

Employment and Labour Fall seminar

Handling downsizing: Mitigating the costs of mass terminations



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Agenda

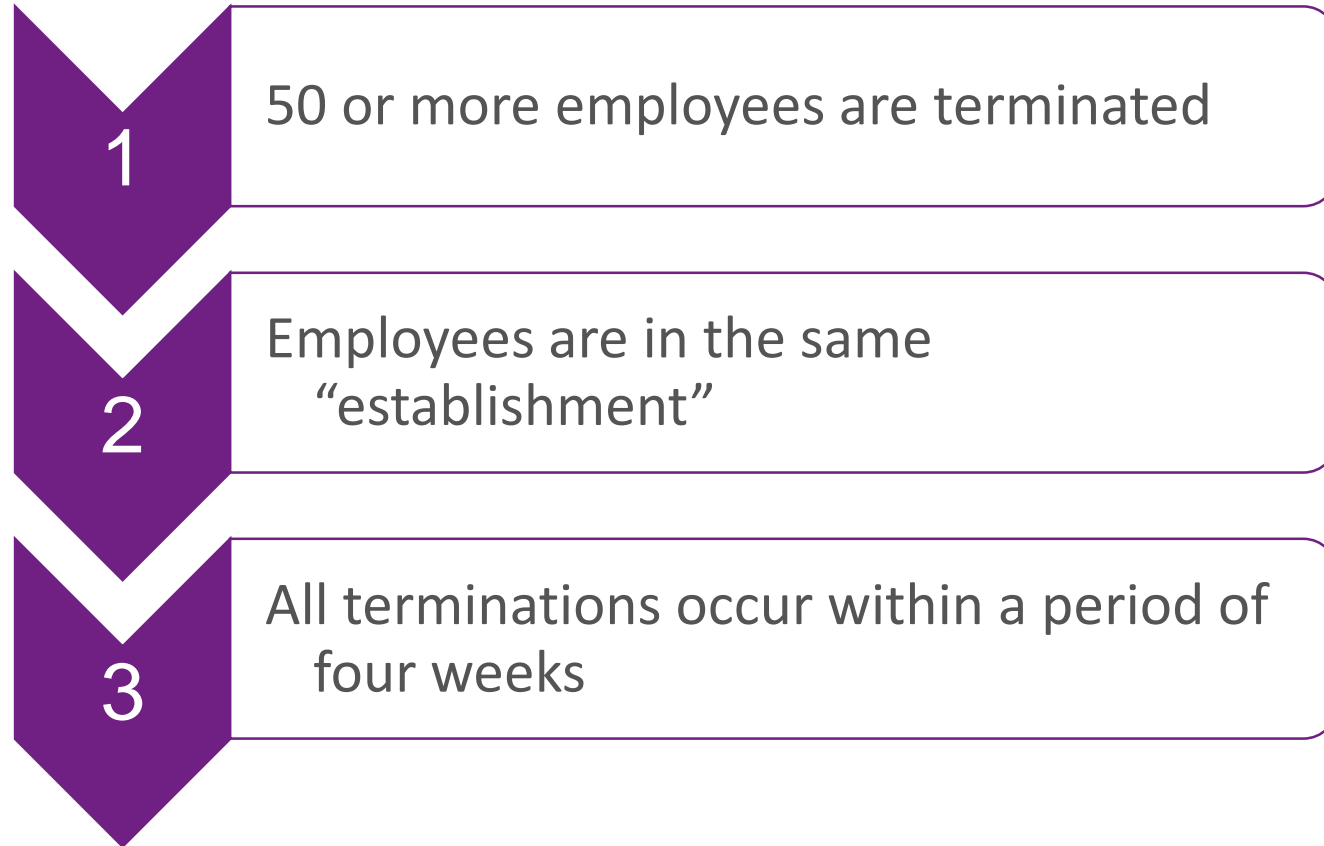
- What is a mass or group termination?
- Mass termination rules under the *Employment Standards Act, 2000* (“*ESA*”)
- Practice Considerations
- Mitigation Strategies

What is a group termination?

- A large number of employees have their employment terminated on or around the same date (often within the same four-week period).
- Can be unintentional!
- Employment standards legislation generally mandates significantly greater statutory notice or pay in lieu of notice be provided to all impacted employees.

Mass Terminations under *ESA*

What triggers the ESA group termination rules?



Mass Terminations under *ESA*

What are the notice periods?

50-199
employees terminated

8 weeks
of notice

200-299
employees terminated

12 weeks
of notice

300+
employees terminated

16 weeks
of notice

Mass Terminations under *ESA*

Severance Pay

An employee with 5+ years of service is entitled to severance pay if:

- 1) the employer has a payroll of over \$2.5 million; or
- 2) the severance occurred as part of a “permanent discontinuance” of all or part of the employer’s business at an establishment and the employee is one of 50 or more employees who have had their employment severed within a 6-month period

Mass Terminations under *ESA*

What is an “establishment”?

An “*establishment*” is defined as

“a location at which the employer carries on business but, if the employer carries on business at more than one location, separate locations constitute one establishment if:

- (a) the separate locations are located within the same municipality, or
- (b) one or more employees at a location have seniority rights that extend to the other location under a written employment contract whereby the employee or employees may displace another employee of the same employer.”

Mass Terminations under *ESA*

“Establishment” and Remote Workers

- October 26, 2023, Ontario’s *Bill 79, Working for Workers Act, 2023* received Royal Assent
- Employees who work from home are eligible for the *ESA*-enhanced notice period during mass terminations
 - Definition of “***establishment***” now includes an employee’s private residence if the employee works from that residence and does not perform work at any other location where the employer carries on business
- Effective October 26, 2023

Mitigation Strategies

- Provide working notice to satisfy all or part of the required extended notice period but beware common pitfalls!
- Leave a buffer for unanticipated terminations
- Consider whether termination obligations can be negotiated in the purchase and sale document (if applicable)
- Stagger the dismissals so that the mass termination obligations are not triggered

Practical Tips

- Keep track of terminations!
- Always provide written notice of an upcoming group termination, as written notice will confirm when notice was given to the employee, and that the termination notice is valid
- If an employee resigns during working notice, they are still entitled to their ESA severance pay but not the remainder of their enhanced termination notice

Practical Tips

- Employers are required to consider all the usual factors for an individual termination (e.g. long serving employees with no written employment contract, or employees on disability leave who may have a human rights complaint if terminated with the group)
- Employers should have termination provisions in their employment contracts that limit notice to statutory minimums, and have the termination clause regularly reviewed to ensure it is legally enforceable in the relevant jurisdiction

Dentons Group Termination Toolkit