

**WORKFORCE RESTRUCTURING DONE RIGHT—
MANAGING RISK STRATEGICALLY**

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You're sitting at your desk, having what passes for a normal day in Human Resources, when the edict comes down from the CEO's office: reduce headcount by 10%. You groan and think, "Here we go again." But you take comfort in knowing that you've gone through this drill before, and you reach in your desk drawer to get the old reorganization forms so you can send them out to all the division heads.

Not so fast. You don't have to do it the same way as last time, and you probably shouldn't.

First of all, you don't have to repeat the mistakes that have historically been made in workforce restructuring.¹ You don't have to apply ineffective processes or take *valueless* risks. Better than that, you can manage the *inevitable* risks more strategically. Best of all, you can take advantage of this opportunity to institute talent systems that will actually improve your organization's effectiveness.²

Background

In the '80s, employers restructured their workforces because of mergers and acquisitions. In the '90s, they restructured because of process reengineering and other performance or quality

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¹ The most common form of restructuring is a reduction in force, and much of this article focuses on RIFs, but the principles in this article apply to other forms of restructuring as well.

² In a similar manner, Mr. Kesler argues that current business growth strategies provide a window of opportunity to shape a more meaningful HR agenda. See Kesler, *Four Steps to Building an HR Agenda for Growth: HR Strategy Revisited*, Human Resources Planning, vol. 23 (2000), issue 3, at 24-37.

improvement initiatives. So all the restructuring is done, right? Obviously not. Employers continue to find it necessary to restructure for a variety of reasons, including economic downturns, continued mergers and acquisitions, competitive pressures, globalization of markets, technological changes, and structural or operational changes.

As employers face the next round of restructuring, they can benefit from the experiences of the past twenty years. At a minimum, they can avoid tactics and approaches that have proved ineffective, have caused excessive disruption and expense, and have failed to satisfy regulatory requirements. But this article does not focus on those minimal learnings. Rather, we believe an employer should be able to apply judgment and legal savvy to evaluate and manage the inevitable risks of a restructuring in a much more strategically focused way. And we believe a company that wants to achieve real breakthrough improvements in talent can capitalize on the opportunity a restructuring provides to bring about that result.

A couple of preliminary notes. First, this article applies primarily to restructuring the exempt workforce, or even just the managerial workforce. Restructuring the non-exempt ranks is generally much simpler and does not justify some of the types of analysis and effort this article describes. Most HR groups that have had to conduct a restructuring effort in the non-exempt ranks are already aware of the applicable requirements³ and have established suitable methods for administering such a program. In general, we believe a restructuring program in the non-exempt workforce should be designed as simply as possible, both for ease of administration and to discourage challenges. For example, if the employer bases non-exempt RIF decisions solely on seniority, that will be simple to administer and employees will be able to satisfy themselves (simply by referring to the seniority list) that the decisions are non-discriminatory,⁴ consistent, and at least roughly fair. A simple method such as seniority will not ensure that the employer retains the best performers, but the burden of identifying those performers and defending performance-based decisions generally outweighs the business advantage of undertaking such an effort for the non-exempt ranks.

The other preliminary note is a fundamental lesson from the past 20+ years of workplace restructuring initiatives: to restructure effectively and defensibly takes time and resources. Too often, upper management demands immediate results and is too focused on cutting costs to put the needed resources into planning and properly conducting the restructuring. We do not mean to be naïve about the realities of restructuring. We recognize that often companies that

³ For example, in a unionized workforce, the employer must satisfy the requirements to bargain with the union over the effects of the reorganization, such as any severance benefits for displaced employees in the bargaining unit, and in some circumstances, the employer must bargain also about the decision to conduct the reorganization. The reorganization also may raise a variety of issues under the collective bargaining agreement, such as issues about transfers, seniority, recalls, and benefits.

⁴ If, however, the employer has only recently emphasized hiring minorities or women, such that minorities and women tend to have the least seniority, then basing RIF selections on seniority could subject the employer to a disparate impact claim.

undertake restructuring initiatives are under enormous pressure to cut costs and bring about other dramatic changes as quickly as possible. It is unusual for an employer to take the time and devote the resources to conduct a restructuring process as we describe in this article. We believe it is helpful, however, to describe the steps that *ideally* are taken in a restructuring process when sufficient time and resources are available. With such a complete description, an employer that is facing pressure to cut steps and costs from the process can make deliberate and thoughtful choices as to the steps to eliminate or modify.

Managing Risk Strategically

Another fundamental lesson from the past 20+ years is that an employer undertaking a workforce restructuring should integrate and coordinate the human resources strategy with the legal strategy. Too often, legal considerations come into play only at the point of defending restructuring decisions. It is equally counter-productive, however, to allow concerns about legal risks to overwhelm the need to achieve operating excellence. The integrated approach we describe in this article balances and manages legal risks while focusing the necessary attention on the company's talent imperatives.

Managing risk does not mean trying to eliminate any and all risk—unless the employer is so risk-averse that avoiding risk overwhelms every other goal, in which case the employer probably will find much of this article inapplicable. Managing risk instead means:

Recognizing risks. This includes gathering the necessary information and applying the necessary knowledge and judgment. For example, the employer should have the knowledge and judgment to recognize that displacing an employee who has recently made a complaint about the employer to a regulatory agency poses a risk that the employee will assert a whistleblower claim. Obviously the employer cannot strategically manage risks that it does not find or recognize.

Eliminating valueless risks. A restructuring program often triggers various clear regulatory requirements, and there would be no value in encountering the risk of failing to satisfy those requirements. For example, if the employer modifies its pension plan in connection with the restructuring, the employer should ensure that it goes through the necessary formalities for plan modifications and satisfies the applicable ERISA requirements such as providing notice to affected employees.⁵ Similarly, if a restructuring involves either a “plant closing” or “mass layoff” as defined by the federal Worker Adjustment and Retraining Notification (WARN) Act,⁶ it is almost never worth taking the risk of failing to provide notices as that Act requires.⁷

⁵ See Employee Retirement Income Security Act of 1974 § 104(b)(1)(B), 29 U.S.C. § 1024(b)(1)(B).

⁶ See 29 U.S.C. § 2101. Some states have enacted similar plant closing laws, and state law may impose additional requirements in a reorganization, including requirements under the unemployment compensation benefit system.

⁷ See 20 C.F.R. Part 639. With very limited exceptions, the employer must provide at least 60 days' notice to the affected employees and to specified government officials, and the
(continued . . .)

Evaluating and selectively undertaking risks. This step should be obvious and yet is often unrecognized. It is not necessary either to avoid all risk or to blindly charge into risks. Some risks are worth taking and some are not. If a position or a function is vital to the company's success, the employer should be prepared to accept more risk in making the staffing decisions for that position or function. On the other hand, suppose an employer is applying an assessment process to compare two candidates for a non-critical position; suppose the two candidates are assessed as being only slightly different in capability; and suppose the employee who is assessed as slightly less capable is disabled, pregnant, over 40, and a member of a minority group, while the other candidate is a white male under age 40. Some employers are so rigid and mechanical in applying their rating and selection systems that they would ignore the risks involved in displacing the female employee.

Reducing risks. Although we advocate undertaking risks that are strategically justified, the employer still can and should adopt practices to reduce those risks (as well as the risks that are not strategically valuable but are simply unavoidable). Several of the restructuring steps and tactics described in this article are designed to reduce the level of risk, both by reducing the likelihood that a displaced employee will challenge the displacement and by placing the employer in the best posture to defend itself against any such challenges. For example, communicating effectively with employees and providing appropriate separation benefits will reduce the likelihood that an employee will assert a claim; selecting the right decision-makers and documenting the selection process appropriately will help the employer defend against any such challenges.

To be an effective strategic partner (with the line management and legal professionals) in a restructuring effort, the Human Resources professional may have to set aside a deeply ingrained mindset. HR professionals generally are strongly committed to consistency as the hallmark of fairness and non-discriminatory treatment. And the consistency habit generally serves them well. However, if a workforce restructuring is to bring about dramatic, breakthrough improvements, the employer probably will have to accept (selectively, exercising strategic judgment) the risk involved in treating some groups or individuals differently than others. That does not mean being arbitrary, discriminatory, or unfair. To be fair and non-discriminatory, it is not necessary to treat everyone the same; it is necessary only to treat *similarly situated* people the same. An employer can defensibly treat individuals differently, as long as the employer can credibly explain why those individuals were not similarly situated. Likewise, an employer can treat a particular business unit, division, or department differently for legitimate, non-discriminatory reasons. Of course, having to justify different treatment (*i.e.*, having to explain why people were not similarly situated) involves risk and burden, and an employer should not take on that burden when the strategic benefit is not sufficient. But as Ralph Waldo Emerson said, "a foolish consistency is the hobgoblin of little minds." A company cannot bring about meaningful change through little thinking.

notices must contain specified details about matters such as bumping rights and schedules for separations.

Pursuing a Talent Agenda

Talent is the most compelling issue facing many businesses today. Even a company that needs to reduce headcount typically faces talent gaps in critical operations and functions. The natural tendency is to view separately the problems of needing to restructure the workforce and needing to improve talent; management may assume that it is necessary to delay addressing the talent needs until the company weathers the difficult process of restructuring. In fact, however, the restructuring process provides a prime opportunity for the employer to institute and execute a talent agenda that will strengthen the company's performance and competitiveness.

The primary reason that restructuring the workforce and pursuing a talent agenda are synergistic is that many of the steps and processes involved in effective restructuring are also valuable in building the talent level. Another reason is more prosaic but very important. When the CEO says to undertake a restructuring effort, people listen. Resources are mobilized, energy is focused, deadlines are met, and agendas are fulfilled. The savvy HR professional can borrow that thunder and apply it to the talent needs that have been neglected for so long.

When these efforts are combined effectively, the outcome is profound and ideal. The company finds that it can accomplish more with fewer people. In the course of pursuing the talent agenda, the employer discovers previously unrecognized pockets of talent and identifies the optimal utilization of its talent resources.

In general, the following steps are involved in instituting and executing a talent agenda. These steps are woven into the restructuring process that is set forth in the remainder of this article:

- Identifying critical operations and functions
- Identifying critical capabilities
- Inventorying current talent capabilities (skills) and capacity (depth, quantity)
- Exploring and assessing individual talent
- Applying talent to needs
- Acquiring or developing additional talent to fill gaps
- Developing talent for future needs

Restructuring and Talent-Building

In our experience, successfully restructuring a workforce, while simultaneously pursuing a talent agenda, involves four phases which include the following steps. The order in which the steps are set forth is a logical order for an employer to follow, but an employer can vary somewhat from this order, or can conduct certain steps simultaneously, without adversely affecting the outcome.

Phase One: Laying the Groundwork

1. Building the Business Case: The employer should prepare a written statement setting forth, in plain language, what it is trying to accomplish with the restructuring. The statement should describe the business conditions leading to the conclusion that the restructuring is necessary; identify and analyze alternative approaches and explain why they are not sufficient (at least by themselves); and set forth specific, measurable objectives for the restructuring initiative.

The primary purposes of the written business case statement are to give guidance to the people who are building the new organization and to persuade a jury, if that becomes necessary, that the restructuring effort was necessary and appropriate. To satisfy the latter purpose, the statement should be reasonably self-explanatory (*i.e.*, understanding it should not require a lot of additional information about the industry, the economy, or other factors) and must not sound callous or arrogant. The discipline of preparing a careful business case statement also helps ensure that upper management has, in fact, identified the right solution for the prevailing business conditions and is not reorganizing just as a knee-jerk response.

2. Identifying Critical Operations and Capabilities: If the employer is to make smart strategic decisions, it has to recognize which operations and capabilities are truly critical to its success, such that they justify undertaking additional risk (if necessary) and they need to be protected, even strengthened, in the restructuring. Although this step may seem straight-forward, many employers find it very difficult because of the cultural and political implications of designating certain operations or capabilities as being more important than others. This is a time, though, for clear-eyed judgment; the employer must not allow turf battles, excessive sensitivity, or particular domineering personalities to cloud its vision.

The critical operations are not necessarily the ones that immediately put bread on the table. Research and development is the lifeblood of some companies. For others, marketing—building and protecting a defining brand—is essential. Others depend on their technological infrastructure for their competitive advantage. The point is to identify the operations that are really going to drive the business and determine its competitive future. These operations will not necessarily constitute formally established departments or other organizational units.

Similarly, the employer should identify the capabilities that will be critical to its success. These critical capabilities generally are concentrated within the critical operations, but the employer should recognize the potential that certain capabilities will be critical even though they are functionally or organizationally part of operations that do not quite reach the level of critical.

3. Inventorying Current Capabilities and Capacity: