

12 DEPARTMENT OF LABOR

170 BUREAU OF LABOR STANDARDS

Chapter 15: RULES RELATING TO SEVERANCE PAY

1. Definitions

As used in this chapter and in interpreting 26 MRSA §625-B, unless the context clearly requires otherwise, the following terms have the following meanings:

- A. "Continuously employed" means the employee has worked for the covered employer without a break of employment. Absence from the workplace while on paid or unpaid leave, including but not limited to vacation, sick, or family medical leave, or workers' compensation, is not considered a break in service.
- B. "Date of termination or relocation" means the date on which there was a substantial cessation of operations as determined in accordance with section II.
- C. "Date of mass layoff" means the effective date on which a layoff was determined to meet the criteria of a mass layoff, as determined in accordance with section III.
- D. "Eligible employee" means an individual who is qualified to receive severance pay as determined in accordance with section IV.
- E. "Facility" means one or more locations of employment that are geographically proximate and that share staff or equipment.
- F. "Gross earnings" includes all pay for regular hours, shift differentials, premiums, overtime, floating holidays, holidays, funeral leave, jury duty pay, sick pay and vacation pay earned within the last 12 months prior to the closing or mass layoff. "Gross earnings" does not include payments made under a 3rd-party benefit program, such as disability payments. "Gross earnings" also does not include payments unrelated to hours worked or use of leave time, such as taxable fringe benefits (e.g. group term life insurance or a health insurance opt-out program).

II. Determination of the Date of Termination or Relocation

If the Director determines that a termination or relocation of a covered establishment has occurred or will occur, the Director shall determine the date of termination or relocation in accordance with this section.

- A. In doing so, the Director shall consider the following factors:
 - 1. The date of the decision to close or relocate the establishment;

2. The date of any announcement to the employees that the establishment will be closed or relocated;
 3. The point at which the number of employees employed at the establishment is less than 50% of the number of employees for the same time period one year earlier;
 4. The point at which the number of hours worked at the establishment is less than 50% of the number of hours worked for the same time period one year earlier; and
 5. The point at which any production or output measure is less than 50% compared to the production or output for the same time period one year earlier.
- B. The Director may, in addition to the foregoing, consider other factors particular or unique to the operation of the establishment that affect the date of termination or relocation.
- C. No one factor is presumed to be controlling. In determining the date of termination or relocation, the complete operations of the establishment may be considered. If the director's determination of a covered establishment's date of termination or relocation is based primarily on the fact that the covered establishment has on that date reduced its number of employees, number of work hours or production to less than 50% of that of the same time period one year earlier, as described in factors 3, 4 and 5 of subsection A, the director's determination is a presumption that may be overcome by evidence that the covered establishment's operations did not substantially cease on that date.
- D. Layoffs that are of a seasonal nature whereby it is customary for the establishment to operate only during a regularly recurring period or periods of less than 26 weeks in a calendar year will not be primary evidence of a termination or relocation.
- E. In the event that eligible employees continue to be employed for some period after the date determined by the Director, the employer is liable for severance pay calculated as of the date determined by the Director but the employer may pay the severance within one regular pay period after the eligible employee's last full day of work, notwithstanding any other provisions of law.

III. Determination of the Date of Mass Layoff

When a layoff of any duration occurs that results in an employment loss of at least (1) thirty-three percent of the employees and at least 50 employees or (2) five hundred employees, the person or persons initiating the layoff must notify the Director consistent with section IV, below, and §625-B (6).

If the Director determines that a mass layoff at a covered establishment has occurred, the Director shall determine the effective date of mass layoff in accordance with this section.

- A. In doing so, the Director shall consider the following factors:
1. The expected length of the layoff and the basis for that expectation;
 2. The earliest effective date of any layoff within the last 12 months;

3. Whether employees have been recalled and how many have been recalled 6 months after the last date on which laid off employees worked;
 4. The number of employees laid off and the percentage of employees laid off and retained;
- B. The Director may, in addition to the foregoing, consider other factors particular or unique to the operation of the establishment that affect the date of mass layoff.
- C. No one factor is presumed to be controlling.
- D. Layoffs that are of a seasonal nature whereby it is customary for the establishment to operate only during a regularly recurring period or periods of less than 26 weeks in a calendar year will not be primary evidence of a mass layoff.
- E. Employees employed by a temporary or staffing agency which does not directly or indirectly operate the covered establishment do not experience an employment loss at a covered establishment as long as the employee remains employed by the temporary or staffing agency.
- F. If the Director determines that a mass layoff has occurred at a covered establishment, an employer is liable to eligible employees of the covered establishment for severance pay at the rate of one week's pay for each year, and partial pay for any partial year, from the last full month of employment by the employee in that establishment. The severance pay to eligible employees is in addition to any final wage payment to the employee and must be paid within one regular pay period after the employee's last full day of work, notwithstanding any other provisions of law. Failure to provide severance pay constitutes a violation of §625-B, and pursuant to §625-B(9), may subject a person to penalties as established in that section.

IV. Notice

- A. All notices required by 26 MRSA §625-B must be provided to the Director. Notice to other MDOL employees, even if required by state or federal statute, does not constitute sufficient notice under §625-B. Employers may provide the Director a copy of any WARN notice, but all employers must also provide sufficient notice under §625-B and this section.
- B. Notice of a mass layoff, including notice provided pursuant to section III of these rules, or a closure must include the following:
1. The name of each affected employee;
 2. Contact information for each affected employee, including phone number, email address and home address, to the extent known;
 3. Each affected employee's job title, date of hire, length of employment, work location, and most recent rate of pay;
 4. The anticipated last date of work for each affected employee;

5. The work location or locations affected by the mass layoff or closure; and
 6. The total number of employees employed at the covered establishment during the 12 months prior to the notice.
- C. If more than 90 days' notice is provided and the mass layoff or closure occurs prior to the original date in the notice but more than 90 days after notice was provided, additional formal notice is not required.
 - D. If more than 90 days have elapsed since the original date in the notice and the mass layoff or closure has not occurred, a new notice is required for any subsequent mass layoff or closure.
 - E. Employers are encouraged to notify the Director, informally, of any revised dates.
 - F. Failure to provide required notice constitutes a violation of §625-B, and pursuant to §625-B(9), may subject a person to penalties as established in that section.

V. Determination of Employee Eligibility

- A. To be eligible for severance pay for the termination or relocation of a covered establishment, an employee must have worked at the establishment at some time during the 12-month period prior to the date of termination or relocation and must;
 1. Not be covered by an express contract providing for severance pay that is equal to or greater than the severance pay under 26 MRSA §625-B;
 2. Not have accepted employment at the new location;
 3. Have been continuously employed at the establishment for at least three consecutive years under the current ownership;
 4. Not have been terminated for cause; or
 5. Not have voluntarily quit prior to the date set for cessation of activities in the initial notice by the employer.
- B. An otherwise eligible employee that has been disqualified due to a termination for cause may appeal this disqualification to the Bureau. The Department of Labor, Division of Administrative Hearings will make a determination of the validity of a termination for cause under the standards for unemployment compensation set in 26 MRSA §1403, sub-§23. The employee must have exhausted all other internal or administrative appeal processes prior to filing such an appeal with the Bureau. A written appeal must be filed with the Bureau no later than 90 days following the termination for cause or 30 days after the date of termination or relocation, whichever is later.

VI. Calculation of Severance Pay

- A. An employer terminating or relocating a covered establishment shall pay each eligible employee one-week's pay for each full year that the eligible employee has worked at the establishment regardless of prior ownership of the establishment.

- B. In determining an employee's "week's pay" pursuant to §625-B(1)(H), a week may not be included in "the number of weeks in which the employee received gross earnings" if the employee's compensation for that week consisted only of items excluded from gross earnings (see section I(F)).
 - C. The years worked will be calculated from the most recent date of hire or date of rehire, in case of a break in employment, to the last date the eligible employee worked at the covered establishment.
 - D. The employer may only discount the severance pay by any voluntary and unconditional payments made to the eligible employee, except that premiums or bonuses offered to encourage employees to maintain employment through the termination or relocation period may not be used to discount severance. The employer may discount the severance pay by any payments made under a contract that provides for severance pay.
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STATUTORY AUTHORITY: 26 M.R.S.A. §625-B(8); 26 M.R.S.A. § 42.

EFFECTIVE DATE:

November 5, 2005 – filing 2005-408, major substantive

AMENDED: