



Monday, October 19
11:00 am–12:30 pm

302 Managing a Global Workforce: HR and Employment Law Challenges

James Beyer
Director-Employment Law
Accenture

Ellen Rice
Senior Employment Counsel
EMC Corporation

Ken Sprang
Attorney

Faculty Biographies

James Beyer

James R. Beyer is director of employment law at Accenture, in Chicago, where he leads the group. Accenture is a global management consulting, technology services, and outsourcing company, currently with approximately 180,000 people serving clients in over 120 countries.

Previously Mr. Beyer was a senior employment law attorney with International Business Machines Corporation. He was also previously counsel to then Gardner, Carton & Douglas in Chicago and an associate with the Chicago office of Seyfarth, Shaw. He was also a law clerk in the U.S. District Court for the Northern District of Illinois.

Mr. Beyer is an adjunct professor of law at IIT Chicago-Kent College of Law, where he teaches privacy in employment law and international employment law. Mr. Beyer was elected as a fellow to the College of Labor and Employment Lawyers. He is also active in many pro bono activities. He created and chairs the Accenture legal group's pro bono and corporate citizenship program. Mr. Beyer is a frequent speaker and writer in the employment law area both in the US and internationally. He is the program co-chair of ACC's Employment and Labor Law Committee and was previously the co-chair of the Web cast committee.

Mr. Beyer has a BA from DePauw University and received his JD with highest honors from the IIT Chicago-Kent College of Law, where was an editor of the *Law Review*.

Ellen Rice

Ellen Rice is senior employment counsel at EMC Corporation, in Hopkinton, MA, the world leader in information infrastructure solutions. Ms. Rice counsels senior management and human resources personnel on a broad range of employment law issues. In addition, she handles commercial and employment litigation and provides counsel on internal investigations. She also advises and improves on business processes related to privacy, information security, records and information management

Prior to joining EMC, she worked in the Washington D.C. Metropolitan area. She served as assistant general counsel in the United States Department of Justice's Executive Office for United States Attorneys, associate general counsel at a nationwide food distribution company, and as a labor and employment law associate at the law firm Paul, Hastings.

She has presented numerous speeches to ACC, ABA, and other legal related programs.

Ms. Rice received a BA from Tulane University and is a graduate of Harvard Law School.

Kenneth Sprang

Kenneth A. Sprang is the former senior vice-president, general counsel, and secretary of OnIt Digital, Inc., a start-up international interactive advertising company. He is also an adjunct professor at the Catholic University Columbus School of Law in Washington, DC. His responsibilities for Onit included serving as HR Director, mergers and acquisitions, corporate governance, and completing numerous transactions.

Before joining Onit, Mr. Sprang was general counsel to the Psychiatric Institute of Washington in Washington, DC, where he provided counsel in labor relations and employment, healthcare, and other regulatory matters. Over the course of his career, Mr. Sprang has founded legal departments for several start-up companies, as well as working in the legal departments of Calgon Corporation, a former subsidiary of Merck & Co., Inc., and Cyclops Corporation. He also spent several years as a full-time law professor

Mr. Sprang is a member of ACC's Washington Metropolitan Area Chapter; ABA, and its labor section's committee on the development of the law under the NLRA; and the DC and Maryland Bar Associations. He serves as pro bono general counsel to Boys To Men International and as a member of the board of directors of Kidsave International.

Mr. Sprang received his BS from the Ohio State University and an MA from the University of Michigan. He earned his JD at Case Western Reserve University School of Law, where he was an associate editor of the law review and a member of the Order of the Coif.

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OVERVIEW

- RIF's or Redundancies
- Global Non-Compete agreements
- Cultural Awareness

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NAVIGATING THE RECESSION WITH A GLOBAL WORKFORCE

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INTERNATIONAL LAYOFFS IN A SLOWING GLOBAL ECONOMY

- What began as a crisis of finance in the United States has rapidly engulfed the entire world in an economic recession. Hundreds of millions of people all over the world are losing their jobs, their income, their savings, their homes, and their ability to survive.

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Most International Employees Have “Vested/Acquired” Rights

- Outside the US the operative legal rule is “indefinite” employment, not “employment at-will.”
- Indefinite-employment systems restrict employment terminations; fired employees have cause of action for unfair dismissal.

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Effect of Vested/Acquired Rights

- Similarly, this vested/acquired rights concept also prohibits the employer from, without cause and consent, demoting, cutting pay, making material work changes, transferring worker to another city, discontinuing benefit plan, or assigning intolerable tasks until an unwanted employee quits.
- In many countries, the burden in related lawsuits is on employer to prove the employee quitting was **not** a constructive discharge.
- Very similar to a labor union context in the US.

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Effect of Vested/Acquired Rights

- In some countries (Brazil), an employee may have standing to sue even without quitting.
- Employee not required to prove discriminatory motive

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RIFS HYPOTHETICAL

- Your employer is a U.S. manufacturer of automobile parts with subsidiaries in various countries around the world. The company has more than 50,000 employees across the world in all major countries. It has 10,000 employees in Europe, including 1000 in France, Germany, Italy and the Netherlands. Your CEO has advised you that he wants to reduce the workforce the workforce across the globe by 10% and he wants this done within 60 days.
- Can you lawfully implement an across the board RIF like this?
- What are the hurdles you will face in doing so?

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- RIF's may be known as "Redundancies" or "economically justified dismissals."
- Approach to RIF's in most countries is quite different from the approach in the US.

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THE 10 STEPS OF AN INTERNATIONAL RIF

- Determine context of redundancies
- Gather information
- Conduct cost-analysis
- Develop timeline
- Conduct selection process

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6. Notify / consult / obtain approval of government / employee rep groups
7. Prepare termination documents
8. Deliver termination documents (possibly after individual consultations)
9. Make applicable payments
10. Complete administrative follow-up

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Step 1: Determine context of redundancies

- "Plain" redundancy: Threshold requirements for economically justified dismissals (e.g., Malaysia & UK, redundancy as determined in reasonable employer discretion; France and Japan, serious slow-down or economic losses)
- Redundancy connected to acquisition or outsourcing: for EU employees, restrictions under Acquired Rights Directive and "ETO" (economic, technical, organizational) reason unrelated to the redundancy

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Step 2: Gather Information

- **Gather by jurisdiction:**
 - Total headcount
 - Affected headcount
 - Works councils, unions, employee representative groups
 - Applicable CBAs, severance policies or practices, work / retirement rules
 - Sample or individual employment agreements (for contractual obligations)
- **NB: Data privacy obligations**

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Employment Contracts

- Common outside U.S. for rank and file as well as managers and executives.
- Any employment termination must comply with termination-specific clauses in individual employment contracts (which are often legally mandated outside the US), collective agreements, and company-issued benefit plans and severance policies.

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Step 3: Conduct cost-analysis

- Determine applicable notice & severance entitlements per employee under statute or CBA
- Individual Contracts
- Consider any additional payments

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Individual Severance Pay Requirements

- Countries impose up to 4 forms of individual severance pay:
 - pre-termination notice obligation/pay in lieu;
 - mandated severance payout/end-of-service "indemnity";
 - wrongful termination cause of action (or a so-called "severance indemnity" court award); and
 - mandated "redundancy pay" (RIF pay)
- Each jurisdiction has its own local rules.

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Step 4: Develop Timeline

- Develop *realistic* timeline for each jurisdiction, keeping in mind:
 - Government notification / consultation / approval obligations, as applicable
 - Employee representative group notification/consultation obligations
 - Employee notice requirements (e.g., pay in lieu of notice?)

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Step 5: Conduct Selection Process

- Determine if any protected employees, e.g., Pregnant employees, employee representatives, etc.
- Consider legally-mandated selection criteria
 - Social factors (e.g., China, France, Germany, Italy)
 - "Last in, first out" (e.g., Malaysia – recommended, Netherlands within each age group)
- If none, determine fair, non-discriminatory selection criteria, e.g., performance, seniority, etc.
- Requirement to offer alternative positions.

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Step 6: Notify/Consult/Obtain Approval of Government/ Employee Representative Groups

Government notification/consultation and/or approval requirements,

- e.g., Netherlands (prior approval for unilateral terminations)
- Employee representative groups, e.g.,
 - Works' Councils
 - Unions

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Collective Bargaining and Consultation

- In Europe an employer that merely considers RIF has to sit down and talk to workers before making any decision.
- May meet with Worker Representatives, Trade Unions, Local Works Councils and any European Works Council
- In these required consultations, the employer must demonstrate "economic, technical and organizational" reasons for the RIF, but worker groups and government officers may push back.

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Collective Bargaining and Consultation (2)

- These consultations can take up to 75 days or more in Italy and can be document-intensive.
- Belgium once launched criminal proceedings against executives of an automaker who shut down a plant without talking to employees first.

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Government or Court Approval

- In the Netherlands the government must approve a layoff; no approval means no RIF. Governments from Colombia and Venezuela to Japan, Korea and China can block layoffs not blessed by government agencies or judges.

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Step 7: Prepare Termination Documents

- Where unilateral terminations are not permissible/ recommended, prepare mutual termination and/or resignation agreement (e.g., China, India, Japan, Korea)
- In other jurisdictions, prepare termination letters and releases

- Don't forget to address non-local equity

NB: Translation requirements

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Step 8: Deliver Termination Documents

- Determine if individual consultation is required (e.g., statutory dismissal procedure in UK or negotiations where a resignation/mutual termination needs to be agreed upon)
- Sign resignation/termination documents (NB: signatory requirements!)
- Deliver resignation/termination documents

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Step 9: Make applicable payments

Step 10: Complete administrative follow-up

- Don't forget the nitty-gritty stuff!
 - Discontinue payroll & Benefits
 - Cancel visas
 - Issue unemployment documents/ Stamp "books"
 - Issue reference letters

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Country-Specific Local Procedures and Rules Governing RIF's

- France – Multinational must demonstrate “real and serious” economic need at two levels: the French affiliate and the parent and subsidiaries in the same line of business.
- Japan – Layoffs are extremely difficult. Employer’s reasons are subject to strict scrutiny and must demonstrate real financial necessity and show cost-cutting steps already taken.

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European Union RIF Standards

- When in consultation with employee representatives for RIF discussions, the following information is required to be disclosed: economic reasons of the reductions in force, number of employees to be dismissed, number of employees normally employed, an outline of the procedure by which the projected dismissals have to be effected, the criteria proposed for the selection of the workers to be made redundant, and the method to be used for calculating any severance payments.
- There is a legal requirement that due consideration be given to balanced economic and social development within the European community.

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European Union RIF Standards (2)

- Depending on the applicable legislation of Member States, the employer will have to explain why the number of employees to be made redundant (RIF) cannot be reduced and will also have to present measures aimed at mitigating the negative social effects of the redundancies.
- Achieving RIF across one or more EU jurisdictions involves coordinating different employee representatives and other legal considerations.

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RIF Issues in China

- Employers contemplating a reduction in force of 20 or more employees or 10% or more of the workforce are allowed to do so in the context of a bankruptcy restructuring, severe production difficulties or change of productions, technology or business form, but must give the union or all employees at least 30 days advance notice. Mass firings because of labor problems are impermissible.

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GLOBAL ALTERNATIVES TO RIFS

- Multinationals often turn first to measures softer than RIF's, such as: pay-cuts, benefit cuts, hours cuts, pay freezes, forced paid vacation, unpaid furloughs, and temporary shut-downs.

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5 Steps for Addressing Economic Challenges Without Redundancies

- Reduction
- Materiality
- "Red circle"
- Consultation
- Consent

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No. 1 Reduction

- Employers generally cannot unilaterally reduce material terms/conditions of employment, e.g., alter the workforce, cut in hours/benefits/compensation, change in job titles where change amounts to a demotion.
- Employers are generally permitted to grant employees a benefit, e.g., a pay raise or other improvement, though some jurisdictions like Chile prohibit such unilateral action..

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Pay-Cuts

- Pay-cuts involve unique complexities and require a 5 step analysis.
- Step 1 – Verify that pay-cuts are not illegal (as in Italy and Panama) or contrary to public policy (as in Brazil).
- Step 2 – Comply with minimum wage laws, statutory benefit mandates, and employment contracts. Cannot cut below minimum wage law or break collective employment agreements (unless renegotiated).

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Pay-Cuts (2)

- Step 3 – Articulate a demonstrable, genuine, and pressing economic need that justifies the pay-cut.
- Step 4 – Determine whether employee consent is necessary.
- Step 5 – Follow the country-specific local procedures.

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Country-Specific Local Procedures and Rules Governing Pay Cuts

- Spain – Collective agreements commonly set minimum wages for specific positions higher than the statutory minimum wage; a pay-cut cannot dip below the contractual rate.
- Italy – Flatly prohibits reducing pay, even with consent of the employee or trade union. Pay-cuts are considered impossible.

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No. 2 Materiality

- Outside the US, employers cannot unilaterally downgrade **material** terms or conditions of employment.
- Employers are generally free to impose truly *de minimis* cuts such as downgrading office equipment, discounting certain office supplies, or rephrasing a "Sales Director" title to "Director of Sales"

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No. 3 Red Circle

- Alternative to unilaterally-imposed pay-cuts or demotions is to "red circle" employees, freezing pay and withholding future raises.
- Red-circling often lawful in indefinite-employment countries unless
 - It amounts to unilateral discontinuance of existing compensation/review practice of regular raises, or
 - Statute or individual or collective agreement requires regular raises or good-faith merit increase reviews.

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No. 4 Consultation

- Where an overseas work council, similar to US labor union, represents employees in a workplace, any material reduction in terms or conditions is likely to be a mandatory subject of bargaining/information/consultation.

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No. 5 Consent

- Can usually reduce material work conditions if affected employees and/or their representatives consent.
- Consent may be subject to challenge as inherently coerced, due to the imbalance in bargaining power.
- Union/works council consent is often binding, but in some contexts or countries an employer reducing terms will need to collect both representatives' and affected individual employees' consents.
- Employees generally have little incentive to consent absent employer consideration; cuts to work conditions often possible only when structured as a buy-out.

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Considerations in China

- Employers are required to present proposals and rules that affect things like compensation, work hours, leave, insurance etc. to the company union or employee representative congress.

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Additional Concerns in Vested Rights Countries

- Some jurisdictions are concerned that employers saddled with onerous vested rights obligations might sell out assets, or outsource to transfer their vested employee rights obligations.
- Many jurisdictions impose “transfer of undertakings” rules where employees’ vested rights transfer over to an asset purchaser or outsource service provider. These vested rights are said to become acquired rights with the new employer.

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NON-COMPETITION COVENANTS IN THE GLOBAL MARKETPLACE

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NON-COMPETITION COVENANTS

- Generally governed by local law where the employee works
- Hard to have uniform company-wide forms
- Important to understand what is considered reasonable in each jurisdiction
- During employment - majority of jurisdictions recognize employees owe duty of loyalty and cannot compete
 - China is an exception – no such duty

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NON-COMPETITION COVENANTS

- For after employment, need a valid non-compete agreement with reasonable scope (duties), time, and geographic area which varies depending on jurisdiction
 - China, Germany, and Spain have two-year caps
 - Italy has a five-year cap for executives; three-year cap for other workers

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NON-COMPETITION COVENANTS

- Many jurisdictions require monetary consideration
 - France requires payment post-employment (30-50% of monthly salary); reserve right of employer to waive obligation
 - China requires payment post-employment (33-66%); only allowed for senior personnel
 - United Kingdom – payment not required but increases likelihood of enforceability

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NON-COMPETITION COVENANTS

- Choice of law provision often not effective (e.g., EU Article allows for law of host country to govern)
- Many jurisdictions will not re-write or blue-pencil overly broad provisions (e.g. Canada and Hong Kong)
- Reason for termination can be important (e.g. in Singapore and Hong Kong, wrongful termination nullifies a non-compete)

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AWARENESS OF CULTURAL DIFFERENCES

Dorothy, this isn't Kansas!

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Be Cognizant of the culture, this can be as important as the legal issues

- Essential business culture_guides for the international traveler

http://www.executiveplanet.com/index.php?title=Main_Page#Related_Links

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ACC Extras

Supplemental resources available on www.acc.com

European Briefings

ACC Docket. May 2008

<http://www.acc.com/legalresources/resource.cfm?show=14327>

310 Navigating Global Compliance: Establishing Rules for Taking the High Road in the Borderless Corporation.

Program Material. February 2007

<http://www.acc.com/legalresources/resource.cfm?show=20132>

Managing the Global Legal Department.

ACC Docket. July/August 2009

<http://www.acc.com/legalresources/resource.cfm?show=422427>

Please note, these additional resources are provided by the Association of Corporate Counsel and not by the faculty of this session.