

Beware of Pitfalls When Employees “Waive” Vacation Time



It's fairly common for an employee to sit down with a supervisor or company official and negotiate over when the employee will take vacation. The idea of waiving vacation for additional pay often arises in the course of these discussions. But what many employers don't realize is that the agreements that emerge from such negotiations—and perhaps even the negotiations themselves—may be a violation of employment standards laws.

The Legal Risks of Waived Vacation Time

Some employee rights can be negotiated away. For example, some provinces allow employees to give up their right to receive overtime under certain conditions, such as under the terms of an averaging agreement. But other rights are completely non-negotiable, e.g., the right to be free from discrimination.

Where do the rights to minimum vacation receive? The answer varies depending on the province. Most provinces require employers to ensure that their employees take all of the vacation time allotted to them. This would seem to imply that it's against the law for an employee to waive vacation time allotted to them. But that's not necessarily so. In fact, about half of the jurisdictions in Canada specifically do allow waivers of vacation time in lieu of payment, as long as the employer documents the waiver properly. The laws fall into two general patterns:

The 8 Limited Waiver Jurisdictions: Employment standards laws in eight of the 14 jurisdictions—Fed, NS, NT, NU, ON, QC, SK and YK—allow waivers of vacation time provided they meet certain specific conditions. The strictest restrictions are in QC where an employer may not grant an employee's request to waive vacation time—or request such a waiver itself—unless

- A collective agreement specifically permits the waiver; or

- The employee requests payment in lieu of a third week of leave after a two-week shutdown.

In SK, waivers may only be granted if there's a labour shortage. In NS, only employees who work for less than 90% of regular working hours during a continuous 12-month period may give up their right to paid vacation in lieu of vacation pay.

The remaining limited waiver jurisdictions—Fed, NT, NU, ON and YK—have specific rules governing the preparation of the waiver. For example, the waiver must be in writing and signed by both the employee and employer. The employer must also pay additional wages for the time not taken. In NT, NU, ON and SK, the waiver must also be filed with or approved by the government agency that oversees the employment standards laws.

The 6 Silent Jurisdictions: The employment standards laws of the remaining six provinces—AB, BC, MB, NB, NL and PEI—don't say a word about whether an employee may waive their vacation time in lieu of payment. Does this mean it's okay to allow such waivers? Unfortunately, the law in most of these jurisdictions is unclear, although some provinces have published guidance that do allow for waivers in limited circumstances. For example, BC expressly allows payment in lieu of vacation time for "silviculture" workers. If you're located in one of the six silent jurisdictions you need to talk to your lawyer before making vacation waiver arrangements with your employees.

And even if your jurisdiction does allow waiver of vacation time, your employment contracts and collective agreements may not. So be sure to check the terms of your agreements before making any deals.

WHAT TO DO

The key to compliance is to not assume that you can allow employees to waive vacation time any time you and they want. Be aware that such agreements are subject to strict restrictions and make sure you know what the rules are in your province.

Once you determine that the waiver is legal, you need to put the agreement in writing. This is expressly required in some provinces and territories; and it's highly advisable everywhere else.

What should your waiver say? "The waiver doesn't have to meet any particular format," says a representative from the Ontario Ministry of Labour. But there are certain things it should include, she adds. Although there's no such thing as a one-size-fits-all form, the Insider's Model Form represents a good starting point for creating your own waiver. Like our waiver, be sure your waiver contains the following:

- The identity and signature of the employee making the waiver;
- How much vacation time the employee wants to waive, in hours or days;
- The reason for the request;
- When the employer will compensate the employee for the waiver; and
- The signed approval of the appropriate manager and Labour Standards Officer, if your province requires it.

Also, be sure to keep a copy of the completed waiver in the employee's personnel

record once it is completed and approved.

Conclusion

Letting key employees trade away vacation for additional pay offers some immediate business advantages to employers. But it's not a practice you want to become too fond of over the long haul. It's not just the legal restrictions that should give you pause. Keeping employees on the job without a break is questionable personnel management—even if it's the employee's idea to skip the vacation. Bear in mind that getting away for a while is essential to an employee's physical and mental health. Keeping a valued employee at her post without a break might help you hang onto her for a couple of vacation weeks but cause you to lose her permanently to burnout.