

# ANNUAL VACATIONS WITH PAY

The employment standards legislation of every jurisdiction in Canada provides eligible employees the right to a minimum annual vacation with pay. However, there are notable differences across the country with respect to breadth of coverage, eligibility requirements, scheduling rules and division of annual vacations, as well as in the manner of calculating vacation pay.

## HISTORICAL BACKGROUND

A statutory right to an annual vacation with pay first appeared in Canada more than 60 years ago. In 1944, Ontario enacted the *Hours of Work and Vacations with Pay Act*, which required most employers to grant their employees one week of vacation with pay per year. In so doing, the province's legislature acceded to union and public demands for minimum employment standards regarding vacations, in the context of government-imposed wage controls. A number of other provinces enacted similar legislation soon thereafter: Saskatchewan (1944, in force 1946); British Columbia, Quebec and Alberta (1946); and Manitoba (1947). By 1970, all other jurisdictions in Canada had followed suit.<sup>1</sup>

Statutory vacation with pay provisions have evolved in the decades that followed their introduction. Legislation in the various jurisdictions was amended to increase minimum annual vacation entitlements, to provide—in a majority of cases—additional vacation time to employees with longer periods of service and to increase the amount of vacation pay accordingly. Amendments also reduced or eliminated certain eligibility requirements. For example, until recently, a number of jurisdictions had requirements similar to those currently in force in Newfoundland and Labrador, whereby an employee must work a minimum number of normal working hours in a year to qualify for an annual vacation.

## THE PRESENT SITUATION<sup>2</sup>

### *Minimum Duration of Annual Vacations*

In all jurisdictions, eligible employees are entitled to at least two weeks of annual vacation with pay after each completed year of employment. The exception is Saskatchewan, where

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<sup>1</sup> Edith Lorentsen and Evelyn Woolner, *Fifty Years of Labour Legislation in Canada*, (Department of Labour, Canada, 1950), pp. 29, 38-41. In the other jurisdictions, statutory provisions regarding annual vacation with pay first came into effect in the following years: New Brunswick, 1955; federal jurisdiction, 1958; Nova Scotia, 1959; Prince Edward Island, 1967; the Northwest Territories, 1968; Yukon, 1968; and Newfoundland, 1970.

<sup>2</sup> Information provided below reflects the general standards contained in employment/labour standards statutes and regulations. For the most part, standards that apply to specific categories of employees (e.g., employees covered by the *Regulation respecting minimum labour standards in certain sectors of the clothing industry* in Quebec, or by the *Terms and Conditions of Employment in Defined Industries Regulation* in Ontario) are not dealt with in this document.

employers must provide no less than three weeks of vacation with pay to employees who have completed one year of service.

In 11 jurisdictions, employees are entitled to an additional week of vacation with pay after a specified period of service. In Alberta, British Columbia, Manitoba and Quebec, employees are entitled to three weeks of annual vacation with pay after five consecutive years of employment with the same employer. The same applies in the federal jurisdiction after six consecutive years of employment; in the Northwest Territories and Nunavut after six years of employment accumulated over the previous ten years; in New Brunswick and in Nova Scotia after eight years of employment; and lastly, in Newfoundland and Labrador after 15 years of continuous employment. After ten years of employment, employees in Saskatchewan must be granted four weeks of annual vacation with pay. It should be noted that employees in Quebec who have at least one year of uninterrupted service, but who do not yet qualify for three weeks of annual leave with pay, can take an additional week of annual leave, without pay, if they so request. This additional leave must be taken in one unbroken period, although it is not necessary to take it immediately before or after an annual leave with pay.

Two provinces, Quebec and New Brunswick, afford prorated vacation time to employees who have completed less than one year of service with their employer. In Quebec, those employees are entitled to one day of vacation per month of *uninterrupted service* during the reference year<sup>3</sup> (up to 10 days); in New Brunswick, employees are entitled to at least one day of vacation per month during the vacation pay year<sup>4</sup> in which they worked, to a maximum of two weeks of vacation. Furthermore, employees in New Brunswick who have completed eight consecutive years of service, but who have only worked for part of the vacation pay year, are entitled to one and one-quarter days of vacation per month in which they worked during that period. In contrast, Alberta's *Employment Standards Code* allows an employer to reduce an employee's vacation and vacation pay in proportion to the number of days the employee was absent from work.<sup>5</sup>

To simplify the administration of vacations and vacation pay, especially in larger firms, a number of jurisdictions allow employers to designate a *common anniversary date*, instead of calculating each individual employee's length of service.<sup>6</sup> However, this is subject to a number of

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<sup>3</sup> In Quebec, the "reference year" extends from May 1 to April 30, unless an agreement or decree fixes a different starting date for the period (s. 66).

<sup>4</sup> New Brunswick's *Employment Standards Act* defines a "vacation pay year" as "the period from the first day of July to the last day of June then following" (s. 24(2)).

<sup>5</sup> This applies to absences on days "the employee was or would normally have been scheduled to work, but did not." (Alberta *Employment Standards Code*, s. 44)

<sup>6</sup> These jurisdictions are Alberta, British Columbia, Manitoba, Ontario, Saskatchewan and the federal jurisdiction. As mentioned earlier in footnote 3, a different "reference year" may be established by agreement under Quebec's legislation. Furthermore, in the Northwest Territories and Nunavut, the *Annual Vacation Regulations* under the *Labour Standards Act* provide that a written application must be made to a Labour Standards Officer appointed under the Act (LSO) for approval of a calendar year or other year as a "year of employment". The application must contain the following information: the name and address of the employer; the calendar year or other year for which approval is sought; the reasons for the request; a statement of the present vacation year that is in effect by the employer and the employee; and such other information as the LSO requires. The LSO can approve the application as submitted, deny the application or approve the application for a definite or indefinite period of time, subject to such terms and conditions that he/she deems desirable (s. 4 of the *Regs.*).

limitations, to ensure employees' right to a vacation with pay is not curtailed by such an arrangement. For example, employers in Alberta, Manitoba, Ontario, Saskatchewan and the federal jurisdiction who establish a common anniversary date must provide a prorated vacation with pay to employees with less than one full year of employment on that date. In Manitoba, the Director of Employment Standards may also, under certain circumstances, revoke or impose terms and conditions on the use of a common anniversary date. British Columbia's *Employment Standards Act* simply states that "an employer may use a common date for calculating the annual vacation entitlement of all employees (...), so long as this does not result in a reduction of any employee's rights" with respect to an annual vacation and vacation pay.<sup>7</sup>

### ***Minimum Amount of Vacation Pay***

In most Canadian jurisdictions, vacation pay is set at 4% of an employee's annual wages,<sup>8</sup> except where the employee is entitled to three weeks of vacation, in which case the amount of vacation pay must be equal to at least 6% of annual wages. Vacation pay is calculated differently in Saskatchewan. Vacation pay in that province is defined as  $\frac{3}{52}$  of an employee's total wages for the year of employment, or  $\frac{4}{52}$  when the employee is entitled to four weeks of annual holidays. Moreover, an employee paid monthly in Alberta is entitled to an amount of vacation pay at least equal to his/her wages for normal hours in a work month, divided by  $4\frac{1}{3}$ , for each week of vacation. Finally, in Manitoba, an employee is entitled to a vacation allowance consisting of:

- 2% of the wages he/she earned during the year of employment in respect of which he/she is entitled to the annual vacation; and
- 2% of the cash value of board and lodging, or of the allowance in lieu of board and lodging, that the employee received as part of his/her usual remuneration that year in respect of his/her regular working hours (where applicable).

In Quebec, special provisions also apply to employees who are absent from work due to sickness or accident or by reason of a maternity leave. Should such an absence result in the reduction of an employee's annual leave indemnity (i.e., vacation pay), the latter is to be calculated on the basis of average weekly wages earned during the period of work, multiplied by the number of weeks of vacation entitlement. This amount can be prorated for employees who have less than one year of uninterrupted service. An annual leave indemnity calculated in this manner is not to exceed the amount to which an employee would have been entitled were it not for the leave or absence.

Although the formula used to calculate vacation pay—annual wages times 4% or 6%—is common to most jurisdictions, there is relatively little consistency across Canada as regards the types of earnings (e.g., salary, tips, holiday pay) that are to be considered as "wages". Indeed, the definition of wages varies in the employment standards legislation of each jurisdiction, both in terms of breadth and precision. For example, Quebec's *Act respecting labour standards* defines wages as "remuneration in currency and benefits having a pecuniary value due for the

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<sup>7</sup> British Columbia *Employment Standards Act*, s. 60

<sup>8</sup> Instead of "annual wages", vacation pay provisions in some jurisdictions refer to "total wages" or "wages earned in a year of employment".

work or services performed by an employee”.<sup>9</sup> This is broader, but also much less specific, than definitions used in provinces such as Alberta and Ontario, which explicitly list the types of payments (e.g., tips, expenses, discretionary bonuses) that are not deemed to be wages for vacation pay (and other) purposes. Moreover, special vacation pay provisions sometimes apply to certain categories of employees, particularly in seasonal occupations such as construction and harvesting, or where wages are calculated on a piece work basis.<sup>10</sup>

### ***Timeliness of Payment (Vacation Pay)***

Provisions in all jurisdictions stipulate when an employer is required to disburse vacation pay to an employee. However, requirements are far from identical across Canada.

Normally, vacation pay must be paid in a lump sum within a specified period before the vacation begins. For instance, all three territories and the Atlantic Provinces<sup>11</sup> require that an employee receive his/her vacation pay at least one day before beginning a vacation. In Saskatchewan, vacation pay must be paid in the 14-day period preceding the vacation; where an annual vacation is fragmented, a portion of vacation pay must be paid before each period of vacation. Provisions in Manitoba stipulate that vacation pay is to be paid on the “last working day” before the vacation, unless the employer and the employee agree otherwise.

In some jurisdictions, vacation pay may be paid on the regular pay day following the start of a vacation. However, this is normally subject to certain conditions. For example, in the case of Alberta, employees can instead request to receive their vacation pay at least one day before starting a vacation. In the federal jurisdiction, vacation pay may be disbursed on the regular pay day during or immediately following a vacation, but only where it would not be practical to make the payment earlier or where it is an established practice in the industrial establishment. Otherwise, vacation pay must be paid within 14 days before the vacation begins. In British Columbia, an employer must pay an employee his/her vacation pay seven days before the beginning of a vacation, unless both agree (or a collective agreement provides) that payment will be made on the employee’s scheduled pay days.

In Ontario, there are elaborate provisions regarding the payment of vacation pay. Employees covered by the relevant provisions of the *Employment Standards Act* must normally receive their vacation pay in a lump sum before their vacation begins. There are nevertheless numerous exceptions to this rule. Where an employer pays an employee’s wages by direct deposit, vacation pay may be paid on or before the pay day for the period in which the vacation falls. This also applies if an employee does not take vacation in complete weeks. Moreover, with the employee’s agreement, an amount for vacation pay may be disbursed on each pay day, as soon as it accrues, provided that the amount is indicated separately in a wage statement. An employer and employee may also agree on an alternative date for payment of vacation pay.

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<sup>9</sup> Quebec: *Act respecting labour standards*, s. 1(9)

<sup>10</sup> For example, this is the case in British Columbia with respect to silviculture workers and in Alberta as regards construction workers.

<sup>11</sup> Provisions in Nova Scotia specify that, if a vacation is broken in two or more periods, vacation pay must be paid one day before an unbroken vacation period of at least one week.

Ontario's legislation even specifies that vacation pay must be paid with respect to a vacation that has been cancelled because of a strike or lockout.

Finally, legislation in some jurisdictions, such as Nova Scotia and Saskatchewan, specifies the latest date on which vacation pay must be paid if an employee waives his/her vacation.<sup>12</sup> Any vacation pay owing must be paid out when an employee's employment is terminated, usually within a set period of time.

### ***Eligibility Requirements***

To qualify for a vacation, employees in most jurisdictions must have completed at least one year of continuous employment with their current employer. Ontario's *Employment Standards Act, 2000* expressly states that this includes both *active* and *non-active* service (e.g., periods of leave or layoffs that do not constitute a termination of employment).

In some cases, employees whose service with the same employer has been interrupted for a relatively brief period—as is often the case for seasonal or casual employees—may nevertheless be entitled to an annual vacation. In Alberta, any break in employment of less than three months is to be counted as a period of continuous employment when determining whether an employee is entitled to three weeks' vacation. A provision in Saskatchewan's *Labour Standards Act* (not yet proclaimed in force) would include, in the calculation of an employee's service with an employer, any break in employment of less than 13 weeks. It is worth noting that Yukon's *Employment Standards Act* specifies that annual vacation provisions apply "to all employees, including employees who are employed on a part-time, seasonal or temporary basis".<sup>13</sup>

To be eligible for an annual vacation, employees covered by Newfoundland and Labrador's *Labour Standards Act* must also have worked for an employer at least 90% of the normal working hours in a continuous 12-month period. Newfoundland and Labrador is the only province in Canada to have such a requirement.

It should be noted that the above eligibility requirements only pertain to employees' entitlement to a period of vacation leave; they do not apply with respect to vacation pay. Even if an employee does not qualify for a vacation, he/she must still be paid any vacation pay earned, at the applicable rate. The only employees not entitled to vacation pay are those not covered by the relevant legislation and, in certain provinces, those who have not completed a specified period of employment: five calendar days in British Columbia and 14 continuous days in Yukon.<sup>14</sup>

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<sup>12</sup> Vacation pay must be paid no later than one month after the 12-month period in which it was earned in Nova Scotia, and no later than 11 months after the date the employee becomes entitled to the "annual holiday" in Saskatchewan.

<sup>13</sup> Yukon *Employment Standards Act*, s. 19(1).

<sup>14</sup> In Yukon, employees who work irregular hours or fewer than five days per week are deemed to meet this requirement if they have worked their usual work days and usual hours in a two week period.

An employee who does not meet statutory qualifying requirements may nevertheless be entitled to a vacation and/or vacation pay if provided for under a collective agreement or in an individual contract of employment.

### ***Scheduling of Vacations***

In all Canadian jurisdictions, it is the employer's prerogative to determine when each employee may take an annual vacation, within certain limits laid down by law.

First, a vacation must be granted within a specified period after the date on which the employee becomes entitled to it: within four months in New Brunswick and Prince Edward Island; 10 months in the federal jurisdiction, Manitoba, Newfoundland and Labrador, Nova Scotia, Ontario, and all three territories; and 12 months in Alberta, British Columbia, Quebec and Saskatchewan. As explained in the next section, some jurisdictions may authorize employees, usually with their employer's consent, to postpone their vacation.

Secondly, eight provinces and the federal government require that employers provide a minimum period of notice to their employees before they start their vacation. The minimum notice period ranges from one week in New Brunswick, Nova Scotia and Prince Edward Island to four weeks in Quebec and Saskatchewan. Employers under federal jurisdiction and those in Alberta, Newfoundland and Labrador, and Manitoba must give at least two weeks of notice (15 days in Manitoba). Obviously, such notice is not normally necessary where an employer and an employee agree on a mutually satisfactory vacation starting date.

### ***Postponement of Vacation***

The postponement of an annual vacation for a specified year of employment is expressly permitted, subject to certain conditions, in federal legislation as well as in the *Annual Vacations Regulations* of the Northwest Territories and Nunavut. A written agreement to postpone a vacation must be signed by the employee affected and his/her employer to be effective. In the case of the Northwest Territories and Nunavut, such an agreement must also be filed with a Labour Standards Officer (LSO). In addition, a LSO in these territories may authorize an employee's individual application for a postponement, if the latter is based on exceptional circumstances.

What happens if an employer postpones or cancels an employee's *previously scheduled* annual vacation—or even whether this is allowed—is somewhat unclear in the legislation of most jurisdictions. However, Saskatchewan and Newfoundland and Labrador both provide that an employer, in such a case, must reimburse the employee affected any vacation-related expenses that cannot be recovered through other means (e.g., non-refundable deposits, penalties and pre-paid expenses).

## ***Division of Vacation Time***

Legislation in most jurisdictions—apart from the federal jurisdiction, New Brunswick and the three territories—specifies whether annual vacations must be provided in one or more periods. In Alberta, Newfoundland and Labrador, Nova Scotia, Prince Edward Island and Saskatchewan, employers must allow their employees to take their annual vacation with pay in one unbroken period. The same applies in Quebec, albeit with some exceptions.<sup>15</sup> Three other provinces—British Columbia, Manitoba and Ontario—require that employers schedule vacations in periods of not less than one week.

Nevertheless, vacations may sometimes be divided into shorter periods. In some provinces, the decision on whether or not to split a vacation is left at the employee's discretion. Legislation in Newfoundland and Labrador and in Saskatchewan provides that an employee may choose, by giving notice to his/her employer before a specified date,<sup>16</sup> to take a vacation in more than one period of at least one week each.<sup>17</sup> In Quebec, an employee entitled to more than one week of annual vacation with pay can also request to divide the latter in two periods. Such a request may be refused, in Quebec as well as in Saskatchewan, but only if the employer's establishment is closed, for a period at least equal to the employee's annual leave, to allow all employees to take their vacation at the same time.<sup>18</sup> With the agreement of their employer, employees in Quebec<sup>19</sup> and in Newfoundland and Labrador may split their annual vacation in shorter periods (i.e., in three or more periods in Quebec; in periods of less than one week in Newfoundland and Labrador).

In other provinces (Alberta, Manitoba, Nova Scotia, Ontario), an employee's vacation may also be broken in shorter periods, although obtaining the employer's consent is a prerequisite. Legislation may also set certain limits with respect to the minimum duration of vacation segments. For example, a vacation may not be taken in less than one-day increments in Alberta. Also, in Nova Scotia, an employee's vacation may only be divided if it includes one unbroken period of at least one week.

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<sup>15</sup> Quebec's *Act respecting labour standards* identifies some circumstances in which an annual vacation may be broken. Employers who closed their establishment for any period of annual leave before March 29, 1995, may divide in two periods the annual leave of an employee entitled to three weeks of vacation: one of the two periods must coincide with the closing period, and one period must last at least two weeks. Furthermore, a collective agreement or decree may provide for, or prohibit, the division of an annual leave into two or more periods. As noted previously, an additional period of unpaid annual leave (see above under the heading "*Minimum Duration of Annual Vacations*") need not be taken immediately before or after an annual leave with pay.

<sup>16</sup> An employee must give notice before the date on which he/she becomes entitled to the vacation.

<sup>17</sup> In the province of Newfoundland and Labrador, a vacation must be taken in periods of either one week, two weeks or, where applicable, three weeks.

<sup>18</sup> To do so, an employer in Saskatchewan must first receive the written approval of the Director of the Labour Standards Branch.

<sup>19</sup> Unless otherwise provided in a collective agreement (see footnote 15).

## ***Waiver of Vacation***

A number of jurisdictions—the federal jurisdiction, Nova Scotia, Ontario, Saskatchewan and all three territories—specifically allow employees to forego their annual vacation in exchange for pay in lieu. In general, this can only be done if certain strict conditions are met.

In all cases, save Nova Scotia, the decision to waive a vacation must be agreed to by both the employee concerned and his/her employer. In Nova Scotia, an employee may waive his/her entitlement to a vacation by notifying the employer in writing, but only if he/she has worked for less than 90% of the regular hours in a continuous period of one year.

Obtaining the approval of the appropriate government official is required in Ontario, the Northwest Territories and Nunavut. In the latter two territories, a Labour Standards Officer may only authorize a waiver if satisfied of the existence of exceptional circumstances.

Although such a prior authorization is not necessary in Saskatchewan, an agreement to waive an annual vacation under the province's legislation must nevertheless be filed with the Director of the Labour Standards Branch. Moreover, such an agreement may only be made if there is a shortage of labour.

Quebec is the only jurisdiction whose legislation explicitly prohibits employers from replacing an employee's annual leave by a compensatory indemnity. However, there are some exceptions. Employers do not need to conform to this rule if an applicable collective agreement or decree provides otherwise. Furthermore, an employee may request to give up a third week of vacation in exchange for compensation if the establishment where he/she is employed closes for two weeks during the year to provide a common vacation period for all employees.

## ***Exclusions from Statutory Annual Vacation Provisions***

Often, legislation excludes certain classes of workers and industries from the application of annual vacation provisions, or from employment standards in general. Not surprisingly, the list of groups who are covered, or exempted, can vary to a significant extent among all the jurisdictions.

Certain exclusions are found in the legislation of several jurisdictions. Among these appear managers, selected agricultural workers, salespersons remunerated by commission, real estate agents, participants in work experience and job induction programs, commercial fishermen, part-time domestic workers, sitters and companions employed in a private home, teachers, and practicing members and students of designated professions.

Employees whose conditions of work are prescribed by a collective agreement may or may not be covered by statutory annual vacation provisions, depending on the jurisdiction. In many instances, statutory annual vacation provisions can be superseded by a collective agreement



where the latter contains a contract clause that is, in most respects, at least as favourable for employees.<sup>20</sup>

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<sup>20</sup> For example, in New Brunswick, the *Employment Standards Act's* vacation and public holiday provisions do not apply if a collective agreement or contract of employment provides an employee equal or greater vacation and holiday benefits, when combined (s. 22(1)). However, the Act also stipulates that parties to a collective agreement can agree that a benefit, privilege, right or obligation provided in an agreement apply in lieu of a provision of the Act (s. 4). In contrast, employees covered by a collective agreement fall outside the scope of most employment standards in Prince Edward Island, including those regarding vacations and vacation pay (s. 2(4) of the *Employment Standards Act*).

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