

Morgan Lewis

Managing European Employees  
in an Economic Downturn

Changing Employment Terms and Conditions as  
an Alternative to Reductions in Force

May 20, 2009

# Introduction

- A British Chambers of Commerce poll recently revealed that:
  - 58% of surveyed UK businesses were planning to freeze pay this year
  - 12% were intending to cut wages
- Changing employee terms and conditions is an alternative to RIFs in Europe, and is increasingly common
- A large telecommunications company in the UK has announced no pay increase in 2009, affecting 100,000 employees
- A major car manufacturing company has cut wages by 10% because it has shortened its working week
- A large car rental company in France is trying to implement wage cuts
- A major consulting, technology and outsourcing services provider has frozen the salaries of its best paid employees in France and is reducing variable compensation

# What are the types of changes to terms and conditions being introduced in Europe?

- Pay freeze
- Salary cut
- Reduced working hours
- Unpaid holiday
- “Furloughs”
- Part-time working/job-share
- Changing bonus plans
- Restructuring benefits

# Are there common themes across the EU?

- Compelling business reason/rationale
- Potential discrimination issues
- Procedural requirements will be involved and critical
- Consultation will always be necessary – though its form may vary

UK

# Ways to change terms and conditions in the UK

- Option 1- Employee consent
- Option 2 - Unilaterally imposing new terms
- Option 3 - Terminating employment and offering to re-engage the employee on the new terms

# Option 1 - Employee consent

- Getting consent reduces the risk of a claim being brought at a later stage
- Consent from individual employees, union, or domestic works council or pursuant to the terms of a collective bargaining agreement, whichever is relevant
- Best to get in writing
- Incentivize employees to consent
  - explain rationale for the changes – e.g., a better alternative to redundancies
  - additional incentives/benefits that cost less than the savings?

# Option 2 - Unilateral imposition by the company

- Most employees may accept the changes, especially in the current economic climate
- If not, an employer may seek to impose changes unilaterally on those who do not voluntarily accept
- Employees then have 3 choices:
  - **Stand and sue**
    - *Claim breach of contract damages on the basis of loss, and claim can be brought up to six years from the date of breach*
    - *Unlawful deduction from wages – up to three months from the deduction*
  - **Resign and claim constructive dismissal**
    - *If change amounts to repudiatory breach of contract, and resignation is in response to that breach*
    - *Breach of contract (notice period)*
    - *Unfair dismissal (currently capped at £76,700)*
  - **Refuse to work under new terms**
    - *Summary dismissal risk from employee perspective*
- Downside for employer is that it does not have certainty at this stage that there will be no claims

## Option 3 – Dismiss and re-engage

- Six potentially fair reasons for dismissal in the UK
  - Capability, conduct, redundancy, illegality, retirement and “some other substantial reason” (SOSR)
- Dismissing employees who have refused to sign up to the new terms and offering to re-engage them could be SOSR
- Dismissal also needs to be procedurally fair to avoid a finding of unfair dismissal
- Factors that assist in an “SOSR” defense are that:
  - the dismissal must be for a reason that the reasonable employer would consider sound
  - the change need not be essential to the survival of the business

# SOSR procedure

- SOSR dismissal must be “reasonable,” which inevitably involves some level of consultation. Relevant factors include:
  - Employer’s motives
  - Employees’ reasons for rejecting change
  - Was reasonable warning given?
  - Were the reasons for the changes sufficiently and clearly explained?
  - Was an impact of the changes assessment undertaken?
  - Were alternatives considered?
  - Was there an attempt to get voluntary agreement?
  - Did genuine consultation take place?
  - Did the employer respond reasonably to any objections?
  - Did a majority of affected employees accept the changes?
  - Did a recognized trade union recommend or object to the changes?

# Other dismissal procedures

- Employer must also follow the statutory dismissal process
  - Failure to follow could lead to a 25% increase in any award
- Collective redundancy regime applies if 20 or more dismissals

France

# French Issues - Background

- In France, an employer who contemplates an RIF must have a real and serious economic reason as defined by case law:
  - Economic difficulties: the company must demonstrate genuine and sufficiently serious economic difficulties at the date of the dismissal.
  - Technological changes: the company must demonstrate that although all efforts were made to adapt the workforce, the employee is not able to perform his role after the change
- Implementing a RIF in France is considered complex, unpredictable and burdensome, notably because of timing issues and Works Council consultation obligation
- Exploring alternatives to redundancy is mandatory when the employer is legally required to set up a social plan to protect the employment (“*Plan de Sauvegarde de l’Emploi – PSE*”)
- Dismissal on economic grounds may not occur before all efforts of training in order to adapt employees’ skills and all efforts to find redeployment solutions have been made

# Changing terms and conditions

Changing terms and conditions requires:

- Prior consultation with the works council; and
- Employee consent; such consent may be implied if (i) the change is on economic grounds and (ii) a specific procedure is followed (Article L. 1222-6 Labor Code):
  - Written proposal sent to each concerned employee by registered mail
  - Absence of answer by the employee within one month following receipt of the registered mail = implied acceptance

# Changing terms and conditions (cont.)

- Employee's express refusal → employer may either (i) maintain the existing terms and conditions or (ii) terminate the employee – pursuant to a termination procedure which requires:
  - Consultation with the works council,
  - Social plan (if more than 10 employees are impacted).
- How to incentivize employees to consent:
  - Have a sound explanation,
  - The works council often requires that a counterpart be given (i.e. a commitment by the employer that a social plan (RIF) will not be put in place).

## Unilaterally imposing new terms will result in:

- Breach of contract by the employer
- The employee may:
  - Refuse to work under new terms and sue the employer to obtain maintenance of previous terms and conditions – summary proceedings available.
  - Quit and claim constructive dismissal.
  - Continue to work under new imposed terms and sue at a later stage (claim back pay and return to previous terms and conditions. Statute of limitation: five years).

# Other solutions

- Salary freeze
  - Possibly subject to:
    - *Minimum wage (SMIC),*
    - *Yearly collective bargaining agreement if applicable, and*
    - *Information and consultation with the works council*
- Furlough
  - Employer may not force an employee to take unpaid leave
  - Possible to ask employees to reduce their paid “holidays backlog” when the activity is low – but they are not obliged to accept,
- Partial unemployment (*chômage partiel*),
- “Employee sharing” (employers with overcapacity loan employees to other businesses)

Germany

# Ways to change terms and conditions in Germany

- Option 1 - Reducing working time and pay
- Option 2 - Reducing pay and benefits

# Option 1 – Reducing working time and pay

- Short-time work
  - Requires agreement with works council (if any) or employee consent
  - Government benefit for employees
    - *Temporary reduction of working time for economic reasons that cannot be avoided*
    - *Affects at least 1/3 of the employees in the facility (suspended until Dec. 31, 2010)*
    - *Reduction in pay of at least 10%*

# Option 1 – Reducing working time and pay

- *Maximum period usually six months (extended to 18 months for short-time work introduced in 2009, extension to 24 months envisaged)*
- *Employees receive short-time pay of 67% or 60% of loss in net income from federal employment agency*
- *Employers compensate 80% of the difference between normal and reduced contribution to statutory pension insurance*
- *50% of this compensation will be reimbursed by the federal employment agency until Dec. 31, 2010*

# Option 1 – Reducing working time and pay

- Other measures
  - Require employee consent
  - Part-time work
  - Sabbaticals, unpaid leave

## Option 2 – Reducing pay and benefits

- Under collective bargaining agreements
  - Unions rarely agree on pay cuts
  - If at all, only for individual employers in severe economic difficulties
  - Deferral clauses for pay increases

## Option 2 – Reducing pay and benefits

- Under works agreements
  - May govern certain benefits, for example vacation or Christmas pay
  - Termination of works agreement by employer
    - *Difficult for employers that are not bound by collective bargaining agreements (post-termination application)*
  - Agreement with works council

## Option 2 – Reducing pay and benefits

- Under employment contracts
  - Voluntary pay and benefits?
    - *Reservation clause regarding voluntary nature possible for pay and benefits that are not made on a regular basis (for example, once a year, like vacation and Christmas pay)*
    - *Employee does not acquire claim to payment or benefit*
    - *Employer may discontinue payment or benefit*
  - Right to revoke pay and benefits?
    - *May be agreed with respect to regular pay and benefits*

## Option 2 – Reducing pay and benefits

- *Clause may not extend to more than 25% to 30% of total pay and benefits*
  - *Employee must continue to receive pay equal to pay under collective bargaining agreement*
  - *Clause must give possible reasons for revocation*
- Employee consent
- Amendment termination
- *Pay reductions only if business is in severe economic difficulties*
  - *Comprehensive restructuring plan*

# Contact Information

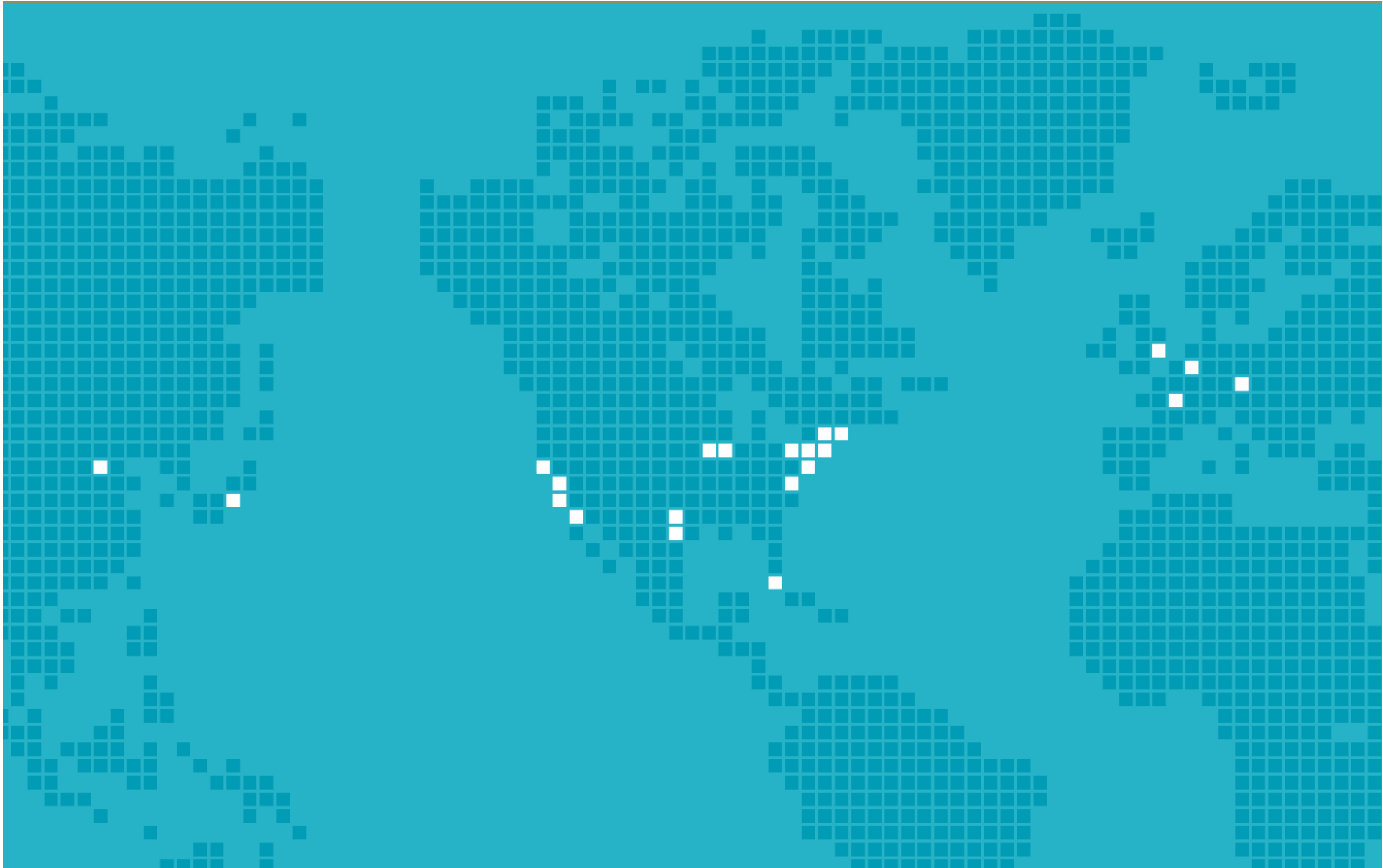
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