



大成 DENTONS

Global Employment Webinar Series

# Managing Collective Redundancies: North America

Thursday 12 January 2023

9am PST | 12pm EST | 5pm GMT | 6pm CET

Grow | Protect | **Operate** | Finance

# Welcome

## Your Speakers Today



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# Agenda

- Considerations Before a Layoff
- Layoff Selection Criteria
- Preparing for the Layoff
- Communicating the Decision
- After the Announcement
- Q&A



# **CAN & US: Considerations Before a Layoff**

# **CAN & US - Considerations Before a Layoff: Strategies for Avoiding a Layoff**

- Hiring freezes combined with natural attrition
- Reduction in hours (including prohibiting overtime)
  - CAN: May trigger constructive dismissal
  - US: If reduce hours by 50% or more, may trigger WARN Act
- Furlough/temporary layoff
  - CAN rules – specific requirements
  - US: Intermittent: Consider exempt employees
  - US: If more than 6 months, may trigger WARN Act

# **CAN & US - Considerations Before a Layoff: Unionized Facilities**

- Collective bargaining agreement obligations
- Duty to bargain
  - Decision vs. effects
  - Sufficient notice



# **CAN & US: Selection Criteria**

# CAN & US – Selection Criteria: Selection Process and Criteria

- Who will perform the selection?
  - Have they had appropriate training?
- Objective vs. Subjective Criteria
- Review selection decisions to ensure consistency with stated layoff goals
  - Are decisions supported by documentation?
- Disparate impact analysis
  - Protected Classes?
  - Protected Activity?
  - Protected Leave?



# **CAN: Preparing for the Layoff**

# **CAN & US – Preparing for the Layoff: Analyze Employment Agreements/Offer Letters**

- Notice
- Severance
- Payments due at termination (e.g., bonuses, vacation)
- Equity rights (e.g. accelerated vesting)
- Post-employment obligations (e.g., non-compete, non-solicitation)

## **CAN (Ontario) – Preparing for the Layoff: The Mass Layoff Threshold**

The *Employment Standards Act, 2000 (Ontario)* :

- Employment of 50 or more employees is terminated
- At the employer's establishment
- Within a 4-week period

# CAN (Ontario) – Preparing for the Layoff: Has the Threshold Been Met?

## Counting the number of Employees

- 50 or more employees, including those who have worked for three months or less
- Count is based on when employment is terminated, and not when notice is given.
- The key is that employment is terminated in the same four-week period.

## What is an Establishment?

- An employer's establishment is a location at which the employer carries on business.
- If an employer carries on business at more than one location the employees are counted as if at a single establishment if:
  - Separate locations are within the same municipality OR
  - One or more employees at a location have seniority rights that extend to the other location under a written employment contract which allows the employees to displace another.

# CAN (Ontario) – Preparing for the Layoff: Employer Obligations

Ontario Employers must:

- Comply with Notice requirements: Submit Form 1 (Notice of termination of employment) to the Director of Employment Standards and post the Form 1 where it will come to the attention of impacted employees.  
<https://forms.mgcs.gov.on.ca/en/dataset/016-1552>
- Provide Mass termination notice
- Provide Severance if applicable
- Additional contractual entitlements

# **CAN (Ontario) – Preparing for the Layoff: How Much Notice?**

The amount of notice employees must receive in a mass termination is not based on the employees' length of employment, but on the number of employees who have been terminated. An employer must give:

- 8 weeks' notice if the employment of 50 to 199 employees is to be terminated
- 12 weeks' notice if the employment of 200 to 499 employees is to be terminated
- 16 weeks' notice if the employment of 500 or more employees is to be terminated

Note the default is that this is working notice and the employees are expected to work during that notice period. During the statutory notice period, the employer must not reduce the employee's wages or alter any other term or condition including contributing to the employee's benefit plan.

# CAN (Ontario) – Preparing for the Layoff: What About Severance?

In addition to Notice, Ontario Employers must pay minimum severance to terminated employees who were employed by the employer for five years or more where:

- 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
- The employer has a global payroll of \$2.5 million or more

Be aware: Obligation to pay severance exists even if the employee is on leave and in receipt of Workers Compensation benefits. Likewise it is essential to ensure that employees on other job protected leaves (i.e. maternity leaves) are provided notice.

## **CAN (Ontario) – Preparing for the Layoff: Will Meeting the Mass Termination Requirements be Enough?**

- Providing ESA entitlements may not be enough to protect employers from a civil claim.
- ESA minimums are just that – minimum requirements.
- The presumption is that an employment contract is terminable without cause only on reasonable notice. Without an enforceable termination clause in the employment contract, the employee will be entitled to claim common law notice.

## **CAN (Ontario) – Preparing for the Layoff: Risk of Failing to Follow Rules**

*Wood v. CTS of Canada Co.*, 2018 ONCA 758 (CanLii) – failure to serve and post Form 1 at the beginning of the statutory notice period meant that the employer was required to provide additional pay in lieu to terminated employees.

## **CAN (Québec) – Preparing for the Layoff: Threshold for a Mass Layoff**

- The *Act respecting Labour Standards* (LSA) defines the collective dismissal as “*The termination of employment by the employer, including a layoff for a period of six months or more, involving not fewer than 10 employees of the same establishment in the course of two consecutive months constitutes a collective dismissal governed by this division.*”
- Therefore, in Québec a collective dismissal is :
  - the termination of employment, including a layoff for a period of six months or more;
  - involving not fewer than 10 employees of the same establishment;
  - in the course of two consecutive months.

# **CAN (Québec) – Preparing for the Layoff: Has the Threshold Been Met?**

- **Counting the number of employees**
  - All employees are counted, including unionized personnel, non-unionized personnel, personnel on leaves absences and management personnel;
  - Employees that are not terminated or that fall within one of the few exceptions provided by law are not taken into account (i.e. employees who are credited with less than 3 months of service at the time of termination, employees laid off for less than 6 months, employees whose contract for a fixed term expires, senior managerial personnel, etc.).
- **What is an establishment?**
  - The LSA does not contain any definition of the concept of establishment.
  - Generally, an establishment is a physical location where employees are performing work. However, in the context of a collective dismissal, the establishment is not necessarily equivalent to a building or street address.
  - Thus, several buildings could together be considered as a single establishment for the purpose of defining a collective dismissal.
  - Each situation should be analyzed on a case-by-case basis.

# **CAN (Québec) – Preparing for the Layoff: Employer Obligations**

- Notice must be provided to the Ministry of Labour, Employment and Social Solidarity, with copies to the Labour Standards Commission and to the unions.
- Notice must contain information provided by regulation.
- Once sent, this notice must be placed in a conspicuous and readily accessible place in your establishment.
- If at least fifty (50) employees are terminated, the employer may be asked to participate in a reclassification committee by the Ministry of Labour.

# CAN (Québec) – Preparing for the Layoff: How Much Notice?

- The amount of notice required depends on the number of employees affected by the dismissal:
  - where the number of employees affected is fewer than 100, eight weeks is required;
  - where the number of employees affected is between 100 and 299, 12 weeks is required;
  - where the number of employees affected is 300 or more, 16 weeks is required.
- If the notice is not provided as a working notice, the employer must pay the impacted employees their remuneration (excluding overtime) for the equivalent of the collective dismissal notice period; insurance and pension benefits must also be continued unchanged during this period.
- This constitutes the minimum statutory notice (or indemnity in lieu thereof) that must be provided to all impacted employees; some employees might be entitled to longer notice under general civil law rules or collective agreement.

# CAN (Québec) – Preparing for the Layoff: Standard Terminations

Regular Statutory Notice under the LSA

Period of Employment	Notice
3-12 months	1 week
1-5 yrs	2 weeks
5-10 yrs	4 weeks
10 yrs +	8 weeks

Collective Dismissal Notice under the LSA

Number of employees terminated	Notice
10 to 99	8 weeks
100 to 299	12 weeks
300 or more	16 weeks

# **CAN (Québec) – Preparing for the Layoff: Notice Under General Civil Law Rules or Collective Agreement**

- **Unionized personnel**
- **Non-unionized personnel only**
- ✓ **Be careful** Employers should also verify whether any of the impacted employees are governed by contractual obligations contained in an offer letter or employment with regards to specific separation notice.

# CAN (Québec) – Preparing for the Layoff: What About Severance?

## Reasonable notice under the *Civil Code of Québec* (CCQ)

- Pursuant to the CCQ, employers have to provide employees with a reasonable notice based on:
  - The length of service;
  - The salary level;
  - The age;
  - The position occupied; and
  - The special circumstances in which it is carried out.
- The reasonable notice is inclusive of the collective dismissal statutory notice or individual statutory notice.
- A reasonable notice will range from 2 to 4 weeks notice or indemnity in lieu thereof per year of service, with a usual maximum threshold of 24 months.
- The reasonable notice obligations are of public order.
  - The parties cannot contract out of these obligations

## **CAN (Québec) – Preparing for the Layoff: Risk of Failing to Follow Rules**

- The LSA provides that if an employer does not give the statutory notice the employer must pay a compensatory indemnity to each employee affected by the collective dismissal.
- In the case of a superior force or unforeseeable event, the employer is not required to pay an indemnity.
- An employer who fails to give notice, or who gives insufficient notice, may be liable to a fine of \$1 500 per week of non-compliance. The fine is in addition to the payment of the indemnities.

# CAN (Québec) – Preparing for the Layoff: Other Considerations

**Benefits** Continuation of benefits during the statutory notice period is mandatory in Ontario while in Quebec continuing benefits in whole or a part of the notice/severance period is optional (except for the statutory minimum collective dismissal period where it is mandatory).

**Duty to mitigate** Mitigation of damages applies such that a reduction of paid out notice/severance benefits can be factored-in what is provided to the impacted employees should they find alternate employment during the notice/severance period. Note - slowing economy may diminish the ability of employers to look to a failure to mitigate as an argument for reducing an employee's notice period.

**Release** For non-unionized employees, we recommend having the impacted employees sign a release depending on how generous the conditions provided are and whether most of the notice/severance period is worked or paid as a lump sum indemnity or salary continuation.

In Quebec these letters, releases and notifications will have to be provided to employees in French as per the *Charter of the French language's* requirements.

**Employees on leave of absence** They will benefit from additional legal recourses on top of the other general recourses made available to all of the other impacted employees.



# **US: Preparing for the Layoff**

# **US – Preparing for the Layoff: Statutory Notice Obligations**

- Federal & state WARN Acts – 60 to 90 days' advanced notice
  - Affected employees
  - Government officials
  - Union

# US – Preparing for the Layoff: Statutory Notice Obligations

- Federal triggers:
  - Facility or operating unit closure if at least 50 employees affected
  - Layoff of 500 or more employees
  - Layoff of 50-499 workers if 33% of total workforce at single site
  - Furlough of 6 or more months that hits above numbers
  - Reduction in hours for 50 or more workers by at least 50% for each month in any 6-month period
- Some state WARN Acts have a lower trigger point
  - CA: 50 employees
  - NY: 25 employees if 33% workforce
- Lookback periods, 30-90 days

# US – Preparing for the Layoff: Drafting Documents

- Termination letters
  - Reason
  - Benefits
  - Final paycheck
- Severance in exchange for a release?
  - OWBPA\* disclosures for release of ADEA claims
    - 45 days vs. 21 days to consider
    - Decisional unit
    - \*US employees only
- Talking points

Job Title	Age	# Selected	# Not Selected
(1) Bookkeepers	25	2	4
	28	1	7
	45	6	2
(2) Accountants	63	1	0
	24	3	5
(3) Retail Sales Clerks	29	1	7
	40	2	1
(4) Wholesale Clerks	33	0	3
	51	2	1



# **CAN & US: Communicating the Decision**

# **CAN & US – Communicating the Decision: To Affected Employees**

- Individual vs. group meetings
- In-person vs. letter, email, text, phone, etc.
- Honest, direct, empathetic

# **CAN & US – Communicating the Decision: To Remaining Employees**

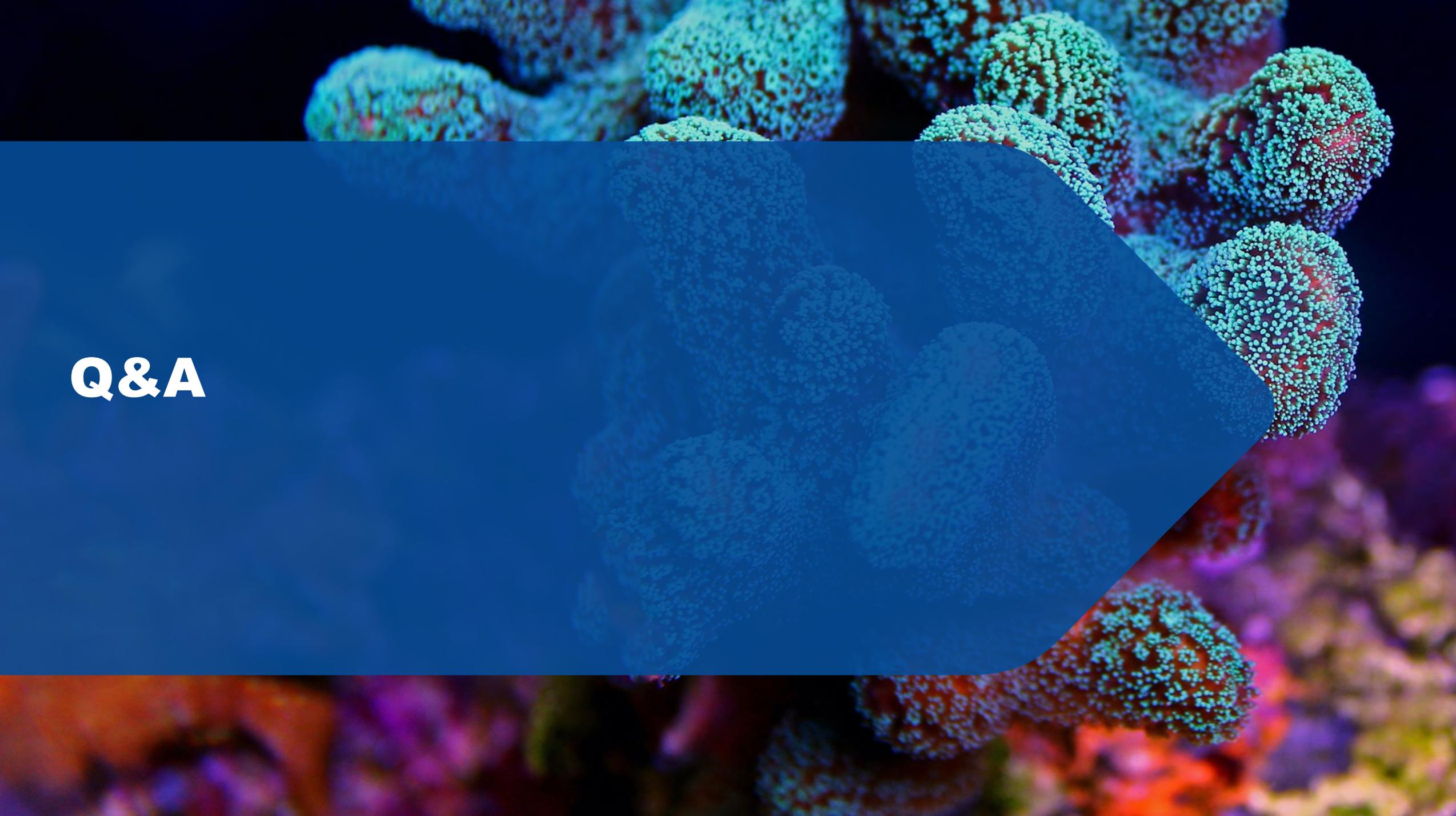
- In-person meeting
- Establish/rebuild trust
- Emphasize health of business
- Emphasize retained employees' critical role in rebuilding



# **CAN & US: Post-Announcement**

## **CAN & US – Post-Announcement**

- Prepare for separation date
- Severance payments/final paychecks
- Benefits
- Security
- Equipment/Company information
- Recordkeeping
- US: Immigration obligations



**Q&A**

# How Can Dentons Help?

Experience in conducting global projects across multiple jurisdictions



**Strategic advice on  
how to operate for  
the best outcomes**



**Global footprint with  
immediate access to  
intimate knowledge  
of local law  
requirements, rules  
and practices**



**Strong project  
management  
delivery skills and  
track record**

# Value Added Services at Your Disposal

## Collective redundancy hub

This new web site section contains updates on recent developments from our global teams.

In particular, the **interactive tracker** provides quick and easy access to summaries of collective dismissal and redundancy rules; it now covers over 60 jurisdictions around the world.

Link to the Hub: [Dentons - Collective redundancy hub](#)

Link to Tracker: [Dentons - Global collective redundancy tracker](#)

The screenshot displays the Dentons Collective Redundancy Hub and Tracker interface. The top section, titled "Collective Redundancy", provides an overview of laws, rules, and procedures. Below this, there is a disclaimer and supported browsers information. The main interactive part of the interface allows users to select a location (country, state, etc.) or compare up to 3 different locations. The selected locations are France, Germany, and United Kingdom. A "Go" button is visible. Below the selection, there is a table with an "Overview" section and a table with columns for France, Germany, and United Kingdom. The table contains two rows of information regarding specific rules and when they apply. Below the table, there are two featured articles: "Global employment webinar series: managing collective redundancies" and "Global collective redundancy tracker". The bottom section, "Spotlight on:", features two articles: "Stricter measures to prevent company closures and collective dismissals (in)" and "Collective redundancies and the P&O Ferries debacle".

### Collective Redundancy

Laws, rules and procedures relating to reductions in work force.

Managing a global workforce reduction programme while navigating local law requirements can be a complex process. This Dentons Collective Redundancy tracker provides quick and easy access to summaries of the collective dismissal and redundancy rules in more than 60 countries.

If you need any further assistance, please contact us. Please save this link to your website favorites for quick and easy access.

**Disclaimer:** The contents of this tool have been prepared in good faith as introductory guidance. This tool is not designed to provide legal or other advice. You should not take, or refrain from taking, action based on its content. Please use your own professional judgment and seek independent legal advice in case of questions.

**Supported browsers:** Google Chrome, Mozilla Firefox, Microsoft Edge, Apple Safari.

Select a location (country, state, etc.) or compare up to 3 different locations:

France Germany United Kingdom

If you want to get information about more locations, this is currently available through [generating a printable PDF](#).

Select key points (optional)

Go Reset

	France	Germany	United Kingdom
<b>Overview</b>			
1. Are there specific rules that govern collective dismissals or reductions in force?	Yes.	Yes.	Yes.
2. When would these rules apply?	Collective redundancy rules apply when an employer is proposing to make redundant 2 or more employees in the company. These rules are reinforced in case of contemplated dismissals of at least 10 employees over a 30-day period in companies having at least 50 employees.	In general, the collective redundancy rules apply if an employer: 1. has between 20 and 60 employees and dismisses more than 5 employees within a period of 30 days; 2. has between 60 and 500 employees and dismisses 10% or more than 25 employees within	Collective redundancy rules apply when an employer is proposing to make redundant 20 or more employees in one "establishment" over a 90-day period.  There are specific rules about the meaning of an "establishment". However, it usually refers to an individual branch, store or office location.

**Global employment webinar series: managing collective redundancies**

In this series, our Dentons Global Employment and Labor team offers practical advice and guidance to help employers manage collective redundancy exercises across numerous regions.

[Read more](#)

**Global collective redundancy tracker**

This interactive tool provides quick and easy access to summaries of collective dismissal and redundancy rules in over 60 countries around the world.

[Go to tool](#)

**Spotlight on:**

September 28, 2022  
**Stricter measures to prevent company closures and collective dismissals (in**

April 14, 2022  
**Collective redundancies and the P&O Ferries debacle**

# We are where you need us

**82**  
Countries

**+200**  
Offices

**+12,200**  
Lawyers



- Locations in purple represent Dentons offices.
- Locations in blue represent associate firms, offices or special alliances as required by law or regulation.
- Locations in green represent approved combinations that have not yet been formalized.
- Locations in gray represent Brazil Strategic Alliance.
- Locations in brown represent offices from which Dentons is separating.

# Thank You!



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