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5 Key Questions to Formulate a Top-Down Strategy for APAC Layoffs

Compliance and Ethics

Employment and Labor



Cheat Sheet

- **Key questions.** Creating a solid strategy to handle regional layoffs starts with asking the right questions.
- **Hard choices.** It's up to in-house counsel to ensure they examine not just who, but why each employee should be let go — and document it.
- **The list.** Once the list of employees has been compiled, country requirements will dictate how the layoffs are communicated. A layoff plan should be created and necessary approvals sought before moving forward.
- **Alternatives.** In-house counsel may have to prove that alternatives to layoffs were considered before going through with ending employment.

Good business is strategic business. In-house counsel, as a critical business partner, are regularly asked to facilitate the business plan and to find the most efficient and effective ways to accomplish business goals. Nowhere is this more challenging than when the business requires a restructure that impacts or reduces headcount in APAC.

Business restructures occur for many reasons: post-merger acquisition synergy, reduction in costs, business transitions, changing markets or technologies, or creating efficiencies. Whatever the reason, in-house legal teams must often formulate an approach for widely disparate collective redundancy laws across multiple countries.

It can be tempting to send emails immediately to local counsel to determine local options, but this initial approach often results in a bottom-up strategy with unexpected delays, disjointed timelines, and a frustrated business. Counsel may discover too late that the proposed justifications for the layoff are untenable in several locations or that the process requested by the business will take two or three times longer than the business can handle.

Instead, in-house counsel should build its strategy from the top-down based on the answers to five key questions that will account for the likely impact of local law on the initiative. These answers will give in-house counsel a quicker basis for advising the business on what to expect and, further, to help facilitate expectations around timing and costs.

1. Which countries are impacted?

This seems like an obvious question, but its value lies in the initial assumptions in-house counsel can make on the overall strategy based on the countries involved.

Although the laws for redundancies or retrenchments vary widely across APAC, experienced employment counsel can typically divide them into three groups:

1. Countries where the local requirements are less significant;
2. Countries where the local requirements are more significant; and
3. Countries where the company has a union or labor representative.

At the risk of a gross generalization, we divide them as follows.

Local requirements are less significant

Countries that are former UK Commonwealth jurisdictions tend to provide restrictions on employers that are less significant than other locations. This means that in-house counsel can assume that the separations will likely be relatively straightforward, quick, and inexpensive.

In APAC, these countries include Singapore, Hong Kong, and the Philippines. Hong Kong and Singapore allow terminations for any reason, with notice or pay in lieu of notice, and do not require proof of an extensive business justification. Although the Philippines limits the right of employers to unilaterally terminate, it allows more reasons for redundancies than other APAC locations and its severance entitlements are relatively low cost. To be sure, the relative ease of these locations can become quickly difficult if the sites are subject to a union or collective bargaining agreement.

Local requirements are more significant

Other countries (such as China, Japan, South Korea, and Australia) tend to have more significant thresholds, processes, and costs associated with them. In-house counsel can assume that retrenchments involving these locations will take longer, cost more, and may ultimately not be possible without employee consent if the business justification is insufficient.

Unions or collective associations

Regardless of the local statutes, if the impacted entity is represented by a union or other collective bargaining association, in-house counsel can assume that the process will be

more complicated in terms of time, money, and options. The relevant collective agreement and the relationship with the union will be critical in assessing the business's options.

2. What is the business justification?

In-house counsel must clearly understand the business justification at both the macro and the micro levels. In other words, why is the business doing the restructure overall, *and* why is it impacting X, Y, Z countries?

The answer to this question will determine whether the business has a right to unilaterally terminate workers' employment or whether it will need the employees' consent.

The less imminent a business disaster is if the restructure does not occur, the more likely the company will need employee consent in most APAC countries — resulting in a need for higher severance packages to incentivize the employees to leave.

For example, in China, business justifications for a unilateral employment termination include:

1. Bankruptcy,
2. Serious difficulties in production or business operations,
3. Switch in production, or
4. The introduction of a major technological innovation and, after the amendment of the labor contract, the company still needs to reduce staff.

Similarly, in the lifetime employment schemes of Japan and Korea, employers must show a significant deficiency to justify the unilateral terminations, such as years of declining revenues and operations at a loss, often demonstrated in an analysis by an outside accounting firm.

This may include an analysis of not just the local business, but the global business, as well. Unless the company can adequately demonstrate the required basis, the retrenchments will be invalid and the employees reinstated or entitled to payment of increased severance and/or other entitlements.

Note that even in locations like Singapore or Hong Kong, ensuring evidence of a valid business justification is important in the event an employee later challenges their separation as unlawful discrimination, unfair, or otherwise illegal.

> In many cases, mutual consent terminations can avoid the risks associated with a unilateral termination and bypass the lengthy notification or other mandatory processes.

It is quite common in locations that significantly restrict the employer's right to terminate employees (or for those locations that mandate lengthy processes) to seek to terminate employees through mutual consent.

In many cases, mutual consent terminations can avoid the risks associated with a unilateral termination and bypass the lengthy notification or other mandatory processes. Mutual consent terminations must be handled with care, however, so as not to be deemed a unilateral termination. And they often require not just additional incentives for the employee to agree to leave but also an important measure of trust between the employee and the employer.

3. How were the employees selected for layoff?

Local regulations may limit the business's ability to select the employees they wish to lay off. In-house counsel's clear understanding of who was selected and why will help in-house counsel to guide the business in understanding — up front — the impact of such selections.

The guiding principles are that terminating entire departments, divisions, or positions are less likely to run afoul of any local laws as a business generally has the right to establish what departments or positions are needed. But, terminating *some* but not *all* of a position or group becomes much trickier as local laws may require the business to follow certain selection standards.

For example, a number of APAC locations require the business to select employees strictly based on tenure (i.e., last in first out) while others may require the business to consider nearness to retirement, family responsibilities (i.e., are they the sole income earners for a family?), likelihood of ability to find another job, or other factors. In the Philippines, employers should follow "fair and reasonable criteria" such as employment status, efficiency, physical fitness, age, and financial hardship.

While performance can often be used for selection, in-house counsel should ensure that there is *proof* to back up a claim that one employee performed better/worse than another in the event of a challenge.

4. What are the notification, information, and consultation obligations?

Once in-house counsel know the answers to the above, the next important question is to determine whether the local jurisdiction has any employee or government notification obligations. If in-house counsel do not have this information, it is important to get it from local counsel as soon as possible. The answer will determine the timing of the process in each jurisdiction.

For example, in China, the employer may be required to prepare a formal layoff plan and coordinate a general meeting (at least 30 days in advance of the intended separations) for discussion with affected employees. The plan may also need to be filed with the local labor bureau which, in some cases, may also need to approve the plan.

In India, certain categories of employees and state governments may be entitled to one to three months' written notice. Factory workers in some situations may not be terminated without approval from the state government.

Understanding these processes will directly impact the when/how the layoffs can be communicated.

5. What are the severance entitlements?

Finally, to understand the costs, in-house counsel should have a clear picture of:

1. What the minimum statutory severance obligations are and
2. Whether there are any entitlements to severance under a pre-existing contract, policy, or practice.

Indeed, an employer's past practice can heavily influence what the current expectations for severance will be. Employees will demand more compensation than what is initially offered, so

employers should be prepared in advance with the response.

Other pitfalls

Remember that, in addition to the above, some countries require proof of alternatives to layoffs taken before the layoffs can occur.

For example, Japan, Korea, and Malaysia require employers to use layoffs only as a last resort, and a reviewing authority or agency may demand to see evidence of steps taken by the employer to avoid the layoff before instituting the initiative. These may include freezing recruitment, reducing overtime, reducing shifts, reducing hours, reducing workdays, or training/transfer/alternative employment.

Some employees, regardless of the business justifications for the separation, are simply protected from termination. These often include employees on maternity leave or in their nursing period, those holding special positions with a trade union, or those who are or have been injured in the course of their work for the company. These individuals will typically require further negotiation and ex gratia payments to incentivize them to exit.

Finally, when eliminating positions, check to see if the position is linked to a permit or license necessary for the local business to continue. For example, the local entity may need individuals with certain finance or other industry authorization to justify the entity's existence or operations. These individuals should not be transferred or laid off without a plan.

Avoid the hassle

In short, by seeking answers to these five key questions, in-house counsel will be better armed to develop its top-down strategy for the layoff or restructure exercise and avoid many of the inadvertent hurdles or hassles that create extra costs, time, and/or frustration.

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David Blanco



ASEAN Head of Law, Patents & Compliance

Bayer Healthcare and Consumer Health

David Blanco leads a diverse ASEAN Law, Patents & Compliance Team of lawyers which manages complex and high risk strategic matters across all Bayer Group legal entities, partnering close to all businesses (Pharmaceuticals, Consumer Health, and CropScience) and geographies; including emerging markets. At the same time he serves as the APAC LPC business partner/regional counsel for Bayer CropScience Division as a core member of its APAC Leadership Team providing strategic legal, compliance, and licensing business partnering counselling & advice, while providing innovative-creative solutions in different capacity to several functional leadership (category) teams including its Digital Venture Incubator (Climate Corporation).

Prior to this role, he held various legal & compliance and licensing portfolios in different geographies of Asia, Africa, and Latin America. As in-house corporate lawyer with 25 years living and working in Asia, serving in several board membership capacities through his career, Blanco has developed particular expertise in the buildup a culture of innovation and transformation into legal functions, antitrust/ competition law and merger regulation, licensing, IP defense, mergers integration, and dealing with significant regulatory, reputational, and legal matters related to Life Sciences industries and markets. Currently, however, he is focusing on the impact of digital transformation for all Bayer core businesses (Digital Incubator & Ventures) as well as the legal and compliance function itself, the evolution of frameworks that will be necessary to cope with digitization, and how legal and compliance departments will digitally evolve and benefit from analytics and AI.

Isha Malhotra



Of Counsel

Littler

Isha Malhotra is of counsel for Littler.

Trent Sutton



Shareholder

Littler

Trent Sutton is a shareholder of Littler.

Nancy Zhang



Special Counsel

Littler

Nancy Zhang is special counsel for Littler.