

COVID-19 and the Global Workplace

BY CHRISTOPHER BACON AND OSCAR LEIJA
Vinson & Elkins LLP, Houston

Managing human resources issues for a multinational company is challenging even during the best of times. Global human resources managers know that it's rarely possible to have a single set of policies and benefit packages that can be applied consistently throughout the company, regardless of the location. Different cultures, standards of living, economies, welfare systems, and legal systems make that impossible. While many companies succeed in having a single Code of Conduct or consistent non-discrimination and anti-harassment policies, when it comes to administering pay and benefits or making decisions about hiring or layoffs, it's much more difficult to do the same thing in every country where the company has operations.

Ordinarily, the inconsistencies in how global companies deal with tough economic decisions in different localities are not so noticeable because the effects of natural disasters, trade wars, or currency devaluations often do not affect all operations in the same way or at the same time. While a dramatic currency devaluation might have devastating effects on the operations in one country if the cost of production has suddenly increased, the operations in another might benefit if its product has become cheaper to buy. While a trade war may threaten a business in the countries that have imposed or been subjected to those tariffs, the economies of other countries



may end up benefiting by the addition of new manufacturing facilities that would not be subject to retaliatory tariffs. Even the effects of a global recession are likely to be staggered and will not necessarily manifest themselves in every country at the same time. Hence, it is unusual for companies to have to furlough or lay off employees across the globe at exactly the same time. During the current COVID-19 pandemic, however, multinational businesses have found themselves considering salary cuts, furloughs and outright layoffs throughout their global operations. No country has been immune to the effects of this pandemic. Workers in every major economy have

been required or strongly encouraged to "shelter-in-place," while many industries have been forced to temporarily shutter either because of a lack of demand or because of a breakdown in the supply chain.

In this paper, we will look at the unique challenges that multinational companies based in the United States must confront when conducting furloughs and reductions-in-force during the COVID-19. We will begin by looking at the typical challenges that employers face when terminating expatriate employees, either foreign employees who have been hired to work in the United States, and American or U.S. Permanent

Residents who have been “expatriated” on a temporary basis to work for foreign affiliates. We will then discuss why it is usually impossible to approach furloughs and reductions-in-force in the same way in different locations. We will conclude by looking at how newly enacted laws and welfare benefits that have been specifically enacted in response to the COVID-19 pandemic have further complicated the decision-making process that companies must go through when deciding whether to furlough or lay off employees.

Laying off Employees in the United States.

As most global human resources managers know, it is “easier” to terminate employees in the United States because most non-union employees in the U.S. are “at-will” employees who can be terminated without cause.¹ And yet, there are many federal and state laws, not to mention common-law doctrines,² which often swallow up the simple principle of at-will employment. The fact is that American employment law can be quite complex when you are laying off a group of employees: What is the impact that our reduction-in-force is having on employees in protected classes? How can we get an enforceable release from laid off employees?³ Do we have to provide WARN notices?⁴ Can the furloughed employees remain on our health plan? Do we have to bargain with the union?⁵

To complicate matters further, American employers may also have to consider the effects of new laws that were enacted in response to the COVID-19 pandemic. Are we better off letting our employees take advantage of the temporary expansion of unemployment benefits under the recently-enacted CARES Act?⁶ Will any of our employees be eligible for federally subsidized paid leave under the Emergency Paid Sick Leave Act

and the Emergency Family and Medical Leave Expansion Act?⁷

Furloughing or laying off foreign employees in the United States.

Terminating an employee who is a U.S. citizen or permanent resident is tough enough. But what do you do about your foreign employees who are in the United States on a non-immigrant visa? When an employer decides to furlough or lay off employees who are in the United States on a non-immigrant visa (an H-1B or L-1A visa, for example) those employees will not only find themselves unemployed, but they are likely to be required to leave the country unless they can find another employer who will sponsor them a visa within 60-days of their termination.⁸ While employers of H-1B visa holders have an obligation to pay for their trip back to their country of origin,⁹ that will be of little solace to the engineer who has worked in the United States for four or five years and was hoping to eventually secure a Green Card. Many holders of non-immigrant visas have bought homes, enrolled their children in local public schools and have become integral parts of their local communities. Complicating matters even further for these employees is the difficulty of traveling during this pandemic.

Some employers have attempted to avoid layoffs by imposing across-the-board salary cuts for employees that earn over a certain amount. Unfortunately, one of the conditions of being allowed to hire an employee on an H-1B visa is that the employer will pay the employee the amount that it promised the employee at the outset.¹⁰ Hence, that is not a viable solution unless the employer wants to exempt its non-immigrant employees from the salary cuts.

Furloughing or laying off U.S. expatriates in foreign countries.

Generally, when employers need to terminate U.S. employees (citizens or U.S. permanent residents) who have been assigned to a foreign country, they will typically try to relocate the employee back to the United States. The reason for this is simple. In many countries, no-cause layoffs are either illegal or the employer is required to pay separated employees a statutory severance—often substantial in amount—which is usually based on the employees’ seniority.¹¹ There is nothing more frustrating for an employer than to be sued in a foreign court or tribunal by an ex-employee who has just been paid a generous severance only to learn that the employee’s release of claims may not be enforceable in the foreign jurisdiction. The risk of this happening increases if the terminated employee happens to be a citizen of the country where he had been assigned.

In addition to the usual concerns about the applicability of foreign labor and employment laws that employers must contend with when terminating a single employee, multinational employers considering layoffs or furloughs of employees assigned to foreign affiliates will also need to think about other countries’ legal requirements for conducting reductions-in-force or mass layoffs. While other countries often do permit reductions or redundancies for economic difficulties, companies are frequently required to negotiate the reductions with unions or works council. In some countries, failure to negotiate the decision with the works council can prevent any reductions from taking place.¹² In certain countries, companies must also obtain government approval before proceeding.¹³ Given that most countries have more employee-friendly laws than the U.S., companies should not be surprised if expatriates avail themselves of legal remedies in the

country of their foreign assignment if they are included in a layoff.

New laws enacted in foreign countries in response to COVID-19.

U.S. companies with employees in other countries should also keep in mind that new laws have been enacted in many countries in response to the COVID-19 pandemic that might make it more difficult to terminate employees at this time. Argentina, for example, typically allows terminations of employment contracts for “force majeure” reasons. However, the Argentine government recently issued a decree temporarily banning layoffs due to “force majeure” reasons or the lack of work.¹⁴ Likewise, Turkey recently passed legislation that introduces a temporary restriction on termination of employment contracts unless the termination is based on immoral, dishonorable, or malevolent conduct on the part of the employee.¹⁵ At the same time, the change in law does not disallow employers from suspending employment contracts because of COVID-19, meaning employees are not required to provide services and employers are not required to compensate them.

In response to the COVID-19 pandemic, Australia passed legislation limiting the kinds of terminations an employer can conduct due to economic reasons.¹⁶ The legislation generally disallows the use of temporary layoffs for economic reasons. However, an employer can effect a temporary separation by offering employees paid or unpaid leaves of absence. As for permanent layoffs based on redundancy, Australia’s new law imposes a handful of obligations on employers before they can permanently lay off an employee. First, an employer must consult with employees on at least two occasions before resorting

to termination. Second, the employer must attempt to secure alternative employment positions for the employee. And third, employers must provide the employee with notice (or pay in lieu of notice) and redundancy pay.

“
... new laws have been enacted in many countries in response to the COVID-19 pandemic that might make it more difficult to terminate employees at this time.
”

Any company considering layoffs or furloughs in another country should also consider whether governmental benefits are available to employers who retain employees, much like the United States Congress provided in the recently enacted CARES Act. In the UK, for example, the government is helping employers with up to 80 percent of wage expenses, up to specific caps.¹⁷ The Netherlands adopted the Temporary Emergency Measure for Work Retention scheme, or NOW,¹⁸ which promises to cover up to 90 percent of eligible employers’ wage costs. Along similar lines, South Korea’s efforts to stem COVID-19’s economic effects include offering employers employment retention subsidies, with the view that the economic benefits available to employers will dissuade them from implementing reductions-in-force.¹⁹ South Korea’s subsidies cover up to 90 percent of employers’ wage costs, up from the

coverage of 66 percent of wage costs the government first promised. However, large firms remain subject to the original 66 percent threshold.

In the case of a company with employees in countries where the government is providing generous subsidies to those employers who retain employees, employers may well decide against layoffs or furloughs on the strength of the government benefits available to employers who refrain from workforce reductions. Whether a company decides to stay the course with layoffs or opts for the government benefits will turn on an employer’s specific circumstances. In some instances, the government benefits can offset an employer’s expenses. At a minimum, government benefits for employers can defray a company’s labor costs; in others, the government benefits may not justify a company’s decision to abstain from reductions-in-force. However, before committing to a decision, employers should determine their eligibility for government benefits for employers. If such benefits exist, employers should use that information to inform their decision whether to conduct reductions-in-force.

Other Considerations.

Payroll issues aside, some U.S. companies may want to repatriate expatriate employees for health and safety reasons depending on the extent that COVID-19 has affected, or will affect, the countries where their employees are assigned, and on the ability of those countries’ health care systems to treat any employee who becomes sick. As we have all seen, the country-specific data keeps changing. Whereas multinational companies initially focused their attention on their operations in China, then in Italy and other parts of Western Europe, the New York area has been ground zero through much of the month of April—though it

appears that the infection rate there is beginning to plateau. On the other hand, the number of cases in certain Latin American and Middle Eastern countries where many U.S. expatriates work for U.S. multinational companies is now growing at a much faster rate.

A further challenge facing employers with employees in countries where the infection rate is growing exponentially is how to bring those employees home. Even when there are still available flights from those countries, adherence to social distancing guidelines on a flight home could be a challenge. Given the risks, travel may not be advisable for an employee whose age or health conditions make them more susceptible to COVID-19.

Suffice it to say, managing a multinational workforce has never been simple, but COVID-19 has compounded the challenge for U.S. companies that operate internationally, especially at a time when companies are looking to retrench, furlough or lay off employees.



Christopher Bacon is counsel at Vinson Elkins LLP, where he practices in employment law. Fluent in four languages, Chris frequently advises clients on international employment issues. He is a 1990 graduate of Harvard Law School.

Oscar Leija is a 2019 graduate of Harvard Law School who recently joined Vinson Elkins LLP. ■

Endnotes

- 1 See, e.g., *Montgomery Cnty. Hosp. Dist. v. Brown*, 965 S.W.2d 501, 502 (Tex.1998) (citing, e.g., *East Line & R.R.R. Co. v. Scott*, 72 Tex. 70, 10 S.W. 99, 102 (1888) (noting the general rule)); see also RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 2.01 cmt. a (Tentative Draft No. 1, 2008) ("The courts in 49 states recognize the principle that the employment is presumptively an at-will relationship.").
- 2 See, e.g., *Sabine Pilot Service, Inc. v. Hauck*, 687 S.W.2d 733 (Tex. 1985).
- 3 See, e.g., Older Workers Benefit Protection Act, 29 U.S.C. § 621, et. seq.
- 4 See Worker Adjustment and Retraining Notification Act (WARN Act), 29 U.S.C. §§ 2101–2109.
- 5 See *United Food and Commercial Workers, AFL-CIO v. NLRB*, 519 F.3d 490 (D.C. Cir. 2008); see also *Porta King Bldg. Systems, Div. of Jay Henges Enterprises, Inc. v. NLRB* (8th Cir. 1994) (employer's refusal to bargain with union violated NLRA).
- 6 See Coronavirus Aid, Relief, and Economic Security Act of 2020 (CARES Act), Pub. L. No. 116-136.
- 7 See Families First Coronavirus Response Act, Pub. L. No. 116-127.
- 8 8 C.F.R. § 214.1(l)(2).
- 9 8 C.F.R. § 214.2(h)(4)(iii)(E).
- 10 See 20 C.F.R. § 655.731.
- 11 In Mexico, for example, an employee who is discharged without cause is entitled to three months' salary plus 20 days' pay for each year of service, and any accrued salary and bonuses. Employees are also entitled to severance payments equal to 12 days' salary. *Ley Federal del Trabajo*, art. 162.
- 12 See *Betriebsverfassungsgesetz 2001* (Works Constitution Act 2001), § 102 laying out works councils' rights (with regard to termination).
- 13 See, e.g., Industrial Disputes Act, 1947 (requiring covered employers to seek and obtain government approval before terminating workmen) (India).
- 14 See Decreto 329/2020, *Boletín Oficial de la República de Argentina*, número 34.344 (Mar. 21, 2020).
- 15 Law No. 7226 on Amendments to Certain Laws, (Repeated) Official Gazette (Mar. 26, 2020).
- 16 Coronavirus Economic Response Package (Payments and Benefits 2020) Amendment Rules (No. 2) 2020 (Cth).
- 17 Her Majesty's Revenue and Customs, Collection, Coronavirus Job Retention Scheme (May 15, 2020), <https://www.gov.uk/government/collections/coronavirus-job-retention-scheme> (collecting government guidance on the United Kingdom's Coronavirus Job Retention Scheme).
- 18 See Government of the Netherlands, Coronavirus: Financial Schemes for Businesses and Self-Employed People, <https://www.government.nl/topics/coronavirus-covid-19/information-for-business-owners>.
- 19 See Article 60, Labor Standards Act; see also Article 41-2, Employer's Obligation to Cooperate, Infectious Disease Control and Prevention Act.