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Individual Employment Dismissal Obligations Outside the US

Challenge:

Overseas, dismissing an individual employee gets complex and is heavily regulated. Dismissal mandates under foreign law tend to fall into three broad categories: dismissal procedures, pre-termination notice and severance pay/wrongful termination awards.

US employers accustomed to American-style employment-at-will face a significant challenge when dismissing an overseas employee who enjoys generous protections under employee-friendly foreign legal regimes. Before "pulling the trigger" on a dismissal abroad, an employer needs to understand and comply with a number of specific dismissal obligations under foreign law. Here we inventory the seven types of laws that overseas jurisdictions impose on employers dismissing individual employees. We group these types of laws into three broad categories: dismissal procedures, pre-termination notice, and severance pay/wrongful termination awards.

But even before unpacking what these various foreign dismissal obligations are, a US-based multinational that needs to dismiss an employee abroad often first asks *how much the layoff will cost*. Laws in most countries impose rules on no-cause firings that force employers to pay some sort of severance pay. How much it costs to dismiss a given employee abroad tends to link to the employee's final pay rate and length of service, and no-cause termination pay outside the US tends to run highest where pay rates are highest. Severance costs are most expensive where targeted staff is long-tenured and high-compensated; severance costs are cheapest where an employee is short-tenured and low-paid. But there are exceptions: A few high-wage jurisdictions such as Singapore and Switzerland impose relatively light statutory severance pay obligations. And occasionally a short-tenured low-paid overseas employee makes out an expensive dismissal claim under a theory like "moral harassment."

When calculating the total cost of any given employment dismissal, in addition to factoring in mandatory severance payments, always add up accrued debts the employer already owes the exiting employee. Local law dictates what these debts are, how they accrue and when an employer must pay them. Besides paycheck up to final day worked, these debts may

Pointer:

Understand and account for the various dismissal obligations that apply to an employment dismissal abroad.

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include: earned commissions, vested/accrued benefits including vacation pay, retirement commitments, pro rata annual bonuses, pro rata "thirteenth month salary" and pro rata profit sharing pay. Some employers also owe post-termination compensation under their own equity plans and restrictive covenants.

To quantify dismissal costs and to comply with an employer's other (non-cash) obligations when firing or laying off an employee aboard, comply with all severance mandates that foreign laws impose. Individual dismissal mandates under foreign law tend to fall into three broad categories: (A) dismissal procedures; (B) pre-termination notice; and (C) severance pay and wrongful termination awards. Drilling further down, these three broad categories split into seven specific types of dismissal obligations. We address these seven types of dismissal law obligations, grouped under the three broad categories.

In our discussion here, we assume a "plain vanilla" overseas dismissal—that is, one that does not implicate good cause, economic necessity, or some special employee status like pregnancy or probation. We address those "Threshold Dismissal Circumstances Overseas" in our *Global HR Hot Topic* of February 2013.

A. Dismissal Procedures

We begin our inventory of the world's individual dismissal law obligations by addressing *procedural requirements* in employment dismissals. Many (but by no means all) overseas jurisdictions in effect outlaw the direct "Donald Trump" approach to a dismissal—*"You're fired!"*—and require instead that employers take affirmative steps before pulling the dismissal trigger. Employers tend to see these steps as cumbersome technicalities, but the reason laws impose these procedural steps is to give workers (or their representatives or local government) a chance to save their job. These dismissal procedure mandates split into two specific types: procedures with employees and procedures with government agencies and courts.

1. Procedures with employees. Many countries' employment dismissal laws require that an employer, before deciding to fire any given individual employee, take certain pre-termination procedural steps with the targeted employee himself, or with his representative or bargaining agent. In many countries these individual dismissal steps are straightforward and simple. For example, the Czech Republic and Nicaragua simply require that dismissals be communicated in writing. And many countries grant *Weingarten*-like rights that let even non-union employees bring representatives to dismissal meetings (*NLRB v. J. Weingarten, Inc.*, 420 US 251 (1975)). But elsewhere, mandated individual dismissal procedures can be complex and time-consuming. For example, in France mandatory pre-firing procedures begin with the registered-mail transmission of a French-language letter summoning a targeted employee to a discussion meeting, followed by more notices, meetings, waiting periods, internal appeals and papers the employer must send by registered mail. Chad and other Francophone Africa countries impose looser versions of these French-style requirements. Perhaps unexpectedly, even the common-law UK requires that employers adopt in-house multi-step dismissal procedures—UK employers have some flexibility in articulating in-house procedures for "sacking" employees, but their procedures must conform to a mandated template. Other countries impose employee consultation procedures. Indonesia, for example, requires holding a negotiation session with a would-be fired employee. And where a union or works council represents employees, labor law in many places requires employers inform, consult or bargain with local representatives over a contemplated individual firing.

2. Procedures with government agencies and courts. Some jurisdictions impose "lifetime employment" models that in theory prevent employers from dismissing individual staff (absent good cause or economic necessity) and that require a government agency or court approve each individual firing. The government overseer, of course, tends to focus on whether the employer has good cause or economic necessity. In Japan, Korea and Germany, an employer can fire an individual employee only if the employer has good cause that a judge will later ratify in court. If a fired Japanese, Korean or German employee sues and the employer cannot establish good cause supporting the dismissal, the employee wins his job back. Law in these countries does not even impose statutory severance pay, because a wrongly fired employee wins reinstatement plus back pay. (Germany's code recognizes severance pay only for executives called *leitender Angestellter.*)

"Lifetime employment" countries aside, the government role in ratifying employment dismissals tends to be greater as to collective rather than individual dismissals, but some jurisdictions do impose government approval steps even for individual employee terminations. In some of these jurisdictions, an affirmative government approval is necessary for an employer to pull the trigger and fire. In Indonesia, for example, the local Industrial Relations Court must approve a dismissal, and a similar doctrine applies in Iraq. In India, at workforces of 100 or more "workmen" (low wage workers), a government agency must approve most individual no-cause firings. In Nicaragua the Ministry of Labor must approve, in advance, for-cause dismissals and economic-necessity dismissals, but not no-cause dismissals. In the Netherlands since World War II, individual dismissals were illegal unless a court or government labor agency had specifically authorized them in advance, but in 2013 this was being downgraded from a government *approval* requirement to a government *notification and consultation* procedure. Governments from Colombia and Venezuela to China and the Philippines can block individual firings deemed inappropriate.

B. Pre-termination Notice

Many countries require that an employer give a dismissed worker some notice before a firing. In these countries, firings are not supposed to be of the *"clean out your desk"* variety. Indeed, some legal systems believe in the pre-separation notice concept so completely that they impose a reciprocal notice obligation on resigning employees, amounting almost to a temporary form of indentured servitude. Most jurisdictions let an employer pay out mandatory dismissal notice in lieu, but jurisdictions like Switzerland do not—employers in these countries have no choice but to let a dismissed employee work out actual notice. Some jurisdictions do not let employers pay out pre-termination notice unless the worker had previously consented (in his employment agreement) to an in lieu cash-out.

3. Pre-termination notice obligations. How much pre-termination notice an employer must give depends both on the jurisdiction and on employee-specific factors like service period and contractual notice provision. Mandatory pre-dismissal notice periods can run from a few days to several *years*. Most legal systems are short-notice jurisdictions that impose only from a week to a few months of notice (unless, of course, an individual or collective contract requires more). For example, in Mexico statutory notice runs one month, in South Africa it runs up to four weeks, in the UK it runs one week per year of service capped at twelve weeks, in Brazil it runs from 30 to 90 days, and in France it runs from 14 days to six months. But a handful of long-notice jurisdictions impose pre-dismissal notice of many months or even several years—so much notice that employers almost universally pay it out in lieu. In long-notice jurisdictions, notice periods tend to be unliquidated, hard to calculate and subject to complex formulae like the Clayes formula in Belgium or subject to various tiers like short statutory notice plus long common law or "reasonable" notice plus contractual notice in Canada. In these long-notice jurisdictions, local law tends not to impose any actual severance pay—the long notice itself (again, almost always paid out in lieu) takes the place of severance pay. But there are exceptions even to this. Ontario, for example, requires both long notice and liquidated statutory severance pay.

C. Severance Pay and Wrongful Termination Awards

The most expensive part of dismissing an individual employee overseas usually is paying out severance pay or a money judgment for wrongful termination. Putting aside notice pay in lieu (which is technically notice, not severance pay), four types of severance or separation pay obligations exist around the world, often more than one in a given country. First and simplest is liquidated severance pay, a fixed or readily ascertainable statutory severance pay amount due. Second and more complex is unliquidated severance pay, essentially an unfixed cause of action for wrongful termination (in England called "unfair dismissal"). Third, most countries tend to let a fired individual employee bring additional severance claims disputing the fairness of a firing, such as due process/discrimination/"moral harassment" claims (in England called "wrongful dismissal"). Fourth are employment contract and employer policy claims (in England also called "wrongful dismissal"). We address each of these types of severance pay.

4. Liquidated severance pay awards. A liquidated severance pay system imposes on an employer dismissing an employee without cause a fixed or readily calculable severance pay obligation. Employers can calculate these obligations using formulas based on final pay rate and employee tenure/length of service. Material disputes over the amount of severance pay owed are rare, because the sums are liquidated. For example:

- **Arab countries** require employers to pay liquidated "end-of-service gratuities" based on tenure and final pay rate. In some countries these are due even if an employee quits.
- **Brazil** funnels severance pay through a government-mandated system of bank-administered individual employee unemployment compensation accounts called "FGTS." As severance pay, an employer owes 40 percent (paid to the employee) plus 10 percent (paid to the government) of the corpus of the employee's FGTS account. Each employee's FGTS account holds 8 percent of that employee's life-to-date earnings with that employer plus past interest. So liquidated severance pay in Brazil tends to equal about 4 to 5 percent of an employee's life-to-date earnings with the employer.
- In **Greece**, liquidated severance pay depends on whether the employer gives statutory notice: Greek employees with one to four years' tenure get two months' pay without notice or one months' pay plus notice. An employee with more than 24 years' tenure gets two years' pay with notice and one year's pay without notice. Everyone else gets something in between.
- In **Mexico**, liquidated severance pay is three months' pay plus 20 days' pay per year of service plus the lesser of an additional 12 days' actual pay or 12 days of pay at minimum wage rate, per year of service.
- In **Spain**, for employees hired before February 2012, statutory liquidated severance pay is 45 days pay per year of service capped at 42 months' pay. For those hired after February 2012, it is 33 days per year capped at 24 months.

5. Unliquidated severance pay awards (wrongful termination claims). A multinational headquarters that pulls the trigger on an overseas no cause firing is quick to ask how much severance pay will be due, as if severance pay everywhere is liquidated and ascertainable using a defined formula. It is not. England, France, South Africa and other places impose no fixed or liquidated severance pay obligation (or they impose only *de minimus* ones). Rather, for severance pay, these jurisdictions offer a dismissed employee an unliquidated cause of action for wrongful termination (in England, "unfair dismissal"). A local court or "labor tribunal" awards a severance "indemnity" for a successful claim. In these countries, therefore, an employer seeking to fire someone without good cause will not know in advance precisely how much severance indemnity that employee might win in court. In the UK, these awards are subject to a statutory cap (which rises annually and is soon capped at one year's pay), but UK employers do not know how much any given prevailing employee might win up to the cap. In France, wrongful dismissal awards range from a minimum of three months' pay to a cap of 24 months' pay; again, where a given employee's award will fall can be hard to predict.

An American headquarters firing someone in a liquidated severance pay jurisdiction will, of course, seek some way to quantify the employee's wrongful termination claim. Consider an analogy to a personal injury lawsuit against a tortfeasor: The precise amount of damages to be awarded is unknowable until a plaintiff proves his case and a court issues an award. Court awards in these cases tend to be fairly predictable and cluster within a range, yet no one can say in advance exactly how much any given claimant will win within that range. And unless local law imposes a cap, no one can say whether this particular case might be exceptional and fall outside the range.

6. Due process, discrimination and "moral harassment" awards. Beyond liquidated and unliquidated severance pay awards, many jurisdictions let a fired individual employee sue an ex-employer for additional dismissal damages (and often reinstatement) where the employee characterizes the firing process as illegal, unfair, discriminatory or harassing. Jurisdictions from Indonesia, Italy and Japan to New Zealand, Peru, South Africa, the UK and beyond recognize this type of claim (in England called "wrongful dismissal"). And "moral harassment" claims in the dismissal context are increasingly common in Brazil, Venezuela and elsewhere.

These causes of action are conceptually distinct from an employer's basic obligation to pay regular severance pay (liquidated or unliquidated). These causes of action seek an additional award (and sometimes a reinstatement order) on the separate ground that in firing the worker, the employer resorted to unfair or illegal tactics, or had an illegal motive. Where local law imposes specific dismissal procedures, these "firing due process" claims include allegations that the way the employer executed the firing breached the mandated procedures.

This means, then, that an employee who wins one of these claims gets enriched beyond the amount of the jurisdiction's basic (liquidated or unliquidated) severance pay award. Remedies for these claims may include a greater uncapped money judgment and reinstatement. These jurisdictions let employees win this extra separation pay because a prevailing employee proves the employer committed a separate wrong beyond the wrongful termination itself, and so deserves extra money for this extra injury. In one highly publicized May 2010 labor arbitration in Toronto, a unionized worker won CAD 500,000 for a "bad faith" firing. Sweden awards punitive damages when a court holds a dismissal procedurally unfair. In South Africa, a court that finds a dismissal "automatically unfair" raises the cap on a basic severance/dismissal award from 12 months' pay to 24 months' pay. The UK caps unliquidated severance pay ("unfair dismissal") awards, but removes this cap for due process/procedural "wrongful dismissal" claims. France assesses a penalty of an extra month's salary for certain infractions of France's complex dismissal procedures.

7. Employment contract/policy awards. Our final category of separation payment that an employer might owe to an employee it fires abroad is dismissal liability under an employer's own individual or collective employment contracts and policies, or non-compete agreements. This obligation, of course, grows not out of local law but out of an employer's (or its bargaining agent's) own commitments. In some countries, employment agreements commonly impose termination-pay provisions. In Canada, individual employment contracts commonly contain liquidated notice pay provisions. In Italy, industry-wide ("sectoral") collective agreements ("CCNLs") impose extra liabilities for both individual dismissals and reductions-in-force. And many US-based multinationals have issued their own international severance pay policies or else have undertaken in-house severance pay commitments in their benefit plans, equity plans, expatriate programs or previous merger and acquisition agreements. (And beyond extra severance *pay* mandates, some employers' own individual and collective employment contracts and policies impose dismissal *procedure* obligations.)

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