

International Reductions in Force: A Case Study

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Case Study Overview

Case Study Overview

- California-based company with remote employees in nearly 30 different states and 10 countries
- Implemented a RIF affecting employees in a half dozen countries and a dozen U.S. states
- Prompted by organizational changes and effort to right scale and ensure profitability
- Worked with local counsel and HR business partners in each country

Considerations in the U.S.

Key U.S. Considerations

- Potential discrimination and retaliation claims
- Strategies to mitigate risks
- Federal and state Worker Adjustment and Retraining Notification Acts
- Separation agreements and termination notices

Discrimination and Retaliation

RIF decisions cannot be based on protected characteristics. E.g.:

- Race
- National Origin
- Religion
- Sex
- Gender Expression or Identity
- Sexual Orientation
- Age
- Pregnancy and Related Conditions
- Marital/Family Status
- Disability and Genetic Information
- Leave Status
- Union Activities
- Whistleblower or other Protected Activity

Disparate Treatment Discrimination

- Direct evidence proves discrimination without the need for inference or interpretation
 - e.g., statements by a person involved in the decision making process that reflect a discriminatory animus
- Can also be established with indirect evidence
 - e.g., where a similarly situated person of lesser qualifications outside of the protected class was retained, and employee proves that employer's stated legitimate non-discriminatory reason is pretext for unlawful discrimination

Disparate Impact Discrimination

- Is there an adverse impact upon a protected class?
- Statistical evidence is used to support disparate impact claims
- Proof of discriminatory intent is not necessary
- Employer must demonstrate the challenged practice is "job-related for the position in question and consistent with business necessity"
- Plaintiff can show there is an available alternative employment practice that would satisfy the employer's legitimate interests without having a disparate impact on a protected class
- Age Discrimination under federal law - based on reasonable factors other than age

Risk Reduction Strategies

- Determine which functions and positions will need to be eliminated, without reference to employee names
- Managers and HR should determine objective, non-discriminatory criteria. Should be consistent with reason for RIF
- Although employers are generally permitted to use subjective criteria, objective are superior in defending discrimination claims
- Determine weight to provide to various criteria. Consistently apply them
- Implement multiple levels of review and utilize multiple decision makers
- HR should conduct bias review to ensure managers' recommendations are not based on improper factors and documented rankings do not contain any references to protected characteristics

Risk Reduction Strategies (cont.)

- Document the decision-making process with transparent decision-making criteria. Ensure proper documentation of any performance-based decisions
 - Particular focus on employees in protected groups and when only certain employees will be selected from a job category
- Conduct a statistical analysis to determine if there is any disparate impact for any particular groups
- If the statistical analysis shows disparate impact, examine more closely whether the decisions are job-related and supported by business necessity, or that reasonable factors other than age support the selections (if adverse impact on age was found)
- Consider release agreements

Federal Worker Adjustment and Retraining Notification Act (WARN Act)

- Requires employers to give employees at least 60 days' advance notice in the event of a covered “plant closing” or “mass layoff”
- Applies to employers with 100 or more employees (excluding employees who have worked less than 6 months in the last 12 months and not counting employees who work an average of less than 20 hours a week)
 - “Plant Closing”—shutdown of an employment site, facility or operating unit that results in an employment loss for 50 or more employees during any 30-day period at a single site of employment.
 - “Mass Layoff”—loss of employment at a single site of employment during any 30-day period for 500 or more employees, or for 50-499 employees if they make up at least 33% of the employees at the site
 - Job losses within any 90-day period will count toward WARN threshold levels, unless the employer demonstrates that the job losses are the result of separate and distinct actions and causes

WARN Act (cont.)

Who Must Receive Notice:

- The exclusive collective bargaining representative of affected employees
- Unrepresented individual workers who may reasonably be expected to experience an employment loss
- The state dislocated worker unit
- The chief elected official of the unit of local government in which the employment site is located (e.g., the mayor of the town/city where the layoffs will occur)

State WARN Acts

- A number of states and localities have enacted their own WARN statutes:
 - California, Connecticut, Hawaii, Illinois, Kansas, Maine, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, Oregon, Rhode Island, South Carolina, Tennessee, Virgin Islands, Wisconsin, for example
- Some states' laws do nothing more than track federal requirements. Others may:
 - Extend coverage to employers not covered by WARN
 - Lengthen the notice period
 - Remove exemptions available under federal law
 - Impose additional penalties for non-compliance

Considerations For Obtaining Releases

- Release agreements must provide employees pay and/or benefits to which they would not otherwise be entitled absent a release
- *Review handbooks, collective bargaining agreements, and employment contracts for existing obligations*
- Consider package of severance benefits, health care continuation (COBRA), outplacement services, and acceleration of equity
- Releases of claims under the ADEA must conform to the Older Worker Benefit Protection Act. 45 days to review. 7 days to revoke. Right to seek counsel. Appendix with list of employees in decisional unit
- Some states may also require employers to provide employees under the age of 40 with a minimum number of days to review and sign a release (such as California and Illinois)

Termination Notices and Letters

- Comply with WARN notice requirements
- Not all states require the employer to provide termination letters, but many do if the employee requests one (Nebraska, Nevada, Washington, etc.)
- Some states require employers to provide specific notices to employees at termination
 - Examples include providing notice in the form of statements detailing how to file for unemployment benefits (often using state-specific forms)
- If covered by COBRA:
 - Employers must provide notice of employees' rights to temporary continuation of group health coverage
- Timely pay final wages consistent with state law

Considerations in Australia

RIF – “Redundancy” – The Process

1. Job is no longer required in part or in whole
2. Consult with affected employees
3. Offer redeployment to any suitable vacant position even if lower level job
4. End the employment by giving or paying out notice and statutory minimum redundancy pay of 4-16 weeks

Specific Considerations/Obligations

- Consider any relevant clauses in the employment contract
- Justify the redundancy via a business case
- Consultation – limited only to staff covered by Tribunal made occupational or industry determinations that set minimum employment benefits (“Awards”) and collective agreements
- Staff entitled to be consulted and earning up to AU\$167,500* (US\$112,000) can make an unfair dismissal claim

* These figures increased each 1 July by about rate of inflation

Statutory Redundancy Pay

- < 12 months 0
- 1-2 years 4 weeks pay
- Steadily rises each year
- 9-10 years 16 weeks pay
- 10 years or more 12 weeks pay

15 or more employees to be dismissed

- Required to notify Centrelink – the national employment service
- Consult with affected employees with members at the business
- Notice to Centrelink/unions to advise of:
 1. number of staff affected
 2. reason for RIF
 3. categories of affected staff
 4. timing
- Consultation requires opportunity to confer about:
 - Measure to avert/minimise the proposed terminations
 - Measures to minimise the adverse effects of the proposed terminations

Considerations in EU/UK

Preparation

- Identifying the employees implicated
 - Preparation of a “business case” document explaining the reasons (subject to consultation)
 - Need for selection criteria?
 - Are any “protected” employees affected?
 - Maternity/sick leave
 - Works council/union representatives
- Need to notify any governmental (or similar) authorities?
 - Netherlands – dismissal permit required from UWV

Understand the Process

- Consultation, consultation, consultation...
 - Must be built into time line
 - Either individual or collective
 - Works councils
 - Collective Bargaining Agreements
 - Needs to be completed prior to termination
- Process required may be linked to dismissal protection laws
 - No such thing as “at will” employment
- Redeployment

Termination Mechanisms

- Notice periods
 - All EU employees likely to be entitled to some form of notice, either under contract or by statute
 - Understand the options and timing:
 - Payment in Lieu of Notice, Work, Garden Leave
 - Certain countries limit when notice can be given or run from
 - Germany – 15th or the end of the month

Termination Mechanisms (cont.)

- Method of delivery of termination notice
 - Special requirements?
 - Germany – wet ink signatures, delivery to home
 - Employer has to prove delivery
 - No email or e-signature
- Government notification may be required in addition

Severance Payments

- Most EU countries require some form of severance to be paid in addition to notice and salary
 - Usually linked to length of service
 - Can be fixed by law, contract or CBA
 - Some countries call it an “indemnity”
- Enhanced severance/release?
 - Common (UK), recommended (NL), not really used unless dispute (Germany)

Questions?

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