Published on *The National Law Review* https://natlawreview.com

Vacation Policy Pitfalls for Illinois Employers

Article By:

Ian Fisher

The **Illinois Wage Payment and Collection Act**, 820 ILCS 115/1, et seq., governs the payment of wages—including vacation pay—in Illinois. While most employers understand that they must pay their workers on a regular basis for the wages the employees have earned, many do not consider how vacation policies may create a heightened risk of a wage class action lawsuit.

Simply put, employers must pay the wages earned by an employee at least semi-monthly, or no more than 13 days after they are first earned. Departing employees must be paid all earned wages by the next regular pay period. The Act defines wages to include vacation pay. This is where things can get tricky. An employer is not obliged to provide any vacation time to its employees. However, once it chooses to provide vacation, the vacation time becomes earned wages that must be paid under the Act to the employee, even if the employee terminates their employment.

Employees receive vacation time in one of two ways. First, an employer can award vacation time without requiring employees to first work some period of time. Such a policy is called an “inducement for future service” policy and immediately vests. Hence, employees may take vacation time under an “inducement for future service” policy without meeting any length of service criteria (and with no obligation to repay the vacation time should the employment end). Such “inducement for future service” policies are unusual.

The other alternative is where the vacation is earned based on service. For example, the employer can award two weeks of vacation for each year of employment. This is considered a “length-of-service” policy and the law requires that employees earn “length-of-service” vacation time on a pro rata basis, even where the employer’s policy says they do not. In other words, the vacation time vests as the employee works. Thus, an employee who would earn two weeks of vacation after completing a year of employment is entitled to be paid for one week of vacation wages if he/she leaves the employer six months into the year, regardless of what the employer’s policy says. Most employers have “length-of-service” policies.

An employer with a “length-of-service” policy must pay a departing employee the vacation wages they earned on a pro rata basis. This is where a vacation policy can become dangerous. If the employer has a policy that an employee only gets their vacation if they are employed in the following year, the employer is at risk with regard to every employee who left or, in the future leaves, its employment without getting paid vacation pay on a pro rata basis. Such policy flaws lend themselves to class action lawsuits because the employer’s liability to the class will usually turn on a single question, such as whether the vacation policy is legal or not.

A class action lawsuit can be filed by one departing employee on behalf of all employees who left the employment without getting vacation pay. A class action lawsuit is dangerous because it aggregates all employees' claims into a single lawsuit brought by just the class representative. In 2010, the Illinois legislature amended the statute of limitations under the Act to allow a class representative to file on behalf of a class that goes back in time up to ten years. Because of the large number of unnamed, but represented, employees that can be in a class, the situation can create potentially disastrous financial exposure for an employer. And, if the representative employee prevails, she is entitled to recover from the employer her attorneys' fees, which are usually substantial. As if this were not enough, the 2010 amendment also permits employees to collect damages of two percent per month—of 24 percent per annum—on any unpaid wages. Willful refusals to pay wages can also be criminal.

Even if the class action lawsuit settles for a set amount of money, the employer usually must also pay the class representative's attorneys' fees. Under the 2010 amendment, a prevailing employee is entitled to recover her attorneys' fees, even she did not file her case as a class action.

Recognizing the risk, some employers have tried to limit their exposure by requiring that employees sign an agreement that they will make any claims within a short period of time—for example, six months. Importantly, the plaintiffs' bar and the Illinois Department of Labor take the position that the Act prevents an employee from agreeing to limit any of the rights bestowed on the employee by the Act. Thus, an employee's written agreement that they will bring any claims for unpaid wages within six months is unenforceable as a matter of public policy.

Employers should be careful to ensure that their policies comply with each state law in which they have employees, including the 2010 amendments to the Act. If an employer is unfortunately named in a class action lawsuit, they should promptly seek legal advice from a law firm with experience in defending against class action lawsuits.

National Law Review, Volume IV, Number 316