

iGlobal Strategic Guidance Series 4: Terminations

Ending Employment Around the World



In the US, employment ‘at will’ gives most businesses great flexibility when it comes to managing the workforce on home turf. The freedom to end an employment for (almost) any reason – or none at all – makes termination quick, easy and cheap. But try this in most European countries and the result could be unfair dismissal claims, large notice and severance payments, or even a court declaration that the termination is null and void. You may find trade unions, works councils or even the government getting involved.

Whether it involves a one-off poor performer or a global Reduction in Force, getting the termination process right matters. Mismanaged termination

processes are not only costly but may alienate your remaining workforce, particularly if a local office already looks upon US HQ with some suspicion.

This edition of the iGlobal Strategic Guidance takes a high level look at what US businesses operating overseas need to know about when ending employment, from the legal framework, through the importance of local culture, to the role of the state in defending employees and the unemployed.

We provide a **key point planning checklist** at the end to help to avoid expensive termination traps.

What are the key issues?

No two countries are identical when it comes to termination but almost all jurisdictions impose more restrictions on employers than the US. Europe is well known for being a minefield (and a bank raid) when it comes to terminations but Latin America (for example, both Brazil and Mexico) can be equally tricky, as can be parts of Asia. Canadian employees could be entitled to notice period payments approaching two years and firing employees in China and Japan can be almost impossible. Two similar problems in different parts of the world, such as roles that are no longer worth their investment, could have entirely different solutions.

Global or Local?

The first question is whether the termination relates only to a single country or is part of a multi-country (or even global) Reduction in Force affecting employees in a range of countries. Different planning considerations will arise depending on the answer.

Decisions to terminate across borders are mainly driven by business objectives and economic reality. In many ways this is the easier ‘sell’ to employees. The finger of blame is not pointed at them but rather attributed to external factors. You should consider whether and to what extent you can or should adopt a uniform cross border approach to:

- **Timing:** when to inform employees of the termination programme and the risk of termination;
- **Message:** what message to give about the company’s present circumstances and the reasons for the RIF;
- **Compensation:** your approach to the severance employees will get/be offered.

News travels fast. If employees do not hear it from you, they will likely hear another version of it – a version you do not control – from elsewhere.

In some countries, you may have no choice but to deal with each satellite office on a case-by-case basis. Local rules may determine which employees are let go:

- Sweden operates a ‘last in, first out’ rule;
- UK collective consultation rules may require either 30 or 45 days of discussions with employee representatives before any terminations can be made;
- In France or Germany works councils or trade unions will do everything they can to slow the process down (often by months), and have authority to negotiate enhanced severance on employees’ behalf.

Learn and understand the local market and plan carefully how best to incorporate each jurisdiction’s peculiarities into your global RIF strategy. As they say in business school, “proper prior planning prevents pitifully poor performance”.

Local terminations: know your market, know your employee

Meanwhile, an entirely country specific decision could be economic or there might be a personal reason: poor performance and misconduct are the most common.

Is the employee protected at all?

The first question is, does the employee qualify for unfair dismissal protection at all? In some jurisdictions the protection is automatic; in others such as India and Singapore blue collar or lower earners are more protected than white collar high earners; in Australia or Germany those with 6 months’ service are protected.

Performance reasons

The reason you give to an employee for wanting to end their employment might not be your real reason for the termination. Knowing *'the way things are done here'* is extremely important.

For example, loss of face is a big social issue in many parts of Asia and errors are not readily forgiven. Tell an employee in China that they are under-performing and the response is likely to be litigation. Chinese employees often do not complain while in employment, but ending employment in a blunt fashion could see claims not just in relation to the dismissal but for grievances that have been internalised for years. Suddenly that bonus the employee was upset not to receive several years back rears its head. Chinese courts – mainly pro-employee – may well accept jurisdiction over matters the company thought had been long passed over.

Meanwhile many European and Latin American countries place very high thresholds to justify poor performance terminations. Is there another reason you could give instead?

The one thing that applies virtually the world over is that it is easier (but not easy) for employees to hear that they are not to blame for losing their job. Even in those countries where you are allowed to dismiss for poor performance (and it is not all), you are usually required to performance manage and document that management for several months before you have the right to dismiss. Does HR have the appetite, expertise and time to performance manage properly?

Performance management can also throw up all manner of other complications: grievances, employees going sick, or creation of a toxic workplace atmosphere by an angry and demotivated worker. Performance management, incorrectly handled, may well result in unfair dismissal claims.

Economic reasons

Redundancy can be equally difficult. Some jurisdictions, like the UAE, do not recognise it at all. In others, such as France, the courts are not sympathetic to globally profitable companies trying to trim unprofitable local roles.

Commercial settlements

The answer may often be to reach a commercial agreement with the outgoing employee. Does the local legal framework give you the flexibility to shorten the termination process by making a settlement agreement with the employee?

Most jurisdictions allow employees to sign settlements for cash. However, the deck is often stacked against the employer. In some countries it may be necessary to start a formal process – or even dismiss – before you can talk about a deal. Dutch employees know you cannot normally

dismiss them without obtaining a dismissal permit from the government or going to court first, so most won't even entertain discussions before those steps have begun. Italian employees who anticipate the worst could report sick to prevent their employer from dismissing them. If you want to cut a deal, plan carefully the best time to propose it – the answer will not be the same in each country.

Don't expect your foreign workforce to behave the same way that your American one might. In countries with high unemployment and low labour market flexibility, employees do not tend to be as ready to quit and move on as their US counterparts. Expecting a demotivated and under-utilised employee to get fed up and leave voluntarily is often wishful thinking. This is even more true for those with long service: an employee in Ireland or Portugal with 20 years' service knows they could get two years' salary if the company dismisses them. They are unlikely to resign and leave with nothing. More likely they will stay put, making little effort, and wait for the company to get tired of them. A further reason for an employee do this is the welfare state: unemployment benefits in countries like Germany or France are extremely generous – sometimes up to 80% of the employee's most recent salary. But employees who quit voluntarily may forfeit their rights to benefits. It therefore pays for them to sit tight and wait to be fired.

The cost of terminating an employee may be off-putting but the issues seldom resolve themselves if left unmanaged. Given the way severance payments work in many countries, putting the termination decision off until next year will just make it even more expensive. Meanwhile, you may have wasted a further 12 months' salary on an employee/role that does not merit the investment.

Checklist for planning terminations

Here are some things to think about when terminating locally:

Reasons for the termination:

- What is the reason for the termination? How does a termination for that reason work in that jurisdiction? Is it possible at all? How easy will it be? Will you need to involve unions, works councils, attorneys or anyone else besides the employee and yourselves? How long will it take?
- Is there another reason you can use that would make your case stronger or the process quicker or simpler? In some countries, economic terminations need to go via the works council first, whereas performance terminations do not. In others, performance dismissals might require a longer process whereas redundancies can occur within weeks or even as little as one day.

Costs of the termination: Identify the potential costs up-front. Set a realistic budget. Is the termination worth the risk and cost or could the issue be managed more cost-effectively another way. For instance, moving the employee to a more appropriate role. Can the exit be achieved by offering the employee money to leave on good terms? Taking what appears to be the cheapest approach may turn out to be a very false economy.

Timing of the termination:

- What is your preferred planning timeline and how does this fit with the timing of the local legal process?
- In the Netherlands, for instance, you will do well to get a court dismissal permit in fewer than 8 weeks and then there is the notice period on top.
- Trade unions, the labour inspector or works councils could all slow things down if they need to be involved.
- Are there termination notice deadlines? Countries like Switzerland and Germany have month-end deadlines.
- What (if any) are your options to speed the process up?
- Map out your logistical challenges to ensure you can meet your deadlines.

People to involve: Who are the right people to involve in this termination process, and when? Local HR or Head Office HR? Do you need to involve in-house or external counsel in advance? Which managers do you need? Who is authorised to sign off formal letters or agreements? Is everyone available when they will be needed, given your timetable?

Risk assessment of the termination: What risks do you face? Is there any risk of a discrimination or whistleblowing claim by the employee? Have you followed the right process? For redundancies, are pooling and selection criteria issues? What is the risk of an unfair dismissal lawsuit? Make an informed assessment of the risk (both probability and potential consequence) as you plan the termination.

Risk management of the termination: Do you need to take steps before commencing the termination process to strengthen your case, e.g. communications between managers justifying the need to make redundancies, or a thorough investigation into disciplinary allegations?

Logistical challenges of the termination: Is this a work from home or highly mobile employee? Are there time zone issues or are the employee and management in different places? Do you need face-to-face meetings or can they be conducted by phone? Do the documents (or does the conversation) need to be in a local language? Does the employee need to receive an ink-signed original termination letter? Who is authorised to sign for the company, where are they located and are they available at the right time?

Know the individual employee: Last but not least, what do you know about the employee you are dealing with? Are they realistic or are they confrontational? The right approach often has just as much to do with the individual personality as the local law.

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