Don’t Spend Your Vacation In A Courtroom: Potential Vacation Time And Vacation Pay Issues That Every Employer Should Know About



In Canada, every legal jurisdiction has laws governing an employer’s vacation obligations. These obligations are separated into vacation time and vacation pay. Although the rules around vacation time and vacation pay vary somewhat from province to province (as well as for federally regulated employers under the *Canada Labour Code*), they are usually at least somewhat similar. This briefing note speaks in general terms to vacation time and vacation pay obligations from an Ontario law point of view.

What are statutory vacation entitlements?

Generally speaking most employees, regardless of whether full-time, part-time, salaried, hourly or term contract employees, are entitled to both statutory vacation time and statutory vacation pay. However employment standards legislation usually includes limited groups of employees who are exempt from vacation with pay entitlements (i.e. various professionals and students).

In Ontario, employees with less than five years of service are entitled to a minimum of two weeks of annual vacation time, plus vacation pay calculated on the basis of 4% of their total wages. Employees with five or more years of service are entitled to a minimum of three weeks of annual vacation time, plus vacation pay calculated on the basis of 6% of their total wages. More vacation time and/or vacation pay (excess vacation) may be given to employees, but not less.

Can unused vacation be forfeited?

Statutory vacation pay under employment standards legislation can never be forfeited.

On the other hand, statutory vacation time can be forfeited under some employment standards legislation, but often only if the employer and employee agree in writing. In Ontario, the Director of Employment Standards also needs to approve of this arrangement. Vacation time which is in excess of statutory minimum entitlements can generally be forfeited, so long as the employer has made that clear in a policy or employment agreement.

Who dictates when vacation time is taken?

The timing of vacation is ultimately in the control of employers, rather than employees. While employers and employees can agree on when to take vacation time, the ultimate decision-making rests with the employer.

How is vacation pay calculated?

This is a complex question but most simplistically, statutory vacation pay must be provided on all base salary, overtime, non-discretionary bonuses and commissions, as all of these items generally fall under the definition of wages. Vacation pay should be shown as a separate line item on paystubs. It will not generally satisfy governing bodies to explain that it was included within employee wages.

How long is the limitation period for vacation pay claims?

The limitation period for statutory entitlements under the *Employment Standards Act, 2000* (Ontario) (the ESA) is two years, and the general litigation limitation period for court actions under the *Limitations Act* (Ontario) is also two years. Keep in mind however, that the Ontario Ministry of Labour, Training and Skills Developments' Policy and Interpretation Manual states that more than two years of vacation pay can become owing during a two-year period "because vacation pay can be paid in a number of ways under the ESA and may therefore come due at different times…"

As well, keep in mind that the *Limitations Act* states that a claim is discovered on the earlier of: (a) the day on which the person with the claim first knew that the injury, loss or damage had occurred or (b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).

Key points to keep in mind

1. Vacation entitlement years are not necessarily the same as calendar years. Make sure that you know what your vacation entitlement year is, and that it's set out in your vacation policy.
2. Have some understanding as to what is meant by a "stub" period. A stub period is essentially the period of time between when an employee commences work with an employer, and the start of the vacation entitlement year.
3. Ensure that you're tracking statutory vacation time and vacation pay, as that's what needs to be adhered to in order to demonstrate compliance with the ESA.
4. Vacation pay generally should be shown as a separate line item on employee pay stubs.
5. Look to the ESA for rules on when to pay statutory vacation pay.
6. In Ontario, vacation pay continues to accrue through to the end of the ESA termination notice period (although it does not accrue on statutory severance pay under the ESA).

Conclusion

The laws around vacation time and vacation pay are complex, and leave employers open to calculation errors and potential complaints or claims. This briefing note is not comprehensive, and is intended simply to provide a flavour for some of the considerations and issues which arise in the context of employee vacations.

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