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J. Geoffrey Howard, Mike Korbin, Martin Sheard

Sweat the Small Stuff: Significant ESA Liabilities You Never Knew You Had (and How to Manage Them)

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What We Will Cover:

- Vacation Pay
  - Vacation pay on non-base pay and incentives
  - Vacation pay during statutory leave
- Overtime Claims and Exemptions
  - Managers
  - Professions
- ESA based severance claims
- Travel Time
- Training
- Deductions

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Vacation Pay Test:

Your firm pays an employee entitled to 4% vacation pay $52,000 in salary plus $20,000 in commissions in a year and gives her 3 paid weeks of vacation pay with salary worth $3,000. (helpful hint: 4% of $72K = 2,480)

My company **does not** owe any more vacation pay to her for that year.

True or False?

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A: False

Let's find out why….

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A few things to remember about vacation pay:

- the time off and the pay are actually two separate entitlements under the ESA
- the vacation pay must accrue on all "wages", as broadly defined in the ESA

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"Wages" covers almost all kinds of Non-base pay including:

- overtime, stat holiday premiums; stat holiday pay
- almost all forms of cash incentive compensation/bonuses/commissions ("Incentives")
- Unclear if non-cash bonuses could be subject to vacation pay e.g. RSUs, options
- AND: strangely according to the ESB, vacation pay itself!

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Incentive Pay – the biggest exposure

- Many employers are only accruing vacation on base pay i.e. base hourly earnings or salary
- Very few employers are accruing vacation pay on Incentives
- At the same time, more and more employees are participating in Incentives
- And the % of Total Compensation paid as Incentives is growing

making this a growing risk

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These conditions are a perfect storm for vacation pay claims:

- savvy plaintiff lawyers are asking: did you receive vacation pay on overtime or Incentives? and filing ESA claims in parallel with wrongful dismissal claims
- ESB is awarding vacation pay at 4 or 6% on Incentives and overtime earnings **going back up to 2.5 years** due to the way vacation pay can be paid under the ESA
- Example: Six year employee Jill earned bonuses of $25K and $20K over the past two years and a final pro-rated bonus of $15K. At 6%, she can be awarded **$3,600** in vacation pay!

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To make matters worse: *Kenpo Greenhouses Ltd. v. Director Of Employment Standards*, (1997) 32 B.C.L.R.(3d) (S.C.) ("*Kenpo*")

- Many employers fail to pay vacation pay on Non-base earnings but provide more than the minimum number of paid weeks vacation with salary
- Logically, if the total vacation pay paid equaled the ESA rate on Total Wages, no further vacation pay should be awarded
- Example: Jim earns salary of $52,000 and although he was just hired, he gets 3 weeks vacation with salary. He also earns $20K in bonus.
- Total Wages =$72K X 4% statutory vacation pay = $2,880
- Actual vacation pay paid = $3K
- Vacation Pay owing: ?

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- Surprise!: According to the BCSC decision in *Kenpo*, the employer would still owe vacation pay on the bonus of $800
- Why: the court held on the wording of the employee's vacation entitlement, that the extra salary vacation pay was an extra benefit that should not reduce liability for vacation pay on Incentives.
- The decision may have rested on the wording of the employment agreements in that case but has wider application
- With respect, this decision seems wrong. The ESA only states how much total vacation pay must be accrued, not what is called or exactly how it is calculated.
- But *Kenpo* remains the law for now and is enforced by the ESB

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What are the solutions? There are two ways to partially reduce this additional cost:

Option 1: For employers offering more than the ESA minimum paid weeks of vacation with salary:

Define vacation pay earned as the greater of:

- the value of the paid salary weeks; or
- the ESA rate on the Total Wages

Put this in your vacation policy and Employment Agreements

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Option 2: To cover vacation pay on Incentives only (and assuming base pay already meets minimum wage):

- Redefine all bonuses/commission as comprised of a "base" amount; then
- State 6% (to cover the highest ESA rate) vacation pay will be added;
- to equal what you wanted to pay "all in"

Example: instead of paying 5% commission, pay 4.7% base commission, add 6% to pay Total Commission of 5%

You will need to ensure plans and policies reflect this and the vacation pay shows separately on pay statements

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Vacation Accrual During Statutory Leaves

- The past decade has seen an explosion in the number, and length of statutory leaves, including actual duration taken
- Mothers can now take up to 18 months off for maternity/parental leave;
- Care leaves and missing child leaves have been extended to many months
- Employers are often surprised to learn that an employee off on leave can have any vacation entitlements
- Clearly this makes no common sense: why does an employee off work need vacation time to recover from work?

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Vacation Pay During Statutory Leaves

- Under the "deemed continuous employment" ESA section covering statutory leave taker rights, "vacation entitlement" is deemed continued
- The EST has interpreted this as requiring accrual of vacation time off
- Because the requirement to accrue vacation pay is separate and on "wages", no vacation pay needs to accrue on unpaid leaves
- ESB's position: if employee's vacation entitlement is stated as "you will be entitled to 3 paid weeks of vacation" (with no policy on point), this means vacation pay must also accrue during leave

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What are the solutions to minimizing this exposure?

- Accrue the time off but require it to be taken at the end of the leave which is typically the most convenient time
- Your vacation policy must state that no vacation pay accrues during statutory leaves to avoid liability for the vacation pay
- Be careful to apply the same approach to all leaves (statutory, disability, discretionary)
- I recommend a rule that no vacation pay accrues over any form of leave exceeding a threshold length e.g. 1 month

Note: Quebec mandates continued vacation pay accrual over the first 6 months of maternity/paternity (but not parental) and sick leaves

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Overtime Question

An employee works in excess of 8 hours per day routinely throughout the entire employment term, then is terminated and entitled to damages in lieu of reasonable notice. Is the employee entitled to overtime pay over the notice period?

a. Yes.
b. No.
c. Depends.

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c. is correct

- The answer is nuanced and depends upon multiple factors, including:
  - Whether exempt from overtime e.g.
    - Managerial status;
    - Professional designation (and actual duties); and
  - Working notice vs. summary termination.

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ESA Exemptions

Under the ESA, the Regulations certain professions are excluded from:

- ESA overtime requirements; and/or
- The entire ESA.

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Managers

The ESA Regulations have 25 categories of exemptions from the overtime provisions of the ESA. They are too numerous to catalogue in this presentation. From our experience the most common exemption to cause problems is the "manager" exemption.

Managers (Cont'd)

For the purposes of the ESA Regulation exemption from paying overtime, a "manager" is defined as follows:

- "(a) a person whose principal employment responsibilities consist of supervising or directing, or both supervising and directing, human or other resources, or
- (b) a person employed in an executive capacity[.]"

Managers (Cont'd)

The provisions of the ESA are supposed to be interpreted in a manner to ensure that exceptions are narrowly construed such that the ESA is given such large and liberal interpretation as will best ensure the attainment of its purposes.

The decisions look at all the details of a person's job, emphasizing factors such as the proportion of one's time spent in any given task, oversight of budgets and other resources and (very frequently) the authority to hire/fire employees.

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Other Exemptions

The Regulations spell out numerous other exemptions to the overtime requirements, including:

- High technology professionals.
- Commissioned salespersons.

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Professions Exempted from the ESA

- Professions exempted from the ESA include all the big ones you might assume: doctors, accountants, engineers etc.
- If you are subject to one of these exemptions, none of the protections of the ESA help you.
- As ever, the law on this point is nuanced: professionals must be using their professional skills in their job.

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Question regarding exempt professional

- 90% of your workforce consists of widget-makers, who of course are not exempt from the protections of the ESA. Keeping track of all those widgets is a CPA. 100% of her time is spent doing CPA-type tasks, and she is exempt from the protections of the ESA.
- The widget industry falls on hard times and you need to terminate her on a without-cause basis.

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Question regarding exempt professional (cont'd)

You look to her employment contract, which says all employees shall receive the notice set out the ESA on termination. Being exempt from the ESA, does she get:

a. $0;

b. The amount a non-exempt employee would receive under the ESA; or

c. common law notice (aka reasonable notice)?

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The correct answer is b. Whereas the ESA provides for nothing, her contract incorporates the ESA severance formula. Thus her entitlement flows from contract, not statute, though with a statutory calculation incorporated into it.

U.B.C. v. The Association of Administrative and Professional Staff on Behalf of Bill Wong, 2006 B.C. Court of Appeal

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Pannell v Imperial – Cautionary Anecdote

Note that substantially cutting the hours of an hourly-wage employee who works long shifts has been held to be a constructive dismissal. *Pannell v. Imperial Paving Limited*, 2010 BCSC 172

Damages were set in an amount to reflect the hours the employee should have worked through a reasonable notice period.

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Pannell v Imperial – Cautionary Anecdote (cont'd)

After the conclusion of the trial in *Pannell*, the plaintiff argued that the plaintiff's five months of working notice would have involved substantial overtime, which ought to have been paid at time and a half under the ESA. The claim was not decided or procedural ground.

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Getting around *Macaraeg* on severance overtime claims

- In *Macaraeg v. E Care Contact Centers Ltd.,* 2008 BCCA 182 the Court of Appeal ruled that employees cannot bring a court action claim based solely on breach of the ESA.
- The Court essentially said that where legislation prescribes a right, but also provides an enforcement mechanism, claimants can only use that mechanism.
- Here that avenue was Employment Standards Branch, not the courts of British Columbia.

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Macaraeg and Martin's *Pannell* argument

- The courts should award damages over the reasonable notice period based on the lawful performance of working notice.
- So: if employee regularly worked overtime
- And: the ESA requires payment of overtime pay for such hours
- Then the damages award should reflect a reasonable estimate of the overtime pay that should have been paid—even if the employer had not been paying it.

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Travel Time Test:

A sales rep drives from home in Langley to the office in Surrey. Throughout the day she drives to Abbotsford and Chilliwack for sales calls then back to the Surrey office. Then she drives home at the end of the day. Which is correct:

A. All of this is paid travel time;
B. The trips to Abbotsford and Chilliwack and back are paid travel time;
C. None of this is paid travel time.

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B is correct

Let's find out why….

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Travel Time Under the ESA

- The presumption under the ESA is that a commute from home to the office and back is not "work" and therefore is not payable.
- The burden is on the employee to prove otherwise, by demonstrating some "very compelling reason" why travel time should be considered "work" and therefore payable.

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- Tribunal decisions recognize that employees often have to commute considerable distances to get to work – and this is still not paid travel time. Examples are commutes of over an hour; commutes of 70km.
- **But**, there are exceptions:
  - don't assign your employee tasks to do en route to work unless you want to pay…
  - Unusual travel time is often considered payable – e.g. a sales rep who lives and works in the Lower Mainland but is required to attend a sales meeting in Kelowna.

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Training Quiz

- Your Company requires that employees must maintain their Foodsafe permit as a condition of employment. Does the Company have to pay the employee for her time in obtaining or maintaining that permit?

A. Yes
B. No

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Training

- B is correct.
- Training to obtain or maintain a general permit or license is not considered work.
- **But**, employers are required to pay an employee's wages for training that is required for the employee to learn how to do her job at the employer's business – e.g. how to use tools and equipment or follow workplace procedures.

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Deductions Question

- Your employee is caught red-handed stealing $1,000 from the till. You terminate for just cause and now you are preparing the final paperwork. The employee has a few weeks of accrued vacation pay owing to him. Are you allowed to deduct the $1,000 from the final pay?

A. Yes
B. No

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The correct answer is B.

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Deductions

- The ESA prohibits an employer from unilaterally making deductions from employee's wages for any purpose unless permitted by the ESA or another statute.
- This means that even if an employee has stolen from the company, or caused damage to the company's property, the company cannot take self-help measures and unilaterally deduct the amounts owing from the employee's wages.
- Rather, you have to either obtain their agreement or sue.

Deductions

- The same is true with overpayments, accidental or otherwise.
  - Including the classic "overtaken vacation balance"
- Even where an employee has been overpaid, the employer cannot unilaterally deduct from an employee's wages to recoup the overpayment. Rather, you have to get the employee's agreement or commence proceedings.
- An agreement to repay (for an overpayment or theft etc.) must be in writing and clearly worded so it is an assignment of wages, and should be characterized as an agreement to meet a credit obligation

Coming Soon? ESA Amendments

- Government conducted a “consultation” on ESA reform, asking for feedback on 6 topics within 31 days ending March 31, 2019
- The government is committed to ESA reform
- Stay tuned for amendments
- But few expect the liabilities we have discussed to be eliminated

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J. Geoffrey Howard
MEP Business Counsel
ghoward@meplaw.ca
604-891-1184

Martin Sheard
Tevlin Gleadle
msheard@tevlingleadle.com
778-837-5728

Michael Korbin
Farris, Vaughan, Wills & Murphy LLP
mkorbin@farris.com
604-661-9330

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