WORKFORCE RESTRUCTURING DONE RIGHT—
MANAGING RISK STRATEGICALLY

by Donald L. Creach
and Gregory C. Kesler*

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

* Donald L. Creach represents employers as a partner in the labor and employment practice group of Hunton & Williams, an international law firm with more than 750 lawyers. Mr. Creach is also a human resources consultant with Competitive Human Resources Strategies LLC, a firm specializing in talent management, human resources management, alternative reward systems and organization change.

Gregory C. Kesler, Managing Partner of Competitive Human Resources Strategies LLC, consults with corporations in the development of executive talent, organization design and human resources planning. Mr. Kesler has worked with more than 40 major corporations, implementing executive succession, assessment and development systems with many of those clients.

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 requirements 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, 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

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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.
be naïve about the realities of restructuring. We recognize that often companies that 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, it is almost never worth taking the risk of failing to provide notices as that Act requires.

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

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

**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 straightforward, 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:** The employer should quickly take a snapshot of its existing workforce, its baseline for the reorganization. This is not the point in the process for an in-depth assessment of talent; rather, at this point, the employer should just collect data on the kinds of rough indicators of talent, such as experience and education, that can be identified quickly and easily. The employer should analyze its capacity—depth, number of employees—in the various capabilities and identify any gaps in critical capabilities.

This snapshot includes assembling and maintaining a complete set of organization charts and employee rosters as of the beginning of the restructuring process. These documents will both aid in the reorganization process and capture information that will be needed in defending against any claims (possibly years later) over the reorganization.

4. **Designing the New Organization:** The employer should design its organizational structure, define roles and responsibilities (including spans of control), and determine the needed staffing quantities at each level of the organization. Although this process should begin early in the restructuring effort, it should be an iterative process so that the design is continually refined during the restructuring as the employer learns more about its needs and resources.

The fundamental principle of designing an organization properly is to ensure that the organizational arrangement is aligned with the business goals. Although it may be useful to compare the structures of benchmark organizations, the company should never lose sight of its own individual business goals. A complete discussion of organization design is beyond the scope of this article, but briefly, the ideal structure satisfies these criteria: (1) focuses resources, attention, and authority where they are critically needed; (2) provides optimal specialization and economies of scale; (3) provides optimal coordination among separate groups or functions; (4) provides control and accountability; and (5) provides opportunities to develop talent and bench strength.

5. **Analyzing Restructuring Options:** The employer should not leap to the assumption that the only way it can accomplish its goals is through involuntary separations. In some circumstances, other tactics will be equally effective. The options include, among others, a hiring freeze coupled with normal attrition, a voluntary separation program, an early retirement incentive program, targeted versions of those voluntary programs (e.g., offered only to selected business units), and combinations of these tactics.

The tactics that depend entirely on voluntary separations can only cut costs, though; they cannot promote a talent agenda, because the employer has no opportunity to shape its workforce based on its talent needs and the talent available. Thus, these tactics should be used only with

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8 We find persuasive the arguments of Eliot Jacques that in virtually every organization, there are no more than six levels of work complexity (as measured by the amount of time that would be required to recover from any mistake committed by employees at that level), and thus a company should have no more than six layers—yes, six—from CEO to rank-and-file.
non-critical operations and capabilities and only when avoiding risk is particularly important to the employer. If the employer is going to pursue a meaningful talent agenda, the employer will have to accept the risk inherent in exerting control over the staffing decisions, at least for critical operations and capabilities.

If the employer applies a combination of restructuring tactics, the employer should direct the timing and sequence of the tactics so that they are most effective and defensible. For example, if an employer combines an early retirement program with involuntary separations, it is highly preferable for the early retirement program to come first, so that the employer can evaluate the results of that program before determining what involuntary separations are needed, and so that the employer does not face claims from involuntarily separated employees who would rather get the early retirement benefit (when it is offered after their separation) than any severance benefits they received.

**Phase Two: Planning the Restructuring Process**

6. **Establishing the Selection Rules and Principles:** Early in the planning stages, the employer should decide on the fundamental procedural rules and principles that will guide the selection process. The kinds of issues to be addressed include: What will be the universe of employees who will be considered for each position to be filled (e.g., only incumbents; only incumbents plus those who have successfully held the position within the past five years; all employees who satisfy minimal qualifications)? Will managers be allowed to select employees from other departments, divisions, or business units? Can employees who are displaced be placed in positions that would not otherwise be reorganized, so that they “bump” employees who would not otherwise be displaced? Are any positions or employees too vital to be subject to displacement? Will employees be relocated to fill positions? What will be the order of filling positions (i.e., which positions are important enough to be filled first, such that those employees are not available for other positions)? Will employees be invited to indicate interest in particular positions—or unwillingness to accept particular positions or locations? Will employees be...

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9 In general, the more control a tactic provides over the shape of the resulting workforce, the higher the risk in applying the tactic. To put it another way, the amount of risk the tactic poses is inversely proportional to the amount of voluntariness of the separations. For example, in a voluntary separation program or early retirement program, the employees are leaving the company voluntarily (if the program is administered correctly) and so are very unlikely to complain about their separations (and thus expose the employer to risk); however, the employer maintains very little ability to ensure that it will end up with the skills it needs, in the business units where they are needed, in the necessary quantities, during the right time periods. If the employer increases the level of control by targeting the programs only to certain business units, it increases the risk of challenges, both from people in the business units excluded from the programs and from people in the targeted business units who may contend that they were targeted because of their age or another prohibited factor. Similarly, the employer increases the level of risk by attempting to steer certain employees toward or away from “voluntarily” accepting a separation program.
invited to state a preference for being severed and receiving separation benefits instead of being placed? Will there be any mechanism for retaining talented employees who happen to occupy expendable positions at the time of the reorganization?

These procedural rules may appear merely bureaucratic, but in fact they have important consequences both strategically and tactically. These rules will either protect and maintain the employer’s critical operations and capabilities or expose them to depletion and disruption. The rules embody the employer’s values and goals in the reorganization. For example, allowing all employees to be considered for any position would embody values of opportunity and openness, while sacrificing values of expediency and efficiency. Similarly, creating a mechanism to retain talented employees who occupy expendable positions would embody the strategic decision that preserving such talent justifies the risk and burden of defending the judgment that these employees should be treated differently. These procedural rules have an enormous effect on the complexity of administering the reorganization and defending the reorganization decisions. For example, if the employer allows bumping, each decision can set off a chain-reaction that is very difficult to manage. By defining the universe of employees under consideration for a position, the employer establishes the group of comparators for any employee who challenges the decision not to select her for the position. And rules of this type affect the scope of the “decisional unit” for which the employer must provide disclosure if the employer wants to obtain waivers as described in step 10 below. Thus, establishing these rules is one of the many steps in which it is important to integrate and coordinate the human resources strategy with the legal strategy.

7. Designing the Talent Assessment Process: The talent assessment process is, of course, a key element in selecting the right people for the new organization. In addition, in any legal challenge, the employer’s process and criteria for assessing and comparing the employees will be examined very closely. A displaced employee may or may not challenge the decision that a reduction in force was necessary, but the employee will certainly challenge the decision that he or she, rather than someone else, should be displaced. The employer should devote considerable attention to designing a talent assessment process that a judge or jury will find understandable and fair. At this key point, pursuing a rigorous talent agenda has the greatest synergistic effect with conducting an effective and defensible reorganization: a powerful, effective talent program necessarily employs rigorous, valid assessment methods that will withstand scrutiny.

Assessing talent is an inherently, inevitably subjective process, and courts are suspicious about subjective processes. Some employers are so skittish about legal risk that they abdicate

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10 In the circumstances of a reorganization, the Older Workers Benefit Protection Act requires an employer to provide disclosure about the job titles and ages of employees in the “decisional unit” when the employer asks affected employees to waive any claims under the Age Discrimination in Employment Act; if the employer does not provide the disclosure and satisfy other OWBPA requirements, the ADEA waiver is not effective. See 29 C.F.R. § 1625.22.

11 See, e.g., Barnett v. W.T. Grant Co., 518 F.2d 543, 550 (4th Cir. 1975) (subjective standards are “always suspect” because of their capacity to mask discrimination). The courts are, however, somewhat more realistic about the subjectivity involved in making judgments about (continued . . .)
their judgment and base their decisions on purely objective—and thus non-predictive—criteria such as seniority. We believe that is a needless overreaction. The assessment process should not abandon subjective criteria, but should put some pants on them. The process should require the assessors to think hard about where those judgments came from, to identify the behaviors and results that justify them, and to relinquish the ones that are exposed as lacking solid grounding. The process should tease apart and analyze the competencies that make up an amorphous category such as leadership or promotability. The ratings on each of the relevant competencies should be supported by observations of behavior and, preferably, results—accomplishments or failures. Typically this process validates some judgments about perceived superstars, deflates others’ balloons, and, most importantly, reveals talent that had been buried. In our experience, this kind of detailed, meticulous analysis also satisfies courts that the employer has not made arbitrary, and therefore potentially discriminatory, decisions.

8. Choosing the Decision-Makers: Before undertaking to staff the new organization, the employer should, to the extent practicable, identify and select the best individuals to make the staffing decisions. The decision-makers should reflect the demographics of the employee group, should be likely to be in place if the decisions are challenged years later, should be loyal to the employer (even when the employer is requiring the manager to make tough decisions about friends and colleagues with whom the manager has worked for many years), and should be knowledgeable about the employee group being assessed. Consciously and strategically designating the decision-makers is more manageable than it may first appear. For example, if it is desirable to include a somewhat older manager in the decision-making group for a set of positions, that manager need not go through every step or attend every meeting in the decision-making process; the manager can simply be given an opportunity to review the decisions at some appropriate stage in the process. If it is preferable to avoid involving a particular manager, that manager can be limited to providing proposals or background information.

9. Designing Separation Benefits: The employer may want to offer any of a wide variety of separation benefits, including severance pay, outplacement assistance, medical benefit coverage, pay for unused vacation or sick leave, and life insurance benefits. In designing and offering these benefits, the employer must satisfy ERISA and COBRA requirements and should analyze and weigh the advantages of the various available approaches.

Severance pay generally is governed by ERISA, and a severance pay plan should be designed, established, and distributed to employees in accordance with ERISA requirements. Having an ERISA-covered severance pay plan that is properly designed actually helps the employer defend against any claims for benefits. A properly designed plan provides the plan higher-level positions. “[I]n filling an upper-level management post, some degree of subjectivity is inevitable, as the decision maker must balance employees’ different strengths and qualifications, predicting all the while who will be the best ambassador for the company and most effectively serve its business needs. Judgments such as these are neither mechanical nor quantifiable. Their imprecision, however, need not signal an infection with age animus.” Vaughan v. MetraHealth Cos., 145 F.3d 197, 204 (4th Cir. 1998).
administrator the discretion to interpret the plan as necessary to decide any claim for benefits. If a disappointed claimant then sues for benefits, the courts defer to the administrator’s discretionary interpretation. If an employer is going to provide medical benefits during a severance pay period, the employer may want to start the 18-month COBRA period at the point of separation and simply not require employees to pay their normal COBRA premiums. If the employer instead provides medical benefits directly during the severance period, it will then have to provide 18 months of COBRA coverage after the severance period ends.

10. Considering the Waiver Issue: The employer may want to consider requiring employees to execute a waiver agreement to obtain any separation benefits, or to obtain an enhanced package of separation benefits. To effectively release any claims under the Age Discrimination in Employment Act, such a waiver must satisfy the complex requirements of the Older Workers Benefit Protection Act. For example, employees must be allowed 45 days to decide whether to agree to the waiver, must be advised in writing to consult with an attorney before signing the waiver, and must be allowed 7 days to revoke their decisions to agree to the waiver. In addition, the employer must provide the employees written information about the ages and job titles of the employees who are and are not eligible or selected for the program of separation benefits, along with other details about the reorganization.12

Collecting and providing this information can involve a significant administrative burden, especially if the reorganization involves large groups of employees or will extend over several months. Advising the employees in writing to consult with an attorney could lead some employees to pursue claims they would not otherwise have considered (especially considering that the attorney will be presented with a package of information about the job titles and ages of the employees affected by the reorganization). Courts generally are hostile to waivers, and if the employer fails to comply with any of the OWBPA technicalities, a court will find the waiver invalid. In that circumstance, the employee can keep the severance pay but still can pursue an age discrimination claim against the employer.13 On the other hand, many employers have found that obtaining waivers greatly reduces or completely eliminates claims. The employer must decide whether that potential benefit justifies the burdens and risks involved in satisfying the OWBPA requirements for an effective waiver.

11. Communicating Effectively and Appropriately: We have somewhat arbitrarily placed communication at step 11; it really applies throughout the reorganization process.

Employers should recognize the importance of effective communications in maintaining employee morale through the stressful period of a reorganization. In addition, employers should recognize the legal consequences of improper or inadequate communications, such as failing to inform the employees who are considering an early retirement option that the employer has decided to provide a more favorable benefit in the future. The employer should carefully plan the

12 See 29 C.F.R. § 1625.22.

communications with any displaced employees so that the communications will be appropriately compassionate without suggesting that the employer has done anything improper or unlawful. And the employer must effectively communicate its vision for the new organization to the employees who will remain in place or will be undertaking new responsibilities.

Phase Three: Implementing the Restructuring Process

12. Assessing Talent: The individuals performing the talent assessment should be trained to understand the purpose and methodology of the assessment. They should understand that this assessment does not serve the same function as an annual performance appraisal or merit pay assessment. They should be taught how to make their best forward-looking assessment of an employee’s likely performance in a new role, in a new organization. As previously noted, the assessors should be required to identify observed behaviors or outcomes—preferably accomplishments or failures—justifying the ratings in each competency dimension.

In any performance or talent assessment process, it is necessary to reconcile the natural differences in standards and approaches among the individuals performing the assessments. Thus, after the initial assessments are performed, there should be a process for harmonizing or standardizing the assessments. It is important to make clear that this step is a natural and necessary part of the process, so that it is not viewed as being a manipulation or corruption of the “real” (first) assessments.

The harmonizing process normally involves face-to-face dialogue among the assessing managers, perhaps with an outside facilitator. In this dialogue, each manager should feel, and be, free to challenge another manager to provide objective data to justify an assessment. If each assessment is based on observed behaviors or results—accomplishments or failures—the comparisons among assessments will be valid and defensible.

The harmonizing process is particularly important and difficult when a reorganization occurs soon after a merger or acquisition, or in other circumstances in which groups that historically have been completely separate are now being combined. In these circumstances, the harmonizing team must compare employees who have worked under different expectations, in different cultures, and with different managers observing the results.

13. Selecting the Right People: Now we have come to the heart of the matter. This is the point at which it is most important to make solid, smart judgments, integrating the human resources strategy with the legal strategy to retain the best talent and to manage risk strategically.

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14 The process we advocate employs separate assessments, as we have found that annual performance appraisals are rarely, if ever, very useful as the instruments for the talent assessment process for a reorganization. The employer should not, however, ignore the existing record in making decisions; it would be very difficult to defend any decision that is strikingly inconsistent with the employees’ existing performance records.
The management group that will make the staffing decisions should not be expected to apply the assessment results and selection rules mechanically. If the process were that automatic, there would be no need for any decision-makers. The managers must be allowed to exercise their business judgment and instincts. At the same time, they cannot simply start with the staffing outcomes they desire and work backward to the inputs that will produce those outcomes. The managers must work in partnership with the employer’s human resources advisors and legal advisors to make the best strategic judgments.

In deciding where to deploy the available talent and which risks to undertake, the team must maintain a realistic, non-politicized understanding as to which operations and capabilities are truly critical. The team members should be honor-bound and vigilant to keep personal agendas, such as protecting personal friends, out of the selection decisions. As in the harmonizing process, each team member should feel, and be, free to challenge another manager to provide objective data—about behaviors and outcomes—to justify a selection.

The process must include a human resources/legal analysis of the selections to identify and gauge the risks so that the team can make the best strategic decisions about undertaking and reducing risks. This may include a statistical analysis of the age, sex, and race impact of the selections. If any employee identified for displacement appears particularly likely to challenge the action, the reviewing group should analyze the employee’s assessment and employment records, then compare the assessments and records of the employees in the same universe who are selected for retention. In addition, the group should assess the implications of any bending of the established selection rules. For example, if the rules do not allow bumping, but one manager engages in bumping to avoid losing a good employee who happens to be relatively young, it will be hard to explain why another manager displaced an older employee with equally good performance instead of letting that older employee bump a less good performer. A manager may try to use the occasion of the reorganization as an opportunity to get rid of an employee whose performance has not satisfied the manager, even if the employee’s performance record does not support the selection or the employee’s position should not be eliminated for operational reasons. If the managers’ selections do not satisfy the established criteria, the employer becomes more vulnerable to claims that the selections were really based on a prohibited consideration such as age.

As risks are identified and gauged, it becomes necessary to make the strategic judgment as to which risks are work undertaking. The selection process almost always involves several iterations as the employer considers alternatives and their implications. Even if the employer cannot afford to invest the time required for some of the other steps we have described, the employer should be as deliberate and thoughtful as possible in this crucial step.

14. Documenting the Assessment and Selection Process: The employer should describe the assessment process and the selection process, in writing, in plain language so that the selection group, as well as a judge or jury, can readily understand how the employer went about making its selections. The employer should decide in advance which documents that are created during the assessment and selection processes should be retained, and they should be maintained carefully so that the history can be reconstructed in response to a challenge that may come years later. For example, the employer should decide in advance whether to retain the
initial, pre-harmonizing-process assessments or to keep only the final results of the harmonizing process.

The employer should view each document as a potential piece of evidence in litigation and assess the likely reaction of a judge or jury. The employer should carefully control the distribution of any documents containing demographic information about the universe of employees under consideration. In general, it should not be necessary (and will not be helpful) for the managers in the selection group to be exposed to such documents; only the people conducting the human resources/legal review of the selections need that information. The employer also should analyze in advance which documents should be protected by the attorney-client privilege or the attorney work product doctrine and should maintain the confidentiality of those documents. For example, any statistical studies of the impact of the selections should be conducted by or at the direction of an attorney, in a manner that will entitle them to attorney work product protection.

**Phase Four: Following Up**

15. **Establishing the New Culture:** After any reorganization, employees are likely to be apprehensive, uncomfortable, and thus unproductive. If the reorganization has displaced some employees, the remaining employees will have lost daily contact with friends and valued colleagues and may have lingering fears for their own future. It is important for the employer to build morale, confidence, and commitment within the new organization as quickly as possible. After a merger or acquisition, it is particularly important for the new company to imprint its culture and to establish enthusiasm and loyalty for the new enterprise. In this effort, the employer should strive to become a preferred employer, one whose employees are proud to be associated with it and will work loyally and diligently to further the organization’s aims.

16. **Developing Talent:** The talent assessment provides an ideal foundation for developing talent, as it identifies not only strengths but limitations and growth areas. The results of the assessment process can be applied directly to prepare individual development plans, conduct succession planning, and establish programs to develop bench strength in critical operations and capabilities.

**Conclusions**

A reorganization does not have to be a disaster or a litigation magnet. A reorganization does not even have to be a negative. It can and should instead be a transformation in which an organization does more with less by identifying its talent and deploying that talent where it is critically needed. Although a reorganization inevitably involves some risk, an employer can manage the risks effectively and strategically by eliminating valueless risks, undertaking the risks that have the necessary strategic value, and conducting the reorganization in a way that minimizes those risks while simultaneously maximizing the talent utilization.