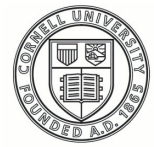

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The Global Employer: How to Respond to a Global Crisis

Baker & McKenzie

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Abstract

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Keywords

globalization, trade, employment, cost reduction, labor

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Baker & McKenzie's Global Labour, Employment and Employee Benefits Practice Group is pleased to present its 41st issue of *The Global Employer*™ entitled "How to Respond to a Global Crisis."

In light of the continuing global economic crisis, we have devoted this issue to ways that organizations can reduce employment costs. Cost-cutting measures can create significant human resource challenges even when just one jurisdiction is impacted, let alone many. Add to that the global nature of many businesses, and the human resources issues can seem to present an almost insurmountable obstacle.

We begin with a global overview that addresses ways that multinational employers can manage employment costs in the current economic downturn while keeping the long-term in mind so they can be positioned to attract and retain talent when the markets rebound. In addition to reviewing alternatives to reductions in force, included at the end of that article are "10 Steps for Decoding a Global RIF" that can help to make the prospect of a complex and multilingual global RIF less daunting.

Following the global overview, we have a variety of jurisdiction-specific articles, including immigration compliance issues and the changing economic climate in Australia; labor-related cost-cutting measures in Austria with a focus on short-time work; alternatives to reductions in force in France, Germany, Italy, and the United Kingdom; and reductions in force in Colombia, Malaysia, and Poland.

Finally, we include articles that identify ways to reduce labor and employment costs in Baku, Brazil, Canada, Taiwan, and Venezuela; work modification in Russia, new employment-related measures to help employers deal with the global financial crisis in Argentina, flexible work arrangements in the Philippines; and the twenty things you need to know about implementing cost cutting measures in the United States.

Our Global Employment Practice includes more than 400 locally qualified practitioners in 39 countries. We have more lawyers with mastery of the subtle intricacies of labor, employment and benefits issues in more jurisdictions around the world than any other leading law firm. *PLC Cross-Border Global Employment* recommends our practice in 19 countries – twice as many as any other major firm. We are recommended or recognized in 12 countries by *PLC Which lawyer?* in its 2008 rankings, and we are among the 10 firms US general counsel list most often as "go-to" advisors on employment matters.

An overview of the global workplace during economic downturn

Few companies can expect to escape the wrath of today's unprecedented global recession. It has spread like a virus, jumping continents and oceans with alarming speed and depth. What started as a United States financial lending debacle has spun into a global economic crisis. With sales teams floundering to sell, consumers wary to consume, and manufacturing slowing to a trickle or worse, governments around the world are injecting their economies with stimulus packages to try to restore consumer confidence and with it, breathe life back into the market.

In the meantime, global employers must find ways to survive the economic downturn. Because employment costs are typically among the highest expenses for any company, it is not surprising that global companies are streamlining their workforces and scrutinizing their labour costs in order to seek out any and all cost savings. Already, unemployment in the United States has hit 8.5 percent, (the highest since 1983), China has hit 4.2 percent (excluding migrant workers and farmers), threatening political stability, Mexico has hit 5 percent of the Economically Active Population "PEA," and the EU-wide unemployment rate reached 7.6 percent in January, with Spain anticipating as high as a 14 percent unemployment rate before the recession subsides.

As global employers continue to tighten their economic belts, they are required to translate formerly unfamiliar local laws into their daily practices. Few countries outside the United States recognize "at-will" employment and even the United States requires notification to "at-will" employees for mass dismissals. The global employer must become not only familiar with the legal nuances of economic dismissals, mass reductions in force and other cost reduction "take aways" where they operate, but also grapple with underwater options and falling equity that no longer serve their initial purposes, as well as address large expatriate and migrant workforces, so necessary in boom times, who now stand idle along side local workers. If that was not bad enough, global employers may find themselves dealing with increasingly desperate trade unions, works councils, and hosts of new governmental regulations to address job loss and security.

How does the global employer grasp all the different jurisdictional requirements? How does it address the stockholders' and market's demand to immediately stem corporate losses with various employment consultation and notification obligations? And how does a corporation manage through these issues today and still remain a viable entity in the local market when the economic tide turns?

The answer is to identify common issues, even if the particular answer to the issue differs from jurisdiction to jurisdiction. By understanding the right questions to ask, global employers can avoid the most common pitfalls from improvident employment decisions when their resources are already strapped.

Scoping the Issues and Initial Data Gathering

The first step is getting a handle on the facts and corporate goals:

- Can we present an organizational chart of our companies?
- In which jurisdictions is the company considering labour cost saving measures?
- What measures is the company considering? (wage freezes, pay cuts, bonus or commission restructuring, reduced work schedules, forced vacations, temporary shutdowns, voluntary exit programs, reductions in force, option exchanges, extending the term of options, redesigning or discontinuing equity or benefit programs, relocating or discharging alien workers)
- Who is the employer? Is it the right employer?
- What is the size of the workforce in the jurisdiction?
- How many employees are anticipated to be impacted by the contemplated measures?
- Are there local and/or national works councils, personnel committees or trade unions in the impacted areas and what is the relationship with these bodies?
- Do the impacted employees have

employment contracts, collective bargaining agreements or equity awards?

- Is there a national (company or industry) collective bargaining agreement applicable to the company even though the company has no union or works council and is this collective bargaining agreement generally declared binding?
- Are there policies or past practices which relate to the anticipated action?
- Is consent, notification and/or consultation of works council(s) or trade unions required?
- Is government approval necessary?
- Do the impacted employees have immigration or visa issues? Are family members impacted by the anticipated action?

Alternatives To Reductions In Force

Many companies prefer to explore alternatives to lay-offs before embarking upon more draconian reductions in force. In fact, some countries, such as China, Japan, and the Netherlands, generally require that the employer demonstrate that it has explored such alternatives before implementing mass dismissals. To take one step further, Taiwan, for example, requires that the employer has utilized all commercially feasible alternatives before dismissing any individual employee. In addition, an employee may be made redundant only if stringent statutory grounds are met (e.g., business contraction for a certain period of time as deemed sufficient by the courts). Employers who fail to comply with the termination-related requirements will be subject to criminal liability.

Wage Freezes

Wage freezes are frequently the least painful and easiest way of at least halting escalating labour costs. Before assuming that such measures are appropriate, however, the employer should ask itself:

- Does the impacted employee's contract or offer letter promise increased wages?
- Do statutory minimum wage laws or collective bargaining agreements require an increase in compensation?
- Is there a past practice of wage increases giving rise to an "entitlement" to wage increases in the jurisdiction?

Pay Cuts

Pay cuts or "take aways" are headline news in the automotive industry and elsewhere. Because "at-will" employment is recognized in the United States, most non-union, "at-will" employers in the United States can implement prospective pay cuts provided their at will language is properly drafted. Before doing so, however, even the "at-will" United States employer should ensure that the pay cut does not take any employee below statutory minimum wage. The employer should also check that the pay cut does not cause an exempt employee to lose exempt status under wage and hours laws.

In contrast to the United States, most other countries will not permit a unilateral reduction in pay. Consent of the employee before any pay cut is required. Even in India, where employers can unilaterally reduce the pay for "workmen" (lower-level employees), at least 21 days' advanced notice must be provided. In some countries (e.g., Germany and the United Kingdom), a reduction in compensation either requires consent, or may be treated as a "termination for change of contract" or "new terms for old." This technically results in a termination of employment followed by an offer of new employment under new terms. In most jurisdictions, however, such as Australia, Austria, Canada, Hong Kong and Singapore, consent is the preferred method for implementing a salary cut.

In some jurisdictions, such as Italy and Costa Rica, an employee is not even permitted to agree to a pay cut and, therefore, such measure is not a recognized cost-saving measure. Some countries (e.g. Argentina and Mexico), allow a pay cut only if the employer pays a partial severance to the affected employees based on their seniority and the impact of the reduction.

Still other countries, such as Spain and the Ukraine, allow a unilateral salary reduction, but will require advance notice and proof of economic justification before an employer is permitted to implement a pay cut.

Finally, in every country – including the United States – where there are trade unions or works councils, pay cuts are a subject of at least consultation if not also agreement. Reduced pay can also result in changed status. In France, for instance, only employees earning over a certain salary threshold may consent to working more than a 35 hour workweek. In addition, employers should consider if the pay cut requires refiling or additional approval for alien workers or whether the reduced pay impacts any other statutory qualifications such as maximum hour restrictions. In the United States, changes to the wage level typically mandate refiling of visas for professional workers in a specialty occupation, and may adversely impact residency sponsorship if the changes will be maintained long term. Employers should also review any Change in Control agreements as well, before implementing a pay cut. Many such agreements have contractual protection for employees if there is a material reduction in compensation.

Bonus and Commission Restructuring

Like pay cuts, bonus and commission restructuring can be a trap for the unwary. Even for United States non-union, "at-will" employers, most states will not permit employers to retroactively adjust bonus or commission plans for work already performed and will only permit prospective adjustments. Attempts to retroactively adjust bonus and commission plans to the detriment of employees can result in unlawful wage forfeiture claims that carry not only civil, but also in some

jurisdictions, criminal violations.

Not surprisingly, most countries prohibit unilateral attempts to modify bonus and commission plans and will require employee consent before making such adjustments prospectively. Although some countries (e.g., Australia, Singapore and the United Kingdom) will enforce provisions in a compensation plan permitting prospective amendments, most countries will not and will deem the employee entitled over time to continue the program notwithstanding language purporting to permit employer amendment. If unions or works councils are present, consultation if not also agreement, will be necessary. As with pay cuts, some jurisdictions will require a showing of economic justification for bonus and commission restructuring. Some countries may treat such restructuring as a partial severance (e.g. Argentina and Mexico), requiring severance payments.

Reduced Work Schedules

Increasingly, both the private and public sectors are attempting to control labour costs by reducing work schedules. In some cases, it may be reduced hours each day, while others may try four-day workweeks. Ironically, within the United States, attempts to reduce labour costs for even non-union "at-will" employees by reducing the work schedule may be more complicated than just a wage cut. Why? While most United States employers may reduce non-exempt employee's work schedule "at will" and pay only for those hours worked subject to minimum reporting time pay, this is not true for exempt employees who must be paid their full salary if they work any part of a "workweek increments" if the reason for working less than a full workweek was caused by the employer. On the other hand, U.S. employees can voluntarily agree to work shorter hours or fewer days, or in some cases permanently reduce their hours and take less compensation – a suggestion that President Obama in fact made during his first address to the Joint Session of Congress. In the United States, production and non-supervisory workers, are now working shorter workweeks, an historic low of 33.2 hours, the lowest since tracking began in 1964.

Everywhere, any contracts or collective bargaining agreements should be reviewed prior to attempting to implement a reduced work schedule. As with pay adjustments, most countries outside the United States will require employee consent before imposing a reduced work schedule on employees, and at a minimum consultation, if not also agreement, with any trade union or works council. Some countries (e.g., Italy) require prior government or labor office approval, or involvement of collective bargaining bodies (e.g., Austria). In the European Union, employers must also be careful to avoid violating the Part Time Directive by ensuring that part-time employees are not discriminated against and if their benefits are reduced, that they are only reduced commensurate with the hours reductions and not more.

While many employees may like the option of telecommuting, unilaterally changing the location of work can also present difficulties in many jurisdictions.

Expatriate employees may face barriers to such changes if their original work visa request was for a full-time commitment. But some visas are also available for part-time work and employers can reduce work schedules with notice to the proper agencies. Employers of H-1B and E-3 visa professionals in the U.S., for example, can file amended visa petitions with new labor condition attestations to authorize reduced work schedules.

Forced Vacation

Many employers are looking for ways of reducing accrued vacation on their books and therefore exploring ways of forcing employees to take paid vacation, particularly in jurisdictions in which they are required to pay out all accrued but unused vacation upon termination of employment. Other companies are looking into forced unpaid vacations as a way of reducing the payroll spend during a tough fiscal quarter.

Notwithstanding "at-will" employment in the United States, some states (e.g., California) require that employees be given at least 90 days or one full fiscal quarter advanced notice before they can be forced to draw down accrued paid vacation. On the other hand, U.S. non-union employers can require non-exempt employees to take a day off ("vacation") without pay, but will find that they have saved no money if they force vacation upon exempt employees in less than a full workweek increment, as they are required to pay the full salary for the week if the exempt employee works any part of that week.

In France, Italy and Spain, during the summer the employer must give the employee vacation and can therefore "force" the employee to take paid vacation. In Australia, employees generally can be forced to take vacation if they have accrued more than 40 days of unused vacation. Employees in the United Kingdom can be forced to take statutory vacation if they receive notice of at least twice the length of the period of leave they will be required to take. Most other countries, however, will require employee consent and advanced notice before forcing the employee to take even a paid vacation. Most countries outside the United States will not permit forced unpaid vacations, and virtually every country will require employee notice and consultation. Many countries prohibit employers from cashing out vacation on reduced rates. In fact, China requires the employer to pay 300 percent of the value of accrued unused vacation. In some countries, the visa approval includes attestations that "standard" benefits are offered to foreign workers. Select changes to vacation benefits can compromise the work permit.

Temporary Shutdowns/Furloughs

Increasingly, companies are temporarily closing their doors and shutting down all or part of their facilities for a week or so as a way of saving money. As the recession deepens, some companies are considering longer shutdowns, in effect

attempting to "hibernate" for the next six months or more in hopes that the economic climate will have improved when they hope to re-emerge. As such action can put large workforces on the street (and hence often also on government unemployment or welfare subsidies) for extended periods of time, governments understandably take a more active regulatory role when temporary shutdowns are proposed.

Mexico is among the many countries that require government approval before an employer can temporarily shutdown a facility. In Mexico, there is a program designed by the government which assists employers with governmental funds if the employer ensures that the temporary shut down will not impact their headcount. In France, if there has been significant reduction of the company's business activities in the country, the employer could, as a last resort option, ask the local state authorities ("*Direction Départementale du Travail, de l'Emploi et de la Formation Professionnelle*"), to implement "technical unemployment" ("*chômage partiel*"), but the company must pay 60 percent of the employees' salary less the allowance paid by the government unemployment funds. Even the United States requires 60 days' advanced notice to both the government and employees if a facility of the requisite size is to be temporarily shutdown in excess of six months. As noted more fully below, such shutdowns can also impact migrant workers and require additional government filings. Most countries, including Australia, Belgium, India (non-workman employees), and Malaysia require employee consent before any temporary shutdown or furlough. Some countries such as India (workmen employees) and Israel require advanced employee notice. Germany, for example, requires advance notice to employees *and* the ability to demonstrate compelling business reasons for the action, otherwise, individual employee consent is required. Several countries such as China, Japan, Korea, Thailand, and the Ukraine require partial pay of 75 percent (Thailand), 70 percent (China and Korea), two-thirds (Ukraine) or 60 percent (Japan).

The treatment of temporary shutdowns for expatriate employees varies. In Mexico, work permits are not generally linked to the payment of salary, so a temporary shut-down does not create wage issues. The same is true for many visas in the U.S., but not for those subject to the Department of Labor's anti-benching rules. These include those most commonly used for foreign professionals (e.g., H-1B, E-3). The law requires that employers pay the visa holders the wages promised on the visa request, subject to some exceptions. An important exception is where the employee voluntarily asks to take an unpaid leave or use accrued vacation time during the shutdown.

Benefits Restructuring

Because benefits often mushroom in boom times to attract and retain a workforce in a highly competitive market, a hard look at "fringe benefits" can often be an effective way to save scarce money. Employers may find that employees or their collective representatives are willing to forego benefits in exchange for a much smaller cash payment or to forego the benefit entirely if it is perceived as an alternative to layoff or other drastic cost-cutting measures.

The first step in addressing benefits is to take an inventory of what benefit "spend" the company is making for each plan or program and in each country and/or facility. Is the company getting the best return on its investment? Would employees prefer cash or a different, lower cost benefit?

Secondly, what legal restraints exist in a country if changes in benefits were to be made? What rights exist by virtue of the employee contract, collective bargaining agreement, statute or past practice? Most countries will not permit unilateral benefit restructuring or take-aways. Even those few countries, such as the United States, which may permit unilateral changes in benefit plans or programs limit such restrictions to prospective changes only. Other countries, such as the United Kingdom, may, if the plan or program is properly drafted in the first instance, deem an amendment accepted by employees if employees continue to work under a "leaner" benefit program for a relatively short period of time. Other countries such as France or Germany will generally require express consent before any "take-aways" are effective, frequently preceded by a notice period before any proposed change is effective. Some countries, such as Mexico allow benefits "take-aways" but only those non-mandatory benefits and as long as a partial severance is paid. If unions or works councils are present, it will invariably require a consultation, if not also agreement, before benefits can be cut or changed.

In addition, benefit cuts or changes may result in a "reportable event" in various government filings. In addition, there may be taxable consequences to the company, employees, or both as a result of a benefit plan or program amendment. Are benefits treated differently depending upon whether the employee is terminated or voluntarily resigns? How are benefit changes handled if participants have already been terminated?

Thirdly, what cost savings can in fact be achieved through reducing or eliminating the benefit? Is it possible to shift or split the cost with employees? If so, what steps are necessary?

Finally, has the company explored the possibility of renegotiating its own contracts with the vendors of benefits to obtain discounts, reduced premiums, or other cost savings for itself and/or its workforce?

Pricing Options and Other Equity

The current state of the global economy has had a dramatic impact on the use of company equity programs to provide effective long-term equity incentives for employees. According to recent statistics, about two-thirds of public companies have more than 75 percent of their outstanding stock options underwater (meaning the purchase price the employee pays to receive the shares is higher than the current market value

of the shares). Global stock plans with share limits meant to cover company's employee share offerings for several years have all but run out of shares due to falling stock prices. For companies hoping to use equity awards as a means to motivate and incentivize employees, underwater options and limited equity offerings are not providing the desired effect.

In response to the problem of underwater options, many companies have or are considering offering employees a right to exchange their options for new option grants with exercise prices equal to the current fair market value of the shares, to restricted stock units/free shares where no exercise price is paid to receive shares or for cash equivalent payments. For U.S. publicly traded companies, these programs generally require shareholder approval and a tender offer filing with the U.S. Securities and Exchange Commission. Employees in each country participating in the option exchange must be provided with a summary of the tax and other legal consequences to them if they elect to participate in the exchange. The preparation and communication of these consequences is subject to strict U.S. oversight, which may make the global offering a challenging exercise. EU-regulated companies generally have an easier time offering employees the right to exchange underwater options because non-transferable employee share options generally fall out of the prospectus requirement implemented under the EU Prospectus Directive 2003/71/EC.

Another tactic for companies dealing with the troubled economy is to offer employees equity in lieu of cash compensation or bonuses. Unlike other forms of compensation or benefits from the employer, employee stock options, restricted stock units/free shares, and share purchase programs tend to be offered by an issuer parent company to its employees and those of its worldwide subsidiaries. However, if the equity replaces compensation or benefits offered by the local employer, this change will likely be a modification of the employment terms and require, at a minimum, employee consent. Moreover, where it might have been acceptable not to translate employee grant materials or consult with works councils in a country because equity was offered by a parent company that was not the employer, once equity replaces an employment benefit, this practice may not be acceptable. Lastly, if the employee is given a choice of cash or equity, the company should keep in mind that offering the employee this choice may well be a securities offer for which a prospectus or exemption from the securities law requirements must be obtained in advance.

Companies are also redesigning their equity plans and offerings to make them more appealing to employees. Global employee stock purchase plans where employees make contributions to the program via payroll deductions and purchase shares at the end of a "purchase period" have become increasingly popular. Unlike options which can be underwater a day after the grant if the stock price drops, purchase plans typically allow employees to purchase shares at a discount or include a company matching contribution to the employee's contribution that is used to purchase additional shares. Companies are also redesigning programs to offer more options to executives, if they perceive their shares as being "undervalued" and having a potential for a significant long-term gain, and more restricted stock units/free shares for rank in file employees who want more certainty from an award that cannot go underwater. Companies are creating sub-plans and special grant documents to permit the company and its employees to benefit from the tax-favored tax programs which exist in certain countries, including France and the U.K., to save on costs. Lastly, companies are redesigning plans to impose performance-based vesting criteria on executives, such as individual or company performance targets, perhaps in response to complaints that executives are unfairly compensated in light of their performance.

Voluntary Exit Programs

Virtually every country prefers to address labour surplus through voluntary attrition rather than through involuntary terminations or other unilaterally imposed cost saving measures. Virtually every country also recognizes that a coerced resignation is not voluntary and will treat such resignation as a constructive dismissal. The key, therefore, is to ensure that any voluntary exit program is in fact voluntary and that post-termination benefits are made available consistent with applicable law. Employers that choose to pursue voluntary exit programs should also plan to address other challenges such as unintended talent flight and may need to consider creative measures for ensuring retention of critical employees. In addition, most employers will want to obtain a release if they provide incentives for a voluntary exit. Whether the release requires certain language and provisions (e.g., United States pursuant to the Older Worker Benefit Protection Act), the employee solicitor's approval (e.g., the United Kingdom) or is ineffective (e.g., Brazil) will depend upon the country where the employee worked.

Reductions in Force

Even in the United States where "at-will" employment arrangements dominate the workplace, reductions in force can be challenging. In other jurisdictions such as India and Singapore, reductions in force can be straight forward, provided statutory notice and severance are provided. In most of the world, however, reductions in force require multiple steps, frequently taking many weeks or longer to implement. The global employer will need to adjust not only its timeline but also its mind-set when going about a global reduction in force if it is to avoid a morass of employment law violations.

Is it a Mass Dismissal?

In some countries, the requirements vary depending upon whether the layoff is considered a mass dismissal. For instance, in the United States, absent a contract or collective bargaining agreement, the employer can terminate without advanced notice or severance

pay unless the layoffs will constitute a mass layoff or plant closing (which includes a shutdown of an operating unit within a single site) under the federal Workers Adjustment and Retraining Act ("WARN") or one of the 27 different state "mini-WARN" acts. Because of the rolling federal WARN window, U.S. employers need to anticipate layoffs at least 90 days into the future or risk having a retroactive violation. In addition, an "employment loss" under WARN includes not only permanent but also temporary layoffs exceeding six months or a reduction in hours of work of more than 50 percent during each month of any six month period. Accordingly, temporary shutdowns or reductions in hours can trigger WARN even if there has not been a permanent layoff. In the event federal WARN is triggered, the employer must give at least 60 days' advanced notice to affected employees, any unions and various governmental entities. Some states require 90 days' notice.

Similarly, several other countries have different processes for "mass dismissals," than individual economically motivated dismissals. In China, for instance, social selection criteria for layoff are only applicable if there is a mass layoff, as opposed to individual terminations. To date, however, while the applicable statute defines a mass layoff as a layoff of 20 employees or more or at least 10 percent of the workforce, China has not yet clearly defined in which specific instances a mass layoff is triggered (e.g., more than two employees if the employer only has 10 employees, for instance? Nationwide? Provincially? Within a single facility?) In the Netherlands, the intention to layoff 20 or more employees within a period of three months within one governmental area is considered a mass layoff. The mass layoff requires a social plan including severance pay. Similarly, in Taiwan, mass layoffs (defined as laying off a certain number or percentage of employees on a given day or in a specified period) require collective consultation, mandatory advance notice period (cannot make payment in lieu) and filing of a mass redundancy plan. In France, there are two types of mass layoffs: a collective dismissal concerning two to nine employees and a collective dismissal concerning at least ten employees. Both types of mass layoffs have their own procedures, rules and timelines.

Common Questions Employers Should Ask When Contemplating a Reduction in Force

- Does it constitute a mass dismissal?
- Is there sufficient economic justification for the dismissals?
- What is the selection criteria for dismissals?
- Are there protected employees immune from dismissal?
- Should *ex gratia* payments be made?
- Are there notification and/or consultation obligations?
- Are there severance pay obligations?
- Are governmental approvals necessary?
- Are releases/waivers appropriate or enforceable?

Economic Justification

Only a few countries, such as the United States, Singapore, Mexico, and Switzerland, do not require employers to demonstrate an economic basis before embarking upon a reduction in force. In contrast, most countries will require some threshold showing beyond wanting to make more money or tough economic times, before permitting layoffs. In the United Kingdom or Malaysia the burden could be as light as explaining a genuine business reason, whereas in Japan the employer is required to demonstrate that without the layoffs it will face either bankruptcy or closure of its operations. Some countries, such as the Netherlands and Taiwan will want to see that the employer has explored alternatives to layoffs and that such measures were not sufficient to avert reductions in force.

Selection Process

In the United States, absent a contract or collective bargaining agreement, the employer is generally free to select anyone it chooses for layoff, provided it is not based upon discriminatory criteria or other protected basis such as whistle blowing, concerted activity or unlawful retaliation. Once there is a tentative list for layoff, many U.S. employers prudently conduct an "adverse impact" analysis, a unique concept not generally seen internationally, to ensure that a protected category is not disproportionately impacted by the chosen selection criteria, allowing the employer to revisit its selection if a discriminatory pattern emerges.

In contrast to the United States, most other countries impose social selection criteria in determining who will be laid off. In the Netherlands, employers are required to select employees for layoff based upon a combination of age and hiring date. The so-called reflection principle must be applied. Interchangeable positions should be categorized based on age groups specified in the law. Within those age groups, the principle of last-in-first-out should be applied. In Germany, employers must consider the employees age, marital status, number of dependents and disabilities in making its layoff selection. In France, the layoff order is determined – in short – by a combination of seniority, family situation, age and job qualifications.

Protected Employees Immune from Layoff

In some jurisdictions, the employee is immune to layoff by virtue of either their condition or status. For instance in China, employees who are pregnant or who have been pregnant for the previous year cannot be laid off. In Taiwan, employees on maternity leave cannot be laid off and employers will

incur criminal liability for failing to comply. In the Netherlands a pregnant employee cannot be laid off until six weeks after the maternity leave has been used by the employee. In some countries, the employee representative to the works council are immune to layoff.

Ex gratia Payments

As one might anticipate, the stringent economic justifications and social selection criteria sometime result in the "wrong" employees being identified for layoff while employees less critical to the successful operation of the business are scheduled for retention. In such cases, employers often negotiate a mutual termination or resignation of the less desirable employee. This typically entails an *ex gratia* payment above and beyond the normal statutory severance pay and is frequently accompanied by a release of claims which may further increase that payment.

Notice and Consultation

In the United States, in an "at-will," non-union context, notice is typically limited to mass layoffs and plant closing under WARN. Not so, however, internationally. Outside the United States, advanced notice even for individual terminations is commonly required. For instance, statutory notice ranges from four weeks to as much as seven months in Germany. In Canada, employees may be entitled, in addition to relatively nominal provincial statutory notice, to up to two years or more of common-law "reasonable notice" if the employment contract does not contain enforceable notice provisions. Most countries require that benefits typically continue during the notice period.

In some countries, such as Japan or Korea, involuntary terminations are rare, or if attempted, require such extended notice, consultation, severance payouts and benefits that it is preferable to pursue a resignation rather than the time or expense of an involuntary termination. Employers, however, need to plan for additional time to negotiate resignations in those countries.

If trade unions or works councils are present, it typically requires additional consultation with such bodies. Even in the United States, employers typically must negotiate the effect of a plant closing with the unions even if the decision to shut down the plant is within the employer's prerogative. As noted above, many countries require government notifications (e.g., United States for mass layoffs or plant closings, Germany, France), or actual approvals from the government (e.g., China's Shandong province).

Releases and Waivers

An employee release or waiver, particularly when the employer is providing any benefit above and beyond that statutorily or contractually required, is generally prudent in order to avoid the company's financing of a legal challenge against itself. Some countries, however, such as Brazil or Malaysia, do not recognize the validity of a release, irrespective of the amount of money paid for it. In other countries, releases are subject to specific requirements or they are rendered a nullity. In the United Kingdom, an employee must be represented by a solicitor before his or her signature on a release is considered valid. In France, the release can only be agreed upon after the employee has received formal notice of termination and, as with all French employment documents, must be provided in French. In Mexico, releases must be approved by the Ministry of Labour. Even in the United States, special release language must be provided to those employees age 40 and over for any release to be effective in releasing an age discrimination claim. No wage and hour release is effective under United States federal law unless it is first approved by a court or Department of Labor. Understanding these distinctions in advance can avoid costly mistakes.

Equity Concerns

When employees are laid off and equity benefits are among the benefits held by the employees, there are certain unique aspects of the equity awards that need to be considered by the company. First, if the program is offered by a parent company to employees of its worldwide subsidiaries, there is typically a plan administrator that must approve any changes to the equity not otherwise called for in the plan. If a German employer wants to give an employee accelerated vesting or cash out options granted by a U.S. parent company, typically the U.S. parent company's compensation committee must agree to the change. There are some countries where the income from the equity benefits must be included in the severance calculation, notwithstanding the fact that the equity award came from a parent company, and some other countries where the terms of the plan and grant agreements with respect to termination may be overridden by statutory or case law. In Denmark, employees who are involuntarily terminated are able to keep their options and continue to vest in them throughout their original term, even if the agreement provides the options are cancelled if not exercised in 90 days. Lastly, any release or waiver of claims intended to cover the employee equity awards must be sure to release the company that issued the equity, as well as the employer.

Global Communications

As noted above, many countries require that an employer engage in good faith consultation (and in some cases, an agreement) with the employee or an employee representative body, such as trade unions or works councils, prior to undertaking reductions in force or other cost-saving measures. Several countries require government approval before implementing reductions in force or other cost-saving alternatives. Although some stock markets may react positively to news of aggressive managerial action to curb labour costs, premature pronouncements of cost-cutting measures or reductions in force before the requisite employee consultation, and in some cases notification or approval, may result in civil violations. In some countries, such as France, such premature pronouncements can be a

criminal violation. It is therefore critical that prior to or during the consultation process, anticipated redundancies or other cost-cutting measures not be pronounced as a *fait accompli*. At most, the employer can state what it is contemplating, subject to appropriate consultation or approvals.

Labour And Works Councils Issues

As alluded to above, the existence of trade unions or works councils can add another dimension to implementing labour cost-saving measures. Good relationships with the works council or trade union are important. But even more important is to know how to deal with them in the most effective manner. In France, the total duration of the works council procedure mainly depends on the length of the negotiations and the attitude of the works council. The process usually takes between approximately two to six months. However the latter does not constitute a maximum duration. It is important that a sufficient Employment Safeguard Plan, is submitted to the works council, which contains proper redeployment measures. If those measures are not part of the Plan, a court may suspend the procedure and order the company to resume the consultation procedure with the works council all over again. In Italy, for instance, trade unions are very important in the process. Unions are entitled to request a joint review procedure with the employer in order to review the reasons justifying the dismissal and to try to find any possible alternative solutions to avoid dismissals. In the Netherlands both advice from the works council should be obtained and simultaneously a Social Plan should be negotiated with the trade unions.

The Migrant And Expatriate Work Force

In any restructuring of the work force, it is important to understand the impact on the visas and work permits of current and prospective expatriate employees. These workers may be particularly impacted by a change in the terms of employment or a separation, as their ability to reside and work in the country is typically dependent on maintaining job duties for the sponsoring employer. In addition, visas and work permits typically bind the employer to fundamental terms and conditions of the job, including wage level, work schedule, benefits package, and work site.

In the current economy, many jurisdictions are enforcing prohibitions on issuance of the visa or work permit if the employer has conducted layoffs for the relevant job. The recent American Recovery and Reinvestment Act of 2009, for example, contains provisions that prohibits employers that receive Troubled Assets Relief Program ("TARP") funds or other taxpayer funds ("federal relief funds") from hiring new H-1B employees when layoffs for similar positions have occurred around the time of filing the H-1B petition.

Before the employer is permitted to make a material change to the terms and conditions of employment, the employer may be required to amend the underlying work permit filing. This is often the case where the original work permit is premised on meeting a market wage or on a validation of the job market. Failure to follow the mandated procedures on a timely basis can subject the employer to claims for back wages and interest, government fines or even criminal penalties.

Furloughs raise similar problems. In many countries, a condition of the visa is that the status be maintained. In the case of work visas, this generally means the employee must be performing services on an ongoing basis. While normal vacations and holidays are expected, indeed required, to be part of the schedule, forced leave without pay can violate status and subject the employee to cancellation of the visa. In some visas in some countries (e.g., the United States H-1B visa), the employer will also be subject to substantial penalties if it does not maintain the required "prevailing wage" payments throughout the employee's tenure.

Employers who attempt to conduct a global reduction in force will face additional challenges. The laws vary widely in terms of the impact to the employee. As highlighted below, some countries expect an immediate departure by terminated foreign workers while others expressly allow them to remain and search for alternative employment. The repercussions of a reduction in force can impact the employer's ability to employ expatriate workers. In response to the economy's challenges, many jurisdictions are enforcing prohibitions on issuance of the visa or work permit if the employer has recently conducted layoffs for the relevant job.

Increasingly, employers are expected to notify the government of terminations. Sanctions for employers who fail to do so are becoming more widespread. Similarly, employers who retain laid off foreign workers prior to lodging their own work permit or amendment filing indicating that there is a change of employer are often subject to employer sanctions.

We include below highlights of the divergences in local law on key issues that impact the work and residency authorization of foreign workers.

Notification to the Government

In view of a global focus on border security, employers can expect to be required to notify the government of the termination of status of foreign workers. UK employers, for example, are obliged to inform the UK Border Agency (UKBA) of reductions by filing a Notice of Premature Ending of Employment or by completing a Change of Circumstances request under the new system. The UKBA will eventually take action to curtail or shorten the individual's leave to remain in the country.

U.S. authorities have opined that failure to notify the Citizenship and Immigration Services Agency of the employment termination of H-1B and E-3 visa holders can expose the employer to liability for back wages with interest. No similar

rule has been applied to foreign nationals under other commonly used visa categories (e.g., TN, L-1, O-1), so it is important to identify the visa held by terminated expatriate employees.

China requires employers to advise the relevant government authorities (typically the labour and public security bureaus) of a foreign worker's termination and to de-register the employee's employment and residence permits within a prompt period after the separation occurs. The same is also applicable for Taiwan.

Grace Period

In the United States, employment-based visa status ends on the date of termination and cessation of services, and the law provides no grace period. The employee is expected to leave the U.S. immediately upon termination, unless a timely request for a change to another lawful status is made (e.g., visitor status to provide time to prepare for a move and sell the house). In contrast, foreign students working during the initial 12 months after graduation can remain in the U.S. and accept work with a new employer without government notification (note that somewhat different treatment applies during the extended 17 month period available to foreign students with STEM degrees).

The situation in Germany is similar. The status ends on the date the permit holder is terminated (e.g., at the end of the termination period) with no grace period. Expatriate workers are obliged to leave Germany unless they obtain another (new) permit due to another (respectively a new) purpose (e.g., employment at a new employer, stay in Germany for family purpose). In contrast, Dutch law provides a grace period of between 28 days and three months, depending on the nationality of the holder of the residence permit and the reason of absence of an extension of the residence permit. The employee must leave the Netherlands at that time, unless requesting a change of restriction of the residence status or an extension of the present residence permit.
Australian law also provides a grace period. The employer is required to inform the Department of Immigration within five working days of an employee's cessation in employment, and the employee will have 28 days from the date of this notification to either apply for another visa or depart Australia. After this point, the visa is susceptible to cancellation.

In Canada, the residency authorization ends on the later of the date on which the work permit or entry stamp expires, which can be well after employment ends. The employee may not undertake new employment until a new work permit is issued, however. Hong Kong similarly allows the worker to remain in country through the work permit expiry, but the expatriate may not undertake new employment until the Hong Kong Immigration Department approves a change of employer.

Change of Employer

Even in jurisdictions that do not recognize a grace period, procedures to lodge a new permit or amendment based on a change of employer are common. In the United States, if the employee has secured another job in a timely fashion, the new employer typically may lodge a new petition and extend the original work permit. For some visas, mere receipt of the request by the government may be sufficient to authorize the expatriate worker to start the new job.

It is more common for employment authorization to be contingent upon approval of the new employer's request. One common pattern is that processing of visa and work permit requests in most countries is frequently more lengthy than the business needs demand. India addresses this issue by allowing workers to obtain interim extensions while the new work permit application is pending with the federal Ministry of Home Affairs.

In France, as a principle, if an employee is dismissed prior to the renewal of the work permit, a new permit of one year will be granted. In the event the individual has not found a new job at the end of this additional one-year period, it is possible to obtain a renewal of the original work permit for the remaining period, during which the expatriate is even able to receive payment of unemployment allowances by the French unemployment authorities.

In some jurisdictions, the options available for a "change of employer" visa may be limited. In the United States, for example, expatriates holding the L-1 intracompany visa who seek to change jobs to a new employer may be precluded from a move due to shortages in the quota for other types of work visas.

Severance Payments

Severance payments typically do not extend the period a foreign worker is authorized to work. In Brazil, which has no grace period (status ends on the last day of the visa or on the date the visa holder is terminated, in the event it takes place before the final date of the work visa), the severance period has no impact on the authorization to remain in the country. The employee is expected to leave Brazil at that time unless an application for an extension or for a transformation of the visa is filed.

Cross-Border Travel

Employees who have been separated are likely to face admission difficulties if they travel internationally after the termination date but prior to the approval of a new employer's work permit or amendment filing.

In the United Kingdom, for example, the individual can remain in the country until the expiry of the leave to remain (or until the UK Border Agency curtails authorization to remain) provided there is no breach in the conditions of entry (e.g., does not take up alternative employment without permission or have recourse to public funds). It is important to note that until the expatriate worker has obtained alternative employment and appropriate work permission, the individual (and any dependant family members) should not travel abroad. If the individual travels abroad, re-entry to

the UK may be refused.

Impact on Future Visa Requests

Most countries consider protection of the local workforce a matter of national interest. Visa requirements that limit the flow of foreign workers into the country often reflect this interest and are applied even in the best economic climates. But as rates of unemployment increase, there is a trend that employers should monitor protectionist legislation with immigration-related provisions to ensure continued compliance. Such as those contained in the recent American Recovery and Reinvestment Act of 2009, discussed above. This new law now threatens the ability of financial institutions, automakers, and others to recruit foreign professionals. Similar trends can be anticipated globally, and employers need to be cognizant that this type of government bail-out is likely to have strings attached.

Preparing For A Brighter Tomorrow

The economy is cyclical. Although company's boom-time concerns of attracting and retaining new talent may seem like a distant memory now, these times will return. Companies that manage responsibly through the tough times will find themselves best positioned to attract and retain talent when the market rebounds. In anticipation of a market upswing, companies should review now what, if any, policies or statutory/contractual obligations it has to recall employees, and by what criteria, before it starts hiring anew. Will the company's benefits and compensation systems, which it may have carefully ratcheted down during the economic downturn, be sufficient to retain or attract talent as the market picks up, or will the company be caught napping? Has the company secured its intellectual property rights now so that, when the work force feels more empowered to move to the highest employer bidder, the company's intellectual property is sufficiently protected? As dark as the economy is today, there will be tomorrow. Will your company be ready?

10 Steps for Decoding a Global RIF

Even though global RIF issues are complex, there are common themes. Systematically working through these issues with experienced advisers can make the prospect of a complex and multilingual global RIF much less daunting.

1. Determine context of the redundancies
- Are there sufficient economic grounds for the redundancy?
- Avoid communication of RIF percentage per country, as some countries may need economic grounds first and then communicate based on that a redundancy figure
- Is the redundancy in connection with a transaction (which may trigger additional restrictions under the EU Acquired Rights Directive)?

2. Gather information by jurisdiction
- Total headcount and overview of positions in organizational chart per country
- Affected headcount per site of employment (this will also be relevant for U.S. WARN purposes)
- Works councils, unions, employee representative groups
- Collective bargaining agreements, severance policies or practices, work/retirement rules
- Sample or individual employment agreements (for contractual obligations)

3. Conduct cost analysis
- Notice and severance entitlements under statute/the applicable collective bargaining agreement and contract
- Additional payments (e.g., vacation payout, pro rata 13 months' pay, ex gratia amount necessary to secure a release)

4. Develop a realistic timeline for each jurisdiction
- Government notification/consultation/approval requirements
- Employee representative group notification/consultation obligations
- Employee notice requirements (and possibility to pay in lieu of notice)
- Compensation committee/board approval for modifications to employee equity plans

5. Conduct selection process
- Protected employees (e.g., pregnant employees, employee representatives, etc.)
- Legally mandated selection criteria (e.g., social factors, last in first out)
- Fair, nondiscriminatory selection criteria
- Requirement to offer alternative positions

6. Notify/consult/obtain approval of government/employee representative groups
- Work through the timeline developed under step 4

7. Prepare termination documents
- Mutual termination or resignation agreements
- Termination letters and releases
- Translation requirements (e.g., Belgium, France, Russia)

8. Deliver termination documents (possibly after individual consultations)
- Consultation with employees before delivery of termination documents
- Specific delivery requirements (e.g., originals, local registered mail, timing)

9. Make applicable payments
- Timelines

10. Complete administrative follow-up
- Discontinue payroll and benefits
- Notify government authorities
- Cancel visas
- Don't forget the retained workforce!

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News from Argentina

Employment related measures to help employers deal with the global financial crisis

The global economic crisis has already begun to impact developing countries as their stock markets and currency drop. Private capital flows are reduced and large investment projects are cancelled because their ultimate profitability is now in doubt. Faced with this prospect, to deal with the global financial crisis, Argentina has implemented measures to increase the employment rate. Among the employment-related measures we can mention are a set of subsidies and a social security regularization plan.

Subsidies

The Government has designed the Productive Recovery Program to grant subsidies to the private sector in crisis to supplement salaries. Through this program, employees may receive from the Government up to AR$600 for 12 months. To have access to this program, the applying companies should prove their crisis situation, present a plan to overcome it, and commit themselves to retaining their personnel during the period in which they are part of the Program. The Ministry of Labor will monitor the companies that join the program, through the Retirement and Pension System, to ensure that they maintain the headcount that was initially reported.

Social Security Regularization Plan

The Government enacted Law No. 26,476 which encourages companies to regularize unregistered employment or non-reported salaries free of cost. The law establishes a two-year abatement benefit in the payment of contributions for those companies that regularize unregistered employment or fail to correctly register the labor relationship. Some implications of the law are as follows:

1. Release of any fines and penalties derived from the lack of registration applied by the Ministry of Labor.

2. Regularized employees would have access to social security benefits under the same conditions to which they would have been entitled had they been correctly registered.

3. The company's payroll can not be reduced for two years. (Such payroll shall be the one corresponding to the period accrued in November 2008). If the payroll is reduced after receiving the benefit, the employer is required to hire new employees within the next 90 days. This is a condition to continue maintaining the benefit.

In addition to the Government's measures, the law requires employers who are making collective redundancies

or suspensions to initiate with the Ministry of Labor, a procedure called Crisis Prevention Procedure, in which they must explain the reasons of their measures and discuss them with the applicable union.

Labor unions are constantly discussing with the Government and the private sector, other potential measures to protect the employment. They have requested that the Government prohibit dismissals for the term of six months and are demanding the application of a supplemental amount, over and above the severance payment, in case of dismissals. As of April 10, 2009, Congress has not discussed this proposal. Meanwhile, in order to maintain employment with those companies showing that they are undergoing financial crisis, some labor unions have accepted conditions of no salary increases, the elimination of overtime, the taking of vacation time ahead of the regularly scheduled time, and temporary lay-offs.

Argentine law does not foresee the global financial crisis as a just cause for terminating employment without severance. The law provides that employers may resort to a reduced severance when there is a *force majeure* event. Courts tend to consider that although the global financial crisis is affecting businesses around the world and putting hundreds of thousands of employees out of work, it may not be sufficient to classify it as a *force majeure* event. In order to pay a reduced severance, the courts require employers to: prove that the crisis they face was an unexpected or uncontrollable event, demonstrate the impact of the crisis on their business, what measures they implemented to avoid any imbalance, that the company had nothing to do with the circumstances that started the crisis, and that it did not act carelessly.

The reduction of salaries also has certain restrictions. Many courts do not accept reductions, unless they are implemented with a reduction of working hours or other alternatives, as long as they do not affect the collective bargaining agreement applicable to the activity of the employer.

Conclusion

Employers may find certain restrictions when executing a cost reduction plan. Such restrictions may come from the law (i.e., requiring a prior communication and entering into a procedure with the union and the labor authority, as well as not allowing the termination of employment using the economic crisis as just cause). They may also come from the interpretation of the law (i.e., courts requiring consideration for reducing salaries, or imposing certain conditions for paying a reduced severance). Finally, the labor unions have increasing power and have staged strikes and picketed when there has been a mass layoff.

Although the Argentine Government has implemented measures to mitigate the adverse impact of the employment crisis, they may not be sufficient. Time will tell if it is necessary to take more drastic actions.

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News from Australia

Australian immigration compliance issues and the changing economic climate

Employers using international assignees in their Australian operations need to be mindful of Australian immigration laws when they consider restructuring their businesses or reducing staff numbers. Inadvertent breaches of Australian immigration laws could attract administrative, civil, and/or criminal penalties.

The Australian Department of Immigration (the "DIAC") has recently introduced legislative and policy changes which could make it more difficult for businesses which have reduced their Australian employee numbers, in order to submit applications to sponsor foreign national

employees for the Business Long Stay Subclass 457 visa ("457 visa").

There have been two significant recent developments.

- On December 18, 2008, the Migration Legislation Amendment (Worker Protection) Act (the "Worker Protection Act") received royal assent and is due to take effect in mid to late 2009. The DIAC is currently drafting regulations which will redefine in detail the current obligations of employers sponsoring 457 visas. The new regulations setting out the "sponsorship obligations" are expected to replace current regulations in relation to "sponsorship undertakings." The new regulations will likely be legislated in late 2009.

- On February 24, 2009, a new 457 visa policy was released in response to the changing economic conditions.

These developments are significant, as use of the 457 visa has proliferated in the past few years, with the granting of almost 60,000 visas to non-Australian employees in 2007-2008.

The 457 visas are generally processed quickly, have a maximum duration of four years, and can be renewed. Spouses and dependent children can be granted the 457 visa as dependents of the main applicant and spouses can work for any employer.

When the economy was buoyant, Australia experienced a shortage of skilled workers. Holders of 457 visas contributed significantly to addressing this shortage, enhancing the operations of many Australian businesses.

Many businesses based in Australia have a non-Australian parent entity and it is often the case that senior directors and managers overseeing business operations in Australia are 457 visa holders. The 457 visa scheme allowed employers to mobilise talents globally and ensured the optimal operation of businesses in Australia.

This article outlines the key changes to the 457 visa scheme and provides practical recommendations to employers on how to manage immigration compliance risks.

Migration Legislation Amendment (Worker Protection) Act

Effect of the Legislation

The Worker Protection Act strengthens the DIAC's power to monitor and penalise 457 visa sponsors found to be in breach of sponsorship obligations. Under the Worker Protection Act, the Minister for Immigration may appoint inspectors who will have the power to enter, without force, the business premises of 457 visa sponsors for the purpose of determining their compliance with sponsorship obligations. Inspectors may inspect any relevant work, material, machinery, appliance, article or facility; interview any relevant person; and require necessary documentation to be produced.

The Worker Protection Act also facilitates information sharing with other government departments. Information found by an inspector under the Worker Protection Act may be disclosed to the Department of Education, Employment and Workplace Relations. In addition, notwithstanding any taxation secrecy provisions, the Worker Protection Act empowers the Commissioner for Taxation to disclose information relevant to a 457 visa holder and/or the sponsoring employer to the DIAC.

Penalties

If an inspector finds that sponsorship obligations have been breached, he or she can impose civil penalties or issue infringement notices. The civil penalty is AUD$6,600 for an individual and AUD$33,000 for a body corporate. Where an infringement notice is issued, fines of up to AUD$1,320 for an individual and AUD$6,600 for a body corporate may be imposed. It is very important to note that an inspector may also issue a written notice requiring a person to produce a document or thing before the inspector at a specified place within a specified period of not less than seven days. Failure to comply brings a risk of imprisonment for six months.

Release of New 457 Policy in Response to the Changing Economic Conditions

In response to the less favourable economic conditions, the DIAC released a new policy document on February 24, 2009, directing case officers to scrutinise more closely 457 visa applications where the DIAC has received information that the business proposing to sponsor foreign national employees, has been reducing its Australian employee numbers. DIAC case officers have been instructed to focus on two key issues:

- Whether the sponsorship of the non-Australian employee would be of benefit to Australia; and

- Whether the salary figure nominated for the non-Australian employee is consistent with his or her proposed role.

Benefit to Australia

Under the new policy, the DIAC will positively consider:

- Applications which can demonstrate that employment opportunities for Australian employees may be lost without the skills of the 457 visa applicant;

- Any overseas employment opportunities the employer offers to its Australian employees;

- Applications which can demonstrate that the skills and attributes of the role in Australia cannot be found locally and the fulfilment of the role will potentially expand Australian imports, exports or the provision of services, notwithstanding the

currently turbulent economic environment;

- Applications seeking to fulfil specialist professional roles where the employer requires an individual with a particular knowledge or understanding of a foreign market or supplies; and

- Applications where fulfilment of the nominated role will improve the employer's operating efficiency and effectiveness; enhance its competitiveness domestically or internationally; increase its turnover, profit or efficiency; and add new or improved products or services to the marketplace. The 457 visa applicant will need to have a demonstrably higher level of skill than can be sourced within Australia.

Nominated Salaries

Under the previous scheme, as long as the nominated base salary figure was above the Minimum Salary Level ("MSL"), the DIAC would not usually enquire further. Under the new policy, an additional consideration of the DIAC is whether the nominated salary figure is consistent with the average remuneration for the nominated occupation group. Highly skilled occupations (generally, senior managers and professionals) whose total remuneration package is over AUD$100,000 are exempt from this consideration.

Employers who may be considering pay reductions (as an alternative to redundancies) should note that where the DIAC is notified that a 457 visa holder's salary has been reduced after approval of the 457 visa, the DIAC would consider whether this change in circumstances negates the basis for granting the visa and should therefore lead to cancellation of the visa.

We expect the full effect of the new policy to be felt in the next few months as it begins to be implemented. The new policy injects a new level of complexity to the preparation of 457 visa sponsorship, nomination and applications. The preparation of 457 visa applications requires a thorough understanding of DIAC salary expectations as well as strategic planning when selecting an occupation for nomination. We would recommend that employers obtain assistance or advice where there is any doubt as to the "benefit to Australia" requirement or the adequacy of the nominated salary.

Compliance Risk Factors to Look Out For

Employers sponsoring 457 visa holders are required to comply with various undertakings made to the DIAC during the 457 visa application process. When reducing staff numbers or cutting costs, employers should consider the following risk factors:

(1) Salary Reductions

If the salary of a 457 visa holder is reduced, the visa holder's base salary (per annum salary inclusive of tax but exclusive of superannuation, bonuses and allowances) should not be reduced below the applicable MSL. Currently, the MSL for 457 visa holders in non-IT occupations is AUD$43,440 while the MSL for 457 visa holders in IT occupations is AUD$59,480. On July 1, 2009 the MSL will increase to AUD$45,221 for non-IT occupations and AUD$61,919 for IT occupations.

It is important to note that even though some types of unpaid leave are granted to 457 visa holders (as set out below), the requirement of paying the 457 visa holder at least the MSL continues. If a 457 visa holder is on a period of unpaid leave while in Australia, the total annual salary received should be not less than the MSL.

The only exception to this rule is that 457 visa holders need not be paid the MSL for any periods they spend outside of Australia.

(2) Leave Without Pay

Under the current DIAC policy, paid leave which has been formally applied for and approved will not be deemed a breach of the 8107 condition for 457 visa holders. As the employees will be paid during their leave period, there is no impact on the MSL.

The 457 visa holders are subject to condition 8107, which requires them to continue working for their employer while holding the visa. Note that this condition applies only to the primary 457 visa holder (i.e. the employee) and generally does not apply to dependents. If condition 8107 is found by the DIAC to have been breached, the 457 visa may be subject to cancellation.

Under the current DIAC policy, employees who have been working for the sponsor for less than 12 months may be permitted to take a study leave or a sabbatical leave of no more than one month in duration. Longer periods of unpaid leave will be acceptable only in very exceptional circumstances and will need to be checked with the DIAC on a case-by-case basis.

Employees who have been employed for at least 12 months may take the following types of unpaid leave without breaching condition 8107:

- Up to four weeks of unpaid leave to take a course of study unrelated to his or her work for the sponsor, for a duration of no more than four weeks;

- Up to three months of work-related study or sabbatical leave for people engaged in academic, educational or research-related occupations;

- Up to four weeks of unpaid leave for holiday in Australia;

- Up to three months of unpaid holiday leave outside of Australia;

- Up to four weeks of unpaid sick leave;

- Up to three months of unpaid paternity/maternity leave; and/or

- Parental, care-giver or personal leave should be checked with the DIAC on a case-by-case basis.

Taking the following types of unpaid leave may be considered a breach of condition 8107 and may potentially lead to visa cancellation:

- Temporary layoff due to a seasonal downturn in the industry;
- Extended holidays in Australia of more than three months' duration while on unpaid leave;
- Full-time study for more than four weeks while on unpaid leave; or
- Unpaid maternity leave of more than three months' duration.

(3) Redundancy, Termination and Completion of Assignment

The sponsoring employer is required to advise the DIAC of a 457 visa holder's cessation of work in writing in the required format within five working days of the date of ceasing work. Failure to do so constitutes a technical breach of the sponsorship undertakings and could lead to the imposition of administrative penalties on the employer. These penalties include being barred from sponsoring future 457 visa applications or cancelling the 457 visa of other sponsored employees.

(4) Cost Cutting

It is understandable given the current economic conditions that some employers need to cut costs and budget restrictions could mean less human resources assistance is available or less legal advisory services are being sought in relation to the immigration processes for employees. However, employers should note that the Migration Amendment (Employer Sanctions) Act 2007 imposes civil and criminal sanctions on employers who allow illegal workers to work.

Employers should therefore maintain stringent and structured visa-checking processes and, where they are unsure whether an employee is permitted to work in Australia, should check with their legal advisor or the Department of Immigration.

Conclusion

With a clear understanding of Australian immigration laws and policy, we are confident that employers will be able to undertake the necessary restructuring of their Australian operations while avoiding any inadvertent immigration issues for the long-term future of their business in Australia.

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News from Austria

Overview of labor-related cost-cutting measures in Austria with a special focus on short-time work

The current worldwide economic crisis has resulted in a decreased need for workers. Companies are considering various measures to reduce costs, if possible, without the need to terminate employment relationships so that they can preserve their workforce to be in the best possible position for a future economic upturn. Once the economic situation and thus the companies start to recover, it will be difficult to quickly find new qualified, reliable, and loyal employees.

So what can be done to survive the crisis? The most frequently used measures of cost-cutting in Austria, apart from terminating employment contracts, are:

- Employment terms and conditions can be changed by mutual agreement, in particular with regard to working time and salary, provided that mandatory minimum standards according to an applicable collective bargaining agreement ("CBA") are considered.
- Where overtime is paid in cash, such (costly) overtime should be avoided. Time-offset should be enhanced with regard to existing balances.

Employers can revoke lump-sum payments for overtime work, in cases where the contracts contain such a revocation provision.

- Voluntary benefits should be cancelled wherever the employer effectively reserves its right to do so.

- In cases of educational leave, the employer and the employee can agree upon a temporary suspension of salary payment.

- Many collective bargaining agreements allow varying the normal working time within a certain period (e.g., up to one year). This allows employers to compensate periods of lower weekly working time during difficult economic conditions with higher weekly working time in better economic conditions.

Short-Time Work

Short-time work has a long tradition in Austria. Its history dates back to the early 1930s, when it was first applied due to economic difficulties in Austria.

Today, Austrian law provides for state-supported short-time work designed to cover and compensate short-term fluctuations of work based on severe economic disturbances for a longer period (e.g., due to unexpected loss or cancellation of orders, reduction of operating supplies, etc.).

Short-time work is a temporary cutback of the normal working time of all or part of a company's workforce as a measure to counter economic difficulties. Short-time work has been on the rise in many countries since the beginning of the credit crunch and the resulting recessions in the U.S., Europe and elsewhere. Since October of 2008, short-time work has significantly increased in Austria as well. Economic forecasters predict that there will be more than 50,000 short-time workers in Austria at the end of May 2009. For comparison, the monthly average of short-time workers in 2007 was approximately 200.

The legal basis for a reform of short-time work was enacted on February 26, 2009.

Government Aid for Short-Time Work

The main benefit for companies and employees, who agree on short-time work, is the possibility that the Austrian Government will subsidize the measure. The Austrian Labour Exchange Office provides money for companies undergoing economic difficulties that want to implement short-time work, provided that certain conditions are met:

1. The economic problems must last for a "longer period of time" and must have an external reason (e.g., cancellation of orders or essential supplies for the company).

2. The regional Labour Exchange Office must be informed in advance.

3. The situation is not the result of seasonal fluctuations.

4. It is likely that full employment will be possible after the short-time work.

5. There is an agreement between the responsible collective bargaining parties.

The government aid paid to offset the shortfall for employees varies depending on the case. In most cases, employees are paid between 70 percent and 90 percent of their normal salary. The employer has to pay short-time compensation to the affected employees amounting to the lump-sum amounts stipulated by the Labour Exchange Office. The employer is then entitled to receive government aid. Thus, additional costs arising in connection with short-time work are shared by both the employer and the state.

New Rules

The reform of short-time work will enter into force retroactively commencing on February 1, 2009.

Short-time work in Austria will become more flexible: companies shall now be allowed to implement short-time work for a period of 18 months instead of a maximum of six months. Under certain circumstances, an extension of this period will be possible. Government aid for short-time work will be granted only if the regular working hours are reduced by more than 10 percent but less than 90 percent.

Furthermore, short-time work can now be combined with educational and qualification measures if such measures will enhance the employees' chances in the job market. Qualification measures will be subsidized by the government in addition to the short-term aid. On the other hand, there will be new retention periods – throughout the whole period of short-time work and for a maximum of four months thereafter (depending on the length of short-time work), employment relationships cannot be terminated by the employer.

The formalities to be observed will not change. Short-time work will further require an agreement between the collective bargaining bodies (chamber of commerce and labor union) in charge of the respective branches of business nationwide. Consultations between the Labor Exchange Office, the works council, the employer and other bodies, if reasonable, will need to occur. In addition, the company requires either the employees' consent or a respective clause in the applicable CBA, enabling the companies either to unilaterally implement such a measure or provide for implementation based on a works council agreement.

Short-Time Work in Austria as a Viable Solution to Cut Labor Costs

On the one hand, short-time work is a costly measure during hard times, as the employer has to bear part of the costs for the reduced working time. On the other hand, the employer can avoid costs that arise at a later stage from new recruiting measures as well as termination of employment contracts.

Austrian Government aid to companies implementing short-time work has made this alternative to terminate employment relationships a well-liked cost-cutting measure for certain industries in Austria, particularly manufacturing and other large industrial companies.

Critics fear that companies may pressure authorities to grant government aid for short-time work, even though not all legal requirements are met, by threatening to otherwise start mass redundancies. Currently, since the requirements for short-time work are checked with less accuracy in order to support industry and prevent redundancies, costs will increase rapidly this year. Because of this significant increase of costs, mainly to be borne by the Labour Exchange Office, politicians are already considering revising the current system. The Austrian Trade Union Federation (ÖGB) also believes that short-time work can be abused causing working conditions to deteriorate. Trade unions demand the reduction of working hours and overtime work as a more appropriate way to cut costs in economic downturns.

Conclusion

Among other cost-cutting measures, short-time work has recently become an important measure in Austria. For the employer, advantages may prevail if the economic downturn will end within a certain period of time and economic recovery is to be expected within a foreseeable timeframe. Short-time work, however, should be implemented only when other cost-cutting measures have already been taken.

Furthermore, a positive outlook for the company's situation after the crisis is essential. Otherwise, companies could find themselves in more trouble than ever due to the additional costs and also statutory retention periods (where redundancies are not allowed) throughout and after the short-time work.

Austria currently provides government aid to companies which implement short-time work in order to make it more flexible and advance its use. Politicians thus expect job preservation throughout the crisis and thereafter. It remains to be seen whether or not this economic effect will occur and legitimate the growing costs combined with this measure.

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News from Azerbaijan

Employment practices aimed at cost reduction

The global financial crisis has forced many Azerbaijani employers to take measures to reduce their labor costs. The main tools to accomplish this are reductions in force (RIF) and salary reductions. Thousands of employees in the country have already faced salary reductions or elimination of their jobs. This has been most pronounced in the oil and banking sectors.

Downsizing

Reductions in force or downsizing procedures are regulated in relatively great detail by the Labor Code of the Republic of Azerbaijan, effective July 1, 1999 (the "Labor Code"). As a post-Soviet law, the Labor Code retains many employee-friendly provisions which restrict the steps which an employer may take. For example, certain categories of employees are exempt from downsizing and may be dismissed only upon the liquidation of the enterprise or the expiry of a fixed-term labor agreement: pregnant women; employees with pre-school children whose sole income is from the enterprise; temporarily disabled employees; and diabetics.

Following adoption of Law No. 608-III QD, On Changes and Amendments to the Labor Code, effective July 10, 2008, additional restrictions on downsizing were imposed. Pursuant to Article 80 of the Labor Code, as amended by Law No. 608-III QD, an employer may downsize employees who are members of trade unions only

with consent of the union. While an employer may challenge a trade union's refusal to approve the downsizing in court, the employees remain employed (and are paid) during the litigation.

A collective agreement concluded with trade unions may also contain a clause eliminating the employer's right to declare a mass redundancy. Azerbaijani employers must take care in negotiating and drafting such clauses as poorly drafted provisions may limit employers' ability to downsize, even in an emergency.

Termination costs should also be taken into consideration as the Labor Code provides for substantial severance payments equal to a month's salary as well as salary for another two months following downsizing if those dismissed remain unemployed during that time.

Downsizing is also complicated upon the change of a major shareholder. For three months following an acquisition, the new owner's ability to downsize the labor force is limited (see chart above).

TOTAL NUMBER OF EMPLOYEES	PERCENTAGE OF EMPLOYEES WHICH MAY BE TERMINATED WITHIN 3 MONTHS OF ACQUISITION
100 - 500	50
500 - 1000	40
More than 1000	30

Salary Reductions

Due to concerns about losing qualified employees and the considerable termination costs, many Azerbaijani employers choose not to downsize. Rather, they choose to reduce employee salaries.

The general rule in Azerbaijan is that employment agreements may only be amended by mutual consent. As a consequence, some employers mistakenly believe that an employee's refusal to accept new remuneration terms prevents a salary reduction. The Labor Code, however, does permit changing material terms for "objective reasons." Employees who refused to accept the new employment terms are entitled to a severance payment equal to two months' salary. Enterprises with more than 50 employees, however, must notify the Ministry of Labor of a change in terms which affect more than 10 percent of the employees.

Corrupt Practice

Some local branches of foreign legal entities enter into employment agreements with foreign employees which are subject to foreign law to avoid the application of the Labor Code. This is permitted under Article 6 of the Labor Code. Nevertheless, these employers are unaware that Azerbaijan ratified the United Nations Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, effective as of July 1, 2003. Article 25 of this convention provides that migrant (i.e., foreign) workers are entitled to treatment no less favorable than those applicable to Azerbaijani citizens. Thus, employment agreements with foreign employees which are subject to foreign law must provide those employees treatment no less favorable than that guaranteed by Azerbaijani law.

Conclusion

The Labor Code does not provide Azerbaijani employers with much freedom in downsizing and other cost reduction measures. Written in the best tradition of socialist labor law, the Labor Code distinguishes the legal framework applied to employment contracts from the general framework applied to other contractual relationships. Indeed, the abundance of mandatory provisions in the Code reduces contractual freedom of employers to a minimum. Law 608 III QD, which amended the Labor Code, considerably limited the dismissal of trade union members, and crippled the last opportunity of the employers to respond to the challenges of the ongoing financial crisis.

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Reduction of costs and rights

Since the effects of the global economical crisis reached Brazil, many companies are focusing their efforts on reducing their costs, especially those related to their employees. Several options have been discussed, such as reducing work hours, reducing annual salary adjustments, forced vacation, unpaid leave, and even lay-offs.

Of all the options mentioned above, most companies in Brazil are opting for the reduction of salaries and benefits, which triggers the reduction of payroll and social security taxes. Many times, the termination of employees is not the best option because of the loss of trained employees, which can eventually lead to additional costs for the company.

However, the Brazilian Labor Code provides that any change to the terms and conditions of the employment contract that causes a "loss" to the employee is null and void. Under Article 468 of the Labor Code, any change in the employment conditions (i) shall require the employee's express consent in writing, and (ii) must not cause any loss (financial or otherwise) to the employee. This Article highlights the protective nature of the Brazilian labor laws.

The only option to reduce salaries and benefits is based on a Federal Constitution general rule, which allows the reduction of the employee's remuneration through a collective bargaining agreement executed with the employee and the labor union. In a true collective negotiation, there is a bargain which causes the company to give something in consideration for the salary reduction. A pure salary reduction without due cause, even when accepted by the employee, can be refused by the union and if accepted may be challenged in court by the lack of mutual concessions.

Past experience shows that employees may later challenge the terms of a collective bargaining agreement when there is not mutual concessions, under the argument that, the parties' rights and obligations were unbalanced, that the union did not protect their interest, or even that they had no option but to accept the proposition made by the company.

The General Labor District Attorney is following up on cases of salary reduction in Brazil and providing guidance based on an old law (Federal Law 4963/65) to unions and companies considering this option: (i) existing evidence of the economic difficulties, (ii) a maximum of 25 percent salary reduction with same reduction of the working time, (iii) a maximum period of three months extended for another three months, if necessary, (iv) same reduction for management remuneration, and (v) limitation of overtime while the salary reduction prevails.

It is arguable whether this old law is constitutional since it was enacted before the current constitution and imposes different restrictions. In any event, Federal Law 4963/65 provides some guidance for a "balanced" salary reduction. Without a collective bargaining agreement, even when there is a bargain or the conditions provided in law 4963/65 are followed, a salary reduction is very risky.

If the company is unable to reach an agreement with the union on a salary or benefits reduction and it goes ahead and implements it anyway, the employee can make a claim for constructive dismissal or later claim salary differences (for the lost wages) while still working (which is very uncommon) or when the employee is terminated. The employee has two years to claim the balance of salaries counted as of the effective date of the termination. If the claim is filed within two years, the employee can claim non-payment of labor rights and balance of salaries for the last five years.

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Employer cost saving measures

Introduction

The current economic downturn has forced employers to reduce operational costs through a number of different initiatives. Since labour force costs are traditionally the largest financial burden on an employer, it makes sense for employers to look to their labour force when implementing cost-saving measures.

Although reductions in force were once the favoured model for many large employers, there is a growing awareness that this approach may not be the most beneficial in the long run to preserving a core workforce capable of resuming operations once the production increases. As a result, employers have recently started considering alternative methods of reducing costs.

The Federal Work-Sharing Program

Purpose

Work-sharing is an adjustment program designed to help employers and workers avoid temporary layoffs when there is a reduction in the normal level of business activity that is beyond the control of the employer. The measure provides income support to workers eligible for Employment Insurance ("EI") benefits who are willing to work a temporarily reduced work-week. Typically, EI provides temporary financial assistance for unemployed workers while they look for work or upgrade their skills, or are on various types of recognized work leaves.

In essence, a work-sharing agreement permits employers and employees to agree to a reduction in hours through the sharing of work among the employees. The EI program will provide benefits to those employees who have agreed to participate in the program, typically 55 percent of their wages for those hours that have been reduced.

Work-sharing is a three-party agreement involving employers, employees and Service Canada, the government agency responsible for coordinating EI benefits. Work-sharing agreements must be agreed upon by both employee and employer representatives. All employees who will be affected by the work-sharing program (the "work-sharing unit") must agree to participate. Work-sharing agreements must also be approved by Service Canada.

The work-sharing program provides for a number of benefits and enables:

- Employers to retain staff and adjust their work activity during temporary work shortages;
- Employers to avoid the expenses of hiring and training new staff once business levels return to normal; and
- Employees to retain their skills and jobs while receiving EI benefits for the days that they do not work.

Which Employees Are Eligible?

A work-sharing unit may consist of any group of EI eligible employees in a particular establishment (and generally includes everyone in the same job description) but may not necessarily include all of the employees in that establishment. Specifically, the unit should not include those employees who are needed to help generate work and thus assist in the recovery of the business, such as senior management, marketing/sales manager, sales agent, etc. Persons in these types of occupations, who are essential to the development and implementation of the recovery of the business, should be working full-time in support of the recovery plan, which is discussed in more detail below.

Not all employees will be entitled to participate in a work-sharing. Apart from those already mentioned, employees participating in a labour dispute will not be considered eligible for work-sharing. In addition, the focus of the program is on "core staff," typically year-round permanent full-time or part-time employees who are required to carry out the functions that will lead to recovery.

To be eligible for work-sharing, an employee must meet the minimum eligibility requirements for regular EI benefits. The exact number of required hours depends on the unemployment rate in the particular EI economic region.

Which Employers Are Eligible?

It is to be noted that not all employers will be permitted to participate in the program. In order to be eligible for a work-sharing, an employer must have been in business in Canada year-round for at least two years. Service Canada must be satisfied that the reduced working hours were unavoidable and that the work shortage is temporary and unexpected. Work-sharing is not available to employers who are undergoing a labour dispute. Finally, the shortage of work must be significant enough to warrant support of the program, typically demonstrated through a decrease in sales/orders of at least 10 percent.

The Recovery Plan

A recovery plan is mandatory for a work-sharing application. The focus of the plan is the steps the employer will take to remain viable within the timeframe of the agreement; in order that recovery may be achieved as the economy strengthens.

Assessment of Application

The criteria to assess applications focus on a number of issues including:

- An employer who is experiencing a temporary, unexpected and unavoidable reduction in business activity;
- An employer who has tried to prevent employee layoffs through other means;
- The community context in which the employer is operating; and
- A recovery plan that demonstrates that the business can be maintained during the period of the Work-Sharing Agreement.

Duration of Work-Sharing

The minimum duration of a work-sharing Agreement is six weeks. The maximum period of a work-sharing is 52 weeks. This new maximum will be in effect until April 3, 2010.

Employer-Imposed Reductions in Compensation

A growing number of employers are resorting to cost-saving measures that purport to limit or roll-back employees' employment-related entitlements. These measures range from capping entitlements to paid time off to across-the-board reductions in salary. For employers these measures are a way to rapidly decrease labour costs while maintaining their workforce. These measures, however, may pose problems in the Canadian context.

Canadian law provides that when an employer makes a unilateral material change to a fundamental term/condition of employment, the affected employee is entitled to treat the change as a "constructive dismissal." A successful claim of constructive dismissal is considered to be a repudiation of the employment contract and is akin to a termination of employment. As such, the employee may be entitled to quit and claim either: (i) their employment standards legislation notice/severance entitlements if they choose to proceed through the administrative complaints process provided by that legislation; or (ii) reasonable notice. The concept of reasonable notice is discussed in more detail below. Alternatively, the employee could choose to remain with the employer and sue the employer for the difference in salary over the reasonable notice period.

What constitutes a material change to a fundamental term/condition of employment is not always clear. Courts have generally agreed that reductions in compensation that amount to 10 percent or more of the employee's overall compensation could be sufficient to constitute a constructive dismissal. There have been cases, however, where less significant reductions have been deemed to be constructive dismissals. Changes to terms/conditions of employment that are not directly related to compensation may constitute constructive dismissal if the affected term/condition "goes to the very heart of the employment relationship." By their nature, potential constructive dismissal claims must be evaluated on a case-by-case basis.

Given the preceding, it is clear that employers have an interest in limiting potential exposure for constructive dismissal claims. Over the years, a number of different approaches have emerged with respect to this issue, with varying degrees of risk.

A recent case from the Province of Ontario, that was subsequently indirectly affirmed by the Supreme Court of Canada, the country's highest court, gives some direction to struggling employers. According to that case, the manner in which to affect material changes to terms/conditions of employment is to provide all employees with reasonable advance notice of termination.

Reasonable Notice

Reasonable notice is a Canadian legal concept whereby an employer who intends to terminate employment is obliged to give an employee advance working notice or pay in lieu thereof. What constitutes "reasonable notice" will vary from situation to situation and will depend on a number of factors, the most important of which are the affected employee's age, position, years of service, and total overall compensation. Reasonable notice can be anywhere from two to 24 months.

Once the "reasonable notice" period has elapsed, the Company might choose to offer to "re-employ" the employees on changed terms and conditions (i.e., with the changed terms/conditions of employment). It must be noted, however, that this method may trigger additional requirements to statutory severance pay in the case of employees in Ontario and those falling under the federal jurisdiction, even if they eventually accept the offer of re-employment.

This suggested method is of limited use to employers who are required to implement changes immediately as a result of significant and pressing

economic constraints. In the event an employer intends to proceed immediately with the proposed changes to the terms/conditions of employment, a number of options have emerged as alternatives to the seemingly unmanageable process suggested by the courts.

The first of these options would be to implement the change without seeking the affected employees' express written consent. Once the employer has announced and implemented the change, the employer would argue that any employee who continued to work had condoned the change and therefore waived their right to claim a constructive dismissal. It is not clearly established at what point the courts would accept the condonation argument. This is a higher risk option than those outlined below.

Alternatively the employer could seek express written consent. In this case, the employer would advise of a prospective salary reduction and give the employees the option, in writing, to consent to the change.

As a practical matter, in the current economic climate, it is anticipated that many employees may choose to consent to changes to the terms/conditions of their employment if they trust the employer's message and believe that doing so will enhance their job security. As a result, many employees may simply accept the change and go on with their employment, whether or not express consent is requested and obtained and whether or not a payment is made for the consent.

An additional note, there has been a growing trend in Canada in recent years toward U.S.-style class actions. Recently, a number of class actions were filed against employers. Although unlikely, wherever a class of employees is subject to a common employer action or set of actions, there is a possibility of a class action law suit. In this case it might be a constructive dismissal, breach of contract, and/or wrongful dismissal class action. To our knowledge, there has not been any such claim instituted against an employer but in light of the potential for a class action, any employer may wish to discuss with legal counsel which of the recommendations would be most suitable in its particular situation.

For the reasons outlined, it is essential to conduct a detailed analysis of what the potential liabilities may be. The threshold determination of whether a change is material and whether it is a change to a fundamental term/condition of the employment relationship should always be determined by legal counsel, particularly as the stakes may be high.

Conclusion

Navigating the options available to employers to reduce labour costs during economically troubled times is a difficult but necessary exercise. Given the different alternatives outlined in this article, it is important for an employer to keep in mind what the purpose of the cost-cutting measure is and whether its goals are likely to be achieved. In order to measure the possibility of success, an employer needs to be apprised of all potential liabilities associated with a proposed course of action. An informed employer is an employer who will successfully implement cost-cutting measures while limiting exposure.

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News from Colombia

Legal overview of reductions in force in Colombia

Companies all over the world are concerned about how the global financial crisis is affecting them, both now and for the future. In addition, they are trying to determine the best ways to reduce costs with as little impact as possible on their future growth once economic recovery begins. For example, responses include

(i) optimizing the efficiency of the company using technology and creativity; (ii) contracting services throughout specialized service providers instead of having employees perform a variety of different tasks; (iii) reducing or modifying labor benefits; and/or (iv) adjusting the workforce to the new level of economic productivity, specifically, reducing the number of employees.

In practice, in order to survive in a profitable way in this global financial crisis, many Human Resources Directors are considering a mix of these alternatives, including the possibility of a reduction in force, an alternative that requires a deep legal analysis.

According to Colombian labor law, employers are generally allowed to terminate labor contracts without just cause. Nevertheless, there are certain events in which the employer cannot freely terminate employment agreements without just cause using the provisions granted in Colombian regulations. Among other things, there are limitations such as: (i) collective dismissals; (ii) the right for reinstatement; and (iii) prior authorization from the Court or the Ministry of Social Protection for certain special protected employees (pregnant women, unionized employees or seriously ill employees). Unless the employer has a strong legal cause to terminate protected employees, the latter can demand that they be reinstated to the job they held prior to termination.

Like many countries, Colombia has special regulations that restrict the termination of a high number of labor contracts within a short period of time. As a consequence, in order to make the decision to execute a reduction in force, there are several labor law issues that should be considered, including those covered in this overview.

General Overview of Collective Dismissals (Mass Lay-Offs)

An employer requires prior authorization from the Ministry of Social Protection in order to dismiss more than a set percentage of employees without just cause in the same semester. Authorization from the Ministry of Social Protection is also required for the partial or total shutdown of operations. Collective dismissals without obtaining clearance from the Ministry of Social Protection are ineffective and the legal consequence is that the employees have the right to be reinstated to their positions along with the payment of salaries, social benefits, and other labor benefits accrued for the entire period between dismissal and reinstatement.

PAYROLL (NUMBER OF EMPLOYEES)	PERCENTAGE OF EMPLOYEES DISMISSED WITHOUT JUST CAUSE IN A PERIOD OF SIX (6) MONTHS, WHICH TRIGGERS COLLECTIVE DISMISSAL
Between 11 and 50	30%
Between 51 and 100	20%
Between 101 and 200	15%
Between 201 and 500	9%
Between 501 and 1000	7%
More than 1000	5%

The percentages that establish whether or not an employer can declare a collective dismissal are listed in the chart above.

Alternatives to Reductions in Force

Alternative 1: Dismiss the Employees with Permission from the Ministry of Social Protection

The collective dismissal of employees requires prior clearance from the Ministry of Social Protection. In this scenario, employers must continue paying wages and other labor benefits until such clearance is obtained, otherwise, the reduction in force process will be terminated.

To obtain authorization from the Ministry of Social Protection, a petition must be submitted to the Ministry with adequate motivation and with the appropriate evidence. Concurrently, employees would have to be summoned in writing on the same date the request was filed, in order for them to have knowledge of the proceedings to be conducted before the Ministry.

One of the disadvantages of this alternative is that the Ministry of Social Protection, in practice, does not grant such authorization without intervening in the procedure to be certain that the reorganization is really supported due to financial or technical problems, and that the employer has been fully complying with all labor obligations. The other disadvantage is that, even if the documentation is properly submitted (as this is not a "beneficial" decision from a political point of view), the Ministry often takes more than ten months to approve a collective dismissal.

With permission from the Ministry of Social Protection, employers will be legally authorized to unilaterally terminate the employees without incurring a wrongful collective dismissal and will only have to grant the employees' mandatory benefits and indemnity obligations resulting from such termination. Protected employees (who cannot be dismissed without just cause) preserve their legal protection if the employer maintains active positions or functioning business units, in which those employees can develop their work, even if there is permission from the Ministry to allow the employer to proceed with a collective dismissal.

Alternative 2: Terminate Contracts by Mutual Consent

In order to execute a reduction in force and to avoid collective dismissal procedures before the Ministry of Social Protection, another alternative for employers is to enter into an agreement with the employees in which they consent to the termination of the labor contracts and to ratify the termination before a labor authority granting a full release from permitted labor accruals. To execute a mass termination of employment agreements by mutual consent, employers can offer a "voluntary retirement plan." Labor jurisprudence of the Colombian Supreme Court of Justice has accepted the offering of retirement plans as a valid mechanism to promote termination of labor relationships by mutual consent provided that the employees' consent to the economic offer provided by the employer is completely voluntary.

Alternative 3: Combination of Alternatives 1 and 2

In some cases, where the employees involved in the termination process are reluctant, the employer can simultaneously offer a retirement plan to the employees and, at the same time, begin procedures to obtain clearance from the Ministry of Social Protection for a collective dismissal. The advantage of this alternative is that a message is sent to the employees communicating, (i) a need and urgency for terminating the labor contracts, (ii) that a retirement plan could be a better option for those terminated, and (iii) that the employer is certain of its compliance with Colombian labor laws.

Tips and solutions

- In most cases, the safest legal scenario is to make an effort to amicably terminate the labor contracts by mutual consent offering a retirement plan. Nevertheless, it is always advisable to analyze the above mentioned alternatives and other matters on a case-by-case basis.
- It is always a better scenario to identify which employees will be included in the downsizing process and offer them the conditions of a unique retirement plan clearly and previously prepared.
- In practice and in the majority of cases, to avoid future claims, the termination of the contracts of protected employees should be done under a mutual consent scenario and approved by labor authorities.
- Identify the protected employees before initiating the reduction in force process in order to determine the scenario for terminating their labor contracts.

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News from France

Alternatives to dismissals in an uncertain economic environment

The recent economic downturn has forced companies, and human resource directors in particular, to use their creativity in order to reduce costs and anticipate the more long-term effects of the current crisis. The French President's slogan "Work more to earn more" is already a thing of the past. Certain companies have already been hard hit by the crisis, others are anticipating, while others are taking advantage of the crisis to "right size" in an attempt to increase profitability.

In an economic downturn there are obvious simple measures that can be implemented such as, ceasing the use of temporary workers, eliminating overtime, salary freezes, non-renewal of fixed-term contracts, etc. However,

other measures exist which are often slightly more cumbersome to implement but are today becoming more and more widespread.

Salary Reduction

It is possible to implement a salary reduction under certain conditions. A company contemplating such a measure must first inform and consult with its works council on such measure and the reasons for same, such as economic difficulties or the need to maintain the company's competitiveness. (We do not address here the need to present such a salary reduction proposal to the unions if the implementation is contemplated while the Annual Negotiation on Salary items (NAO) is ongoing.)

Once the works council has rendered its opinion (non-binding), the salary reduction must be proposed to the individual employees in writing (by registered mail with acknowledgment of receipt). The employees have a one-month period to refuse or accept the change.

In the event certain employees refuse, they will either have to be made redundant (if more than one refusal, then it would constitute a collective dismissal and potentially an "Employment Protection Plan" would need to be implemented if ten or more refuse) or their salary maintained, which from a practical standpoint would be difficult (demotivation of those employees who have accepted).

In the past, it would have been highly unlikely to obtain the consent of the individual employees. However in today's economy, more and more companies have successfully implemented such a salary reduction with a high success rate (90-95 percent). Companies can also provide incentive language whereby, when the economic downturn is over, the salaries will be increased to the current levels. It goes without saying that the salary cannot be reduced below the minimum wage provided by French law, the applicable collective bargaining agreement or a company collective agreement. Often the salary reduction is linked to a reduction of the collective working time.

Reduction of Working Time

In order to implement a reduction of the collective working time, it is, in principle, necessary to conclude a company agreement negotiated with the union representatives. French Labor law provides that the working time organization must be defined by a company agreement (often used in companies with irregular levels of activity, depending on the periods of the year, to attempt to adapt their working time to the workload). In companies where an agreement already exists, a new agreement would need to be renegotiated in the same manner. The works council must also be informed and consulted on the same prior to the final agreement being executed.

The collective agreement (at the company or the branch level) must provide in particular for:

- The conditions and notice for modifications of the planning; the limits to be taken into account for the calculation of overtime performed;
- The conditions whereby employees' absences, hiring or termination during the period must be taken into account for the calculation of the amount of remuneration.

As of January 1, 2010, companies with no union representation will have the possibility, under certain conditions, to enter into company agreements with elected employee representatives or mandated employees. This will allow smaller companies to enter into a working time company agreement.

As a reminder, in any case, the employer (having 50 employees or more) who is contemplating carrying out a reduction in force affecting at least ten employees is required to negotiate a working time agreement within the company. Indeed, French Labor law (article L. 1233-62 of the French Labor Code) provides that the Employment Protection Plan (previously known as "social plan") must include measures concerning the reduction or the organization of the working time, allowing to safeguard as many positions as possible. This will involve both the trade unions (who will sign the agreement) and the works council for prior information and consultation on the project of the working time agreement.

Certain national collective bargaining agreements include specific provisions concerning the situation where there is a significant decrease in the company's activity, and in particular concerning the reduction of the working time.

Generally used to take into account an excess number of employees, the reduction of the working time should have a corresponding decrease in salary.

The reduction of working time must at least be contemplated before implementing an "Employment Protection Plan" in an attempt to avoid eliminating as many positions as possible.

Finally, it is possible for a company to request an employee individually to reduce his or her working time from full-time to part-time, although such requests rarely find willing candidates.

Accrued Paid Vacation and/or RTT days

Another option could be to request employees to take their accrued paid vacation or RTT days. The procedure would vary depending on whether the temporary closure of the company during a vacation period is envisaged. In any event, the works council and/or employee delegates must be informed and consulted prior to implementation.

Partial Temporary Unemployment

There are measures of partial temporary employment where minimal government funding is granted under certain conditions. In order to be able to implement partial temporary unemployment and benefit from funding, there must be either (i) a temporary closure of all or part of the company within a maximum six-week period or (ii) a reduction of the working time below 35 hours/week.

The reduction or suppression of activity must be due to either:

- The economic situation in the economic sector;
- Difficulties in obtaining raw goods or energy;
- A disaster or exceptional bad weather;
- Transformation, restructuring, or modernization of the company; or
- Any other exceptional circumstances.

The temporary closure must be temporary, exceptional, and collective (at a minimum a group of employees). Prior to implementing the same, the employee representatives must be informed and consulted and a formal request made to the French authorities to obtain funding.

During the period of temporary employment, the employees' salary is paid by the French National Unemployment Fund. According to a collective agreement signed with the MEDEF on December 15, 2008, additional remuneration should be paid by the employer of at least 60 percent of their gross salary (less the specific indemnity paid by the French National Unemployment Fund). Certain applicable collective bargaining agreements can provide for higher payments by the employer to the employees.

During the partial temporary unemployment, the employee receives (i) a specific hourly indemnity equal to EUR 3.84 (in companies with less than 250 employees) or EUR 3.33 (in companies with more than 250 employees) paid by the employer which then seeks reimbursement from the French unemployment authorities (since January 1, 2009, the annual maximum hours to be paid by the French unemployment authorities per employee is set at 800 hours or 1000 hours in certain sectors of activity such as the automotive industry); and (ii) as the case may be an additional indemnity paid by the employer in accordance with the agreement with the MEDEF (with a minimum of EUR 6.84 hourly) and/or an applicable collective bargaining agreement. Under specific circumstances, the French authorities can finance in part this additional indemnity up to 80 percent or even 100 percent in exceptional circumstances.

However, since partial temporary unemployment is, as its name suggests, for a temporary situation (temporary decrease in activity), because the length of the current crisis is unknown, partial temporary unemployment is not always a recommended solution and it should not be used to precede dismissals. Moreover, it is recommended to have employees take their accrued paid vacation prior to its implementation or to review/reduce the company's collective working time. Certain companies have gone as far as implementing a "crisis fund" whereby the engineers and executives finance a system of a partial temporary unemployment paid at 100 percent to the blue collar workers by giving up certain of their RTT days and the employer in exchange tops up the employee's contribution with the equivalent amount into a specific fund.

Professional Pauses

Rarely used, companies can ask employees to volunteer for a professional pause in their employment. Such "pause" merely suspends the employment relationship for a limited period of time during which they are not paid (subject to any specific company decision to maintain a fraction of the salary). No consultation with the employee representatives is required.

Externalization or Shared Service Centers

Companies can reduce costs by envisaging to externalize sectors of their activity or services which are not necessarily those activities or services which can be directly linked to a company's profitability. Such an externalization requires the prior information and consultation of the works council and assuming the activity externalized is considered an "autonomous activity."

After information and consultation with the employee representatives, the employees dedicated to the activity externalized would automatically transfer.

Many groups have implemented "shared service centers," which can also significantly reduce the costs of the individual entities using the shared services.

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Temporary layoffs in Germany – one instrument for employers to save costs

In recent months, many companies in Germany have faced a tremendous reduction in sales and have had to cope with customers lacking liquidity, hence their inability to pay their bills. Initially, this was an issue for automotive manufacturers and their tier-one and tier-two suppliers. Now, most industries suffer from the ongoing recession.

Layoffs – The Measure of Choice

Redundancies have always been a strategic instrument to reduce costs, especially in unprofitable business units. At the moment, it seems difficult to assess when markets will recover again and what measures need to be taken to be ready for new business opportunities when customers return. Substantial reduction in force would destroy long-standing operating units and cause a loss in know-how that may be needed again at midterm.

The measure of choice could be temporary layoffs. All employees would remain employed but running costs could be reduced without delay and one-time cost for severance could be avoided.

Implementation of Layoffs

Temporary layoff is the reduction of weekly working time, even down to no work at all. The employer pays the time spent to perform work while the Employment Agency pays further subsidies to the employees. The reduction of working time requires a legal basis, which can either be (i) a provision in the individual employment contract, (ii) a collective bargaining agreement (*Tarifvertrag*), or (iii) a works agreement (*Betriebsvereinbarung*).

Employment contracts rarely stipulate a sufficient provision in this respect, as they necessarily must provide the reasons for a working time reduction imposed on the employee. Without explicitly addressing those reasons, any such clause would be considered invalid and unenforceable under the German law on general terms and conditions.

Agreements on a change of conditions or terminations for change of conditions often cause substantial timely and administrative efforts. Therefore, in most cases either a collective bargaining agreement with the union and/or an agreement with the works council needs to be negotiated.

In many industries, collective bargaining agreements are applicable, which contain provisions on temporary layoffs. Such agreements usually tie the employer's right to reduce the working time to specific operational and/or economic requirements, stipulate thresholds and notification periods, and to a great extent, restrict the duration and timely allocation of working time reductions. Finally, to be permitted to actually reduce the employees' working time, a transformation of the collective regulations by means of works agreements is required.

If no collective bargaining agreements exist or an existing agreement is not applicable to the particular employer, works agreements are the favored instrument. They not only provide for a legal basis to reduce working time but also meet co-determination requirements set out in the Works Constitution Act (*Betriebsverfassungsgesetz*). Works agreements are entered into by an employer and the competent works council.

Co-Determination Rights of Works Councils

Works councils have co-determination rights relative to the implementation of layoffs. Without the works council's consent, any working time reduction unilaterally realized by the employer is invalid. If the works council and employer do not come to an agreement, both parties are entitled to call for a conciliation board (*Einigungsstelle*) that is empowered to make a binding decision.

Although, in practice, negotiations with works councils often cause delays before measures can finally be implemented. In times of obvious crisis, works councils do cooperate and are often willing to support the employer with its efforts to maintain workplaces if this serves to avoid redundancies.

Consequences of an Implementation of Layoffs and Cost-Saving Potential

If layoffs are implemented, the employer has to remunerate its

employees only for the reduced working time. The employees further receive a short-time allowance (*Kurzarbeitergeld*) for up to 18 months in an amount of approximately 60 percent (67 percent for employees with at least one dependent child) of the difference in net remuneration between the regular remuneration and the remuneration reduced due to temporary layoffs, provided statutory prerequisites for a payment of such allowance are met. Payment of short-time allowance is not taxable for employees.

In general, both employer and employee pay nearly the same portion of social security contributions. With respect to working hours cancelled due to temporary layoffs, the employer pays both the employer's and the employee's portion of the social security contributions (except for unemployment insurance), which are computed based on a fictitious gross salary. The employer is reimbursed in an amount of 50 percent of these contributions by the Employment Agency.

Sometimes, collective bargaining or works agreements provide for increased payments to be made by the employer which, from a financial point of view, may reduce the attractiveness of layoffs in a particular situation.

Layoffs and Intended (Mass) Dismissals

During times of temporary layoffs, employers are in principle still entitled to terminate employment relationships, unless this has been excluded in a collective or a works agreement. Although layoffs and payment of short-time working benefits are intended to maintain operations and workplaces, employers may implement layoffs even in cases of intended or realized mass dismissals (e.g., dismissal of at least 10 percent of the workforce in operation with 60 to 500 regular employees within a 30-day period) in order to secure remuneration of the dismissed employees until the end of their notice periods.

In mass dismissal scenarios, a formal permit of the State Employment Agency is required. Such permit provides a legal basis for the working time reduction. Although other legal entitlements for the reduction (i.e., employment contract, collective bargaining agreement and works agreement) are not required in this case, co-determination rights of the works council still have to be considered.

Conclusion

Layoffs by German employers seem to be a useful measure in the midst of the current global economic crisis. Although a significant number of legal requirements must be met before final implementation of layoffs, they do allow for an almost immediate reduction in working hours and, therewith, a substantial cost reduction. At the same time, they help maintain functioning working units and prevent companies from losing important worker know-how.

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Consequences of an Implementation of Layoffs and Cost-Saving Potential Example:

An employee with one dependent child earns EUR 12.50 gross per working hour. Due to temporary layoffs, the monthly **working time is reduced from 160 hours to 100 hours, whereby the employer saves more than 30% of the regular personnel costs.***

1. Total costs for employer without reduction of working time	
Monthly gross salary (160 hours x EUR 12.50):	EUR 2,000.00
Social Security Contributions (employer's portion, i.e., 21.025 %):	EUR 420.50
Total costs:	EUR 2,420.50
2. Total costs for employer in case of temporary reduction of monthly working hours to 100	
2.1 Costs regarding work actually performed	
Monthly gross salary (100 hours x EUR 12.50):	EUR 1,250.00
Social Security Contributions (employer's portion, i.e., 21.025 %):	EUR 262.81
2.2 Costs regarding working hours cancelled due to temporary layoff	
Social Security Contributions (both employer's and employee's portions without unemployment insurance, i.e., 37.35%, of 80% of the wage not paid due to the layoff, i.e., EUR 680):	EUR 253.98
Reduced by 50% reimbursement by the Employment Agency:	EUR - 126.99
Total costs:	EUR 1,639.80
Total Monthly Savings:	**EUR 780.70**

* Savings depend on the hourly wage the employee receives in the example.

The solidarity agreements as an alternative to collective dismissal

The "*contratti di solidarietà*" ("solidarity agreements") were introduced into the Italian legal system in 1984 by Law No. 863 (hereinafter "the Law"). They provide for a reduction of the working hours corresponding with a reduction of the salary. Solidarity agreements may be "defensive or expansive," depending on whether the reduction of working hours is aimed at avoiding dismissals or at hiring new employees.

The most frequently used is the "defensive" form, by means of which employees accept a reduction of both their working hours and their salary with the purpose of totally or partially preventing redundancies that lead to dismissals.

Originally, not all employers could negotiate solidarity agreements, only those operating in certain business fields (mainly manufacturing companies) and employing an average of more than 15 employees during the six-month period preceding the filing of the relevant application at the Ministry of Labor. Subsequently, additional legislation was enacted in order to extend the same option (a trade-off between dismissals on one side, and full-time work and pay on the other) to other employers. However, the comments in this article refer only to the original provisions. All employees, except for those classified as "*Dirigenti*" and a few other exceptions, may benefit from solidarity agreements.

Solidarity agreements must be stipulated between employers and unions. The amount and the modalities of the reduction of the working hours is left to the negotiation between the parties and may be: daily, weekly, or monthly reductions; differentiated for company sector or employee category; or limited to only certain company departments. After the stipulation of a solidarity agreement, the employer may not require employees to work in excess of the agreed upon reduced hours, unless this corresponds to a temporary need and the possibility to require such extra work has been agreed with unions. In any event, the change in working hours must be notified to the competent Labor Office.

Holidays (annual leaves) are also affected by solidarity agreements. Holidays accrued before the working hours' reduction shall be paid on the basis of the full salary, while if they accrue afterwards they shall be paid on the basis of the reduced wages. The same provision also applies in case of sickness, maternity, and wedding leaves.

T.F.R. (which is deferred compensation that accrues annually on the basis of the salary paid to employees) is also impacted by solidarity agreements. T.F.R. must continue to be calculated (and accrued for) on the basis of full working hours but the employer may obtain from the Italian Social Security Agency ("INPS"), a reimbursement of the part related to the hours that have not been worked.

When solidarity agreements are stipulated in order to avoid dismissals, the total reduction in terms of working hours must correspond to the aggregate working hours normally worked by the redundant employees, whose dismissal has been avoided with the solidarity agreement. However, a positive or negative discrepancy of up to 30 percent of the aggregate redundant employees' normal working hours will be tolerated.

In order to encourage employers and unions to use solidarity agreements and therefore limit redundancies, the law provides for both, (i) a social security allowance partially replacing the salary lost by employees, under solidarity agreements, and (ii) a possible reduction of social security contributions due by the employer.

In order for the employees to benefit from the aforementioned social allowance, the employer must file a specific application with the Ministry of Labor along with a copy of the agreement reached with unions. Said allowance is equal to 60 percent of the lost salary, and it is paid in advance by the employer and then reimbursed by INPS to the employer, by offsetting it against the social contributions due by the employer. The allowance may be granted for up to 24 months and may be extended only once, generally, with few exceptions, for a further period of up to 24 months. After the grant of said allowance and its renewal, a new application may be filed only after a period of 12 months.

Every three months, employers who obtained the grant of social security allowance in favor of employees, must provide INPS with a list of the employees included in the solidarity agreements specifying all the relevant data with particular regard to the reduced working hours. The above-mentioned list must also be countersigned by the involved employees.

The benefit of reduced social security contributions may be granted to employers based on the availability of the relevant governmental funding. The employers who stipulated solidarity agreements may obtain a reduction of the social security contributions (due with regard to the employees covered by the relevant solidarity agreements) equal to between 25 percent and 35 percent (depending on the geographical area in which the employer is located) when the reduction of the working hours exceeds 20 percent and a reduction of social security contributions equal to between 35 percent and 45 percent when the reduction of the working hours exceeds 30 percent.

Conclusion

Employers who are evaluating the implementation of cost cutting measures should consider the possibility of solidarity agreements because, depending on the circumstances, they may be a valid alternative to dismissals, particularly when the downturn of the activity is expected to be only a temporary situation.

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News from Malaysia

Malaysia's reponse to the global economic crisis

Introduction

In response to the global economic downturn, in March of 2009, the Malaysian government introduced a RM60 billion stimulus package. One of the primary aims of the stimulus package is to reduce the rising unemployment rate in Malaysia.

Towards this end, the stimulus package with a value of RM700 million includes training and job placement opportunities in both the public and private sectors, double tax deductions for companies which hire previously retrenched employees, exemptions from or reductions on Human Resources Development Fund contributions, an increase of tax exemptions on compensation for loss of employment, and reducing approvals for recruiting non-Malaysians.

While these measures can be said to be the most comprehensive to be rolled out by the Malaysian government, employers who are in difficult economic positions will continue to need to understand the Malaysian legal framework and to carefully manage employment-related issues arising from implementing cost-cutting measures.

Directly Reducing Employment-Related Costs

While redundancy can, in general, be justified as long as the business reasons for the redundancy are genuine and real on the grounds of industrial and trade reasons, and provided that the exercise is properly implemented, a reduction in force ("RIF") should only be implemented as a measure of last resort. Employers in Malaysia are seeking to implement various measures to reduce employment-related costs in an effort to maintain productivity, efficiency, and to avoid having to implement a RIF.

Some of the more common efforts are targeted at reducing the number of shifts, limiting over-time work, reducing the number of working hours, implementing shutdowns, imposing the

forced taking of annual leave, or reducing contractual entitlements such as salaries and contractual (i.e. 13th month) bonuses. Notwithstanding any express agreement to the contrary, working hours, fixed remuneration and annual leave entitlements are generally regarded to be fundamental terms of employment which require prior employee consent to modify.

Employers who implement unilateral revisions to these fundamental benefits will run the risk of the employees deeming themselves constructively dismissed and seeking redress pursuant to the unfair dismissal remedy. Employees in Malaysia who believe that they have been terminated without "just cause or excuse" may bring unfair dismissal claims against the former employer. Where there is a finding of unfair dismissal, the Malaysian Industrial Court will order reinstatement and back wages or compensation in lieu of reinstatement and back wages. (Back wages are calculated from the date of dismissal up to the last day of hearing at the Industrial Court, and are subject to a maximum of 24 months; compensation in lieu of reinstatement is usually quantified on the basis of one month's salary for each year of service or part thereof.) However, if the employees continue to be employed following the imposed variation, it could be argued that they had agreed to the variation through conduct and had waived the right to claim constructive dismissal.

As a key risk mitigation strategy, employers should always first attempt to obtain the consent of the employees prior to implementing the revision. Even if it appears unlikely in practice for employees to agree to the proposed change, the employer should nevertheless make every effort possible to explain to the employees the business reasons and the positive effects the reductions will have on the business.

Depending on the circumstances, such steps could persuade the Malaysian Industrial Court ("Industrial Court") that, taken as a whole, the employer's actions were reasonable, necessary and had constituted a purely business-related cost-cutting measure.

Redundancy

In order to be able to justify the decision to retrench in response to an unfair dismissal claim, employers must be able to successfully establish: (i) the substantive business grounds for the redundancy; and (ii) that the resulting retrenchment exercise was carried out in accordance with accepted standards of Malaysian industrial practice.

The Industrial Court adjudicates unfair dismissal claims on the basis of equity, good conscience, and the substantial merits of the case. While the Industrial Court should not, in theory, step into the shoes of businessmen to proffer its views as to whether the decision to retrench was the correct one in the circumstances, the Industrial Court requires substantial evidence in order to be convinced that the substantive business grounds were, in fact, made out.

It is therefore critical, towards minimising unfair dismissal risks, that there is a comprehensive paper trail in support of the substantive business grounds. The mere assertion that the employer in Malaysia had merely complied with the directions of its holding company, will not be sufficient. Notwithstanding that the employer may have genuine business grounds, a badly managed exercise could result in an unfair dismissal finding.

Implementing the RIF

Given the ease with which employees in Malaysia can bring unfair dismissal proceedings against the former employer, careful planning and implementation is critical. The RIF exercise should be implemented in a manner consistent with the prevailing standards of Malaysian industrial practice.

In this regard, employers should be familiar with the Malaysian Code of Practice on Industrial Harmony ("Code"), which sets out various recommendations in relation to implementing a RIF. While the Code has no legal force (there are no sanctions for non-compliance), the Industrial Court, as well as the various Malaysian appellate courts, have acknowledged in decided cases that the recommendations of the Code which relate to retrenchment are indicative of generally accepted norms of industrial relations practice.

The Code's recommendations include giving warning as early as possible to the employees, taking pre-emptive cost-cutting measures such as scaling back overtime work, selecting employees based on objective criteria, making voluntary payment of termination benefits (i.e. severance), providing employees with paid time off to secure alternative employment, and so on. The Industrial Court will not expect the employer to comply with every single recommendation, but to minimise unfair dismissal risks, an employer must be in a position to prove that it had at least attempted to take on board as many of the Code's recommendations as possible at the time of the exercise.

Selection Criteria

One of the key recommendations of the Code is that the employer should select employees to be retrenched in accordance with an objective criteria. Where the employer does not consider selection criteria in conducting a retrenchment exercise involving employees of the same category, the Industrial Court will hold the employer to the last-in-first-out ("LIFO") principle. While the Code recommends compliance with the LIFO principle, there is no *compulsory* requirement that LIFO must be employed in retrenching employees belonging in the same category.

Recognising the employer's prerogative in determining the appropriate size of its workforce in the interests of operational efficiency, an employer may retrench employees who are more senior, and retain the more junior employees, provided there is sufficient

justification for doing so. Recognised grounds for retaining more junior employees include greater capability, compatibility, productivity, trustworthiness, and efficiency. While it is possible to make the selection based on existing knowledge of the employee, the reasons for the decision must always be supported by substantive and convincing evidence from the employer.

The employer may also replace LIFO with an objective selection criteria configured especially for the RIF exercise. The Industrial Court will, in determining whether the consequent retrenchments were fair, give regard to: (i) whether the selection criteria was reasonable; and (ii) whether the implementation of the selection process in accordance with the selection criteria was fair.

Practical Steps

Notwithstanding the above, there is no guarantee that the former employee would not file an unfair dismissal complaint even where the RIF exercise was conducted in good faith and in line with the various recommendations of the Code. The employer should therefore collate and compile all supporting evidence and documents to show that, even though it had taken all reasonable steps to minimise the possibility of carrying out a retrenchment exercise, it was unavoidable. It is becoming increasingly important for employers to be able to demonstrate what cost-cutting measures (employment-related or otherwise) were taken prior to implementing a RIF.

The employer should also set the stage for retrenchment to the employees well in advance of serving notices of termination. The employees should be briefed on the reasons giving rise to the redundancy of their positions. The employees should be briefed in a face-to-face meeting, and the employer should then follow up in writing. The dissemination of information to the employees will help the employer fulfil certain recommendations set out in the Code, but what is important overall is that the employer be seen as being transparent and fair.

Conclusion

The full extent of the impact of the global economic downturn on the employment landscape in Malaysia remains to be seen. The Malaysian Minister of Human Resources' recent comments that employers may, subject to the law, implement the various cost-cutting measures in preference to RIFs, are encouraging to employers.

While it is possible that the economic downturn could result in the Industrial Court taking a more pro-employer stance in the long term, employers should never assume this to be the case. Employers should therefore continue to manage employment cost-related measures as carefully as possible.

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News from Mexico

National Program to Foster Family Finances and Employment for a Better Living

Due to the impact of the global financial crisis on Mexican companies, the Federal Government announced in January of 2009, a National Program to Foster Family Finances and Employment for a Better Living (the "Program"), that is designed to protect the employment and income of Mexican families. The Program provides support to employment and employees and it includes five main components:

1. Extension of the Temporary Employment Program

The Temporary Employment Program will grant income subsidies to the

segments of the population affected by the decreased demand for work and those facing a financial emergency, in the form of temporary aid. The Program will favor families located in low-income areas, carrying out projects developed by the Departments of Social Development, the Environment, and Communications for the benefit of families or communities.

The Program is currently being implemented in areas with up to 15,000 residents and its beneficiaries will receive for up to four months, 99 percent of the daily minimum wage in effect in the geographic area where the project in which they participate is located. The budget for this extension of the Program has been increased 40 percent, i.e., up to 2.2 billion pesos, in order to increase the number of potential beneficiaries to 250,000 workers and extend the term from four to six months. These subsidies may also be applied in urban areas.

2. Program to Maintain Employment

The Federal Government will also provide a determined amount to the employees of companies, that as a result of the global crisis, are in a technical suspension of activities ("*paro técnico*"), in order to avoid layoffs.

Initially, this aid was intended only for companies in the automotive, automotive parts and electronic industries which are mainly engaged in exporting. The Federal Government, however, has broadened the scope of the Program to include any company in the same situation. This Program commenced in February of 2009 and it will continue for a period of six months. In this Program, the Federal Government will assign 20 billion pesos to preserve approximately 500,000 jobs.

The Federal Conciliation and Arbitration Board will quickly review requests for agreements between the companies and their employees and/or unions to start a technical suspension of activities or the temporary modification of employment conditions. The "*paro técnico*" is not addressed under the Mexican Federal Labor Law. In practice, however, it is the temporary suspension of collective employment relationships that may be reached through an agreement with the labor union or with the employees if no labor union exists.

If the labor union disagrees with the suspension, the company will be required to file a Collective Conflict of Economic Nature. This report is filed to support the fact that further production is excessive relative to the economic conditions and market demand, or that the company is temporarily unable to pay, which may lead to shutting down the company.

In this case, the Board is obligated to conduct a hearing within five days and appoint three experts who will corroborate the company's economic conditions and confirm whether or not the temporary suspension of the employment relationships is justified. The parties may offer corresponding evidence and the Board will decide if the temporary suspension of employment should be granted.

Likewise, there are other measures to mitigate unemployment, i.e., the temporary suspension of certain production lines or specific activities of the company, a rotation of employees so that all participate in the suspension of work, and the temporary or definite modification of benefits and salaries, as long as they are not under the limits provided by the Federal Labor Law.

3. Withdrawals from the Individual Accounts in Case of Unemployment

Section II of Article 191 of the Social Security Law currently states that unemployed individuals who have not withdrawn funds from their individual account during the past five years, are entitled to make withdrawls from their retirement sub-account, dismissal in advanced age and old age, an amount equivalent to 75 days of their base salary used to determine the payment of social security contributions during the previous 250 weeks or 10 percent of the funds of their own sub-account, whichever is lower. The aforementioned amount is available as of the 46th calendar day, from the date of the employee's dismissal. For such purposes it is necessary to file the corresponding request.

Pursuant to the Program, the President will send to Congress a bill reducing from five years to three, the term for the unemployment benefits mentioned above and increasing the amounts allowing the withdrawal of an average of 58 percent, in accordance with the terms to be provided in the amendments to article 191 of the Social Security Law.

4. Extension of the Term to Maintain Rights Under Illness and Maternity Insurance

In terms of the Program and Rule No. AS.1.HCT.140109/2.P. DG. issued by the Technical Board of the IMSS, the period to maintain rights under the Illness and Maternity Insurance is extended from eight weeks to six months. This measure is effective January 1 to June 30, 2009.

This will allow the unemployed and their beneficiaries to continue receiving from the IMSS the medical, surgical, pharmaceutical and hospital benefits granted under the Illness and Maternity Insurance, as long as the employee has paid social insurance contributions for at least eight weeks at the time his or her registration with the IMSS is canceled.

5. Strengthening of the National Employment Service

Finally, the Program includes a measure to strengthen the National Employment Service enlarging its option portfolio to support productive projects, training scholarships, services to link the unemployed with jobs available, as well as other efforts to

support labor flexibility. A budget of approximately 1.25 billion pesos will be allocated for this purpose.

Conclusion

There are a number of alternatives to dismissing employees. The number of working hours may be reduced with the corresponding salary reduction and those hours can be used to train employees so the company will be prepared to respond once the market conditions improve.

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News from Philippines

Philippine Department of Labor and Employment promulgates guidelines on the adoption of flexible work arrangements

On January 29, 2009, the Philippine Department of Labor and Employment ("DOLE") issued Department Advisory No. 2, series of 2009 ("Advisory No. 2-09"). Advisory No. 2-09 sets forth guidelines in the implementation of various flexible work arrangements. The advisory helps employers cope with the current global financial crisis and provides alternatives to employment termination or the total closure of a business establishment.

Flexible Work Arrangements

Advisory No. 2-09 refers to flexible work arrangements as "alternative arrangements or schedules other than the traditional or standard work hours, workdays and workweek." The following are among the flexible work arrangements mentioned by the DOLE:

1. Compressed Workweek: In a compressed workweek scheme, the normal workweek is reduced to less than six days, but the total work hours per week remain at 48 hours. The normal workday is increased to more than 8 hours but not exceeding 12 hours, without corresponding overtime premium.

Department Advisory No. 02, series of 2004 ("Advisory No. 2-04") sets forth the following conditions of a valid compressed workweek scheme:

a. The compressed workweek scheme is undertaken as a result of an express and voluntary agreement of the majority of the covered employees or their duly authorized representatives. This agreement may be expressed through collective bargaining or other legitimate workplace mechanisms of participation, such as labor management councils, employee assemblies, or referenda.

b. In business establishments using substances, chemicals and processes, or operating under conditions where there are airborne contaminants, human carcinogens or noise, the prolonged exposure to which may pose hazards to the employees' health and safety, there must be a certification from an accredited health and safety organization or practitioner or from the business establishment's safety committee, that work beyond eight hours is within threshold limits or tolerable levels of exposure as set forth in the Occupational Safety and Health Standards ("OSHS").

c. The employer notifies the field office of the DOLE regional office having jurisdiction over the workplace of the implementation of the compressed workweek scheme.

Taking Advisory No. 2-04 in conjunction with Advisory No. 2-09, the DOLE notification should be done prior to the implementation of the compressed workweek scheme.

2. Reduction of Workdays: The reduction of normal workdays per week should not last for more than six months. In this regard, the Philippine Supreme Court has held that an employee whose workdays have been reduced for more than six months may be deemed "constructively dismissed or retrenched from employment." *(International Hardware, Inc. vs. NLRC, G.R. No. 80770, 10 August 1989.)*

3. Rotation of Workers: Employees may be rotated or alternately provided work within the workweek.

4. Forced Leave: During forced leaves, the employees are required to go on leave for several days or weeks utilizing their leave credits (if there are any).

5. Broken-Time Schedule: Article 84 of the Labor Code of the Philippines provides that hours worked shall include "all time during which an employee is required to be on duty or to be at prescribed workplace." If a continuous schedule may result in inefficient operations, the employer and employee may agree on a broken-time schedule. In such a case, the schedule is not continuous but the work hours within the day or week remain. A typical example is the work schedule of some waiters or restaurant workers, who are required to work only during peak hours (e.g., 10 am to 2 pm and 5 pm to 9 pm).

6. Flexi-Holidays Schedule: Advisory No. 2-09 states that flexi-holidays schedule "refers to one where the employees agree to avail the holidays on some other days." While the DOLE seems to allow offsetting of holidays so that the employer may avoid payment of holiday premium pay, it also states that there should be "no diminution of existing benefits as a result of such arrangement." The DOLE may need to further clarify the implementation of the flexi-holidays schedule, as requiring employees to work on holidays without premium pay (subject only to offsetting, where the employee is given another day to enjoy the holiday) may result in diminution of benefits in the form of lost premium pay.

The above enumeration is not exclusive, as the DOLE encourages the employers and the employees to explore other alternative schemes.

Requirements

Advisory No. 2-09 provides that the flexible work arrangements are "on voluntary basis and conditions mutually acceptable to both the employer and the employees." Unlike in the case of a compressed workweek scheme where Advisory No. 2-04 expressly provides the mechanism for reaching an agreement (i.e., agreement of majority of the covered employees or their duly authorized representatives, which may be expressed through collective bargaining or other legitimate workplace mechanisms), the DOLE does not provide details on how to reach an agreement for the implementation of the other flexible work arrangements. It is not clear from Advisory No. 2-09 whether the individual consent of the employees must be obtained, or like in the case of a compressed workweek scheme under Advisory No. 2-04, the agreement of a majority of the employees would suffice.

Advisory No. 2-09 requires the employer to notify the appropriate DOLE Regional Office before the implementation of any of the above-mentioned flexible work arrangements.

Advisory No. 2-09 states that the effectivity and implementation of the flexible work arrangements shall be temporary in nature.

Administration

Advisory No. 2-09 states that the parties to the flexible work arrangements shall be primarily responsible for its administration. In case of differences of interpretation, the following guidelines shall be observed:

a. The differences shall be treated as grievances under the applicable grievance mechanism of the company.

b. If there is no grievance mechanism or if this mechanism is inadequate, the grievance shall be referred to the Regional Office which has jurisdiction over the workplace for appropriate conciliation.

c. To facilitate the resolution of grievances, employers are required to keep and maintain, as part of their records, the documentary requirements proving that the flexible work arrangement was voluntarily adopted.

Conclusion

Advisory No. 2-09 is a welcome initiative on the part of the Philippine government. It should encourage employers to consider flexible work arrangements before terminating employees or closing shop. However, the DOLE may need to provide more specific guidelines to clarify some of the vague aspects of the advisory, particularly on the crucial aspect of reaching a mutually acceptable arrangement between employer and employee.

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Group dismissals in Poland – a general overview

Collective redundancies (also called group dismissals or lay-offs) are recognized as one of the most sensitive issues in the current economic situation for entrepreneurs, requiring the most flexible employment solutions to be applied.

Certain companies, due to the restructuring of their business activities or cost-cutting, have already developed new employment strategies such as the reduction of working time followed by the reduction of salaries (change of the employees' work terms and conditions). Those actions, however, do not always reflect the real needs of the companies, which concentrate on restructuring of their global corporate and business structure.

For those employers, the Polish law has a solution defined in the Law dated March 13, 2003 on specific rules for termination of employees due to reasons not attributable to the employees (O.J No 90, position 844, as amended) (the "Law on Group Dismissals").

Definition

The term "group dismissal" is not defined in the Polish legislation, but it is commonly used to indicate the dismissal of employees due to reasons not attributable to them. It should be noted that the catalogue of reasons qualifying a particular termination of an employment agreement as a "group dismissal" is very broad and encompasses, in principle, all situations in which the employer initiates such termination, and the reasons for such employer's action are not connected with employees. Such reasons may be, for example, organizational or technological changes, restructuring of employment, etc.

A group dismissal imposes on the employer a number of formal and financial obligations which are presented below. Please note that as a general rule, the Law on Group Dismissals applies to those employers who have more than 20 employees. It can find its partial application to those who have less than 20 employees but who terminate their employment relationships solely for reasons not attributed to the employees.

Severance Payment

Collective redundancies in the meaning of Law in Group Dismissals take place if an employer who employs at least 20 persons terminates employment contracts within a period not exceeding 30 days, with:

(i) 10 or more employees, if the employer employs less than 100 employees; or

(ii) 10 percent of employees, if the employer employs 100 or more but less than 300 employees; or

(iii) 30 employees, if the employer employs 300 or more employees.

The dismissal may be achieved upon a notice of termination or upon the mutual consent of the parties (agreement on termination of the employment contract). It must be noted that the number of employees dismissed upon the mutual consent of the parties is added to the total number of dismissed employees (i.e., 30) if, within a 30-day period, at least five employees are dismissed by a mutual consent.

An employee dismissed under a group dismissal is entitled to a severance payment. The right to such payment arises upon the termination of the employment contract. The amount of such payment depends on the length of employment of the employee at a given workplace, and equals from one up to three monthly remunerations of the employee.

The severance payment may not exceed 15 times the statutory minimum salary valid in the year of termination (currently PLN 19,140 – approx EUR 4,055). It should also be noted that if an employee is dismissed solely for reasons not attributable to the employee, such employee is also entitled to a severance payment, even if the number of employees dismissed for such reasons does not exceed the number indicated above ("individual dismissal").

Procedure

The group dismissal procedure may be divided into five steps:

1. The Employer Notifies All the Company's Trade Unions About

the Planned Group Dismissal

Such notification must include the following information: (i) the reasons for the intended group dismissal; (ii) the total number of employees and the professional groups to which they belong; (iii) the professional groups to which employees covered by the intended group dismissal belong; (iv) the period within which such dismissal is to take place; (v) the proposed criteria for the selection of employees to be dismissed; (vi) the sequence of dismissing employees; (vii) the proposal for resolving employee issues related to the intended group dismissal; and (viii) the manner of determining the value of cash disbursements for the dismissed employees.

If no trade unions operate in the company, the employer initiates the consultation procedure with the representatives of the employees, usually elected for this purpose.

2. The Employer Notifies a Provincial Labor Office (*powiatowy urzad pracy*) About the Planned Group Dismissal

Such notification must include the same information as presented in point 1 above, except for information regarding the manner of determination of the value of cash disbursements to be paid to the dismissed employees.

3. The Employer and the Trade Unions Start Consultations in Order to Reach an Agreement on the Group Dismissal or Issue Collective Redundancies Bylaws

Such agreement specifies the procedures for issues regarding employees covered by the intended group dismissal, as well as the obligations of the employer, within the scope necessary to resolve other employee issues related to the intended group dismissal. Such agreement must be reached within a 20-day period from the notification of the trade unions as referred to in point 1 above.

If it turns out to be impossible to discuss the content of the agreement with all the company's trade unions, the employer must negotiate the content of the agreement with those trade unions which are representative according to the provisions of the Labor Code. If, however, it turns out that it is impossible to enter into an agreement with the representative trade union(s), the employer may determine the procedure for group dismissal on its own. The employer is obliged, however, to take into account, to the extent possible, the proposals presented by the company trade unions during the consultations. In such situation, the employer is issuing the collective redundancies bylaws.

The collective redundancies bylaws are also issued if no trade unions operate in the company and if the employees' representatives are consulted as regards redundancies.

4. The Employer Notifies the Provincial Labor Office for the Second Time

This notification must include the following information: (i) determinations made with regard to the group dismissal, including the total number of employees and the number of employees to be dismissed; (ii) the reasons for their dismissal; (iii) the period within which such dismissal is to take place; and (iv) the conducted consultations of the intended group dismissal with the company trade unions. A copy of such notification must also be delivered to the company's trade unions.

5. The Employer Starts to Dismiss the Employees

A notice of termination must be given to an employee being dismissed after the second notification of the provincial labor office (as referred to in point 4 above), at the earliest. Moreover, termination of the employment contract (upon a notice thereof or mutual consent) must also occur after a 30-day period from the second notification of the provincial labor office, at the earliest.

It should be pointed out that the procedure presented above does not apply to so-called "individual dismissals" (which we mention above). Such dismissal requires the procedure applicable to "normal" dismissals, which is provided by the Labor Code. Thus, an individual dismissal, in order to be achieved upon a notice of termination, must be consulted with the trade unions representing such employee, i.e., the employer's intention to terminate the employment requires such consultation. Consultation with the trade unions is not required if the employment is terminated upon mutual consent.

Protection of Special Groups of Employees

With respect to the following groups of employees, an employer may not terminate their employment agreements and may only serve a notice of termination of their work terms and conditions:

- Employees who have less than two years before retirement age, provided their employment record allows them to retire upon reaching the prescribed retirement age;
- Pregnant employees and those on maternity leave;
- Members of trade union management boards;
- Members of a company's trade unions authorized to represent the trade unions in relations with the employer;
- Social labor inspectors; or
- Employees enrolled in active, basic or reserve military service, or optional training.

Sanctions

Termination of employment agreements made without or in violation of the above-mentioned procedure makes said termination illegal.

If an employee considers his or her termination to be unfair or illegal, he or she has the right to appeal it to a labor court within seven days of the receipt of such a notice. If the labor

court finds that a notice of termination is illegal or unfair, it may, at the employee's request, rule that: (i) the notice is ineffective; (ii) the employee must be re-employed in the event an employment agreement is terminated; or (iii) the employee must be paid compensation. The labor court may, regardless of the employee's request, order that the employee be re-employed or that re-employment is unreasonable or impossible and award only compensation. As a rule, such compensation may be equal to the remuneration for the period of two weeks to three months, but not less than the remuneration due for the notice period. This rule was, however, questioned by the Polish Constitutional Tribunal (ruling SK18/05 issued on November 27, 2007) allowing the employee to claim compensation for any damages suffered by the employee due to a violation of the termination procedure.

For illegal termination of employment agreements, an employer may be fined up to PLN 30.000. Employees cannot legally waive their right to appeal in the event that the termination of the employment agreements is illegal.

As a rule, an employer should re-employ the employee whose position has been made redundant if it decides to employ personnel in the same occupational group. This obligation exists if the employee informs the employer that he or she is willing to return to work. The employee may apply in every available form, even verbally, within one year from the time of termination of the employment agreement.

The employer should re-employ the employee within 12 months from the date of termination of an employment agreement due to collective redundancies.

Conclusion

Each employer who intends to terminate a significant number of employment relationships within a short period of time should take into consideration the provisions of the Law on Group Dismissals. Should such provisions be applied, the employer is obliged to initiate the consultation procedures either with trade unions operating within the company or employees' representatives. The consultation process is to be performed within 20 days from the time the employer announces its intent to introduce group dismissals to the trade unions/employees' representatives as well as to the local labor office.

If the parties to the consultation process reach an agreement, a collective redundancies agreement is to be signed (or the collective redundancies bylaws are to be introduced). It also requires a second notification to the labor office. In such circumstances, the employer may start serving the termination notices or sign the termination agreement but the employment relationships may be terminated only after the expiry of the 30 days from the second notification to the labor office. An employee may demand re-employment or compensation if there is a violation of the procedure described above.

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News from Russia

Various ways for work modification in Russia

Introduction

The current global economic downturn forces many companies to review personnel costs and improve existing staff performance. However, when making changes, employers must follow proper procedures to avoid possible collective and individual disputes. Russian labor law offers various ways for work modification but their flexibility and ease of implementation are questionable.

Labor law in Russia is a specific branch of law, where fundamental principles of civil and commercial law do not apply. Russian labor regulations are relatively rigid and there are many principles and rules, which are tempered by social trends. Litigation statistics (individual

labor disputes) show the tendency of the court to rule in favor of the employee.

The Labour Code

Russian Labor Code (hereinafter, "the Labor Code") is the major statutory enactment which regulates employment matters. The Labor Code provides companies with several alternatives to help them minimize personnel costs. During the present trend of mass cost reductions, employers primarily freeze different benefits such as bonuses, health care compensation, and meal and mobile telephone allowances which have been provided to employees by verbal arrangement. Basically, such curtailments do not cause negative consequences between the employer and employee. Furthermore, the Labor Code provides the opportunity to change labor provisions with or without an employee's written consent. Needless to say, companies prefer to modify the work environment unilaterally because in most cases such modifications result in higher labor capacity for less money.

Russian companies differ in the fact that many employees were hired "in store" and the current economic climate has provoked the reversed situation where employers prefer to cut manpower and, in turn, overload the remaining human resources. While the Labor Code provides for staff redundancy, the duration, cost and difficulty of this alternative forces Russian employers to find other ways of dismissal such as mutual agreement between the employer and employee.

Modification of Labor Conditions

The financial instability of many companies may result in mass dismissals and violation of employees' labor rights, so the Russian state authorities have responded accordingly. The Russian Government has increased the unemployment benefit and reduced the quota for the retention of foreign specialists. As of January 2, 2009, all employers must notify their district employment center on short workweek conversion.

Essential amendments made to the Russian Labor Code in 2006 provide employers the opportunity to change the work environment at their discretion. This option has become very useful in the current market conditions. In general, modification of labor conditions at an employer's discretion may be done if the organizational or technical work environment is changed. Currently, there is no available court practice explaining whether the economic downturn applies. Therefore, there is always risk that any modifications made can be deemed as unlawful by the court.

A company can implement new labor conditions with only two months' notification to the respective employees. By doing so, an employer can change everything for an indefinite period of time, but the labor function of each employee shall remain the same. However, a reduction of working time can be introduced only to avoid mass dismissals, and only for a period of up to six months. Such additional restrictions directly affect employees' salary which varies based upon the quantity of hours worked.

Pursuant to the Labor Code, an employer shall request the trade union's opinion about reducing the working time. Companies need to pay special attention to this statutory procedure because disregarding it may result in collective and individual labor disputes. The modification of working conditions can result in claims from employees for reinstatement of work with compensation, moral damages, and payment for forced absence. An employee can decline working in the new environment, in that case an employer shall offer another vacant position or has the right to dismiss him or her in the absence thereof.

Taking into account that a shortened work week can be implemented with only two months' prior notification, several manufacturing companies will implement periodic idle time. Shutdown is considered as an emergency measure because it paralyzes production and the employer is obligated to pay employees at least two-thirds the amount of their average salary. The main risk of this alternative is that the establishment of weekly idle time may be considered a reduction of working time and subject the company to penalties for violation of labor laws. As a result of this, the employees may make a claim to the court about the validity of idle time for further payment of the remaining one-third of the salary lost due to the shutdown. It is recommended, therefore, that companies properly document each implementation of idle time. Moreover, shutdown in a company shall be uniform. In other words, three shifts of employees in one shop shall work an equal amount of time during the shutdown. This is important to avoid discrimination claims.

Unpaid Leave

The instability of today's workplaces has resulted in greater employee acceptance of unpaid leave versus losing their jobs. The Labor Code does not provide for compulsory leave at an employer's discretion and the option essentially derogates the employees' rights. Unpaid leave which continues for more than 14 calendar days is not accounted for in total duration of the work year, for which an employee can take vacation. Moreover, unpaid vacations affect the average salary of the employee, which is used for the calculation of sick-leave allowance and other forms of compensation.

Redundancy

The Labor Code does allow for the redundancy of personnel, and that measure is extensively used in Russia. However, the reduction procedure has many pitfalls. There are two types of redundancy in Russia – reduction of a position in the staff schedule and reduction of the number of employees working in one position. In the latter situation, the employer shall choose the employees that are to be dismissed and

the employees who have a priority right to continue working. Such selection is based upon qualification, labor capacity and the employee's individual situation (e.g. existence of dependents or invalids in family). However, the decision of the employer is always subjective in nature and employees often make claims to the court based on the validity of the decision and they can request reinstatement of employment.

An employer must notify employees, trade unions and the local employment centre of a prospective staff redundancy not less than two months prior to the dismissal. After the redundancy, the employer shall prepare a list of any available vacancies that can be offered to the dismissed employee for future work in the company. It is important to mention that the employer must offer all vacancies that the employees can occupy, taking into account their health status and education. Failure to comply with this requirement may result in an employee's claim for illegal dismissal. Staff redundancy is an expensive procedure for any employer. In addition to a one month salary allowance, the dismissed employees can require the company to provide them with their average salary for up to two months while they conduct a job search.

Conclusion

In general, staff redundancy is a difficult type of dismissal for employees. Taking into account that reduction of personnel can be subjective in nature, employees do not want to be on a "blind side." In that case, termination of the employment agreement based on mutual consent of an employer and an employee can be the best solution for both parties if they come to terms regarding a severance payment. Such agreement essentially minimizes labor disputes, does not engage third parties (e.g. employment centre, labor inspection, public prosecution), is more comfortable for employees and the formalization of the human resource documents is easier.

Labor conflicts not only stress the company's management but also cause a chain reaction of other claims for monetary compensations. It is important to note that successful negotiations with employees are more likely if the company has a strong legal position and a solid business reputation.

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News from Taiwan

Labor-related cost-cutting measures in Taiwan

Taiwan's labor-related laws and regulations have traditionally been protective of employees. The law imposes many stringent requirements on employers, including strict limits on an employer's flexibility to reduce its labor force, even when business reasons provide a legal basis for doing so.

Today, however, employers are under increasing pressure to implement labor-related cost-cutting measures. A recent, privately conducted poll indicated that Taiwan's unemployment rate may have reached a staggering 9.47 percent. According to the same poll, involuntary unemployment accounts for approximately 50 percent of the unemployment rate. Evidently, as Taiwan experiences a sharp downturn in its economy, companies ranging from locally owned businesses to branch offices of multinationals have adopted various forms of viable measures in their attempt to reduce labor-related costs. This article discusses several options employers are using to cut labor costs.

Unpaid Leave

Unpaid leave has become one of the most popular cost-cutting measures for Taiwanese employers in recent months. It enables employers to cut costs and retain a degree of flexibility in the labor force while minimizing their risk of exposure to wrongful termination suits.

Article 21(1) of the Taiwan Labor

Standards Law ("LSL") provides that an employee's compensation is the result of a mutual agreement (whether oral or express) between the employee and the employer. By requiring an employee to take unpaid leave, however, the employer unilaterally modifies the employee's salary and work hours. Accordingly, employers must seek the prior consent of the affected employees in order to lawfully require them to take unpaid leave. Furthermore, salary reductions usually affect other payments made to or on behalf of the employees (e.g., pension contributions as well as health and labor insurances). While not mandated by law, employers typically include explanatory clauses regarding adjustments made to such payments as a result of salary changes.

The issue of unpaid leave has presented a dilemma for the Council of Labor Affairs of the Executive Yuan ("CLA"), the competent labor authority in Taiwan. The CLA has recently enacted several rulings to address the rising number of companies requiring their employees to go on unpaid leave. Although unpaid leave adversely affects the employee, it is understandably regarded as a viable alternative to lay off or outright reduction in salary, since unpaid leave is considered temporary and has the effect of directly reducing the employers' labor and operating costs.

In an effort to balance the interests of both employers and their employees, the CLA initially permitted companies to reduce the salaries of employees on unpaid leave to a level below the statutory minimum wage, citing the "urgent and temporary nature" of these reductions. This initial ruling has been met with great resistance from the public and contradicts several of the CLA's previous rulings, all of which proscribe salary reductions below the statutory minimum.

Within two weeks of its initial efforts to facilitate employer-required unpaid leave, the CLA came out with a revised ruling prohibiting salary reductions below the statutory minimum wage, which is currently set at NTD 17,280 per month. Apart from the public outcry, concern over employer abuse is suspected as one of the primary reasons the CLA has revised its initial ruling on unpaid leave. Under the initial ruling, employers could, on paper, maintain a reserve of employees without paying any compensation. The CLA subsequently issued a series of new rulings and established a monitoring mechanism which requires employers to notify both the CLA and the local labor bureau of the unpaid leave. The CLA, together with the local labor bureau, now regularly monitors employer use of unpaid leave.

Although the CLA has not issued a standard notification form, employers are generally required to submit information relating to (i) the number and/or percentage of employees affected; (ii) whether any employee will receive less than the statutory minimum monthly salary; (iii) any agreement reached regarding pension contribution or labor/health insurance, as these contributions are affected by the pay scale of the affected employees; and (iv) the anticipated effective length of such unpaid leave.

Employers who require their employees to use unpaid leave to reduce labor costs must be mindful of the need to obtain the latter's consent. If an employer unilaterally changes work hours or workdays, thereby reducing the employees' salaries, the employer may be subject to an administrative fine of between NTD 6,000 and 60,000 as well as payment of the salary reductions. Additionally, the affected employees may terminate their employment contracts pursuant to Article 14(1)(6) of the LSL (employer's breach of the employment contract), and demand severance payment.

Factory/Facility Closure

As an alternative to unpaid leave, some employers in Taiwan have resorted to other cost-saving measures that have a similar adverse effect on the employees, such as a temporary factory or facility closure. If, during such a closure, the employees are required to take leave, then the rules and regulations for unpaid leave apply as well. In other words, employee consent is required whenever employers reduce employee salaries, including as a result of a temporary factory or facility closure. The same administrative penalty, payments, and consequences apply to employers who use factory or facility closures to reduce labor costs.

Reduction in or Removal of Non-Statutory Employee Benefits

Employers intending to reduce or remove employee benefits must also comply with the relevant statutory and contractual requirements, even for benefits not required by law. Employers who hire more than thirty employees and are subject to the LSL must establish a set of published rules, called the Work Rules, which are considered a part of the employment contract. The Work Rules and any subsequent revisions thereto are reported to and approved by the local competent labor authority. Although changes to the Work Rules generally require the approval of the competent authority, the amended Work Rules may be enforceable when announced to the employees without approval from the competent authority, provided that the changes are reasonable and do not adversely affect the rights of the employees.

When an employer intends to reduce or remove a non-statutory employee benefit expressly provided for in the Work Rules, the employer must obtain approval from the local labor bureau and announce the proposed change to the employees.

In actual practice, when reviewing the amended Work Rules, the local labor bureau will typically require the employer to obtain employee consent or by consensus reached in the employer-labor negotiation sessions for any amended provisions that the bureau deems unfavorable to the employees.

Generally, the local labor bureau will approve amendments only if the employer submits proof of employee consent.

In the past, obtaining the requisite consent from employees has been both time-consuming and impractical. More recently, however, employees appear more willing to consent to changes that reduce or remove non-statutory benefits, viewing it as a better alternative than unpaid leave or reduction in base salary.

Reduction in Salary

Although a direct cost-cutting option, formal salary reductions are traditionally more difficult to negotiate with employees than other measures. An outright reduction in salary generally requires the consent of the affected employees pursuant to Article 21(1) of the LSL, and the reduced salary may not be less than the statutory minimum wage for a permanent employee. Employees are typically more likely to withhold their consent for the salary reductions, since reductions are perceived to be somewhat "permanent" and the employees are still required to do the same work.

While the majority of courts, as well as the competent authority, require prior employee consent for salary reductions, two district courts have held that a temporary reduction in salary through an internal announcement (in lieu of the employees' consent) is permitted on the ground that such change in an employment term falls within the scope of reasonable change of the Work Rules.

It should be carefully noted, however, that the district courts' rulings are extremely limited and apply only to circumstances where the need for salary reduction is caused by *force majeure* or circumstances entirely outside the employer's control, such as the SARS epidemic. Since the two rulings have no binding authority, companies should be extremely careful in relying on them as the basis for implementing unilateral salary reductions.

Layoffs/Redundancies

Termination of employment at will is not recognized in Taiwan. An employee may be made redundant with advance notice (or payment in lieu thereof) and severance payment only if one of the following statutory grounds for termination under Article 11 of the LSL has been met:

(i) The Company's business is suspended or assigned;

(ii) The Company suffers from an operating loss or business contraction;

(iii) *Force majeure* necessitates suspension of the job duties for more than one month;

(iv) A change in business nature requires a reduction of employees and the particular employees cannot be assigned to another suitable position; or

(v) The employee cannot satisfactorily perform the duties required for the position held.

Business contraction has recently become an oft-used legal ground for redundancies. However, according to court precedents, the employer must provide evidence showing that it has sustained such business contraction over a period of time, the required length of which depends on, among other factors, the severity of the contraction. Furthermore, in a wrongful termination suit filed by an employee whose position is made redundant, the employer often has the burden of showing that layoff is the only option and that the employer has considered all other feasible alternatives before rendering the employee's position redundant. Accordingly, in order to meet this evidentiary burden, employers often first adopt measures with less adverse impact on the employees, such as unpaid leave or reduction in salary, before implementing employee layoffs.

Moreover, given the degree of difficulty for an employer to prevail in a wrongful termination suit, employers in Taiwan are often advised to settle with the employees, paying a lump sum on top of the statutory severance in exchange for the employees' release of claims. However, the employers are advised to build a strong case for termination, including collecting the necessary data and utilizing other less adverse tactics prior to declaring an employee's position redundant.

Mass Severance

In a scenario where the employer is required to make the positions of a large number of employees redundant, the employer must be aware of the additional requirements imposed by the Protect Law of Mass Severance ("MSL"). The MSL imposes a number of time-consuming reporting and collective consultation requirements that are triggered when the number or percentage of redundancies (including workers subject to fixed-term labor contracts pursuant to a 2008 Amendment) reaches the applicable threshold. The MSL will be triggered in the following instances:

1. "Where a site in an enterprise of fewer than thirty (30) employees intends to lay off over ten (10) employees within sixty (60) days;

2. Where a site in an enterprise of more than thirty (30) employees but fewer than two hundred (200) employees intends to lay off over twenty (20) employees within one day or over one-third (1/3) of the total number of employees within sixty (60) days;

3. Where a site in an enterprise of more than two hundred (200) but fewer than five hundred (500) employees intends to lay off more than one-fourth (1/4) of the total number of its employees within sixty (60) days, or more than fifty (50) employees within one day; or

4. Where a site in an enterprise of

more than five hundred (500) employees intends to lay off one-fifth (1/5) of the total number of its employees within sixty (60) days."

If one of the above thresholds is met and the MSL is triggered, the employer will be required to file a Mass Severance Plan ("MSP") 60 days prior to the proposed termination date and enter into negotiations with the employees at large. If the employer and/or the employees cannot reach an agreement, the competent labor authority will request the employees and the employer to form a Negotiation Committee. In addition to negotiating the terms of the MSP, the Negotiation Committee will also be empowered to propose alternatives. The final agreement reached by the Negotiation Committee is binding on individual employees and will be submitted to the court with proper jurisdiction for review and approval.

A company may be fined an amount of not less than NTD 100,000 but not more than NTD 500,000 for failing to file the MSP pursuant to Article 17 of the MSL. The fines will be imposed consecutively on a daily basis until submission is made. Additional fines are imposed for violation of the MSL for, among other things, the employer's failure or refusal to enter into negotiations or arbitrarily reassignment of employees.

Once the MSL is triggered, the process of redundancy is inevitably prolonged since employers are not allowed to make payment in lieu of the 60 days' notice and consultation period. In order to avoid triggering the MSL, which prolongs the layoff process and incurs additional expenses, employers contemplating labor reductions in Taiwan should be aware of the relevant MSL thresholds and should carefully plan their layoff schedules, dividing the employees who will be made redundant into groups to be terminated at different stages. Alternatively, employers may be advised to enter into mutual termination agreements with the employees in order to bypass the MSL.

Conclusion

In order to effectively reduce labor-related costs in a timely manner while complying with the rigid requirements of Taiwan's labor laws, employers in Taiwan are advised to plan carefully and ensure that their plans are in compliance with labor laws before making any moves that will adversely affect employee salaries or benefits.

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News from the United Kingdom

Redundancy in the UK – the alternatives

Many, perhaps most, UK employers are actively and urgently seeking ways of reducing employment costs without, before, or in addition to dismissing employees for redundancy.

In the past, redundancy exercises routinely and, in accordance with the law, entailed considering, and often consulting on, alternatives to redundancy before making employees redundant (see "Collective Redundancies: Consultation"). In the current climate, such consideration is no longer merely procedural or theoretical.

In many cases, employers' redundancy policies or collective bargaining agreements set out measures which the employer must consider before implementing compulsory redundancies. If these are not to be followed, employers may need to renegotiate terms with employees and/or their representatives.

In this article, we look at some of the options open to UK employers, the legal constraints, and some of the immediate and longer-term risks and consequences. Some of the options can be adopted relatively simply, without

changing employment terms and conditions. Where terms and conditions must be changed, the process becomes more difficult.

The relatively good news is that many employees and their representatives have proved willing to accept changes in fundamental terms and conditions, such as pay, where this is seen as a genuine alternative to their own or others' redundancy. Such acquiescence, however, may be short-lived: we can expect a raft of claims in the following months and years as a consequence of emergency measures introduced by employers now without due regard to the legal requirements.

Cost-cutting Measures Which Do Not Involve Changing Employees' Terms and Conditions

Reducing the Number of Agency Workers

At present, or until the UK implementation of the EU Agency Workers Directive, which may happen in late 2009, there is no specific legislation which protects the rights of agency workers. Agency workers are not normally entitled to statutory or other redundancy payment and may not make unfair dismissal claims against the end-user client unless they successfully maintain that they are really employees of the end user. Although current case law indicates that such claims may be difficult for agency workers to win where there is a genuine contract between the end user and the supplier of workers, we can expect increasing numbers of such claims, particularly where workers have become embedded in the business. In addition, agency workers can, and do, bring general discrimination claims against end users. Where workers are employed by the supplier, they may be able to claim unfair dismissal or redundancy payment against the supplier.

A key consideration will be the terms of agreement with the agency or business which provides the workers. These may contain onerous notice and/or penalty clauses as well as express provisions on the termination of workers.

Nonrenewal of Fixed-term Contracts

Fixed-term workers have the same minimum rights as permanent workers. They also have special protection under the Fixed-term Employees Regulations 2002. These Regulations cover all employees with a contract of employment which is due to end when a specified date is reached, or when a specified event does or does not happen, or when a specified task has been completed. The Regulations provide that fixed-term employees should not be treated less favourably than comparable permanent employees on the ground that they are fixed-term employees unless there is an objective justification.

Nonrenewal of a fixed-term contract amounts in law to a dismissal. If the dismissal is for redundancy, then a consultation process must take place, as in the case with a permanent employee. Where the employee has continuous employment of two years or more, whether under one contract or successive ones, he or she will be entitled to statutory redundancy payment.

Fixed-term employees should not be selected for redundancy purely because they are on fixed-term contracts unless there is an objective justification. It may be justified to dismiss for redundancy where, for example, employees have been brought in specifically to complete particular tasks or to cover peak periods of demand.

Salary Freezes

Most contracts of employment do not include a right to a salary increase but merely, if anything, a right to a salary review. (Some contracts do, however, provide a right to an increase and a method for its calculation. In some cases, rights are incorporated via collective bargaining agreements, in which case different considerations apply.) Employers may seek to impose a salary freeze across the whole business, or only to specific parts of it. In either case, employers must carefully consider any disproportionate or discriminatory impact the move may have on particular groups of employees. It will be very difficult to justify exceptions within groups. In particular, where employers exercise discretion, following a pay review or otherwise, case law provides that this must not be exercised irrationally. Nor must an employer act in a way that will likely destroy the relationship of trust and confidence.

Cutting Back on Benefits and Perks

Where such benefits are completely discretionary, they can be cut. However, some benefits may be contractual or may have become contractual by reason of custom and practice. Where benefits are or have become contractual, see section on "Changing Terms and Conditions," below. Where it is not possible to withdraw a benefit, many employers re-draft the rules (which will, in most cases, be non-contractual or expressed to be subject to variation at anytime by the employer) to make economies. Such measures, in practice, are unlikely to be met with much opposition from employees or give rise to any subsequent claims.

Layoffs and Short-term Working

When employees are not provided with work by their employer and the situation is expected to be temporary, they may be regarded as being laid off. Where the layoff persists, it may amount to a dismissal. Employees may then be entitled to redundancy pay or to make an unfair dismissal claim.

Technically, a worker is deemed to have been placed on "short-term working" where he or she receives less than half a week's pay because his or her hours have been reduced.

An employer may lay off employees where there is an express contractual right to do so or where a collective agreement or national agreement which the employer follows gives the right to do so. A right to lay off may also be implied if it has been established over a

long period by custom and practice.

Employees may be laid off without pay only where there is a specific contractual term allowing the employer to do so. Employees may then be entitled to a small statutory guarantee payment from the employer, for a limited period only. This situation is fairly unusual.

If there is no contractual right to lay off without pay but the employer does so, the employee may sue for damages for breach of contract or claim unlawful deduction of wages, unfair dismissal or redundancy pay.

There may be an entitlement to statutory redundancy payment if an employee who is laid off or put on short-term working for more than four consecutive weeks, or six in any 13, gives notice and resigns. Equally, an employee may choose to accept the breach of contract and treat the contract as continuing. In the absence of an express or implied right, employer and employees may agree to a layoff, usually at low rates of pay.

Sabbaticals, Career Breaks, and Unpaid Leave

In practice, there is little difference between an agreed layoff and a sabbatical, other than in presentation. Many employers offer employees short or longer unpaid or low-paid periods off work for specific purposes, sometimes as a reward for long service. These schemes may be extended, or introduced and promoted. Any such arrangements must be carefully documented. Because absences of this kind are not covered by any statute, and there is very little case law, the status of the contract of employment may be genuinely uncertain, particularly if the absence is to be a long one.

Employer and employee should agree which terms and conditions of the contract would continue to operate during the employee's absence, considering in particular how to deal with other types of absence, (e.g., sick leave, maternity or paternity leave, and annual leave) and the pension position. In the current climate, most employees would ask for a guaranteed return to their former job or a promise that redundancy terms at least as favourable as those which obtained when they left are still available to them. These are promises which an employer might not be able to give.

Flexible Working

Although certain employees who care for children up to the age of 17 have a right to request flexible working, there is no general right for either employee or employer to have or impose different working patterns, although workforce agreements and collective agreements sometimes allow for such changes. Where an employer wishes to impose a different regime, it will normally have to seek the employees' consent or impose the new regime (see "Offer New Contracts for Old," below). Such changes may well prove to be attractive to some employees and may seem a simple solution which perhaps entails only a relaxation of normal rules. Again, however, any agreed changes must be carefully recorded and end-dates of the arrangement agreed: it may otherwise prove very difficult to require the employee to revert to normal working.

Withdrawing Offers of Employment Already Made

Where offers of employment have been made in advance, typically to groups of recruits such as trainees, they may be withdrawn if employment has not yet started. Where the offer has been accepted, the employer may still withdraw from the agreement on payment of the appropriate contractual notice period set out in the contract of employment (or, if none, the statutory notice). Case law provides that the employer need to pay no more than this minimum contractual or statutory sum. In practice, for reputational reasons, some employers choose instead to defer start dates for new joiners, on payment of a nominal sum. Such arrangements constitute a variation of contract and must be very carefully documented: if the employer does not take on a new recruit on the promised deferred date, a claim may be made for any losses suffered as a consequence, such as the chance of another job.

Voluntary Redundancy

An employer may wish to seek volunteers for redundancy, usually on favourable terms. The safest course if discrimination claims are to be avoided is to offer voluntary redundancy to all, or to all within an entire group of employees, on terms which are also as non-discriminatory as possible. Particular care must be taken in any weighing for length of service in view of possible age discrimination claims, bearing in mind, however, that such provisions may be entrenched and attractive to many employees.

If the voluntary redundancies are to be followed by compulsory redundancies, care must be taken, as the total numbers may bring the exercise within the collective consultation regime (see "Collective Redundancies: Consultation," below). Voluntary redundancies must not be effected until consultation is completed.

Changing Terms and Conditions: The Law

- Employers have no general right under UK law to change terms and conditions, however serious the circumstances or the business imperatives.

- Contracts of employment very rarely incorporate an express right to vary fundamental contractual terms and conditions such as pay or working hours.

- Where contracts of employment contain no right to vary in the manner proposed, employees' consent to the change(s) will be required. Consent may be express, or implied by acquiescence, although relying on implied consent may be risky.

- Where all or some employees do not consent, an option may be to

terminate their contracts of employment and offer new ones which incorporate new terms.

Changing Terms and Conditions: The Three Options

Impose the Changes Without Seeking Express consent

Consent will be assumed after a period where the employee remains in employment, complies with the change and does not work "under protest." Implied consent may be found relatively quickly in relation to changes that have an immediate practical effect, such as salary reduction or reduction in hours, but it may take three months or more of uncertainty and involve a considerable risk. Where changes such as in a redundancy procedure or pension arrangements have no immediate impact, it will be unsafe to assume consent until the employee is affected by the change. In the face of unilaterally imposed changes, employees may:

- Remain in employment and claim for lost wages, etc.; and
- Resign and claim constructive dismissal and associated losses.

Obtain Express Consent

This normally entails a consultation process. Consent is more likely if the employer engages in a thorough and meaningful consultation, the employer can convince the employees that it has sound reasons for effecting the change(s) and the proposed implementation is seen to be fair. Individual consultation (which need not be lengthy) will entail providing each employee with an explanation of what the change means for them. The employer must plan what action to take if all or some of the employees do not consent. Where the fallback plan is to dismiss (and possibly re-engage new contracts) those who do not consent and more than 20 employees are involved, statutory collective consultation requirements will apply. Failure to follow them may give rise to claims for protective awards of up to 90 days' pay per employee, in addition to unfair dismissal claims.

Offer New Contracts for Old

An employer could dismiss employees, offering new contracts which incorporate greater flexibility. An employer might be able to defend consequent unfair dismissal claims if it can provide a legitimate business reason for requiring the changes and show compliance with a fair procedure before dismissal. While it is not necessary to show that without the change the business would face closure, the employer needs to prove that there were substantial reasons, with good supporting evidence. The tribunal would balance the business reason against the effects on the employees. The employer should have also followed as thorough a consultation as possible. This route is not without risk: a tribunal could decide that the employer's business reasons are insufficient or the consultation process was inadequate. The procedure might also antagonise employees – some employees who are needed might decide to go. The process also takes time.

Wage and Salary Cuts

An employer's failure to pay the correct wages or salary will normally amount to a breach of contract, as pay is a fundamental term of an employment contract. Rarely does a contract contain an express right to cut wages or salary or imply such right. This generally means that an employer must seek each employee's consent to such a change or risk claims for breach of contract, unlawful deduction from wages or unfair (constructive) dismissal.

Employees' consent to such a measure should be an informed consent, following proper consultation. How an employer obtains employees' consent to a pay cut would depend on the circumstances and the employer's relationship with its employees and their representatives, if any. The immediate risks to the employer are that employees would refuse to consent, that not all employees would consent, that employees would express their agreement to be "under duress" – or that they would not respond at all. The employer must have a contingency plan and be prepared to execute it (see "Offer New Contracts for Old," above). It is not yet possible to tell what the long-term consequences are, but the risks will inevitably increase where employers implement such cuts arbitrarily or unfairly or without proper consultation.

Changing Bonus Schemes

Employers may wish to change existing bonus schemes, aligning them more closely with ongoing business aims and requirements.

Changing a bonus scheme often involves changing terms and conditions even where the scheme is labelled discretionary, unless the employer has reserved an absolute discretion whether to operate the scheme, and how.

Under the implied duty of mutual trust and confidence, an employer must not act in a way that will likely destroy or seriously damage the relationship between employer and employee. An employee may assert that variation or termination of a scheme will damage or breach this relationship. The question of whether it is breached will depend on the nature and extent of any change proposed or made and the ways in which the planned changes are implemented.

Where an employer breaches an express or implied term, affected employees may sue for breach of contract, claiming typically any bonus accrued but unpaid on the termination date, if employment has ended, including during any notice period.

Where changes in a bonus scheme or arrangement are serious enough to be deemed a breach of the duty of mutual trust and confidence, employees might resign and claim unfair (constructive) dismissal.

Employers may still wish or need to change bonus schemes unilaterally, whether or not they have a clear right to do so.

An employer wishing to minimise claims and liability should, after checking the wording of the scheme and any ancillary documents, very carefully:

- Consider if the changes would have any disproportionate adverse effect on groups or individuals which might be discriminatory (and give rise to discrimination claims, most likely on grounds of sex, equal pay or age);

- Assess the impact of any proposed scheme on pay and remuneration structures, again testing for discriminatory factors; and

- Carry out a thorough consultation with employees and their representatives – ideally in all cases but necessarily in any case where 20 or more employees might be affected by the changes.

If there is no right to vary the terms of a bonus scheme and employees do not agree to such a variation, employers may need to dismiss and re-engage (see "Offer New Contracts for Old.")

Existing Bonus Schemes: Can an Employer Refuse to Pay Out?

Where existing schemes provide an entitlement to a bonus and the employee already qualifies for a bonus under the terms of the scheme, it will be a breach of contract if the employer refuses to pay or pay less than the entitlement.

The employee will be entitled to claim breach of contract even if the employer can no longer afford to pay the bonus or if the bonus does not conform to current regulatory requirements or guidance. While there have been recent examples of very senior executives voluntarily foregoing (or even repaying) bonuses to which they were entitled, an employer could not lawfully compel an employee to do so.

Unless a scheme already incorporates an enforceable claw-back clause, there is no legal right to recover bonus payments already made.

Obligations and Liability

Collective Consultation and Notification

Where more than 20 employees are affected and an employer proposes to offer new contracts for old, even only as a last resort where employees do not consent to the changes, collective consultation requirements apply. This necessitates consultation commencing at least 30 days before the first of the dismissals takes effect (90 days if more than 100 employees are within the scope). The sanction is a protective award of up to 90 days' pay per employee.

Where 20 or more dismissals are possible, the employer must also notify the appropriate government department. Failure to notify is a criminal offence, for which an employer may be fined, although this is rare.

Unfair Dismissal Claims

Employees with more than one year of service may claim unfair dismissal. Dismissal may arise either from termination expressly by reason of redundancy or failing to agree on new terms and conditions, or resignation in response to an imposed change.

To defend such claims, the employer must show that it has a potentially fair reason for the dismissal and that it acted reasonably in terminating for that reason. This entails following a fair procedure. In the context of new contracts for old, a fair procedure includes collective consultation with appropriate employee representatives as well as individual consultation with the particular employee.

The remedy is a basic award of up to UK£9,900 (based on age and years of service) plus a compensatory award based on the financial loss suffered by the employee. This is capped currently at UK£66,200.

Where the matter began before April 6, 2009, unfair dismissal awards will be further increased by 10 percent to 50 percent (subject to the cap) if the employer has failed to follow the statutory dispute resolution procedures. On or after that date, awards may be increased by up to 25 percent where the employer fails to follow principles of fairness set out in the new Acas Code of Practice on dismissal and disciplinary matters.

Discrimination Claims

Direct or indirect discrimination claims are a possibility in any cost-cutting exercise where workers can be shown to have been singled out for unfavourable treatment on one of the grounds protected under UK legislation, or to have been adversely impacted by a particular provision. Compensation in discrimination claims is unlimited.

Unlawful Deductions From Wages/Breach of Contract Claims

Where an employer implements changes without consent, employees, even while in employment, may make claims for unlawful deduction from wages. Equally, employees may bring breach of contract claims.

Collective Redundancies: Consultation

Where an employer proposes to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less, the employer shall consult about the dismissals all the persons who are appropriate representatives of any of the employees who may be affected by the proposed dismissals or may be affected by measures taken in connection with those dismissals.

The consultation must include discussion about ways of: (i) avoiding the dismissals; (ii) reducing the numbers of employees to be dismissed; and (iii) mitigating the consequences of the dismissals, and shall be undertaken by the employer with a view to reaching agreement with the appropriate representatives.

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Do you really know how to implement workplace cost-cutting in the U.S.? 20 "*gotcha!'s*" you need to know

It is no secret that employment cost-cutting in the U.S. (as elsewhere) is a top priority. Many global companies look to the U.S. as the first place to cut wage and benefit costs, thinking "at-will" employment makes the U.S. an easy target for quickly and unilaterally implementing cost-cutting measures. In today's economy, the unfortunate reality is that many human resource ("HR") professionals and top management are bombarded with information about how to implement cost-cutting, and think they can "do it right." For smaller companies, many employees are all too willing to accept wage and benefit cost-cutting and deferrals (sometimes even proposing it themselves) in an effort to retain their jobs. These trends converge for HR professionals, and sometimes top management without HR aid, to quickly implement cost-cutting measures in the U.S., crossing their fingers that they "did it right" or that employees won't complain.

There are many lesser-known issues in the U.S. that are "gotcha!'s" even for the most-experienced HR professional or employment in-house counsel. At-will employment or voluntary agreement by employees will often not avoid potential liability.

Have you "done it right?" Will you "do it right"? This article focuses on the "gotcha!" employment issues for common cost-cutting measures that have received little or no press.

Delayed or Deferred Compensation

Gotcha! Delayed Payroll

States impose harsh financial and possibly criminal sanctions against employers who miss or delay paydays. Some states require employers to have established payroll periods (e.g., no less frequent than semi-monthly for nonexempt employees and monthly for exempt employees), and established paydays no more than a certain number of days after the close of the payroll period. For example, in California, where an employer misses a set payday, it is exposed to US$100-US$200 in penalties, which are calculated per employee per missed payroll period, and to possible criminal penalties, in addition to owing the late wages.

Gotcha! Deferred Compensation

Arrangements to delay compensation can raise issues under State and Federal law.

In some states, employers are not permitted to issue payment in the form of company IOUs or even formal promissory notes (even where the employee voluntarily agrees or suggests it themselves) without complying with strict requirements. For example, California law requires earned wage payments that are deferred (whether through a promissory note, deferred compensation agreement, simple IOU, payment in coupons or other merchandise, or any other way of deferring earned wages), that the agreement be (1) negotiable and payable in cash, (2) payable on demand, (3) without discount, (4) payable at a business within California, the name and address of which must appear on the agreement, and (5) with sufficient funds in the account to honor the demand for payment. Employers who cannot or do not pay on demand may be subjected to a variety of penalties including wage claims by employees, civil penalties, and misdemeanor criminal liability. Such limitations can "undo" the intended deferred costs that were the very purpose for such an arrangement.

Employers who choose to implement deferred compensation programs should proceed carefully to avoid unintended consequences under U.S. federal law, as well. In some circumstances, for example, compensation that is earned in one tax year but is not paid until a subsequent tax year may be subject to an additional 20 percent federal penalty tax under IRS regulations. Furthermore, some states require companies that provide employer-managed deferred compensation plans to periodically provide employees participating in the plan with specified financial information and reports. Moreover, the federal 409A tax rules may limit the availability of deferred compensation arrangements with high level executives.

Forcing Vacation and Vacation Buyouts

Gotcha! Advance Notice of Forced Vacation

A few states require employers to provide advance notice prior to forcing employees to take vacation. In California, for example, the State Labor Commissioner takes the position that employers must provide at least 90-days or a full fiscal quarter advance notice before forcing any California employees to use vacation.

Forced vacation in less than full workweek increments can also be a problem for exempt employees under some state laws, and is subject to challenge under federal law (discussed further under shortened work-weeks and temporary shutdowns below).

Gotcha! Tax Consequences of Vacation Buyouts

Employers may want to encourage employees to cash out vacation time in an effort to lower the amount of accrued vacation on the company books. Allowing employees to voluntarily choose to cash-out their vacation may be deemed taxable income in the year of the offer, even if the employee does not choose to take the cash out. Employers should therefore cash out vacation unilaterally to employees to avoid these tax and accounting issues.

Shortened Work-Weeks and Temporary Shutdowns

Gotcha! Do You Owe Your Exempt Employees for the Whole Week (or Worse, Overtime)?

Many employers are announcing shortened work weeks or temporary shutdowns (furloughs) for their U.S. facilities. For non-exempt (i.e., hourly paid) employees, this is fine. Exempt employees, however, (i.e., certain types of salaried employees) are governed by more specific regulations that require a guaranteed weekly salary. There are two rules that flow from the guaranteed weekly salary requirement.

First, exempt employees are entitled to their entire weekly salary if they perform any work during the workweek, unless the request for time off is voluntary by the employee (such as sick time or vacation time). As a result, an occasional unpaid shutdown of less than a full workweek is impermissible for exempt employees. Importantly, the "workweek" is not just any seven-consecutive days: the workweek is defined by law as the workweek established by the employer for payroll purposes (most commonly Saturday to Sunday).

Involuntarily forcing vacation for exempt employees during a few days of the workweek (such that the exempt employees receive a full weekly salary comprised of the vacation pay and normal pay) was historically also impermissible. The U.S. Department of Labor ("DOL") has recently softened this position, however, and states with their own exempt salary requirements have not yet signed on to this change. Thus, even if allowable under federal law, state law may still prohibit the forced vacation cost-cutting in less than full work week increments.

Second, exempt employees' salaries cannot be "occasionally" reduced based on a reduction in their work or hours. The employer can, however, implement permanent or long-term shortened workweeks with a commensurate salary reduction for its exempt workforce.

Failure to carefully implement these shortened workweeks or furloughs, and forced vacation, for exempt employees can result in their claiming the entire workweek salary just for performing some work in that workweek. Worse, they could claim that their exempt status was compromised, and seek overtime payments for work performed that pay period or month.

Gotcha! Employees on Certain Company-Sponsored Visas May Be Protected from Shortened Workweeks or Mandatory Furloughs

U.S. workers working under certain company-sponsored visas, such as H1-B, H-1B1 and E-3, have contractual and legal rights as described in their Labor Condition Application filed with the federal government. In addition to promising certain wage levels, those same filings usually promise full time (40 hours a week) work. These visas carry with them "anti-benching" rules that prohibit forcing such visa-holders to work less than the promised hours per week. When implementing shortened workweeks or furloughs, U.S. employers must allow these U.S. visa holders to work, or voluntarily choose to take vacation or voluntarily go unpaid as their peers are doing. Forcing the shortened workweek or unpaid time off would otherwise allow for back-pay and other penalties for employees on these types of visas.

Gotcha! Employees Entitled to Extended Leave Due to Shutdowns or Shortened Workweeks

Employees on statutory family and medical leave under the federal Family Medical Leave Act ("FMLA") are permitted up to 12 weeks of leave per year, with guaranteed reinstatement (except for legitimate position eliminations unconnected to the leave). Most U.S. employers and leave administrators track these 12 weeks carefully for employees, and notify employees when their 12 weeks are exhausted. These 12 weeks do not include periods when the employee would not otherwise be working, such as shutdowns or shortened workweeks. As a result, the 12 weeks of allowable leave must be extended by the shortened workweeks or periods of shutdowns implemented during the leave. Thus, employees on these leaves may be entitled to more than the normal calendar-12 weeks, and HR professionals should be very careful when counting the 12 weeks before denying reinstatement.

Gotcha! Did You File the Mandatory Unemployment Form?

Many states, require employers to file or provide employees mandatory unemployment forms when

implementing shortened work weeks or temporary shutdowns. These forms allow the employees to apply for unemployment during the period of the shutdowns, or apply such time towards any unemployment waiting time periods.

Salary Cuts and Headcount Freezes

Most U.S. employees are expressly "at-will" and do not have guaranteed salary in their employment agreements, meaning the employer can unilaterally change salary. Most U.S. bonus and commission plans also expressly allow the employer to amend or terminate the plan at any time. For this reason, the U.S. workforce is normally the first, and easiest, to be targeted for salary or bonus cuts.

Gotcha! Revoking Salary Offers or Offers of Employment

In some instances employers have made offers to new hires at promised initial salaries, but due to company-wide salary cuts or headcount freezes, now need to decrease the offered salary or revoke the offer of employment altogether before employment commences. If those potential new hires rejected other, better offers in reliance on the promised starting salary, or incurred some other specific economic losses preparing to start work as promised, some state laws may allow those employees to recoup their "detrimental reliance" losses, notwithstanding the express "at will" offer. One such state is California, which in addition, provides for statutory and criminal penalties, and double damages, if the employee moved in reliance on an offer for a greater amount of salary or on a subsequently-revoked offer. The employer should, therefore, handle changed or revoked employment offers carefully.

Gotcha! Wage Forfeitures and Clawbacks

Salary reductions can only be made prospectively, with any reduction taking effect only after employees have been given notice of the change. For bonus and commission plans, this can limit changes for work already performed, even if the bonus or commissions have not yet been paid. Attempting to claw back a portion of those wages for work already performed may be deemed an unlawful wage forfeiture, and in some states, can constitute a criminal offense. For those employees who voluntarily offer to give back bonuses, this can have tax consequences they are not thinking through.

Gotcha! Employees on Certain Visas May Be Protected from Salary Cuts

A lesser-known issue is the "contractual" obligations owed to certain company-sponsored visa holders, such as H1-B, H-1B1 and E-3 visa holders. These visas required the employer to file a Labor Condition Application with the DOL when they hired the employee which guaranteed a certain wage level. When implementing salary cuts, U.S. employers may not reduce these visa-holders' salaries below the level stated on the Labor Condition Application without providing proper notice to the government. Before reducing salary for these visa-holders, the employer must confirm the new rate of pay is still at least equal to the government's prevailing wage level for similarly employed workers, and file a new Labor Condition Application with the DOL and an amended or extended visa petition with U.S. Citizenship and Immigration Services prior to implementing the salary reduction. Failure to do so may entitle these visa holders to file a complaint with the DOL seeking their promised wage level.

Outsourcing Functions

Gotcha! Do You Owe That Contractor Back Wages, Benefits, and Associated Tax Penalties?

Many U.S. companies are seeking to outsource functions to contractors rather than employees in an effort to save payroll taxes and benefit costs. In doing so, employers should be cognizant of the very-real contractor misclassification risks when assessing who to hire as a contractor, and what work may be assigned to them. Employees hired back as contractors, for example, present heightened risks and are the most likely to be found misclassified. Asking contractors to perform core functions that company employees perform creates a potential for misclassification claims. A successful misclassification claim can result in owing back wages (including overtime), expense reimbursement (many times for expenses that could have been controlled or decreased if paid in-house in the first instance), and the value of benefits and vacation. Indeed, the federal and state agencies are spearheading efforts to identify contractor misclassification issues, and a single claim of contractor misclassification can result in a company-wide audit by the government agencies. For all these reasons, contractor usage can be one of the riskiest cost-cutting areas, and should be handled carefully.

Reductions-In-Force ("RIF")

Gotcha! Replacing Poor Performers are not RIFs

Sometimes employers want to "save hurt feelings" by using a RIF to terminate poor performers, but with the intention of then filling their jobs with a new employee. This can be problematic for several reasons. For example, employees who were told their positions were eliminated, later to find out they were replaced, may claim the stated layoff was really a "pretext" for unlawful discrimination or retaliation. Because the employer was not forthcoming with the real reason for termination, changing course after the fact by presenting a different reason (poor performance) as a defense has been rejected by courts and juries. In addition, the employee may not be entitled to severance benefits under the company's severance plan if it is not a true position elimination, and paying them such benefits could establish an unintended severance practice.

Some employers wish to expressly

terminate a group of employees based on performance, letting employees know that the company intends to replace them. This is permissible, but should be documented separately from position eliminations. For example, employers should maintain documentation supporting the decisions for performance-based group terminations (such as ranking charts, instructions from HR or legal department, severance practices, etc.), that do not commingle the employees being affected by position eliminations.

Gotcha! Prohibited Decision Factors

Leaves of Absence – Most employers know it is unlawful to use statutory leaves of absence as a basis to select an employee for layoff. Despite the best intentions of well-trained managers and HR professionals, leaves can infect the decision-making process in less obvious ways. For example, if production quotas are used as ranking factors for the layoff selections (normally objective and appropriate factors), but individuals on leave did not achieve their production goals due to their protected work absence, this could result in a lower ranking leading to their selection for layoff. HR professionals and legal counsel reviewing ranking factors should therefore look closely at selections that include employees on leave, or recently returning from leave.

Salary Level – Another seemingly objective and appropriate ranking factor for layoff selections is salary level, especially when a RIF is being implemented as a cost-cutting measure. Under U.S. law, compensation has been held to be a legitimate RIF factor. Some states however, prohibit using salary as a RIF factor where there is a correlation between age (40 or over) and salary.

Visa Status – Quite a bit of media attention has focused on keeping Americans employed in various industries, and U.S. employers may mistakenly think it is therefore better to retain U.S. citizens over visa holders during a RIF. As long as an employee is authorized to work in the U.S. (even under a visa), federal law generally prohibits using citizenship or visa status as a basis for terminations. (There are different rules for the few H1-B dependent employers, financial institutions, and companies who receive TARP funds, however.) Citizenship-based discrimination claims are on the rise, particularly stemming from company-wide layoffs. U.S. employers should therefore be careful that layoff selections are not affected by visa or citizenship status.

Gotcha! Are Your Exempt Employees Now Non-Exempt After the RIF?

A RIF that is used to reduce headcount typically results in the remaining employees performing a broader range of job duties. Many times, management is taking on more and more of their subordinates' duties. As this happens, employers need to evaluate whether exempt employees are performing too many non-exempt duties to qualify for their historically-applicable exemption. For example, following a RIF, as the time the manager spends picking up non-exempt duties overshadows the time spent on management duties, a manager may no longer be "primarily engaged" in management duties, even if the manager still supervises two or more full-time employees. As part of a headcount reduction, U.S. employers should review the classifications of remaining employees and their (now re-organized) job duties to confirm that exempt employees still qualify for their respective exemptions.

Gotcha! Prior Severance Practices

Under federal law, an employer's practice of providing severance can give rise to a implied contractual right to that severance. Additionally, severance practices that involve discretion or ongoing administration (such as company-paid COBRA) are, in fact, ERISA severance practices and constitute an ERISA violation if they are not committed to a written, ERISA-compliant severance plan. As a result, U.S. employers who had previously offered severance but now want to eliminate or reduce such severance may have a "de facto" severance policy that needs to be terminated or superceded prior to effectuating layoffs.

Gotcha! Company-paid COBRA Severance Benefits

Under the American Recovery and Reinvestment Act of 2009 ("ARRA"), employers are required to pay 65 percent of COBRA costs for U.S. employees involuntarily terminated (other than for gross misconduct) between September 1, 2008 and December 31, 2009, for up to nine (9) months of the COBRA period. Employers can recoup that amount through tax credits. Employers voluntarily covering employees' COBRA costs as a severance benefit, however, are ineligible to take advantage of this tax credit for the severance period. Employers paying only part of employees' COBRA costs as a severance benefit are still required to pay 65 percent of the amount actually charged to the employee (and only recoup that amount as a tax credit). As a result, employers looking to cut costs should consider not offering Company-paid COBRA severance benefits for 2009 to be able to take full advantage of the tax credits.

Gotcha! That Operating Unit Closure, or Subsequent RIF, Triggered WARN

U.S. employers considering and implementing RIFs usually are well aware of their obligations under the federal Worker Adjustment and Retraining Notification Act ("WARN"), and track terminations and provide 60 days' advance WARN notice if the layoffs result in 50 or more *and* one-third of the facility's workforce being laid off in a 90-day period. But WARN also has a lesser-known provision for the closure of a business line or operating unit. In that situation, a layoff of only 50 employees from a facility (regardless of how small a percentage

of the workforce) will trigger federal WARN notice obligations for all employees in that business line or operating unit being laid off, and any other layoffs in that facility related to the business line's or operating unit's closure. Some state WARN-equivalent laws also have lower thresholds for a business closure. For example, California's WARN statute, Cal-WARN, requires 60 days' advance notice of a business operations if the particular facility employed 75 or more persons in the past 12 months, regardless of whether the employer phases out the terminations over time. Employers should therefore also consider whether a business line is being closed when undertaking the federal and state WARN analyses.

In addition, it is very important for U.S. employers to forecast future layoffs in the next 90 days. Except in limited circumstances, all U.S. layoffs within a rolling 90-day window are counted toward federal WARN. If the employer decides shortly after a layoff that another round of layoffs is necessary within the next 90 days, the combined layoff numbers could trigger WARN, putting the employer in a retroactive violation if it failed to give WARN notice during the earlier layoff.

Gotcha! Did You Look at the State Law for Advance Notice Requirements?

Some states also have their own WARN-equivalent laws (mini-WARN laws) that must be considered as well. These mini-WARN statutes can have lower thresholds (such as in California, which is triggered with 50 or more terminations from a covered facility), or longer notice provisions (such as New York's requirement for 90 days' advance notice of mass terminations). The following states have their own mini-WARN statute: California, Colorado, Connecticut, Georgia, Hawaii, Illinois, Indiana, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, New Hampshire, New Jersey, North Carolina, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Washington, West Virginia, and Wisconsin.

Gotcha! Pay in Lieu of WARN Notice is Not Compliance

Some U.S. employers that trigger WARN notice obligations when implementing a layoff consider paying employees 60 days' pay upon immediate notice of termination in lieu of providing WARN notice. This pay in lieu of notice is not technically compliant with WARN, which requires the employees be employed with full benefits during the 60 day notification period. Pay in lieu of notice may not provide the continued benefits of employment, such as vacation accrual, continued vesting, and continued participation in health benefit plans.

Gotcha! The Ineffective, or Worse, Criminal Release

In the U.S., in most cases it is permissible to pay severance and in exchange secure a release from the employee of all employment-related claims. The release, however, must be drafted carefully to be enforceable and obtain the sought-after release. Using business form releases will not work for employment claims. Indeed, if the wrong payments are recited in the release (such as undisputedly earned salary or bonuses), just presenting the release to the employee can be criminal in California. Including a covenant not to sue within the same provision as the release can also void the entire release with respect to federal age discrimination claims, as recently held by the 9th Circuit federal appeals court covering the western states (Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, and Guam). To release employment-related age discrimination claims under federal law, as just one example, the release must meet heightened notice and revocation requirements, and for a group layoff (involving as few as two employees) additional "age appendix" informational requirements that accurately track the "decisional units" used for the RIF. (What comprises the "decisional unit" is not always clear, and courts have with increasing regularity refused to enforce releases for minor mistakes in the informational list.) Further, not all claims can be released by law, such as workers' compensation claims or unemployment claims. Under federal law, employees cannot release wage claims for violation of the federal Fair Labor Standards Act ("FLSA") without prior approval of the U.S. Department of Labor or a court. For these reasons, U.S. employers should be aware of the employment nuances when preparing the form release, and should understand what exposures may remain notwithstanding the release.

Conclusion

In conclusion, the U.S. poses many hidden pitfalls in cost-cutting that can undo the intended saving results, and even result in having to pay the amounts anyway, on top of penalties, attorneys' fees, and interest. Some pitfalls can even result in criminal liability. For most of these issues, it is a matter of having a detailed understanding of where the cost-savings can occur, and where they are limited. HR professionals and management are therefore well-advised to run their proposed cost-cutting measures by savvy employment specialists to ensure they are avoiding a potential "gotcha!"

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Personnel reductions and other similar measures under the Venezuelan labor legislation

Article 34 of the Venezuelan Organic Labor Law (the "OLL") defines mass or collective dismissals as, the dismissal in a three month period or (if the Ministry of the People's Power for Labor and Social Security (the "Ministry of Labor") considers that the circumstances are critical) in a longer period (which is limited to six months by the Regulations to the OLL), of:

(i) 10 percent or more of the workforce if the company has more than 100 workers; or

(ii) 20 percent or more of the workforce if the company has more than 50 up to 100 workers; or

(iii) 10 or more workers if the company has less than 50 workers.

If a mass dismissal takes place, the Ministry of Labor may, for reasons of social interest, suspend it and order the employer to reinstate the affected employees with back payment of salaries and benefits.

The employer has the option of initiating a personnel reduction procedure when economic or technological reasons are given for the reduction, by filing a collective conflictive petition before the competent Labor Inspector's Office. This petition is not admissible when the workers are exercising their unionization and collective bargaining rights. In any event, the petition does not result in a decision from the Labor Inspector to either approve or disapprove of the same. On the contrary, the petition is delivered to the union or workers (if the category of workers affected is not unionized), for the employer to engage in negotiations with them. In addition, during the procedure the workers are protected against dismissals, deterioration of work conditions, and transfers. Finally, if negotiations are not successful, the matter is to be brought to arbitration. For these reasons, in practice, many employers prefer not to initiate this procedure, but actually engage in direct and private negotiations with the union and/or workers, offering the workers attractive severance packages to motivate them to resign voluntarily from their employment.

In any event, the Regulations to the OLL provide that negotiations initiated by the employer through the formal personnel reduction procedure may not necessarily result in the dismissal of the workers, but that the negotiation could also result in:

(1) The temporary modification of conditions provided for in a collective bargaining agreement ("CBA"), in order to alleviate the employer's economic costs, as provided for in Articles 525 and 526 of the OLL. According to the OLL and its Regulations, any modifications agreed upon under Articles 525 and 526 must be justified on economic circumstances that put in danger the activity or existence of the company, and are supposed to last for a term not to exceed the remaining period of effectiveness of the CBA. After the CBA expires, all conditions are restored to their original status, and if the economic crisis persists, another negotiation will be necessary. During the term of effectiveness of the modified conditions, the affected workers are protected against dismissals, deterioration of work conditions and transfers.

(2) The collective suspension of the work in order to overcome the economic crisis, during a term that may not exceed sixty (60) days. During the suspension of the work, there would be a suspension of the individual employment relationships or contracts with the workers affected, and, as a result, the company would not be obligated to pay their salaries and the workers would not be obligated to provide their services. However, the company would have to continue to provide housing and food (if the company was bound to do so prior to the suspension), and would also have to continue to comply with the obligations provided in the CBA which are not supposed to stop during a suspension. In addition, in practice, sometimes companies in similar situations agree to provide certain limited loans and other similar financial aid to the workers affected during the suspension. If the economic situation is overcome and the company recovers, it could voluntarily forgive the loans or provide additional financial aid.

(3) The initiation of a process to recapitalize and reactivate the company in association with the workers through

co-management or self-management structures. In this case, the State shall bring special protection in various manners (among others, (a) the granting of credits or subsidies with certain preference, through governmental financial institutions; and (b) the renegotiation of their debts with the National Treasury or those relating to the social security contributions).

Some companies prefer to explore other legal options such as the ones summarized above before proceeding to reduce personnel. There are certain other legal options to be explored than the ones described above, which could also help companies navigate through the economic environment from a Venezuelan labor law perspective. The Venezuelan labor legislation does not contain many detailed provisions regulating the options mentioned above and other options that could be implemented, and, consequently, there are certain questions that remain unanswered. However, certain reasonable solutions or temporary relief from certain labor costs to allow the company to survive or overcome an economic crisis could be found, and we encourage companies to obtain legal advice in order to create a plan that suits their specific case before proceeding. Legal advice may also be beneficial for companies that are not in economic trouble but have resolved to maximize the use of their economic resources and thus are in need of designing compensation and benefit structures that are reasonably satisfactory for the company and its workers and reduce the possibility of legal claims or contingent liabilities.

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