

Using Vacation Waivers to Resolve Staffing Shortages



Trade vacation pay for time to keep desperately needed employees on the job.

What's at Stake?

Uncertainty and volatility have heightened the absenteeism and staff shortage challenges HR directors were wrestling with even before the pandemic began. What happens if there's a new outbreak? What are we going to do if the schools and daycare centres shut down again and employees can't come to work? As before, you'll have to call on the employees who are still available to pick up the slack. The problem is that many of those employees are sitting on vacation time that they haven't been able to use.

One possible solution is to let employee trade some or all of their accrued vacation time for additional pay. This way, you get the staffing relief you need and employees get extra cash in the bank. These so-called "vacation waiver" (sometimes referred to as vacation pay in lieu of time) arrangements are common in collective agreements. But you can also make them with non-union employees, provided that you comply with the employment standards laws of your jurisdiction. Here's what you need to know to achieve that objective.

Vacation Waiver Law, 101

Under employment standards, employees become entitled to minimum paid annual vacation after a specific period of continuous employment, typically 2 weeks after one year of service and 3 weeks after 5 years. The typical pay rate is 4% of salary for employees entitled to 2 weeks' vacation and 6% for employees entitled to 3.

The 8 Waiver Jurisdictions

The basic rule: Employees aren't allowed to waive their right to vacation pay, regardless of jurisdiction. However, there are currently 8 jurisdictions that expressly allow for waiver of vacation time in limited circumstances.

Vacation Waivers are allowed in the following jurisdictions and territories:

- Federal
- Nova Scotia
- Northwest Territories
- Nunavut
- Ontario
- Prince Edward Island
- Québec
- Yukon

Vacation Waivers are not expressly allowed in the following jurisdictions and territories:

- Alberta
- British Columbia
- Manitoba
- New Brunswick
- Newfoundland
- Saskatchewan

Waiver arrangements must be in writing and may be subject to strict restrictions:

- In Ontario and the 3 territories, the vacation waiver agreement must be approved by the jurisdiction's Director of Employment Standards (and the territories won't grant such approval unless the parties can show the arrangement is due to "exceptional circumstances");
- To prevent burnout, Nova Scotia and Prince Edward Island allow employees to waive their vacation entitlements only if they've worked less than 90% of their regular working hours during a continuous 12-month period; and
- In Québec, employees with 3 weeks' vacation (aka, annual leave) can waive their entitlement only if the establishment closes for 2 weeks on occasion of the annual leave.

The 6 Silent Jurisdictions

The employment standards laws of the other 6 provinces—AB, BC, MB, NB, NL and SK—do not say anything about whether employees may waive their vacation time in lieu of payment. (**Exception:** BC expressly allows payment in lieu of vacation time for "silviculture" workers.) That does not necessarily mean waivers are illegal; but it does mean that they may be illegal and that you need to talk to an Employment Standards officer or lawyer before entering into any waiver arrangements.

How to Make Legally Sound Vacation Waiver Agreements

The key to compliance is to not assume that you can let employees waive their vacation time unless and until you check the **employment standards rules of your jurisdiction** and vacation entitlement rules in your jurisdiction. Also keep in mind that even if your jurisdiction does allow waiver of vacation time, your employment contracts and collective agreements may not. So, be sure to check what they say, too.

Once you determine that the proposed waiver is legal, be sure to put the agreement in writing. One approach is to have employees who want to trade vacation time for pay complete a form like the vacation waiver request template **Waiver Request** . Like our template, be sure your waiver request form lists 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 Employment Standards Officer if your jurisdiction 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.

Takeaway

Letting key employees trade away vacation for additional pay can be a big help if you're facing staffing shortages and uncertainty. But it's not a practice you want to become too fond of over the long haul. Getting away for a while is essential to an employee's physical and mental health. Keeping valued employees at their post without a break might help you hang onto them for a couple of vacation weeks but cause you to lose them permanently to burnout. This is true even when the employee is the one proposing the waiver.