WSIB Premiums Payable on Separation

by Jack Siegel
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Through the course of almost 25 years of dealing with the Workplace Safety and Insurance Board (formerly the Workers' Compensation Board) on issues ranging from employer classifications through benefit entitlement for alcoholism, I can safely say that I have seen my share of unusual, unexpected and outright bizarre decisions and policies implemented by this agency over the years.

Of recent note, I was asked to look into the treatment of termination payments made to a departing employee, and the extent to which such payments are to be treated as insurable earnings for the purposes of reporting to the Workplace Safety and Insurance Board ("WSIB"). Of course, if earnings are to be reported, the employer is required to pay an insurance premium on those earnings that can range anywhere from 0.18% to 15.86%, depending upon the employer's industry. While one might anticipate that such payments are either included or not, the answer, as expressed in WSIB Policy Document No. 14-02-08, is anything but straightforward. Particularly where the termination payments are to be substantial, real cost savings can be attained by structuring termination payments in a manner designed to minimize WSIB liabilities.

As most employers are aware, termination payments can be categorized in a number of ways. Under the *Employment Standards Act, 2000* (the "ESA"), Ontario employers can be required to give notice, or pay in lieu thereof, ranging from one to eight weeks. Over and above this, severance pay under the legislation (which cannot be provided as working notice) can reach a maximum of 26 weeks' pay. As well, common law obligations to give notice or pay in lieu of notice will frequently give rise to additional payments in lieu of notice, or arrangements whereby a departing employee's salary is continued for a period of time, even though the employee is no longer required to report to work or provide services.

Each of these types of payments are treated differently by the WSIB.

Pay in lieu of notice (termination pay) under the ESA will always be included as part of insurable wages, upon which WSIB premiums must be paid. But severance pay under the same legislation does not constitute insurable earnings, and employers need not include such payments in the amounts that they report to the WSIB, and upon which premiums are calculated.

Similarly, "retiring allowances" are also excluded from insurable earnings. This includes payments that are made in a lump sum or in installments (over and above ESA termination pay as referred to above) and is seen to include any damages for wrongful dismissal, whether awarded by way of court decision or as a result of settlement, as well as payments in lieu of benefits or payments for unused sick pay credits, where employers provide for this.

What stands separate and apart, however, are salary continuation payments. These frequently arise as part of a termination package proposed at the time an employee is advised of termination or as a settlement structure when wrongful dismissal is claimed. Because a salary continuation represents a notional continuance of the employment relationship, the WSIB, with one notable exception, treats all such payments as regular salary, upon which premiums are payable. Accordingly, although the difference between a retiring allowance paid in installments and a salary continuation is subtle indeed, a salary continuation can conceivably result in an added expense as high as 15% of the value of the arrangement.

For reasons that are not explained in the policy, this rule only applies to salary continuation payments made during the same calendar year in which the person left active employment. Payments made in the following year, oddly, are not insurable. Accordingly, although there is some real benefit, from a Workplace Safety and Insurance Board premium perspective, in avoiding salary continuations where an employee is terminated early in the year, these considerations will diminish in importance when an employee is terminated towards the end of the calendar year, since salary continuation payments made after December 31st will not be subject to WSIB premiums.

We are always pleased to be able to assist our employer clients in the planning of employee terminations and the structuring of separation payments in the most economical manner possible. ■