



What's New in HR Law

Statutory Severance Pay Entitlement Based on Global Payroll

June 30, 2021

Bottom Line

Employers who have a payroll of 2.5 million dollars *anywhere in the world* will now have to provide their qualifying Ontario employees with statutory severance pay upon termination of employment. Previously, there was case law to support that an employer's obligation to remit severance pay would only be triggered if it had a payroll of over \$2.5 million in **Ontario**. However, a recent decision by the Divisional Court makes it clear that borders will not protect employers from owing severance pay to qualifying Ontario employees.

Severance Pay in Ontario

The term "severance pay" is thrown around a lot, and is commonly used to refer to any payment an employee receives upon termination of their employment. However, in Ontario, the term "severance pay" has a very specific meaning under the *Employment Standards Act, 2000* ("ESA"), and not all employees are entitled to it (unlike notice of termination, which almost everyone is entitled to, and which is also dealt with under the *ESA*).

Severance pay is specifically dealt with in Sections 63 – 66 of the *ESA*. Section 64 deals with entitlement to severance pay and states:

64 (1) An employer who severs an employment relationship with an employee shall pay severance pay to the employee if the employee was employed by the employer for five years or more **and**,

(a) the severance occurred because 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 their employment relationship severed within a six-month period as a result; or

(b) the employer has a payroll of \$2.5 million or more.

Outside of situations involving mass terminations, if a person is entitled to severance pay, it will generally be by virtue of Section 64(1)(b).

Section 64(2) of the *ESA* specifically explains when an employer will be deemed to have a payroll of 2.5 million or more, and states:

(2) For the purposes of subsection (1), an employer shall be considered to have a payroll of \$2.5 million or more if,

(a) the total wages earned by all of the employer's employees in the four weeks that ended with the last day of the last pay period completed prior to the severance of an employee's employment, when multiplied by 13, was \$2.5 million or more; or

(b) the total wages earned by all of the employer's employees in the last or second-last fiscal year of the employer prior to the severance of an employee's employment was \$2.5 million or more.

Notably, Section 64(2) does not answer the question whether "all of the employer's employees" refers to employees based just in Ontario, in the whole of Canada, or all over the world.

This question had been previously addressed both by the civil courts and by the Ontario Labour Relations Board ("OLRB"), with contradictory answers resulting. Helpful for employers, the OLRB had previously taken the position that because the *ESA* is a piece of Ontario legislation, the severance provisions could only relate to an employer's payroll within the province of Ontario. However, as a result of a ruling issued by the Divisional Court earlier this month, the OLRB's precedent in this regard has been overturned.

Hawkes v Max Aicher (North America) Limited ("Hawkes")

The above question was recently addressed afresh, with the Divisional Court taking an opposite view to that previously espoused by the OLRB. The most recent pronouncement from the Divisional Court is that an employer's total payroll – both inside and outside of the province of

Ontario – will be considered when determining whether an Employer has a payroll of \$2.5 million for the purpose of Section 64(2) of the *ESA*.

In *Hawkes*, the Divisional Court dealt with an application for judicial review of a decision from the OLRB. The OLRB had determined that the employee was **not** entitled to severance pay. At the time of the employee's termination, the employer's payroll in Ontario was less than \$2.5 million. However, the employer's global payroll (including parent companies) was well in excess of \$2.5 million.

The Divisional Court ultimately set aside the OLRB's decision. In reaching this resolve, the Divisional Court found that the OLRB's interpretation of the severance pay provisions of the *ESA* did not meet the objective of the legislation "to protect the interest of employees by requiring employers to comply with certain minimum standards" (as set out by the Supreme Court of Canada in *Machtinger v. HOJ Industries Ltd.*).

The Divisional Court considered, but ultimately rejected, arguments that the OLRB could not compel the production of documents from foreign jurisdictions. On this point, the Divisional Court agreed with arguments made by the Director of Employment Standards that Employment Standards Officers do have the ability to order production of payroll documents or information from employers, even if some of that information does not relate to an employer's operations in Canada.

Check the Box

As a result of this decision, employers should be aware that if they have a payroll of \$2.5 million or more, even if that payroll is spread across the globe, they will be on the hook to provide statutory severance pay to employees in Ontario, assuming the other qualifying criteria under the *ESA* are met.

Further, it is important for employers to take note of the fact that, historically, a low threshold has been applied when determining if employers are related under the *ESA*. Practically, this means that employers may not be shielded from the severance pay obligation just because they are operating under different names, or as different legal entities, than an affiliated company.

Prior to terminating the employment relationship of an Ontario employee, an employer should carefully examine their obligations under the *ESA* to ensure compliance with all required statutory minimums.

Need more information?

For more information about this decision, or about any issues related to severance pay or the *ESA* more generally, contact [Darren Avery](#) at 519.435.6008 or your regular lawyer at the firm.



Toronto

Bay Adelaide Centre
333 Bay Street, Suite 2500,
PO Box 44
Toronto, Ontario M5H 2R2
tel: 416.408.3221
fax: 416.408.4814
toronto@filiation.on.ca

London

620A Richmond Street, 2nd Floor
London, Ontario N6A 5J9
tel: 519.433.7270
fax: 519.433.4453
london@filiation.on.ca

Hamilton

1 King Street West, Suite 1201
Box 57030
Hamilton, Ontario L8P 4W9
tel: 905.526.8904
fax: 905.577.0805
hamilton@filiation.on.ca