



Employment Issues Arising from Corporate Restructuring

2018



Agenda

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**Employment
Law Issues
Arising from
Restructuring**

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**Guidance
Before & After
Restructuring
& Common
Pitfalls**

03

**Discussion
Q&A**

Speakers



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Restructuring – a crucial issue for your business

Restructuring entails many risks

- Wrongful termination lawsuits
- Reputational damage to the company
- Loss of morale and declining performance of the remaining workforce

A recent Harvard Business Review article noted that after a restructuring:

- The remaining employees had an average 20% decline in job performance
- Downsizing a company by 1% led to a 31% increase in voluntary turnover in the following year

Today we will:

- Outline the legal considerations surrounding restructuring
- Provide practical advice on the implementation of a restructuring to ensure the success of a company after this process



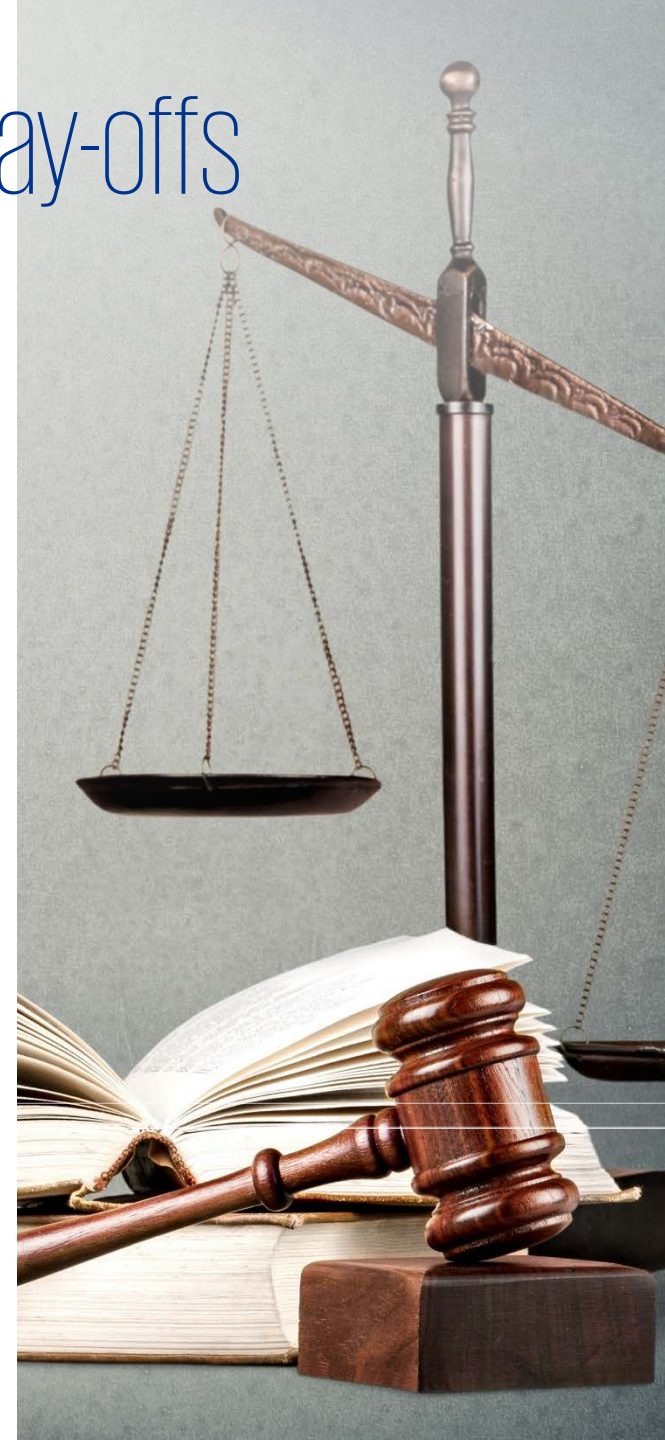
Legal bases for restructuring layoffs



Legal Bases for Restructuring Lay-offs

May only lay-off employees for a limited number of legal bases:

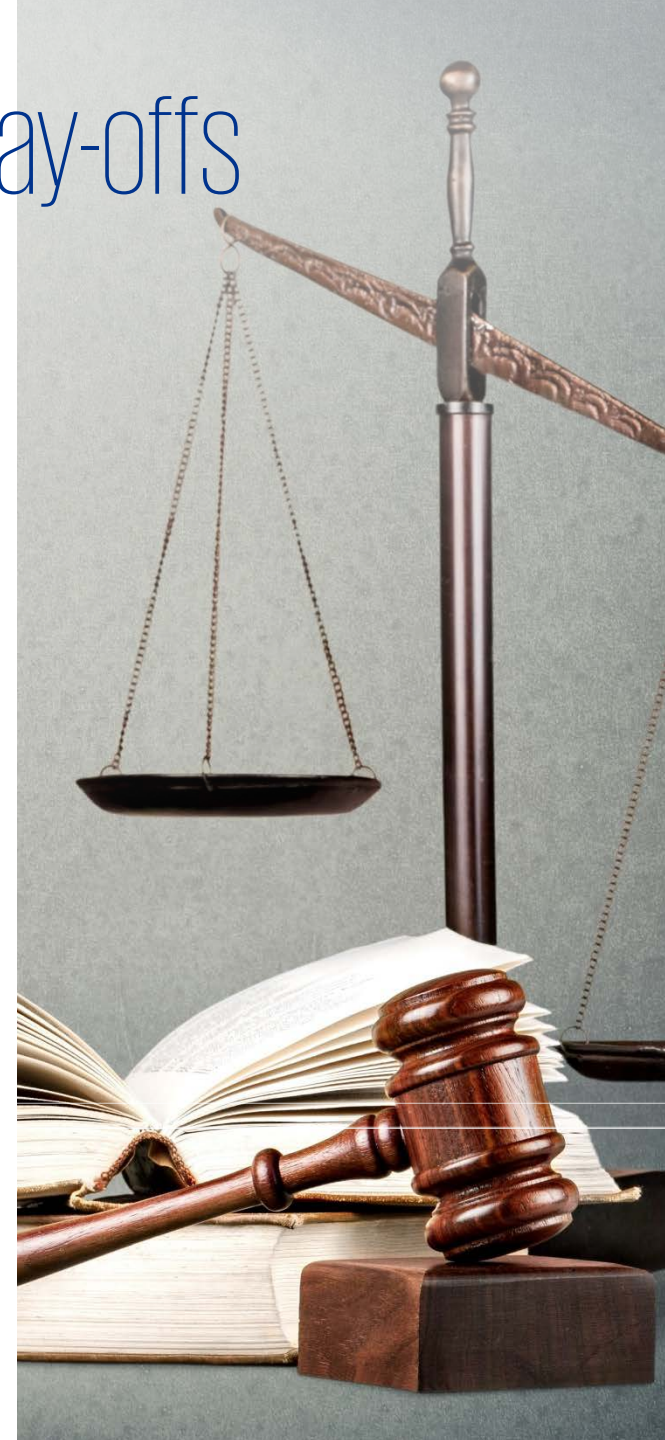
- Organizational restructuring or change of technology
- Economic reasons
- Merger, consolidation or division of an enterprise



Legal Bases for Restructuring Lay-offs

“Organizational restructuring or change of technology” is defined as:

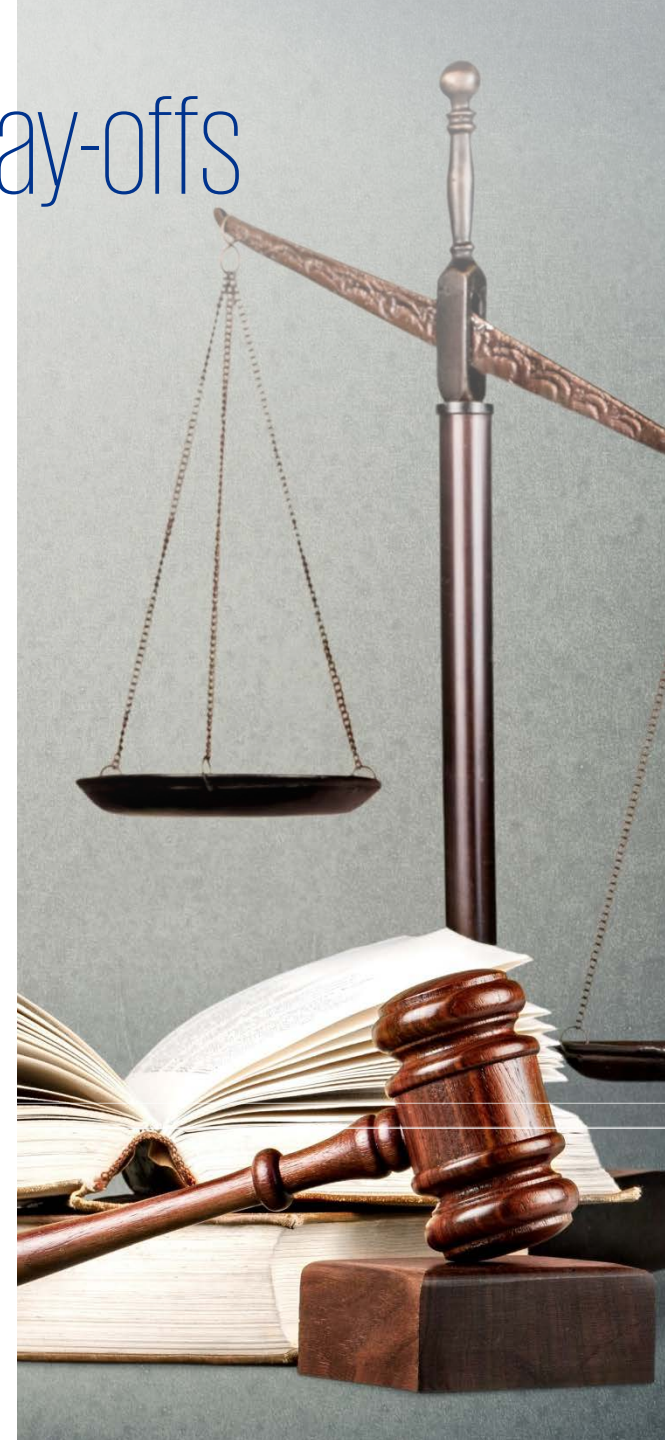
- Change of organizational structure, re-organization of employment;
- Change of products, product structure;
- Change of technology process, machinery, equipment related to the manufacturing activity and the business of the employer;



Legal Bases for Restructuring Lay-offs

“Economic Reasons” is defined as:

- Economic crisis or recession; or,
- Implementation of a State policy on restructuring the economy of implementation of international commitments.

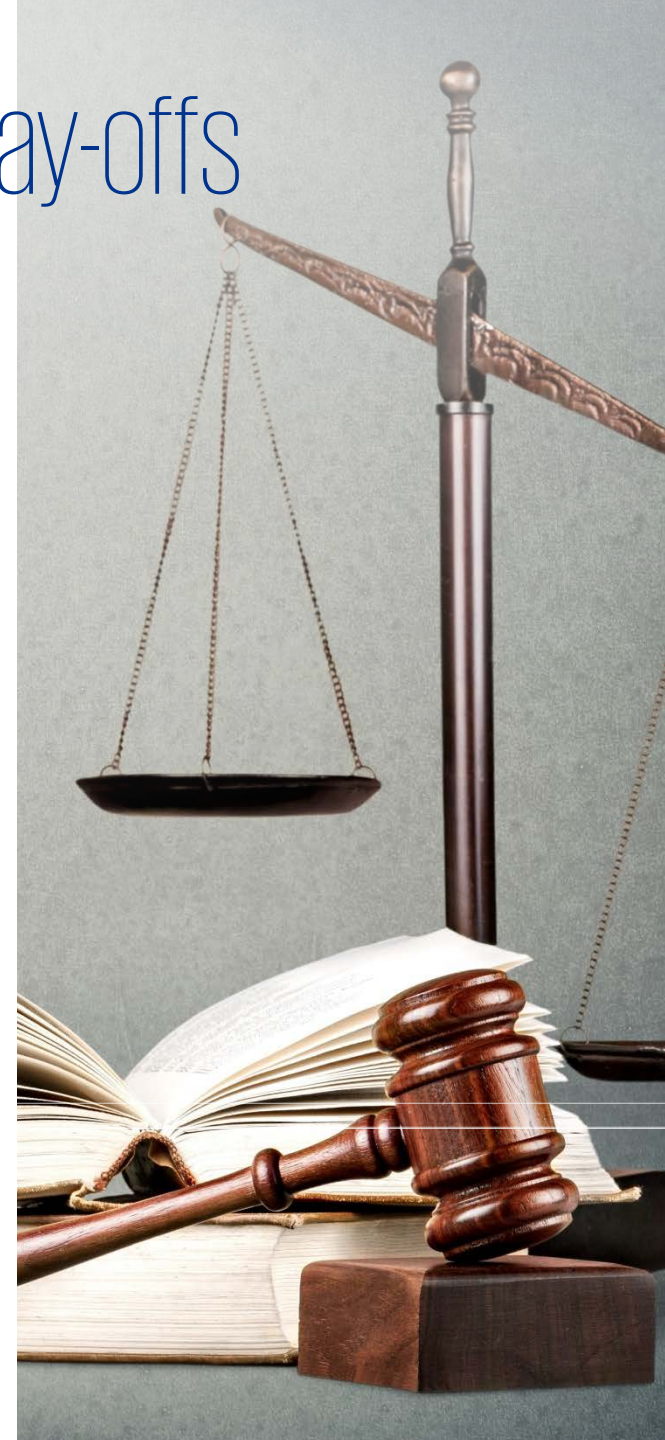


Legal Bases for Restructuring Lay-offs

Evidence is required:

Must have documentation to prove a legal basis for the layoffs exists. This may include:

- Financial reports showing a decline in business
- Organizational charts showing the labour structure before and after
- Decision of the Investor/Board of Members and General Director to reorganize labour, change products or change machinery/equipment
- Reports regarding company plans to change technology, products or product structure





Steps and timing



Steps and timing of restructuring layoffs

	Step	Considerations	Timing
1	Consider whether there is a legal basis for restructuring	Supporting documentation to establish the legal basis must be provided	90 days prior to the target termination date
2	Consider whether any employees have protected status	<p>An employee has protected status if he/she:</p> <ul style="list-style-type: none"> – is ill or suffered an injury caused by a work-related accident or occupational disease – is on annual leave, personal leave, or any other type of leave agreed by the employer; – is getting married, pregnant, is on maternity leave or is raising a child under twelve (12) months; – is on leave pursuant to the parental leave; – is a part-time trade union officer. 	90 days prior to target termination date

Steps and timing of restructuring layoffs

	Step	Considerations	Timing
3	Prepare a labour usage plan	<p>This must include the following:</p> <ul style="list-style-type: none"> – the employees to be retrenched, to continue to be employed, to retire and those who will be transferred to part-time work – The measures and financial funding for the implementation of the plan – The legal basis for the redundancy and supporting documentation 	80 days prior to termination date
4	Consult upon the labour usage plan with the trade union	<ul style="list-style-type: none"> – Meet with the corporate level trade union, or if one does not exist, the immediate upper-level trade union to discuss the labour usage plan – The trade union does not have to agree, but written minutes of the contents of the meeting must be recorded 	Upon completion of drafting the labour usage plan

Steps and timing of restructuring layoffs

	Step	Considerations	Timing
5	Notify the employees who will be terminated	<ul style="list-style-type: none"> – While not specifically provided under the law, some judges have held that notice should be provided to employees – 30 days' notice should be provided for employees on definite-term contracts, and 45 days' notice should be provided for those on a permanent contract 	30 or 45 days prior to the termination date.
6	Notify the labour authority of the layoffs	<ul style="list-style-type: none"> – An official notice – The labour usage plan – Supporting documentation to provide the legal basis – Minutes of the consultation with the trade union 	30 days prior to the termination date.
7	Carry out steps under the labour usage plan	<ul style="list-style-type: none"> – Retrain employees if possible or pay a retraining allowance 	Upon notifying labour authority

Steps and timing of restructuring layoffs

	Step	Considerations	Timing
8	Issue a termination decision on the redundancy	<ul style="list-style-type: none"> – The General Director should issue a termination decision regarding the employees to be laid off 	On the termination date
9	Payout termination entitlements to the employees	<ul style="list-style-type: none"> – Where the legal basis for the redundancy is organizational restructuring or change of technology or economic reasons, the employer can pay out entitlements within 30 calendar days – If another legal basis is relied upon, employees must be paid out within 7 working days. 	7 working days or 30 calendar days



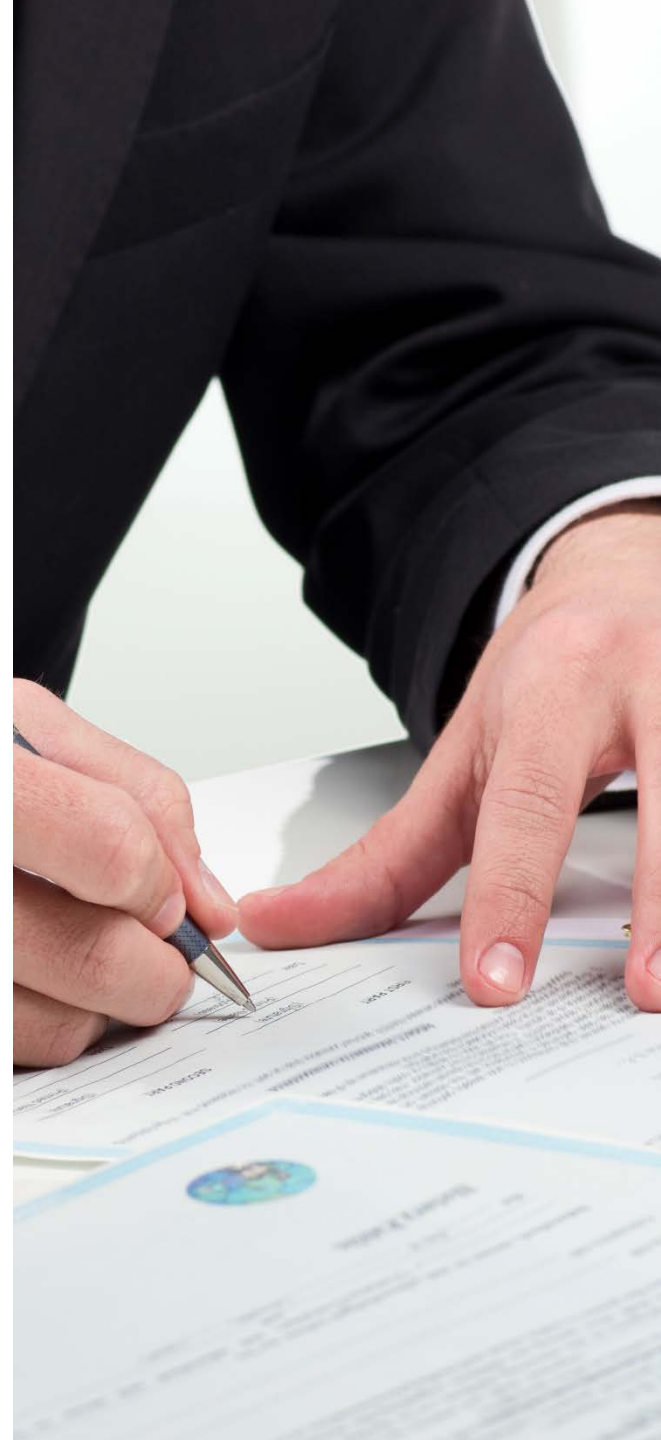
Payments upon termination



Payments upon termination

All employees are entitled to the following upon termination of employment:

- Accrued salary until the termination date
- Pro-rata amount of non-discretionary bonuses/allowances
- Payment in lieu of accrued unused annual leave



Payments upon termination

In addition to the above, redundant employees may be entitled to **job-loss allowance**.

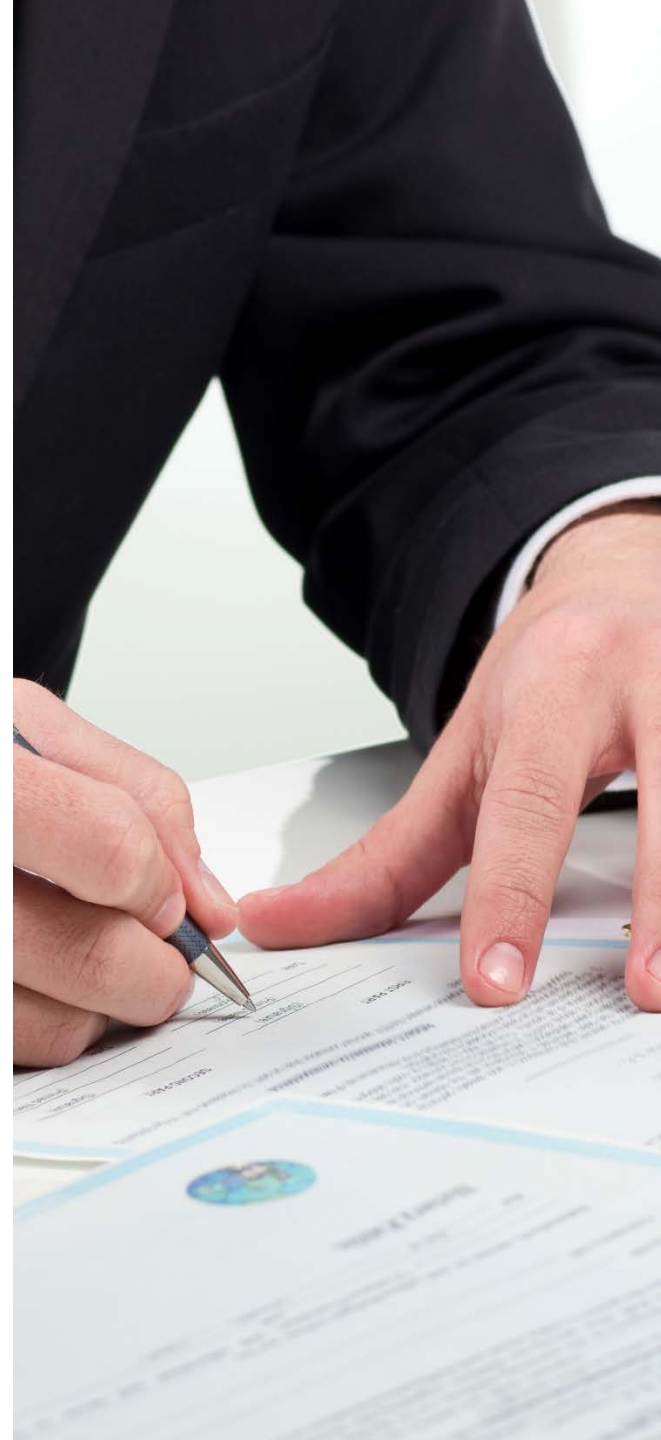
- Employees must have worked for at least 12 months prior to termination to be eligible
- Applies to working periods during which the parties did not participate in unemployment insurance (“UI”) which would include:
 - Working periods prior to 1 January 2009 (the date when UI was introduced)
 - Any periods where there were gaps in the parties’ participation in UI such as during the employee’s probation, maternity leave, or absence due to a long illness



Payments upon termination

Calculating Job-loss Allowance

- In respect of applicable working periods, employees are entitled to 1 month's salary per year of service, but at least 2 months' salary
- Periods of 1 full month to under 6 months are rounded to half a year, and periods of 6 full months to 1 year are rounded to one year
- The employee's average salary over the 6 months immediately preceding the termination is used to calculate job-loss allowance



A woman with glasses and a blue shirt is shown in profile, pointing her right index finger at a digital screen. The screen displays a chart with the text '100 Series' and '5 tracks'. The background is dark with many colorful bokeh lights in shades of blue, yellow, and purple. The KPMG logo is in the top left corner.

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Practical alternatives

Practical Alternatives

Practical Difficulties with Layoffs

- If your company lacks its own corporate trade union, securing a consultation session with the District-level or Industrial Zone-level trade union can be difficult
- Hiring a new employee for a position similar to one where an employee was recently made redundant could provide the basis for a wrongful termination lawsuit
- Cannot use labour outsourcing services for positions where employees have recently been made redundant



Practical Alternatives

Enter into mutual termination agreements with employees

- May not need to undergo onerous statutory redundancy process
- If your company lacks a corporate trade union, can avoid time and cost involved in dealing with immediate upper level trade union
- More options post-termination: no restrictions on hiring new employees or using outsourcing



Practical Alternatives

Implementing the mutual termination approach

No.	Step
1.	If you have a corporate trade union, consult with them regarding the restructuring
2.	Hold a town-hall meeting, followed by one-on-one meetings with employees to explain why the restructuring is necessary, and that employees will be offered an ex-gratia payment in exchange for entering into a mutual termination agreement but if they refuse the company will make them redundant under the statutory procedure
3.	In the one-on-one meetings, present mutual termination agreements and request employees to sign and return them with 2 – 3 business days

Practical Alternatives

Implementing the mutual termination approach

- If you have flexibility with timing, can attempt the mutual termination process first
- If timing is tight, can implement the procedures simultaneously and mention the mutual termination agreements within the labour usage plan



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Case Study



Case Study - Restructuring Sales Team

A company decides to eliminate its sales department, and instead contract out this function to an external provider. The sales department includes:

Bob,
American
citizen

Mai Anh,
6 months
pregnant

Tuan,
just returned from
1.5 months illness

Quan,
part-time trade
union officer



Case Study – More details

A company decides to eliminate its sales department, and instead contract out this function to an external provider.

- The company is **not pleased with the performance of the existing sales** department, which is why it has decided to try to contract out this function;
- **Management has provided emails and verbal feedback** to the employees regarding its dissatisfaction with their performance... but management has **not provided any formal negative performance appraisals**;
- There is not a performance management policy in place;
- The company considers its **use of the external provider an experiment**, and if the company is not pleased with this new arrangement, intends to reinstate its sales department and hire new people;
- All of the employees were hired only 3 years ago;
- The company has 100 employees.

Case Study - Questions

What issues do you see arising from this scenario?

- What legal basis could the company rely upon for the lay-off?
- Do any of the employees have protected status?
- What factors in this scenario could provide the employees with a basis to claim their lay-off is a wrongful termination?
- Would any of the employees be entitled to job-loss allowance?
- Are there any other concerns with this plan?



Case Study

What legal basis could the company rely upon for this scenario?

- Changes to organizational structure or technology since the company is reorganizing its labour by eliminating an entire department

Do any of the employees have protected status?

- Quan, the part-time trade union officer, explicitly has protected status under the Labour Code
- Mai Anh (6 months pregnant) does not officially have protected status, but there is a risk that the authorities would interpret the provisions of the Labour Code broadly to extend protection to her

Case Study

What factors in this scenario could provide the employees with a basis to claim their lay-off is a wrongful termination?

- Management’s previous complaints about the employees’ performance could cause the authorities or the court to question whether the legal basis for the lay-off is genuine
- If within a short period of time, the company reinstates the sales department and hires new people, the legal basis for the redundancy will also seem fabricated



Case Study

Would any of the employees be entitled to job-loss allowance?

- Tuan would be entitled to job-loss allowance for the period during which he was absent from work due to his illness. This period would be rounded to half a year, but we would receive 2 months' salary as a minimum.
- Bob would be entitled to job-loss allowance for his entire working period, because foreigners do not participate in UI. He would receive 3 months' salary.

Are there any other concerns with this plan?

- The company cannot contract out the sales function to a company providing labour outsourcing, as it is prohibited to use labour outsourcing to replace laid off employees.



Thank you



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