, can be found in an arbitrator's decision interpreting a collective bargaining agreement. In *Address-O-Mat, Inc. v. Retail Employees, District 65*, the contract involved contained a provision prohibiting the employer from removing his plant from the local area. Had the employer attempted to do that, the union would have had a clear remedy. Instead, the employer diverted both machinery and business to a new firm under the control of one of its shareholders and officers. The employer then laid off a number of employees due to lack of work. The arbitrator stated that if this action had been taken by the employer in good faith and for bona fide business reasons, it probably would have been proper. However, he found the action to have been in bad faith and for the sole purpose of subverting the intent of the agreement by taking jobs away from union employees. The award directed the employer to return the machinery and the work to its plant, reinstate laid-off workers and pay them damages. The point here is simple. An action taken solely for reasons of anti-union animus rather than valid business purposes could be interpreted as an attempt to destroy the rights of employees under the contract and therefore a violation of the implied covenant of good faith and fair dealing found in every contract.

33. 40 Wis. 2d 270, 162 N.W. 2d 16 (1968).
34. Id. at 283, 162 N.W.2d at 23.
35. [1961] 61-1 LAB. ARB. AWARDS (CCH) ¶ 8158.
36. Id. at 3775.
37. Id.
38. Id. at 3776.
39. See, e.g., *Comunale v. Traders & Gen. Ins. Co.*, 50 Cal. 2d 654, 328 P. 2d 198 (1958) (insurer's implied covenant of good faith and fair dealing in contract of insurance was
A number of collective bargaining agreements have provisions dealing with plant closings, relocations and similar situations. These provisions may provide for advance notice of the dislocation, or the right to severance pay, retraining or transfer. Obviously the existence or nonexistence of these provisions will depend on factors such as the union's priorities and its relative bargaining position. The fact that a collective bargaining agreement provides for severance pay, however, will not give an employee an option to forego the severance pay and instead transfer to the employer's new location. The employees will still be limited to the rights and protections actually granted by the contract. Of course, as with any contract, differences will arise as to the interpretation or application of particular provisions. Thus, a question could arise as to whether a seniority provision in an agreement provides seniority within a single plant or within the company as a whole.

In sum, the extent of the protection afforded to dislocated employees under collective bargaining agreements varies from none to substantial. A union with substantial bargaining power may be able to gain concessions. It can be expected, in view of continued business migration to the sunbelt, that unions will bargain harder in the future for protections against dislocations.

III. STATE STATUTES PERTAINING TO BUSINESS DISLOCATIONS

State statutory provisions dealing with business dislocations generally take one of two broad approaches. The first is essentially

breached by wrongful denial of coverage and refusal to settle within policy limits); RESTATEMENT (SECOND) OF CONTRACTS § 231 (Tent. Drafts Nos. 1-7, 1973) (duty of good faith and fair dealing).

40. See, e.g., Sterling-Regal Engraving Co. v. LPIU, Local 90-P, [1971] 71-1 LAB. ARB. AWARDS (CCH) ¶ 8390, where the contract being applied provided for six months notice of a termination of business, six weeks notice of certain relocations, retraining and/or transfer of employees and payment of severance pay in the amount of one week's salary for each year of continuous employment.


42. The recent contract between the United Rubber Workers and B. F. Goodrich, for example, has provisions applicable to plant closure. Among other things, notice must be given at least six months in advance of a plant closure. Letter from Matthew Contessa, URW-Goodrich Coordinator, to Philip Harmon (July 5, 1979). Although not specifically dealing with dislocations, the recent agreement between Chrysler Corp. and the United Auto Workers giving UAW President Fraser a seat on the Chrysler board of directors is pertinent. Bus. Wk., Nov. 12, 1979, at 93. "As a Chrysler director, Fraser is likely to push for more worker say in decisions on plant closings." Id.
to place obligations on a business intending such a course of action. The second is to provide benefits to persons adversely affected by the dislocation. Several statutes combine the two approaches.

The most basic statutory provision is one merely requiring advance notice to employees. South Carolina law contains a provision that if an employer within the state requires advance notice from an employee of when that employee will quit, the employer must give notice of its intent to shut down not less than two weeks in advance, or the same length of time in advance as required of employees before they quit. 43

The burden imposed on an employer by this provision is minimal. Furthermore, it is a burden which can be avoided by the employer, for if the employer does not require notice of intent to quit from its employees, the statute is inapplicable. The concern of the law is mandating fair play.

Wisconsin has a somewhat more refined statutory provision. 44 It requires an employer employing one hundred or more persons to give sixty-day written notice to the Department of Industry, Labor and Human Relations of a decision to merge, liquidate, dispose or relocate within or without the state, resulting in a cessation of business operations affecting employees. The employer is further required to provide such information as the department requires concerning payroll, affected employees and compensation owed the employees. The department may require submission of a plan for final payment of wages in full to affected employees. 45

This provision applies only to relatively large employers, probably based on the fact that the problems created by totally unanticipated business dislocations are far more acute in such cases. Furthermore, it is a relatively narrow provision aimed mainly at ensuring payment of all compensation due affected employees. The sixty-day notice requirement gives the department adequate time to achieve the statutory aims by obtaining information from the

43. S.C. Code § 41-1-40 (1976). The statute is not applicable to shutdowns caused by an unforeseen accident to machinery, an act of God or an act of a public enemy. A violating employer is subject to fine of up to five thousand dollars and is liable to employees for damages caused by failure to give notice. Id.


45. Wis. Stat. Ann. § 109.07(1) (West 1979-1980 Supp.). Violation of the statutory obligations is a misdemeanor and an offending employer may be fined up to $50 for each employee terminated by the dislocation. Id. § 109.07(2).
employer and requiring, if necessary, a plan of payment. An incidental effect, however, of the statute is to prevent covered employers from consuming actions within its purview within a sixty-day period after the decision to act has been made. While in many, perhaps most, of the cases in which a business decides to merge, liquidate or relocate, the decision is made more than sixty days prior to the planned action, there will be those cases where a business, absent the statute, would have acted immediately or in less than sixty days.

In Maine, the statute\(^46\) goes one step further. Like the Wisconsin statute, it requires employers of one hundred or more persons\(^47\) to give written notice sixty days in advance of dislocation\(^48\) to the Director of the Bureau of Labor. In addition to the notice obligation, the statute makes the employer “liable to his employees for severance pay at the rate of one week’s pay for each year of employment by the employee in such establishment.”\(^49\)

This statute not only places obligations on the business or employer in the dislocation situation, but also provides benefits in the form of severance pay to some of the affected employees. The severance pay provision, however, does not aid only those employees who are in fact adversely affected by the dislocation. An employee who obtains work at similar or even more favorable terms after separation still receives benefits. Furthermore, apart from separation benefits under a collective bargaining agreement, other benefits to which the employee is entitled are disregarded. If, then, a skilled worker employed by a covered establishment at three hun-

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\(^46\) ME. REV. STAT. ANN. tit. 26, § 625-A (West 1979-1980 Supp.).

\(^47\) In Maine, it is sufficient if the employer employed 100 or more persons within the preceding twelve-month period. This closes a potential loophole, i.e., the gradual reduction of the workforce to below the statutory threshold in order to avoid the statutory obligations, particularly the severance pay obligation. Id. § 625-A(1).

\(^48\) The provision applies to relocations and terminations, both of which are defined in the statute. A “relocation” is “the removal of all or substantially all of industrial or commercial operations in a covered establishment to a new location, within or without the state of Maine, 100 or more miles distant from its original location.” Id. § 625-A(6). A “termination” is the “substantial cessation of industrial or commercial operations in a covered establishment.” Id. § 625-A(7). The provision would appear not to cover partial relocation or termination, even if permanent.

\(^49\) Id. § 625-A(9). There are four exceptions enumerated in the statute to the liability for severance pay. They are: a) the dislocation is a result of physical calamity; b) the employee is covered by an express contractual provision for severance pay; c) the employee accepts employment at the employer’s new location; and d) the employee has been in the employ of the employer for less than three years. Id. § 625-A(10). “Physical calamity” is defined to include an adjudication of bankruptcy. Id. § 625-A(5).
dred fifty dollars per week is terminated because of a business dislocation, the worker would receive $10,500 if he or she had been employed by the employer for thirty years. This would appear to be true even if the employee obtained similar employment at four hundred dollars per week, if the employee decided not to work and retired with a company pension, or if the employee were found to be entitled to unemployment compensation benefits under the Maine Employment Security Law. It would also appear that under the Maine Employment Security Law the employee would not be disqualified from or ineligible for unemployment compensation benefits because of the payment of separation benefits.

In contrast, however, persons with less than three years service with the employer are not entitled to any separation benefits regardless of actual adverse impact of the dislocation on them. In short, the statute provides a windfall for some employees and disregards others who may be equally deserving.

An interesting Michigan statute takes an entirely different approach. As discussed above, financial inducements are commonly believed to be of value in enticing businesses into a location, in encouraging them to expand, and in keeping them from relocating. For these reasons, such inducements have been relatively common, and Michigan has been no exception. The Michigan statute makes it unlawful to move or abandon a business which has received any consideration or inducement from a municipality for the location, construction, operation or expansion of a business without restoring the consideration with interest from the date of the original gift. The act applies to benefits given to a predecessor company or a company officer or agent, and violations of the Act are a misdemeanor. The provision is inapplicable, however, if

51. See § 1193(5), relating to disqualification for benefits based on the receipt of remuneration. Id. See § 1043(17) and (19) (West 1979-1980 Supp.), defining “unemployment” and “wages”. Id. Cf. Dubois v. Employment Security Comm’n, 150 Me. 494, 114 A.2d 359 (1955), wherein it was held that employees’ entitlement to unemployment benefits was unaffected by receipt of one week’s pay for each year of service in a lump-sum payment pursuant to a collective bargaining agreement upon retirement. The court’s reasoning in that case would appear applicable to separation benefits under the Maine statute.
55. Id. § 445.602.
56. Id. § 445.603. The penalty provision is § 445.604 and it subjects individuals to
the corporation or company received the inducement or consideration for erecting, constructing, enlarging or maintaining a business or establishment at a city, town or place "for a specified length of time and [has] fully complied with all conditions of the contract . . . ."

This provision insures that cities, towns, villages and counties get at least what they bargain for when they offer inducements to businesses. If the inducement is linked as consideration for a commitment of definite duration, the statute becomes inapplicable when the business fulfills the obligation. If the inducement is not in return for a time-limited commitment, the statute essentially treats it as a loan which comes due, with interest, when the condition motivating the gift no longer obtains. In any event, the application of the statute can be avoided by expressly limiting the obligation of the business at the inception of the contract.

Finally, every state and the District of Columbia currently has an unemployment compensation act. An employee who is out of work due to a dislocation may be entitled to receive unemployment compensation benefits. The benefits are financed through a federal unemployment tax on employers of 3.4% of each employee's wages, up to $6,000 per annum. An employer, however, is allowed a credit of 90% of the amount of taxes paid under an approved state unemployment system, up to a maximum of 2.7%. State unemployment tax structures generally provide for experience rating and allow reduction of unemployment tax rates of employers with histories of low unemployment. The federal unemployment tax includes additional credits for employers whose state unemployment tax rate has been improved due to good experi-

imprisonment of up to one year or a fine of not more than $1,000 or both. A corporation or company is subject to a fine of $1,000 per day for each day it is in violation. \textit{Id.}

57. \textit{Id.} § 445.606.
59. This tax is imposed by the Federal Unemployment Tax Act, 26 U.S.C. §§ 3301-10 (1976).
60. \textit{Id.} § 3301.
61. \textit{Id.} § 3306(b)(1).
62. \textit{Id.} § 3302(a)(b). \textit{See generally id.} § 3304 and 20 C.F.R. § 601.1-5 (1979) on approval of state unemployment laws by the Secretary of Labor. The unemployment compensation laws of every state and of the District of Columbia have been approved.
The revenues produced by state unemployment taxes are deposited in the Federal Unemployment Trust Fund and credited to the particular state's account. These funds are then withdrawn by states to pay unemployment claims.

Unemployment compensation laws are laws of general application and benefits are not limited to employees out of work due to a dislocation. If, however, a dislocation is the cause of the unemployment, the employee will receive unemployment benefits on the same terms as any other claimant. This means that the employee will have to meet the eligibility requirements imposed by the statute. These requirements usually include being unemployed, filing a claim for benefits, meeting a waiting period requirement, being able and available for work and seeking work. Benefits may also be limited to those who have been employed for a specified period of time, earned a minimum amount of wages, or both. In addition, to avoid disqualification for benefits, a claimant usually must accept a suitable offer of work.

If the employee is entitled to unemployment compensation benefits, he or she will receive a modest benefit for a limited number of weeks, usually up to a maximum of twenty-six. The benefits under unemployment compensation laws are by no means

68. See [1974] 1B Unempl. Ins. Rep. (CCH) ¶ 3001 for a listing of the minimum wage and time-employed requirements for each state.
69. See, e.g., Ohio Rev. Code, Ann. § 4141.29(D)(2)(b) (Page 1979 Supp.), which denies benefits to an unemployed person who refuses an offer of suitable work without good cause.
princely,\textsuperscript{71} are generally charged to the employer’s account,\textsuperscript{72} and may raise the employer’s unemployment tax rate. However, this is not necessarily the case. One author has stated that:

Because the . . . tax is not perfectly experience rated, many lay-offs result in no increase, present or future, in an employer’s tax rate. Even if he is charged for the lay-off . . . experience-rating plans are constructed so that it is several years before his tax rises to reflect fully the cost of a particular lay-off.\textsuperscript{73}

In addition, the employer could already be at the maximum tax rate, making an increase in the rate by definition impossible.

A dislocated employee may be entitled and even required to avail himself of the services of a state employment services agency. The Wagner-Peyser Act\textsuperscript{74} created the United States Employment Service (USES) within the Department of Labor. Its purpose is to “promote the establishment and maintenance of a national system of public employment offices.”\textsuperscript{75} Among other duties, these offices engage in counseling and placing unemployed individuals.\textsuperscript{76} The Act encourages states to establish employment service offices by authorizing appropriations of money for payment to states which have an unemployment compensation law approved by the Secretary of Labor under the Federal Unemployment Tax Act and which are in compliance with the requirements of the Wagner-Peyser Act.\textsuperscript{77} These requirements include designation or creation of a

\textsuperscript{71} See [1979] 1B Unempl. Ins. Rep. (CCH) ¶ 3001 for the minimum and maximum amounts of weekly allowed benefits. For 1979, 14 states had maximum benefit rates of under $100 per week for claimants with no dependents. Id. In no state does the maximum benefit rate for any claimant reach $200 per week. Id. These benefits are, however, not subject to income tax except in the case of some relatively high income taxpayers. I.R.C. § 85 (1979). In a few industries, such as the steel, auto and rubber industries, an unemployed individual may be entitled to supplemental unemployment benefits (SUB) under a plan negotiated between the employer and a union. The benefits combine with state unemployment compensation to provide the worker with a given percentage of his former pay. For example, the United Rubber Workers plan provides 80% of former base gross pay and the United Auto Workers plan provides 95% of former base take-home pay. Wall St. J., Jan. 2, 1980, at 1, col. 1.

\textsuperscript{72} See, e.g., Ohio Rev. Code Ann. § 4141.24(D)(1) (Page 1979 Supp.) (employer’s account charged for benefits based on the remuneration paid by him).

\textsuperscript{73} D. Hamermesh, Jobless Pay and the Economy 67 (1977).


\textsuperscript{75} Id. § 49.

\textsuperscript{76} Id. § 49(b); 20 C.F.R. § 602.2-3 (1979).

\textsuperscript{77} 29 U.S.C. § 49(d) (1976).
state agency to cooperate with the USES and submission to the USES of a plan for carrying out the provisions of the Act within that state. The money paid to the states pursuant to this arrangement is for use in administering the states’ public employment offices. Many states have availed themselves of the benefits of the Wagner-Peyser Act and many dislocated workers have found employment as a result.

Overall, there is little disagreement with the proposition that unemployment compensation and employment services systems are necessary and desirable. While there is disagreement as to exactly how such systems should be structured, few would argue for a wholesale dismantling of them. Although unemployment compensation only replaces a portion of an employee’s lost wages, almost $17 billion in benefits were paid in 1975.

IV. Federal Statutes Pertaining to Business Dislocations

There are three points at which federal law comes into play with respect to business dislocations. The first is the federal role in the unemployment compensation and employment services areas, both of which have already been mentioned. The second is the Trade Act of 1974. Among other things, the Act provides relief from injury to workers, firms and communities caused by foreign import competition. The Court of Appeals for the First Circuit has viewed the Trade Act as:

[A] comprehensive program to foster economic growth and full employment in the United States and to strengthen economic relations with foreign countries by reducing restrictions on foreign trade and imports. Because the Congress recognized that increased importation of foreign

78. Id. § 49(c).
79. Id. § 49(g); 20 C.F.R. § 602.20 (1979).
81. See, e.g., OHIO REV. CODE ANN. § 4141.04 (Page 1973), establishing an employment services division of the Ohio Bureau of Employment Services. The section is expressly intended to enable Ohio to obtain the benefits of the Wagner-Peyser Act.
83. D. HAMERMESH, supra note 73, at 1.
85. Id. §§ 2251-394. Subchapter II of the Act contains the provisions for relief from injury caused by import competition. Id.
goods could cause serious economic dislocations in certain segments of American Society and because it wished to ameliorate the consequences of such dislocations, it established a series of remedial programs to assist affected groups in adjusting to the effects of increased imports.\textsuperscript{86}

With respect to adversely affected workers, once the appropriate certification of eligibility has been made by the Secretary of Labor,\textsuperscript{87} workers are entitled to apply for a myriad of benefits. Those workers who have been found to be totally or partially separated from their employment because of increased foreign imports are eligible for trade adjustment allowances,\textsuperscript{88} employment services,\textsuperscript{89} training (including supplemental assistance for expenses when the training facilities are not within commuting distance of the worker's regular place of residence),\textsuperscript{90} job search allowances\textsuperscript{91} and relocation allowances.\textsuperscript{92}

Business firms adversely affected by increased foreign imports are also eligible for assistance.\textsuperscript{93} The most important aid available is financial and may be in the form of either direct loans or loan

\textsuperscript{86} Usery v. Whitin Machine Works, Inc., 554 F.2d 498, 500 (1st Cir. 1977).
\textsuperscript{87} See 19 U.S.C. §§ 2271-74 (1976), 29 C.F.R. § 90 (1979), and Cprek, Worker Adjustment Assistance: Black Comedy in the Post-Renaissance, 11 LAW & POLICY IN INT'L. BUS. 593, 609-678 (1979), which deal with the process of criteria for certification.
\textsuperscript{88} 19 U.S.C. §§ 2291-92 (1976); 29 C.F.R. § 91.6-.14 (1979). The trade adjustment allowance is 70\% of the worker's average weekly wage, not in excess of the average weekly manufacturing wage, minus 50\% of the amount of remuneration earned for the week. 19 U.S.C. § 2292(a) (1976). The assistance may be paid for up to 52 weeks, with an additional 26 weeks permissible to enable an employee to complete an approved training program. Id. § 2293(a). There is a reduction of the assistance payable for any week by the amount of unemployment compensation benefits a worker has received or would have received if he had applied for that week. Id. § 2292(c). There is also an overall limit on the assistance payable of 80\% of the worker's average weekly wage. Thus, if an individual receives for any week a combination of remuneration for services rendered, unemployment insurance benefits, training assistance allowance and trade readjustment allowance exceeding 80\% of his average weekly wage, the trade adjustment allowance will be decreased in an amount equal to the excess. Id. § 2292(e).
\textsuperscript{89} Id. § 2295. This would include, among other things, testing, counseling and job referral. Id. See 29 C.F.R. § 91.17 (1979).
\textsuperscript{91} 19 U.S.C. § 2297 (1976); 29 C.F.R. §§ 91.40-.47 (1979). Job search allowances of 80\% of expenses up to $500 may be provided to workers who cannot reasonably be expected to find suitable employment in the local commuting area. Id.
\textsuperscript{92} 19 U.S.C. § 2298 (1976); 29 C.F.R. §§ 91.28-.36 (1979). A relocation allowance of 80\% of reasonable expenses, with no dollar limit, plus a lump sum of three times the worker's average weekly wage up to a maximum of $500 is authorized of the worker cannot be reasonably expected to find suitable employment in the local commuting area. Id.
guarantees.\textsuperscript{94} Prerequisites must be met for the granting of assistance, such as a requirement that the funds needed be unavailable from the firm’s own resources and that there be a reasonable assurance of repayment.\textsuperscript{95} No loan made or guaranteed may have a maturity date of more than twenty-five years\textsuperscript{96} and no loan guarantee may be for more than ninety percent of the outstanding balance.\textsuperscript{97} No firm may receive direct loans which at any time aggregate more than $1 million or guaranteed loans which at any time aggregate more than $3 million.\textsuperscript{98} Priority for assistance is given to firms within the “small firms” meaning of the Small Business Act.\textsuperscript{99}

Communities are also eligible for adjustment assistance if a significant number of workers in the area are adversely affected by increased foreign imports.\textsuperscript{100} Aid provided may take the form of loan guarantees to private lending institutions which loan money to private borrowers within the affected area.\textsuperscript{101} Between corporations, preference is given to that corporation with an employee stock ownership plan meeting certain criteria.\textsuperscript{102}

Finally, the Act includes a section stating that at least sixty days prior to moving productive facilities to a foreign country, a firm should give notice to the affected employees and to the Secretaries of Labor and Commerce.\textsuperscript{103} It also recites that it is “the sense of the Congress” that such a firm should apply for and use the assistance available under the Act and offer employment opportunities in the United States, along with relocation assistance, to affected employees.\textsuperscript{104}

Several aspects of this Act are interesting. The first is the broad range of types of assistance and potential recipients, including the potentially dislocating employer. The second is the narrow scope of application of the Act. If the dislocation is not due to increased foreign imports, then the Act is inapplicable. Third, benefits provided under the Act are not funded by the dislocating em-

\textsuperscript{94} Id. § 2344.
\textsuperscript{95} Id. § 2345(a).
\textsuperscript{96} Id. § 2345(c).
\textsuperscript{97} Id. § 2345(e).
\textsuperscript{98} Id. § 2345(h).
\textsuperscript{99} Id. § 2345(d).
\textsuperscript{100} Id. § 2371(c). See generally id. §§ 2371-74.
\textsuperscript{101} Id. § 2373(d).
\textsuperscript{102} Id. § 2373(f).
\textsuperscript{103} Id. § 2394(a).
\textsuperscript{104} Id. § 2394(b).
ployer. This is probably consistent with the philosophy of the Act, which is to remedy the effects of increased foreign imports due to the Trade Act of 1974. Presumably the employer is viewed as essentially faultless and, therefore, is not made responsible for the costs of adjustment assistance under the Act. Fourth, while providing for advance notice of certain transfers of operations, the notice appears to be at best a moral and not a legal requirement. No penalty provisions are included.

A third area where existing federal law may come into play is under the National Labor Relations Act (NLRA). This is one aspect of business dislocations which has received substantial attention. For that reason, it will be dealt with here in summary fashion.

If an employer closes all or part of a business concern or relocates it, an employee or union might argue that such action constitutes an unfair labor practice. The argument would be that by engaging in the dislocating activity the employer had either interfered with his employees' rights to engage in concerted activities or had discriminated with respect to the terms or conditions of employment in order to discourage union membership. Certain basic rules clearly apply here. First of all, an employer has an absolute right to terminate operations completely. This is true whether or not the motive is anti-union animus. An economic justification need not exist. The United States Supreme Court held in Textile Workers v. Darlington that the NLRA does not require one to remain an employer. The rule is somewhat different, however, with respect to a partial closing or a relocation. The Court stated that a partial closing is an unfair labor practice if "motivated by a purpose to chill unionism in any of the remaining plants of the . . . employer and if the employer may reasonably have foreseen that such closing would likely have that effect." Similarly, the relocation of a plant or its work to a new location in an attempt to discourage union activity would constitute an unfair la-

106. This would be a violation of § 8(a)(1) of 29 U.S.C. § 158(a)(1) of the National Labor Relations Act. Id. [hereinafter N.L.R.A.]. Employees are given the right to engage in concerted activity by § 7 of the N.L.R.A.. Id. § 157.
107. Id. This would be a violation of § 8(a)(3) of the N.L.R.A., § 158(a)(3).
109. Id. at 275.
bor practice. This is the so-called “run-away shop” situation.\textsuperscript{110} Conversely, if the partial closing or relocation is a result of economic and not anti-union motivations, the action would not be an unfair labor practice.\textsuperscript{111}

In addition to the question whether a dislocation in and of itself constitutes an unfair labor practice, a question may also arise as to the employer’s duty to bargain.\textsuperscript{112} Although the Supreme Court did not expressly address the issue, it has been accepted since \textit{Darlington}\textsuperscript{113} that an employer need not bargain about a decision to terminate operations completely. There is disagreement as to whether an employer must bargain over a partial closing or a plant removal, at least absent anti-union animus.\textsuperscript{114} Apart from any duty to bargain over the actual decision, the employer will be required to bargain over the effects of a partial closing or plant removal.\textsuperscript{115} Probably the most important point here is that the em-

\begin{enumerate}
\item See, e.g., NLRB v. Winchester Electronics, 295 F.2d 288 (2d Cir. 1961), wherein the court rejected the employer's contention that the simultaneous commencement of layoffs at one plant and the opening of another plant resulted from labor shortages and transportation difficulties at the first plant, and held instead that the employer's actions were motivated by a desire to eliminate a union. \textit{Id.} at 291-92. The court therefore upheld the determination by the National Labor Relations Board that such action constituted an unfair labor practice. \textit{Id.} at 292.
\item See, e.g., Kipbea Baking Co., 131 N.L.R.B. No. 56 at 411 (1961) (relocation was not an unfair labor practice where made for business reasons and not for the purpose of encouraging or discouraging union activity).
\item This duty arises from § 8(a)(5) and (d) of 29 U.S.C. § 158(a)(5) and (d) (1976). Together these provisions place an obligation on the employer to bargain in good faith with the representatives of his employees with respect to wages, hours and other terms and conditions of employment, and make it an unfair labor practice for an employer to refuse to do so. With respect to matters other than wages, hours, and terms and conditions of employment, each party is free to bargain or not to bargain. NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 349 (1958).
\item 380 U.S. 263 (1965).
\item Compare, e.g., the majority and dissenting opinions in Brockway Motor Trucks v. NLRB, 582 F. 2d 720 (3d Cir. 1978). The majority stated that “there is an initial presumption . . . that a partial closing is a mandatory subject of bargaining.” \textit{Id.} at 735. The majority believed that the interests of the parties should be balanced and that the duty to bargain would not arise if severe economic necessity would render any bargaining pointless. \textit{Id.} at 731-34. The dissent argued that, absent anti-union animus, a partial closing is not a mandatory subject of bargaining. \textit{Id.} at 747. (Rosem, J., dissenting).
\item See, e.g., NLRB v. Rapid Bindery, Inc., 293 F.2d 170, 176 (2d Cir. 1961), wherein the court stated, [t]he decision to move was not a required subject of collective bargaining . . . . However, once that decision was made, § 8(a)(5) requires that notice of it be given to the union so that the negotiators could then consider the treatment due to those employees whose conditions of employment would be radically changed by the move.
\end{enumerate}
ployer need not agree to any proposal or make any concession. After so doing, an employer may unilaterally take action.

The fourth point at which federal law may apply is Title IV of the Employee Retirement Income Security Act of 1974. The provisions of Title IV would only be applicable if the dislocation were accompanied by the termination of one or more qualified pension plans. Title IV establishes the Pension Benefit Guaranty Corporation (PBGC) within the Department of Labor. A pension plan covered by Title IV may not be terminated without the approval of the PBGC. That approval is only given if the PBGC determines that the assets of the plan are sufficient to pay all basic benefits under the pension plan. If the assets of the plan are insufficient to meet these obligations, the PBGC will guarantee benefits of up to seven hundred fifty dollars per month, adjusted annually. The PBGC can recover from an employer that maintained a pension plan which has been terminated the lesser of the current value of the benefits guaranteed under the Act less the plan’s assets on the date of termination, or thirty percent of the net worth of the employer. Finally, Title IV requires the PBGC to provide insurance to employers who maintain or contribute to a pension plan covered by pension benefit guarantees. This insurance protects an employer from liability in the event of a plan termination, with the employer being required to pay premiums and be insured for over sixty months before benefits would be payable. The wisdom of this Contingent Employer Liability Insurance has been questioned.

In Cooper Thermometer Co. v. NLRB, 376 F.2d 684, 688 (2d Cir. 1967) the court, expanding the Rapid Bindery decision, held that the employer had a duty not only to bargain on the terms of the shutdown but also to bargain on the issue of transfer to the new plant.

117. See, e.g., NLRB v. Dell, 283 F.2d 733, 740 (5th Cir. 1960) (employer's refusal to bargain was an unfair labor practice inasmuch as negotiations had not reached an impasse); U.S. Cold Storage Corp., 96 N.L.R.B. 1108-09 (1951). The board stated that "the duty to meet of course does not mean that parties must engage in futile bargaining in the fact of a genuine impasse." Id.
119. Id. § 1302(a).
120. Id. § 1341.
121. Basic benefits are defined by the Pension Benefit Guaranty Program (PBGC) as benefits guaranteed by Title IV. Id. §§ 1301(a)(6), and 1322(a).
122. Id. § 1322(a)-(b)(3).
123. Id. § 1362(b).
124. Id. § 1329(a).
125. Id. § 1323(d).
One argument made is that the existence of the insurance will allow an employer to terminate a plan without liability and, therefore, will in effect encourage plan terminations.\(^{128}\)

If a dislocation, then, were to be accompanied by the termination of a plan covered by Title IV, the employer could be faced with a substantial immediate liability which could range up to thirty percent of the net worth of the business. This potential liability could conceivably motivate an employer to attempt to avoid the dislocation, and ultimately operate to save jobs.

V. PROPOSED LEGISLATION PERTAINING TO BUSINESS DISLOCATIONS

A number of bills have been proposed both at the federal and state levels to deal with the business dislocation situation.\(^{127}\) The focus here will be on several bills which have been proposed in current and past sessions of the Ohio legislature and the United States Congress. The general approaches taken in the Ohio and federal bills can be expected to be similar to proposed bills in other states, and comments made with respect to these bills should be equally pertinent to similar bills in other jurisdictions.

The most basic type of proposed legislation merely requires advance notice of business closings and relocations. An example of such a bill, proposed in the federal Congress, was H.R. 579.\(^{128}\) It would have required any person acquiring a business facility in or affecting interstate or foreign commerce to give actual notice to employees and notice by publication to the community at least one year and 180 days prior to closing or relocating the business. The notice would have had to include an explanation of the reasons for the action.\(^{129}\) In addition, the owner of a business facility in or affecting interstate or foreign commerce which had been in operation for ten years or more and employed 200 or more persons would have had to give actual notice to employees and constructive notice

\(^{126}\) Lind, *Alternatives to CELI: Strengthening and Preserving the U.S. Private Pension System*, 29 LAB. L.J. 747 (1978). In addition, Lind argues that allowing an employer to insure its liability “would be an open invitation to raise benefits and shortly thereafter terminate the plan, thereby leaving the pension system, through PBGC premiums, to foot the bill.” *Id.* at 749.

\(^{127}\) *Bus. Wk.*, June 25, 1979, at 32 cites Michigan, Ohio, Massachusetts, Rhode Island and Pennsylvania as states with bills under consideration and Illinois and New Jersey as states with bills about to be introduced. *Indus. Wk.*, July 9, 1979, at 27 adds Connecticut and California as having legislation introduced or being prepared.


\(^{129}\) *Id.* § 1.
by publication to the community at least 180 days prior to a closing. The notice, again, would have had to include an explanation of the reasons for the action.\textsuperscript{130} A person aggrieved by a violation of the proposed act would have been entitled to bring a civil action.\textsuperscript{131} Presumably this would have included not only employees, but also suppliers, lenders, subcontractors and others. It would seem that if relief had been intended only for employees, it would have been simple enough to substitute the word “employee” in the place of the term “any person.” In addition, the bill contained a criminal penalty for a willful and knowing violation.\textsuperscript{132}

Passage of this bill would have meant that a person acquiring a covered business facility could not have closed or relocated\textsuperscript{133} for almost one and one-half years. The effect would most likely have been to discourage the purchase of an existing business facility, and instead would have placed an incentive on beginning a new facility which would not have been covered for a period of ten years.\textsuperscript{134} Many existing businesses might in fact have become unmarketable.\textsuperscript{135} Facilities which had been in operation for ten or more years and employed 200 or more employees would have been subject to a shorter advance notice requirement. On the other hand, the local community and employees would still have had, in essence, a headlock on a covered business facility for almost one-half year. The business could not have closed or relocated sooner, no matter how compelling the reason, without having been subject

\textsuperscript{130} Id. § 2.

\textsuperscript{131} Id. § 3.

\textsuperscript{132} Id. § 4. A violator would have been subject to a $5,000 fine, imprisonment for one year, or both.

\textsuperscript{133} One problem with the bill was that the terms “close” and “relocate” were not defined. This left open the questions of whether a partial closing, a lay-off of short duration, and a relocation of minimal distance, \textit{e.g.}, one-quarter of a mile, were covered. Arguably, the language of the bill was broad enough to cover the lay-off and relocation at a minimal distance.

\textsuperscript{134} H.R. 579, 95th Cong., 1st Sess. § 2 (1977).

\textsuperscript{135} This would be due in part to the fact that there is no minimum size necessary for coverage of a business acquisition, it only being necessary that the business be in or affecting interstate or foreign commerce. If the “affecting interstate commerce” factor were given as broad an interpretation here as it has in other areas of federal law, the reach of the provision would be quite broad. \textit{See, e.g.}, Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964), and Katzenbach v. McClung, 379 U.S. 294 (1964), upholding application of Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a \textit{et seq.} (1976), to wholly intrastate commerce. In \textit{Heart of Atlanta} the Civil Rights Act was successfully applied to soliciting and accommodating interstate travelers and in \textit{Katzenbach} to offering to serve interstate travelers and purchasing goods which had moved in interstate commerce.
to civil suit and criminal penalty.

An alternative to requiring advance notice of dislocation is to provide benefits to employees who are adversely affected by a dislocation. Ohio H.B. No. 594 is a bill which merely provides an additional thirteen weeks of unemployment compensation payments to certain dislocated employees. It would apply to employers who employed at least 500 persons at any establishment at any time in the preceding two years. The bill would provide additional benefits to employees when 1) the employer has totally closed any establishment for at least one year, 2) the Administrator of the Ohio Bureau of Employment Services determines that the closing has resulted in a situation where the local labor market cannot readily absorb the employees out of work as a result of the closing, and 3) the employees have no remaining entitlement to regular unemployment benefits. The benefits paid are chargeable to the account of the employer. The numerical trigger for the application of this bill is rather high and coverage of employers rather narrow. In addition, partial closings or partial relocations are not covered.

While the bill may have been well intended, its very narrow application would seem to create a favored class of unemployed individuals. The simple fact is that in a large labor market, such as Cleveland, the market would probably be able to absorb 500 unemployed individuals, barring special circumstances such as a depression or a closing of a highly specialized business. On the other hand, a closing of a business with fifty employees in Limerick, Ohio, may find the local labor market totally unable to absorb the unemployed individuals. If inability of the local labor market to absorb the unemployed is the trigger to entitlement to the additional benefits, then a much lower numerical standard of coverage, such as twenty to fifty employees, should be used. The fortuitous circumstance that one was employed by a very large employer as opposed to a moderately-sized or even relatively small employer should not be the basis for the provision of benefits. Apart from the high numerical threshold, however, tying eligibility for the ad-

137. Ohio H.B. No. 594, 113th Gen. Ass. § 1 (1979-80). An amended Ohio H.B. No. 594 was passed by the Ohio House and Senate and sent to the Ohio governor, who vetoed it. The amended bill was more generous than the bill as introduced, providing for waiver of tuition and fees for affected persons for a period of up to 52 weeks at any public educational institution. These educational benefits were to be for use in qualifying an affected individual for new employment. Ohio Am. H.B. No. 594, 113th Gen. Ass. (1979-80).
ditional benefits to the inability of the local labor market to absorb the unemployed seems like a reasonable approach.\textsuperscript{138}

Requiring advance notice of a planned dislocation and providing benefits to an employee who is adversely affected by a dislocation need not, of course, be mutually exclusive. Several proposed bills would, in fact, do both. One example is the proposed Community Readjustment Act of 1979 which has been introduced into the Ohio legislature.\textsuperscript{139}

The bill is fairly straightforward. It provides that the owner of an establishment which employs more than 100 persons would, upon deciding to close,\textsuperscript{140} relocate,\textsuperscript{141} or reduce operations,\textsuperscript{142} be subject to certain requirements. First, there would be a requirement of giving written notice to a number of parties at least two

\begin{itemize}
  \item \textsuperscript{138} There is a companion bill to this one, Ohio H.B. No. 593, 113th Gen. Ass. (1979-80). It would require the Ohio Bureau of Employment Services and private employment agencies to cooperate in finding jobs for employees affected by major business closings. It applies only to a total and permanent closing for a period of at least one year of a single business facility employing at least 500 persons, not including a work site never intended to be permanent. The bill does not require a finding that the unemployed workers cannot be readily absorbed into the local labor market. The bill provides that the Bureau and private agencies in the city or county in which the business facility is located shall share all information regarding job opportunities which may be suitable for affected employees. Failure of an employment agency to comply with the obligations the bill proposes would be grounds for revocation of the agency’s license. \textit{Id.} § 1.
  \item \textsuperscript{139} Ohio S.B. No. 188, 113th Gen. Ass. (1979-80). The bill is basically a reintroduction of Ohio S.B. No. 337, 112th Gen. Ass. (1977-78). Both were sponsored by State Senator Michael Schwarzalder. One reason justifying focusing on the Ohio bill is the substantial amount of attention it has generated, including an editorial in the Wall Street Journal, Dec. 7, 1978, at 20, cols. 1-2. The bill has also been recently introduced into the Ohio House with 13 co-sponsors. Ohio H.B. No. 968, 113th Gen. Ass. (1979-80). It was apparently introduced there due to the difficulty backers of the bill in the Ohio Senate were having in getting the bill out of committee and onto the floor.
  \item \textsuperscript{140} Defined as “permanent shutting down of operations at any establishment other than because the employer has filed for bankruptcy in accordance with federal bankruptcy laws.” Ohio S.B. No. 118, 113th Gen. Ass. § 1 (1979-80). Apparently the bill is not intended to cover the lay-off or temporary shutdown situation. On the other hand, what does permanent mean? A temporary shutdown can later become permanent. What happens then? Is this a gap in the bill’s coverage?
  \item \textsuperscript{141} \textit{Id.} Relocation is defined as a “transfer of a part of an employer’s operation . . . to another existing or proposed establishment located at an unreasonable distance, as determined by rule . . . and which results in at least a 10\% reduction in the number of employees at the establishment,” but it does not include transfers within a political subdivision. \textit{Id.} The statute does not expressly require a permanent transfer of operations and therefore could be argued to cover a temporary “contracting out” situation. \textit{Id.}
  \item \textsuperscript{142} \textit{Id.} Reduced operations is defined as a “permanent shutting down of a portion of the operations at any establishment so as to reduce the number of employees employed at that establishment by at least 50\% over any two-year period.” \textit{Id.}
\end{itemize}
years in advance of the proposed action. Further, the bill mandates that businesses to which the bill applies must provide a written economic impact statement with information regarding payroll, number of employees affected by the dislocation, the wages of such employees, amount of lost state and local tax revenue and the financial effect of the dislocation on community businesses.\footnote{143}

Another requirement would be the making of a lump-sum payment to each employee losing his job, equal to the average weekly wage of the employee times the number of years that employee has been employed by the dislocating employer, along with payment into a county Community Readjustment Fund equal to ten percent of the total annual wages of all employees who have lost their jobs.\footnote{144} The employer would also be compelled to continue the health insurance of affected employees for six months or until an employee finds other full-time work,\footnote{145} and to offer the employee suitable employment at any other facility owned by the employer if that facility is hiring, paying the employee's reasonable relocation expenses.\footnote{146} The employee would not be required to accept such employment under the bill,\footnote{147} but if accepted, the employer need not pay that employee's severance benefits.\footnote{148}

The money paid into a Community Readjustment Fund could be used for a variety of purposes, with priority given to providing jobs for affected employees. Interestingly, the funds would be authorized to grant money to a political subdivision for emergency tax relief where the dislocation had caused a substantial loss of tax receipts.\footnote{149}

One view of the philosophy behind this bill is:

[t]o tax industries for certain uninsurable costs they im-

\footnote{143. \emph{Id.} The two-year notice may be dispensed with if it is determined that circumstances beyond the control of the employer make such notification impossible. \emph{Id.}}

\footnote{144. \emph{Id.} It is expressly provided in the bill that acceptance of the severance payment by the employee shall not result in denial of unemployment compensation benefits under \textsc{Ohio Rev. Code Ann.} § 4141.01 \textit{et seq.} (Page 1973), nor shall it affect seniority or recall rights of the employee with the dislocating employer. Ohio S.B. No. 188, 113th Gen. Ass. § 1 (1979-80).}

\footnote{145. Ohio S.B. No. 188, 113th Gen. Ass. § 1 (1979-80). This was not required by the predecessor bill, Ohio S. B. No. 337, 112th Gen. Ass. (1977-78).}

\footnote{146. Ohio S.B. No. 188, 113th Gen. Ass. § 1 (1979-80).}

\footnote{147. However, there might still be an issue of refusal of suitable work for purposes of unemployment compensation benefits. \textsc{Ohio Rev. Code Ann.} §§ 4141.29(d)(2)(b) & (a)(3) (Page 1978 Supp.).}

\footnote{148. Ohio S.B. No. 188, 113th Gen. Ass. § 1 (1979-80).}

\footnote{149. \emph{Id.}}
pose on communities. . . . A sudden, once and for all, irreversible shutdown of a large plant is a social cost not shared by the private enterprise which makes the decision. . . . It is not the sort of event that an insurance company would find feasible to insure against. . . . So, ideally, we would like the legislation to bend business decisions slightly in a direction which otherwise they would not take. . . . In other words, it will raise the costs of relocation or shifts of production elsewhere.¹⁵⁰

This bill proposes strong medicine. The proponents of the bill, perhaps justifiably concerned about the impact of business dislocations on employees, local tax revenues and the business community as a whole, are attempting to enact legislation which would, as a practical matter, make hostages of local businesses.¹⁵¹ Dislocations within the scope of the bill could become so costly and burdensome that business decisions would virtually always be to act so as to avoid the dislocation.¹⁵² The effect of this, one must believe, would be passage of similar legislation in other states and continual amendment of the legislation to tighten the headlock on local business. The result of such an internecine competition would be business stagnation, with businesses often being unable to relocate or close even an unprofitable facility.

A federal bill similar to this was the proposed National Employment Priorities Act of 1976.¹⁵³ It would have amended the Fair

¹⁵⁰ Written testimony of Peter Bearse, Ph.D., Woodrow Wilson School of Public International Affairs, Princeton University, regarding Ohio S.B. No. 337, 112th Gen. Ass. (1977-78), dated February 8, 1978.

¹⁵¹ If an employer chooses to simply ignore the requirements of the bill, the employer would be subject to a civil suit by any employee, resident of the community, or employee organization or representative. If a court found the employer intentionally failed to give the required notice, the court could enjoin the closing, relocation or reduction of operations. Ohio S.B. No. 188, 113th Gen. Ass. § 1 (1979-80).

¹⁵² Undated promotional material in the possession of the author prepared by the Ohio Public Interest Campaign, an ardent supporter of the bill, in arguing that the costs imposed would be minor, estimates that the cost to General Motors of benefits to employees when it closed its Frigidaire Division in Dayton, eliminating 8,000 jobs, would have been $36.4 million before and $19.7 million after taxes. For Goodyear closing its Akron plant the estimates are $7.3 million and $3.9 million respectively. This estimate apparently does not include the cost of required payment into the Community Readjustment Fund. Ohio S.B. No. 188, 113th Gen. Ass. § 1 (1979-80).

Labor Standards Act\textsuperscript{154} to require any business concern employing at least fifty employees\textsuperscript{155} to give written notice to the Secretary of Labor and affected employees at least two years in advance\textsuperscript{156} of closing or transferring all or part of the operations of an establishment of that concern.\textsuperscript{157} The notice would have had to include considerable information such as the reasons for and alternatives to the dislocation, the extent of potential employment loss caused by the dislocation, plans to alleviate this unemployment, and detailed economic data about the establishment involved and the larger business concern, if one existed.\textsuperscript{158}

Affected employees would have been entitled to file an application for adjustment assistance with the Secretary of Labor, who would have made a determination as to eligibility.\textsuperscript{159} The adjustment assistance could have taken many forms including, but not limited to, income maintenance payments, maintenance of pension and health benefits, job placement and retraining, relocation allowances, early retirement benefits, emergency mortgage and rent payments, and food stamps and surplus commodities for persons below the poverty level. In addition, a dislocated employee, to the extent practical, would have had to be offered suitable employment available at other establishments of a business.\textsuperscript{160}

The bill would have also authorized assistance to other parties in the event of a dislocation. Assistance to local governmental units to replace the substantial loss of revenue from payroll and real and personal property taxes, to businesses in the community in the form of loans or loan guarantees for the purpose of providing in-

\begin{footnotesize}
\begin{enumerate}
\item[155.] H.R. 13100, 94th Cong., 2nd Sess. § 2 (1976). In determining whether the statutory 50 employee threshold had been met, parent corporations would have been considered with all their subsidiaries. \textit{Id.} This would have closed a potential loophole.
\item[156.] \textit{Id.} The notice requirement would have been inapplicable if less than 15\% of all members of any labor organization or less than 15\% of all employees at an establishment suffered an "eligible employment loss," defined as being unemployed or receiving less than 85\% of the pre-dislocation average weekly wage. \textit{Id.} In addition, the Secretary of Labor would have been able to approve notice given with "all reasonable promptness" if he found that in good faith the business concern could not have predicted the dislocation two years in advance. \textit{Id.}
\item[157.] \textit{See} note 155 \textit{supra.} The definition of "transfer of operations" would have excluded those in which the new location was a reasonable commuting distance from the old. \textit{Id.}
\item[158.] \textit{Id.}
\item[159.] \textit{Id.} Only employees suffering an eligible employment loss would have been entitled to adjustment assistance. \textit{See} note 156 \textit{supra.}
\item[160.] \textit{See} note 155 \textit{supra.}
\end{enumerate}
\end{footnotesize}
creased employment opportunities and to businesses faced with dislocation would have been authorized.\[161\]

The bill had a very interesting section which would have withdrawn benefits from businesses which engaged in unjustified dislocations. If after an investigation the Secretary of Labor found that a dislocation had not been justified, could have been avoided if the business had accepted assistance under the bill’s provision, had not been preceded by filing of an advance notice as required, or was to a new location outside the U.S. even though other suitable alternatives existed, then the business would have lost a number of benefits under the Internal Revenue Code\[162\] with respect to both the old and new establishments.\[163\]

This bill is interesting in several respects. First, while the proposed Ohio Community Readjustment Act\[164\] would provide for employee benefits, to be paid by dislocating employers, the federal bill would have provided benefits funded by appropriations from general revenues. Thus, to the extent that one accepts the philosophy that business dislocations generate “social costs” which should be borne by the offending business enterprise, the bill was unsound. On the other hand, if one is convinced that a business enterprise may be run with profit maximization as a goal and that the interests of employees, the community and local political subdivisions need not be considered in business decision making, the bill adopted the appropriate approach. The costs generated are then not viewed as the responsibility of the dislocating employer and are treated as part of a general welfare program. Second, the authors of the bill recognized that federal law currently not only permits but also aids and perhaps encourages business dislocations. The bill, therefore, attempts to prevent the Internal Reve-

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161. *Id.* Two forms of aid to businesses faced with dislocation would have been financial assistance, including loans and loan guarantees, and employee retraining. Certain findings by the Secretary of Labor would have been necessary before such assistance could have been extended. These would have included findings that the dislocation would cause a substantial loss of employment, that dislocation would be economically justified and that the assistance could reasonably be expected to enable the business to operate on an improved financial basis and thereby avoid the dislocation. *Id.*


163. H.R. 13100, 94th Cong., 2nd Sess., § 2 (1976). These would have included the investment credit under I.R.C. § 38, the accelerated depreciation range under I.R.C. § 167(m) and deductions for ordinary and necessary expenses under I.R.C. § 162(a) if those expenses related to the unjustified dislocation. 26 U.S.C. §§ 38, 162(a), 167(m) (1976).

nue Code\(^{165}\) from being utilized to subsidize what are deemed to be unwarranted dislocations.\(^{166}\)

A number of bills introduced into Congress would attempt to avoid dislocations by promoting employee and employee-community ownership of businesses which would otherwise be dislocated. The Voluntary Job Preservation and Community Stabilization Act (H.R. 2203) and the Voluntary Broadened Stock Ownership, Job Preservation and Community Stabilization Act\(^{167}\) (S. 1058) would both provide assistance to meet these goals.

In the United States Senate, S. 1058 would authorize the Economic Development Administration (EDA), after a determination by the Secretary of Commerce that the use of funds is within the purposes of the Act, to provide guaranteed loans to employee or employee-community organizations for start-up, operating costs, and equity funding for the purchase of stock.\(^{168}\) The bill would allow the EDA to use funds appropriated under the proposed National Public Works and Economic Development Act of 1979,\(^{169}\) but would not appropriate additional funds.\(^{170}\) H.R. 2203, on the other hand, would authorize additional appropriations of at least $100 million per fiscal year for the fiscal year ending September 1980 with increased amounts for the six succeeding fiscal years.\(^{171}\) The bill would authorize loans by the Secretary of Commerce to the employee or employee-community group for start-up and operating costs connected with purchasing a concern, but the funds for the actual purchase of the stock would be loaned directly to the individual employees.\(^{172}\) The bill would require a written commitment from an employee or employee-community organization to act as the agent of the federal government in collecting loan and interest repayments through payroll deductions before loans would be made to employee members of the organization.\(^{173}\) Loans to in-


\(^{168}\) Id. § 5.


\(^{172}\) Id. § 5.

\(^{173}\) Id. § 5 (c)(2)(C).
individual employees exceeding $15,000 in amount or ten years in duration would be prohibited. In addition, forgiveness of loans would be expressly prohibited.\textsuperscript{174}

A bill which would promote employee ownership of small businesses is the Small Business Employee Ownership Act.\textsuperscript{175} This bill would make loan guarantees available under the Small Business Administration's business loan program\textsuperscript{176} to enable employees to purchase small business concerns which would otherwise be closed, liquidated or relocated.\textsuperscript{177} The loans guaranteed could be made to employee organizations, employee-owned business concerns and business concerns' employee stock ownership plans (ESOP's) and trusts (ESOT's).\textsuperscript{178} The principal amount of any loan guaranteed could not exceed $500,000.\textsuperscript{179}

The bill would permit a guarantee of up to ninety percent of the total remaining payments at the time of default. Thus, the Small Business Administration's obligations would not exceed $450,000 on any guarantee. In addition, at least fifty-one percent of the total stock or other asset value must be owned by at least fifty-one percent of the employees of the concern after the assistance is rendered. Finally, except with respect to ESOP's, there must be a method whereby the loan to the employee organization can be repaid by employee members through payroll deductions if the method of repayment used fails to produce the necessary cash.\textsuperscript{180}

All of the bills establish certain prerequisites for the extension of aid, with a number of these being aimed at assuring that the business concern involved would be a viable concern after the transfer of ownership to employees or the employee-community group,\textsuperscript{181} or would generate sufficient revenues to repay loans guaranteed.\textsuperscript{182} In addition, a requirement for assistance under all the bills is that all employees be offered an opportunity to participate

\textsuperscript{174} \textit{Id.} § 5 (d).
\textsuperscript{175} S. 388, 96th Cong., 1st Sess. (1979); the same bill in the House of Representatives is H.R. 3056, 96th Cong., 1st Sess. (1979). S. 388 has passed the Senate.
\textsuperscript{177} S. 388, 96th Cong., 1st Sess. § 5 (1979).
\textsuperscript{178} \textit{Id.}
\textsuperscript{179} \textit{Id.} § 5 (as amended). As introduced, the limit was $1 million. As introduced, H.R. 3056 had a $500,000 limit on loan guarantees. S. 388, 96th Cong., 1st Sess. § 4 (1979).
in the ownership plan, and to the extent practical, that provision be made for the repurchase of stock owned by employees no longer associated with the business.\textsuperscript{183}

In analyzing these bills, it should be noted that the Small Business Employee Ownership Act\textsuperscript{184} would not be very useful in averting major dislocations. The bill is aimed at promoting employee ownership of small businesses and thus has correspondingly low limits on the loan guarantee program proposed. A dislocation could, however, be as traumatic to an employee of a small business as it would to an employee of a large one. The economic effects on the employee could also be the same. However, S. 1058\textsuperscript{185} and H.R. 2203\textsuperscript{186} would provide a major financing vehicle for employee ownership of businesses. On its face, this solution to the problem of business dislocation appears to be most fair. Instead of requiring the employer to keep its capital at risk for up to six months or two years, or imposing a tax on employers who make a decision to dislocate, presumably for valid business reasons, the bills would enable employees to step in and place their capital at risk. By successfully operating the business concern, employees can potentially demonstrate that the contemplated dislocation was not the only nor, perhaps, the best course of action.

At a deeper level, however, the bills pose serious questions. Assuming that employers would consent—which is by no means certain—the wisdom of allowing it is not clear. Many dislocations are valid business decisions. In order to avoid involving employees in the ownership and operation of marginal or financially troubled concerns, care must be exercised. Further, there is a potentially broader objection to the proposed bills. Economist Peter Drucker argues:

Investing the worker’s main savings in the business that employs him may be “industrial democracy,” but it is financial irresponsibility. The employee already has a big stake in the company that employs him: his job. To put the employee’s financial future, his pension claim, into the same basket violates all principals of sound investment.\textsuperscript{187}

\textsuperscript{183} See notes 181-82 & accompanying text supra.
\textsuperscript{185} 96th Cong., 1st Sess. (1979).
\textsuperscript{186} Id.
\textsuperscript{187} F. DRUCKER, THE UNSEEN REVOLUTION 8 (1976). Consider in this regard the position of 16,700 salaried workers of Chrysler who participate in a thrift purchase plan owning
Drucker further contends that using "employee pension money to invest in the employing company would make sure that few employees would ever get a pension," and states that over half of all businesses disappear altogether within a forty-year period.\textsuperscript{188} Thus, a business which appears sound when purchased by employees may go bankrupt ten or twenty years later. Although Drucker's comments were directed at use of employee pension funds, they would seem to apply equally well to any plan to have employees invest a substantial part of their assets in an undiversified portfolio—their employing company. Should unsuspecting workers be induced to make, either directly or indirectly, a substantial investment in an operation in which businessmen may have already decided there is no future? Will it be necessary to step in at a later date and bail out a substantial number of these concerns in order to protect employee expectations and prevent financial disaster for groups of workers? Finally, if it is determined that it is inadvisable to encourage employees to take these risks, then is it justifiable to force unwilling employers to assume them?

Finally, the most recent bills introduced into Congress combine all of the above approaches. An example is the National Employment Priorities Act of 1979.\textsuperscript{189} Briefly, business concerns having an annual gross volume of sales of business of at least $250,000 would be covered by this bill.\textsuperscript{190} The bill would require advance notice of a change of operations\textsuperscript{191} at an establishment which would result in an employment loss\textsuperscript{192} in any eighteen-month period that "equals or exceeds the lesser of 100 employees or 15 percent of the employees."\textsuperscript{193} The notice would have to be given to the Secretary of Labor, employees, labor unions, and units of local gov-

\textsuperscript{188} Drucker, supra note 187.


\textsuperscript{190} S. 1608, 96th Cong., 1st Sess. § 3(4) (1979).

\textsuperscript{191} Defined as a "transfer of any operation from an establishment or the termination of any operation." Id. § 3(5).

\textsuperscript{192} Defined by the bill. Id. § 3(11).

\textsuperscript{193} Id. § 4(a).
ernment and would have to include specified information. 194 The advance notice period would vary from six months to two years, depending on the number of employees suffering an employment loss. 195

Adversely affected employees would be eligible for a number of benefits and protections under the bill. These would include the opportunity to transfer to other establishments owned by a business concern, 196 the right to income maintenance payments, 197 the right to continued employer contributions to employee benefits plans, 198 and the right to continued employer contributions to pension plans for certain older workers to enable them to vest under the plan. 199 The employees may also be eligible for training, job search expense payments, and moving expense payments provided by the Secretary of Labor. 200

Business concerns intending to dislocate would be eligible for assistance for the purpose of avoiding the dislocation. 201 The assistance would be available in the form of "loans, loan guarantees, interest subsidies, and the assumption of any outstanding debt." 202

Affected local governmental units would be eligible to receive assistance in the form of loans and loan guarantees from the Secretary of Labor. 203 In addition, the bill would make dislocating businesses liable for the major portion of the community's loss in real or personnel property taxes due to the dislocation. 204

The bill would authorize the Secretary of Labor to make loans and loan guarantees for a number of purposes including the acquisition of ownership of firms by employee associations. 205

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194. Id. § 4(b).
195. Id. § 4(b)(3)(A).
196. Id. § 11. The employer would also be required to pay the reasonable moving expenses of an employee accepting a transfer. Id. § 9(b).
197. Id. § 9(a)(1)(A). Unlike some of the proposed bills, these payments would be related to actual income loss and would be reduced by the amount of any unemployment compensation or trade readjustment allowance paid. Id. § 9(a)(4). In addition, employees receiving a retirement benefit from a pension plan to which the employer has contributed would not be entitled to any income maintenance payments. Id. § 9(a)(10).
198. Id. § 9(a)(1)(B).
199. Id. § 12(d).
200. Id. § 13.
201. Id. § 15.
202. Id. § 16(a)(1).
203. Id. §§ 18, 19.
204. Id. § 23.
205. Id. §§ 20, 21.
Finally, the bill would provide substantial penalties for violations.\textsuperscript{206}

VI. CONSTITUTIONAL LAW ISSUES

The bills which have been proposed to deal with the problem of business dislocations raise a number of potential constitutional law issues. While these issues will not be discussed in great depth—that is best left to constitutional law scholars—it is necessary to highlight certain problem areas, and to make some modest suggestions as to how some of these problems might be avoided.

A. Contract Clause

The contract clause of the United States Constitution\textsuperscript{207} has recently gained substantial attention due to two Supreme Court cases\textsuperscript{208} which have implemented the clause to invalidate state legislation. This discussion will focus on the most recent of these two cases, \textit{Allied Structural Steel v. Spannaus}.\textsuperscript{209} The statute under consideration in that case was the Minnesota Private Pension Benefits Protection Act.\textsuperscript{210} Under this law a private employer with one hundred or more employees, at least one of whom resided in Minnesota, was liable for a pension refunding charge if it terminated a qualified pension plan or closed a Minnesota office where the employees were covered by a qualified pension plan. The charge would be sufficient to provide a full pension to all workers employed at any location within the state with ten or more years of service, including service prior to the effective date of the act.\textsuperscript{211} In addition, the Act required any employer covered by it to give the Commissioner of Labor and Industry notice at least six months in advance of a cessation of operation or termination of a pension plan.\textsuperscript{212} The Act was passed on April 9, 1974,\textsuperscript{213} to become effective

\begin{thebibliography}{9}
\bibitem{206} Id. §§ 24-26.
\bibitem{207} U.S. Const. art. I, § 10, cl. 1.
\bibitem{208} Allied Structural Steel v. Spannaus, 438 U.S. 234 (1978) (contract clause used to invalidate state pension legislation); U.S. Trust Co. v. New Jersey, 431 U.S. 1 (1977) (contract clause used to invalidate legislation retroactively repealing statutory convenant for the protection of bondholders).
\bibitem{211} Id. §§ 181B.02-.03.
\bibitem{212} Id. § 181B.08.
\bibitem{213} 438 U.S. at 238.
\end{thebibliography}
BUSINESS DISLOCATIONS

the next day.\textsuperscript{214}

Allied Structural Steel had over 100 employees, thirty of whom were employed in Minnesota. Allied began to phase out its Minnesota operations in the summer of 1974, releasing eleven of its thirty employees and giving notice, as required, of its intent to close its state office. The company had a pension plan providing for vested pension benefits for employees age sixty-five regardless of length of service, and for other designated employees with no less than fifteen years of service. Nine of the eleven employees released had more than ten years of service with the company but did not, under the plan, have vested pension rights. The commissioner notified Allied that it was subject to a pension funding charge of approximately $185,000. The company brought an action to avoid the liability, arguing that the Act transgressed the contract clause.\textsuperscript{215} After losing at the federal district court level,\textsuperscript{216} the company appealed to the Supreme Court.

The majority opinion of the Supreme Court conceded that "the contract clause does not operate to obliterate the police power of the states."\textsuperscript{217} The Court made it clear, however, that the contract clause does "impose some limits upon the power of a State to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police power."\textsuperscript{218} In reversing, the Court relied heavily on \textit{Home Building & Loan Association v. Blaisdell},\textsuperscript{219} a depression era contract clause case upholding a Minnesota mortgage moratorium law. The Court stated that several factors had been important in that case. These were the existence of an emergency situation, limitation of the statute to the duration of the emergency, the reasonableness of the conditions imposed, the careful tailoring of the statutory provisions to the emergency and, finally, the fact that the statute was based on a broad social problem and not simply designed to protect a favored few.\textsuperscript{220}

The Court believed the Minnesota statute under consideration did not pass constitutional muster for several reasons. First, the Act regulated an area which had not been regulated by the Minne-
sota legislature in the past and operated as a substantial impair-
ment of a contractual obligation in an area—the funding of a pen-
sion plan—where reliance on the terms of the contract is
important. Second, the changes it required the company to make
were retroactive and were immediately effective with no gradual
phase-in or grace period. In addition, the Court determined that
the law was not aimed at "broad and desperate economic condi-
tions" as had been the case in Blaisdell, but instead was
aimed only at those employers who had "in the past been suffi-
ciently enlightened as voluntarily to agree to establish pension
plans."

Several comments can be made here. First, this case, when
viewed in conjunction with United States Trust Co. v. New
Jersey, indicates that the Supreme Court is at least willing to
consider a contract clause argument. Second, the case does offer
some guidance on drafting a bill to avoid contract clause problems.
One possibility would be to provide benefits payable out of general
revenues instead of the dislocating employer's pocket. A bill
drafted in this manner would not affect the rights as between the
parties. The problem here, of course, is a philosophical one. If the
social costs of a dislocation are viewed as the employer's dirty
linen, then an approach which provides reparations out of general
revenues is unacceptable. A second possibility is to draft a bill
which is prospective in operation or, at least, provides a modest
grace period before taking effect. A grace period would eliminate
the surprise element, which appeared to bother the majority in Al-
lied Structural Steel, and serve notice that at some definite
point in the future the employer would be held to the statutory
requirements. This would eliminate a reliance argument, since at
that point the employer would have no reasonable basis for not
taking the statutory requirements into account in making business

221. Id. at 246-50.
222. Id. at 249.
223. 290 U.S. 398 (1934).
224. 438 U.S. at 250. The dissenters disagreed with the majority as to the seriousness
of the social problem addressed by the statute and the extent of the burden imposed on
employers. Id. at 252-55. They argued that the contract clause only invalidates state laws
which diminish and not those that increase the duties of a contractual obligor. Id. at 256-59.
226. See, e.g., the proposed National Employment Priorities Act of 1976, H.R. 13100,
decisions. Finally, since the contract clause operates as a restriction on states only, a bill introduced at the federal level would not be subject to subsequent invalidation under the clause.

B. Equal Protection

A statute dealing with business dislocations could potentially be subject to an equal protection attack under the fourteenth amendment, \textsuperscript{228} under the due process clause of the fifth amendment \textsuperscript{229} or under a state constitution. \textsuperscript{230} A potential target under an equal protection attack would be a numerical threshold for the applicability of the statute. A number of the proposed bills include numerical thresholds which would limit their applicability to larger employers. \textsuperscript{231} Typical of the numerical threshold argument is the Maine statute dealing with business dislocations. \textsuperscript{232} In \textit{Shapiro Bros. Shoes v. Lewiston-Auburn S.P.A.}, \textsuperscript{233} an earlier version of the Maine statute was attacked on equal protection grounds, both under the Maine and United States Constitutions. Not only the numerical threshold, in this case 100 or more employees, but also the exemption from coverage of businesses forced out of business was challenged.

The Maine Supreme Judicial Court described the requirements of the equal protection doctrine under both the Maine and federal constitutions as:

Only invidious—arbitrary or unreasonable—discrimination is prohibited by law. \ldots \ldots \lfloor T \rfloor \text{he legislature may in its wide discretion promulgate legislation which treats some classes differently from others so long as the dissimilar treatment is not arbitrary and is rationally related to the objectives of the statute.} \ldots \ldots \lfloor I \rfloor \text{t is not necessary for the Legislature to remedy all the evils in a given area when it passes a certain act.} \ldots \ldots

\textsuperscript{228} U.S. CONST. amend. XIV, § 1.
\textsuperscript{229} U.S. CONST. amend. V. In \textit{Bolling v. Sharpe}, 347 U.S. 497 (1954), the Supreme Court held that "discrimination may be so unjustifiable as to be violative of due process." \textit{Id.} at 499. Thus, the due process clause of the fifth amendment has been found to apply an equal protection guarantee to classifications under federal law. J. NOWAK, R. ROTUNDA, & J. YOUNG, \textit{CONSTITUTIONAL LAW} 383 (1978).
\textsuperscript{230} \textit{See, e.g.,} Ohio Const. art. I, § 2; Mich. Const. art. I, § 2.
\textsuperscript{233} 320 A.2d 247 (Me. 1974).
[M]ere imperfection in classifications in the area of economics and social welfare does not lead to a constitutional violation. ... 234

The Court upheld both the numerical and the voluntary-involuntary classifications, easily finding a justification or reasonable basis for them. With respect to the numerical classification, the Court believed that dislocations caused by the closing of a large business would be greater than when a small employer closed. For this reason the classification served the purpose of excluding from coverage those businesses whose closing would cause minor or even negligible dislocations.235 As to the voluntary-involuntary classification, the Court opined that application of the statute's notice and severance pay requirements to involuntary closings might be unnecessarily harsh. The resulting unfairness of applying the Act to businesses unable to avoid closing provided a rational basis for the classification.236

The Maine Court relied upon the rational basis analysis used by the federal courts in most equal protection cases which turn on the wisdom of economic legislation.237 One could attempt to fault the conclusion as to the validity of the numerical threshold by pointing out that the effect of a business closing is not totally or even mainly determined by the size of the employer. Other factors, such as the size of the local labor market, the current unemployment rate in that labor market and the skill level of dislocated employees affect the severity of the dislocation. The problem is that a statutory threshold requirement could not presume to take all of these factors into account and yet remain workable. Thus a statutory threshold, which takes into account only one of a number of determinants, would represent a legitimate legislative judgment.

In sum, one can be reasonably assured that any of the numerous bills which have been proposed could, as written or with minor changes, pass muster under a rational basis equal protection

234. Id. at 255-56.
235. Id. at 256.
236. Id.
C. The Taking Problem

The fifth amendment238 prohibits the taking of private property for public use without just compensation. This provision is made applicable to the states through the fourteenth amendment.239 In addition, similar requirements are found in many state constitutions.240 Cases in which actual physical possession of property is taken fall clearly within the language of the prohibition. Other types of cases have presented more difficult problems. It has been determined, for example, that aircraft flights over property at low altitudes may constitute a compensable “taking.”241 In addition, it has been held that statutes which go too far in regulating a property owner’s use of his land may constitute a “taking.”242

With respect to the proposed legislation, the advance notice requirements in several of the bills243 could be argued to constitute a compensable “taking.” Consider the situation of a business concern which has suffered sizable losses for several years on a plant in state X. If either Congress or the state legislature had passed a statute requiring the concern to give two years advance notice before closing, the effect would be to force the business to maintain its capital at risk for two years regardless of losses. Does this constitute a compensable “taking” of an estate for years? Is the concern entitled to a recovery for the use of its capital for two years? There is substantial case law holding that an investor-owned utility is entitled to earn a reasonable rate of return on its investment. It has been held that the failure or refusal of a regulatory commission to permit such earnings amounts to a confiscation

238. U.S. CONST. amend. V.
240. See, e.g., Ohio CONST. art. I, § 19.
of property without due process of law.\textsuperscript{244} Thus it would appear that an argument could be made that the two-year advance notice requirement can operate, in the case of a concern which is not reasonably profitable, in the same manner as confiscatory rates in the case of a utility.

The Supreme Court addressed the taking problem concerning business dislocations in \textit{Brooks-Scanlon Co. v. Railroad Comm'n of Louisiana.}\textsuperscript{245} The case involved a lumber company which also operated a railroad in Louisiana. The Railroad Commission of Louisiana ordered the company to operate the railroad. The company, desirous of abandoning the operation, claimed it would suffer losses of more than $1,500 per month if it complied.\textsuperscript{246} In a brief opinion by Justice Holmes, the Court held the company could not be compelled to carry on even part of its business at a loss.\textsuperscript{247} The Court analogized to the line of utility cases referred to above, stating that "the principle is illustrated by the many cases in which the constitutionality of a rate is shown to depend upon whether it yields to the parties concerned a fair return."\textsuperscript{248} The Court never clearly articulated the basis for its decision, yet did cite an old due process case\textsuperscript{248} in support of its conclusion.\textsuperscript{250}

The \textit{Brooks-Scanlon} decision was cited by a New York trial court in a 1978 case. That case, \textit{People ex. rel. Lewis v. Safeco Insurance Co.,}\textsuperscript{251} involved an attempt by the New York Superintendent of Insurance to obtain an injunction preventing two insurance companies, both wholly owned subsidiaries of Safeco, from

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\textsuperscript{244} See, e.g., Board of Pub. Util. Comm'r's v. New York Tele. Co., 271 U.S. 23 (1926) wherein the Court stated that: "The just compensation safeguarded to the utility by the Fourteenth Amendment is a reasonable return on the value of the property used at the time that it is being used for the public service. And rates not sufficient to yield that rate are confiscatory." Id. at 31. See also Bluefield Water Works & Improvement Co. v. Pub. Serv. Comm'n of W. Va., 262 U.S. 679 (1923), where the Court stated that the principle that unreasonable and confiscatory rates deprive a public utility of its property in violation of the fourteenth amendment was "so well settled by numerous decisions of this Court that citation of the cases is scarcely necessary." Id. at 690.

\textsuperscript{245} 251 U.S. 396 (1920).

\textsuperscript{246} Id. at 397.

\textsuperscript{247} Id. at 399.

\textsuperscript{248} Id.

\textsuperscript{249} Munn v. Illinois, 94 U.S. 113 (1876). The case involved an Illinois statute regulating grain warehouses. The Court stated that while the fourteenth amendment prevents states from depriving an owner of his property without due process of law, private property affected with a public interest is subject to public regulation. Id. at 125-26.

\textsuperscript{250} 251 U.S. at 399.

\textsuperscript{251} 98 Misc. 2d 856, 414 N.Y.S.2d 823 (Sup. Ct. 1978).
\end{flushleft}
surrendering their licenses to do business in New York and phasing out their insurance business in the state. The reason for the desire to withdraw from the state was $7 million in business losses over approximately a three-year period. The defendant companies proposed an orderly phase-out which would include honoring all existing policies until the next expiration date.\textsuperscript{252} The court held that although the police power gave the state the right to regulate the insurance industry, that power was not absolute. The court noted that the insurance companies were protected both under the United States and New York Constitutions by the prohibitions against taking private property for public use without just compensation and against depriving a person of property without due process of law.\textsuperscript{253} The court concluded that the state could not “conscription and compel them to continue doing business at a loss in [the] State,”\textsuperscript{254} basing this conclusion on due process grounds.\textsuperscript{255} It would appear that there is authority supporting the proposition that a company cannot be compelled to do business at a loss and has a right to discontinue unprofitable operations. If this is in fact true, several questions then arise. First, can a concern be compelled to do business at a reasonable profit? In \textit{Safeco}, one cause of the companies' losses apparently was a moratorium the New York Superintendent of Insurance had imposed on rate increases on certain policies.\textsuperscript{256} This action most likely made it impossible for the companies to make a profit. Nonetheless, the court stated that without “the most severe and grave public emergency, the State may not compel a corporation to conduct a business against its choosing.”\textsuperscript{257} In sum, the court might have allowed a forced continuation at a profit if faced with a true emergency situation, but not otherwise.

A recent New Jersey case involved facts similar to those in \textit{Safeco}. In \textit{Sheeran v. Nationwide Mutual Insurance Co.},\textsuperscript{258} the New Jersey Commissioner of Insurance brought an action in an

\begin{itemize}
  \item \textsuperscript{252} \textit{Id.} at 858-59, 414 N.Y.S.2d at 824-25.
  \item \textsuperscript{253} \textit{Id.} at 864-65, 414 N.Y.S.2d at 827-28.
  \item \textsuperscript{254} \textit{Id.} at 866, 414 N.Y.S.2d at 829.
  \item \textsuperscript{255} \textit{Id.} The court stated that this determination made it unnecessary to decide the additional issue of whether the companies had been deprived of their property without just compensation. \textit{Id.} at 866-67, 414 N.Y.S.2d at 829-30.
  \item \textsuperscript{256} \textit{Id.} at 858, 414 N.Y.S.2d at 824-25. According to the companies, this decision was “[t]he straw which broke the camel's back.” \textit{Id.}
  \item \textsuperscript{257} \textit{Id.} at 867, 414 N.Y.S.2d at 830.
  \item \textsuperscript{258} 80 N.J. 548, 404 A. 2d 625 (1979).
\end{itemize}
attempt, essentially, to force Nationwide to continue offering renewal options in New Jersey on automobile policies. Nationwide, which alleged these policies were unprofitable, decided against renewing these policies although it did not intend to surrender its certificate of authority to do business in New Jersey.259 The New Jersey Supreme Court approved a requirement that the Company offer indefinite renewals unless the company surrendered its license to do business in New Jersey.260 In so doing, the court rejected the company's contention that it was being deprived of its property without due process of law.261 The court stated that if its business were unprofitable, the answer was to apply to the Commissioner of Insurance for rate increases.262 Interestingly, the court concluded that Nationwide was entitled to a reasonable profit and would have a judicial remedy in the event of an unreasonable rate structure.263

In sum, the New Jersey Supreme Court was persuaded that a state may validly require a licensed company to continue at least a profitable insurance business if it is in the public interest. The court emphasized, however, that "the insurance business is strongly affected with a public interest and therefore properly subject to comprehensive regulation."264 It is not altogether clear that the court would apply the same rules to other types of businesses.

A second question which arises is whether a brief advance notice requirement which is carefully tailored to meet a specific need would be valid. A number of the proposed bills would establish a two-year advance notice requirement.265 As discussed above, these may pose a "taking" problem. It appears likely, however, that a brief advance notice requirement aimed at, for example, insuring the payment of wages due would not be objectionable.266 In such a case, the requirement, while potentially forcing an employer against its will to continue operating a concern for a brief period,

259. Id. at 553, 404 A. 2d at 627. Thus, the case differs factually from Safeco in that the insurance companies in that case were desirous of withdrawing entirely from doing business in New York.

260. Id. at 561, 404 A.2d at 631.

261. Id. at 559-60, 404 A.2d at 630-31. The court clearly treated the issue as one of deprivation of property without due process of law. Id.

262. Id. at 560, 404 A. 2d at 631.

263. Id. See note 244 and accompanying text supra.

264. 80 N.J. at 559, 404 A. 2d at 630-31.


BUSINESS DISLOCATIONS

would seem to be a valid exercise of the police power. The interest involved—payment of wages—is an area of traditional concern to the states and is already highly regulated. A notice period of a month or less would be a reasonable regulation that would help enforce legal requirements as to the payment of wages without unnecessarily interfering with an employer’s ability to operate a business as he or she sees fit.

D. Commerce Clause

Finally, and perhaps most importantly, the proposed bills raise serious commerce clause problems. The United States Constitution gives Congress the power to regulate commerce among the states. While a state is thus prohibited from undertaking to regulate interstate commerce, it has consistently been held that if a state statute “regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.” Once a proper local interest is found behind a statute, the process of determining the constitutionality of the law is essentially a balancing test. The extent of the impact on interstate commerce is examined, as is the local interest involved. If the impact of the law on such commerce is disproportionate to the expected benefits, or if the local interest could be as adequately protected with less impairment of interstate commerce, the statute will likely be overturned.

The proposed Ohio Community Readjustment Act of 1979 and similar state bills would appear to pose problems on several grounds. First, even if one begins with the assumption that a legitimate state interest is involved and that the bill is nondiscriminatory, applying to intrastate as well as to interstate relocations, the burden or impact on interstate commerce is severe. Businesses planning to relocate to another state could not do so for two years after the decision to relocate is made, and then only after paying a potentially massive bill for severance pay and community readjustment, collectively described by the Wall Street Journal as an “exit

267. U.S. Const. art. I, § 8, cl. 3.
One cannot help but believe that the effect of dislocation could be dealt with in a less burdensome manner. For example, unemployment insurance benefits have been available to dislocated employees for a number of years. These benefits are paid through a system that taxes the company payroll to establish a fund which is available when necessary. The system does not impose a significant burden on interstate commerce. Without getting into the question of whether or not the availability of unemployment benefits is an adequate response to business dislocations, which is inherently a legislative matter, it can be said that substantially the same benefits available under the Ohio Act could be provided by a small additional payroll tax on covered employers. The funds generated could be placed in a fund available to make reparation to the appropriate parties in the event of a dislocation. Employers would, however, be free to make a decision to move their entire business or portions thereof in interstate commerce free from undue restrictions.

Another alternative which is available is the general revenue approach. Again, the same benefits could be provided from general tax revenues while businesses could still be relocated in interstate commerce free from burdensome restrictions. The proposed National Employment Priorities Act of 1976 and the readjustment assistance provisions of the Trade Act of 1974 typify this approach. However, this may lead to a philosophical problem. If one is convinced that dislocating employers are somehow morally responsible for the social costs generated, a general revenue approach is inappropriate. A scheme financed by large employers in general, however, might be more palatable since the costs would be borne by the class of businesses responsible, if not entirely by the individual dislocating employers.

Further, it appears, at least to a degree, that the proposed Ohio Community Readjustment Act of 1979 is based on the assumption that it is inherently better when Ohio residents enjoy the fruits of a business than when residents of other states do so. Yet while the relocation of an Ohio business to, for example, North Carolina will cause losses to the local economy and hardships for

272. See notes 58-82 & accompanying text supra.
274. 19 U.S.C. §§ 2251-394 (1976); See notes 84-104 & accompanying text supra.
local businesses, individuals and communities, there will undoubt-
edly be concomitant benefits to local North Carolina businesses, 
individuals and communities. Is Ohio in a position to say that its 
residents have a superior claim to these benefits and to enforce 
this view by penalizing and restricting relocating employers? This 
question presents the very type of situation at which the commerce 
clause was aimed. The framers of the Constitution viewed Con-
gress as the body best able to make the determinations necessary 
in adjusting competing state interests. In a recent case, the Su-
preme Court declared that it has constantly been on guard against 
"economic isolation" and that "where simple economic protec-
tionism is effected by state legislation, a virtually per se rule of 
invalidity has been erected." The Court further noted that the 
"evil of protectionism can reside in legislative means as well as legis-
lative ends" and that it did not matter whether the article of 
commerce is being kept in the state or out of it. The Court felt 
that "[w]hat is crucial is the attempt by one state to isolate itself 
from a problem common to many by erecting a barrier against the 
movement of interstate trade."

Limits imposed on states in regulating interstate commerce do 
not, however, apply to Congress. Thus, a number of the proposals 
dealing with business dislocations would be clearly valid if enacted 
by Congress. The argument could be made, then, that, at least with 
respect to interstate relocations, Congress is the appropriate body 
to deal with the problem and legislate a solution.

VII. CONCLUSION

Existing legislation pertaining to business dislocations consists 
primarily of unemployment compensation and employment ser-
vice laws. A large number of bills have been proposed to deal 
specifically with business dislocations, a number of which propose

276. Philadelphia v. New Jersey, 437 U.S. 617 (1978), noted in Garbage, the Police 
Power and the Commerce Clause, 8 CAPITAL U. L. REV. 613 (1979).
277. 437 U.S. at 623.
278. Id. at 624.
279. Id. at 626.
280. Id. at 628.
281. Id. See also Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1, (1928), wherein 
the Court stated: "A State is without power to prevent privately owned articles of trade 
from being shipped and sold in interstate commerce on the ground that they are required to 
satisfy local demands or because they are needed by the people of the State." Id. at 10.
282. See notes 58-82 & accompanying text supra.
schemes of stringent regulation. To an extent, these proposed bills may be representative of a trend to move issues away from the bargaining table and into the legislative chamber.  

Several modest suggestions can be made at this time. First, state legislatures are probably not the appropriate bodies to deal with the problem of major business dislocations. There are at least two reasons for this. One is the substantial commerce clause problem that confronts state regulation in this area. The other and potentially more important reason is that state legislatures will be unable and, most likely, unwilling to take into account and balance all of the varied and competing interests involved. The United States Congress, with representation from different states and geographic regions, presumably would be. The immediate objection is that certain groups, most notably legislators from the sunbelt area will at least initially oppose regulation. Yet this strengthens rather than weakens the argument for federal regulation of business dislocations. It is precisely these diverse interests which must be shaped into a reasonable accommodation.

Second, the seriousness of the problem, as well as the strong support legislation in this area has and will continue to receive, make it likely that regulation of business dislocations will eventually occur. These regulations should be structured to deal with the actual adverse effects of such dislocations and should not be punitive in nature.

Finally, the wisdom of promoting employee ownership should

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283. "In essence the labor movement has been moving issues off the bargaining table and into the public domain, partly because, except for such unions as the auto and steelworkers, it does not have the power to win what it wants in bargaining." Bus. Wk., Sept. 3, 1979, at 28.

284. See notes 267-81 & accompanying text supra.

285. "Congressmen from the Sunbelt states have no desire to discourage plant relocations, and business groups find two problems with such legislation: it intrudes further into the management rights area and, they argue, such regulation would penalize companies that go out of business or move their facilities for valid reasons." Cook, Labor Lines Up on Plant-Closing Issue, Industry Wk., Sept. 3, 1979, at 24.

286. Michigan has passed an act, signed by the Governor on July 2, 1979, which encourages employers to give advance notice of a dislocation and also encourages employee-owned corporations. 1979 Mich. Pub. Acts No. 44 (codified at Mich. Comp. Laws Ann. § 450.751 et seq. (West Supp. 1979-80)). The Act does not provide authorizations for loans or loan guarantees. Id.

be re-examined.\footnote{288 If an approach which promotes such ownership is adopted, adequate safeguards against unsound investments must be provided.}

\footnote{288. \textit{See} notes 184-200 \& accompanying text \textit{supra}.}