

**Q&A Session for “Managing International Mass Terminations
During an Economic Downturn”
November 19, 2008**

Q1: Would changing their conditions include changing their job description to encompass the decrease in size of the company? E.g., someone was the security IT person before the RIF, but now is a more general IT person with the same salary after the RIF?

France: Proposing a change in an employee’s conditions is something that, in accordance with his or her redeployment obligation, the employer must consider before deciding to dismiss an employee. However, a change in the employment contract requires the employee’s express written consent. In case of economic layoffs, the French Labor Code (article L. 1222-6) provides for a specific procedure under which the employer may propose a modification of the employee’s contract in writing (by registered mail). In the absence of refusal within a month following receipt of the written offer, the employee is deemed to have accepted the proposed change.

UK: Potentially yes, but it would depend on the degree to which the person’s role is actually changed. Marginal or minor change would arguably not trigger this, but anything beyond that could be characterized as a change in job and this would likely trigger the collective regime. Any case is going to be fact dependent and would need to be looked at carefully before a definitive judgment could be made.

Germany: n/a

Q2: Is it a common tactic of works council and unions to fail to reach an agreement on a social plan? Are the conciliators truly unnatural? What can an employer do to combat such tactics?

France: n/a

UK: n/a

Germany: It is a common tactic of works councils to delay entering into an implementation agreement in order to get a financially more attractive social plan. Unions are not directly involved in these negotiations.

There really is no counter tactic. What employers should try, if it becomes clear that the works council is not at all interested in signing an implementation agreement, is to get to the conciliation body as soon as possible.

All but one member of the conciliatory body are nominated by either the employer or the works council, so these members are certainly not impartial. The employer and the works council must agree on the person to be appointed chair of the conciliatory body. Failing agreement, the chair will be appointed by the labor court. Since the chair is usually a labor court judge, it can generally be regarded as impartial. Nevertheless, it goes without saying that some judges are more employer-friendly than others and vice versa.

Q3: In light of the EU Directive on Age Discrimination, can age be used as a factor in constructing a social plan in Germany?

France: n/a

UK: There are very tight limitations on the use of age as a factor in any RIF selection and employers would have to be very clear on a compelling reason and justification for using age. Equally, factors that may be indirectly age related (e.g., length of service) must also be approached with caution in the United Kingdom.

Germany: According to the German Federal Labor Court, age can still be used as one of four factors in the social selection. It is also possible to form age groups (e.g. until 29, from 30 to 39, 40 to 49) and to perform the selection within these groups. Regarding social plan benefits, the Federal Labor Court has held enforceable rules in social plans that provide for a cap on the severance (which usually affect older employees more than younger employees) or that provide that severances may be reduced for employees who are entitled to early retirement pensions from the social security pension scheme.

Q4: What is the practice for securing releases of legal claims in exchange for the termination benefits provided as part of a mass termination?

France: Pursuant to French case law, it is not feasible for an employer to subject the payment of termination benefits provided in a social plan or in economic termination measures to the obtaining of a release of legal claims by the employee.

UK: Provided the employer is looking to make payments that go beyond the contractual and statutory payments that the employer would be required to pay in any event, then the answer is that it is very common practice in the United Kingdom for employers to make payment of severance conditional upon the employee's executing a release agreement (Statutory Compromise Agreement). The Compromise Agreement must conform to certain statutorily designated formalities and the employee must have independent legal advice.

Germany: It is possible to secure releases of legal claims from employees. However, releases in individual agreements must not unfairly disadvantage the employee. Therefore, such releases should be made mutual.

Q5: Can you address OWBPA requirements in the context of an int'l RIF? (For example, a re-org in IT) Global org is examined, and it's decided to close service center in Germany, reduce in the United States and the United Kingdom and transfer work to Spain. What is the decisional unit for OWBPA purposes?

This is a very fact-based issue that does not lend itself to Q/A format. Please contact David McManus (contact information below) for more information on this topic.