Employers with Limited Canadian Presence May Be Required to Fulfill Significant Severance Obligations Thanks to Recent Court Decision

Insights
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A Divisional Court in Ontario, Canada recently issued a ruling that could have significant potential extra-jurisdictional consequences for U.S. employers with even a single employee based in Canada. The court's June 15 decision determined that when analyzing a long-term employee's right to a severance payment, the Employment Standards Act of 2000's (ESA) $2.5 million payroll threshold refers to the employer's *global* payroll, not just its payroll in Ontario. This means that organizations with even a very limited role in Canada – a presence that includes a single employee in Ontario, perhaps – could be on the hook for significant compliance obligations that may be easily overlooked. What do employers need to know about this latest development?

What Does Employment Standards Act Require?

The ESA has required that employers pay severance to its Ontario employees since 1981, but that requirement was originally limited to mass terminations of 50+ employees. In 1987, the Ontario Legislature expanded the scope of the severance provision such that it applied to individual terminations of 5+ year employees where the employer's payroll is $2.5 million or more. Although many prior tribunals interpreted this threshold to refer to payroll in Ontario only, the Divisional Court just noted in *Hawkes v. Max Aicher (North America) Ltd.* that these prior interpretations were not logical based on the plain meaning of the statutory language or on the Legislature's intent when it amended the statutory language in 1987.

Recent Court Decision Confirmed Expansive Interpretation of ESA

Doug Hawkes was a maintenance manager from 1977 to 2015 – first for previous organizations, and then ultimately for Aicher, a wholly owned subsidiary of a German-based steel company that purchased the assets of Hawkes' then-employer in 2010. In 2015, Aicher terminated Hawkes. Thereafter, Hawkes sued AIcher for termination, vacation, and severance pay. In 2017, an employment standards officer (ESO) for the Ministry of Labor awarded Hawkes termination pay and vacation pay – but not severance pay. The ESO based the decision on the fact that Aicher did not meet the $2.5 million threshold in section 64 of the ESA. It found that only the salaries in Ontario – and not those in Germany or elsewhere – should be included in the calculation of the threshold.

Aicher appealed this decision to the Labor Board, citing *Paquette v. Quadraspec Inc.*, which held that an employer's national payroll – and not just its provincial (Ontario-based) payroll – should be considered when considering section 64 of the ESA. Hawkes argued that by the same logic, his employer's extra-provincial (in this case, global) payroll should also be considered in determining whether Hawkes was entitled to severance. The Board rejected this argument, saying that section 64 was generally interpreted to only include Ontario-based payroll and that *Paquette* was factually distinguishable from the facts at issue in Hawkes' case.

In his appeal of the Board's decision, Hawkes requested that the Divisional Court decide whether section 64 of the ESA was restricted to Ontario employment or whether payroll from other locations should be included. The Divisional Court reviewed the statutory language and determined that the geographic limitations imposed elsewhere in the ESA did not apply to and could not be read into section 64, which did not have any such limitations. If the Legislature had intended to impose a geographic limitation on section 64, it ruled, they would have included it in the statutory language as it did with the other sections of the ESA.

Moreover, the Divisional Court noted that factual differences between Hawkes' case and the *Paquette* case were not material enough to warrant ignoring its findings. On the contrary, the Divisional Court highlighted *Paquette*'s review of the statutory history, noting that the purpose of the amendments in 1987 were twofold: (1) expanding protections for individual, long-term workers; (2) while exempting smaller companies from the burdens of severance payments. The Divisional Court found that rather than interpreting the payroll exemption in a manner that would extend the ESA's "protections to as many employees as possible," the Board had interpreted the exemption too broadly, which would allow "some large national or multinational corporations to avoid paying severance pay to long-service employees."

The Divisional Court also rejected arguments regarding the Legislature's lack of jurisdiction to legislate regarding matters outside of Ontario. Specifically, the Court stated that there "is no jurisdictional impediment to Ontario legislating that an assessment of an employer's ability to pay severance should take into account the size of the employer outside of Ontario." On the basis of these findings, the Divisional Court remanded the matter back to the Board and ordered it to determine what amounts were owed to Hawkes.

What Should You Do?

Employers with operations of any size in Canada should take caution. If this decision stands, it could mean that you might exceed the payroll minimum threshold based on your global payroll even if you have but one employee in Ontario. This, in turn, could trigger ESA obligations and require you to pay out severance in an amount of one week per year up to a maximum of 26 weeks.

We will continue to monitor this situation for any developments related to this case, including any appeals, so you should ensure you are signed up for Fisher Phillips Insights to receive the most up-to-date information. If your organization does business in Canada or employs any individuals in

to-date information. If your organization does business in Canada or employs any individuals in Ontario, please contact a member of Fisher Phillips' International Practice Group to learn more about the potential implications of this case and how your organization can mitigate any risks associated with it.

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