Guide to Restructuring a Cross-Border Workforce

Ukraine

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A. Reduction in Workforce

1. Is there a concept of redundancy - based on a shortage of work or other economic reasons - as a justified reason to dismiss employees in your jurisdiction? If so, how is it defined?

Redundancy is a justified reason for dismissal under Ukrainian legislation and may be defined as a change in the staffing structure of the company through the termination of certain positions or reducing the number of staff for certain positions.

2. In brief, what is the required process for making someone redundant?

The process for making someone redundant consists of the following steps:

- Issuing a resolution regarding the commencement of redundancy

Such a resolution is formalised by the minutes of a general meeting of the company (ie, an employer) or by a resolution of a sole participant of the company (ie, an employer) if the company has a sole participant.

The redundancy can be initiated due to changes in the organisation of production and labour at the company, including reorganisation or liquidation of the company.

- Notifying the trade union (if established at the company) about the planned redundancy

At least three months before redundancy, the trade union must be notified about the scheduled redundancy, the reasons for the redundancy, the number and categories of employees who may be affected, and the timing of the redundancy, and should arrange for consultation on measures to prevent or minimise, or to mitigate the adverse effects of, redundancy.

- Setting up the criteria and the selection of employees to be made redundant, issuing an order on establisment of the Personnel Commission and concluding the Act of Comparison

This step includes the establishment of the Personnel Commission, defining criteria for evaluating employees to be made redundant, identifying employees whose dismissal is prohibited by law and employees who have preferential rights to remain employed.

- Notifying the State Employment Service of Ukraine about the collective redundancy

This step only applies if the redundancy is a collective one. If applicable, such notification should be submitted at least two months before the date of redundancy.

- Notifying the affected employees about the commencement of redundancy procedure and the absence of open suitable vacancies

This should be made at least two months before the redundancy.

- Obtaining the consent of the trade union (only if it is established) to terminate the employment agreement with a particular employee who is a member of that trade union (during martial law, this only applies to employees elected to trade union bodies)
- Issuing an order on dismissal and servicing a copy of the order to each respective employee

This should be done at the end of two months' notice.

- Payment of severance and any other outstanding amounts (ie, salary, compensation for unused vacation days, bonuses (if any), severance payments of an average monthly salary, etc) no later than the last working day
- Entering records in the employees' labour books and handing over labour books to the respective employees on the last working day (if applicable), and signing the employee's Personal Card (Form P2).
- Familiarising the employees with the documents and fulfilling the employer's obligations

3. Does this process change where there is a "collective redundancy"? If so, what is the employee number threshold that triggers a collective redundancy?

The main difference between redundancy and collective redundancy is that collective redundancy requires additional notification to the State Employment Service of Ukraine two months beforehand (by filing a report on the scheduled redundancy according to statutory form 4-PN). The approval of the State Employment Service is not required to implement a collective redundancy.

A redundancy qualifies as a collective redundancy if, in the space of one month, the following number of employees were made redundant:

- 10 or more employees by an employer with between 20 and 100 employees;
- 10% or more of employees by an employer with between 101 and 300 employees;
- 30 or more employees by an employer with between 301 and 1,000 employees;
- 3% or more employees by an employer with more than 1,001 employees.

4. Do employers need to consult with unions or employee representatives at any stage of the redundancy process? If there is a requirement to consult, does agreement need to be reached with the union/employee representatives at the end of the consultation?

During the redundancy process, the employer must consult with the trade union (if established) on measures to prevent or minimise dismissals or mitigate the adverse effects of any dismissals. Trade unions have the right to submit proposals to employers on the postponement, temporary suspension or cancellation of measures related to the dismissal of employees, which must be taken into consideration (but do not necessarily have to be accepted by the employer).

However, the employer should obtain the consent of the trade union (if established) to terminate the employment agreement with a particular employee who is a member of that trade union (during martial law this only applies to employees elected to trade union bodies). The employee may not be dismissed if the trade union withholds its consent for a justified reason.

5. If agreement is not reached, can the restructure be delayed or prevented? If so, by whom?

If the trade union submits proposals on postponement, temporary suspension or cancellation measures related to the dismissal of employees (three months prior to redundancy), the employer must consider them. If the proposal is not reasonable, the employer may proceed with the redundancy as scheduled. However, the risk of lawsuits will likely increase.

Also, if the trade union does not give its consent for an employee's termination and this refusal is justified, the respective employee may not be terminated. During martial law, this only applies to employees elected to trade union bodies.

6. What does any required consultation process involve (ie, when should it commence, how long should it last, what needs to be covered)? If an employer fails to comply with its consultation obligations, what remedies are available?

At least three months before redundancy, the trade union (if established) must be notified about the scheduled redundancy, the reasons for such redundancies, the number and categories of employees who may be affected, and the timing of the redundancy. Also, the employer should arrange for a consultation on measures to prevent or minimise dismissals or mitigate the adverse effects of any dismissals.

If an employer fails to comply with its consultation obligations, the redundancy may be challenged through the courts.

7. Do employers need to present an economic business rationale as part of the consultation with unions/employee representatives? If so, can this be challenged and how would such a challenge normally be made?

As per question 6, among other things, employers must provide reasons for redundancies (ie, changes in the organisation of production and labour) to trade unions. According to the courts, changes in the organisation of production and labour are to be considered objectively necessary actions of the employer caused by the introduction of one of the following:

- new equipment or new technologies;
- an improvement in the company structure, working hours, or management activities to increase labour productivity or improve economic and social performance;
- a desire to prevent bankruptcy and collective redundancy of employees and preservation of human resources during temporary shutdowns in work; or
- a desire to create safe working conditions or improve sanitary and hygienic conditions etc.

Trade unions or individual employees may try to challenge the rationale for redundancy. Initially, this can be done with a formal letter to an employer. If the employer does not accept the trade union's arguments, the redundancy may be challenged through the courts.

8. Is there a requirement or is it best practice to consult employees individually (whether or not the employer is also legally required to collectively consult employees)?

The legislation does not require individual consultations with employees.

9. Are there rules on the selection of individual employees for redundancy?

If the redundancy affects positions in which several individuals are employed and not all employees with that position are being made redundant, the employer should follow a special procedure to select the individuals who will be made redundant. Such an evaluation should be carried out by the Personnel Commission. The Personnel Commission is a special body that should be established by the director of the company (ie, the employer) to compare employees' qualifications and productivity, and verify preferential rights to remain employed and the prohibition of certain categories of employees from dismissal.

10. Are there any specific categories of employees who an employer is prohibited from making redundant?

Certain categories of employees have special protection and cannot be made redundant:

- pregnant women, women having children under three (under six if a child requires home care), and single mothers having a child with a disability or a child under 14;
- fathers bringing up a child under three, a child with a disability or a child under 14 without a mother (including where the mother is staying long-term in a medical facility) – this also applies to adoptive parents and foster parents;
- employees called up for regular military service, mobilised employees, employees serving with the military based on a contract, including those who concluded the contract with the Territorial Defence Forces within the "special period" – as well as employees who stay in medical institutions after being injured during military service or who were captured or are declared missing;
- employees under 18;
- employees aged 15 to 28 who have been given their first job after the completion of studies or after being released from regular military service or alternative (non-military) service (they are protected from dismissal for the first two years) as well as young graduates of public educational institutions in certain professions, the demand for which was previously stated by employers (protected during the first three years);
- former members of a trade union's bodies for one year after the expiry of the term for which they were elected (with certain exceptions); and
- employees involved in socially useful work during martial law (for the duration of that work).

Nevertheless, the law does not limit the possibility of the mutual termination of the employment relationship with protected employees.

11. Are there categories of employees with enhanced protection (eg, union officials, employees on sick leave or maternity/parental leave, etc)?

In cases of equal productivity and qualifications, preference is given to the following employees:

- individuals who have families, if such individuals have two or more dependents;
- individuals whose family does not have other members with independent earnings;
- employees with a longer length of service with the employer;
- employees who study at higher and secondary specialised educational institutions in off-work hours;

- individuals, who took part in military actions, victims of the Revolution of Dignity, individuals with disabilities as a result of war and individuals covered by the Law of Ukraine On the status of war veterans, guarantees of their social protection, as well as individuals rehabilitated under the Law of Ukraine On the rehabilitation of the victims of the repression of the communist totalitarian regime of 1917-1991, among those who have been subjected to repression in the form (or forms) of imprisonment, restriction of liberty, or the involuntary placement of healthy individuals in a psychiatric institution by an extrajudicial or other repressive body;
- authors of inventions, utility models, industrial standards and rationalisation proposals;
- employees who sustained a labour injury or occupational illness while working for the employer;
- employees who were forcibly displaced from Ukraine (for five years after their return to permanently reside in Ukraine);
- employees who were former military personnel and individuals and provided an alternative (non-military) service (for two years from the date of their retirement from that service);
- employees who are less than three years from pension retirement age; and
- other rare cases.

12. What payments are employees entitled to when made redundant? Do these payments need to be made within a specified period? Are there any other requirements, such as giving contractual notice, payments into a central fund, etc.

In a redundancy, employees are entitled to their salary for the period worked before the termination date, compensation for unused vacation, bonuses (if applicable), and a severance payment (calculated under certain procedures). The final payment must be made to the employee on the last working day.

The employer must notify the employee in writing of the amounts accrued and paid to the employee on the termination date.

13. If employees are entitled to redundancy/severance payments, are there eligibility criteria and how is the payment calculated? If this is formula based, please set out the formula.

If an employment relationship is to be terminated due to redundancy, the employee will be entitled to a severance payment of one average monthly salary (statutory minimum).

The average salary is calculated based on payments for the last two calendar months of employment preceding the month of dismissal.

14. Do employers need to notify local/regional/national government and/or regulators before making redundancies? If so, by when and what information needs to be provided?

If the redundancy qualifies as a collective redundancy (see question 3), the employer must notify the State Employment Service of Ukraine two months before the scheduled redundancy.

The notification should be submitted according to the statutory established form 4-PN. The following information should be provided to the State Employment Center: the positions to be made redundant, the number of employees to be made redundant, the date of the order on the scheduled redundancy, and the date of the scheduled redundancy.

15. Is there any obligation on employers to consider alternatives to redundancy, including suitable alternative employment?

With the notice of redundancy, the employer must also offer the employee another position within the company corresponding to a relevant profession or specialty, if such suitable positions are available.

16. Do employers need to notify local/regional/national government and/or regulators after making redundancies, eg, immigration department, labour department, pension authority, inland revenue, social security department? If so, by when and what information needs to be provided?

In general, there are no obligations for employers to notify state authorities after making redundancies.

However, if the employee responsible for tax accounting is to be made redundant (eg, chief accountant), Ukrainian tax authorities must be notified within 10 days.

17. If an employee is not satisfied with the decision to make them redundant, do they have any potential claims against the employer? If so, what are they and in what forum should they be brought, eg, tribunal, arbitration, court? Could a union or employee representative bring a claim on behalf of an employee/employees and if so, what claim/s and where should they be brought?

Employees who were made redundant may file a claim for their reinstatement to the courts. The statute of limitation for such claims is one month following receipt of the order of dismissal. The courts may extend this if the employee can provide justification for the delay (which quite likely may occur due to the war).

An employee may file a claim for reinstatement if he or she believes that:

- the termination in the form of redundancy was not connected with the changes in production and labour organisation;
- his or her preferential right to continued employment was not taken into consideration during the redundancy;
- his or her right to special protection was violated during the redundancy; or
- the respective procedure for redundancy was observed by the employer.

If the court decides that the redundancy was illegal or unjustified, the employee may be:

- reinstated;
- awarded compensation in the amount of the employee's average monthly salary for the period from the date of termination up to the date of the respective court decision;
- awarded compensation for moral damages (usually token amounts – up to USD 500); or
- awarded reimbursement of legal fees.

It is not common for trade unions to bring claims on behalf of an employee or employees.

18. Is it common to use settlement agreements when making employees redundant?

It is common to use settlement agreements, since termination by mutual agreement mitigates the risks related to reinstatement.

19. In your experience, how long does it normally take to complete an individual or collective redundancy process?

The redundancy procedure normally takes between two-and-a-half and four months (depending on the availability of a trade union, the number of employees affected, and other factors). This does not include the time needed for the preparation of redundancy documentation.

20. Are there any limitations on operating a business for a period following a redundancy, like a prohibition on hiring or priority for rehire being given to previous employees?

Once redundancy is completed and the respective position is eliminated and then re-established within 12 calendar months, work on this position should first be proposed to a person who was made redundant, and only after his or her refusal can another person get an offer on the same terms.

Restructuring/Re-organisation of the business

21. Is employee consultation or consent required for major transactions (such as business transfer, mergers, acquisitions, disposals or joint ventures)?

The legislation does not require the employer to conduct consultations with employees (trade unions) or obtain their consent for major transactions.

22. What are the remedies that are available if an employer fails to comply with its consultation duties? Can employees take action to prevent any proposals going ahead?

Not applicable.

23. Is there any statutory protection of employees on a business transfer? Are employees automatically transferred with the business? Are employees protected against dismissal (before or after the transfer of employment)?

In the case of an employer's reorganisation (merger, acquisition, separation, demerger, restructuring), the employee's employment agreement continues with the company that initially employed them. Termination of employment is possible due to redundancy or other grounds prescribed by the Labour Code of Ukraine.

24. What is the procedure for a transfer of employment (upon a business transfer or within group companies)?

The transfer of employment is automatic. As a general rule, a business transfer in Ukraine is a share transfer. Accordingly, no changes are introduced to the company's staff structure at the business transfer.

25. Are there any statutory rules on harmonising the transferring employees' terms of employment with the existing employees' terms of employment?

There are no statutory rules on harmonising the transferring employees' terms of employment with the existing employees' terms of employment (except for general requirements related to equal pay, non-discrimination, etc).

Changing Terms and Conditions

26. Can an employer reduce the hours, pay and/or benefits of an employee?

Ukrainian employers can unilaterally change the essential working conditions of their employees (including employees' pay, working hours, and benefits). Essential working conditions may only be changed if there are changes in the organisation of production and labour (see question 7).

The general rule is that an employee must be notified of such changes two months before the implementation of the changes, but during martial law (currently effective in Ukraine) the employee must be notified no later than the introduction of such changes. The employment agreement can be terminated by the employer if the employee refuses to continue working due to a change in the essential working conditions.

27. Can an employer rely on an express contractual provision to vary an employment term?

Generally, no.

28. Can an employment term be varied by implied conduct?

Generally, no.

As an exception, the following rule applies. If, after the end of an employment agreement, the employment relationship continues and neither party requests its termination, the agreement is deemed to be extended for an indefinite period.

29. If agreement is required to vary an employment term, what are the company's options if employees refuse to agree to the proposed change?

If the employee refuses to agree to the changes in essential working conditions due to changes in the organisation of production and labour (see question 26), employment relations may be terminated with the payment of one average monthly salary as a severance payment.

If the changes in the employee's working conditions are not related to changes in the organisation of production and labour, the employee may refuse to agree to them. In such cases, the employee may not be terminated.

30. What are the potential legal consequences if an employer varies an employment term unilaterally?

If the employer varies an employment term unilaterally without legal grounds (ie, not related to changes in the organisation of production and labour), the employee's previous employment terms may be re-established through the courts or administrative procedures (with the support of the State Labour Service of Ukraine).

Areas to Watch

Please provide an outline of any upcoming legislative developments or other issues of particular concern or importance that may change the answers above and are not already covered in this questionnaire. Please limit responses to the jurisdictional level rather than descriptions of wider global trends. Please limit your response to around 200 words.

The Ukrainian parliament is considering a draft law aiming to bring Ukrainian labour legislation in line with the provisions of Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the member states relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses.

The draft law provides for the establishment and procedure of succession in employment relations. Among other things, it establishes an obligation on the employer to continue the employment agreement if there is a transfer of the business or its parts to another business owner, as well as an obligation for employers to inform employees and their representatives of the date (approximate date) and reasons for the succession, the economic, technological, structural consequences of the succession or consequences of a similar nature that will affect the rights of employees.

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