

Global HR Hot Topic

Tackling Challenges in Global Human Resources Administration and Compliance

Workforce Restructurings and Vested/Acquired Rights Outside the US

Challenge:

American multinationals too often restructure or make changes in their overseas operations under inappropriate assumptions informed by US employment-at-will.

US employers are free to make sweeping reductions in work terms, a freedom they exercise regularly. An article in *The New York Times* called "A Hidden Toll on Employment: Cut to Part Time" (July 31, 2008) reports on US employers unilaterally cutting hours, benefits and take-home pay. Another *New York Times* piece addresses the trend of US workers "being told to move abroad—or else." According to the article, US employers will transfer a worker saying "I don't care if your wife has to stay here, this is what you have to do." "Leaving Wall St. for a Job Overseas" (August 12, 2008). US employers also regularly rewrite employee handbooks, discontinue HR programs, restructure and integrate workforces, and downgrade employees' jobs and job titles.

These unilateral reductions in US work terms are possible because the US has no doctrine of *vested and acquired rights*. US employment-at-will, unique in the world, remains good law in the states: "Despite dire predictions of the demise of [US] at-will employment in the early years of the 21st century, it appears...that 'funeral arrangements' may still be a bit premature." "Employment-at-Will: Has the Death Knell Officially Sounded?" *International HR Journal*, Summer 2008, at 16, 21. Americans usually think of employment-at-will as related to employment *terminations*, because employment-at-will

is defined as an employer's right to fire an employee for any reason or no reason except a discriminatory or retaliatory reason—even on a "whim." *Supra* at 16. But *employment-at-will also is what grants US employers their freedom to reduce employment terms in day-to-day human resources operations*: After all, an employee who can be fired at will has no standing to complain about a reduction in conditions *less* than a termination.

By contrast, outside the US the operative rule is "indefinite" employment—or, as it is known in the Philippines, the "security of tenure" doctrine. Indefinite-employment systems regulate, restrict or prohibit employment terminations and grant to fired employees a cause of action (of one sort or another) for unfair dismissal. An implicit corollary of any rule restricting no-cause terminations is that an employer barred from firing without cause also cannot *constructively discharge*. After all, if an indefinite-employment-system employer could constructively discharge, the prohibition against unfair dismissals would become meaningless as an employer without legal cause could "fire" workers simply by demoting, cutting pay, and assigning intolerable tasks until they quit. Of course, any restriction on constructive discharges is the same as a restriction on unilaterally reducing material terms and conditions of employment.

Pointer:

Even when there will be no terminations, before making any change that will affect workforces outside the US, factor in the ramifications of *vested and acquired rights*.



Each monthly issue of *Global HR Hot Topic* focuses on a specific challenge to globalizing HR and offers state-of-the-art ideas for ensuring best practices in international HR management and compliance. White & Case LLP's International Labor and Employment Law Practice helps multinationals globalize business operations, monitor employment law compliance across borders and resolve international labor and employment issues.

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This is why workers outside the US are said to enjoy “vested” rights in their existing terms and conditions of employment. In indefinite-employment jurisdictions, employers generally cannot, without employee consent, make material workplace changes, such as (for example) transferring a worker to a different city or discontinuing a benefit plan. Outside the US, employers are usually free only to make *immaterial* tweaks to work conditions such as (for example) moving an employee’s office from one floor to another or changing a benefit plan from one provider to another. In a sense, the vested rights rule abroad works a lot like US law in the *labor union* context: *Unionized* US employers generally cannot unilaterally reduce material terms and conditions of employment until bargaining in good faith to impasse.

Outside the US, an employer that violates this rule and unilaterally makes changes that materially reduce terms and conditions of employment risks having the employee quit, sue for constructive discharge, and demand full severance pay. In many countries the burden in these lawsuits shifts to the employer to prove the quit was *not* a constructive discharge. In countries such as Brazil, an employee may have standing to sue even without quitting.

So the question becomes: *Can an employer operating under indefinite employment ever restructure or otherwise reduce terms or conditions of employment to account for new business realities?* The answer is a very qualified “yes,” subject to five principles:

- **Reduction.** An employer in most countries outside the US cannot unilaterally *reduce* material terms/conditions of employment, such as via a workforce restructuring, a cut

in hours/benefits/compensation, or an employee transfer/reassignment/demotion (or a change in job titles where the change amounts to a demotion). But outside of exceptional jurisdictions like Chile, employers can make a unilateral change that workers greet as an improvement, such as a pay raise or a new benefit.

- **Materiality.** Outside the US employers cannot unilaterally downgrade *material* employment terms, but are generally free to impose truly de minimus cuts such as (perhaps) downgrading office equipment, or rephrasing a “Sales Director” title as “Director of Sales.”

- **“Red circle.”** One alternative to unilateral pay cuts or demotions is for an employer to “red circle” employees, freezing pay and withholding future raises. Red circling can be perfectly legal in indefinite employment countries unless it amounts to a unilateral discontinuance of an existing compensation/review practice of giving regular raises, or unless some statute or individual or collective agreement requires regular raises or good-faith merit-increase reviews.

- **Consultation.** Just as with labor unions in the US, where an overseas works council or trade union committee represents employees in a workplace, any material reduction in terms/conditions is likely to be a mandatory subject of bargaining/information/consultation.

- **Consent.** An employer usually can reduce material work conditions when the affected employees or their representatives *consent*. Often employers get signed consents by paying employees a lump sum incentive to

sign away a vested right. However, in some countries individual employee consent is subject to challenge as inherently coerced, due to the imbalance in bargaining power. Union/works council consent can be binding, but in some contexts or countries an employer reducing terms will need to collect *both* representatives’ *and* affected individual employees’ consents. But watch for laws that ban employee consents in certain contexts. Italy’s civil code (art. 2103) prohibits reducing pay even with consent, and so an Italian union’s consent to a pay cut is void (Italy Sup. Ct. Dec’n 11362 of May 8, 2008).

Distinct from this concept of vested rights is the separate principle of *acquired* rights. Some indefinite employment jurisdictions seem to fear that employers saddled with onerous vested rights obligations might sell out assets, or might outsource, to transfer away their vested employee rights obligations. To protect employees’ vested rights in a business transfer or outsourcing, many (but not all) indefinite employment countries impose so-called “transfer of undertakings” rules by which, as a matter of law, employees’ vested rights transfer over to an asset purchaser or outsource service provider. These employees’ *vested* rights are said to become *acquired* rights with the new employer.

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