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TORYS LLP

Employment Reorganisation Roadmap

Canada

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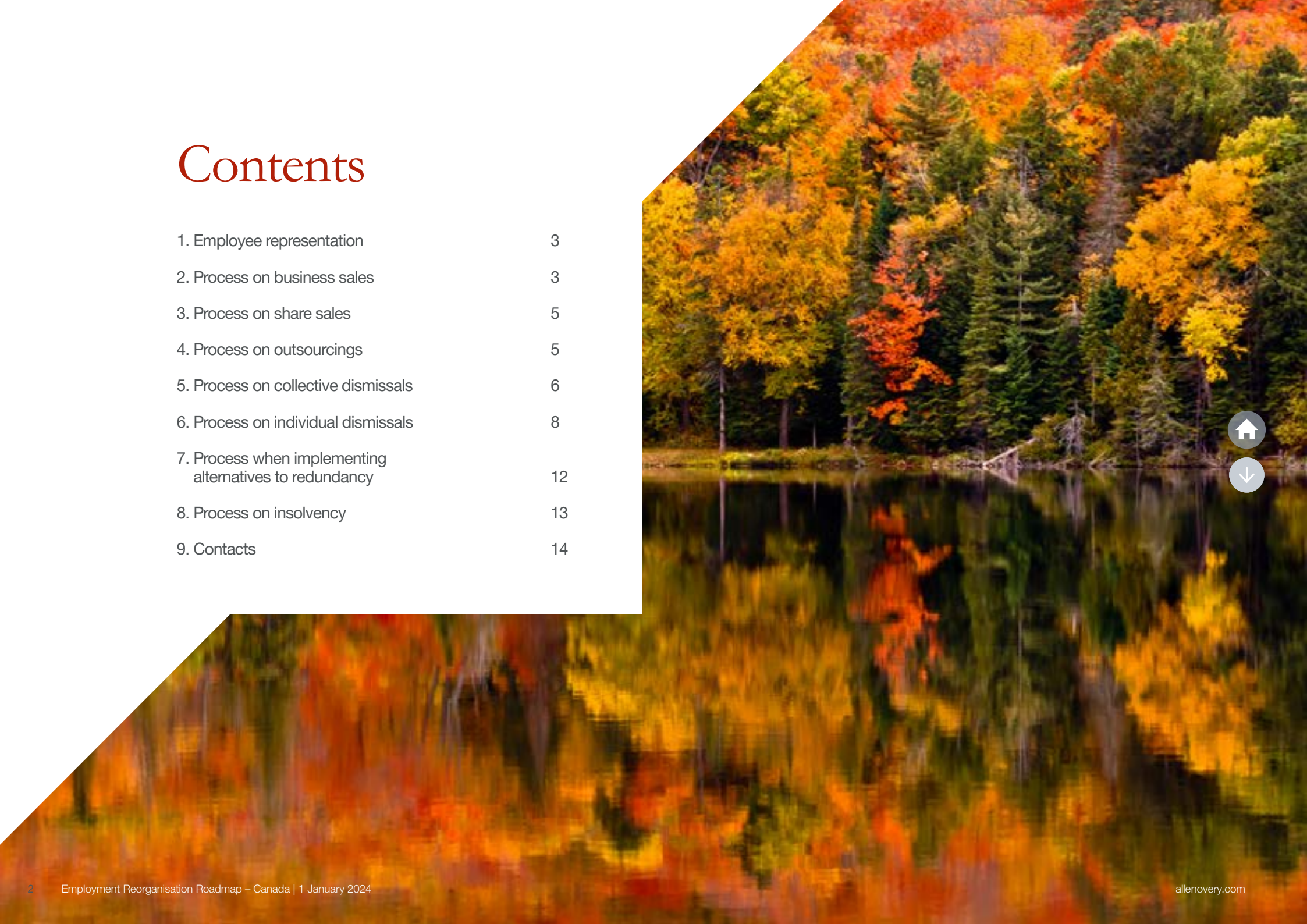
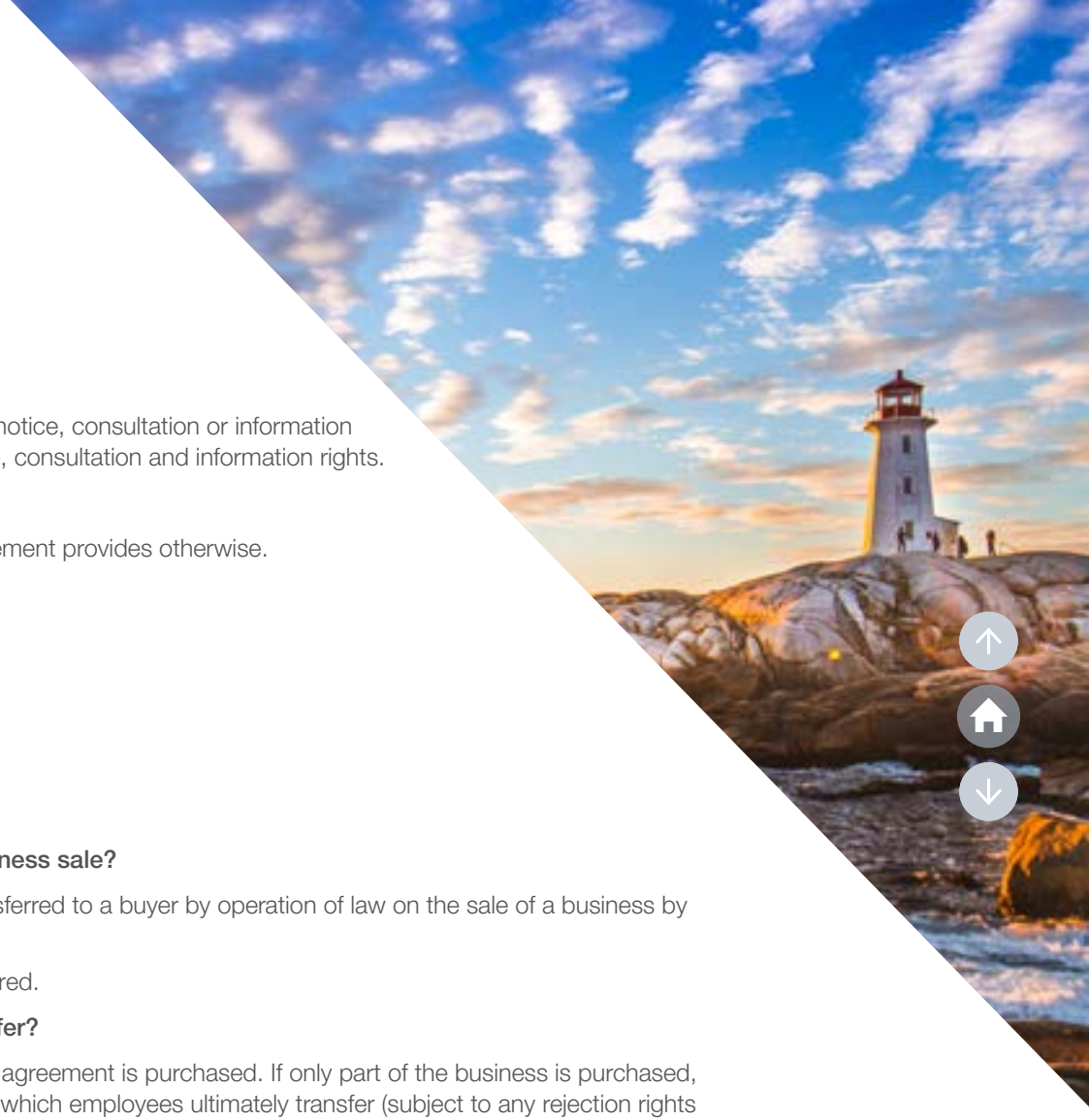
Contents





1. Employee representation

1.1 What are the main forms of employee representation involved in restructurings?

A union or other collective bargaining agent that represents employees may have rights to notice, consultation or information related to a restructuring of a business. These rights do not generally extend beyond notice, consultation and information rights.

1.2. Is there a system of employee participation rights?

Employees have no right to management or board representation, unless a collective agreement provides otherwise.

2. Process on business sales

2.1 Are employees automatically transferred to a buyer by operation of law on a business sale?

Other than in the Province of Quebec, non-unionised employees are not automatically transferred to a buyer by operation of law on the sale of a business by way of asset purchase.

Unionised employees (and employees in the Province of Quebec) are automatically transferred.

2.2. If so, in broad terms, what is the legal test for identifying which employees transfer?

Unionised employees transfer automatically when an entire business subject to a collective agreement is purchased. If only part of the business is purchased, the buyer and the union can agree on a new definition of the bargaining unit, and therefore which employees ultimately transfer (subject to any rejection rights employees may have, as described in the answer to **2.3**), and if the parties cannot agree, the relevant labour Tribunal can define the new unit.

Non-unionised employees do not transfer automatically.

Note that, except where otherwise stated, the information provided throughout this document is specific to the Province of Ontario. Employer obligations under applicable laws in Canada vary by province or, in the case of federally-regulated employees, are determined by federal employment laws. The same general principles apply in all Canadian jurisdictions, except the Province of Quebec, but there are differences between each jurisdiction which can be material.

2.3. Can employees object to the automatic transfer of their employment and what are the consequences of an objection?

Non-unionised employees do not transfer automatically. They are under no obligation to accept employment with the buyer (see answer to **2.4**).

The terms of the collective agreement may confer the right on unionised employees to reject the transfer, for example by "bumping" more junior unionised employees so that the senior employee can remain with the seller. If such rights exist, the buyer may not have certainty as to which and/or how many employees will be available to operate the business post closing.

2.4. Do obligations to inform and consult employees or employee representatives arise on a business sale?

On the sale of a business by way of an asset sale, an employee's employment will not be automatically transferred to the buyer (except for employees who are unionised and employees in the Province of Quebec). A buyer may make a written offer of employment to an employee of the seller and should provide the employee with an opportunity to consider whether to accept or reject such offer. In practice, the norm is to provide the employee with at least one week to consider a written offer. Employees who accept an offer will be deemed to have continuous employment and their length of service with the seller must be recognised by the buyer. If employees are not offered employment with the buyer, the seller is obliged to provide notice of termination of employment (or payment in lieu) (please see **section 6 – Process on individual dismissals** for further information on the notice requirement).

If employees are represented by a union or other collective bargaining agent, the seller may be obliged to inform the union of the proposed transaction and to bargain with respect to the transaction and its effects. If applicable, the "successor employer" provisions under the Ontario Labour Relations Act, 1995 (LRA) effectively provide that the buyer is bound to recognise the union's right to represent the employees, is bound by the terms of a then current collective agreement and becomes the employer of the employees. Collective agreements may specify further information obligations and consultation requirements in this scenario.

2.5. What are the penalties for non-compliance with information and consultation obligations on a business sale?

If the employees are represented by a union or other bargaining agent, failure to consult or provide notice or to meet any other obligations as set out in the collective agreement or under the LRA may be the subject of a grievance or an unfair labour practice complaint under the collective agreement and relief may be granted by the Ontario Labour Relations Board (LRB).

3. Process on share sales

3.1. Do obligations to inform and consult employee representatives arise on a direct share sale (ie on the sale of the company itself)?

A direct share sale does not generally trigger a consultation requirement, unless provided for in a collective agreement. Note, however, that any post-sale reorganisations or transfers may trigger obligations to consult employee representatives under a collective agreement and/or the LRA.

3.2. Do obligations to inform and consult employee representatives arise on an indirect share sale (on the sale of a company's direct or indirect holding company)?

An indirect share sale does not generally trigger a consultation requirement, unless provided in a collective agreement. Note, however, that any post-sale reorganisations or transfers may trigger obligations to consult employee representatives under a collective agreement and/or the LRA.

4. Process on outsourcings

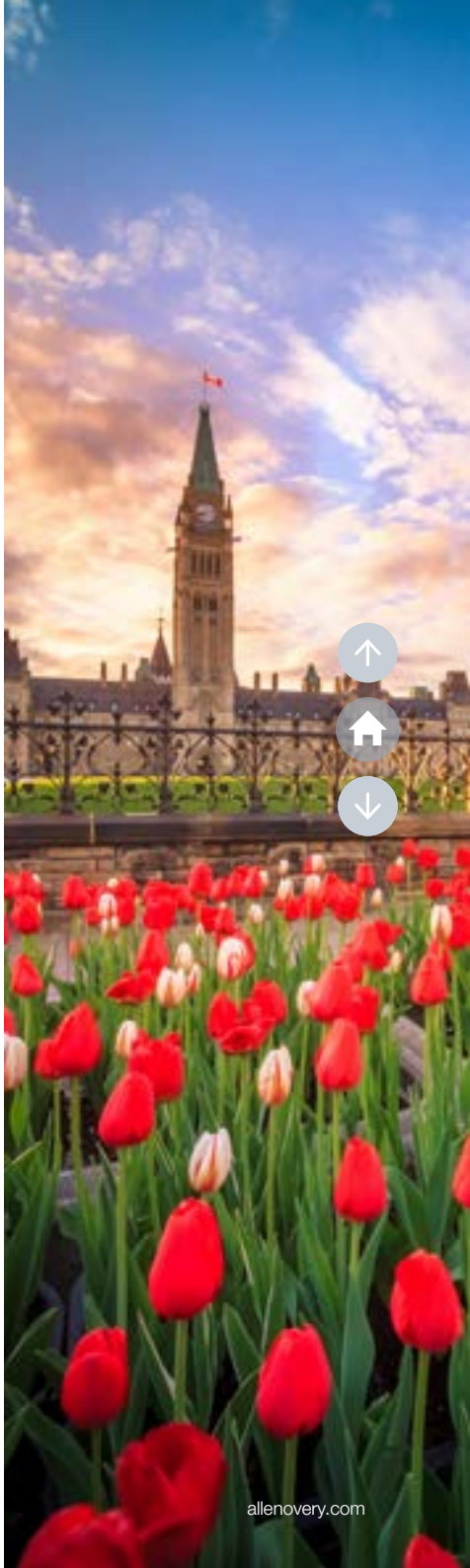
4.1. Are employees transferred by operation of law in the following scenarios: (i) on an initial outsourcing of processes/services; (ii) on a change of supplier; or (iii) on an insourcing of processes/services?

Employees are not automatically transferred by operation of law in any of these scenarios. The transfer of employees must be agreed separately in the outsourcing arrangement. Employees will only transfer to a new supplier/service provider if it offers them employment and they accept.

4.2. Do obligations to inform and consult employees or employee representatives apply in any of these scenarios?

There are no such obligations with respect to non-unionised employees.

Collective agreements may contain "contracting out" provisions which stipulate notice or consent requirements in respect of unionised employee representatives.



5. Process on collective dismissals

5.1. Is a "collective dismissal" (or "mass layoff") defined by law?

Under the Ontario Employment Standards Act, 2000 (ESA), a mass termination arises if the employment of 50 or more employees at the employer's establishment is to be terminated in a consecutive four-week period. There are proposals to expand the definition of "establishment" to include an employee's private residence if the employee performs work in the private residence and does not perform work at any other location where the employer carries on business.

5.2. Do obligations to inform and consult employee representatives arise on a collective dismissal?

Where there is a mass termination, an employer has an obligation to provide between eight and 16 weeks of notice (or payment in lieu of such notice) to employees, with the amount of notice varying on the basis of the number of employees dismissed. For further details, please see **section 6 – Process on individual dismissals**.

In the case of unionised employees, there may be specific obligations in collective agreements requiring management to consult and to take special measures to minimise the consequences of the collective dismissal.

5.3. Do obligations to inform and consult the competent authorities arise on a collective dismissal?

Where the mass termination notice requirements are triggered, there is also an employer obligation to:

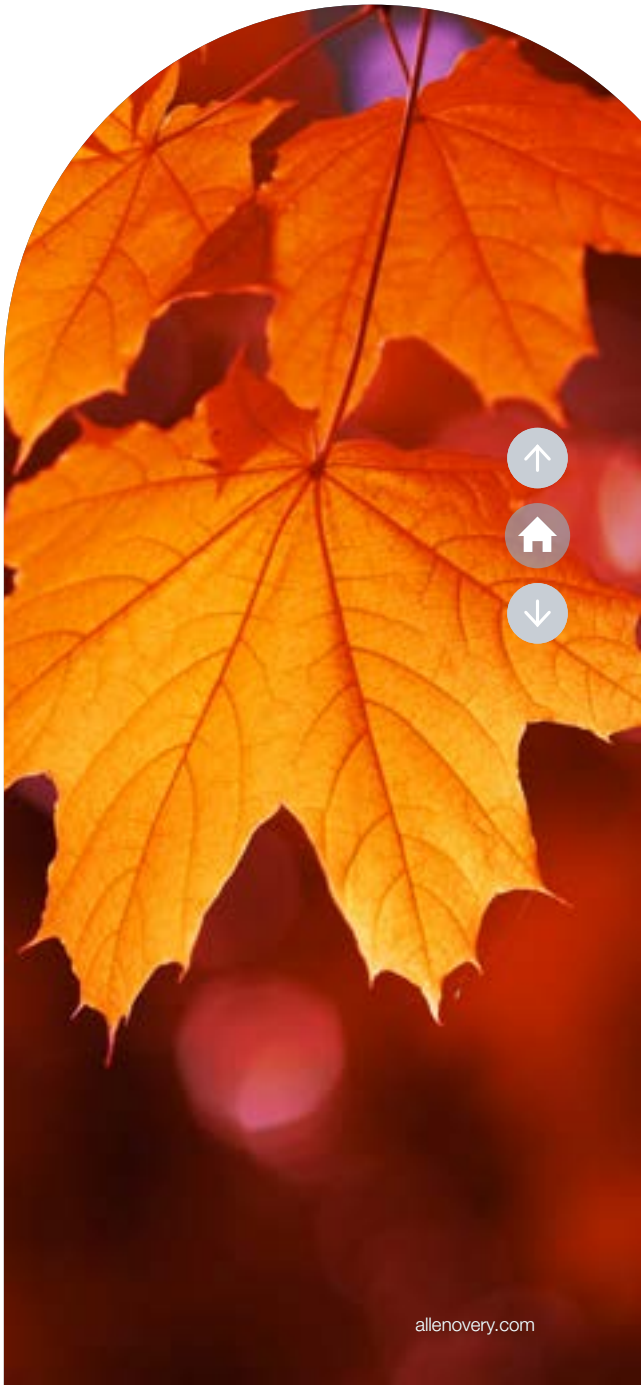
– provide certain prescribed information to the Director of Employment Standards, and

– post that information in the workplace and provide affected employees with certain prescribed information on the first day of the notice period.

The information must be provided to the Director of Employment Standards prior to the date that notice is given to employees.

5.4. When are these obligations triggered?

The obligation to provide information to the Director of Employment Standards on a mass termination is triggered prior to the date notice is given to employees.



5.5. What are the penalties for non-compliance with information and consultation obligations on a collective dismissal?

Notice of termination is deemed not to have been given to employees until notice in the required form has been given to the Director of Employment Standards. As a result, failure to comply with the requirement to give notice to the Director of Employment Standards may result in an extension of the required notice period to be provided to the employees.

An employee who thinks that they have not received the notice (or pay in lieu) to which they are entitled under the ESA, may file a claim with the Ministry of Labour. Employees who have not agreed in a contract to a fixed amount of notice on termination of employment may also bring a civil court action for payment in lieu of common law reasonable notice of termination. For further details regarding employee claims, please see **section 6 – Process on individual dismissals**. Unionised employees may have redress under the grievance provisions of the applicable collective agreement.

5.6. Do obligations to inform and consult employee representatives and/or competent authorities arise in the context of multiple dismissals, which do not qualify as a collective dismissal, as defined by law?

Typically no such obligations arise, but a collective agreement may contain more employer notice or consultation obligations in respect of multiple dismissals which do not cross the mass termination threshold established by the ESA (see answer to **5.1**).

5.7. Does an employer have options/alternatives when it has been unable to reach agreement with employee representatives during the negotiation period?

Typically, disputes with employee representatives in respect of unionised employees are subject to the grievance procedure set out in the collective agreement, the final stage of which is often binding arbitration. Disputes may also be determined through application by either party to the LRB.

6. Process on individual dismissals

6.1. Are employees entitled to a minimum period of notice on dismissal on redundancy or economic grounds?

Individual notice of termination entitlements

Under the ESA, an employer is required to provide an employee with notice of termination, or payment in lieu thereof, as follows:

– 3 months to 1 years' service – 1 week

– 1+ to 3 years' service – 2 weeks

– 3+ to 4 years' service – 3 weeks

– 4+ to 5 years' service – 4 weeks

– 5+ to 6 years' service – 5 weeks

– 6+ to 7 years' service – 6 weeks

– 7+ to 8 years' service – 7 weeks

– 8+ years' service – 8 weeks

Mass termination notice entitlements

Under the ESA, where the employment of 50 or more employees is terminated, the mass termination notice obligations are triggered. Notice entitlements of employees who are dismissed as part of a mass termination are as follows:

– 8 weeks in the event of 50-199 dismissals

– 12 weeks in the event of 200-499 dismissals

– 16 weeks in the event of 500+ dismissals

Common law notice obligation

ESA notice is the minimum rather than the maximum notice to which an employee is entitled. Employees who have not expressly agreed to accept ESA amounts will be entitled to common law reasonable notice of termination (or pay in lieu). A contract between an employee and employer (whether an individual contract or collective agreement) may provide that an employee is entitled only to the ESA amounts or may specify a greater notice (or pay) entitlement.

Common law reasonable notice is not based on a formula. It is determined on an individual basis by considering a number of factors including, but not limited to, age, years of service, position, salary and whether the employee was induced to leave other employment to join the employer from another. This is typically subject to the employee's duty to mitigate by seeking other employment. Generally, common law notice is roughly equal to one month of notice per year of service. The generally accepted maximum for common law notice is 24 months, but courts have sometimes held that employees are entitled to more. This right does not usually apply to unionised employees, whose rights are normally set out in the relevant collective agreement.

An employee's right to payment for common law reasonable notice and the notice payments under the ESA are concurrent, and therefore common law reasonable notice may generally be provided in satisfaction of ESA entitlements.

6.2. Does any special procedure apply when proposing to implement an individual dismissal on redundancy or economic grounds?

An employer is not required to have cause to dismiss an employee. However, if an employee is dismissed without cause, the employer must provide the employee with notice of termination of employment or a payment in lieu thereof (see answer to **6.1**). In addition, employers should treat their employees with honesty and respect, particularly at the time of dismissal and should refrain from engaging in conduct which is insensitive or in bad faith. Failure to act in good faith may result in an extension of the employee's reasonable notice period.

All employee benefits, including incentive payments and long and short term disability payments, must be continued during the statutory notice period. In addition, the employer may not alter the terms of employment during the statutory notice period. Arguably, employees are entitled to benefit continuation throughout the entire reasonable notice period. However, terms and conditions of group-insured benefits contracts with insurers typically preclude employers from continuing some of these benefits throughout the entire notice period, particularly long and short term disability benefits, leaving the employer with some exposure should the employee become disabled during the notice period.

6.3. Does special dismissal protection apply where dismissals are to be implemented following or in connection with a business transfer?

There are no default special protections, but employer conduct can extend the notice or the payment in lieu of notice owed to employees: for example if the buyer induces the employees to abandon their employment with the seller and accept employment with the buyer and subsequently terminates employment without cause.

6.4. Are employees entitled to a minimum severance payment on dismissal for redundancy or economic grounds?

An employee with five or more years of service is entitled to statutory severance pay if either:

– the employment of 50 or more employees is terminated within a six-month period as a result of a permanent discontinuance of all or a part of the employer's business at an employer's establishment, or

– the employer has a payroll of CAD2.5 million or more.

Severance pay is calculated by multiplying the employee's regular wages for a regular work week by:

– the number of years of service completed by the employee, and

– the number of months of service not included above that the employee has completed, divided by 12.

The severance payment obligation is subject to a maximum of 26 weeks of the employee's regular wages.

6.5. What are the penalties for non-compliance with individual dismissal procedure?

An employee may either file a claim with the Ministry of Labour for their statutory entitlement or pursue a civil action in the courts for their common law entitlement.

Statutory (ESA) Claims

An Employment Standards Officer may issue an order against the employer to:

– pay wages

– pay compensation (ie, for loss of reasonable expectation of continued employment and/or for emotional pain and suffering), and/or

– pay an administrative cost to the Director of Employment Standards (which in the case of a wages order, is equal to the greater of CAD100 and 10% of the wages owing).

In certain situations, the Employment Standards Officer also has the power to order that an employee be reinstated to their former employment.

Prosecution

The Ministry of Labour may also choose to prosecute the employer or any other person who does not meet its obligations under the ESA. If convicted of an offence, individuals face fines of up to CAD50,000, imprisonment for up to 12 months, or both.

A corporation can be fined up to CAD100,000 for a first conviction. If the corporation has already been convicted of an offence under the ESA, it can be fined up to CAD250,000 for a second conviction. For a third or subsequent conviction, the corporation can be fined up to CAD500,000.

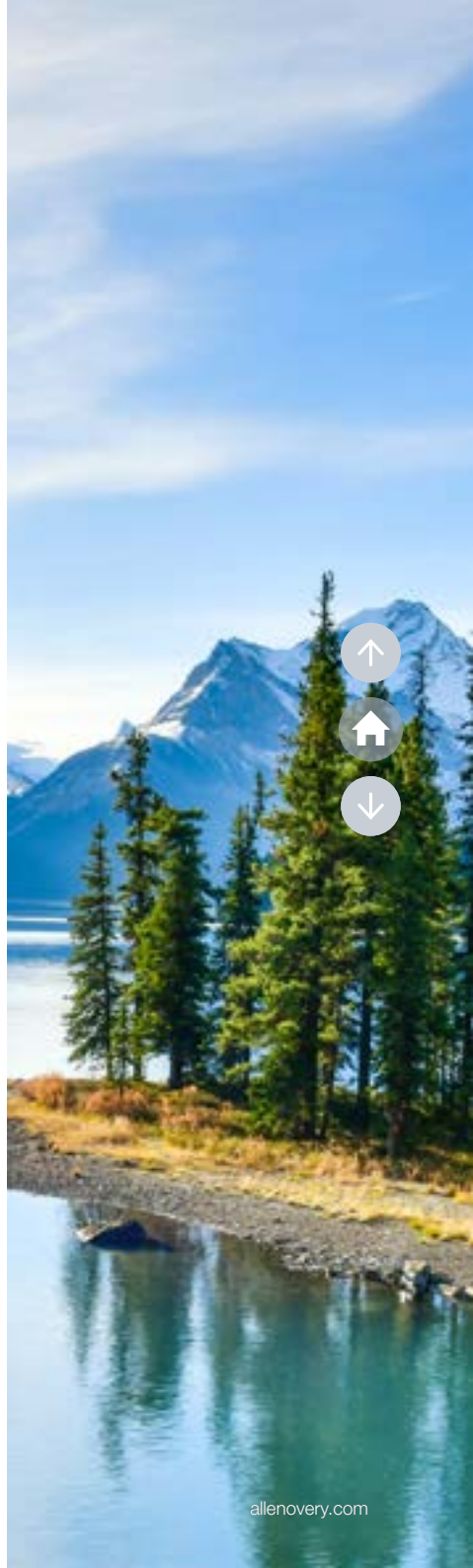
Civil claims

An employee may pursue a wrongful dismissal claim and, if successful, may be awarded damages (based on wages and benefits during their common law reasonable notice period). Where the employer has acted in bad faith or in an unfair or insensitive manner in connection with the dismissal, additional damages in the form of an extended notice period, may be awarded.

In exceptional cases, including where the employer has engaged in high handed, flagrant or malicious conduct, aggravated and punitive damages may be awarded.

6.6. Is there any special legal protection or does any special treatment apply for particular groups of workers?

Common law reasonable notice is determined on an individual basis by considering a number of factors including, but not limited to, age, years of service, position, salary and whether the employee was induced to leave other employment to join the employer (see answer to **6.1**). Accordingly, some employees will be entitled to more notice than others.



7. Process when implementing alternatives to redundancy

7.1. Can changes to employment terms be made with or without express employee consent?

Absent an explicit right to do so in the employment agreement, the employer needs to obtain employee consent to make changes to the terms and conditions of employment for non-unionised employees. If made unilaterally, changes may amount to constructive dismissal and put the employee in a position to claim they have been wrongfully dismissed.

Collective agreements typically lock in the terms and conditions of employment for unionised employees for the duration of the collective agreement.

7.2. Must an employer consult individually or collectively with affected employees or their representatives (if any) before making changes to employment terms?

Yes, employee or representative consent/agreement is usually required, absent an explicit right to make changes in the employment/collective agreement (see answer to **7.1**).

7.3. Do additional restrictions apply if changes are proposed in connection with or following a business transfer?

There are no statutory rules to this effect but it is common in Canada for sellers to include post-closing covenants restricting the ability of a buyer of a business to make adverse changes to terms and conditions of employment for a length of time.

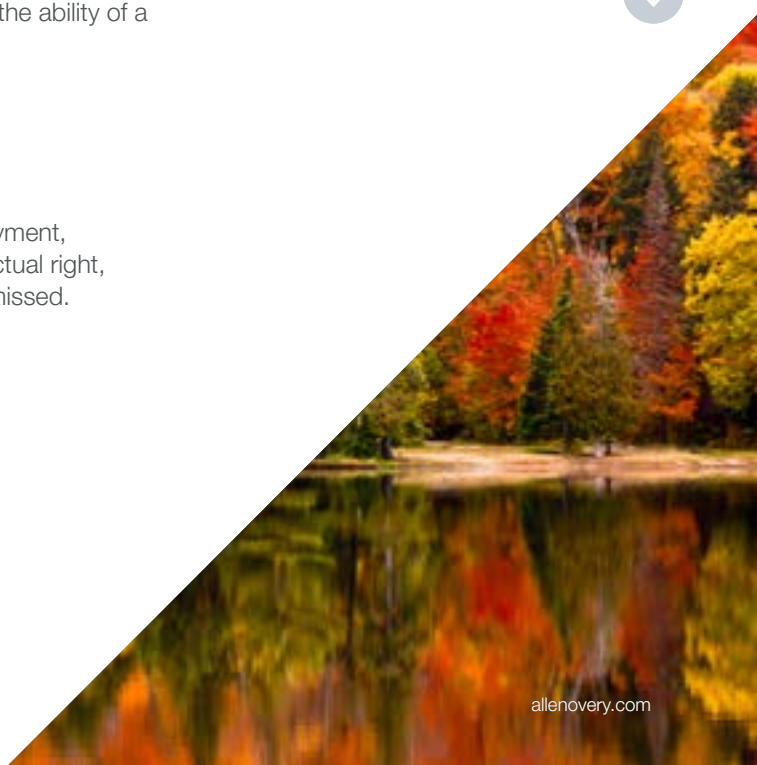
7.4. What are the penalties for non-compliance with these procedures?

See the answer to **6.5** for further information as to penalties.

7.5. Do national laws promote or permit any alternatives to redundancy (eg layoff or short-time working)?

There are statutory rules that govern, among other matters, when a temporary layoff is deemed to be a termination of employment, but layoffs are not permitted absent an explicit contractual right on the employer to impose them. In the absence of a contractual right, layoffs may amount to constructive dismissal and put the employee in a position to claim that they have been wrongfully dismissed.

Collective agreements often contain established layoff procedures in respect of unionised employees.



8. Process on insolvency

8.1. Do obligations to inform and consult employee representatives arise on the sale of an insolvent business (whether share sale or business sale)?

The same rules apply as in the case of the sale of a solvent business (see **section 2 – Process on business sales**). If employees are represented by a union or other collective bargaining agent, the seller may be obliged to inform the union of the proposed transaction and to bargain with respect to the transaction and its effects. In addition, an employee's employment will not be automatically transferred to the buyer (except for employees who are unionised and employees in the Province of Quebec), and employees will therefore need to accept offers of employment from the buyer in order to transfer with the business.

8.2. Does the buyer of an insolvent business inherit employees and/or employee liabilities by operation of law?

The obligations of the buyer of an insolvent business to inherit employees or employee obligations, by operation of law, are no different from the obligations in respect of a solvent business. The successor entity, trustee in bankruptcy or receiver cannot be insulated from successor employer claims if it meets the criteria of being a "successor employer". An acquirer of the business will be a "successor" employer if it offers employment to employees or if it purchases a business which has employees who are unionised or who work in the Province of Quebec. In addition, "successor employer" claims may be made if the successor entity, trustee in bankruptcy or receiver inherits the essence of the business, or where there is substantial continuity of the business. Where the workforce in question is unionised, a trustee in bankruptcy or receiver may be able to negotiate an agreement with the union that it will not bring a "successor employer" application.

8.3. Do obligations to inform and consult employee representatives arise where collective dismissals are to be implemented in an insolvent business?

The same obligations apply as in the case of collective dismissals in a solvent business (see **section 5 – Process on collective dismissals**).

9. Contacts

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