Make Sure Layoffs Don’t Violate “Group Termination” Rule



Layoffs aren’t simply a business issue. They trigger special “group termination” requirements under employment standards laws. Such rules may apply not only to mass layoffs but to more modest workforce reductions—as few as 3 terminations per month over a 4-month period. As HR manager, you must be prepared to deal with the group termination rules to keep your company from committing employment standards violations. This article will explain what you need to know.

Defining Our Terms

This article will use the term “group termination” rather than the colloquial “lay off” to refer to the permanent termination of a group of employees because that’s how such transactions are typically labeled in the employment standards laws.

What the Law Says

The employment standard requirements kick in when group terminations occur. So the first thing you need to be able to do is recognize when your company is engaging in a group termination covered by the law. But that’s not as simple as it sounds. One problem is that the definition of group termination varies from province to province. In general, whether a termination is a *group* termination under the ESA depends on 5 factors:

1. Number of Employees Terminated. Group termination requirements are typically based on the number of employees terminated. In AB, Fed, BC, MB, NL and ON, the threshold is 50 employees. In other words, group termination rules apply if 50 or more employees are terminated. In NB, NS, QC and SK the threshold is only 10.

2. Which Employees to Count. To calculate the number of employees terminated you also need to know who to count. Most jurisdictions exclude:

- Employees who’ve worked less than 3 months;
- Seasonal employees and those employed for a definite period or task; and/or
- Employees who’ve refused “reasonable” alternative employment.

3. Length of Time Over Which Terminations Occur. To determine if the group termination rules apply, you also need to determine the appropriate time period. That’s because group termination requirements can apply even if all the terminations don’t happen in

one fell swoop. In 11 jurisdictions (Fed, AB, MB, NB, NL, NT, NU, NS, ON, SK and YT), the number of terminated employees is determined over 4 weeks. For example, in AB, group termination requirements apply if 50 or more employees are terminated over a 4-week period. In BC and QC, employees terminated are calculated over a 2-month period.

4. Whether Terminations Are Counted Business-Wide or By Facility. Calculating terminations gets tricky when terminations are spread out among different facilities. Fed, NS, ON, QC and SK count all employees within the employer's "establishment," which could include multiple facilities. Thus, employers in these jurisdictions may be unable to avoid reaching the group termination threshold by spreading out terminations among different facilities. However, in AB and BC, the group termination number applies to terminations occurring within a single location.

Example: A BC employer who lays off 140 employees over a 2-month period can remain under the 50 employee threshold by spreading the layoffs out evenly among 3 different facilities. The other provinces and territories don't say whether the number is based on the whole business or separate facilities. But, according to experts, since they don't mention geography, these laws presumably would count terminations on a company-wide basis.

5. Whether Any Exceptions Apply. Employment standards lay out exceptions when the group termination rules don't apply. For example, in SK, employers aren't required to follow the group termination provisions for terminations caused by "unforeseeable events." BC exempts certain industries, such as construction, fishing and fire fighting, from group termination rules. In ON, the group termination rules don't apply regardless of how many employees are terminated as long as at least 90% of the workforce continues to work and the termination isn't the result of a permanent shutdown of all or part of the employer's business.

6 Things You Must Do to Comply

Rule 1: Give Extra Notice or Wages in Lieu of Notice

Unlike termination of individuals where notice is based on length of service, in a group termination notice depends on the number of employees terminated. Required notice for group termination is generally longer than notice for individual terminations—ranging anywhere from 4 to 18 weeks.

In most provinces, including SK, employers are allowed to overlap the notice periods. In other words, individual and group notice don't count separately and employees get whichever notice is longer. But in at least one province—BC—the notice period for group terminations is *in addition to* the notice the individual is entitled to based on length of employment. In other words, the 2 notice periods are counted separately and don't overlap.

Example: A BC machine operator with two years of service is let go as part of a group termination involving 150 employees:

- **Individual Notice:** 2 weeks;
- **Group Notice:** 12 weeks;
- **Total Notice:** 14 weeks.

In a province where the notice periods overlap (and employees with 2 years of service get 2 weeks of notice), e.g., SK, the same machine operator would get 12 weeks notice.

Another twist: For staggered terminations, 2 jurisdictions—BC and MB—require

employers to give notice of termination to *all* terminated employees before the date the *first* employee is terminated. So if a company initiates rolling lay offs, it must give the appropriate amount of notice in advance of the first wave. Thus, employees in the first wave will actually get more than the minimum notice required by law.

Example: A BC company announces that it will permanently lay off 500 employees over a two-month period. The first wave will be let go on March 31; the rest will be terminated on May 31. The company must give all 500 employees notice of termination in mid-December (16 weeks before the first wave). So employees in the first wave get 16 weeks notice and employees in the second wave 25.

Rule 2: Give Written Notice of Termination

Although it's something you should probably do anyway, some provinces don't require employers to give employees written notice of termination in individual terminations. But written notice *is* required for group terminations in most jurisdictions, including Fed, BC, MB, ON, QC and SK. Written notice must also include specific information, such as:

- The effective date of termination (or terminations, if they're staggered);
- The reasons for termination; and
- The total number of employees terminated.

Some jurisdictions require even more detailed information. For example, in MB, notice of termination must include the names of at least two people who may be the employer's representatives on a joint planning committee. Regardless of what your jurisdiction requires, if the notice isn't written properly, it won't be effective. And if notice isn't effective, employees will continue to earn wages until proper notice is provided and the additional service time they accrue after improper notice is served will have to be factored into the determination of how much notice they get.

Rule 3. Notify Third Parties

Upon group termination, employers must provide prior notice to not just the employees but third parties such as:

The Government. In every province except PEI, employers must alert the government about the group termination. In many cases, notice to the government is required even before the employer notifies the employees. For example, ON requires employers to complete a specific form and forward it to the Director of Employment Standards before giving notice to the affected employees.

Trade Unions. Eight jurisdictions—Fed, BC, MB, NB, NT, NU, QC and SK—require employers to notify the terminated employees' trade unions or bargaining agents. And even if you're not located in one of these jurisdictions, such notice is likely to be required under the terms of your collective agreements.

Rule 4. Post Notice

In addition to giving notice directly to trade union and employees, some jurisdictions, including Fed, MB, NB, ON and QC, require employers to post the termination notice in a conspicuous place where affected employees are likely to see it.

Rule 5. Form a Committee

Some jurisdictions also require employers to form a committee (usually called a joint planning or reclassification assistance committee) once they determine that a group termination is necessary. The purpose of the committee, which usually has an equal number of employer and employee representatives, is to determine whether terminations can be avoided. If the committee agrees that there are no realistic alternatives and that termination is necessary, it must establish methods for helping terminated employees obtain other employment. Some provinces, including BC, MB, ON and QC, don’t automatically require a joint planning committee but authorize the government to order the employer to form one at any time.

Rule 6. Consider Trying to Get a Waiver

Employment standards laws typically give employers the right to request a waiver exempting them from having to follow the group termination rules under certain conditions, e.g., because terminated employees are adequately protected by their collective agreement. But experts say that waivers are rarely granted and aren’t usually a viable option. For example, Air Canada recently requested a waiver of the joint committee requirements in connection with the flight attendants lay off mentioned above based on the protections provided in the affected employees’ collective agreement. But the request was shot down by the federal Labour Minister.

This Story Will Help You:

Ensure that your company carries out group terminations without committing employment standards violations