FAMSVILLE

MANAGING LAYOFFS IN NIGERIA:

WHAT THE "MAGNIFICENT 7" AND OTHER TECH GIANTS SHOULD KNOW

INTRODUCTION

Today's business world is a survival of the fittest, characterized by the economic downturn, excess manpower, negative implications of technological expansion, and revenue decline during which employers may be left with no choice, but to lay off employees as a measure to stay afloat or fiercely compete. Sadly, the "Magnificent 7" and the world's largest tech companies are not immune from these harsh, but inevitable drivers of business decisions leading to workforce reductions. Magnificent 7 is an acronym whose origin is derived from the acronym "FAANG" coined by CNBC's "Mad Money" host, Jim Cramer sometime in 2013. FAANG represented a group of high-performing and prominent technology companies**: Facebook, Amazon, Apple, Netflix, and Google (now known as Alphabet). However, the FANG companies subsequently metamorphosed into the buzzword- Magnificent 7, comprising Apple, Microsoft, Alphabet, Amazon, Nvidia, Tesla, and Meta.**

The Magnificent 7 and most tech companies often operate a global hierarchical structure, cross-functional in nature and product-orientated. The parent company is usually headquartered in the United States or the United Kingdom, run by global Heads/Managers reporting to a global Chief Executive Officer (CEO), while subsidiaries or divisions are incorporated in regions where the products are accessed by users such as Europe, Asia and Africa. The result of this is a centralized system of decision-making and standardized output across all value chains including Human Resources (HR) functions who are at the core of "hire and fire". Statistics have shown that in 2023, layoffs across the planet have yet again cost tens of thousands of tech employees their jobs; this time, the workforce reductions have been driven by the biggest names in tech such as Google, Amazon, Microsoft, Yahoo and Zoom. A vast majority of their employees in Nigeria have not been excluded from the impact of the layoffs which are more often than not, dictated by the global management execs of these mega companies.

Global layoffs are often tricky, and accompanied by unpredictable consequences depending on the geographical regions impacted. The diverse implications of layoffs from one geographical region to the other, are attributable to non-uniformity of regulatory standards, ambiguities of local labour laws particularly in Africa, and Nigeria in particular, compared to other jurisdictions with robust regulatory frameworks. Thus, the Magnificent 7 and other entities of their ilk face regulatory and contingent liability risks in Nigeria due to these factors. Without more, it becomes important for Big Tech to understand and comply with local requirements while conducting layoffs in Nigeria. Layoffs in the global tech ecosystem are an integral part of an entity's lifecycle in the path to competitiveness, expansion and dominance of user markets. Rather than refrain from establishing corporate presence in Nigeria (and consequently hiring employees directly) on the basis of unclear legal processes, market experience has shown that outsourcing layoffs to experienced tech-labour law lawyers in the impacted region(s) has proven to be the elixir of regulatory backlash and imminent litigation.

WHY LAYOFFS IN NIGERIA ARE TRICKY

The fast-paced/agile systems of the Magnificent 7 and Big Tech compared to local requirements of a prescribed duration for notices, regulatory consents, consultations etc; Most players in the Big Tech ecosystem, operate in highly dynamic and competitive environments, where quick decision-making is crucial. Where profitability metrics, changing business needs, or market conditions, influence redundancies, tough decisions have to be made, and quickly too. This need for agility often collides with fairly long notice periods and unending consultation requirements of local labour laws. Managing the employment life cycle of thousands or even millions of employees can thus be both complex and challenging. The agile systems and processes Big Tech have in place are often designed to maximize efficiency and scalability. Thus, such processes may involve speedy procedures for termination, which may not align with the specific timelines and requirements mandatorily required by local labour laws.

Balancing the act between the innovative culture of tech companies and the traditional demands of contractual requirements and local laws; The Magnificent 7 and startups generally, share an attribute in common innovation. The common culture of innovation across board is not only limited to products but to the thinking process and unconventional approach of these entities to problem-solving. Most times, these systemic innovative approaches influence decisions of HR who often breach local requirements in redundancies unwittingly, while implementing redundancies as every other organizational challenge. Primarily, there exists a sharp contrast between innovation and traditional specific requirements regarding layoffs regulated by local laws.These laws together with contracts of employment of impacted workforce typically outline notice periods, severance pay, consultation requirements, and other obligations which employers must adhere to, when implementing layoffs.Notwithstanding, it is possible to incorporate innovative thinking in managing layoffs in a manner which safeguards employee rights, preserves brand reputation, and concurrently eliminates legal risks.

Policy and Legislative Gaps: The lack of specific provisions to regulate redundancies may indicate a policy or legislative gap in local labour laws. As a result, global tech employers may face uncertainty regarding legal duties and the right processes to follow when implementing workforce reductions. This lack of clarity can lead to inconsistent practices, disputes, and potential legal risks for both employers and employees.

Evolving Nature of Best Practices: Nigeria's labour laws are quite silent on redundancies, prescribing best practices instead. Best practices are not fixed and can evolve over time. As industries change, new technologies emerge, and societal expectations shift, and what was once considered a best practice may become outdated. The attendant unpredictability and non-harmonization by a single entity on what constitutes global best practices tasks Legal and HR Functions of global tech entities to stay updated with the latest trends and adapt their practices accordingly. The local labour court's decisions hardly provide specific guidance on how to navigate these best practices, compounding the uncertainty. Where best practices are defined, interpretation and application are likely to be subjective. Different stakeholders, including employers, employees, industry experts, and legal professionals, may have varying viewpoints on how best practices should be implemented. Where the labour court's decisions may provide some guidance, it may not cover every specific aspect or situation, leaving room for varying interpretations and potential disagreement.

LOCAL PERSPECTIVES ON LAYOFFS

A layoff is a permanent or temporary termination of employment often initiated by an employer, for reasons unconnected to the employee's performance, usually, economic reasons targeted at cutting costs.

The Nigerian employment law is governed primarily by The Nigerian Labour Act, 1971 which contains general provisions as to the protection of wages; secondarily by judicial decisions, contracts of employment and employment handbooks.

By the Nigerian labour law provisions, companies may lay off employees on the grounds of "Redundancy". Redundancy is defined as an involuntary and permanent loss of employment caused by an excess of manpower. The scope of this definition has been expanded by Case Law to encapsulate factors such as technological advancement, acquisition of a company, restructuring, and workplace closure as valid grounds for a declaration of redundancy.[1] Case Laws have further defined redundancy as a mode of removing an employee from service when his post is declared redundant by his employer. It is neither voluntary retirement nor dismissal from service. It is also not a voluntary or forced resignation, nor is it a termination of appointment. Rather, it is a unique procedure whereby the employee is quietly and lawfully relieved of his appointment.[2]

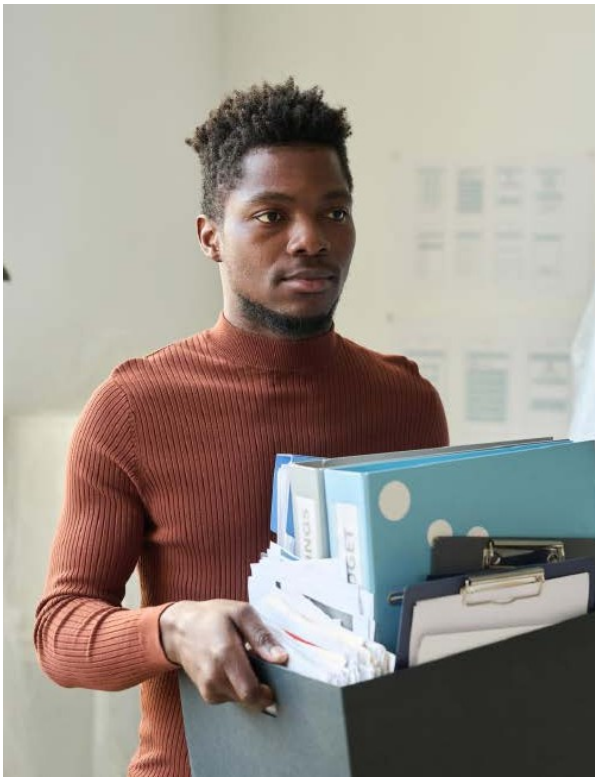
The procedure for redundancy set out by the Nigeria Labour Act is stated as follows; in the event of redundancy;

1. the employer shall inform the trade union or workers' representative concerned of the reasons for and the extent of the anticipated redundancy;

2. the principle of "last in, first out" shall be adopted in the discharge of the particular category of workers affected, subject to all factors of relative merit, including skill, ability and reliability; and

3. the employer shall use his best endeavours to negotiate redundancy payments to any discharged workers who are not protected by regulations made under subsection (2) of this section.[3]

The Act further provides that the Minister (in charge of labour and employment) may make regulations providing, generally or in particular cases, for the compulsory payment of redundancy allowances on terminating a worker's employment because of his redundancy.[4] However, the Minister is yet to make such regulations in respect of redundancy, thus it becomes expedient for employers to comply with the provisions of Collective Bargaining Agreements (CBAs) made with representatives of trade unions; the employment contract and employment handbooks.



1 Section 20(3) of the Nigeria Labour Act,1971 (CAP.LI CHAPTERLI LABOUR ACT)

2 Adibuah v. Mobil Oil (Nig) Plc (2015) LPELR-40987(CA)

3 Section 20(1)(a)-(c) of the Act(CAP.LI CHAPTERLI LABOUR ACT)

4 Section 20(2) of the Act(CAP.LI CHAPTERLI LABOUR ACT)

The Act further defines workers in its interpretation section to mean an employee or "any person who has entered into or works under a contract with an employer." The contract may be for manual or clerical work, a contract of service, or "a contract personally to execute any work or labour." However, the Act excludes from its scope, "persons exercising administrative, executive, technical or professional functions as public officers or otherwise." Employees of Big Tech fall within this category of technical, executive and professional labour excluded from the Labour Act's scope. However, this becomes ironic as the Nigerian labour court, has maintained severally that the Labour Act is a guide to all employers in various sectors, notwithstanding. Thus, HR, external lawyers and In-house counsel of the Magnificient 7 and other entities in the tech sector are likely to attract contingent liability of litigation and regulatory fines, where the approach to layoffs is outside the ambits of the guiding law, the Labour Act.

This category of employees (technical and professional labour) is subject to the terms and conditions of their employment contract. This further necessitates the application of the contractual documents and international best practices in countries with similar legal systems such as the United Kingdom, Australia and India.

REDUNDANCY PROCEDURE AND GLOBAL BEST PRACTICES

In the absence of express prescriptions of a specific procedure for redundancy, local courts have decided that global best practices should be adopted by Employers. Notably, what amounts to global best practices in HR is a question of fact which must be proved by the party relying on it except in cases where the best practice has been previously applied or enforced by the local courts.[5] IILO Conventions, Standards and Recommendations, writings of distinguished jurists in labour and employment law, relevant local and foreign case laws, and evidence of widespread and consistent application of such best practices by industrially advanced countries of the world may constitute evidence of global best practices.

The redundancy procedure employed by Big Tech as global best practices (and valid under local laws) are specified as follows;

1. Establishment of fair reasons for redundancy after considering alternatives to redundancy.
2. Redundancy selection.
3. Redundancy consultation.
4. Termination by redundancy notice or letter/ Negotiation of Mutual Settlement Agreement(if any).
5. Redundancy payment.

5 Section 7(6) of the National Industrial Court Act, 2006

NAVIGATING REDUNDANCY BENEFITS/ PAYMENTS IN NIGERIA's TECH ECOSYSTEM

A redundancy payment is a form of compensation that an employer pays to a redundancy-impacted employee, usually in addition to any existing contractual payment due to such an individual. Local laws place an obligation on an employer to use its best endeavours to "negotiate redundancy payments", with affected employees.

Unsurprisingly, the Nigerian Labour Act is silent on compulsory redundancy payment and the formula for computing a redundancy payment. Thus, an employer of tech labour in Nigeria is not under any absolute legal obligation to make such payment except global best practices, employment contracts or CBAs so require. In negotiating redundancy payments payable by contract, CBAs or global best practices, the employer has an obligation to make redundancy payments and exercise best efforts to do so. It is within the employer's discretion to determine the redundancy payment formula but it is expected that such a formula will be reasonable and fair after considering the peculiar circumstances, such as the employee's role, length of service, and salary among others.

The silence of the law on benefits gives rise to misinterpretation, ambiguity, uncertainty, and risk of non-compliance leading to fines, and damages in litigation. However, since employees are afforded the freedom to negotiate payouts it serves as a cost-cutting edge for Big Tech who are mostly inclined to maximizing profits while aggressively minimizing losses.

MUTUAL SETTLEMENT AGREEMENTS (MSAs): DE-RISKING LAYOFFS IN NIGERIA.

Due to the involuntary nature of redundancies, employers have found Mutual Settlement Agreements (MSAs) instrumental in restructuring the portfolio of employees. An MSA is the understanding in writing, between an employer and employee to terminate the employment relationship on freely agreed and mutual terms. The MSA is commonly used by employers, especially multinational companies to avoid post-termination legal and reputational risks such as litigation for wrongful terminations of employment or dismissals.

Some important clauses that should be included in an MSA are;

1. Waiver of Right; This is an important and commonly-included clause in MSAs which provides that the employee waives his or her right to seek legal remedy in court against the employer. This clause also absolves the employer of any potential claims by the employee.

2. Non Disclosure/Confidentiality; This clause is to the effect that the employee shall not, at any time before and after the employment termination date divulge any financial, tax or economic information, any other confidential or proprietary information relating to the business of the company or relating to the Employee's relationship with the company.

3. Claw-back Clause: This clause is to the effect that where the employee decides to re-engage the employee after the execution of the MSA, the company shall have the right to require the employee to forfeit the severance payments paid to the employee. The employee may also make the subsequent engagement of the employee subject to the employee returning the redundancy payments paid by the company under the agreement. Alternatively, such sums shall be deducted from the employee's salary in their subsequent engagement with the company.

4. Redundancy Payments: The agreement should set out the redundancy payment or benefits and the redundancy payment formula to be adopted by the employer.

Generally, MSAs are valid and enforceable in law, but precautionary measures are to be adopted by employers in avoiding common potential loopholes which may invalidate the agreement such as duress, undue influence, and fraud. Employers must ensure that an MSA is in writing and signed by both parties. It is also advisable that an MSA is executed with relatively senior staff (lower than a manager cadre at the bare minimum) who are reasonably expected to understand and appreciate the nature and consequences of such an agreement. The provisions of the MSA must clearly be free from any element of unconscionability and unfairness, as the existence of such elements may constitute evidence of inequality of bargaining powers which may void the agreement on judicial intervention.

MSAs have over the years proved as a veritable tool in the hands of the Magnificent 7 and their competitors as far as layoffs in Nigeria are concerned. Market indicators have also shown that where they are not properly handled with appropriate safeguards, they may open a floodgate for unscrupulous employees to take advantage o employers, portending high business risks for players in the tech ecosystem.

LITIGATION FLASHPOINTS BIG TECH EMPLOYERS SHOULD CONSIDER WHILE CONDUCTING LAYOFFS

Huge litigation costs arising from layoffs largely stem from unfairness in conducting the procedure. Employers considering a layoff should be cautious of the following obvious litigation flashpoints:

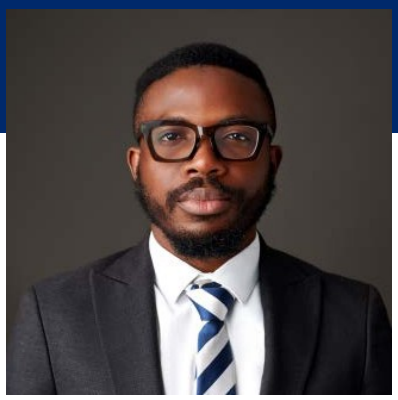
- **Wrong legal guidance** in reviewing employment contracts/handbooks and applicable local legislation in determining the best steps to take in conducting a layoff. Tactical navigation of stipulated statutory and contractual timelines is only possible when tech employers are supported by nimble local counsel.
- **Non-compliance with mandatory steps** by employers in layoffs.
- **Insincerity in conducting layoffs,** usually a function of failing to identify the right basis for employee disengagement. In a recently- decided suit, Nigeria's HR court ruled that a certain layoff on the basis of redundancy was unlawful, as the impacted employee was able to prove that someone else had been hired by HR to fill their role
- **Layoff patterns disclosing disregard for Human Rights.** Tech entities must be wary of creating patterns in layoffs such as discriminatory activity in the exercise. There might be grounds to contest a layoff if there is a pattern of discrimination related to pregnancy or childbirth, whistleblowing, sexual preference, or expression of a statutory right.
- **Non-use of contractual safeguards** is likely to render layoffs cost-inefficient. The inclusion of clauses to protect trade secrets, confidential information, and possible litigation is usually advised as a bar to guard against regulatory sanctions and judgement debts in litigation.

CONCLUSION

Navigating the complex landscape of global best practices mandated by Nigeria's labour courts, which are usually unharmonized, poses huge challenges for the Magnificent 7 and other employers of tech labour in Nigeria in the local implementation of global layoffs. The discrepancies between the textual position of local laws and practical realities further deepen the uncertainty surrounding compliance. These risks have created an emergent market for tech labour lawyers who have supported global HR teams of tech companies in layoffs.

These firms, equipped with seasoned experience in litigation and employment advisory for tech companies, understand the intricacies involved. They are well-versed in the evolving legal landscape and can provide valuable insights into drafting employment contracts that consider potential litigation scenarios. By leveraging their expertise, tech employers are able to better mitigate risks and ensure alignment of HR decisions with Nigerian Case Law while also addressing the practical aspects of implementing global best HR practices.

Collaborating with specialized firms helps employers of tech labour navigate the nuances of the law and provides a broader perspective on industry-specific guidelines and evolving standards. Such partnerships facilitate the development of robust employment practices that go beyond mere legal compliance and prioritize factors like employee well-being, diversity, and sustainability, post-layoffs. As these uncertainties persist in the Magnificent 7 circle, onboarding tech employment advisory firms with experience in litigation and a deep understanding of the tech industry remains a game changer in ensuring employers strike a balance between speedy layoff processes, and global best practices, ultimately fostering a healthy world of work.



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