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Global reductions in force – top tips to get them right

As global economic uncertainty continues, some companies are considering cost-saving initiatives, including workforce reorganizations and reductions, in the US and internationally. While there may be business pressure to implement such measures quickly, multinational employers are encouraged to plan ahead to achieve their objectives and minimize risk, particularly when embarking on a reduction in force (RIF) across multiple countries.

Outside the US, the RIF process can be expensive, complex and lengthy depending on the jurisdictions involved. What can be achieved in a day in the US (or a couple of months if the federal Worker Adjustment and Retraining Notification (WARN) Act or state mini-WARN acts apply), can take months on a global scale. Likewise, terminations that can be implemented in the US at no or limited cost (with separation payments enshrined in releases) are often far more expensive internationally due to different local statutory obligations. The implications of non-compliance with local rules can also vary. Financial penalties and litigation are the most common risks; however, in some countries, injunctions (often by employee collective groups such as works councils or unions) and criminal sanctions are possible. Employee relations considerations and reputational risk should be factored in as well.

Despite these challenges, global RIFs can be successfully managed with careful planning and implementation that bears in mind local legal requirements and best practices and cultural expectations. Below, we identify top tips to help employers avoid common HR, legal and project management pitfalls when implementing RIFs across borders.

(1) Determine the business justification

While most jurisdictions recognize redundancies, local standards required to justify such terminations differ. In some countries, limited evidence of a business decline is typically sufficient (e.g. UK, US, Australia), but in others (e.g. Japan, much of mainland Europe), the threshold is higher, requiring the company to demonstrate ongoing serious financial difficulties (e.g. in Spain, this could require evidence of a reduction in revenue or sales figures for 3 consecutive quarters in comparison with the same quarters in the previous year).

Managing internal and external communications is critical to ensure that all stakeholders receive the right messages at the right times. Premature announcements or inaccurate or overly rosy statements about the company's financial picture can raise significant challenges, for instance, by eroding the business justification for the RIF. In practice, though, insufficient business justifications can often be overcome with more generous local severance packages.

(2) Gather necessary information

During the planning stage, employers should determine the total headcount of affected employees per country (and state / province / territory where applicable), and gather any relevant information on any work councils, employee representatives or collective bargaining agreements (CBAs), types of employees (fixed-term / interns / contingent workers / contractors), form and individualized employment agreements, copies of relevant policies and procedures, and information on prior

redundancy practices.

(3) Determine whether group or individual layoff and follow mandatory consultation and government notification obligations

If the redundancy affects multiple employees, employers should identify the mass layoff headcount threshold for the relevant jurisdictions and determine which obligations are triggered. If the threshold is reached due to the number of impacted employees, information and consultation exercises with employees and/or their representative, as well as government notifications and sometimes approvals, may be required within certain timeframes.

(4) Develop a realistic timeline

Based on the information gathered, employers are encouraged to prepare termination timelines and costing tools for each jurisdiction. Additionally, employers should determine the overall timing to wrap multiple jurisdictions with different timelines, bearing in mind that certain requirements in one or more affected countries may be particularly time consuming and delay the global project. Businesses looking for a quick simultaneous day on which all impacted employees globally are notified of the RIF and no longer required to attend work (i.e. a universal "day 1"), should understand that, in global terms, a "day 1" step is often an initial invite to a consultation meeting to discuss the potential exit. Thus, outside the US, "day 1" is usually not the day that employees are actually terminated. Rather, employees will remain employed during any consultation exercise until it concludes. In addition, the fact that they will be exited often must be phrased as being "provisional" so as not to amount to a "fait accompli" that could undermine the consultation being viewed as genuine and lead to claims. This process can in turn impact follow-up timelines, such as town halls for those not subject to redundancy, as well as other potential issues. For example, in certain jurisdictions it may be unlawful to terminate an employee's access to company systems as of "Day 1," which can be a material concern to employers. Where local laws require a consultation period between the "Day 1" notification and the eventual termination, companies may want to consider potential workarounds (e.g., paid leave) if they do not want employees to be able to access the workplace and company systems. These approaches can raise other risks, so companies are urged to consider the pros and cons of each scenario.

(5) Determine the "real" cost of a global redundancy

Outside of the US, employees are generally entitled to notice (either given or paid in lieu). Additionally, they may be entitled to severance pay based on local statutory or contractual obligations. Employers should also be prepared for other mandatory payouts, including non-compete payments, accrued vacation entitlement, commissions and bonuses.

Employees may receive ex gratia (non-mandatory) payments in exchange for a release of claims. This typically is not a requirement, but offered at the discretion of the employer. Given the complications of implementing redundancies globally or as part of a negotiated social plan, ex gratia payments are relatively common in global RIFs. They can range from a few weeks' compensation to several months (or even a year or more) depending on the country involved, prior practices, seniority of the employee, and strength (or lack thereof) of the redundancy case.

(6) Address impact on benefits and immigration

In addition to contractual, statutory and ex gratia payouts, companies should analyze the impact of the RIF on any employee benefits, including treatment of equity in the parent company.

Relatedly, the termination may trigger the requirement to notify immigration authorities of the termination where the employee is employed with a visa or other temporary work permit. Often,

companies consider softening the blow on employees on work permits or visa by providing a longer working notice to permit them to secure a new work permit from a new employer prior to departure.

(7) Engage in lawful selection of employees

When selecting employees for termination, employers should follow statutory requirements that outline selection criteria, such as social selection based on protected levels of employees in France, Italy and Germany, and last-in first-out (LIFO) in Sweden. In these jurisdictions, performance (or lack thereof) may not be a lawful way to select employees.

If no local statutory selection criteria exist, employers should use fair, objective and consistent selection criteria which are non-discriminatory. While employers in the US typically review whether a RIF will have an adverse impact on employees in a protected class, this is less common outside the US for several reasons, including limited data due to data privacy rules.

It is also important to confirm rules and determine risks vis-à-vis protected employees. For example, in China, it is unlawful to terminate a pregnant employee during her pregnancy, maternity leave, or breast-feeding period (within one year after birth). In France, employers must comply with a specific procedure to dismiss protected employees, which is subject to the prior authorization of the Labor Inspector. Categories of protected employees in France include employee representatives and candidates (current and former for a period of 6 months) as well as pregnant employees or employees on maternity leave. In general, employers should exercise caution when terminating any employees who are on sick leaves or have suffered an occupational illness or injury.

(8) Work through consultation requirements with collective groups

It is important for employers planning collective redundancies to identify any collective groups (work councils, unions, employee forums) that require notification and consultation. Even absent existing collective groups, consultations may be required with employee representatives specifically elected for purposes of mass layoff consultations, e.g., in the UK. Typically, such mass layoff consultation obligations are triggered when certain headcount thresholds are met in terms of impacted employees, and this tipping point varies by jurisdiction. For example, in the UK, it may be triggered when an employer proposes to dismiss 20 or more employees within a period of 90 days. Depending on the jurisdiction and circumstances, an employer’s failure to follow local laws can result in substantial fines (sometimes calculated based on the total number of employees being dismissed) or worse, criminal penalties or injunctions to stop the RIF. For example, in the UK, an employment tribunal may award up to 90 days’ pay per affected employee if the employer fails to inform and consult employee representatives on a collective dismissal. Fines can quickly add up in a mass dismissal scenario.

(9) Draft and deliver country specific termination documents and releases

Employers should determine when notice of termination and any releases can be issued and the form and appropriate method for delivery. Common pitfalls that can trip up employers and prevent timely implementation of a RIF include not having the appropriate signatory available to sign in person where required; failing to translate termination documentation (e.g., Belgium, France); and failing to comply with a requirement that termination notices be original wet ink signed (e.g. Germany). By confirming local rules related to signatures, including whether e-signature or soft copies are sufficient, employers can minimize the risk of delays and ensure documents are enforceable.

It is also important to confirm local rules on the enforceability of releases as some jurisdictions (e.g., Brazil) may not allow for enforcement even with an ex gratia payment, or impose various requirements to create a binding waiver of claims (e.g., opportunity to obtain legal advice, additional consideration, translation, approval and/or filing with local authorities).

(10) Post-termination obligations

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Employers should pay close attention to specific deadlines by which termination payments must be made and/or certain authorities notified. Similar to final paycheck laws in certain states in the US, other countries often have specific requirements that must be followed to avoid substantial penalties. Termination of employees on work visas can also trigger additional obligations, e.g., notifications to Singapore government authorities for tax clearance purposes.

Despite its challenges, a RIF can be successfully managed with careful planning, bearing in mind country-specific legal requirements. It is important to note that local laws, rules, regulations and trends are often evolving. As such, employers should seek legal advice to develop a strategy tailored to their unique circumstances.

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