



DRIVING BUSINESS
THROUGH INVESTMENT
IN PEOPLE

Features Legal

Navigating Ontario's ESA: Length of service calculated four different ways

March 1, 2024

By Natalie Nicholson | Sherrard Kuzz LLP



DRIVING BUSINESS
THROUGH INVESTMENT
IN PEOPLE



Natalie Nicholson

Several entitlements under the Ontario *Employment Standards Act, 2000* ("ESA") are based on an employee's length of service with an employer. This includes an employee's entitlement to notice of termination, severance pay, vacation and leaves of absence. However, it may surprise an employer to know that an employee's length of service is calculated differently depending on both the circumstances and entitlement at issue.

In most cases, the answer is simple. An employee's length of service is calculated from their first day of employment until their final day of employment with the employer. Inactive periods of service, such as a leave of absence under the ESA or a temporary layoff, do not result in a break in employment and count towards an employee's length of service.

However, the answer is more nuanced when an employee has more than one period of employment with the employer. For example, if an employee resigns and subsequently returns to the employer, or is re-hired by the employer on a seasonal basis after a clear

break in service. There are also special considerations when an employee is hired by the purchaser in a sale of business.[1]

While the nuances in the ESA may be easy to miss, it is important for an employer to be aware of them to ensure it is meeting its statutory obligations.

More than one period of employment

Notice of termination

Under the ESA, an employee is entitled to up to eight weeks of notice of termination (commonly, pay in *lieu* of notice) based on the length of their “period of employment.” If an employee has two successive periods of employment that are not more than 13 weeks apart, they must be added together and counted as one period of employment. [2] This applies regardless of why the earlier period of employment came to an end (e.g., termination of employment or resignation). If the break between periods of employment is greater than 13 weeks, the previous period of employment is not counted.

Severance pay

Under the ESA, an employee is entitled to severance pay upon the termination of their employment if they were employed by the employer for five years or more and the employer has a global payroll of \$2.5 million or more.[3] An employee is entitled to up to 26 weeks of pay at their regular wages based on the number of completed years and months of employment with the employer.

Unlike notice of termination, all of the time spent as an employee is included in determining (a) whether the employee is entitled to severance pay (*i.e.*, whether they have been employed for five or more years) when their employment is severed, and (b) the amount of severance pay to which they are entitled. This applies regardless of the length of time between periods of employment and why the earlier period(s) of employment came to an end. For example, if an employee worked for the employer for two years, voluntarily resigned to pursue another opportunity for five years, returned to the employer, and their employment was severed after three years of employment, in the aggregate, this would satisfy the five year requirement for severance pay.[4]

Vacation and leaves of absence

When determining an employee's entitlement to vacation pay and time and leaves of absence under the ESA, only the employee's current period of employment is counted, even if their previous period of employment ended fewer than 13 weeks earlier. It is important to note that even if an employee is not entitled to a leave of absence under the ESA, the employee may be entitled to a leave of absence under the Ontario *Human Rights Code* (*e.g.*, sick leave or parental leave).

Sale of business

Section 9 of the ESA provides for continuity of employment when a purchaser hires an employee of the seller, so long as the gap between the respective periods of employment is fewer than 13 weeks from the earlier of (a) the last day of employment with the seller and (b) the date of the sale. In that case, the purchaser is required to

recognize the employee's prior length of service with the seller for the purpose of determining the employee's entitlements to notice of termination, severance pay, vacation with pay, and leaves of absence.

Don't forget the common law

An entirely separate article could be written on the nuances and every-changing law regarding common law termination entitlements! For now, suffice it to say that an employee may have additional termination entitlements at common law unless an enforceable employment agreement limits those entitlements. For example, while an employer must recognize an employee's prior service to the extent required under the ESA, an employer may not be required to recognize prior service at common law. To minimize the potential for disagreement down the road, an employer might consider including in an employment agreement language that directly addresses if (and how) an employee's previous service will be recognized.

Final thoughts

Even for seasoned HR professionals something as simple as calculating an employee's length of service can have unexpected nuances under the ESA. When in doubt, consult with experienced employment counsel.

To learn more and for assistance, contact your Sherrard Kuzz LLP lawyer, or our firm at info@sherrardkuzz.com.

Natalie Nicholson is a lawyer with Sherrard Kuzz LLP, one of Canada's leading employment and labour law firms, representing employers. Natalie can be reached at 416.603.0700 (Main), 416.420.0738 (24 Hour) or by visiting www.sherrardkuzz.com.

The information contained in this presentation/article is provided for general information purposes only and does not constitute legal or other professional advice, nor does accessing this information create a lawyer-client relationship. This presentation/article is current as of March 1 2024 and applies only to Ontario, Canada, or such other laws of Canada as expressly indicated. Information about the law is checked for legal accuracy as at the date the presentation/article is prepared, but may become outdated as laws or policies change. For clarification or for legal or other professional assistance please contact Sherrard Kuzz LLP.

[1] "Sale of business" is broadly interpreted under section 9 of the ESA, which applies to the "sale" of all or part of a "business."

[2] Section 8(2) of O Reg 288/01.

[3] An employee is also entitled to severance pay if the employee was employed by the employer for five years or more and the severance occurred because of a permanent discontinuance of all or part of the employer's business at an establishment and the employee is one of 50 or more employees who have their employment relationship severed within a six-month period as a result.

[4] If an employer paid the employee severance pay when their previous period of employment was severed, the employer is not obligated to pay the employee severance pay for that same period of employment again.