Implementing Downsizing and Layoff Decisions During the Global Recession – How Multi-National Companies are Grappling with the Current Economic Crisis

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I. INTRODUCTION

The Global recession has impacted every region of the world. Multi-national companies are being forced to make tough but necessary personnel decisions in all of their operations around the globe. One of the many challenges is ensuring that layoffs and redundancies are implemented in full compliance with local laws, which can vary greatly from country to country and often from region to region within a given jurisdiction. Compliance issues have been a particular challenge for American-based multi-nationals that are forced to implement layoffs in a country with 50 different states – and 50 different sets of employment laws and rules – as well as numerous countries around the world. This task is made even more daunting by the fact that, at-will employment, while a common denominator throughout the United States, is applicable in only a few jurisdictions overseas (e.g., Hong Kong, Slovakia, and Switzerland). Thus, despite an employment contract that provides otherwise, even upon giving requisite notice an employer may not be able to terminate the services of an employee. This means multi-nationals have to put together a solid game plan so that their layoff decisions are implemented consistently throughout their operations around the world while still maintaining compliance with often unique local laws.

II. CONSIDERING PERSONNEL DECISIONS SHORT OF LAYOFFS

Most businesses look first to less drastic options than layoffs. The most common alternatives used by American- and EU-based companies include:

- Reducing overtime;
- Hiring freezes;
- Salary freezes;

- Salary reductions;
- Furloughs;
- Temporary shutdowns;
- Work-sharing arrangements;
- Shortened work weeks or workdays;
- Eliminating training programs;
- Boosting healthcare premiums;
- Creating incentives for employees to voluntarily resign or retire.

All of these options are viable human resources decisions, but they also trigger a whole host of legal issues. In the United States, for example, issues impacting wages, hours, and benefits are covered by both federal and state law. Certain states such as California have a complex series of laws that go well beyond what the federal government requires. Countries outside of the United States in some cases allow many of these decisions to be implemented while other countries do not. Adding to the complexity is the fact that labor unions and works councils often have to be consulted prior to implementing these types of decisions.

While some countries may allow forced retirements, the United States does not. For example, in the United Kingdom, employers can dismiss workers at the age of 65 without a statutory redundancy payment, and German companies can lawfully require their employees to retire at a certain retirement age without running afoul of age discrimination laws (BMW, for instance, has a policy of requiring its executives to retire at age 60.) Under American law, it would be considered age discrimination to compel older workers to retire. Decisions must be based upon legitimate business criteria other than age or other so-called protected categories such as race, color, sex, national origin, religion, disability and the like. Voluntary programs can be established to incentivize older workers to retire but the choice must be theirs. Many American companies do not like this option because voluntary retirement packages and other voluntary termination programs often result in their best employees choosing to leave because they know they can find another job elsewhere. For that reason, most companies target those jobs and employees whom they feel need to be let go.

In the EU, and particularly in Germany, companies with temporary reductions in their operations can currently use public funds to compensate their employees for temporary shortened work weeks or workdays. The labor agency pays between 60% and 67% of the net monthly salary for up to 24 months, which is the difference between the salary for the full workweek and the temporary reduced working time. The payment follows after application to and approval by the labor agency.

Unlike their American counterparts, asking older employees to retire generally does not create legal problems in the EU. For example, until December 31, 2009 Germany had a law whereby an employer and employee could agree on early retirement with special public funds available to compensate the employee. The Part-Time Retirement Act allowed employers to reduce their work force – with the consent of their employees. Although the law is no longer in force, it simply means the public funding is no longer available; employers can still ask employees to retire early as long as they are willing to compensate them accordingly. Further, some union contracts still include this option.

Malaysia has a Code of Conduct for Industrial Harmony, which was entered into by the Minister of Labour and manpower, the Malaysian Council of Employers Organization, and the Malaysian Trade Unions Congress on 9 February 1975. The Code lays down certain guidelines for carrying out a retrenchment exercise and is deemed to embody the principles of fair labour practices that have been agreed to by the representatives of the employers and the workmen.

The Code includes several provisions on cost-cutting that parallel the less drastic measures that American- and EU-based businesses also are taking before initiating layoffs:

- Limiting recruitment;
- Restricting overtime;
- Restricting work on the weekly rest day;
- Reducing the number of shifts or days worked a week;
- Reducing the number of hours of work;
- Retraining;
- Transferring to other departments.

Even though the Courts have consistently maintained that the Code is not legally binding, employers are encouraged to consider its provisions in the interest of industrial harmony and to demonstrate that a retrenchment is undertaken only after other options are no longer viable. Finally, prior to undertaking a retrenchment, employers must notify the Labour Department by filing a PK Form, which *does* require them to indicate whether any cost-cutting measures had been undertaken prior to the retrenchment exercise.

Businesses in Malaysia are further encouraged to institute a voluntary separation scheme (VSS) before undertaking any mandatory retrenchment. The primary objective of a VSS is to reduce, on a voluntary basis, the surplus staff. A company will either invite all employees to apply for VSS or limit the invitation to only the employees engaged in the categories affected by the reorganization. Regardless, a company carrying out a VSS must not pressure any employee into opting for the VSS as he or she may reluctantly agree, and then allege afterward that he or she was coerced into doing so. If the employee is then successful in establishing the coercion, the Court likely will hold the termination to be unfair.

Businesses in Hong Kong employ similar options, including reducing employee pay, requiring employees to take compulsory no-pay leave, or using up their annual leave; however, in many instances, employees must first agree to these measures.

III. IMPLEMENTING LAYOFFS

Initiating a reduction in force for either entire facilities or part of an office or plant raises numerous legal challenges, particularly in the United States. If adequate care is not taken, litigation can result. Terminated workers often hire plaintiff's counsel, who will initiate lawsuits for wrongful termination, discrimination, retaliation, and claims for violations of various federal and state laws, including the Family and Medical Leave Act, the Fair Labor Standards Act, state labor laws, and the like. Given the proliferation of these types of claims in Europe, Latin America, Asia, and elsewhere, U.S.-based multi-national companies tend to approach reduction in force decisions from a unified perspective since, they likely will be challenged in court regardless of the jurisdiction.

Implementing layoffs in the EU often have both collective and individual employment law implications based on the fact that all EU countries have some type of employee representation body in place. In most EU countries this body can claim that it must be consulted before any layoff is implemented. In countries such as Germany or France, the representation body even has the right to negotiate the terms and conditions for the layoff, e.g., severance payments for the redundant employees.

European Union employment law itself calls for the establishment of a works council to represent employees (directive 2002/14/EC of March 11, 2002). The directive applies to companies with at least 50 employees in the respective member state or to a branch office with at least 20 employees. The directive also determines that the works council has the right to information and consultation including, for example, information on the development and economic situation of the company and information and consultation on management decisions likely to lead to substantial changes in business and employment relationships – such as mass layoffs. The directive further stipulates that information shall be given at such time and with such content to enable employees' representatives to prepare for consultation with management.

There also is a special cross-border employee representation body -- the European Works Council -- which is mandatory for all businesses with 1,000 employees in the EU and that have at least 150 employees in two EU countries each (directive 94/45 EC of September 22, 1994). The European Works Council can claim information and consultation rights before any cross-border layoff. For example, a multi-national employer with operations in Spain, Denmark, and other EU countries that plans a mass layoff that would affect both the Spanish and the Danish branches requires information and consultation with the European Works Council.

The process is slightly different in Poland, where issues related to mass lay-offs currently are regulated under the *Collective Dismissals Act*, enacted in 2003. The Act does not provide for a specific advance period to employees, but instead introduces a special procedure by which mass lay-offs are to be effected. Traditionally, an employer that intends to effect a mass lay-off must first consult with the employee representatives or with the trade unions operating at its place of business.

In India, a reduction in force is referred to as "retrenchment" (layoff has a different meaning). Retrenchment means termination by an employer of the services of a workman *for any reason whatsoever*, excluding certain specific situations. The words, *for any reason whatsoever*, are particularly important. The Supreme Court of India, in various judgments, has held that an employer has the discretion to organize and arrange its business in the manner it thinks best. If termination of workmen becomes necessary, and is a bona fide employment action, then the adjudicator under the Indian ID Act will not interfere.

In China there are statutory grounds for a "mass layoff" if the number of employees to be laid off is at least 20 (or, if fewer than 20, at least 10% of the work force). In addition, employers must consult with all employees or with the employer's labor union at least 30 days in advance of the proposed layoff and report the workforce reduction plan to the labor bureau. As a practical matter, terminations on this ground are quite rare given both government opposition and the difficulty in proving that the required conditions exist to support a significant termination.

In Malaysia, the Industrial Court has expressly recognized the employer's prerogative to restructure its business and manpower requirements, and therefore is generally reluctant to interfere in such an exercise as long as it is implemented in a *bona fide* manner. More specifically:

- There must be a demonstrated need to retrench (e.g., financial losses, reduced turnover/loss of business, reduced profits and the shaving-off operations).
- The employees must be redundant, as evidenced by the fact that the business requires fewer employees or there is a quantum leap, for example, in the state of technology resulting in a significant reduction in the need for the current number of employees.
- The basis of selecting employees for retrenchment must be carried out in accordance with the established industrial requirement of "Last In First Out" (LIFO) such that the most junior employees, with respect to job category or class – not salary – are the first to be retrenched.

There have been instances in which the Courts have upheld a company's departure from LIFO. However, the company must then establish – and ensure – strict compliance with whatever alternative criteria it decides to use instead. And, if the criteria are rejected as not being objective enough, the Courts could render the retrenchment of all the affected employees unfair. The Code of Conduct for Industrial Harmony encourages employers to implement objective criteria for a retrenchment, to be worked out in advance with the employee's representatives or trade union.

India also adheres to the concept of "last come first go," so the employer must normally take that into consideration before it implements the actual layoff. As in Malaysia, however, there are of course exceptions to this rule.

The situation is different in Korea where, as a practical matter, involuntary termination of employees is a very difficult task for an employer. Although legislation making layoffs possible became effective on February 20, 1998, successfully implementing a layoff pursuant to the rules is an onerous task. There are several, very specific criteria that a company must first meet, including 50 days' prior notice to the union that represents the majority of the employees and submitting a report to the Ministry of Labor 30 days prior to the layoff.

Contrast this to Hong Kong, where there is no other consideration needed as long as the company has a legitimate reason to implement a mass layoff (e.g., closing an office, no further need for such a large workforce due to a reduction of work, etc). The criteria, however, must not infringe any anti-discrimination laws nor protection conferred on pregnant women, or sick or injured employees.

A. Establishing a RIF Management Team

Smart companies will establish a team of managers who oversee the selection process for layoffs. These individuals will coordinate the company's efforts to identify and determine which plants, departments, or work groups should be eliminated or reduced. Once those decisions are made, this group then coordinates the evaluations of the performance of employees who may be subject to the layoff. The importance of having a management team oversee this process is to ensure fairness and consistency in how layoff decisions are made. The team will establish the criteria to be used when determining who will be selected for a layoff. Typically, forced rankings are done so that employees within a given work group or department are ranked from top to bottom based on their performance. Some companies will use seniority as a "tie-breaker." In addition, applicable collective bargaining agreements will have to be consulted to determine whether they impact any of the decisions. For example, in the United States as well as many other countries, it is common to have a union contract that sets forth how layoff decisions are to be implemented. Seniority is often the most important factor. When these contracts are applicable, the company must abide by those rules when selecting employees for layoff.

Establishing a management team to prepare and oversee the layoff process is also useful in the EU. This results from the fact that most EU jurisdictions have strong works council systems that entitle them to exercise at least information and consultation rights and, in some countries such as France or Germany, also give them co-determination rights.

The core task of the RIF management team for layoffs in the EU is to prepare not only the redundancy process itself, but the negotiations with works councils and unions, including possible media attendance and political involvement on the local and/or national level (depending, of course, on the scale of the layoff). Multi-nationals should be aware that works councils and unions try at this stage to get injunctions from labor or other courts that will hinder the employer from proceeding with a reduction in force; thus, legal advice is often required in the initial preparation process, as well.

Finally, management teams are also common in China where layoffs often are conducted through individual termination agreements signed with each employer. The team generally will devise a strategy on how to implement such layoffs, including the proposed severance package and back-up plan should an employee refuse the package. Communication channels should also be opened with the labor bureau (and union) to ensure the procedure goes smoothly.

B. <u>Determining the Timing of the Layoffs</u>

The company's management team in consultation with human resources needs to determine when layoffs will occur and how much advance notice, if any, to give employees. In the United States, the Worker Adjustment and Retraining Notification Act (WARN Act) requires certain employers to provide 60 days' advance notice for "plant closings" or "mass layoffs." If an employer fails to give proper notice, employees can recover pay and benefits for the period during which the employer did not provide notice, up to a maximum of 60 days. Determining whether the WARN Act applies is a very technical analysis and legal counsel should be consulted. There are certain circumstances under this law where less than 60 days' notice may be provided. These include the "faltering company" exception (where the company is quickly running out of money), or where there is "an unforeseeable business circumstance" (such as the termination of a major contract or severe economic downturn), or due to a natural disaster. Because these exceptions are rarely used, companies should consult experienced employment lawyers. In addition, some states in the U.S., such as California, have their own local version of the WARN Act. These laws are often much more extensive, providing extra rights to employees.

Outside of the United States, local law often requires advanced notice of layoffs. In fact, the timing for layoffs in all EU jurisdictions is dictated mostly by specific statutes, in large part because most countries do not have at-will employment; thus the notice periods play a critical role in implementing mass lay-offs. In many jurisdictions, the amount of advance notice often depends upon the type of employee laid off and the basis for the termination decision. Italian law, for example, mandates that an employer must first inform the staff representatives and/or the trade unions of the decision to proceed with the collective dismissal. Within seven days of receiving the notice at the relevant unions, the parties must meet to discuss and analyze the possibility of avoiding dismissals. If the company and the trade unions are unable to reach an agreement within the set period of time or, once agreement has been reached or the maximum length of the procedure has expired, the company is allowed to terminate the redundant employees by giving each of them written notice of the due notice-period. The selection of the employees to be dismissed should follow the criteria provided by the agreement reached during the procedure or, in the event of a negative outcome, the employer should follow the criteria provided for by law (family conditions, seniority, technical productive, or organizational matters). The company should also provide a written list of the dismissed employees, including a detailed description of the selection criteria applied for each one.

In India, employers are required to give employees (who have completed one year in the company) at least one month's notice plus 15 days of compensation pay for each year of work, calculated on the basis of the latest pay received. An employer with more than 100 employees must give at least three months of notice plus the compensatory pay. Further, in the case of manufacturing companies with more than 100 employees, business must obtatin prior permission of the government before anyone (even one person) can be laid off. No prior permission required where there are fewer than 100 employees, although there are post termination notification requirements. In Colombia, when an employer lays off workers based on economic or technological reasons, employees are entitled to an advance notice depending on the number of months or years of uninterrupted work the employee has performed. Canadian employees, in some cases, can be entitled to significant advance notice (sometimes up to two years or more) based on provincial law. Korea requires employers to give a minimum written notice period of 30 days, or 30 days of ordinary salary in lieu thereof.

In many EU jurisdictions statutory notice periods increase with the seniority of the employee. In Sweden, notice depends on when the employee was hired: if prior to January 1, 1997, notice is determined by age; for hires after January 1, 1997, notice is based on length of service. In Germany, the standard notice period is four weeks to the 15th or the end of the calendar month, and increases to seven months to the end of the calendar month after 20 years of employment. Upon agreement by the employer and employee, a worker still in his or her probationary period has a notice period of two weeks. And timing is also very much affected by the information and consultation rights of the works council. In Germany the Works Constitution Act (*Betriebsverfassungsgesetz*) stipulates that the works council has to be informed in due course and in detail concerning intended layoffs/work force reductions, even before the process is started. This is required by law for companies with more than 20 employees if a so-called change of business, i.e., a mass layoff, is started by the employer. And, depending on the size of the company, the employer must inform the Economic Committee (which is outside the works council) about its economic matters, in addition to apprising the works council and ultimately the joint works council and group works council. And, finally, the labor office (*Agentur für Arbeit*) has to be informed concerning any intended mass layoffs, including details on the number of affected employees.

During the negotiation phase prior to a layoff, companies generally negotiate a settlement of interest (*Interessenausgleich*) and social plan (*Sozialplan*) with the works council. The settlement of interest is an agreement between the employer and the works council that describes the company's intended restructuring (in particular, the number of employees to be dismissed), the schedule for termination, and other related measures. In the settlement of interest, the criteria pursuant to which employees are going to be dismissed are based on data given by the social election under the Protection Against Dismissal Act (*Kündigungsschutzgesetz*). It is extremely important that the social election is performed without any significant mistakes, since every mistake puts the validity of the termination at risk for possible litigation in front of the labor courts.

According to the Works Constitution Act, a company is not required to obtain the approval of the works council concerning the settlement of interest and termination of employees. The law simply stipulates that the employer must undertake good-faith negotiations in trying to reach agreement with the works council concerning a settlement of interest, even if such negotiations fail in the end.

In offices where works councils are established under the Works Constitution Act, the council has one week to inform the employer about any concerns regarding the intended dismissal. This period is three days in case of intended termination without notice.

The social plan is an agreement between the employer and the works council that stipulates the social (financial) compensation for the layoff/work force reduction. In particular, the social plan covers any losses of present possession and any financial losses for the employees in connection with the termination. Unlike the settlement of interest, the social plan agreement is enforceable by the works council. Thus, if the negotiations on the social plan fail, the Conciliation Board (*Einigungsstelle*) determines the scope and extent of the financial compensation to the employees who are to be laid off. The procedure of the Conciliation Board is similar to an arbitration process, and its decision is binding for both the employer and the works council.

It is important for employers in Germany to know that an employee who brings legal proceedings in front of a labor court claiming wrongful notice may be entitled not only to reinstatement to his or her former position, but also to financial compensation. The employee can claim remuneration for the months during which he or she did not receive a salary payment because the employer thought the employment relationship had been terminated. In other EU jurisdictions, such as the United Kingdom, reinstatement is rare, and litigation focuses on financial compensation for job loss.

France, for example, has special laws for closing down businesses and layoffs that are quite similar to the German rules with its strong role for the works council. This is especially relevant for purposes of financial compensation for the job loss. The French works council, for example, can claim an economic justification for a layoff and the involvement of a public labor inspector. And in Spain mass layoffs can be carried out only if based on considerable evidence of economic, technical, organizational, or production grounds. As in other EU jurisdictions, layoffs require consultation with the works council for up to 30 days, as well as permission from the respective regional labor departments.

Malaysia's Code of Conduct for Industrial Harmony suggests the following guidelines in determining the timing of layoffs:

- Giving as early a warning, as practicable, to the workers concerned;
- Assisting the workers in finding work outside the undertaking, in co-operation with the Ministry of Labour and Manpower;
- Spreading the employment terminations over a longer period;

- Ensuring that no announcement of the layoffs is made before the workers and their representatives or trade union have been informed.

In addition, to help minimize the likelihood of successful claims of unfair dismissal by the retrenched employees, companies should:

- Invite the affected employees to a discussion at the earliest available opportunity to convey the plans for reorganizing the department/division and its future manpower needs.
- Advise the employees of any other positions of equal or even lesser remuneration that may be available to them within the company.
- Inform the employees that a "golden handshake" inclusive of contractual salary in lieu of notice and unused accrued annual leave could be extended on the terms of an agreement of mutual separation.
- Notify the relevant authorities.

C. Determining Whether Separation Agreements and General Releases Will be Obtained from Terminated Employees

Given how litigious American society is, very rarely will companies provide severance pay or other benefits to departing employees without receiving a signed separation agreement and general release. In other words, an employee will be required to sign a document releasing his or her rights to sue the employer in exchange for valuable consideration (i.e., monetary or other compensation). Separation agreements must be written very carefully since they are governed exclusively by state law. And, while they clearly are enforceable, many states have specific requirements they must follow. In addition, the Older Workers Benefit Protection Act (OWBPA) is triggered for those employees over the age of 40. That law has very specific requirements in terms of how such an agreement has to be written and what types of statistical information must be provided to departing employees. If these laws are not followed completely, the separation agreements are not enforceable.

Multi-national companies are finding that most jurisdictions outside the United States are now also enforcing similar agreements. When implementing layoffs in multiple jurisdictions around the world, companies must coordinate these efforts with local counsel so that the separation agreements follow all locally required laws and are written in the local language.

German law, for example, calls for a very strict written form of a separation agreement or general release, requiring the original signature of the employee. E-mail, a photocopy or pdf-copy is not sufficient. Further, since not all employees are fluent in English, many multi-national companies find it useful to have bilingual agreements, with both the local language and English in the same document. This also helps HR departments that are perhaps based in the U.S. to read and understand a separation agreement made at the company's offices in Vienna or Copenhagen.

The following checklist should be helpful in drafting an effective separation agreement, both in the United States and the EU:

1. Ensure that the agreement complies with all applicable laws for the jurisdiction in which the terminated employee worked.
2. Make sure that all potential claims (under federal and state law), both known and unknown, are covered by the release.
3. Draft the agreement in language that is easy to understand.
4. Provide adequate consideration for the waiver of claims and fully describe the consideration in the agreement.
5. Include confidentiality and non-disparagement clauses.
6. Agree to submit actions to enforce the agreement and address all breaches of the agreement to binding arbitration.
7. Consider requiring the employee to promise not to seek re-employment with the organization.
8. Include a clause stating that neither party admits liability or wrongdoing.
9. Comply with the requirements of the OWBPA if the employee is over 40 years of age.
10. Advise the employee to obtain independent legal advice before signing the agreement.

There are some countries, however, that do not permit separation agreements and general releases to be used. In other cases, there are special requirements such as those that exist in the United Kingdom where an employee must be represented by a solicitor in order for the release to be valid and enforceable. Some countries – Mexico is one such example -- require that a government agency approve the release.

D. <u>Determining What Types of Compensation and Benefits Will be Provided to Departing Employees</u>

Regardless of the jurisdiction, it is entirely unlikely that a separation agreement and general release will be enforceable when departing employees are entitled to certain benefits such as statutory severance pay, mandatory benefit continuation, and advance notice of layoff. As a result, multi-national employers have to decide what type of severance package will be provided, and whether it will be limited to what is required by law or a union contract or whether additional compensation will be provided above and beyond what is legally or contractually required.

Most EU countries have different rules for salary payment and severance pay to terminated employees. But, since at-will employment is generally unknown in the EU, most call for at least salary payment during the notice period and additional severance pay thereafter. And, based on respective EC directives, most EU countries have mandatory rules for compensating employees for unused vacation claims in case of dismissal.

In France for example employees are generally entitled to notice periods from one to three months. And French employees can claim a dismissal payment, which is a minimum statutory dismissal payment stipulated in the French Labor Code, calculated using both salary and seniority. In Germany, employers are required to pay at least the employee's salary for the notice period and a completely free negotiable severance pay.

1. Salary Continuation and Severance Pay

Most employers will have a consistent policy providing the exact same benefits to comparable employees. Typically, severance pay will be provided based on the number of years of service that a given employee worked for the employer. Many U.S.-based companies start with the assumption that they will provide one week's pay for each year of service and many go well beyond that, depending on what they can afford and what they determine is fair and reasonable. Most U.S.-based companies do not have an existing severance pay policy or plan and instead make these decisions as the need arises. Once the amount of severance pay is decided, the company next needs to determine whether it will be paid in a lump sum or spread out over time. In most cases, companies will specifically state that, when paid over time, the severance payments will cease once the employee becomes gainfully employed elsewhere.

Outside of the United States, most jurisdictions have a statutory severance requirement. Specific formulas are set forth, which differ from country to country but are typically based on the type of employee affected and the employee's years of service. Although not legally binding, a common formula for calculating severance pay in Germany is 0.5 gross monthly salary per year of seniority with the company. Courts in the Netherlands apply a formula (based mostly on an employee's age) that can entitle the employee to up to two months of salary for every year of employment. In Portugal, an employer must pay severance compensation in an amount equal to one month of salary for each year of service, subject to a minimum of three months of pay. In Poland, the specific amount depends on the length of employment with the employer: one month if the employee has worked for the employer fewer than two years, two months if between two and eight years, and three months if more than eight years. In Vietnam, an employee whose labor contract is terminated and who has worked for an employer for more than 12 months must receive an allowance equal to the aggregate amount of one-half of one month's salary for each year of employment, plus salary allowances (if any). Severance payments in Brazil, on the other hand, are determined based on: (1) which party initiates the termination, (2) the duration of the agreement, (3) the length of time the employee has been in the terminating employment relationship, and (4) whether the termination is with or without cause. (Dismissals with cause are those resulting from the violation of legal or contractual obligation, such as negligence in the performance of the employee's duties and job abandonment.)

2. Benefit Continuation

In the United States, terminated employees are entitled to unemployment compensation benefits. While those benefits are helpful, the amount is capped and is not significant. There is also a maximum amount of time for which they are provided. In addition, U.S. federal law requires that certain employers provide employees with health insurance continuation at the employee's expense. Some companies elect to pay COBRA benefits on their employees' behalf for a certain designated period of time, which normally ends once the employee finds alternative employment.

This law, the Consolidated Omnibus Budget Reconciliation Act (COBRA), was recently amended and includes two new provisions:

- Former employees (and those obtaining health insurance through them) are eligible for a nine-month subsidy of 65% of their COBRA premium payment if they were involuntarily terminated from September 1, 2008 through December 31, 2009. In that instance, the employer may collect only 35% of the COBRA premium from the former employee and must pay the 65% subsidy up front. The employer may take the subsidy payment as a tax credit.

- If a former employee was involuntarily terminated between September 1, 2008 and February 16, 2009, but did not elect COBRA coverage, the former employee now has a "second chance" to enroll in COBRA and receive the subsidy. The same is true for former employees who enrolled in COBRA coverage, then dropped it.

Under this new law, an employer must pay 65% of the COBRA premium for eligible former employees or dependents. After the employer has collected the 35% payment from the former employee, the employer may take a credit against its quarterly payroll tax. If this results in an overpayment, the employer can either receive a refund or use it as credit against future taxes. Some of these benefits are due to expire later this year unless Congress decides to extend it.

Many countries outside the United States either have government programs that provide health insurance benefits to laid off workers or require the employer to pay for these benefits on the employee's behalf for a certain period of time. This is generally true in the EU, where terminated employees are entitled to unemployment compensation benefits, which means they stay in the public social security system for purposes of health insurance, old age pension etc. Elsewhere, such as Indonesia, laid off employees are entitled to compensation for housing, medical, and hospitalization (which is deemed to be 15 percent of the severance pay and/or service pay to which the employee is entitled). In the United Kingdom, the National Health Service, which is funded through taxes, provides access to doctors and necessary hospital treatment regardless of an individual's financial means or employment status. As a rule, employers in Poland are not required to provide any special benefits for employees who are laid off unless they are provided under an individual employment contract or through internal policies or regulations of the employer. Multi-national companies need to make a determination about these benefits prior to implementing layoffs so that they can coordinate company-paid benefits with whatever is required by local law.

Although there is no legal requirement in Malaysia to provide retrenchment benefits (except where they are either statutorily or contractually provided for), the Courts generally have viewed the payment of such benefits as supporting the company's claim that the retrenchment was bona fide. Although the payment of such benefits does not act as an estoppel to the employee filing a claim of unfair dismissal, in the event the Court eventually finds in favour of the retrenched employee, it will reduce the award sum accordingly.

3. Stay-Until-Close Bonuses

Regardless of whether all or part of an operation will be closed as part of a downsizing or layoff, companies typically need certain key employees to remain after the layoff decisions are implemented to help wind down their operations. These key employees normally are the most sought after in the market place and often are quickly hired by other companies; thus, it can often be difficult for companies to hold on to them to assist with this important last bit of work. In order to incentivize these employees to stay with the company for an additional period of time, employers commonly provide "stay-until-close" bonuses. These one-time payments typically are spelled out in a separation agreement and state that, if the employee satisfactorily performs certain services on the company's behalf and remains employed with the company until a designated date, he or she will receive a specified bonus. This is the most effective way for a company to properly wind down its operations. "Stay-until-close" bonus payments are used regularly by U.S. companies and are now becoming more and more popular in other jurisdictions around the world. Because the decision to stay and assist with a closure is voluntary on the employee's part, companies need to think carefully and creatively about the financial incentives or other compensation they are willing to provide to ensure that they are able to keep key employees with the company for however long they are needed.

Stay-until-close bonuses are also popular with businesses in almost all EU jurisdictions and have proven to be the most effective way of securing the continued commitment of key employees in layoffs scenarios. In many cases the bonus amount is determined by the employee's position within the company. In Germany, for example, it is common for blue collar employees to be offered a stay-bonus of one or two gross monthly salaries; key white collar employees may claim and receive much more (e.g., as much as six to 12 gross monthly salaries).

Employers in Malaysia are not obliged to accept the offers from all the employees who opt for voluntary separation. There may be more volunteers, for example, than there are positions being eliminated or, similar to other jurisdictions, the company may require the continued services of a particular individual. These exceptions generally do not present any problems unless the company subsequently undertakes an additional retrenchment exercise and retrenches any employees who did not opt for VSS over those who did.

4. Protecting Trade Secrets and Requiring the Return of Company Property and Equipment

Every country around the world treats non-competition agreements differently. As a result, to the extent they are included as part of the hiring process or a layoff, great care must be taken to ensure that these non-compete provisions are enforceable in the local jurisdiction in question. In the United States, most states allow employers to ask their employees to sign a non-competition agreement. However, some states, such as California, are prohibited from having such provisions except in very limited circumstances.

Whether or not a non-compete agreement is utilized, employers should ensure that laid off employees return all company property and equipment and that they agree on an ongoing basis to protect the company's trade secrets and other confidential information. Employees who signed a confidentiality agreement at the time they were originally hired should be reminded of this, and that document should routinely be attached to a separation agreement. The separation agreement itself should also include language indicating that an employee's entitlement to receive severance benefits will be conditioned upon his or her returning all company property, including all records, documents, notes, customer lists, keys, company credit cards, laptop computers, company-issued cell phones, and any other property belonging to the employer.

5. Outplacement Assistance

Helping departing employees find new work is not typically required by law or by union contract. Instead, multi-national companies often find that this is a very inexpensive – and humane -- way to assist departing employees find alternative work, and can serve as valuable consideration to support a release. Most outplacement firms are willing to provide these services to departing employees on a fixed-fee basis for a certain limited period of time. The types of services typically provided include:

- Career transition training;
- Resume assistance;
- Interviewing skills;
- Job search assistance.

E. <u>Communicating the Layoff Decisions</u>

Multi-national companies need to carefully coordinate all communication regarding a layoff decision so that all impacted employees learn about the layoffs at the same time. When information leaks out early or is provided to certain groups before others, it can create significant morale and employee relations problems. To keep this from occurring, smart companies plan how the communication will occur. The information needs to be provided not only to the employees directly affected by the layoff, but also to those who are indirectly affected, as well as, in many cases, customers and vendors who might be impacted.

From the EU perspective, it is very important to keep in mind the information and consultation rights of the works council. EU employment law stipulates that information to the works council shall be given in a timely manner – in particular, before any communication with employees or third parties occurs. If the works council hears about a planned layoff from any source other than the company itself, litigation is almost guaranteed to occur. Thus, the general rule within the EU is to keep the appropriate works council fully informed. There is little if any chance of the works council leaking the information since they are legally obliged to treat all business-related information confidential. In Germany, for example, a works council leaking business secrets is comparable to committing a criminal offense.

Whenever there is a proposed layoff, a single company spokesperson should be designated to address the media. There has been significant litigation in the United States as a result of mixed messages being provided to the media by different levels of managers. This has created confusion among departing employees as to the reason for the layoffs, which in turn has generated litigation. A classic case is where employees are told they are being laid off because of economic problems but then a high-level executive tells the media that these layoffs were really done just to "trim the fat and bring in new, fresh blood." While these statements alone can imply age was a factor in the decision, it also can upset departing employees who feel they were lied to or that the information they were provided was misleading. Claims of age discrimination, wrongful termination, and fraud often result from such situations. Again, such problems can easily be avoided if one key spokesperson is identified – and that individual is instructed on exactly what to say to the media.

Companies typically will develop a short memo setting forth the basis for the layoffs and often enclose a question-and-answer sheet addressing issues that routinely might be raised. The company must determine who will meet with the affected individuals and what specifically to tell them. Equally important, management needs to develop a clear message to employees who are not being laid off. Those who remain following a layoff are often extremely nervous that they will be next and very likely will start looking for alternative employment unless they receive certain assurances from the company regarding the stability of their jobs.

Communications about the layoff decisions to affected employees should be short, concise, and to the point. They should briefly describe:

- The reason for the layoff and what, if any, efforts took place to save money short of these layoffs;
- Eligibility for recall following a layoff;
- Severance benefits;
- Whether a separation agreement will be required, and if so, what are its terms;
- Return of company equipment and ongoing protection of company's trade secrets and other confidential information.

Appendix A
Reductions-In-Force – A Planning Guide

A. Initial Considerations

1. Consider downsizing without layoffs through:

    a) Attrition,

    b) Shortened workweeks,

    c) Voluntary retirements,

    d) Voluntary severance packages, and

    e) Other cost-cutting measures such as wage freezes.

2. Determine whether U.S. WARN applies by looking at:

    a) The size of the reduction, and

    b) Other WARN criteria.

3a. Articulate and document the business justification.

3b. *For EU jurisdictions*: Consider which employee representative body or works council can claim information and consultation – both on the EU or national level. Consider the best time to do this (best practice: as late as legally possible but not so late as to violate applicable laws).

4a. Obtain the commitment of top management.

4b. *For EU jurisdictions*: Consider if government agencies (e.g., labor offices) have to be informed about the intended layoff – or if agency consent is even required. Keep in mind doing so can create a factor of delay in the layoff schedule.

B. Initial Preparations

1. Ensure proper procedures and background:

    a) Establish a RIF management team.

    b) Determine the timetable to be followed, including the timing of the WARN notice.

    c) Conduct a workforce analysis to help avoid discrimination claims.

    d) If the RIF causes a disparate impact, be sure you can justify the selection criteria as a business necessity.

    e) Review any applicable collective bargaining agreements.

    f) Establish RIF criteria, such as:

        i) Seniority

    ii) Merit

    iii) Skills

  g) Review and evaluate severance packages/out-placement assistance.

2. Develop your RIF program to reduce potential liability:

  a) Consider the total numbers/positions to be reduced.

  b) Develop evaluation criteria.

  c) Rank employees.

  d) Review EEO impact/problems, with attention to age discrimination claims.

  e) Analyze economic issues relating to:

    i) Salary continuation/severance,

    ii) Benefit continuation/COBRA,

    iii) Pension plan terminations,

    iv) "Stay till close" bonuses, and

    v) Early retirements and severance incentives.

  f) Develop termination agreements and general releases with attention to the Older Workers' Benefit Protection Act.

  g) Develop out-placement assistance.

  h) Consider a counseling program for needy employees.

  i) Develop a Communications Program including:

    i) Management notice and training,

    ii) "Question and answer" handout and

    iii) Notification to laid off employees, with written explanatory materials.

  j) Refer all inquiries from governmental agencies and lawyers to counsel.

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