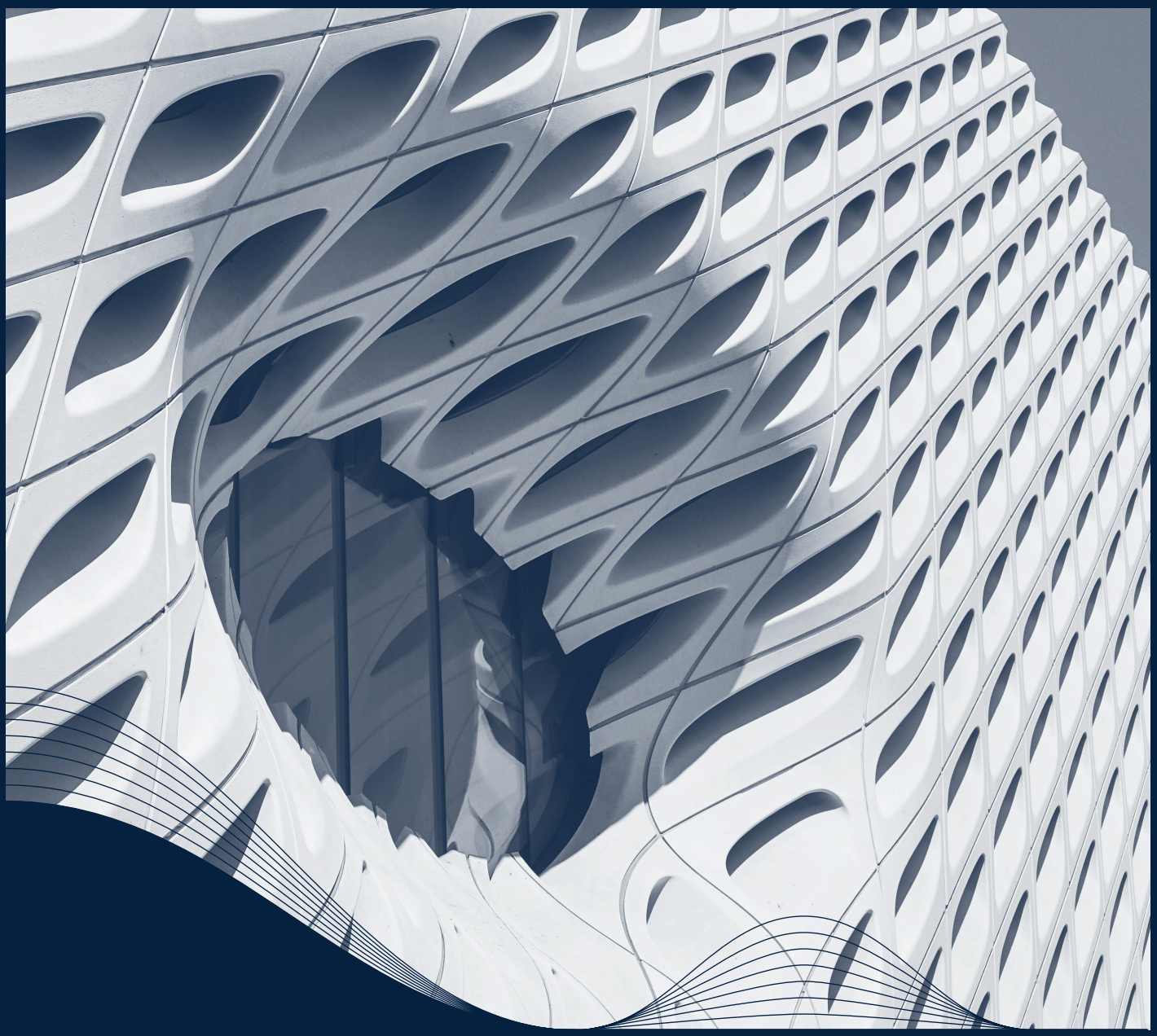


Reductions in force and other cost-saving measures: A guide for global employers

DLA PIPER

Reductions in force and other cost-saving measures: A guide for global employers

In response to economic challenges like inflationary pressures and slowing growth, some global companies are considering cost-saving measures, including reductions in force (RIFs), to build their financial health and retain flexibility. Local laws vary widely, however, making it critical for global employers to take care when assessing and implementing such measures.

In addition to reviewing legal requirements and risks across jurisdictions, companies are also weighing how actions may impact their future growth strategy, their reputation and their people.

Below we offer strategies for global employers to consider during periods of heightened volatility and slower economic growth.

Global RIFs

Outside the US, RIFs can be expensive and time-consuming. Managing a multi-country downsizing only adds to the complexity from a legal, HR and project management perspective because the legal frameworks, collective bodies, time frames, costs, culture and even the terminology involved can vary significantly across borders. Here are key considerations for global employers planning multi-jurisdictional RIFs.

1. Identify your business objectives and justification

While a redundancy or economic termination is a concept recognized in most jurisdictions, the standards required to justify a termination on those grounds differ. In some jurisdictions, such moves are fairly easy to justify, simply requiring limited evidence of business decline (eg, UK, US, Australia), but in others (eg, Japan, much of mainland Europe), the threshold is higher, requiring the company to be able to demonstrate ongoing serious financial difficulties. In practice, insufficient business justifications can sometimes be overcome by providing more generous local severance packages.

2. Determine any limitations on global redundancies

Restrictions may apply if RIFs are implemented in conjunction with a business transfer. In particular, in the EU, rules on business transfers – so-called TUPE laws stemming from the EU Acquired Rights Directive (ARD) – might restrict when and how the RIF can be implemented. Other jurisdictions (eg, Quebec) also have laws equivalent to the ARD prohibiting terminations because of a business transfer. Employers should be mindful that restrictions may also apply in other contexts, such as during an extraordinary global crisis. For example, many countries placed restrictions on economic dismissals during the most intense part of the COVID-19 pandemic (which have since been lifted).

3. Gather and verify data

In the initial planning stages, the business should gather head count (total employees and number impacted) per country, state and province; information on any works councils, employee representatives or collective bargaining agreements (CBAs); types of workers (eg, employees on fixed-term working arrangements, atypical workers); employment agreements; copies of policies and procedures; and information on prior practices.

4. Assess the "real" cost of a global redundancy

Outside of the US, employees generally will be entitled by law to notice of termination (either given or paid in lieu). They may also be entitled to receive severance based on local statutory formulas or company contractual entitlements. Other mandatory payouts may include non-compete payments, accrued vacation entitlement, commissions and bonuses.

Several mainland European countries require the company to negotiate a "social plan" with employee representatives if significant redundancies are proposed to prevent or alleviate the economic consequences. The social plan may include provisions relating to severance payments, paid leave, training and other similar measures. In addition, employees may receive an "ex gratia" (non-mandatory) severance package in exchange for a release of claims.

Project planning is more important than ever because, post-COVID-19, employers don't necessarily know where their employees are located, and therefore which laws will apply and whether they will count toward the collective threshold in relevant countries.

5. Focus on project planning and timelines

Identifying the roles of relevant stakeholders and assembling a project management team are critical because implementation will take place across very different legal systems, collective structures and cultural backdrops.

Employers also are encouraged to prepare termination timelines and costing tools for each jurisdiction. As the requirements in one or more of the affected countries may be particularly time-consuming, preparing an overall timeline at an early stage can help mitigate the extent to which any outliers hold up the wider global project.

6. Determine lawful employee selection criteria

Some jurisdictions have requirements that govern the selection process (eg, social selection in France, Italy and Germany; last-in first-out in Sweden). In the absence of local statutory selection criteria, employers should use fair, objective and consistent criteria.

Employers should confirm local rules and assess litigation risks. For example, employee representatives and employees on certain types of leave, including maternity and other types of family leave, are frequently afforded special protection from dismissal.

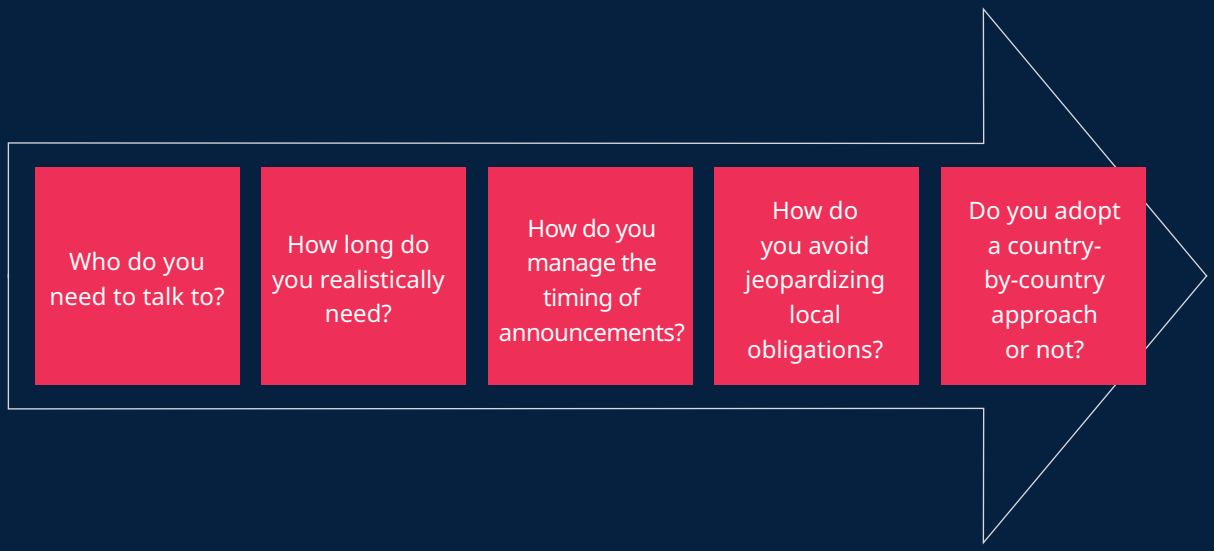
7. Consider benefits and immigration issues

Implications for treatment of equity compensation awards should be considered. For example, some countries, such as Canada and Denmark, regulate how the vesting of such awards should be addressed during certain employment terminations.

Employers may be required to notify immigration authorities if terminated employees are working on a visa or other temporary work permit.

Key steps — information and consultation

A coordinated plan for engagement from the outset is critical to address:



8. Follow consultation requirements with collective groups

At an early stage, employers are encouraged to determine the triggers, scope and timing requirements for information and consultation exercises with each collective group or individual. When the threshold for a mass dismissal is triggered, many jurisdictions also require governmental filings or notifications.

Information and consultation requirements should be managed within the context of the overall project and built into the plan. Options will vary based on the scope of the RIF, but may include, eg, starting the consultation in high-risk countries earlier (but being mindful of the impact of legislation which may require consultation to begin as soon as proposals are formulated) or carving out high-risk jurisdictions from the wider plan and dealing with those separately.

9. Prepare and deliver termination documents and releases

Employers should determine when notice of termination and any releases should be issued, as well as the required method for delivery. Additional consideration often will be required to secure releases. Employers should also confirm jurisdiction-specific rules to ensure releases are enforceable locally – eg, signature of employee's legal representative, labor authority or court approval and/or filing, translation, form of signature (eg, wet?).

10. Determine post-termination obligations

There may be specific time frames within which termination payments must be made and/or authorities notified (such as the tax or immigration authorities).

Other cost-saving measures

Companies may want to evaluate whether other cost-saving measures can help them achieve their goals more effectively. While a RIF will curtail payroll and benefits-related expenses, it can also generate significant costs in the near term, including severance payments and talent gaps within the organization.

Below we identify several potential cost-saving measures and key considerations for each.*

1. Furlough employees

Where permissible, the ability to temporarily furlough employees and the pay (if any) due as a result will depend on local rules and may require the employer to follow a statutory process. For example, collective groups will, in most cases, have information and consultation requirements and, in some countries, like Germany, co-determination (ie, consent) rights. Individual employee information and consultation (and potentially individual consent) may also be required and should factor into timing requirements.

Many non-US jurisdictions do not allow for mandatory unpaid furloughs or short-term layoffs. Companies may be required under some local laws to maintain employees' pay (or a proportion of such pay) during any temporary furloughs or short-term layoffs. In some countries, employees may not need to be paid their salary (unless otherwise agreed), but may receive state unemployment benefits. In other jurisdictions (eg, China, France and Italy), employees may be entitled to a prescribed minimum statutory salary payment.

If ultimately positions are made redundant during or after furloughs or short-term layoffs, the normal local laws that apply to redundancies / RIFs must be followed.

2. Freeze compensation

While a freeze on salary or merit increases can help employers maintain costs and can sometimes be implemented unilaterally, limitations may apply. In some countries, minimum salaries must be increased from year to year by law. For example, an applicable collective bargaining agreement may set out the legal minimum salary increase. In other countries, the practice of giving salary increases year after year may become an acquired right.

3. Reduce employee salaries

Detrimental changes to key terms and conditions of employment, including changes in compensation, generally are not permitted outside of the US without employee consent (and, if there are collective groups, without union or works council consultations). Depending on the circumstances, employees could bring a claim for breach of contract and/or constructive dismissal if changes are implemented unilaterally. In addition, in some jurisdictions (including many Latin America countries, such as Argentina and Brazil), employees cannot consent to detrimental changes such as a reduction in salary. When relying on consent, ensure that it is given clearly and that potential impacts, such as those to pensions and benefits, are specified.

4. Reduce variable compensation

This option may allow for greater flexibility if the compensation plan is truly discretionary and the employer exercises discretion reasonably. However, depending on the jurisdiction, the mechanics of the incentive plan and its administration, there is a risk that employees may successfully claim that the amount of their variable compensation is an acquired right. Other implementation requirements may also apply.

*Thank you to Amie Aldana and Jose Irias for their contributions to this section.

Employers are urged to consider the timing of changes based on the plan term and implement prior to a new plan year where possible.

5. Reduce working hours

In most countries, unilaterally reducing an employee's working hours (with a corresponding reduction in pay) can create the risk of a claim for breach of contract and/or constructive dismissal. In some cases, employers may be able to reserve the right to unilaterally impose this type of measure through a contractual right. For example, in the UK it has become more common since the arrival of COVID-19 to include a short-time working clause in employment agreements. Additional requirements such as consultation or notification to labor authorities may apply.

6. Mandate use of paid leave

Given the challenges of reducing or freezing employee compensation, requiring employees to take paid leave (eg, as part of a holiday shutdown) may be a more successful strategy in many jurisdictions. Where allowed, an employer may be able to reduce the vacation liability on its books, improving its financial position. Some jurisdictions (eg, Hong Kong, Singapore, Australia) may allow employers to determine the dates on which employees must take statutory leave, subject to certain limitations. In contrast, in many jurisdictions, for instance in the EU, employers may not be able to unilaterally mandate when employees take leave.

7. Encourage voluntary unpaid leave

In lieu of mandating paid leave, employers may consider asking employees to take voluntary unpaid leave for a period of time. This option comes with the caveat that in most countries, employees cannot be forced to take leave and so consent must be freely given. In other words, such unpaid leave should be truly voluntary and not imposed on employees (which raises the risk of claims such as those for breach of contract and/or constructive dismissal). Employers are encouraged to draft agreements carefully to reflect mutual agreement and to consider the impact on employee benefits.

8. Implement a hiring freeze

While halting recruiting searches and permanent employee hiring across the board may help avoid the need for future layoffs, careful implementation is critical to minimize potential impacts to long-term business strategies. Employers are encouraged to communicate with HR, recruiters and others who make hiring decisions to ensure the organization is aligned and to consider whether some activities (eg, talent mapping, attraction, filling critical vacancies or revenue-generating positions) should continue.

9. Revoke job offers

Revoking or delaying an offer of employment may be difficult in many jurisdictions where an individual already has accepted an offer of employment. For example, in France, a revocation may be considered a dismissal without real and serious cause, which could expose the company to claims for pay in lieu of notice and damages for unfair dismissal (with greater exposure if the individuals have already resigned from their current positions). Employers are encouraged to seek counsel on whether and how to communicate changes to offers with impacted individuals.

10. Other cost-saving measures

Depending on the jurisdiction, other cost-saving measures may be available, such as reducing the number of non-permanent direct workers who have limited or no employment rights (eg, agency staff, temps, consultants, contractors), eliminating discretionary bonuses, or changing performance metrics and goals under long-term incentive plans and multi-year performance-based equity awards. Employers should consult with counsel regarding the potential benefits and risks of various strategies, including labor and employment, tax and compliance issues, based on their circumstances.

ADDITIONAL RESOURCES

Compare laws on mass layoffs / collective redundancies across jurisdictions on GENIE, our market-leading global employment website. If you're not already a subscriber, please contact GenieSubscriptions@dlapiper.com to be added as a new user.

Economic downturn: Key executive compensation issues for employers

HOW WE HELP

Our global employment team has helped hundreds of multinational organizations implement cost-saving measures, including reductions in force, in jurisdictions around the world. Please contact our employment partners or your DLA Piper relationship attorney if you have questions.

About us

DLA Piper is a global law firm with lawyers located in more than 40 countries throughout the Americas, Europe, the Middle East, Africa and Asia Pacific, positioning us to help clients with their legal needs around the world. Find out more at dlapiper.com.

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Employers will want to continually monitor developments related to these issues. To learn more about the implications of these developments for your business, please reach out to any member of the DLA Piper Employment Group or your DLA Piper relationship attorney. You can also contact:

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