An Introduction to Global Reductions in Force

What employers need to know in four key jurisdictions

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What will we cover?

1. What qualifies as a redundancy in each jurisdiction?
2. When is an employer required to consult with employees before a dismissal?
3. What happens if an employer wants to dismiss only some employees in a group?
4. Are employers required to consider alternatives to dismissal?
5. What payments are dismissed employees entitled to?
6. What liabilities could an employer face if it doesn’t comply with its obligations?
What qualifies as a redundancy in each jurisdiction?
1 - What qualifies as a redundancy in each jurisdiction? (UK)

• Redundancy has a statutory definition (sec.139 ERA)
• Broadly falls into three categories:
  • A business closure – closure of the business altogether
  • A workplace closure – closure of a site
  • Diminished requirement for employees to do work of a particular kind
• It is important to be able to identify whether there is a genuine redundancy situation
• Focus on what employees actually do rather than what individuals were employed to do
• The concept of redundancy as such does not exist in France

• Statutory definition

• Completed by the French Courts
1 - What qualifies as a redundancy in each jurisdiction? (Germany)

- General dismissal protection provided under Protection Against Unfair Dismissal Act (Kündigungsschutzgesetz – KSchG)
- Statutory grounds for dismissal:
  - Conduct-related dismissal
  - Person-related reasons
  - Operational reasons
- Dismissal for operational reasons considered lawful if:
  - Specific job position was eliminated
  - No vacant position at the company
  - A social selection has been properly carried out
Reductions in force (RIF) – whether arising out of economic reasons, integration-related reasons such as when corporations combine or merge, or other reasons – are an unfortunate fact of working life in the United States.

But, the concept of redundancy and the type of statutory regulation of it that exists in the UK does not exist in the United States. Here, likely because of the notion that employment is at-will, there is more latitude in designing and implementing an RIF:

- In most U.S. states, barring a contractual, statutory, or common law prohibition, employers may terminate the relationship with or without cause, and with or without notice.

So in the United States, the issue is generally not “whether” an RIF can occur, but “how” to minimize legal risks. While there are a host of potential risks, they are often associated with two federal laws and their implementing regulations –

- The Older Workers Benefit Protection Act (OWBPA), 29 U.S.C. § 626 (f); 29 C.F.R. § 1625.22, et seq.

These laws are construed quite technically by the courts and mostly from the perspective of the employee. As such, the RIF process in the United States is often very difficult, numbers- and data-driven, and needs to be well managed with a lot of advanced planning, discipline, and ongoing monitoring.
When is an employer required to consult with employees before a dismissal?
2 - When is an employer required to consult with employees before a dismissal? (Germany)

- **Individual consultation**
  - No obligation for the employer to consult with affected employees before dismissal

- **Collective consultation**
  - Individual dismissal:
    - Works council has to be heard *prior to every dismissal* (Sec. 102 of the Works Constitution Act - Betriebsverfassungsgesetz)
    - Works council has a one-week period to comment on dismissal
  - Collective dismissal:
    - Requirement to negotiate with works council about reconciliation of interest (*Interessenausgleich*) and a social plan (*Sozialplan*)
    - Negotiation process can take between several weeks and several months
2 - When is an employer required to consult with employees before a dismissal? (France)

- **Individual consultation**
  - Individual redundancy or redundancy of less than 10 employees over a 30-day period
  - Must explain the reasons why the employee’s dismissal is contemplated
  - Offer redeployment positions (if any) and remit the retraining agreements (if applicable)

- **Collective consultation of the employees’ representatives**

- **Agreement of the Labour Authorities** (social plan, i.e., more than 10 employees whose redundancy is contemplated in a company having more than 50 employees)
• Individual consultation
  • Fundamental to the fairness of any dismissal
  • Must consult with an open mind – must not be a *fait accompli*
  • Must consider points that are raised and respond
  • Consult about any selection criteria, the pool for selection, the basis for selection, ways to avoid redundancy and alternative employment

• Collective consultation
  • Where there is a proposal to dismiss as redundant 20 or more employees within a 45-day period
  • Must consult with trade union and/or appropriate representatives
  • Must notify the Secretary of State
  • Set information must be provided to the representatives
  • Where propose:
    • 20 or more redundancies – minimum 30 days of consultation
    • 100 or more redundancies – minimum 45 days of consultation
  • Award of up to 90 days’ pay per affected employee for breach
There is no requirement under U.S. federal law to consult with employees prior to dismissal – absent either a contractual or other commitment such as might exist in an individual employment contract or a policy published to employees, or a bargaining obligation that might exist in the unionized setting.

The actual decision to dismiss is generally not, in and of itself, a negotiation. Nonetheless, effective communication is critical, whether prior to the action or contemporaneously, and “the what, the by whom, and the how” should be very carefully planned.

What is required, because of WARN, is advance notice (up to 60 days) to employees in situations of:

- A “mass layoff” (either one-third of the workforce and 50 employees, OR 500 employees in a 30-day period at a single site of employment); or
- A “plant closing” (a closure of a facility, OR the shutdown of a single operating unit within a facility affecting 50 or more employees in a 30-day period)

There are aggregation rules (looking backward 90 days and forward 90 days), and special rules for contiguous locations and field-based employees.

WARN compliance requires:

- Advance planning, as well as knowing the numbers and the schedule of separations
- Strict adherence to myriad technical requirements, such as the content of the required written communications to the affected employees, the Bargaining Unit Representative (if applicable), the State Dislocated Worker Unit, and the Chief Elected Official of the Local Government

Caution: Employers should review state-specific requirements and be cognizant of the state-specific “Baby WARN” statutes.
What happens if an employer wants to dismiss only some employees in a group?
3 - What happens if an employer wants to dismiss only some employees in a group? (UK)

- Need to undertake a fair selection process
- Identify the pool of employees from which to select
- Consider which employees undertake similar work
- To what extent are employees’ jobs interchangeable?
- Consider bumping
- Use fair, non-discriminatory, and objective selection criteria
- Criteria should be focused on role’s requirements going forward
- Apply the criteria fairly
3 - What happens if an employer wants to dismiss only some employees in a group? (France)

- Selection criteria set forth by the Employment Code and the National Collective Bargaining agreement applicable

- Criteria applied on a professional category basis

- Criteria applied at the company level unless a collective agreement provides otherwise

- The “Macron” draft statute ("projet de loi pour la croissance et l’activité") may allow the employer company to apply the selection criteria at the site level on a discretionary basis when a social plan has to be implemented
• Social selection is required among comparable employees prior to dismissal.

• Three steps to be taken by employer:
  • Step 1: Define a group of comparable employees (interchangeable?)
  • Step 2: Assess which employee has the least eligibility for protection on the basis of (i) seniority, (ii) age, (iii) duties to support dependents, (iv) severe disability
  • Step 3: Exclude specific employees from social selection process whose special qualifications, knowledge or skills are of major importance for company
3 - What happens if an employer wants to dismiss only some employees in a group? (US)

• There are generally no specific restrictions in making separation decisions between and among employees in connection with an RIF – except in a unionized setting, or in a situation where the employer has imposed its own limitations

• But, and notwithstanding the concept of at-will employment, an employer should be in a position to articulate the legitimate reasons why Employee X was selected for separation

• The selection criteria are not, unlike some of the other jurisdictions, mandated by the government – but, instead, are largely at the discretion of the employer
  • The single incumbent job is the easier one: The job is no longer needed and can be eliminated
  • The multiple incumbent job is more difficult: A combination of objective / subjective criteria (seniority, past performance, skills, etc.) should be developed, applied, and weighted

• In the United States, the prudent employer will – when dismissing only some employees in a group – want to reach closure and obtain a release of claims in exchange for the payment of severance. Since age-based claims are often the most concerning during an RIF, the Older Workers Benefit Protection Act comes into play:
  • Under the OWBPA, the starting point is defining the scope of the group – called the “Decisional Unit.” There is no bright line test. A Decisional Unit may cut across sites of employment and there may be multiple Decisional Units within one reduction program. It depends on that portion of the organization structure from which selections were made. No matter how the Decisional Unit is defined, it will never be airtight or bulletproof.
  • Also under the OWBPA, the employer must provide a written Disclosure to employees listing the job titles and ages of the employees in the Decisional Unit and indicating those selected for separation and those not selected. This requires extreme accuracy. Whether that is achieved turns on the quality and integrity of the data, and strict adherence to the technical requirements of the OWBPA.
Are employers required to consider alternatives to dismissal?
4 - Are employers required to consider alternatives to dismissal? (UK)

• As part of consultation, the employer should consider ways to avoid any redundancies

• If there is no alternative to making a role redundant, the employer should consider whether any alternative employment is available

• Use reasonable efforts to find alternative employment

• Not obliged to create roles that don’t exist

• Provide employees with sufficient information about the available roles

• Consider whether any alternative roles in the group of companies
• Employers must consider alternatives to dismissal:
  • Scope of the redeployment obligation
  • Obligation to try to find a buyer
• Yes, employers must consider alternatives to dismissal

• Dismissal for operational reasons is *only justified* if the employee cannot be reassigned to another free position within the company, even under modified working conditions

• Fewer free positions than employees to be made redundant: Selection based on four social criteria has to be carried out

• Employer needs to consider whether job vacancies should be published during redundancy process
Alternatives to dismissal need not be considered – absent a contractual commitment such as in a collective bargaining agreement or a policy by the employer restricting its right to dismiss.

Nonetheless, employers often consider:

- Voluntary Exit Programs
- Separating temporary workers or other types of casual workers before regular full-time workers
- Salary freezes, hiring freezes, reduced hours
- Allowing, during a WARN or other notice period, employees selected for separation the opportunity to post for other open jobs.
What payments are dismissed employees entitled to?
• **Statutory termination payments:**
  • Notice pay
  • Dismissal compensation
  • Compensation for accrued annual leave untaken
  • Redeployment leave
  • Additional payments may be provided in the social plan and/or in the employment agreement

• **Damages if the redundancy is held to be unfair**
  • No ceiling
• No statutory requirement for a redundancy payment
• A practice has developed that employers pay a severance in order to reach a settlement with the employee because of high risk of an unlawful dismissal:
  • Rough rule: between 0.5 to 1.5 monthly remuneration for each year of employment

• Collective dismissal:
  • Social plan agreed with works council regularly provides severance payments and a respective calculation formula redundancy payments
  • Redundancy payments can also be part of collective bargaining agreements
  • No at-will employment
5 - What payments are dismissed employees entitled to? (UK)

- Statutory redundancy payment
- Need two years’ continuous employment
- Statutory formula:-
  - Complete years’ service \( \times \) Weekly pay
    (max. 20 years) (subject to statutory cap)
  - Multiplier of 1.5 for each complete year employee is aged over 41
- Contractual/Discretionary/Custom and Practice redundancy entitlement
- Notice or Pay in Lieu of Notice
- Beckmann rights
From the applicable state government, dismissed employees may be entitled to termination benefits in the form of unemployment compensation.

They may also, by reason of a federal law known as the Consolidated Omnibus Budget Reconciliation Act (COBRA), be entitled (at their own expense) to a continuation of health care coverage for a period of time.

From the employer, dismissed employees are generally not entitled to any post-termination payments or benefits – aside from vested rights to pension and other benefits, and such things as the payment of accrued but unused vacation pay.

The principal exception is what the employer may provide by way of a severance pay plan (in accordance with the provisions of the Employee Retirement Income Security Act of 1974), or in a separation pay policy.

Such plans or policies are common in the United States. While the actual amount of severance is at the employer’s discretion, many employers wish to be somewhat generous so as to secure a release of claims and bring closure.
What liabilities could an employer face if it doesn’t comply with its obligations?
6 - What liabilities could an employer face if it doesn’t comply with its obligations? (France)

• **Criminal liability**
  • Criminal offence ("délit d’entrave") in case of failure to consult with the staff representatives

• **Financial sanctions incurred by the employer**
  • In case of unfair dismissal (absence of true and serious grounds):
    • Companies having at least 11 employees, and for employees having at least two years’ service: damages amount to at least six months’ salary - no ceiling
    • Damages may be awarded to the employees in case of **failure to comply with the redundancy procedure**
  • **Failure to apply the selection criteria**: claim for damages for the loss suffered as a result
  • Redundancy can also be considered as **void** if no social plan was implemented, or in application of an invalid plan
    • In such cases, the employees are either reinstated or granted damages in compensation, which cannot be less than 12 months’ salary
Employees are free to file an action at the competent labor court to contest dismissal within three weeks upon delivery of the termination notice (see Sec. 4 KSchG).

In case of non-compliance with the various employer’s obligations, the labour court will declare the dismissal to be void and the employment continues to exist. Consequence:

- Employee has the right to claim for all salaries and benefits that have accrued after the expiration of the notice period until the date of the decision.
- Employee can also claim for actual re-employment.

High financial exposure for the employer.
6- What liabilities could an employer face if it doesn’t comply with its obligations? (UK)

- Failure to inform and consult collectively - 90 days’ pay per affected employee

- Unfair dismissal – generally two years’ qualifying service
  - To be a fair dismissal, need a fair reason, and dismissal must be fair and reasonable in all the circumstances, including the procedure followed
  - Basic award – same calculation as statutory redundancy payment (will not be recovered twice)
  - Compensatory award - an amount the Tribunal considers to be just and equitable in the circumstances. Currently capped at lower of (1) one year’s pay; or (2) £76,574

- Discrimination – uncapped

- Whistle-blowing - uncapped
6 - What liabilities could an employer face if it doesn’t comply with its obligations?

• Dismissed employees may have a plethora of statutory and common-law claims to invoke to challenge their separation and, if successful, can obtain a wide variety of monetary and equitable relief. In addition:
  
  • An employer that fails to provide the required Notice or proper Notice under WARN may be liable for 60 days’ back pay and benefits, as well as statutory penalties
  • An employer that fails to comply with the technical requirements to the OWBPA can have its release agreement invalidated and, at least as to age-based claims, might have to face challenges to the dismissals

• To reduce legal risks, the RIF process needs to be well managed. This requires:
  
  • Advance planning
  • Clear reasons for the RIF and what is to be accomplished
  • Control over the process and over individual managers
  • Development and application of RIF selection criteria
  • Statistical analyses of the selection and criteria decisions
  • Due diligence / deeper dives into problematic separations
  • Knowing the numbers, and having good data to assess any WARN obligation and prepare any OWBPA Disclosures
  • Ongoing monitoring, particularly in RIFs that occur over a period of time
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Degrees of Risk
Thank you for attending!

We will send you the recorded session and slides.

Questions and feedback?
Please call or email any of today’s presenters.

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