Avoiding Employment Litigation: A Guide for Multinational Companies

Employment and Labor

Litigation and Dispute Resolution

CHEAT SHEET

- ***Preparation.*** Global employment laws can be hard to navigate during business change and can lead to litigation. Counsel must identify potential legal roadblocks, plan ahead, and provide a strategic approach.
- ***Cost-realignment.*** When implementing cost-realignment measures, such as benefit forfeitures, consider the jurisdiction and how it impacts entitlements; identify the necessary legal processes within the country; document communications; and plan for potential disruptions.
- ***Workforce reductions.*** If your company decides to reduce the workforce, consult local counsel to ensure that the justification, selection, notice and severance, and special cases (like workers with visas) are all addressed appropriately.
- ***Reorganizations.*** To prepare for reorganizations, employment counsel should advise on the transfer, relocation, or seconding of employees and how this will impact equity compensation and benefit plans — taking into consideration local labor laws.

Only one thing is certain: Nothing is certain. To determine the future of global economic growth, you can check your favorite regularly published economic indices, government forecasts, stock markets, or daily headlines, but those can only serve as guideposts. The global transactions market remained robust in 2018 and into 2019, despite well-publicized macro-economic uncertainty, stemming from

Brexit concerns, among other developments. Real threats to free trade and investment flows remain, with the potential for a much more serious outbreak of protectionism and isolation on a global scale. A recession may or may not be looming, depending on the data relied on by the news outlet. So, as in-house employment counsel in organizations with international workforces, what can you do to best position your company to survive in such uncertain times? The short answer: Be prepared … for anything and everything.

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To get you started, this article focuses on approaches, tips, and preparation pointers that will be needed to effectuate some of the most common types of actions that in-house employment counsel of multinational companies (MNCs) are likely to face in the near future. Companies are and will continue to react to market changes through the exercise of cost-realignment strategies, reductions in force, and reorganizations. Keeping a “steady hand” during these uncertain times means being able to identify key legal considerations, especially in places where there are often more employment and human resource challenges. Collect relevant information to guide your actions. By staying abreast of the latest employment trends, companies operating in multiple jurisdictions can avoid costly employment litigation.

Cost-realignment strategies

When faced with uncertain economic prospects, focus often turns to rationalizing labor spending and right-sizing the workforce to fit the company’s projected needs. Short of layoffs, there are a number of measures that can be explored, including:

1. Reducing working schedules;
2. Forcing unpaid time off or vacation;
3. Temporarily shutting down certain operations; or
4. Implementing compensation reductions or benefit forfeitures.

These initiatives may help the company achieve economic goals without impacting the workforce headcount, and can be viewed very favorably by the workforce if explained in that light — certainly more favorably than layoffs would be.

Within the United States, each of these measures comes with its own federal- and state-specific legal requirements, which will require planning even for employees in an at-will, non-unionized environment. However, in other jurisdictions, whether each of these initiatives can be implemented at all, and the difficulty of implementation, varies. Addressing the following common themes at the outset will help facilitate implementation across the board.

Consider the source

Assess the source of the compensation items or benefits (also known as entitlements) that the company seeks to change, and how the entitlement was originally granted to the employees in each jurisdiction (e.g., promised in the employment agreement, policy, work rules, etc.). For certain entitlements, the company may not be able to implement the change at all (e.g., a wage freeze may

not be possible under the applicable collective bargaining agreement). Pay particular note to incentives that have been offered by a foreign parent company rather than by the local employer (e.g., equity awards), it may be easier to reduce such incentives than to reduce staff or salaries themselves. This depends on how the incentives have been presented to employees. If the company has been careful to distinguish these incentives from local compensation and other entitlements, it may be possible to reduce or even eliminate these incentives unilaterally. If the company has included references to these incentives in local employment agreements or total reward statements, or if the incentives have been offered regularly without disclaimers about the discretionary nature of such incentives, it may be risky to take unilateral action. In the latter case, some of the steps noted later (e.g., employee consent, notice or consultation procedures, translations) may need to be followed.

Identify the process

Notices, consultation, and employee consent requirements vary by jurisdiction and may catch MNCs by surprise.

There may be a particular legal process that must be followed before the change can be validly implemented. For example, it's common to include notice and consultation procedures, either with the employees or their representatives (e.g., unions or works councils). Therefore, MNCs should identify any employee representative bodies and consider the company's obligations vis-à-vis each one based on the proposed legal measures.

Additionally, employers generally need to obtain employee consent to any proposed changes to terms and conditions of employment. In some jurisdictions, a valid economic justification is also required. The company will need to prepare appropriate documentation and think through the economic justification before approaching the workforce. Finally, government approval and/or notice may be required.

Think locally about global communications

Any communications to employees regarding proposed changes should be carefully drafted so that the statements do not apply country-specific norms outside of that country. Many concepts do not translate. Communications should generally use anticipatory and preparatory language to avoid giving the premature impression that the decision will be conclusively carried out in violation of legal requirements and obligations to local works councils. Translations may be required in some countries; in these cases, translations should be done by a professional translation service.

Paper the changes

Assuming the change can be rolled out, determine how to document the change properly (e.g., by way of a formal employment agreement amendment, side letter, amendment to work rules or policies, etc.) so that it is legally valid.

Plan ahead for potential disruption

Keeping employees engaged and invested in a changing environment can be challenging. Consider the impact these cost-cutting measures may have on employee retention and the needs of the business. While across-the-board cuts are a good way to manage costs without impacting

headcount, if the remaining workforce is not sufficiently compensated to achieve business needs and retain key talent, this will not be a successful tactic.

Managing reductions in force

On the spectrum of employment impact, reductions in force are at the most extreme end. Eliminating positions is something that most in-house counsel have become familiar with over the years. By comparison, in the United States, where employees generally are employed at will, barring union involvement or statutory notice requirements, reductions in force can be straightforward. **Similarly, in India, Singapore, and other jurisdictions, so long as statutory notice and severance are provided if required, reductions in force also can be relatively straightforward. However, in most of the world, including the majority of Europe as well as Canada, Australia, and Japan, employees enjoy mandatory protections against dismissal.** Employers who propose global reductions in force need to plan ahead for alternate timelines and redundancy costs. The following are tips to keep in mind when approaching reductions.

Align management decisions with legal requirements

While it may seem obvious, a key strategy to minimize the likelihood of litigation risk for unfair dismissal is to make sure that management decisions are documented and vetted with legal counsel. This process will have to be tailored to the particular jurisdiction. However, in all cases, having a process where managers are required to explain their rationale can help build a record to prove that legally defensible decisions were made. The process also ensures that managers can explain their reasons and this can be helpful in preparing them for discussions with employees. It follows that if employees can understand the business rationale for eliminating their position, this will go a long way to helping them accept the decision and move forward. While not legally required, it is advisable that sufficient preparations are taken to ensure that decisions are ultimately communicated clearly and respectfully to the workforce.

Justification

The starting point for analyzing reductions in force is understanding the legal threshold for a justified reduction. Where protection against dismissal exists, dismissal will be unlawful if the employer does not have an appropriate legal justification. In some countries, dismissal may also be unlawful if the employer does not follow an appropriate process (which can be quite elaborate and feel onerous from an outside perspective). The sanctions for unlawful dismissal can include increased compensation, reinstatement (with back pay from the time of termination in some countries), financial penalties, and, in limited cases, criminal fines and sanctions.

The degree of justification required varies significantly from jurisdiction to jurisdiction. **In some countries, such as Japan, the threshold for showing economic justification is so high (that is, the company must be on the verge of bankruptcy) that collective dismissals are rarely implemented.** In other countries, such as China and India, even a justified dismissal may require union and government notification, which can deter companies from unilateral dismissal.

Selection

How does the employer ensure that the “best” employees remain after the reduction in force? What freedom does a company have to pick and choose those employees whom it wishes to retain? That

freedom is, in many cases, restricted to some degree. In the United Kingdom, for example, it is necessary to select employees based on objective and non-discriminatory grounds, but these can (and generally do) include performance and skills. That approach applies in many jurisdictions, but in some countries, such as Germany and many Asia-Pacific countries, mandatory social selection criteria apply. Such selection criteria might, for example, require an employer to prioritize older employees, those who have children, are pregnant, or on maternity leave, such that those individuals are offered alternative roles, or even completely protected from the dismissal process. Finally, best practices for mitigating potential liability (i.e., discrimination claims) exist in almost every jurisdiction. Research them and make sure your human resource staff is familiar with them.

Consultation

Depending on the jurisdiction, there is often an obligation to consult with employees over potential dismissals, either on an individual or collective basis, or both. Whether collective or individual obligations apply generally depends on the jurisdiction, the existence of any employee representative body, and the number of affected employees. In some countries, the proposed dismissal of as few as two employees is sufficient to trigger those collective obligations. Where a consultation obligation exists, a key consideration is to ensure that the reductions are phrased as “proposed” reductions until a full consultation process has been completed. Employers should, therefore, be wary of making public statements that they will dismiss employees unless the consultation process is complete.

Where collective obligations apply, it will be necessary to consult with elected representatives of the employees (in which case it may be necessary to arrange an election or similar process), trade union representatives, and works councils (at either local or transnational level).

The period of consultation varies significantly, lasting up to several months in some countries (often those where significant authority is delegated to works councils or other employee representative bodies). At the planning stage, it may be very difficult to set out an accurate timescale, since much will depend on how amenable employees and/or their representative bodies are to the employer’s proposals. It may be necessary to factor in individual consultations as well as collective consultations (often after the collective consultation phase is complete). In addition, there may be an obligation to inform or even to seek the approval of local labor authorities (such as the local labor inspector) for the proposed reduction before it is confirmed.

Consultation will generally involve consideration of alternative roles, and other ways of avoiding the proposed dismissals. It may also be necessary to agree on a social plan with the employee representatives (notably in the case of Germany, France, and the Netherlands). Social plans consist of a set of agreed-upon financial measures to “cushion” the effect of the dismissal on the affected employees. It may include, for example, relocation assistance or incentives in the case of quick redeployment. Again, the ease with which an employer is able to agree to such a plan may depend on the company’s generosity and the willingness of the employee representatives to enter into realistic discussions regarding the proposals. In this regard, the reduction process is thought to be much more collaborative than in countries such as the United States and subject to some level of buy-in by works councils or other employee representation.

Notice and severance

Even if the dismissal is lawful, there will usually be some financial liability in one or more of the following categories, over and above contractual or mandatory notice:

- **Contractual liability:** Employees in danger of dismissal may have a contractual right to additional notice and severance payments through agreements or plans and policies, and sometimes simply by virtue of an employer's previous custom of paying such sums;
- **Statutory liability:** This may include statutory severance payments, other mandatory social protection payments, or contributions to a state unemployment fund;
- **Sums agreed upon with employees/employee representatives:** This could include payments under an agreed-upon social plan, or the equivalent, or ex gratia benefits above any entitlements in return for a complete waiver of claims.
- **Change-of-control plans:** In the context of acquisitions, it is increasingly common to provide some type of change-in-control plan. It is, of course, necessary to check the provisions of these plans to determine whether payments are due and, in particular, whether such payments are inclusive of statutory or contractual entitlements.
- **Benefit plans:** It is not uncommon for benefit plans to contain special provisions where employees are terminated due to a reduction in force. These must be reviewed.

Release

It may be possible to enter into an agreement with the employee under which the employee waives the right to bring any claim against the company concerning the dismissal. It is common to negotiate severance packages for senior employees, and it may also be appropriate for more junior employees, if the risk of claims of unlawful dismissal is significant. In some countries, it is necessary for the employee to obtain independent legal advice on such agreements, or for the release to be executed as a deed. In others, all release agreements must be approved by the labor courts. Some countries do not recognize a release of claims known and unknown (as opposed to an acknowledgment of all payments due and owing).

In the case of a global employer, it is advisable to think about your severance practices in advance of the need to actually make a reduction in force. **Having an appropriate severance program in place that adequately considers the ability of employees to transition to new roles, and is based on local practices, can enable your company to act nimbly where there are multiple and different statutory hoops to jump through.** Stated differently: Spending a little more than what may be required by a particular jurisdiction may enable a company to obtain release agreements, which may avoid costly litigation. Thinking about the right severance package to offer for a voluntary release may save a company time, and avoid the distraction and expense of litigation. It also might be the right thing to do as the company thinks about the best way to ensure that the people who are not a good fit for the business are able to leave and bridge the gap in their employment records as they look for new opportunities.

Equity awards

If impacted employees hold equity awards, additional considerations exist. Some equity plans or award agreements have specific provisions for this situation (such as accelerated or continued vesting) if a reduction of force occurs. Alternatively, such protection may be in separate agreements with particular employees. Some equity awards do not include such protection. In this case, a company may decide to either give employees additional vesting to help the reduction go more smoothly, or to simply benefit the impacted employees as a gesture of goodwill or follow the plan and award agreement provisions, and not provide any additional vesting or benefit. If additional vesting is desired, the company will need to be sure to follow any corporate requirements, such as approval from the issuing company's board of directors (or compensation committee), as this would be a material amendment of the award. A release from the employee should be obtained if such a benefit

is provided. If no additional vesting is desired, the company will need to assess if this will be feasible in light of local law. If the equity awards have been granted by a foreign parent company rather than by the local employer, it may be relevant whether the equity awards have been kept separate from the local employment arrangement, and whether equity awards have been granted regularly and without disclaimers about the discretionary nature of the awards. If they have not been kept separate, or have become an entitlement, the company may need to consider compromising on this issue to avoid claims from impacted employees. The equity award income (and, if applicable, the loss thereof) may be considered in calculating severance amounts, depending on the country and, in some countries, whether or not the equity awards have been kept separate from the local employment arrangement.

Immigration issues

A reduction in force involving foreign nationals often carries the added complication that the employee not only loses the job but also the right to live in the country. Depending on an employee's visa category, there might be no grace period between the loss of a job and the requirement to depart the country. It may be appropriate to plan to help these employees put their affairs in order. Loss of the sponsoring employer may also detrimentally impact the plans of the employee and family members to reside in the host country permanently.

In some countries, it may be possible to substitute sponsoring employers or otherwise limit residency problems. Understanding local laws and the options available can make termination easier for both parties.

Diligence checklist and conclusion

The following is a checklist of information and decision points that you (or your outside counsel) will need in order to best advise the company.

Employees and jurisdictions

- Which jurisdictions are involved?
- How many employees in each entity/jurisdiction?
- What type of employees? (Employees, contractors, temps, managerial, non-managerial, exempt/non-exempt, Employment Act, non-Employment Act, workman, non-workman, etc.)
- How much time do they spend in the target business?
- How will employees transfer in each jurisdiction?

"Special status" employees

- Employees with the "wrong" employer?
- Shared service employees?
- Expatriate and internationally mobile employees?
- Employees on work visas/immigration issues?
- Directors? (Who are they, and what are the future plans for them?)

Planned business changes

- Cost-cutting and flexible comp strategies?

- Reductions in force?
- Reorganizations?

Employee bodies

- European, national and local works councils, trade unions, labor unions, employee representatives, etc. What is their remit?
- Will elections be needed?
- How are existing industrial relations?
- What is the effect of notifications to and conduct consultations/negotiations with employees, works councils, and labor unions concerning the transfer of employees and employee benefit plans, where necessary?

Benefits

- Which benefit plans are impacted?
- Review benefit plans and determine what is permissible and what requirements apply.

Equity awards

- Do any impacted employees hold equity awards?
- Review relevant terms of equity plan and award agreements and past practices.
- Note that the equity awards may (and, in some cases, should) be treated differently from other employment terms and conditions under the right circumstances.

HR

- What HR measures are anticipated?
- Changes to terms and conditions?
- Dismissals?
- Severance plans or practices?
- Are there any parallel HR projects ongoing?
- What is the likely impact on consultation/industrial relations?
- Are localized settlement agreements needed?

Communications

- How will changes be communicated within the company and publicly?

Preparing for reorganizations

While cost-realignment and reductions in force are somewhat “insular” exercises limited to employment and HR implementation, reorganizations are cross-functional. **Companies may undertake reorganizations for a number of reasons: to take advantage of corporate income tax planning, for favorable IP treatment, to reduce administrative costs, to rationalize corporate entities, or streamline business units in preparation for a corporate event.** For employment counsel, if employees are impacted, regardless of the reason, then there is work to be

done. Putting aside reductions in force, which are often part and parcel with reorganizations, employers will want to consider some or all of the following, most of which will necessitate considerable planning before embarking on a global reorganization.

Transferring employees between legal entities

For example, following a share acquisition, the buyer may wish to consolidate all assets and employees in one legal entity in each country, rather than retain standalone entities. This consolidation will typically take place via an asset transfer or a merger. The issues discussed in relation to those transactions apply equally here. It may be possible to avoid the payment of severance by having employees consent to a transfer of employer, but if this is not thought through, employers may be in the uncomfortable position of having to pay severance to employees forced to transfer.

Arranging the permanent relocation of employees

Where any significant distance is involved, this may require employees' consent, or trigger requirements to inform and consult employees, as well as collective dismissal rights. Change in job site can also impact visa status.

Seconding employees between entities

While permissible in most jurisdictions, there are a handful of countries where local labor and immigration laws place restrictions on such "employee leasing" practices.

Impact of employee transitions on equity compensation and benefit plans

If equity plan filings have been made for certain entities, a reorganization may trigger the need to notify a governmental authority or to reapply for an approval. Some of these filings may be simple. Some are complicated, (e.g., China exchange control registrations). It is worth examining the relevant filings that may be triggered before deciding on employee transfers or other entity changes. For companies offering an employee stock purchase plan where, typically, entities must be specifically designated for participation, such designations will need to be revisited after a reorganization. If a reorganization will result in increased employee headcounts in a country, thresholds for securities law filings or exemptions should be reviewed. Further, if employees are transferred, relocated, or seconded, this may impact participation in, or sponsorship of, a benefit plan which may not be permissible either under law or the terms of the benefit plan itself, or may require employee consent, notice, and consultation procedures among other requirements.

Senior management changes

In many countries, specific procedures apply when changing roles or dismissing senior managers. In practice, it is often uncomfortable to follow formal legal procedures in relation to the top management, and therefore it is common to seek consent outside of these procedures, and look to enter severance agreements or releases to offset a diminished role. While this approach is generally permissible, care is needed to ensure that this approach does not prejudice the company's position under local law. Even where employees do not have significant employment rights at law, they may have entitlements to severance payments and rights in respect of equity benefits under a golden parachute or change-in-control agreements, which may be triggered by removal, or by significant changes to roles and

responsibilities.

Coordinating and harmonizing terms and conditions of employment

Reorganizations create an opportunity to “clean up” and streamline possibly inconsistent terms and practices among the workforce. Items such as individual terms and conditions, standardizing documentation, including formal and informal policies and procedures, working practices and “discretionary” benefits and plans are all often areas of focus. In many cases, the employees will be contractually entitled to their existing arrangements (or protected by law from detrimental changes — for example, in the European Union, under the Acquired Rights Directive in a business transfer situation). Therefore, changes may require consent. Yet technically the changes might not be enforceable, even with consent. Where there is no contractual entitlement, or alternatively, the employer has a contractual right to change the relevant term unilaterally, there is generally more scope to introduce changes. However, care is still needed in many countries, even where the employer has apparent discretion to make changes. Sometimes rights have become entrenched if they were adopted consistently over time. If the employer is unable to obtain consent, or where consent is impractical, it may still be possible to effect changes, but specific advice is required on a country-by-country basis.

Varying or introducing restrictive covenants to ensure the current employer is protected

This tactic can present particular problems, as typically some consideration will be required for the change. The rules on restrictive covenants vary significantly across the world. Some jurisdictions regard restrictive covenants as invalid, with limited exceptions, regardless of the amount of consideration provided. Others sanction restrictive covenants so long as they are reasonable, and thus specific advice is required.

Creating, adapting, or merging employee consultative bodies

Where entitlements of unions in reorganizations is well-developed in countries such as the United States, it may not be as clear in other jurisdictions where laws are continuing to develop around entities such as national and European works councils and local unions. This should be addressed carefully.

Conclusion

Employment counsel can add enormous value to a multinational organization during uncertain times. Counsel’s guidance is particularly key because of the often disconcerting and potentially material impact global employment laws have on any kind of business change. Poor legal counsel could lead to litigation. **The ability to identify potential legal roadblocks, to plan ahead, and to provide a rational approach to advise the organization is one of the areas where in-house counsel can have the greatest impact.** Regardless of whether your company is considering cost-realignment strategies, reductions in force, or a reorganization, being prepared for all possibilities will guide you through the uncertainty. Good luck!

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