Do Foreign Employees Count Toward ESA Minimum Severance Pay?



Situation

A manufacturing company stops operations at its Guelph facility and closes the facility for good, laying off all 40 employees who worked there. Ontario's group termination laws require employers to pay severance to certain employees if the employer terminates 50 or more workers within a six month period or if the employer's monthly payroll is at least $2.5 million. The facility's payroll is less than $2.5 million, but the manufacturing company has other facilities in the United States. The payroll for all of the company's facilities totals about $10 million.

Question

Does the U.S. employees' payroll count when determining the amount of the employer's payroll for severance calculations?

a) Yes. The employer's payroll is the combined amount that the company must pay to all of its employees, regardless of where they are located.

b) No. Only Ontario employees' payroll is covered by the Ontario group termination laws.

c) No, but if the U.S. employees were located in Canada, their payroll would count toward severance calculations.

[box]

Answer

B. Only Ontario payroll is relevant when it comes to determining whether severance pay is required in a group termination.

Explanation

This hypothetical is based on an actual case from Ontario. The employer refused to pay any severance after it terminated all of the Guelph facility's employees on the grounds that the facility's payroll was less than $2.5 million. The employees' union filed a grievance. It argued that the employer's total payroll for all operations, which was well over $2.5 million, should be taken into account when determining

whether severance payments were required under Ontario's *Employment Standards Act*. But the arbitrator disagreed. "While an employer may have operations and payrolls outside of the province, it is only the Ontario based employment" that is relevant, she said [*Genesta Inc. v. Unite Here Ontario Council*, 2007 CanLII 456 (ON L.A.), Jan. 11, 2007].

Why Wrong Answers Are Wrong

A is wrong because the Ontario legislature, responsible for drafting the employment standards laws in the first place, has no authority to legislate payroll in other provinces or other countries. Its only authority is over businesses operating in Ontario, so only the payroll from the Ontario facility was relevant in this case.

But don't feel bad if you got this one wrong. The arbitrator had a hard time deciding too. She looked to other employment laws in Ontario and even read employment standards laws relating to other industries, including the women's coat and suit industry, to determine whether "payroll" should include foreign employees' pay. The decision would have been a lot easier if the legislature had been clearer and simply add the words "in Ontario" to the payroll requirements like it did with these other laws, she admitted.

C is wrong because it doesn't matter where the other employees work. If they don't work in Ontario, their payroll can't be taken into account when determining an employer's monthly payroll payments for severance pay purposes under Ontario's employment standards laws. [/box]