

# **Workplace restructurings: Temporary layoffs and mass terminations**

**Matthew Curtis & Claire Browne**

# Agenda

- Temporary lay-offs:
  - When can an employer place an employee on a temporary lay-off?
  - How long can an employee be placed on a temporary lay-off?
  - Should employers provide employees with notice regarding a temporary lay-off?
  - What happens when an employer attempts to recall an employee back to work?
- Mass terminations under the *Employment Standards Act, 2000*:
  - When is a mass termination triggered under the *ESA*?
  - What obligations are owed when a mass termination is triggered under the *ESA*?

# Temporary lay-offs

## Can an employer place an employee on a temporary lay-off?

- At common law, employers are not permitted to place an employee on a temporary lay-off.
- In non-unionized workplaces, the right to place an employee on a temporary lay-off is often set out in the employee's employment agreement.
- In unionized workplaces, the right to place an employee on a temporary lay-off is addressed in the collective bargaining agreement.
- The *Employment Standards Act, 2000* establishes how long a temporary lay-off can be for and when it is deemed to be a termination of employment.

# Temporary lay-offs

How long can an employee be placed on a temporary lay-off?

- Generally, under the *Employment Standards Act, 2000*, a temporary lay-off must be no longer than 13 weeks in any period of 20 consecutive weeks.
- A temporary lay-off may be no longer than 35 weeks in any period of 52 consecutive weeks in limited circumstances outlined in the *Employment Standards Act, 2000*.
- A temporary lay-off will be deemed to be a termination of employment if the employee is on a temporary lay-off for longer than these periods.

# Temporary lay-offs

## How long can an employee be placed on a temporary lay-off?

- Employers may place an employee on a temporary lay-off of no more than 35 weeks in any period of 52 consecutive weeks if:
  - Employee continues to receive “substantial payments” from employer;
  - Employer continues to make payments under retirement/ pension plan or group/ employee insurance plan;
  - Employee receives supplementary unemployment benefits;
  - Employee is employed elsewhere during the lay-off and otherwise would be entitled to receive supplementary unemployment benefits;
  - Employer recalls employee within time approved by Director of Employment Standards;
  - Employer recalls employee within time set out in agreement between employer and employee; or
  - If unionized, employer recalls employee within time set out in agreement between employer and trade union.

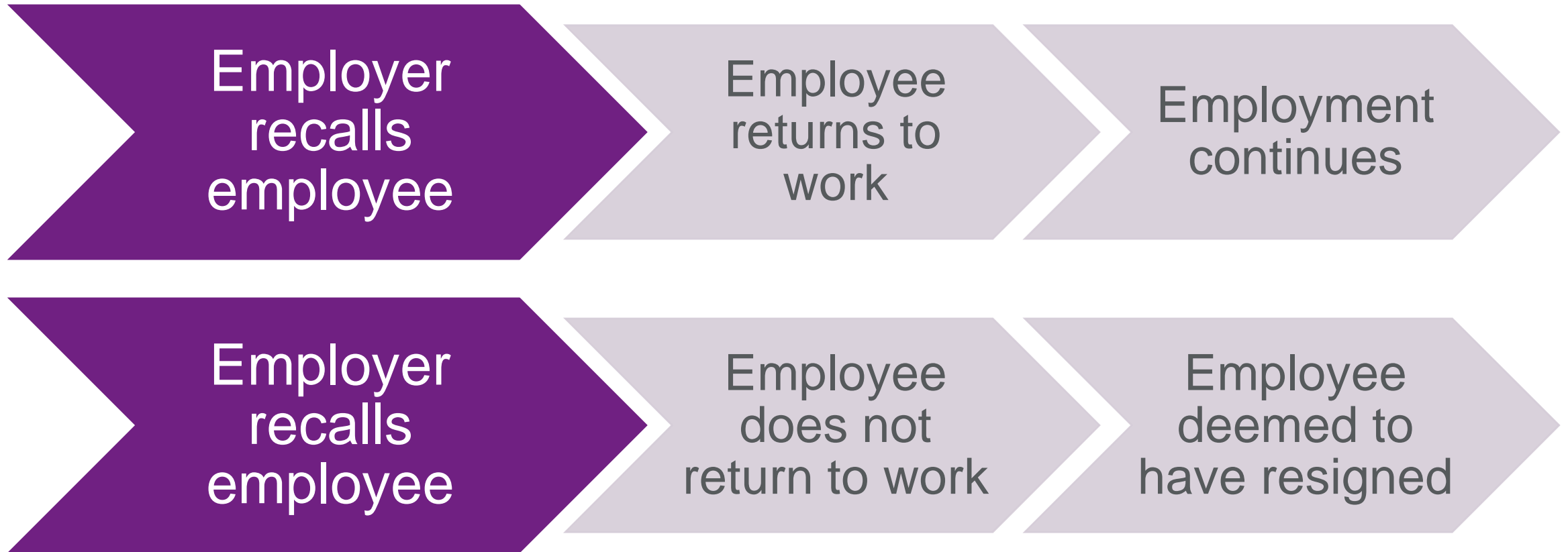
# Temporary lay-offs

## Best practices when placing employees on temporary lay-off

- Employers should provide employees with notice of a temporary lay-off in writing.
- This notice should:
  - Advise the employee that they are being placed on a temporary lay-off.
  - Set out the start date of the temporary lay-off.
  - Inform the employee regarding whether benefits will be continued during the temporary lay-off.
  - Advise the employee that vacation **time** will continue to accrue over the temporary lay-off .
  - Confirm that a record of employment will be issued.

# Temporary lay-offs

Best practices when recalling employee to work



# Temporary lay-offs

## Tips when placing employee on temporary lay-off

- Ensure employment agreement contains a temporary lay-off provision.
- Maintain up to date contact information for employee.
- Confirm preferred method of communication with employee during temporary lay-off.
- Provide employee with clear and timely communication regarding the temporary lay-off, including:
  - Start date
  - Whether benefits will be continued during temporary lay-off
  - Method of communication that will be used to contact employee during temporary lay-off
  - Recall date



# What triggers a mass termination under the *ESA*?

- Three criteria:
  1. 50 or more employees are terminated;
  2. At an employer's "establishment" in Ontario;
  3. Within the same four (4) week period.
- Four (4) week period is "rolling"
  - i.e. Triggered when 50 or more employees are terminated in any four (4) week period.

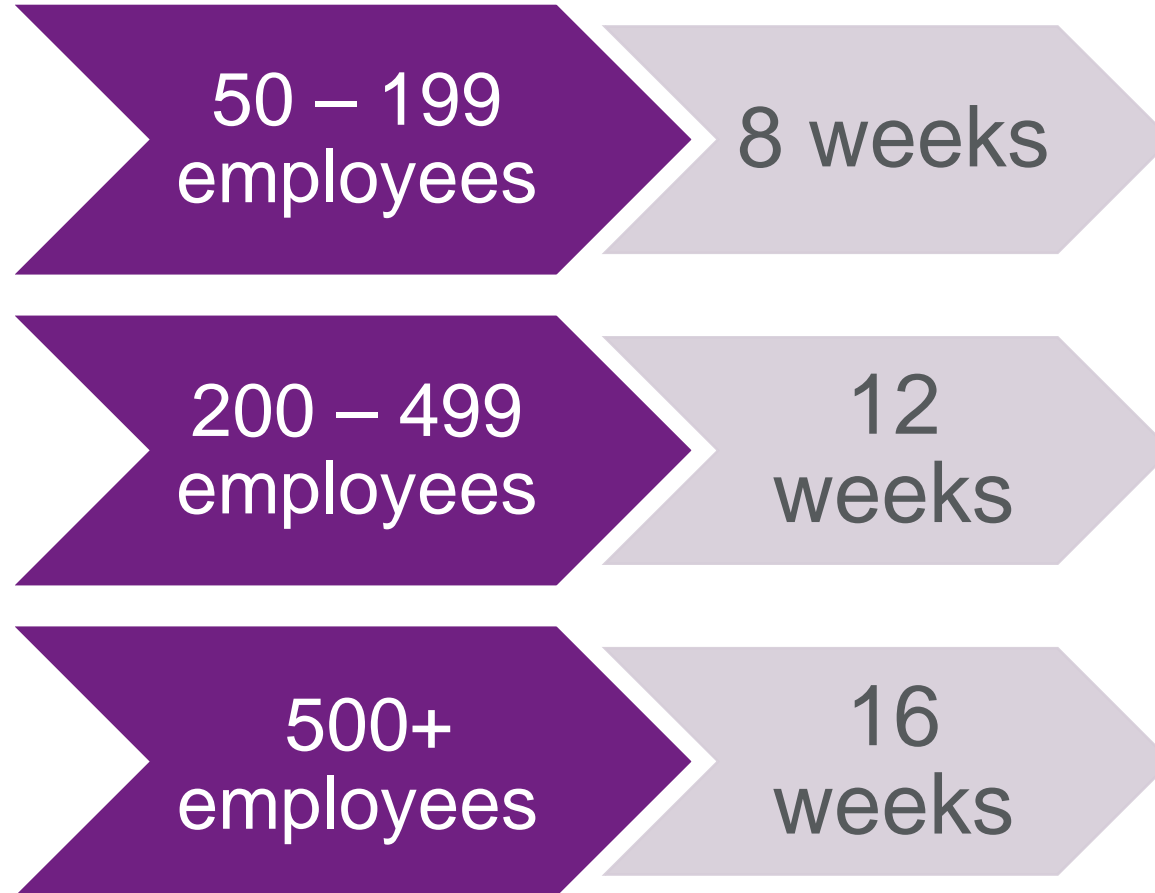
# What is an “establishment”?

- A location at which an employer carries on business
- If an employer carries on business at more than one location:
  - Separate locations within the same municipality constitute one “establishment”
  - Locations where one or more employees have seniority “bumping” rights that extend to another location under a written employment contract constitute one “establishment”
- **Note:** “Location at which an employer carries on business” includes a private residence of the employer’s employee if:
  - Employee performs work in the private residence; and
  - Employee does not perform work at any other location where the employer carries on business.

# Impact of ESA mass termination provisions

- If the mass termination provisions are triggered under the *Employment Standards Act, 2000*:
  - Affected employees will be entitled to additional notice of termination;
  - Affected employees may be entitled to statutory severance pay; and
  - Employer will be required to comply with additional obligations.

# ESA mass termination notice entitlements



# ESA statutory severance pay

- Employees with five (5) or more years of service are entitled to statutory severance pay if:
  - Employer has a global payroll of \$2.5 million or more; or
  - Severance occurred: (i) as part of a “permanent discontinuance” of all or part of an employer’s business at an establishment and (ii) the employee is one of 50 or more employees who have had their employment severed within a **six (6) month period**

# ESA mass termination notification requirements

- Employers must provide the Director of Employment Standards with the following information (in a form approved by the Director):
  - Employer's name and mailing address.
  - Location(s) where the employees whose employment is being terminated work.
  - Number of employees working at each location who are paid: (i) hourly, (ii) by salary or (iii) some other basis.
  - Number of employees whose employment is being terminated at each location.
  - Number of employees who only perform work at their private residence (and number who are being terminated).
  - Date(s) or anticipated dates(s) the employees' employment will be terminated.
  - Name of any trade union local representing any of the employees whose employment is being terminated.
  - Economic circumstances surrounding the terminations.
  - Name, title and telephone number of the individual who completed the form on behalf of the employer.
- In addition, employers must provide the information above in the form approved by the Director to each affected employee.

# ESA mass termination posting requirements

- In addition, employers are required to post a copy of the notice that must be filed with the Director of Employment Standards:
  - In at least one conspicuous place in the employer's establishment where it is likely to come to the attention of affected employees;
  - On the first day of the statutory notice period.
- Employers must ensure that the information remains posted throughout the statutory notice period

# Tips when structuring reduction in force

- Consider providing employees with working notice of termination (as opposed to pay in lieu).
- Consider whether termination obligations can be negotiated and incorporated into the transaction (i.e. purchase and sale document).
- When determining the number of employees that will be included in the reduction, consider building in a “buffer” for unanticipated terminations.
- Consider staggering the terminations to avoid triggering the ESA mass termination obligations.
- Follow the Ministry of Labour’s prescribed notice of mass termination template.
- Ensure the ESA posting requirements are followed for a mass termination.



DENTONS

# Thank you!

## Feedback survey

