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FAQS – REDUNDANCY & RESTRUCTURE

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HARMERS WORKPLACE LAWYERS

The current COVID-19 pandemic has forced organisations to consider whether they should restructure their business and/or make their employees redundant. This FAQ Sheet is provided to assist companies to address and manage issues of redundancy and restructure in the workplace.

WHAT IS A REDUNDANCY?

Under section 119 of the *Fair Work Act 2009* (Cth) ("FW Act"), a redundancy occurs when an employer decides they no longer need an employee's position to be done by anyone. A redundancy can occur when the business slows down due to lower sales, closes down or restructures due to a merger or takeover. Businesses should also consider the terms of any applicable modern award, enterprise agreement and employment contract as they may contain specific definitions of redundancy.

WHAT NEEDS TO BE CONSIDERED IN A RESTRUCTURE OR REDUNDANCY?

Employers should consider why they are restructuring and/or making an employee's position redundant and ensure that those reasons are genuine.

Under any applicable modern award or enterprise agreement, an employer is required to consult with employees about the restructure or redundancy prior to implementing it.

If an organisation decides to dismiss 15 or more employees for economic, technological or structural or similar reasons, an employer must notify Services Australia (FW Act, s 530). If at least one of the employees was a union member, the organisation must also notify and consult with that union (FW Act, s 531).

WHAT IS AN EMPLOYEE ENTITLED TO WHEN MADE REDUNDANT?

The FW Act provides a statutory entitlement to redundancy pay for certain employees which is contingent upon their years of continuous service. For example, an employee who has worked at least 1 year but less than 2 years is entitled to 4 weeks pay (FW Act, s 119). However, regard must be had to the relevant employment contract, any redundancy policy, and applicable modern awards or enterprise agreements as they may have set out more generous redundancy pay entitlements.

An employee is not entitled to redundancy pay if they worked less than 12 months or if their employer had less than 15 employees (including in related entities) (FW Act, s 121). On termination, employees are also entitled to notice of termination (or payment in lieu) and any payment of accrued annual leave and long service leave (if applicable).

ARE THERE ALTERNATIVES TO REDUNDANCY?

As a first step, businesses should consider whether redeployment would be reasonable in the circumstances. That is, is there a position or other work to which the employee can be suitably redeployed? Other alternatives businesses should consider include the following:

- Consider the suitability of alternative working arrangements such as working from home.
- Discuss temporary agreements to change their duties, rosters, or hours with the employee if it means they can keep working.
- Consider asking employees to access paid or unpaid leave.

Employers can also consider standing down their employees without pay if there are appropriate provisions for a stand-down in an employment contract, industrial instrument or at law. Employers may be able to stand their employees down for various reasons, including when:

- the business has closed because of an enforceable government direction (which means the employee cannot be usefully employed, even from another location); and
- there is a stoppage of work due to lack of supply for which the employer cannot be held responsible (FW Act, s 524).

WHAT ARE THE LEGAL RISKS ASSOCIATED WITH A RESTRUCTURE AND/OR REDUNDANCY?

Depending on the circumstances, there are several claims available to an individual affected by a restructure and/or redundancy. These include:

- An unfair dismissal claim on the basis that it was not a "genuine redundancy" (FW Act, s 389).
- A general protections claim on the basis that the individual was selected for redundancy because he/she had, exercised, or proposed to exercise, a protected workplace right, such as making a complaint in relation to their employment (FW Act, s 340).
- A discrimination claim on the basis that the individual was selected for redundancy due to a protected attribute such as sex, age, race, sexual preference or disability.
- A claim for breach of an enterprise agreement, modern award or employment contract on the basis that specified procedures were not followed and/or specific payments were not made.

Michael Harmer
Chairman and Senior Team Leader,
Harmers Workplace Lawyers
michael.harmer@Harmers.com.au
+61 2 9267 4322

Amy Zhang
Executive Counsel and Team Leader,
Harmers Workplace Lawyers
amy.zhang@Harmers.com.au
+61 2 9267 4322

Harmers Workplace Lawyers
Level 27 St Martins Tower
31 Market Street
NSW 2000, Australia
+612 9267 4322
www.harmers.com.au

CHINA

中倫律師事務所
ZHONG LUN LAW FIRM

The current COVID-19 pandemic has forced organisations to consider whether they should restructure their business and/or make their employees redundant. This FAQ Sheet is provided to assist companies to address and manage issues of redundancy and restructure in the workplace.

WHAT IS A REDUNDANCY?

Pursuant to the Article 41 of PRC Employment Contract Law, the following two thresholds shall be met for a redundancy:

1. the affected employees are more than 20 or account for more than 10% of the total staff; and
2. the employer has encountered an applicable situation to implement redundancy.

- The PRC Employment Contract Law also lists the applicable situations for implementing redundancy as follows:

(a) the employer undergoes restructure bankruptcy proceedings;
(b) the employer is in severe financial and operational difficulty;
(c) the employers introduce technological innovation for new products or change of business model and it is still necessary to lay off employees after amending employment contracts;
(d) any other objective economic situations rendering employment contracts no longer performable.

WHAT NEEDS TO BE CONSIDERED IN A RESTRUCTURE OR REDUNDANCY?

(1) Adequacy of Statutory Procedures

As termination of employment is highly regulated in China, the implementation of redundancy must follow the statutory procedures, which includes announcing the redundancy plan to the trade union or all staff, soliciting opinions from trade union or employee representatives and filing the redundancy report to the local labour authority.

Labour authorities in China are usually unwilling to grant a receipt to endorse a redundancy because they intend to stabilise employment and avoid labour disputes, especially during the pandemic period. Therefore, it is currently not an easy task for employers in China to fulfill all the requirements and procedures to achieve employment termination based on redundancy.

(2) Identification of Protected Groups

Certain groups of employees are protected by law from being terminated in redundancy, which include employees during pregnancy, maternity leave, breastfeeding period, medical treatment period, or have lost labour capacity in part or in whole due to work injury or occupational disease.

(3) Selection of Redundant Employees

In redundancy, the PRC Employment Contract Law requires that employers prioritise to retain employees who have a longer fixed term contract, an open-ended term contract or are the sole income earner of the family.

WHAT IS AN EMPLOYEE ENTITLED TO WHEN MADE REDUNDANT?

Under the PRC Employment Contract Law, the employee is entitled to receive the statutory severance, compensation for unused annual leave, overtime pay (if any) upon termination due to redundancy. Employers are usually advised to calculate the overall budget before commencement of the redundancy.

ARE THERE ALTERNATIVES TO REDUNDANCY?

If the legal entity is to liquidate and de-register with all employees to be laid off, the Article 44 of the PRC Employment Contract Law can be applied to end the employment contract with the employees. Under this approach, employers do not need to fulfill the statutory procedures of redundancy.

If the reduction of workforce cannot be legally identified as a redundancy or the statutory procedures are difficult to be completed, the employer may choose to negotiate with the employees for mutual termination of employment. The essence to achieve the mutual termination is that the employer and employee can both agree on a proper amount of severance.

If the negotiation for mutual termination is not successful and there is no work that can be arranged for the redundant employees, the employer may arrange for the employees to enter the idle mode, under which the employees will only receive the local minimum monthly wage from the second month of the idle mode.

IS SEVERANCE PAY LEGALLY REQUIRED?

Yes. The severance is compensated based on employees' service year and average monthly salary standard. The general calculation method is one month salary for one-full year service.

WHAT IS THE COMMON PRACTICE FOR A REDUNDANCY?

Employers in China usually conduct the statutory procedures for redundancy with the negotiation for mutual termination started at the same time. The redundant employees are usually analysed by the employer with the help of attorneys and the negotiation starts with those who are evaluated to be easy to accept mutual termination.

WHAT ARE THE LEGAL RISKS ASSOCIATED WITH A REDUNDANCY?

Terminated employees are entitled to file labour arbitration and litigation and claim that their terminations are wrongful. The employees' arguments that are usually seen in such cases include the employer does not have an applicable situation to evoke redundancy, the employer has not fulfilled all the statutory procedures, and the employees shall prioritise to be retained by the employer compared with their colleagues.

If the labour arbitration commission and/or people's court rule that the employer's termination based on redundancy is wrongful, the employees may either claim employer's payment of double statutory severance or reinstatement of original employment.

Carol Zhu
Partner,
Zhong Lun Law Firm
CarolZhu@zhonglun.com
+86 21 6061 3081

Zhong Lun Law Firm
Level 16, Two IFC, No. 8
Century Avenue, Pudong New Area,
Shanghai 200120, P.R. China
+86 21 6061 3666
www.zhonglun.com

INDIA

The current COVID-19 pandemic has forced organisations to consider whether they should restructure their business and/or make their employees redundant. This FAQ Sheet is provided to assist companies to address and manage issues of redundancy and restructure in the workplace.

WHAT IS A REDUNDANCY?

Redundancy has not been defined under Indian labour and employment laws; however, courts have recognised that employees' services may be terminated on account of business reorganisations, closure, business losses, reduced production, outsourcing of business functions and introduction of technology and automation.

WHAT NEEDS TO BE CONSIDERED IN A RESTRUCTURE OR REDUNDANCY?

The factors that would have to be considered while undertaking a redundancy exercise are: nature of the business undertaken by the employer, location, number of employees impacted and their job functions, terms and conditions of employment contracts, impact of State specific laws and regulations, manner in which the exercise would be implemented, computation of severance compensation, etc.

One of the most important considerations that must be evaluated well in advance is the classification of impacted employees, i.e., whether the employees will be categorised as 'workmen' or 'non workmen' under Indian laws. Service conditions of workmen are subject to far greater protection in India, and redundancy exercises that involve workmen (called 'retrenchment' under Indian laws) must be undertaken in accordance with a prescribed process, which includes seeking approvals from/making reportings to local labour authorities.

ARE THERE ALTERNATIVES TO REDUNDANCY?

In India, some organisations offer mutual separation schemes/voluntary retirement schemes as an alternative to termination of services. Alternatively, employees can resign of their own accord.

IS SEVERANCE PAY LEGALLY REQUIRED?

For 'workmen' employees who have completed 1 year and whose services are being terminated, a minimum of 1 month's notice/payment in lieu thereof would have to be provided, along with 'retrenchment compensation' calculated at 15 days wages for every completed year of service. Payments to non-workmen will be largely governed by contractual terms.

In addition to the above, social security benefits would have to be paid out as per applicable law, and payments under internal policies and requirements under State specific laws would also have to be taken into account.

WHAT IS THE COMMON PRACTICE FOR A REDUNDANCY?

Once the redundancy plan is drawn up, employers hold conversations with the affected employees and outline the separation terms. The timing and nature of this communication is extremely important, and employers must be prepared to address various contingencies. At this juncture, employers may offer a mutual separation option/voluntary retirement scheme as well. For employees who do not accept this, their services will be terminated as per the process specified under law and contract.

WHAT ARE THE LEGAL RISKS ASSOCIATED WITH A REDUNDANCY?

A significant legal risk associated with redundancies is that employees can challenge a redundancy termination before the labour department on grounds that it is unfair/that proper processes were not followed and seek reinstatement along with backwages.

Another risk that could arise in a redundancy context is that if the employers approach the labour department to notify/seek approval for terminating the employees' services, it could result in the commencement of a general inquiry on the labour practices adopted by the employer. This often leads to considerable delays and hinders business operations.

Avik Biswas
Partner,
IndusLaw
avik.biswas@induslaw.com
+91 80 4072 6686

IndusLaw
#101 1st Floor "Embassy Classic"
#11 Vittal Mallya Road
560001, Bangalore, India
+91 80 4072 6600
www.induslaw.com

JAPAN

Atsumi & Sakai

The current COVID-19 pandemic has forced organisations to consider whether they should restructure their business and/or make their employees redundant. This FAQ Sheet is provided to assist companies to address and manage issues of redundancy and restructure in the workplace.

WHAT IS A REDUNDANCY?

A redundancy occurs when an employer decides they no longer need an employee's position to be done by anyone. A redundancy can occur when the business slows down due to lower sales, closes down or restructures due to a merger or takeover.

WHAT NEEDS TO BE CONSIDERED IN A RESTRUCTURE OR REDUNDANCY?

A redundancy is rigorously restricted in Japan. Japanese judicial precedent has established the practice that the following four factors should be met:

(a) necessity of decreasing the number of employees;
(b) necessity of adopting the "unilateral termination of employment contract" method as a means of employment adjustment;
(c) adequate selection of the employees whose employment contracts are to be terminated; and
(d) adequacy of the termination procedure.

In practice, a company needs to ensure that it follows the factors described above, with special attention being given to reasonableness and to communicating and collaborating with employees or any union representative during the redundancy process.

ARE THERE ALTERNATIVES TO REDUNDANCY?

Importantly, with regards to (b) above, an employer is required to make every effort to avoid terminating employees. Even a seemingly justified redundancy plan may be held invalid if a company does not first exhaust all reasonable measures to avoid employee dismissals, for example, by not renewing any expiring fixed term employment contracts, freezing external hiring, transferring or redeploying qualified employees into open positions in other departments or to subsidiary/sibling companies (subject to the employee's consent, if required), soliciting employee early retirements or voluntary resignations and other non-employee related cost cutting measures.

IS SEVERANCE PAY LEGALLY REQUIRED?

Under Japanese law, there is no statutory obligation to pay severance allowance upon termination, except in circumstances when payment is in lieu of notice.

WHAT IS THE COMMON PRACTICE FOR A REDUNDANCY?

Any employment relationship can be terminated by voluntary resignation on the part of the employee even if such voluntary resignation occurs at the suggestion of the employer.

When termination of employment due to redundancy is desired, Japanese employers typically offer voluntary resignation packages to induce employees to voluntarily resign. As long as each employee to be terminated agrees to the terms and conditions of termination, the employer can terminate him/her with or without paying severance, in accordance with the terms and conditions to which the employee agrees. There is no statutory standard for the amount of severance to be offered in connection with a voluntary resignation package.

WHAT ARE THE LEGAL RISKS ASSOCIATED WITH A REDUNDANCY?

On the other hand, if the employee does not accept the offer, the employer may choose to terminate the employee even without the employee's consent although this may of course result in litigation.

In circumstances where the employer has failed to satisfy the court that all such elements and principles are present in its case for redundancy, unilateral termination of employment by the employer would be considered to be void.

Tatsuo Yamashima
Senior Partner,
Atsumi & Sakai
tatsuo.yamashima@aplaw.jp
+81 3 5501 2297

Atsumi & Sakai
Fukoku Seimei Bldg.
2-2-2 Uchisaiwaicho, Chiyoda-ku
100-0011 Tokyo, Japan
P +81 3 550 121 11
www.aplaw.jp

SINGAPORE

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WHAT IS A REDUNDANCY?

"Redundancy" or "retrenchment" are not defined in the Employment Act of Singapore (Cap. 91). However, the Tripartite Advisory on Managing Excess Manpower and Responsible Retrenchment ("Advisory"), which was jointly issued by the Ministry of Manpower ("MOM"), the National Trades Union Congress and the Singapore National Employers Federation defines "retrenchment" as a situation where an employer has terminated an employment contract with no plans to fill the vacancy any time soon.

For completeness, the Advisory also provides guidance on how employers should carry out a redundancy exercise. While the Advisory is not legally binding, it is highly persuasive and employers should abide by it. Where employers do not comply with the Advisory, they may face sanctions from the MOM, such as having their work pass privileges curtailed or may be subject to scrutiny from the Tripartite Alliance for Fair and Progressive Employment Practices ("TAFEP").

WHAT NEEDS TO BE CONSIDERED IN A RESTRUCTURE OR REDUNDANCY?

Firstly, employers should ensure that the selection of employees for retrenchment is based on objective criteria (i.e. the ability, experience, and skills of the employee) and that employers do not discriminate against any employee on grounds of age, race, gender, religion, marital status and family responsibility, or disability.

Secondly, employers are also encouraged to take a long-term view of their manpower needs and maintain a strong Singaporean core. In other words, in any redundancy exercise, employers are encouraged to retrench a foreigner over a local employee. Companies are also required to ensure that the proportion of local employees in the company is not reduced after the redundancy exercise.

Lastly, when considering a redundancy, employers should also consider the questions provided in the checklist in relation to responsible retrenchment practices in Annex B of the Advisory (https://www.mom.gov.sg/-/media/mom/documents/employment-practices/guidelines/tripartite-advisory-on-managing-excess-manpower-and-responsible-retrenchment.pdf). The questions to be considered are as follows:

1. Does the business situation warrant a retrenchment?

2. Did the company tap on government support, put in effort to reskill and deploy employees where possible, before embarking on a retrenchment exercise?

3. Did the company implement other alternatives before embarking on a retrenchment exercise? Examples include, but are not limited to: flexible work schedule, shorter work-week, no-pay leave.

4. Did the company use objective criteria to identify employees to be retrenched and that the criteria used do not discriminate against any employee on the basis of age, race, gender, religion, marital status and family responsibility, or disability?

5. Did the company ensure that the proportion of local employees is not lower, after retrenchment?

6. If company is unionised, were the selection criteria and retrenchment benefit discussed and agreed to with the union?

7. Did the company communicate its business situation and retrenchment plans clearly and in a sensitive manner with compassion to employees?

8. Did the company adhere to the notice period for retrenchment in accordance with the employment contract, collective agreement, or the Employment Act of Singapore (Cap. 91)?

9. Did the company provide retrenchment benefit in accordance with the Advisory?

10. Did the company put in place measures to support the affected employees to move on to new jobs, e.g. engaging Workforce Singapore or NTUC's Employment and Employability Institute for employment facilitation?

Additionally, employers who have at least 10 employees in the company would have to notify the MOM of all retrenchments regardless of the number of employees affected. Mandatory retrenchment notifications are to be made to the MOM within 5 working days after affected employees are notified of their retrenchment via this form.

WHAT IS AN EMPLOYEE ENTITLED TO WHEN MADE REDUNDANT?

Redundancy benefits are only legally required to be paid for employees who have worked more than 2 years with a company. However, because of COVID-19, employers are encouraged to pay redundancy benefits to affected employees regardless of years of service. The MOM recommends that employees be paid 2 weeks to 1 months' salary per year of service, depending on the company's financial position and industry norm. The quantum may be negotiated between the company and the affected employee.

Additionally, it should be noted that where there are agreements or company policies that provide for the quantum of redundancy benefit, the company would be bound by such agreements and policies.

Employers are also encouraged to give more support to affected lower wage employee by providing them with greater redundancy benefits or additional training grants.

ARE THERE ALTERNATIVES TO REDUNDANCY?

As a result of COVID-19, the Advisory provides that the following cost-saving measures may be implemented as alternatives to redundancy. Further details can be found in Annex A of the Advisory (https://www.mom.gov.sg/-/media/mom/documents/employment-practices/guidelines/tripartite-advisory-on-managing-excess-manpower-and-responsible-retrenchment.pdf):

1. Adjustments to work arrangements without wage cuts.

    a. Redeployment of employees to alternative areas of work within the company.
    b. Redeployment of employees to other companies.
    c. Flexible Work Schedule.

        i. i.e. employers can reduce weekly working hours without adjusting wages, by creating a "timebank" of unused working hours. These banked hours can then be used to offset the increase in working hours in subsequent periods.
        ii. Employers who wish to implement flexible work schedule will need to apply to the Commissioner for Labour for approval.

Thomas Choo
Partner,
Clyde & Co Clasis Singapore Pte. Ltd.
thomas.choo@clydeco.com
+65 9780 0071

Clyde & Co Clasis Singapore Pte. Ltd.
12 Marina Boulevard #30-03
Marina Bay Financial Centre Tower 3
018982 Singapore
+65 6544 6500
www.clydeco.com

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For more information about L&E Global, or an initial consultation, please contact one of our member firms or our corporate office. We look forward to speaking with you.

L&E Global
Avenue Louise 221
B-1050, Brussels
Belgium
+32 2 64 32 633
www.leglobal.org

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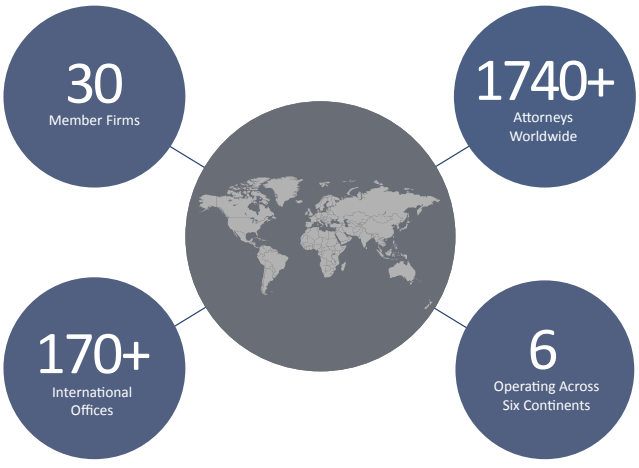

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