Think Global, Act Local: Top Workplace Law Challenges Facing Multinational Employers
Myths and Realities of European Labor/Employment Law
Termination of Employees
Works Councils
Collective Dismissals
Transfer of Undertaking
The Optimist: Everything we decide at headquarters is for the good of the Company and based on business logic. The rest of the world will readily accept this if local management/HR explain it properly.

The Pessimist: We will never be allowed to do any restructuring or terminations in Europe no matter what the reason.
The Company can achieve its goals if it follows the procedures and respects local custom/process.

The process will often take longer and be more expensive than expected.

Time can be inversely proportional to money.
Sources of European Labor/Employment Law

- Country-specific statutes and codes
- Collective bargaining agreements (industrywide or company-based)
- Works Council Agreements
- Individual employment contracts
Termination of Employees in the European Context

US perspective: “Just as you are free to leave the Company at any time, the Company may terminate your employment for any reason, with or without notice.”

European perspective: terminations must be supported by just cause and follow appropriate procedures, and certain categories of employees are protected
Reasonable Grounds for Termination

- Poor performance—adequate notice of failure to meet standards, opportunity to improve, thoroughly documented
- Misconduct—normally requires advance warning, either very serious or sustained
- Economic/organizational—poor financial results, technological change, competitive challenges
- By US standards, reasonable grounds are strictly defined
Notice of termination typically must be in writing and state grounds, often must be delivered in specified manner. Internal “convocation” or hearing may be required to provide employee a pre-termination opportunity to respond (e.g., France, UK). WC interaction may be required (e.g., Germany). Court or government agency approval may be required (Netherlands). In case of protected employee, labor authority or WC approval may be required.
Protected Employees

- Most commonly WC or other employee representatives, pregnant employees, employees on maternity/paternity leave, disabled
- May need prior approval of labor authority or WC to terminate
- Generally entitled to enhanced damages or reinstatement for invalid termination
Gross misconduct—so severe and urgent that employment relationship must be immediately ended e.g., theft, violence

- Typically no notice required, minimal or no indemnities
- Quite rare
Justified dismissal based on performance, conduct, or economic reasons

- Typically notice and statutory or CBA indemnities
- Difficult to satisfy by US standards
Unjustified Dismissal—without cause or sufficient cause under local standards

- Typically notice, statutory or CBA indemnities, severance/damages, and in some countries (e.g., Germany) possible reinstatement
- The most common scenario when HQ is involved
Termination Scenarios (cont’d)

Dismissal of a protected employee

- Notice, statutory or CBA indemnities, significantly enhanced severance/damages or reinstatement
- Very unlikely to happen given the severe consequences
Common even for rank-and-file employees; often contain termination notice periods.

Top executives (e.g., Managing Directors) may not be protected by local employment law. Law for notice periods and indemnity provisions in their contracts.

Fixed-term contracts: may avoid notice and severance exposure, but typically limited in number and duration.
EU Directives on Race (2000/43/EC) and Equal Treatment (2000/78/EC and 2002/73/EC) define protected characteristics of race, gender, religion, disability, age, sexual orientation.

Considerable variation and additional protected categories defined under national law

Increasing in importance (e.g., UK), but generally not comparable in visibility to discrimination law in US, where unfair dismissal unavailable outside the CBA context

Unfair dismissal may be most straightforward route to substantial compensation in most EU countries
Scenario 1

A pharmaceutical product batch must be recalled after it is found that certain quality control checks were not performed on an ingredient shipped from Germany to Quebec. On investigation it is determined that a German employee approved shipment, and a Quebec employee received shipment, without examining the manufacturing records which clearly showed that one of the quality tests had not been recorded as completed.

The Senior VP of Compliance has concluded that these are egregious violations of policy, and that it is essential for the compliance profile of the Company that both employees be terminated. Local HR/management does not wish to terminate the employees given their long service and previously good records. The Senior VP of Compliance wants you (and if necessary, the General Counsel) to either support his position or explain to senior management why the lawyers and HR are obstructing his attempts to enforce the Company’s strict compliance policies.
Scenario 2

Your Company is being investigated by government agencies and the Department of Justice concerning a number of compliance issues. In the course of the Company’s internal investigation of the matters alleged, it is discovered that a US executive engaged in violations warranting immediate termination without severance under the US severance plan. This aspect of the investigation will need to be promptly reported to the Government.

The US executive in question, however, is now serving in an executive position in a European country on an expat contract. You are advised by local counsel that the expat is entitled to the protections of local labor law, and that under local law the violations he engaged in would not be regarded as gross misconduct, and would perhaps not even support a justified dismissal. Based on his total years of service with all affiliates of the Company, the executive if terminated is entitled at least to a payment in lieu of notice of approximately 1 million euros. US outside counsel handling the investigation believes the Government would be appalled at such a payment being made to the executive. The General Counsel has asked you for a solution.
Employees representative groups organized on a site or corporate entity basis to provide a forum for dialogue between employees and management

Companies over a certain threshold number of employees are required to establish under local law of some countries

Prevalent in France, Germany, Netherlands, Belgium, Austria, Italy, Spain, Sweden, Finland

Separate from trade unions, but often influenced/advised/nominated by them

Failure to inform/consult WC’s can lead to civil injunctive actions and, in some countries, criminal sanction
European Works Councils

- Under the European Works Council Directive and implementing national law, a business with 1000 employees within the EU and 150 employees in at least two member states can be required to establish a European Works Council.

- European Works Councils typically meet 1-2 times a year and have independent rights to information and consultation on “transnational” matters (e.g., restructurings involving two or more countries).

- Operate independently of local WC’s, but often have overlapping membership.
EU Information and Consultation Directive (2002/14/EC)

- Defines minimum standards of information and consultation for businesses in all member states
- Information given at such time and with such content as to permit adequate study and preparation for consultation
- Consultation sufficient to permit employee representatives to formulate opinion and obtain a management response with reasons
- Member states to determine practical arrangements for exercising information/consultation rights
Information: management must keep the WC advised of significant matters affecting the business or its employees (usually through periodic meetings) and provide information on specific statutorily-defined issues (such as mergers/acquisitions, restructurings) sufficient to support a consultation process with the WC.

Consultation: the WC has the right to provide an opinion on specific issues.
Advice: formal right to provide written advice concerning a proposal by management (Netherlands)

Co-determination: right in some countries (e.g., Germany) to approve certain measures such as restructurings, matters affecting working conditions

In some countries, WC can appoint members of the corporate supervisory board of directors

WC members are typically protected employees
Mergers and Acquisitions directly affecting the local corporate entity or its employees

Collective Dismissals

Significant organizational changes or restructurings

Changes to company policies or practices

Changes in the corporate entity structure or governance

Matters affecting performance assessment, compensation, data privacy, working conditions
Wide-ranging, burdensome information requests

Lengthy consultation processes

Appointment of outside experts and advisors, leading to additional delay and expense

Can be influenced by trade unions, which have their own agenda

In some countries (e.g., France, Netherlands), WC’s have considerable leverage in litigating issues of process. In others (e.g., Germany), they can force issues to an arbitration board.

Considerable influence on the employee population and even with local management

In multi-country matters, difficulty of coordinating processes with local and European works councils
Scenario 3

Your US-based company is acquiring Tulip Technology N.V., a Dutch entity. Both companies have operations in all EU countries. Confidential negotiations are underway to conclude a purchase agreement in which Tulip will become a wholly-owned subsidiary of your company. It is anticipated that after signing the agreement, it will take about 8 months to complete antitrust/competition law reviews with DOJ and EC, arrange product divestitures, and close the transaction.

You have only become aware of these negotiations shortly before the expected signing of the agreement, and you are concerned about whether rights of information/consultation have been satisfied with respect to the Dutch, European, and other local WC’s. The transaction team has advised that for business and securities law reasons, it is not feasible to engage any employee representative bodies before the agreement is signed, but that they assume you will ensure that there is no litigation with the WC’s which might delay the transaction.
Scenario 4

The DOJ/EC review is going well and the transaction is expected to close in about one month. A large integration team is working on plans to operate the combined business beginning Day 1 after the closing. The European Regional President has emphasized that although it may take some time to merge the operating entities in each country, it is critical that your acquiring company’s local entities establish leadership and control of all country operations immediately after closing. He has decided that on Day 1 the leadership team of each Tulip local entity will immediately report to their counterparts at your company’s local entity, the sales forces will be merged, and the Tulip logos, signs, cards and letterhead will immediately be changed to your company’s name. He asks if you have any problems with this approach.
General principles established by EU Collective Redundancies Directive (98/59/EC): information/consultation, notification to governmental authority, 30-day waiting period, no defense based on decision being made by parent.

Considerable variation under national law

Typical threshold of 10-30 employees over a 30-day or 90-day period

Expect major WC/trade union involvement and, depending on magnitude, political and media dimensions
Notification and (in some countries) approval by government labor authority
Mandatory negotiation period
Formal information/consultation process in WC countries, with influence from trade unions
High level of scrutiny of economic and organizational justifications
Negotiation of a “social plan” setting forth how impact on employees will be addressed through redeployment, outplacement, early retirement, severance
Pressure to provide severance well above statutory entitlements based on other employers’ collective dismissals in that market
Selection rules and reemployment rights
Note that a RIF spanning 2 or more countries may be a “transnational” issue under your European Works Council agreement
The Special Case of France

- Can be a multiplicity of WC’s and other employee representative bodies based on corporate entity and site location
- Very extensive written economic justification and social plan required—can take months to prepare
- WC can ask numerous wide-ranging questions about the local and global business, refusing to provide an opinion until all questions answered to its satisfaction
- Typically outside experts hired at Company expense to assist WC, resulting in more questions
- No legal limit on length of process, although litigation to compel WC opinion can be brought
- Labor inspector approval required
- Negotiation of a social plan with the WC typically does not bar subsequent individual employee suits for damages for wrongful dismissal
Scenario 5

After completion of the Tulip transaction, it is anticipated that there will be synergies in nearly every European country in which your Company and Tulip have operations. Your affiliated personnel in France, Italy, the UK and Romania already have developed tentative plans to reduce headcount by 30%. In France, the process appears quite complicated, as it will involve up to 14 separate WC’s, health/security committees and other employee representatives. Other countries are either in the process of developing RIF plans or are thinking about it.

The General Counsel has heard about the European activity and feels the process is not coordinated, even out of control. She has asked you to assume oversight of all labor/employment issues coming out of the integration and to provide senior management a timeline of expected reductions and an assessment of the major risks and opportunities.
Principles set forth in 2001 EU Directive “relating to the safeguarding of employees’ rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses.”

Significant variations in implementing national laws, with UK law (TUPE) considered one of the most employee-friendly.

Basic concept: when there is a transfer of a business activity organized around a grouping of resources, the employees transfer from the transferor to the transferee.
Rights and obligations under the employment contract, except for pension matters, transfer from the transferor to the transferee.

Transferee must continue to comply with collective agreements.

Employee representation arrangements remain in place if the transferred activity retains its autonomy.

Liability falls on the transferee, although states have the option to make the transferor and transferee jointly liable.

The transfer of undertaking itself cannot be a valid ground for dismissal of employees by either the transferor or transferee.
Is the activity an “undertaking, business, or part of undertaking or business” subject to the law?

What must be disclosed or informed/consulted to employees and/or their representatives in advance of the transfer? What is the remedy for insufficient information/consultation or inaccurate disclosure?

What happens when employees object to the transfer?

What is the scope of liabilities transferred, in particular what happens with pension rights?

What law applies to transfers between EU countries? Does the Directive apply to transfers between an EU country and a non-member?
Scenario 6

As part of the DOJ/EC review of the Tulip transaction, the parties agreed to divest Tulip Products A, B and C to various purchasers. In each case, the IP, regulatory dossiers, and sales forces which are substantially devoted to those products will be transferred within each country to the purchasers. The manufacture of Products A and B, however, will be transferred from Tulip’s plant in France to the purchasers’ plants in Finland and the Netherlands, while the manufacture of Product C will be moved from Tulip’s plant in Germany to the purchaser’s plant in Ireland. The purchasers have excess capacity in their manufacturing facilities and have no interest in taking any employees other than a few managers and supervisors with experience on the product lines.

What are the transfer of undertaking implications of the divestitures?

What additional information do you need?