PLI Current
The Journal of PLI Press

Vol. 3, No. 3, Summer 2019

Workforce Restructurings: A U.S. Perspective

Devjani H. Mishra

Littler Mendelson P.C.

Overview

As of August 2019, the U.S. economic recovery had held for over ten years and had become the longest in U.S. history. Meanwhile, the U.S. labor market is generally viewed as healthy, with unemployment having dropped from 10% in 2009 to 3.7% as of July 2019 and job creation remaining fairly steady.

Yet over this same period of prosperity, business and workforce restructuring has become a regular aspect of corporate practice in the U.S. and globally. Whether or not a restructuring is M&A-driven, and whether it involves retaining and redeploying most personnel in a single company, establishing new locations, integrating legacy teams from multiple enterprises, or making significant reductions in force, every restructuring presents numerous legal and practical issues that management and its advisors must confront. These issues are only magnified

when a restructuring involves cross-border considerations, as is increasingly the case. This article reviews key considerations from a U.S. perspective for those involved in planning and implementing a workforce restructuring, particularly one that involves a reduction in force (RIF).

Setting the Table: Why Are We Restructuring?

At the outset, it is essential for corporate decision-makers to establish the overarching strategy and reasoning for restructuring, and for their advisors to ensure that they understand that reasoning. While the United States generally follows the principle of "employment at will," few would attempt to advance a workforce restructuring for "any reason or no reason," and even a brief glance at our active employment litigation dockets should explain why. Recognizing that employment litigation or other challenges will key in closely on the stated business reasons for the restructuring, both company leadership and their counsel must understand what these reasons are on a deep level and confirm that these reasons support the specific actions to be taken.

Moreover, a cursory statement about "economics" or "changed priorities" typically will not suffice in the event there is a challenge to the restructuring. Rather, those charged with implementing the restructuring need to understand the basic "why?"—*i.e.*, the specific business concern(s) at issue—before they can identify and carry out the "what?"—*i.e.*, the specific steps needed to address such concerns. In many cases, "why?" can also be understood as "what's changed?" For example, perhaps the following has happened:

- A major customer has taken its business elsewhere or a key supplier has raised prices, forcing an across-the-board reexamination of budgets.
- A third-party distributor has become unreliable, and the enterprise is evaluating internalizing or insourcing certain functions rather than trying to identify a new partner.
- An acquisition of a similar enterprise has resulted in redundant personnel.
- The departure of a key employee or team prompts a need to revise compensation, redistribute responsibilities, or create new incentive systems.
- Performance shortfalls or recruiting challenges are causing management to consider ceasing or outsourcing certain business operations.

- Legal or regulatory changes may have increased personnel or operating costs at a particular location, causing management to consider redesigning roles, transferring functions, or relocating employees.

Any of the above events could lead to a workforce restructuring, but knowing which of these—or what other circumstance—is actually at issue can dictate what options are on the table, what parties must be involved, and whether the restructuring plan is likely to be successful.

Unfortunately, and all too often, the discussion of "why" is given short shrift, or even skipped, usually in the interest of speed. Experienced practitioners are familiar with the question "Can't you just give me a template for this?" Yet regardless of how fast a deal is moving, management and its counsel should take the time to align on the basic drivers for the restructuring. Once there is alignment on "why," the implementation team can more accurately examine proposed actions to confirm that they are well grounded, better identify alternatives and contingencies, and ultimately facilitate a smoother process that is less vulnerable to legal or other challenges.

Who's at the Table? Identifying Internal and External Stakeholders

For larger restructurings, and certainly those with cross-border components, management should establish a project team that is accountable for planning and implementing the restructuring successfully. In nominating team members, management should consider a wide range of factors, including the geographies and business functions that may be impacted, the types of business and other expertise that will be required, and the categories of internal and external communications that will need to occur at various stages of the process.

Identifying appropriate team members is a delicate balancing act. On one hand, limiting membership too tightly can create implementation risks if those "in the room" are removed from the operational consequences of their decisions, or are not in a position to carry those decisions out. On the other hand, over-inclusivity can create different risks; where a restructuring will involve a RIF, attempting to involve the individuals who are most knowledgeable about certain functions or

roles may conflict with the need to keep job loss decisions confidential before they are finalized and communicated to the affected individuals, or to control access to other material, non-public information.

Regardless of who ultimately the internal project team comprises, all participants should be advised of the importance of maintaining confidentiality at various stages of the process, using non-disclosure policies or agreements as appropriate. Aside from individual privacy concerns and securities law requirements, information may be protected by data privacy regulations, which may restrict access to certain types of employee data, as well as by salary history laws, which prevent an individual's prior compensation history from being used for certain purposes (such as where an acquiring company is setting compensation for the target's workforce). In many cases, different members of the project team will have different levels of access to information, particularly employee information.

Apart from the internal project team, certain types of restructuring may necessitate communication and collaboration with external stakeholders, especially where a RIF is contemplated. For example, in unionized workplaces, collective bargaining agreements (CBA) may establish layoff provisions and priorities. In certain industries, the employer may also be required to bargain with one or more unions about the effects of the restructuring. Further, if an anticipated RIF is significant enough, either in absolute terms or relative to the size of the workforce, federal and/or state law may require the employer to provide advance notice to government entities, as discussed in greater detail below. Failure to comply can result in substantial penalties and in some cases prevent restructuring plans from moving forward, so identifying external notice and consultation requirements early in the planning process, and budgeting the time to meet those obligations, is vital.

What's on the Table? Identifying Options That Serve the Strategic Plan

Once the internal project team has been established, it should work to identify options that address the business drivers for the restructuring and are consistent with the stated strategy, while also meeting legal and compliance requirements. For simplicity, the balance of this article addresses the issues that commonly arise under U.S. law when a workforce restructuring involves a reduction in force.

A note of caution: no matter how robust the restructuring plan is, employment terminations are emotionally fraught and substantially affect workplace culture, even more so when they impact large groups. As such, the following checklist cannot possibly address every circumstance that may arise in a RIF, but is merely intended as an aid in analyzing the many decisions that a RIF entails. At a high level, the project team should seek to do all of the following:

- Describe the proposed reduction at a practical level;
- Identify possible alternatives to involuntary termination, including other workplace modifications, voluntary separation programs, or early retirement programs;
- Where involuntary terminations cannot be avoided, set the parameters and selection criteria for termination and review all termination decisions against the overall business reasoning;
- After developing an initial slate of affected employees, oversee data analysis for disparate impact on the grounds of gender, race, age, and other legally protected statuses;
- Understand what contractual or statutory notice requirements may exist and plan for them;
- Determine whether severance will be offered to those being terminated, how it will be calculated and paid, and what the eligibility criteria will be;
- Review requirements for release agreements in consultation with inside and outside counsel; and
- Prepare managers and human resources personnel and ensure that restructuring-related communications are consistent with each other and with the overall strategy.

✓ **What are the practical details of the proposed reduction?**

- How many positions need to be eliminated? What percentage of the overall workforce would be affected?
- Where are the affected employees located? How many different sites are affected? Will any be consolidated or closed?
- Are any groups/departments categorically excluded from consideration—which ones, and why?

- Are there *facts on the ground* that affect whether specific employees or groups of employees should be included in or excluded from consideration, or what the expenses associated with terminating employment may be? Examples include the following:
  - Individual employment agreements that restrict an employer's ability to terminate employment without cause or specify notice and/or severance requirements;
  - Change-in-control provisions that may result in an individual receiving special compensation (including but not limited to severance) if relocation, termination, or other specific changes occur within a given time after a transaction;
  - Collective bargaining agreements that require consultation with one or more unions about layoffs or other effects of a restructuring plan;
  - Policies around probationary periods, apprenticeship, or other training periods during which employees may be more subject to early separation;
  - Deferred compensation plans that may be triggered by early separation;
  - Equity acceleration and vesting arrangements;
  - Expatriate and secondment arrangements, as well as ongoing sponsored immigration processes, that may require relocation of personnel upon employment separation;
  - Repayment obligations, such as with respect to sign-on bonuses, relocation expenses, or tuition reimbursements, that may be canceled upon an employment termination without cause;
  - Post-employment restrictive covenants whose enforceability may vary where employment is terminated without cause; for example, state law may not permit enforcement of a non-competition clause, or an employer may choose to waive a non-solicit where it is giving up a business line and does not want to limit individuals' future opportunities;
  - Inventorship and other considerations that require securing employees' cooperation prior to their departure from the company;

- Board and committee memberships that must be re-signed by departing employees and refilled;
- Individual "side letters" and/or verbal commitments or representations that must be addressed based on business interests;
- Protected leaves of absence for family, medical, military service, or other reasons that ordinarily require reinstatement at their conclusion;
- Internal complaints or ongoing investigations, litigation, arbitration, or grievance proceedings—an employee may be protected from retaliation for initiating a complaint or proceeding, and the company must be careful that termination is handled in a non-retaliatory fashion and that, where possible, the open claim is resolved; in other cases, an employee may have information that is critical to the company's investigation or defense of an ongoing matter, and both this information and the employee's cooperation must be secured before that employee leaves;
- General business continuity concerns related to a given employee's specific expertise, location, and function, as well as the impact of other employees' anticipated departure.

- Once all of the above factors are taken into account, how many employees truly remain under consideration for elimination?

✓ **Are there alternatives that eliminate or reduce the need for layoffs?**

- Can work be redistributed or roles redefined to save positions? Alternatives could include eliminating overtime hours (which must be compensated at a higher rate under U.S. law), reducing hours, instituting short-term or long-term furloughs, freezing hiring, delaying future employees' start dates, or implementing a voluntary separation program (VSP) or early retirement program (ERP).
- If the restructuring will involve the company completely eliminating one or more categories of work and moving this work to a third party, are there opportunities for employees whose roles are being eliminated to transition to employment with that third party?

- Will a voluntary program serve the company's business interests? Reducing the number of involuntary terminations may reduce the risk of a legal challenge, but are there enough employees who might leave voluntarily to offset the burden of the added planning this approach will entail?
- Is there enough time to carry out a VSP, given the business needs and the notice requirements under applicable law, such as the Older Workers Benefit Protection Act?
- Is there a "target" group of employees? Can it be defined in a neutral, non-discriminatory manner?
- Does a voluntary program risk eliminating talent if the "wrong" individuals elect to leave? Would retention bonuses be appropriate to incentivize those individuals to stay for the medium or long term?
- What benefits might the company offer in a VSP/ERP? How might voluntary departure affect benefits to which the target employees are already entitled?
- Will the company require waiver/release agreements for VSP/ERP participation?
- What happens if an individual who has elected VSP/ERP falls out of good standing prior to the departure date?

✓ **What are the RIF parameters and selection criteria?**

- How are positions identified for elimination? Begin by returning to the *strategy and business reasoning* for the RIF, as well as job descriptions for the roles that will exist in the restructured organization. Criteria may include individuals' qualifications, skills, experience, productivity, disciplinary history, job performance, and tenure. Selection decisions should be documented, and documentation should include job descriptions, before-and-after organizational charts, and any scoring against the identified criteria.
- Other options include relying on the following:
    - Existing file documentation (warnings, performance improvement plans, etc.)—but always be cautious of undermining the overall strategy by incorporating potentially unrelated business considerations upon which the preexisting documentation was based;

- Special RIF evaluations—carried out with reduction in mind and based on defined criteria, such as an individual's qualifications for positions in the restructured organization—but special evaluations must be generally consistent with historical performance records;
- Forced rankings (special or periodic) that rate employees against each other—noting that these can substantially impact morale and culture; as with special RIF evaluations, forced rankings should be assessed alongside existing data, and raters should understand the context in which rankings are being done;
- 360-degree and/or "peer analysis" evaluations—with the same caveats noted above regarding repurposing preexisting documentation.

✓ **Will the RIF as planned have an adverse impact on any protected class?**

- Work with experienced counsel to evaluate whether the proposed RIF is vulnerable to claims of intentional disparate treatment or disparate impact against an identifiable group based on gender, race, age, or another legally protected status. As to the latter, federal equal employment opportunity regulations require most larger employers to conduct a statistical analysis of anticipated terminations prior to conducting a RIF. Working with counsel, the employer must evaluate whether the planned RIF would have a statistically significant impact on members of a particular protected class within the overall workforce, one or more organizational units or individual job classifications. The question is whether any group would experience an impact that is so far outside of statistical expectations as to create the possibility that it was not by chance (*i.e.*, that it could have been based on discrimination).
- Where such an impact exists, the employer must be prepared to carefully review the business justification for the decisions in question and document any steps taken to address the issue. This can be a time-consuming process, but the failure to conduct it properly can leave a RIF vulnerable to an even more time-consuming legal challenge.

✓ **What are the statutory notice requirements prior to involuntary termination?**

- Where reductions will occur in more than one country, ensure that local statutory and individual contractual requirements are met. Virtually every country other than the United States imposes substantial notice requirements, and employees often are subject to individual employment contracts and/or collective agreements. Employees may also be able to postpone, or even repudiate, termination based upon their individual circumstances.
- In the United States, will the RIF trigger the Worker Adjustment and Retraining Notification Act (WARN), which requires sixty days' advance notice, or pay in lieu of notice of covered *plant closings* and *mass layoffs*?
  - WARN applies to employers with at least 100 employees, not counting those who work an average of less than twenty hours per week;
  - WARN protects all hourly and salaried workers, including managerial and supervisory employees, but not business partners;
  - *Plant closings* involve the permanent or temporary shutdown of all or part of a single site of employment, resulting in the loss of employment for at least fifty employees within a thirty-day period;
  - *Mass layoffs* result in the loss of employment during any thirty-day period of at least 500 employees, or between fifty and 500 employees if that accounts for at least one-third of the employees at a site;
  - A *site* includes buildings within reasonable geographical proximity that share operations, management, or staff, have similar products, or share equipment, requiring decision-makers to consider the relationship between different locations where RIFs are occurring;
  - *Loss of employment* is defined as (i) involuntary termination, not including early retirement; (ii) layoff of more than six months; or (iii) reduction in hours by more than one-half;
  - WARN requires aggregation or consideration of all job eliminations within a rolling ninety-day period, which may cause WARN to apply in the aggregate even if individual smaller RIFs did not trigger WARN.

- If WARN is triggered, the company must provide notice to affected workers or their representatives (*e.g.*, their union), to the state dislocated worker unit, and to the appropriate unit of local government.
- Even if WARN is not triggered, a state mini-WARN act may apply in California, New York, and numerous other states and territories. Mini-WARNs typically cover smaller plant closings and mass layoffs, may cover relocations beyond a certain distance, can require additional types of consideration for affected employees (*e.g.*, benefits continuation), and may require a longer advance notice period of ninety days.
- Employers that violate WARN may be liable to each impacted employee for back pay and benefits for the full period of the violation, up to sixty or ninety days per employee.

✓ **What is the company's severance plan?**

- Does the company intend to offer any severance, beyond any statutory, contractual, or collectively bargained notice period that may apply? If the company intends to obtain releases of employment claims from affected employees, severance is necessary, but what is the company prepared to do?
- Does the company already have a severance plan that covers this circumstance? Does past precedent offer any guidance?
- Does the severance plan apply to employees whose positions are moved beyond a specified geographical limit?
- Does the company intend to offer enhanced severance beyond what the existing plan requires? If so, how much and based on what criteria? Consider:
  - enhanced severance for execution of release;
  - lump-sum versus salary continuation structure;
  - company-paid continuation of health insurance coverage under the Consolidated Omnibus Budget Reconciliation Act (COBRA);
  - waiving post-employment repayment obligations or restrictive covenants;
  - out-placement or job training services;

    - the effect of re-employment within the company or an affiliated company with respect to offsetting any other severance benefits.
- If the company is creating a severance plan, or significantly amending an existing plan, decide whether the plan should be an "employee welfare benefit plan" subject to the Employment Retirement Income Security Act of 1974 (ERISA), rather than a more informal severance policy. ERISA requires creating a written plan document and an ongoing administrative scheme to determine who qualifies, as well as a substantial exercise of discretion and analysis by the company. However, a properly drafted ERISA plan can offer an employer significant advantages in litigation, insofar as courts defer to the company's judgment as to who is eligible for benefits under the plan and individual damages are limited. This assessment should be undertaken in consultation with experienced employee benefits counsel.
- Are there employees who, even though they have been selected for termination, should be offered retention bonuses to ensure that they do not depart too soon? If so, what are the criteria for offering and calculating such bonuses?
- Are there employees who, even though they have *not* been selected for termination, may be likely to leave because of the impact of the restructuring? If so, what retention planning should occur with regard to these employees?
- If the restructuring affects employees in different countries, will employees whose positions are broadly similar, or who have been part of close multi-country working teams, be treated similarly, after accounting for different local legal and contractual requirements? If not, are decision-makers prepared to communicate the reasons for the disparity?

✓ **Has anyone read the release agreement lately?**

In the United States, an enforceable agreement must comply with all of the following:

- It must be in writing and in plain English (or in another language, if required by applicable law).
- It must include state and local law references and requirements and cannot require the release of un-releasable claims under federal, state, or local law.

- It cannot permit retaliation based upon an employee's protected activity, such as filing a complaint under discrimination or whistleblower laws; provisions that purport to limit an employee's future rehire by the company should be carefully examined.
- It may not waive an employee's right to receive injunctive relief to participate in investigations or proceedings initiated or conducted by government agencies, or limit an employee's ability to engage in activity protected under section 7 of the National Labor Relations Act.
- It cannot place conditions on any consideration that an employee is already entitled to, such as accrued vacation or COBRA continuation.
- It must advise the employee of the right to consult with an attorney.
- In group terminations, the release agreement must comply with the Age Discrimination in Employment Act (ADEA) and the Older Workers' Benefit Protection Act (OWBPA), which impose specific requirements where an individual over age forty will release claims of age discrimination. Most prominently, the individual must have up to forty-five days to consider the release and seven days to revoke acceptance thereof and must receive specific information concerning the selection criteria for the RIF and the ages and job classifications of those selected and not selected. Again, it is critical to build in sufficient time to meet these requirements.

✓ **Is management prepared to oversee and communicate this restructuring?**

- The restructuring plan should set forth a solid organizational structure for the business going forward and contingency plans in case valued employees depart despite best efforts.
- Those involved in making selection decisions should be well trained on non-discrimination, compliance, and key company policies; should understand why forced ranking or other special evaluation processes are being used, if they are; and apply such processes appropriately;
- The project team should be carefully composed as noted above, and all team members should be instructed to maintain the confidentiality of project plans, not only out of sensitivity to colleagues who may be impacted, but in keeping with requirements under securities, antitrust, data privacy, and other laws and regulations;

- Whether the company is publicly traded or closely held, communications can make or break a RIF. At the appropriate juncture, the company's communication team should develop messaging materials for both internal and external consumption that are consistent with each other and with the overall strategy.
- In addition, the project team should develop written answers to frequently asked questions (FAQs) and other elements of the internal and external communication plan, and managers should not deviate from them. Wherever possible, written FAQs should include answers to questions that employees are actually likely to ask (*e.g.*, "What will happen to my benefits?"), rather than only those that management feels most comfortable answering.
- At an individual level, managers should be told how to respond to employee queries properly (*e.g.*, "Why me?" "Why not him or her?" "Can I appeal?" "Can I reapply for available future opportunities?") and/or direct such queries to those able to answer them promptly.

✓ **Is human resources, or someone else on the project team, ready to do all of the following?**

- Meet with affected employees, distribute release agreements, and collect executed documentation according to established timelines;
- Monitor return of company property, technology, and proprietary information, particularly from remote employees;
- Conduct exit interviews and promptly escalate any legal, compliance, or security related concerns;
- Provide employees with access to counseling through employee assistance programs (EAPs);
- Ensure compliance with state wage payment laws, including requirements for when employees must receive their final paychecks and payment of accrued but unused holiday, vacation, or sick pay;
- Ensure timely administration of severance payments and benefits continuation under COBRA;
- Handle requests for references uniformly and respond to unemployment claims and requests for documentation consistently;

- Retain RIF-related documentation for all relevant periods—if the business structure, and especially the human resources structure, is likely to change, document retention is a critical element of RIF planning;
- Support managers and employees who are continuing in the business in adapting to the new structure, including cross-training for new roles and reallocating responsibilities.

Devjani H. Mishra is a Shareholder at Littler Mendelson P.C., where she draws on more than twenty years of in-house and outside counsel experience to partner with management to create scalable and efficient solutions to complex workplace challenges. Devjani is also an experienced litigator and has successfully handled employment complaints from inception through trial in federal and state courts and agencies. A version of this article has been published in the Course Handbook for PLI's Cross-Border Employment 2019.