

Ministry
of
Labour

Ministère
du
Travail



Your Guide to the *Employment Standards Act, 2000*

esa
employment standards act

This guide provides information about the Employment Standards Act, 2000 (ESA) and regulations. The information is current as of its copyright date. This guide revises the information contained in all previous versions.

The Ministry of Labour reserves the right to revise this information without advance notice. Revisions will be included in the next guide update. In addition, new information, as it becomes available, will be posted on the Ministry's website at www.labour.gov.on.ca.

The guide is for your information and convenience only. It is not a legal document. For further information and exact wording, please see the ESA and regulations. A Policy and Interpretation Manual is also available for those who wish to have more detailed information about the application of the ESA. To order, call Carswell at 1-800-387-5164 or email orders@carswell.com.

If you have any questions about the ESA or are concerned that the ESA is not being complied with, please call the Employment Standards Information Centre at 1-800-531-5551 to discuss a particular situation or for information on how to file a complaint.

This guide uses examples to help provide a better understanding of the ESA. All personal and business names, characters, places and incidents used in these examples are fictitious.

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INTRODUCTION

The [Employment Standards Act, 2000](#) (ESA) provides the minimum standards for working in Ontario. It sets out the rights and responsibilities of employees and employers in Ontario workplaces. This is a flexible, modern law—one that helps employees to get fair treatment, employers to become more productive, and Ontario to attract more jobs, investment and stimulate economic growth.

About Your Guide to the ESA

This guide is a convenient source of information about key sections of the ESA. It is for your information and assistance only. It is not a legal document. **If you need details or exact language, please refer to the ESA itself and the [regulations](#).**

What Is Covered by the ESA?

The ESA covers a wide range of employment standards including: minimum requirements for workplaces; provisions to assist employees with family responsibilities; increased flexibility in work arrangements; and mechanisms for compliance and enforcement.

Subjects covered under the ESA include:

- Posting Requirements
- Hours of Work
- Eating Periods
- Rest Periods
- Wages and Overtime
- Minimum Wage
- Pregnancy and Parental Leave
- Personal Emergency Leave
- Family Medical Leave
- Public Holidays
- Vacation
- Termination and Severance of Employment
- Temporary Layoffs
- Equal Pay for Equal Work
- Homeworkers
- Enforcement and Compliance

Greater Right or Benefit

If a provision in an agreement gives an employee a greater right or benefit than a minimum employment standard under the ESA then that provision applies to the employee.

Waiver of Rights

No employee can agree to waive or give up his or her rights under the ESA (for example, the right to receive overtime pay or public holiday pay). Any such agreement is null and void.

Other Workplace-Related Laws

The ESA contains only some of the rules affecting work in Ontario. Other provincial and federal legislation governs issues such as workplace health and safety, human rights and labour relations. Related Ontario laws include the *Occupational Health and Safety Act*, the *Workplace Safety and Insurance Act, 1997*, the *Labour Relations Act, 1995*, the *Pay Equity Act*, and the *Human Rights Code*. For more information about other Ontario laws, call ServiceOntario at (416) 326-1234 in Toronto, and toll free in the rest of Ontario at 1-800-267-8097 or visit www.serviceontario.ca.

Federal laws affecting workplaces include statutes on income tax, employment insurance and the *Canada Pension Plan*. For more information about federal laws, call the Government of Canada information line at 1-800-622-6232.

Who is Not Covered by the ESA?

Most employees and employers in Ontario are covered by the ESA. However, the ESA does not apply to certain employees and the employers of such employees, including:

- Employees and employers in sectors that fall under federal jurisdiction, such as airlines, banks, the federal civil service, post offices, radio and television stations and inter-provincial railways
- Individuals performing work under a program approved by a college of applied arts and technology or university
- A secondary school student who performs work under a work experience program authorized by the school board that operates the school in which the student is enrolled
- People who do community participation under the [Ontario Works Act, 1997](#)
- Police officers (except for the Lie Detectors provisions of the ESA, which do apply)
- Inmates taking part in work or rehabilitation programs, or young offenders who perform work as part of a sentence or order of a court
- People who hold political, judicial, religious or elected trade union offices.
- Employees of the Crown are excluded from some (but not all) provisions of the ESA.

For a complete listing of other individuals not governed by the ESA, please check the ESA and its regulations.

I. Posting Information: Rights and Obligations

To help ensure that employers understand their obligations and employees know their rights, the Minister of Labour has prepared and published a poster entitled “What You Should Know About the Ontario Employment Standards Act.” All employers covered by the ESA in the province (excluding the Crown) *must* display this poster in the employer’s workplace where it is likely to be seen by employees.

The poster contains a brief summary highlighting the main standards of the ESA, including:

- hours of work
- rest periods
- overtime pay
- minimum wage
- payroll records
- vacation time and pay
- public holidays
- leaves of absence from work
- termination notice and pay
- reprisals
- enforcement

If the majority language of a workplace is a language other than English, the employer must contact the Ministry of Labour to see whether the ministry has prepared a translation of the poster into that language. If so, the employer is required to post a copy of the translation next to the English or French version of the poster. All multilingual material is available on the Ministry of Labour’s website on the following page: http://www.labour.gov.on.ca/english/es/index_languages.html.

An employer who fails to meet these posting requirements may be fined and/or prosecuted by the ministry.

Copies of the [poster](#) can be obtained:

- free from the Ministry of Labour’s website, www.labour.gov.on.ca
and
- for the cost of shipping and handling, from ServiceOntario Publications, 1-800-668-9938.

II. Record Keeping

All employers in Ontario are required to keep written records about each person they hire.

These records must be kept by the employer, or by someone else on behalf of the employer, for a certain period of time. The employer must also ensure that the records are readily available for inspection.

Contents and Retention of Employee Records

The employer must record and retain the following information for each employee.

- The employee's name, address and starting date of employment. This must be kept for three years after the employee stopped working for the employer.
- The employee's date of birth if the employee is a student under 18. This must be kept for either three years after the employee's 18th birthday or three years after the employee stopped working for the employer, whichever happens first.
- The hours worked by the employee each day and week. This must be kept for three years after the day or week of work. If an employee receives a fixed salary for each pay period and the salary does not change (except if the employee works overtime) the employer is only required to record:
 - the employee's hours in excess of those hours in the employee's regular work week; **and**
 - the number of hours in excess of eight per day (or in excess of the hours in the employee's regular work day, if it is more than eight hours).

Employers are not required to record the hours of work for employees who are *exempt* from overtime pay and the provisions for maximum hours of work.

- Retention of written agreements to work excess hours or average overtime pay. An employer must retain copies of every agreement made with an employee to work excess hours or to average overtime pay for three years after the last day on which work was performed under the agreement.
- Retention of vacation time records. Employers are required to keep records of the vacation time earned since the date of hire but not taken before the start of the vacation entitlement year, the vacation time earned, and vacation time taken (if any) during the **vacation entitlement year** (or **stub period**).
- Retention of vacation pay records. The employer must also keep records of the **vacation pay** paid to the employee during the vacation entitlement year (and stub period, if any) and how that vacation pay was calculated. These records must be made no later than seven days after the start of the next vacation entitlement year (or first vacation entitlement year if the records relate to a stub period) or the first payday after the stub period or vacation entitlement year ends, whichever is later.

Generally, this information must be kept for three years after the record of vacation time and pay was made.

- Information contained in an employee's wage statement. This must be kept for three years after the information was given to the employee.
- All the documents relating to an employee's pregnancy, parental, family medical, personal emergency or declared emergency leave. These must be kept for three years after the day the leave expired.
- Homeworker register. Employers who employ "homeworkers" are also required to keep a register containing the name, address and wage rate of the homeworker. This must be kept for three years after the homeworker stopped working for the employer.

III. Payment of Wages

Employers must establish a regular pay period *and* a regular payday for employees.

An employer has to pay all the wages earned in each pay period, other than vacation pay that is accruing, no later than the employee's regular payday for the period.

Some employees earn commissions or "bonuses" based on sales made in a pay period. In these situations, the employment contract or the practice of the employer often provide that the commission or bonus is not "due and owing" or "earned" until some future event has occurred. For example, this could be when goods or services have been delivered to the customer and full payment has been received. In such cases, the commission or bonus is not "earned" in the pay period in which the sales are actually made. Instead, in accordance with the employer's accepted or agreed-on practice, it is "earned" and paid at a later date.

There are special rules about when employees must be paid their vacation pay. Refer to the [When to Pay Vacation Pay](#) for more information.

How Wages and Vacation Pay Are Paid

An employer may pay wages, including vacation pay, by:

- cash;
- cheque;
- direct deposit into the employee's account at a bank or other financial institution.

If payment is by cash or cheque, the employee must be paid the wages at the workplace or at some other place agreed to *in writing* by the employee.

If the wages are paid by direct deposit, the employee's account must be in his or her name. Nobody other than the employee can have access to the account unless the employee has authorized it. The branch or facility of the employee's financial institution must be within a reasonable distance from where the employee usually works, unless the employee agrees otherwise *in writing*.

When Employment Ends

If an employee stops working, the employer must pay his or her outstanding wages, including vacation pay (plus any payments due to the employee because the employment has ended – See [Termination of Employment](#) and [Severance Pay](#)):

- no later than seven days after the employment ends;
- or*
- on what would ordinarily have been the employee's next regular pay day;

whichever is later.

Wage Statements

On or before an employee's payday, the employer must provide the employee with a wage statement that sets out:

- the pay period for which the wages are being paid;
- the wage rate, if there is one;
- the gross amount of wages and—*unless* the employee is given the information in some other manner (such as in an employment contract)—how the gross wages were calculated;
- the amount and purpose of each deduction;
- any amounts that were paid in respect of room or board;
- the net amount of wages.

The wage statement must be:

- in writing;
or
- provided by e-mail if the employee has access to some means of making a paper copy.

The employee must be able to keep this information separate from his or her cheque.

Vacation Pay Statements

Employees may request (in writing) a statement containing the information in the employer's vacation records. The employer is required to provide the information no later than:

seven days after the request,
or
the first pay day after the employee makes the request,

whichever is later, but subject to the following:

- If the employee asks for information concerning the current stub period or vacation entitlement year, the employer is required to provide the information no later than:
 - seven days after the stub period or vacation entitlement year ends,
or
 - the first pay day after the stub period or vacation entitlement year ends,

whichever is later.

The employer is required to provide the information with respect to each stub year or vacation entitlement year only once.

If the employee has agreed that vacation pay will be paid on each pay cheque as it is earned, the employer does not need to keep records and provide statements about vacation pay as discussed above. Instead, the employer must report the **vacation pay** that is being paid separately from the amount of other wages on each wage statement, or provide a separate statement setting out the vacation pay that is being paid. The employer must also keep a record of that information.

Deductions from Wages and Vacation Pay

Only three kinds of deductions can be made from an employee's wages or vacation pay:

1. Statutory Deductions

Federal and provincial statutes sometimes require an employer to withhold or make deductions from an employee's wages. For example, employers are required to make deductions for income taxes, employment insurance premiums and Canada Pension Plan contributions.

An employer is not permitted to deduct more than the applicable statute allows and cannot make deductions if the money is not remitted to the proper authority.

2. Court Orders

A court order may say that an employee owes money either to the employer or to someone else other than his or her employer, and that the employer can make a deduction from the employee's wages.

If a court determines that an employee owes the employer money, the court order does not have to specifically allow the employer to deduct the debt from the employee's wages. The employer can make the deduction.

However, suppose an employee owes money to someone else other than his or her employer. In this case, a court order may direct an employer to make a deduction from an employee's wages and send the money to a third party. The employer is not allowed to make this deduction if the money is not properly sent on to the third party.

The [Wages Act](#) also limits how much the employer is allowed to deduct at any one time.

3. Written Authorization

An employer may also deduct money from an employee's wages if the employee has signed a *written statement* authorizing the deduction. This is called a "written authorization."

An employee's written authorization must state that a deduction from wages is allowed. The authorization must also:

- specify the amount of money to be deducted;
- *or*
- provide a method of calculating the specific amount of money to be deducted.

An employee's verbal authorization or a general statement ("blanket authorization") that an employee owes money to the employer under certain circumstances is not sufficient to allow a deduction from wages.

Even with a signed authorization, an employer *cannot* make a deduction from wages if:

- the purpose is to cover a loss due to "faulty work." For example, "faulty work" could be a mistake in a credit card transaction, work that is spoiled or rejected, or a situation where tools are broken or company vehicles damaged;
- or*
- the employer has a cash shortage or has had property lost or stolen when an employee did not have *sole* access and total control over cash or property that is lost or stolen. A deduction can only be made when the employee was the *only one* to have access to the cash or property, and has provided a written authorization to the employer to make the deduction.

IV. Minimum Wage

Minimum wage is the lowest wage rate an employer can pay an employee. Most employees are eligible for minimum wage, whether they are full-time, part-time, casual employees, or are paid an hourly rate, commission, piece rate, flat rate or salary. Some employees have jobs that are exempt from the minimum wage provisions of the ESA. (See "[Industries and Jobs with ESA Exemptions and/or Special Rules](#)" for information on these job categories.)

Minimum Wage Rates

Minimum Wage Rate	January 1995	February 1, 2004	February 1, 2005	February 1, 2006	February 1, 2007
General Minimum Wage	\$6.85 per hour	\$7.15 per hour	\$7.45 per hour	\$7.75 per hour	\$8.00 per hour
Student Minimum Wage	\$6.40 per hour	\$6.70 per hour	\$6.95 per hour	\$7.25 per hour	\$7.50 per hour
Liquor Servers Minimum Wage	\$5.95 per hour	\$6.20 per hour	\$6.50 per hour	\$6.75 per hour	\$6.95 per hour
Hunting and Fishing Guides Minimum Wage	\$34.25: rate for working less than five consecutive hours in a day; \$68.50: rate for working five or more hours in a day whether or not the hours are consecutive	\$35.75	\$37.25	\$38.75	\$40.00
		\$71.50	\$74.50	\$77.50	\$80.00
Homeworkers Wage (110 per cent of the general minimum wage)	\$7.54 per hour	\$7.87 per hour	\$8.20 per hour	\$8.53 per hour	\$8.80 per hour

General minimum wage – This rate applies to most employees.

Student wage – This rate applies to students under the age of 18 who attend an educational institution and work 28 hours a week or less when school is in session or work during a school break or summer holidays.

Liquor servers wage – This hourly rate applies to employees who serve liquor directly to customers or guests in licensed premises as a regular part of their work. "Licensed premises" are businesses for which a license or permit has been issued under the Liquor Licence Act.

Hunting and fishing guides wage – The minimum wage for hunting and fishing guides is based on blocks of time instead of by the hour. They get a minimum amount for working less than five consecutive hours in a day, and a different amount for working five hours or more in a day – whether or not the hours are consecutive.

Homeworkers wage – Homeworkers are employees who do paid work in their own homes. For example, they may sew clothes for a clothing manufacturer, answer telephone calls for a call centre, or write software for a high-tech company. **Note that students of any age (including students under the age of 18 years) who are employed as homeworkers must be paid the homemaker's minimum wage.**

The minimum wage rates in each of the above categories and scheduled annual increases are set out on the next page:

Example for calculating general minimum wage

One week in March of 2006, Julia works 37.5 hours. She is paid on a weekly basis. The minimum wage applicable to Julia is \$7.75 per hour. Since **compliance with the minimum wage requirements is based on pay periods**, Julia must earn *at least* 290.63 (37.5 hours × \$7.75 per hour = \$290.63) in this work week. (Note that [eating periods](#) are not included when counting how many hours an employee works in a week).

Minimum Wage Calculation for Employees Who Earn Commission

If an employee's pay is based completely or partly on commission, it must amount to at least the minimum wage for each hour the employee has worked.

A typical case:

Luba works on commission and has a weekly pay period. One week in March 2006, she earned \$150 in commission and worked 25 hours. The minimum wage is \$7.75 an hour. The minimum wage (\$7.75) multiplied by the number of hours worked in the pay period (25) is \$193.75. Luba is owed the difference between her commission pay (\$150) and the required minimum wage (\$193.75). Luba's employer owes her \$43.75

Note: where overtime hours are worked, the calculation is more complicated.

Industry-specific and job-specific exemptions and special rules may apply to some salespeople who earn commission. Please see the chart "[Industries and Jobs with ESA Exemptions and/or Special Rules](#)" for details.

How Provision of Room and Board Affects Minimum Wage

For the purposes of ensuring that the applicable minimum wage has been paid to an employee, an employer can take into account the provision of room and board (meals). Room and board will only be deemed to have been paid as wages if the employee has received the meals and occupied the room.

What employers can deduct for room and board			
The amounts that an employer is deemed to have paid to the employee as wages for room or board or both is set out below:			
Room (weekly)		Meals	
- Private	\$31.70	- each meal:	\$2.55
- non-private	\$15.85	- weekly maximum:	\$53.55
- non-private (domestic workers only)	\$0.00		
Rooms and meals (weekly)		Harvest workers (only) weekly housing	
- with private room	\$85.25	- serviced housing:	\$99.35
- with non-private	\$69.40	- unserviced housing:	\$73.30
- non-private (domestic workers only)	\$53.55		

If an employee is paid more than the minimum wage, the amount that room and board can be deemed as wages paid to an employee can also increase. However, an employer must have *written* authorization from the employee if a higher amount is to be deemed paid as wages. In this case, the wages—after wages have been deemed paid for the provision of room and board but before any deductions are made—must be equal to or greater than the minimum wage less the maximum amounts set out that can be deemed as wages for room and board.

Employees Sent Home After Working Less Than Three Hours

When an employee is required to report to work for a shift of 3 hours or longer but works less than three hours, he or she must be paid whichever of the following amounts is the highest:

- three hours at the minimum wage,
- or**
- the employee's regular wage for the time worked.

For example, if an employee who is a liquor server is paid \$9.00 an hour and works only two hours, he or she is entitled to three hours at minimum wage (e.g., \$6.75 - the liquor servers

minimum wage from February 1, 2006 to February 1, 2007 - x 3 = \$20.25) instead of two hours at his or her regular wage (\$9.00 x 2 = \$18.00).

This is called the "three-hour rule."

The rule does not apply to:

- students (including students over 18 years of age)
- employees whose regular shift is three hours or less
- where the cause of the employee not being able to work at least three hours was beyond the employer's control.

Special rules may apply to certain industries. Please refer to the ESA and regulations.

When the Minimum Wage Changes

If the minimum wage rate changes during a pay period, the pay period will be treated as if it were two separate pay periods and the employee will be entitled to at least the minimum wage that applies in each of those periods.

V. Hours of Work

Certain industries and job categories are exempt from the hours of work rules set out in the ESA. Please refer to "[Industries and Jobs with ESA Exemptions and/or Special Rules](#)" for more information.

Daily and Weekly Limits on Hours of Work

Daily Limit

The maximum number of hours most employees can be required to work **in a day** is *eight* hours a day *or* the number of hours in an established regular workday, if it is longer than eight hours. The only way the daily maximum can be exceeded is by *written* agreement.

Weekly Limit

The maximum number of hours most employees can be required to work **in a week** is *48* hours a week. The only way the weekly maximum can be exceeded is by *written* agreement and approval of the Director of Employment Standards. (An employer may require employees to start working some additional hours 30 days after applying for the Director's approval, as long as certain conditions are met.) An employer must have the Director's approval before an employee can work more than 60 hours a week.

Written Agreement Requirements for Exceeding Limits on Hours of Work

An employer and an employee can agree *in writing* that the employee will work more than:

- eight hours a day;
- his or her established *regular* workday -- if it is longer than eight hours;
- 48 hours a week.

These agreements are valid only if, prior to making the agreement, the employer gives the employee the [Information Sheet for Employees About Hours of Work and Overtime Pay](#) prepared by the Director of Employment Standards that describes the hours of work and overtime rules in the ESA. In order to be valid, the agreement must also include a statement in which the employee acknowledges receipt of the Information Sheet.

In most cases, an employee can cancel an agreement to work more hours by giving the employer two weeks' *written* notice and an employer can cancel the agreement by providing reasonable notice. Once the agreement is revoked an employee is not permitted to work excess daily or weekly hours even if the employer has an approval from the Director of Employment Standards for excess weekly hours.

Director Approval Required to Exceed Weekly Limits on Hours of Work

Employers who would like to make an application for approval for excess weekly hours are required to make their application in a form provided by the Ministry of Labour. An employer who makes an [application for excess weekly hours](#) must post a copy of the application in their workplace on the day the application is submitted in accordance with the Act where it is likely to come to the attention of the employee(s) identified in the application. When the approval or a notice of refusal of the application is received, this must be posted in place of the application.

Hours Free from Work

Employees are entitled to a certain number of hours free from having to work.

Daily

An employee must receive at least 11 consecutive hours off work each day. This applies even if:

- the employer and the employee have agreed *in writing* to a longer workday;
or
- the employer has established a longer regular workday.

This rule does not apply to employees who are on call and are “called in” to work during a period when they would not normally be working.

Between Shifts

Employees must receive at least *eight* hours off work between shifts.

This does not apply if the total time worked on both shifts is not more than 13 hours.

An employee and employer can also agree *in writing* that the employee will receive less than eight hours off work between shifts.

Split shifts

Mabel works in a restaurant. She is on split shifts, working from 6 a.m. to 11 a.m. and then from 2 p.m. to 7 p.m. The total time of her two shifts is 10 hours. Mabel does not have to have eight hours off between the split shifts, because the hours she worked do not exceed 13 hours.

Weekly or Bi-Weekly

Employees must receive at least:

- 24 consecutive hours off work in each work week;
or
- 48 consecutive hours off work in every period of two consecutive work weeks.

Exceptional Circumstances

In exceptional circumstances, and only so far as is necessary to avoid *serious interference* with the ordinary working of the employer's establishment or operations, an employer can *require* an employee to work:

- more than the normal limit of eight hours a day, or the established regular work day if that is longer;
- more than the 48 hours per week (or the greater number of weekly hours agreed to and which are the subject of an approval from the Director of Employment Standards);
- during a required period free from work (see [Hours Free From Work](#)).

Exceptional circumstances exist when:

- there is an emergency;
- something unforeseen occurs that interrupts the continued delivery of essential public services, *regardless of who delivers these services* (for example, hospital, public transit or firefighting services, even if the employee only indirectly supports these services, such as an employee of a company that is contracted to prepare and deliver patient meals to a hospital);
- something unforeseen occurs that would interrupt continuous processes;
- something unforeseen occurs that would interrupt seasonal operations (that is, operations that are limited to or dependent on specific conditions or events -- such as winter ski operations);
- it is necessary to carry out urgent repair work to the employer's plant or equipment.

Here are some examples:

- natural disasters (very extreme weather);
- major equipment failures;
- fire and floods;
- an accident or breakdown in machinery that would prevent others in the workplace from doing their jobs (for example, the shutdown of an assembly line in a manufacturing plant).

Here are examples of situations that do not fall under the exceptional circumstances exemption:

- when rush orders are being filled;
- during inventory taking;
- when an employee does not show up for work;
- when poor weather slows shipping or receiving;
- during seasonal busy periods (such as Christmas);
- during routine or scheduled maintenance.

Eating Periods and Breaks

Employers are required to provide eating periods to employees, but they are not required to provide other types of breaks.

Eating Periods

An employee must not work for more than five hours in a row without getting a 30-minute eating period (meal break) free from work. However, if the employer and employee agree, the eating period can be split into two eating periods *within* every five consecutive hours. Together these must total at least 30 minutes. This agreement can be oral or in writing.

Meal breaks are unpaid unless the employee's employment contract requires payment. Even if the employer pays for meal breaks, the employee must be free from work in order for the time to be considered a meal break.

Meal breaks, whether paid or unpaid, are not considered hours of work, and are not counted toward overtime.

Coffee and Other Breaks

Employers do not have to give employees "coffee" breaks or any other kind of break other than meal breaks.

Employees who are required to remain at the workplace during a coffee break or other type of break must be paid at least the minimum wage for that time. If an employee is free to leave the workplace during the coffee break or other type of break, the employer does not have to pay for the time.

VI. Overtime

For most employees, overtime begins after they have worked 44 hours in a work week. After that time, they must receive overtime pay.

Overtime Pay

Overtime pay is 1½ times the employee's regular rate of pay. (This is often called "time and a half.")

For example, an employee who has a regular rate of \$8.00 an hour will have an overtime rate of \$12.00 an hour ($8 \times 1.5 = 12$). The employee must therefore be paid at a rate of \$12.00 an hour for every hour worked in excess of 44 in a week.

No Overtime on a Daily Basis

Unless a contract of employment or a collective agreement states otherwise, an employee does not earn overtime pay on a daily basis by working more than a set number of hours a day. Overtime is calculated only:

- on a weekly basis
- *or*
- over a longer period under an averaging agreement

Exceptions

Many employees have jobs that are exempt from the overtime provisions of the ESA. Others work in jobs where the overtime threshold is more than 44 hours in a work week. (See "[Industries and Jobs with ESA Exemptions and/or Special Rules](#)")

Managers and Supervisors

Managers and supervisors do not qualify for overtime if the work they do is managerial or supervisory. Even if they perform other kinds of tasks that are not managerial or supervisory, they do not get overtime pay if these tasks are performed only on an irregular or exceptional basis.

Different Kinds of Work ("50% Rule")

Some employees have jobs where they are required to do more than one kind of work. Some of the work might be specifically exempt from overtime pay, while other parts might be covered. If at least 50 per cent of the hours the employee works are in a job category that is covered, the employee qualifies for overtime pay.

when an employee does two kinds of work:

Gerard works for a taxi company both as a cab driver and as a dispatcher in the office. Working as a cab driver he is exempt from overtime pay, but working in the office as a dispatcher he is not.

During a work week, Gerard worked 26 hours in the office and 24 hours driving a cab, for a total of 50 hours. This is six hours over the overtime threshold of 44 hours.

Because Gerard spent at least 50 per cent of his working hours that week as a dispatcher (a job category that is covered), he qualifies for six hours of overtime pay.

Agreements for Paid Time Off Instead of Overtime Pay

An employee and an employer can agree in writing that the employee will receive paid time off work instead of overtime pay. This is sometimes called “banked” time or “time off in lieu.”

If an employee has agreed to bank overtime hours, he or she must be given 1½ hours of paid time off work for each hour of overtime worked.

Paid time off must be taken within three months of the week in which the overtime was earned or, if the employee agrees in writing, it can be taken within 12 months.

If an employee’s job ends before he or she has taken the paid time off, the employee must receive overtime pay. This must be paid no later than seven days after the date the employment ended or on what would have been the employee’s next pay day.

Calculating Overtime Pay

The manner in which overtime pay is calculated varies depending on whether the employee is paid on an hourly basis, on a fixed salary, or has a fluctuating salary. Overtime pay calculations may also be affected by public holidays. The following are several examples of how overtime pay is calculated in different cases.

Hourly Paid Employees

Ravi’s regular pay is \$8.00 an hour. His overtime rate (1½ X regular hourly pay) is \$12.00 an hour. This week Ravi worked the following hours:

Day	Hours Worked
Sunday	0
Monday	8
Tuesday	12
Wednesday	9
Thursday	8
Friday	8
<u>Saturday</u>	<u>8</u>
Total hours:	53

Any hours worked over 44 in a week are overtime hours. Ravi worked nine hours of overtime (53 - 44 = 9).

Ravi's pay for the week is calculated as follows:

Regular pay:	44 X \$8.00 =	\$352.00
Overtime pay	9 X \$12.00 =	108.00
Total pay:		\$460.00

Employees on a Fixed Salary

If an employee's hours of work change from day to day but his or her weekly pay stays the same, the employee is paid a fixed salary.

A fixed salary compensates an employee for all non-overtime hours up to and including 44 hours a week. After 44 hours, the employee is entitled to overtime pay.

Sharon's salary is \$500.00 a week. She worked 50 hours this work week.

1. First Sharon's regular (non-overtime) hourly rate of pay is calculated:
 $\$500.00 \div 44 = \11.36
Sharon was paid a regular rate of \$11.36 for each hour she worked up to and including 44 hours.
2. Next her overtime rate is calculated:
 $\$11.36 \text{ regular rate} \times 1\frac{1}{2} = \17.04
Her overtime rate is \$17.04 for every hour in excess of 44.
3. Then the amount of overtime she worked is calculated:
 $50 \text{ hours} - 44 \text{ hours} = 6 \text{ hours of overtime}$
4. Her overtime pay is calculated:
 $6 \text{ hours} \times \$17.04 \text{ an hour} = \102.24
Sharon is entitled to \$102.24 in overtime pay.
5. Finally, Sharon's regular salary and overtime pay are added together:

Regular salary:	\$500.00
Overtime pay:	102.24
Total pay:	\$602.24

Result: Sharon is entitled to total pay of \$602.24.

Employees on a Fluctuating Salary

If an employee has set hours and a salary that is adjusted for variations in the set hours, the employee's salary fluctuates.

Suppose Ben is hired on the understanding that he will be paid \$400.00 a week for a regular work week of 40 hours. His salary is adjusted for weeks in which he works either more hours or fewer hours. In this case, Ben is actually receiving a wage based on the number of hours he works.

Ben's salary is \$400.00 in a regular work week of 40 hours (where the salary is not adjusted). This week, he worked 50 hours.

1. First Ben's regular (non-overtime) hourly rate of pay is calculated:
 $\$400.00 \div 40 = \10
 Ben's regular rate of pay is \$10.00 an hour.
2. Next his regular (non-overtime) earnings are calculated. He is entitled to \$10.00 an hour for all hours up to and including 44 hours a week:
 $\$10.00 \text{ regular rate} \times 44 \text{ hours} = \440.00
 Ben's regular earnings for the week are \$440.00.
3. Then his hourly overtime rate is calculated:
 $\$10.00 \text{ regular rate} \times 1\frac{1}{2} = \15.00
 His overtime rate is \$15.00 for every hour in excess of 44 hours.
4. The amount of overtime Ben worked is calculated:
 $50 \text{ hours} - 44 \text{ hours} = 6 \text{ hours of overtime.}$
5. His overtime pay is calculated:
 $6 \text{ hours} \times \$15.00 \text{ an hour} = \90.00
 Ben is entitled to \$90.00 in overtime pay.
6. Finally, Ben's regular pay and overtime pay are added together:

Regular pay:	\$440.00
Overtime pay:	<u>90.00</u>
Total pay:	\$530.00

Result: Ben is entitled to total pay of \$530.00.

Calculating Overtime When There is a Public Holiday

When an employee's work week includes a public holiday

John's regular pay is \$8.00 an hour. John worked overtime on a week with a public holiday, but he did not work on the holiday. John's public holiday pay for the Monday is \$64.00 (See [Public Holidays Pay](#) for information on how to calculate public holiday pay). This week John worked the following hours:

Day	Hours Worked
Sunday	0
Monday (public holiday)	0
Tuesday	12
Wednesday	9
Thursday	8
Friday	8
Saturday	<u>8</u>
Total hours:	45

John worked one hour of overtime ($45 - 44 = 1$).

John's pay for the week is calculated as follows:

Regular pay:	44 X \$8.00 =	\$352.00
Overtime pay:	1 X \$12.00 =	12.00
Public holiday pay:		<u>64.00</u>
Total pay:		\$428.00

When an employee works on a public holiday and gets premium pay

Marylin's regular hourly pay is \$10.00/hour. Marylin and her employer agreed in writing that she would work on the public holiday and she would be paid premium pay for the hours she worked on the holiday plus public holiday pay.

During the week of the public holiday, Marylin worked the following hours:

Day	Hours Worked
Sunday	0
Monday	9
Tuesday	9
Wednesday	9
Thursday (public holiday)	9
Friday	9
<u>Saturday</u>	<u>9</u>
Total hours:	54

Since Marylin received premium pay for working nine hours on the public holiday, these hours are not included when the overtime pay is calculated:

54 hours - 9 hours at premium pay = 45 hours = 1 hour of overtime pay

Marylin's pay for the week is calculated as follows:

Regular pay:	44 X \$10.00 =	\$440.00
Overtime pay:	1 X \$15.00 =	15.00
Premium pay:	9 X \$15.00 =	135.00
Public holiday pay:		<u>90.00</u>
Total pay:		\$680.00

When an employee works on a public holiday and gets a substitute day off

Kathleen's regular hourly pay is \$9.00. Kathleen and her employer agreed in writing that she would work on the public holiday and she would receive a substitute day off work with public holiday pay plus her regular rate for hours worked on the public holiday (rather than be paid public holiday pay plus premium pay for the hours she worked on the holiday).

During the week of the public holiday, Kathleen worked the following hours:

Day	Hours
Sunday	0
Monday	9
Tuesday	9
Wednesday	8
Thursday	9
Friday (public holiday)	9
Saturday	6
Total hours:	50

Since Kathleen agreed not to receive premium pay for the nine hours she worked on the public holiday, these hours are counted when the overtime pay is calculated:

$$50 \text{ hours} - 44 \text{ hours} = 6 \text{ hours of overtime}$$

Kathleen's pay for the week is calculated as follows:

Regular pay: 44 X \$9.00	=	\$396.00
Overtime pay: 6 X \$13.50	=	81.00
Total pay:		\$477.00

Kathleen will also get a substitute day off work with public holiday pay within three months of the public holiday or, if Kathleen and her employer agree, within twelve months of the public holiday.

Employees Who Are Paid Wages That Are Not Based on the Hours Worked

Some employees' wages are not based on the number of hours they work in a week but instead are paid by the number of pieces they complete and/or by commission. These employees must be paid at least the minimum wage for all the hours they work. They are also usually entitled to overtime if they work more than 44 hours a week.

Calculating the overtime for piecework or straight commission employees

Becka is paid on a piecework basis. Rhian earns straight commissions. They both worked 48 hours this work week and each received a total of \$480.00.

1. First the regular (non-overtime) hourly rate of pay is calculated:
 $\$480.00 \div 44 \text{ hours} = \10.91
Their regular hourly rate of pay is \$10.91.
2. Then the hourly overtime rate is calculated:
 $\$10.91 \text{ regular rate} \times 1\frac{1}{2} = \16.37
Their overtime rate is \$16.37 for every hour in excess of 44 hours.

3. Next, the amount of overtime worked is calculated:
48 hours – 44 hours = 4 hours of overtime.
4. The overtime pay is calculated:
4 hours X \$16.37 an hour = \$65.48
They are each entitled to \$65.48 in overtime pay.
5. Finally, the regular pay and overtime pay are added together:

Regular pay:	\$480.00
<u>Overtime pay:</u>	<u>65.48</u>
Total pay:	\$545.48

Result: Becka and Rhian are each entitled to total pay of \$545.48.

Calculating the overtime for hourly rate plus commission employees

Justine is paid \$10.00 an hour plus commissions. In one work week she worked 50 hours and was paid \$500.00 in hourly wages plus \$100.00 in commissions.

1. First Justine’s regular rate is calculated:
\$500.00 + \$100.00 = \$600.00 total wages paid
\$600.00 ÷ 44 hours = \$13.64 an hour
Justine’s regular rate is \$13.64 an hour.
2. Then her overtime rate is calculated:
\$13.64 regular rate X 1½ = \$20.46
Her overtime rate is \$20.46.
3. Next her overtime entitlement is calculated:
6 hours X \$20.46 an hour = \$122.76
She earned \$122.76 in overtime wages.
4. Because Justine was paid \$10.00 per hour for all hours she worked, including her 6 overtime hours, she has already received \$60.00 in respect of her overtime entitlement.

Result: Justine was entitled to \$122.92 for overtime pay and was paid \$60.00. Her employer therefore owes her an additional \$62.76.

Note: Some commission employees are exempt from the overtime provisions. (See “[Industries and Jobs with ESA Exemptions and/or Special Rules](#)”.)

Averaging Agreements

Sometimes employees need to work variable hours to meet family responsibilities. For example, perhaps an employee needs to take a child once a month for a day of special medical treatment, but cannot afford to lose a day’s pay. Instead the employee would like to work extra hours in the preceding weeks, to make up the time.

Likewise, employers may need employees to work extra hours during a peak period, in order to fill customer orders.

An employer and an employee can agree in writing to average the employee's hours of work over a specified period of two or more weeks for the purposes of calculating overtime pay. Under such an agreement, an employee would only qualify for overtime pay if the average hours worked per week during the averaging period exceed 44 hours.

For example, if the agreed period for averaging an employee's hours of work is four weeks, the employee is entitled to overtime only after working 176 hours during the four work weeks (44 hours x 4 weeks = 176 hours). Note that averaging periods cannot overlap one another and must follow one after the other without gaps or breaks.

Where a union does not represent employees, averaging agreements must contain an expiry date that cannot be more than two years from the date the averaging agreement takes effect. Where the agreement applies to unionized employees, the employer and union may agree to any expiry date.

An averaging agreement cannot be revoked by either the employer or employee(s) before its expiry date, unless both the employer and employee(s) agree in writing to revoke it.

In addition to having agreements in writing, the employer must also obtain an approval to average hours for overtime pay purposes from the Director of Employment Standards in order to average hours of work for overtime pay purposes.

If, however, an employer has not received either an approval or a notice of refusal from the Director within 30 days of serving the application for such an approval on the Director and has met all other conditions as set out in the ESA, the employer may begin averaging employees' hours but only over two-week periods.

An approval to average hours for overtime purposes expires on the date on which the averaging agreement between the employer and employee expires, or on any earlier date specified by the Director in the approval. The Director of Employment Standards may also unilaterally revoke an approval to average hours of work by providing the employer with reasonable notice.

Employers who would like to make an application for an approval to average hours of work for overtime pay purposes are required to make their application in a form provided by the Ministry of Labour. The [application form](#) is available on the Ministry's website. For more information, please refer to the [Employer's Guide to the Application Process: Excess Hours of Work/Averaging Hours](#).

An employer who receives an approval to average overtime pay must post a copy of the approval in the workplace where it is likely to come to the attention of the employee(s) identified in the approval and to keep it posted until it expires or is revoked and then remove it.

Agreements to Average Hours for Overtime Purposes That Were in Place Before The Law Changed On March 1, 2005

Prior to March 1, 2005, employees and employers could enter into averaging agreements for the purposes of determining overtime entitlements but only agreements to average over periods of four weeks or longer required the approval of the Director of Employment Standards. Averaging agreements entered into under the law as it read before March 1, 2005 and that had not expired or been revoked continued to be valid agreements on and after March 1, 2005. However, as of that date, employers with overtime averaging agreements were required to obtain an averaging approval from the Director of Employment Standards. (Approvals given before March 1, 2005 for

averaging agreements for four weeks or longer, were terminated as of February 28, 2005 and a “new” approval is required.)

Calculating overtime pay when hours of work are being averaged over two weeks

Myron and his employer agree in writing to average his hours for overtime purposes over a period of two weeks and Myron’s employer obtains an approval from the Director of Employment Standards. Myron works 54 hours the first week and 36 hours the second week. He earns \$10.00 an hour and his overtime rate is \$15.00 per hour ($1\frac{1}{2} \times \10.00).

Myron’s overtime entitlement is calculated as follows:

- The total number of hours worked in the averaging period are added together and then divided by the number of weeks in the averaging period to get the average number of hours worked in each week of the averaging period.

$$54 + 36 = 90 \text{ hours}$$
$$90 \text{ hours} \div 2 \text{ weeks} = 45 \text{ hours per week}$$

- The average number of hours worked per week minus 44 hours equals the average number of overtime hours in each week of the averaging period.

$$45 \text{ hours per week} - 44 \text{ hours per week} = 1 \text{ overtime hour per week}$$

- The overtime entitlement in week one and two of the averaging period is calculated by multiplying the average overtime hours per week by his overtime rate for that week.

$$\text{Week 1: } 1 \text{ hour} \times \$15.00 \text{ per hour} = \$15.00$$
$$\text{Week 2: } 1 \text{ hour} \times \$15.00 \text{ per hour} = \$15.00$$

Calculating overtime pay when hours of work are being averaged over four weeks

Connor earns \$10.00 an hour in weeks when he is working in the retail department and \$20.00 an hour when he is working on the assembly line of his employer’s operation. He and his employer have agreed in writing and the employer has received an approval from the Director of Employment Standards to average his hours over four weeks for the purpose of calculating overtime. In the first two weeks of the averaging period he is working in the retail department and his overtime rate ($\$10.00 \times 1\frac{1}{2}$) is \$15.00 an hour. In the second two weeks of the averaging period he is working on the assembly line and his overtime rate ($\$20.00 \times 1\frac{1}{2}$) is \$30.00 an hour.

The maximum number of hours an employee can work in a regular work week, before being paid overtime, is 44 hours. However, since Connor has signed a written agreement and his employer has an approval from the Director to average his hours of work for overtime pay purposes over a four week period he will qualify for overtime pay if his average hours (that is, the average hours per week during the averaging period) exceed 44 hours.

During a four-week period, Connor worked the following hours:

<u>Week 1</u>	<u>Week 2</u>	<u>Week 3</u>	<u>Week 4</u>	=	<u>Total</u>
56	43	35	46		180 hours

Connor's average hours per week in the averaging period are:
 $180 \div 4 = 45$ hours. Connor's average overtime is 1 hour per week.

Connor's overtime entitlement is:

Week 1 \$15.00 per hour X 1 hour = \$15.00

Week 2 \$15.00 per hour X 1 hour = \$15.00

Week 3 \$30.00 per hour X 1 hour = \$30.00

Week 4 \$30.00 per hour X 1 hour = \$30.00

Total overtime pay for 4 week averaging period = \$90.00

What Cannot Be Done

Except where there is an agreement to take time off in lieu of overtime or an agreement to average overtime, an employer and an employee cannot agree that the employee will give up his or her right to overtime pay under the ESA. Agreements such as these are not allowed and the employee is still entitled to overtime pay.

An employer cannot lower an employee's regular wage to avoid paying time and a half after 44 hours (or other overtime threshold that applies) in a work week. For example, if Josée's regular pay is \$12.00 an hour, her employer cannot drop her regular rate in a week when overtime was worked to \$8.00 an hour and then pay her 1½ times \$8.00 for overtime hours worked.

VII. Vacation

Vacation Time and Vacation Pay

This employment standard has two parts: vacation **time** and vacation **pay**. Some employees have jobs that are exempt from the vacation with pay provisions of the ESA. (See "[Industries and Jobs with ESA Exemptions and/or Special Rules](#)" for information on these job categories.)

Employees are entitled to two weeks of **vacation time** after each 12-month vacation entitlement year. Ordinarily, a vacation entitlement year is a recurring 12-month period beginning on the date of hire. Where the employer has established an alternative vacation entitlement year that begins on a date other than the date of hire, the employee is also entitled to a pro-rated amount of vacation time for the period (called a "stub period") that precedes the alternative vacation entitlement year.

Vacation pay must be at least four per cent of the "gross" wages (excluding any vacation pay) earned in the 12-month vacation entitlement year or stub period (where that applies).

An employee's contract of employment or a collective agreement may provide a greater right or benefit with respect to vacation time and/or pay.

An employee who does not complete either the full vacation entitlement year or the stub period (if any) does not qualify for vacation time under the ESA. However, employees earn vacation pay as they earn wages. So if an employee paid by the hour works even just one hour, he or she is still entitled to at least four percent of the hour's wages as vacation pay.

Key definitions:

- Vacation entitlement year: the 12-month period over which employees earn vacation.
- Standard vacation entitlement year – a recurring 12-month period beginning on the date of hire.
- Alternative vacation entitlement year – a recurring 12-month period chosen by the employer to begin on a date other than the employee's date of hire (e.g. employee hired June 1 but employer selects alternative vacation entitlement year commencing September 1).
- Stub period: Period between the date of hire and beginning of the first alternative vacation entitlement year or, the period between the end of a standard vacation entitlement year and the beginning of an alternative vacation entitlement year where the employer switches from a standard vacation entitlement year to an alternative vacation entitlement year. (e.g. If an employer has chosen an alternative vacation entitlement year that runs January 1 to December 31 and the employee is hired on September 1, the stub period will be September 1 to December 31.)

Vacation entitlement year and stub period will include time the employee spends away from work because of:

- Layoff
- sickness or injury
- pregnancy, parental, family medical, personal emergency, and declared emergency leaves
- any other approved leaves (*i.e.* where there is no break in the employment relationship).

Vacation Time

Employees earn a minimum of two weeks' vacation time upon completion of every 12-month vacation entitlement year. The ESA does not provide for any increases to the two-week vacation time entitlement although a contract of employment or collective agreement may do so.

If the vacation entitlement year is a standard vacation entitlement year, the employee will be entitled to a minimum of two weeks of vacation time after the 12 months following his or her date of hire and after each 12-month period thereafter.

If an employer establishes an alternative vacation entitlement year, the employee will be entitled to a minimum of two weeks of vacation time after each alternative vacation entitlement year but will also be entitled to a pro-rated amount of vacation time for the stub period preceding the start of the first alternative vacation entitlement year.

Calculating Stub Period Vacation Entitlements

When the employee has a regular work week

The vacation time entitlement for a stub period is calculated as two (2) weeks multiplied by the ratio (R) of the length of the stub period to 12 months.

Example:

- Employee has a regular work week.
- Employee hired September 1 and alternative vacation entitlement year begins January 1.
- Stub period is September 1 to December 31 (4 months)

Calculation of vacation entitlement for stub period: 2 weeks X R (ratio of stub period to 12 months) where R = 4months/12months

2 weeks X 4/12 = 2/3 of a week.

When the employee does not have a regular work week

The vacation entitlement for a stub period is calculated as two weeks times the average number of days worked per work week during the stub period (A) multiplied by the ratio of the length of the stub period to 12 months (R).

Example:

- Employee does not have a regular work week.
- Employee hired September 1 and alternative vacation entitlement year begins January 1
- Stub period is September 1 to December 31 and there are 17 work weeks in the stub period. The employee worked a total of 51 days in those 17 work weeks.

Calculation of vacation entitlement for stub period: 2 weeks X A X R where
A= 51days/17 work weeks and R = 4 months /12 months

2 weeks X 51/17 X 4/12 (or 2 weeks x 3 days/week X 1/3) = 2 days

Deadlines for taking vacation

The vacation time earned with respect to a completed vacation entitlement year or a stub period must be taken within 10 months following the completion of the vacation entitlement year or stub period. The employer has the right to schedule vacation as well as an obligation to ensure the vacation time is scheduled and taken before the end of that ten-month period.

For example:

Riley was hired on February 24, 2005. His employer established an alternative vacation entitlement year of July 1 to June 30. The pro-rated amount of vacation time that Riley earned for the stub period of February 24, 2005 to June 30, 2005 must be taken within ten months of the end of the stub period (that is, within ten months of June 30, 2005). The vacation time Riley earned for the entitlement year July 1, 2005 to June 30, 2006 would have to be taken within ten months of the end of the vacation entitlement year (that is, within ten months of June 30, 2006).

If the deadline under the ESA for taking a vacation comes up when an employee is on pregnancy, parental, family medical, personal emergency or declared emergency leave, the vacation must be taken when the leave ends or at a later date with the agreement (in writing) of the employer and the employee.

Likewise, if an employee's contract requires that some or all of his or her vacation must be taken within a specified period that comes up when the employee is on a leave and the employee would otherwise have to give up some or all of his or her vacation entitlements under the contract, the employee may defer taking the vacation until the leave ends or take it a later date with the agreement (in writing) of the employer and employee.

Foregoing Vacation

An employee can give up some or all of his or her earned vacation time with the employer's written agreement and the approval of the Director of Employment Standards. This approval does not affect an employer's obligation to pay the employee vacation pay; employees may give up vacation time, but not the right to vacation pay.

How to Schedule The Vacation Time Earned With Respect to a Vacation Entitlement Year

Employers are required to schedule the vacation time earned each vacation entitlement year in a block of two weeks or in two one-week blocks **unless the employee makes a written request, and the employer agrees in writing**, to schedule the vacation in shorter periods. In that case, it is necessary to calculate the number of single vacation days the employee is entitled to.

Calculating the entitlement to single vacation days earned with respect to a vacation entitlement year:

When the employee has a regular work week

The employer takes the number of days in the employee's usual work week and multiplies that number by 2.

- The employee regularly worked Monday, Wednesday and Friday or three days a week in the preceding vacation entitlement year.
- The employee is therefore entitled to 6 single vacation days in respect of that vacation entitlement year.

When the employee does not have a regular work week

The employer calculates the average number days worked in each week in the most recently completed vacation entitlement year and then multiplies that number by 2.

- The employee worked a total of 149 days in the preceding vacation entitlement year.
- There are 52.18 weeks per year.
- The average number of days worked per week in the year would be 149 days divided by 52.18
weeks per year = 2.86 days
- The single vacation days the employee would be entitled to in respect of that year would be 2 X
2.86 days or 5.72 days of vacation.

How to Schedule Vacation Time Earned with Respect to a Stub Period

The vacation time earned with respect to a stub period is calculated as single days based on the formulas set out under the heading **Calculating stub period vacation entitlements**.

If the amount of vacation time earned is between two and five days inclusive, the vacation days must be taken consecutively, unless the employee requests in writing and the employer agrees in writing to shorter periods.

If the amount of vacation time earned with respect to the stub period is more than five days, the first five days must be taken consecutively and any additional days may be taken together with the first five or in a separate period of consecutive days. However, the employee may request in writing and the employer may then agree to schedule the vacation in shorter periods.

Vacation Pay

Employees must receive a minimum of four per cent of the gross “wages” (excluding vacation pay) they earned in the 12 months vacation entitlement year or stub period for which the vacation is being given.

For example, suppose Janice earned gross wages of \$16,000.00 in her vacation entitlement year. She is entitled to four per cent of \$16,000.00 as vacation pay -- \$640.00.

If an employee’s contract or collective agreement provides a better vacation benefit than the minimum required, the employee may be entitled to a higher percentage of his or her gross earnings for vacation pay. For example, an employee might be entitled under his or her contract to three weeks’ vacation, with six per cent of gross earnings for vacation pay.

The gross “wages” on which vacation pay is calculated include:

- regular earnings, including commissions;
- bonuses and gifts that are non-discretionary or are related to hours of work;
- overtime pay;
- public holiday pay;
- termination pay; and
- allowances for room and board.

But do not include:

- vacation pay paid out or earned but not yet paid;
- tips and gratuities;
- discretionary bonuses and gifts that are not related to hours of work, production or efficiency (e.g. a Christmas bonus unrelated to performance);

- expenses and traveling allowances;
- living allowances;
- contributions made by an employer to a benefit plan and payments from a benefit plan (e.g. sick pay) that an employee is entitled to;
- federal employment insurance benefits;
- severance pay.

When to Pay Vacation Pay

In most cases, the vacation pay earned during a completed vacation entitlement year or stub period must be paid to an employee in a lump sum sometime before he or she takes the vacation time earned. There are four exceptions:

1. When the vacation time is being taken in periods of less than one week.
 - In this case, the employee must be paid vacation pay on or before the payday for the period in which the vacation falls.
 - For example, Alvaro is taking vacation from January 1 to January 3, and the normal payday that covers this period is January 30. Alvaro must be given his vacation pay on or before January 30.
2. When the employee has agreed in writing that his or her vacation pay will be paid on each pay cheque as it accrues (accumulates).
 - In this case, the employee's wage statement must show clearly the amount of the vacation pay being paid. This amount must also be shown separately from any other amounts paid.
 - The employer can also issue a separate wage statement for the vacation pay being paid.
3. If the employee agrees in writing, the employer can pay the vacation pay at any time agreed to by the employee.
4. If the employer pays the employee his or her wages by direct deposit into an account at a financial institution.
 - In this case, the employee must be paid vacation pay on or before the payday for the period in which the vacation falls.

When Employment Ends

When employment ends (for example, when an employee quits or is terminated), an employee is entitled to be paid the vacation pay that she has earned and that has not yet been paid out. In some cases this would include vacation pay earned during a previous vacation entitlement year or stub period as well as the vacation pay earned during the current vacation entitlement year or stub period. Vacation pay is also payable on termination pay but not on severance pay.

The unpaid vacation pay must be paid either within seven days of the employment ending or on what would have been the employee's next pay day, whichever is later.

Paying vacation pay owing when employment ends

Jenna was hired on April 1, 2005 and had a standard vacation entitlement year. On March 31, 2006 she had earned two weeks of vacation time and 4% of the wages earned in the vacation entitlement year as vacation pay. Her employer scheduled her vacation for the two-week period beginning June 1 and her vacation pay was to be paid prior to the commencement of that vacation. However, Jenna quit her employment on May 15, 2006. When she quit, her employer was required to pay her the vacation pay earned in the vacation entitlement year April 1, 2005 to March 31, 2006 **plus** the vacation pay earned in her last (incomplete) vacation entitlement year (being 4% of the wages she earned between April 1, 2005 and May 15).

Vacation and Public Holidays

A [public holiday](#) could fall during an employee's vacation period. In that case, the day remains a vacation day for the employee, and if the employee qualifies for the public holiday, the employee is entitled to one of the following:

- The employee can have a substitute day off work with public holiday pay. This must be taken within three months of the public holiday or, if the employee agrees in writing, within 12 months of the public holiday;
- or**
- the employer can pay public holiday pay for that day without giving the employee a substitute day off work, if the employee agrees in writing.

Employees may also agree in writing to work on a public holiday that falls while they are on vacation.

Vacation and Leaves of Absence

Because there is no break in the employment relationship during a period of pregnancy, parental, family medical, personal emergency or declared emergency leave, the time on leave counts toward the completion of a vacation entitlement year or stub period. For example, an employee on leave for all or only part of a vacation entitlement year would have earned a full two weeks of vacation time at the end of the vacation entitlement year. The vacation pay earned during that vacation entitlement year would be a minimum of 4% of any wages actually earned during the year.

Where an employee's contract provides that "paid vacation" is earned through active service (e.g. 1.5 paid vacation days for each month of service or 3 weeks paid vacation for each year of service)

an employee on leave may not earn either vacation time and/or pay while on leave. However, at the end of the vacation entitlement year or stub period, the employer must ensure the employee receives the greater of what was in fact earned under the contract and the minimum vacation time, and vacation pay, he or she would have earned under the ESA.

When a contract of employment provides a greater right to vacation based on active service

Ingrid's contract of employment provides that she earns two paid vacation days for every month of active service. In other words, vacation time and vacation pay are earned together through active service. Ingrid is on a pregnancy/ parental leave for 6 months of her vacation entitlement year.

Although Ingrid's length of service continues to accrue while she is on pregnancy and parental leave, she is not credited with "active" service while on leave.

At the end of her vacation entitlement year her employer determines that she has earned 12 paid vacation days under her contract of employment. Because she regularly works 5 days a week, she has earned enough vacation time under her contract to exceed the two-week minimum required under the ESA. In addition, the employer is able to show that 12 days of regular wages exceeds 4% of the wages she had actually earned during the vacation entitlement year.

Employee must receive at least 2 weeks of vacation time with 4% vacation pay

Tony earns 3 weeks of paid vacation for every year of active service. He is on a parental leave for 8 months of his vacation entitlement year. Under his contract of employment Tony earned 1/3 of the 3 weeks paid vacation he would otherwise earn in a year. In other words, he earned 1 week of paid vacation for the vacation entitlement year. However, his employer must ensure that Tony receives at least the minimum ESA vacation entitlements of 2 weeks of vacation time and 4% vacation pay. The employer will therefore have to provide Tony with another week of vacation time and ensure the week of vacation pay earned under the contract is not less than 4% of the gross wages he had actually earned in the vacation entitlement year.

An employee who is on a pregnancy, parental, family medical, personal emergency or declared emergency leave has the right to defer taking her or his vacation entitlement until the leave of absence expires (or until some later date if the employer and employee agree). This is the case even if the employee's contract of employment states that the employee is not allowed to defer taking vacation or restricts an employee's ability to do so.

This means that an employee who is on a leave of absence under the ESA will not lose any vacation time or vacation pay because he or she is on a leave. It also ensures that an employee does not have to choose between taking less than his or her full leave entitlement and losing some or all of his or her vacation pay or vacation time.

An employee who has the right to defer vacation until the expiry of a leave of absence may forego his or her right to take vacation time, with the agreement of the employer and the approval of the Director of Employment Standards, Ministry of Labour. However, an employee cannot forego his or her right to be paid vacation pay.

VIII. Public Holidays

Ontario has eight public holidays:

- New Year's Day
- Good Friday
- Victoria Day
- Canada Day
- Labour Day
- Thanksgiving Day
- Christmas Day
- Boxing Day (December 26).

Most employees who qualify are entitled to **take these days off work and be paid public holiday pay**. Alternatively, they can **agree in writing to work on the holiday** and they will be paid:

- public holiday pay plus premium pay for the hours worked on the public holiday;
or
- their regular rate for hours worked on the holiday, plus they will receive another day off (called a “substitute” holiday) with public holiday pay. If the employee has earned a *substitute* day off with public holiday pay, the public holiday pay calculation is done with respect to the four work weeks before the work week in which the *substitute* day off falls.

Some employees may be required to work on a public holiday. (See [Special Rules for Certain Industries](#) later in this Chapter.) While most employees are eligible for the public holiday entitlement, some employees work in jobs that are not covered by the public holiday provisions of the ESA. To determine whether a job is covered, or if special rules apply, see “[Industries and Jobs with ESA Exemptions and Special Rules](#).”

The amount of public holiday pay to which an employee is entitled is all of the *regular wages earned* by the employee in the four work weeks before the work week with the public holiday *plus* all of the *vacation pay payable* to the employee with respect to the four work weeks before the work week with the public holiday, *divided by 20*.

Regular wages does not include any overtime or premium pay payable to an employee.

While some employers give their employees a holiday on Easter Sunday, Easter Monday, the first Monday in August, or Remembrance Day, the employer is not required to do so under the ESA.

Performing Both Covered and Exempt Work

Some employees perform more than one kind of work for an employer. Some of this work might be covered by the public holiday part of the ESA, while another kind of work might be exempt from public holiday coverage.

If an employee performs both kinds of work, exempt and covered, he or she is eligible for the public holiday entitlement with respect to a particular public holiday if at least half of the work performed in the work week of the public holiday is work that is covered.

Here is an example:

Rupert works for a taxi company as both a taxi cab driver (work that is exempt from public holiday coverage) and a dispatcher (work that is covered by the public holiday part of the ESA). In the work week that Canada Day fell, at least half of Rupert's work was as a dispatcher. Because this work is covered by the public holiday part of the ESA, he is eligible for the public holiday entitlement for Canada Day.

Qualifying for Public Holiday Entitlements

Generally, employees qualify for the public holiday entitlement unless they:

- fail without reasonable cause to work all of their last regularly scheduled day of work *before* the public holiday or all of their first regularly scheduled day of work *after* the public holiday (this is called the “Last and First Rule”);
- or***
- fail without reasonable cause to work their entire shift *on* the public holiday if they agreed to or were required to work that day.

Most employees who fail to qualify for the public holiday entitlement are still entitled to be paid premium pay for every hour they work on the holiday.

Qualified employees can be full time, part time, permanent or on contract. They can also be students. It does not matter how recently they were hired, or how many days they worked before the public holiday.

The "Last and First Rule"

The "last regularly scheduled day of work before the public holiday" and the "first regularly scheduled day of work after the public holiday" do not have to be the days right before and right after the holiday.

For example, an employee might not be scheduled to work the day right before or after the holiday. As long as the employee works all of his or her last regularly scheduled shift before the holiday and all of the first one after it, or provides reasonable cause for not working either of those days, he or she meets this qualifying criterion.

Reasonable Cause

An employee is generally considered to have "reasonable cause" for missing work when something beyond his or her control prevents the employee from working. Examples include, but are not limited to: absences related to personal emergency leave (i.e. personal illness, injury or medical emergency, and the death, illness, injury, medical emergency or urgent matter relating to certain family members and dependent relatives) as well as absences for family medical leave.

Employees are responsible for showing that they had reasonable cause for staying away from work. If they can do so, they still qualify for public holiday entitlements.

How the Last and First Rule Works

A typical case

Rosie's regular work week runs from Monday to Thursday. A public holiday falls on a Monday, and Rosie's workplace closes down for that day. If Rosie works the entire shift on the Thursday before the holiday and the Tuesday after the holiday, or shows reasonable cause for failing to work either of those days, she qualifies to be paid for the holiday.

When an employee takes a day off

A public holiday falls on a Monday, and Lev's workplace closes down for that day. Lev regularly works Monday to Thursday. Lev has asked his employer for permission to take off the Thursday before the public holiday because he has a personal appointment. His employer *agrees*. Lev's last regularly scheduled work day before the holiday is now considered to be on the Wednesday.

If Lev works his entire Wednesday shift before the holiday and his entire Tuesday shift after the holiday, or has reasonable cause for not working either of those days, he qualifies for the paid public holiday.

When an employee leaves early

A public holiday falls on a Friday, and Doris's workplace is closed for the holiday. Doris normally works from 9 a.m. to 5 p.m., Monday to Friday. However, she wants to leave at 3 p.m. on the Thursday before the public holiday. The employer *agrees*. Doris's regularly scheduled shift on the Thursday before the public holiday is now considered to be from 9 a.m. to 3 p.m.

If Doris works from 9 a.m. to 3 p.m. on the Thursday and 9 a.m. to 5 p.m. on the following Monday, or shows reasonable cause for failing to do so, she is entitled to the paid public holiday.

When an employee is on vacation

Canada Day falls on July 1. George is on vacation from June 25 to July 9. If George works all of his last regularly scheduled shift before his vacation and first regularly scheduled shift after his vacation —on June 24 and July 10—or has reasonable cause for failing to do so, he will qualify for the paid public holiday.

When an employee is on a leave or layoff

Lydia is on pregnancy leave when the Canada Day holiday occurs. If Lydia works her last regularly scheduled day of work before her leave, and her first regularly scheduled day of work after her leave, or has reasonable cause for failing to do so, she will be entitled to the paid public holiday.

When there is no reasonable cause

A public holiday falls on a Monday, and Ellen's workplace is closed for the holiday. Ellen does not work on her last scheduled day before the holiday, and she fails to show reasonable cause for missing that day. She receives no pay for the holiday.

Public Holiday Pay

The amount of public holiday pay to which an employee is entitled is all of the *regular wages earned* by the employee in the four work weeks before the work week with the public holiday *plus* all of the *vacation pay payable* to the employee with respect to the four work weeks before the work week with the public holiday, *divided by 20*.

When to Include Vacation Pay in the Calculation of Public Holiday Pay

The amount of *vacation pay payable* to include in the calculation of public holiday pay depends on whether the employee is on vacation at any time during the four work weeks prior to the public holiday, and the manner in which the employee is to be paid vacation pay. Please refer to the [Vacation](#) chapter for information on the different ways vacation pay can be paid.

Vacation Pay Payable

If the employee is to be paid his or her vacation pay **before he or she takes a vacation** [in accordance with s. 36(1)] or **on or before the pay day for the period in which the vacation falls** [in accordance with s. 36(2)], vacation pay will be included in the calculation of public holiday pay if the employee was on vacation during that four work week period. If the employee who is paid in accordance with s. 36(1) or 36(2) was not on vacation during that period, no vacation pay will be included in the calculation.

If the employee is to be paid vacation pay **with every pay cheque** [in accordance with s. 36(3)] the amount of vacation pay to include in the calculation of public holiday pay will be at least 4% of all of the employee's wages earned during the four work week period. (Note that if an employee has a greater right or benefit with respect to vacation, such as 3 weeks of vacation with 6% of wages, then the "vacation pay payable" will be based on that greater percentage.)

Sun.	Mon.	Tues.	Wed	Thurs.	Fri.	Sat.
18 (Nov.)	19	20	21	22	23	24
25	26	27	28	29	30	1 (Dec.)
	3	4	5	6	7	8
9	10	11	12	13	14	15
16	17	18	19	20	21	22
23	24	25 Public Holiday	26	27	28	29

If an employee is to receive his or her vacation pay **in a lump sum on a certain date or dates** [in accordance with s. 36(4)], vacation pay will be included in the calculation of public holiday pay only if that date or dates falls during the relevant four work week period.

Calculating the Four Work Week Period Before the Work Week With a Public Holiday

The “four work weeks before the work week with the public holiday” does not necessarily mean the four *calendar* weeks immediately before the holiday. This period is based on the *employer’s work week*.

Christmas Day falls on a Tuesday. Suppose that an employer’s work week runs from Thursday to Wednesday. In this case, the four work weeks used to calculate public holiday pay are those four weeks counting backwards from the first Wednesday (the last day of the employer’s work week) before the day on which the public holiday falls.

In this example, the regular wages earned by the employee and the vacation pay payable to the employee with respect to the four work weeks indicated by the shaded area—November 22 to December 19—are used in the calculation of public holiday pay.

Calculating Public Holiday Pay

A typical case

Iryna works five days a week and earns \$100.00 a day. She worked her last regularly scheduled work day before the public holiday and her first regularly scheduled day after the holiday. She receives her vacation pay when her vacation is taken. She was not on vacation during the four work weeks leading up to the public holiday.

1. Iryna’s total regular wages earned are calculated:

\$100.00 per day X 5 days = \$500.00 per week

\$500.00 per week X 4 work weeks = \$2,000.00

Iryna earned \$2,000.00 of regular wages in the four work weeks before the public holiday.

2. The amount of vacation pay payable with respect to the four work week period is calculated:

Iryna receives her vacation pay when she takes her vacation. Because she was not on vacation during the four work week period, the amount of vacation pay payable with respect to the four work weeks before the public holiday = \$0

3. Then her total wages earned and vacation pay payable is added together and divided by 20:

$$\$2,000.00 + \$0 = \$2,000$$

$$\$2,000 \div 20 = \$100.00$$

Result: Iryna is entitled to \$100.00 public holiday pay.

When vacation time is involved

Brock works five days a week and earns \$100.00 a day. He was on vacation for two of the four weeks before the public holiday. He receives vacation pay before he takes his vacation. He is paid \$1,000.00 vacation pay for his two weeks of vacation. Brock worked his last regularly scheduled work day before the public holiday and his first regularly scheduled work day after the holiday.

1. Brock's total regular wages earned are calculated:

Brock worked 10 days.

$$\$100.00 \text{ per day} \times 10 \text{ days} = \$1,000.00$$

2. Then the amount of vacation pay payable is calculated:

Brock was on vacation for two of the four work weeks prior to the work week with the public holiday, and is paid vacation pay before he takes his vacation. The amount of vacation pay payable with respect to the four work weeks prior to the work week with the public holiday = \$1,000.00

3. Then his total wages earned and vacation pay payable is added together and divided by 20:

$$\$1,000 + \$1,000 = \$2,000.00$$

$$\$2,000 \div 20 = \$100.00$$

Result: Brock is entitled to \$100.00 public holiday pay.

When an employee works part-time and each pay cheque includes vacation pay

Tegan works three days a week and earns \$100.00 a day. She worked her last regularly scheduled work day before the public holiday and her first regularly scheduled day after the holiday. She and her employer have agreed in writing that she will receive four per cent vacation pay on each cheque.

1. First, Tegan's regular wages earned are calculated:

$$\begin{aligned} \$100.00 \text{ per day} \times 3 \text{ days} &= \$300.00 \text{ per week} \\ \$300.00 \text{ per week} \times 4 \text{ weeks} &= \$1,200.00 \end{aligned}$$

2. Her vacation pay payable is also calculated:

$$\begin{aligned} \$4.00 \text{ per day (4\% of \$100)} \times 3 \text{ days} &= \$12.00 \text{ per week} \\ \$12.00 \text{ per week} \times 4 \text{ weeks} &= \$48.00 \end{aligned}$$

3. Then her regular wages earned and vacation pay payable are added together:

$$\$1,200.00 + \$48.00 = \$1,248.00$$

4. Tegan's total regular wages earned and vacation pay payable are then divided by 20:

$$\$1,248.00 \div 20 = \$62.40$$

Result: Tegan is entitled to \$62.40 public holiday pay.

When there are no set hours and each pay cheque includes vacation pay

Bertie does not work a set number of hours per day or days per week. Her pay varies from week to week, according to the time she has worked. She and her employer have agreed *in writing* that she will receive four per cent vacation pay on each pay cheque.

1. First, Bertie's regular wages earned during the four work weeks before the holiday are calculated:

$$\$1,500.00 \text{ regular wages}$$

2. Second, her vacation pay payable is calculated:

$$\$1,500.00 \times 4\% = \$60.00$$

3. Then her regular wages earned and vacation pay payable are added together:

$$\$1,500.00 + \$60.00 = \$1,560.00$$

4. Bertie's total wages earned and vacation pay payable are then divided by 20:

$$\$1,560.00 \div 20 = \$78.00$$

Result: Bertie is entitled to \$78.00 public holiday pay.

When an employee is on a leave

Zoe usually works five days a week, earning \$100.00 a day. She receives vacation pay before she goes on vacation. On June 10, she went on a 17-week pregnancy leave, followed by a 35-week parental leave.

During her leaves, she was not paid wages or vacation pay. She received maternity and parental benefits from the federal Employment Insurance program, but these benefits are not considered "wages."

Zoe is entitled to receive public holiday pay for the public holidays that fall during her leave as long as she works her last regularly scheduled day before her leave and her first regularly scheduled day after her leave, or has reasonable cause for failing to do so.

Zoe went on leave on June 10 and only worked seven days during the four work weeks before the Canada Day public holiday. Her public holiday pay for Canada Day is:

- Regular wages earned: \$100.00 a day X 7 days = \$700.00
- Vacation pay payable: \$0 (she was not on vacation during the four work week period)
- Public holiday pay: $(\$700.00 + \$0) \div 20 = \$35.00$ public holiday pay

Her public holiday pay for the rest of the public holidays that fall during her leave will be \$0. This is because she will not have earned any wages or vacation pay on any of the days during the four work weeks before each of those holidays.

When an employee is on a layoff that lasts about a month or more

Eugen usually works five days a week, earning \$100.00 a day. He was placed on temporary layoff on November 15. During his layoff, Eugen was not paid wages or vacation pay. He received employment insurance benefits during this time, but these benefits are not considered “wages.”

Eugen was recalled to work on December 27. He is entitled to be paid public holiday pay for Christmas Day and Boxing Day as long as he works his last regularly scheduled day before the layoff and his first regularly scheduled day after the layoff, or has reasonable cause for failing to do so.

However, because Eugen did not earn any wages or vacation pay in the four work weeks before those two public holidays, the amount of public holiday pay he is entitled to will be \$0.

Premium Pay

Premium pay is 1½ times an employee’s regular rate of pay. *If* an employee is entitled to receive premium pay for work on a public holiday, he or she must be paid 1½ times his or her regular rate of pay for each hour worked.

For example, Nathan’s regular rate of pay is \$10.00 an hour. This means that his premium pay will be \$15.00 an hour ($\$10.00 \times 1\frac{1}{2}$).

Substitute Holiday

A substitute holiday is another *working* day off work that is designated to replace a public holiday. Employees are entitled to be paid public holiday pay for a substitute holiday.

A substitute holiday must be scheduled for a day that is no later than three months after the public holiday for which it was earned. Or, if the employee has agreed *in writing*, the substitute day off can be scheduled up to 12 months after the public holiday.

Entitlements for Public Holidays

Entitlements for public holidays vary depending on such things as whether the holiday falls on a working day or a non-working day and whether the employee works on the holiday. The different entitlements are set out below.

When a Public Holiday Falls on a Working Day but the Employee Does Not Work

Most employees have the right to get the public holiday off and get paid public holiday pay. (Some employees may be required to work on a public holiday. See [Special Rules for Certain Industries](#) later in this chapter.)

When a Public Holiday Falls on an Employee's Non-Working Day or During an Employee's Vacation

When a public holiday falls on a day that *is not* ordinarily a working day for an employee, or during the employee's vacation, the employee is entitled to either:

- a substitute holiday off with public holiday pay;
- **or**
- public holiday pay for the public holiday, *if* the employee agrees to this *in writing* (in this case, the employee will not be given a substitute day off).

When an Employee Who Qualifies for the Day Off Has Agreed in Writing to Work on a Public Holiday

Most employees have the right to get the public holiday off and get paid public holiday pay. However, if an employee agrees *in writing* to work on the public holiday, there are two options:

- the employee is entitled to receive regular wages for all hours worked on the public holiday, plus a substitute day off work with public holiday pay;
- **or**
- if the employee agrees *in writing*, he or she is entitled to public holiday pay for the public holiday plus premium pay for all hours worked on the public holiday. In this case, the employee will not be given a substitute day off.

Calculating Public Holiday Pay Plus Premium Pay

A public holiday falls on one of John-Duncan's normal working days. He and his employer have agreed *in writing* that he will work on the public holiday and that, instead of getting a substitute holiday, he will be paid public holiday pay plus premium pay for all the hours he works on the holiday.

John-Duncan regularly works eight hours a day, five days a week. His regular hourly pay rate is \$9.00. He has worked on all his scheduled work days in the four work weeks before the public holiday. He receives his vacation pay before he takes his vacation; he was not on vacation during the four work weeks before the public holiday. He works eight hours on the public holiday.

Public holiday pay calculation

1. First John-Duncan's total regular wages earned in the four work weeks before the public holiday are calculated:
8 hours per day X \$9.00 per hour = \$72.00 per day
\$72.00 per day X 5 days = \$360.00 per week
\$360.00 X 4 work weeks = \$1,440.00
John-Duncan earned \$1,440.00 in the four work weeks before the public holiday.
2. Second, the amount of vacation pay payable with respect to the four work weeks before the public holiday is calculated. Because John-Duncan gets paid his vacation pay before he takes vacation and he was not on vacation during the four work week period, his vacation pay payable is: \$0.
3. His total wages earned plus vacation pay payable is then divided by 20:
 $(\$1,440.00 + \$0) \div 20 = \$72.00$

John-Duncan's public holiday pay entitlement is \$72.00.

Premium pay calculation

4. Finally, the premium pay owing to John-Duncan for his work on the public holiday is calculated:
\$9.00 per hour X 1½ = \$13.50
\$13.50 per hour X 8 hours worked = \$108.00
John-Duncan's premium pay entitlement is \$108.00.

Result: John-Duncan is entitled to public holiday pay of \$72.00 and premium pay of \$108.00, for a total of \$180.00.

When an Employee Agrees to Work on a Public Holiday but Fails to Do So

If an employee has agreed *in writing* to work on the public holiday but does not do so -- and does not show reasonable cause for not having done so -- the employee has no right to public holiday pay or to a substitute day off with pay.

However, if the employee can show reasonable cause for not working the public holiday, then entitlements will depend on which of the two options below the employee chose in exchange for agreeing to work on the public holiday:

- if the employee had agreed in writing to work on the public holiday for regular wages plus a substitute day off with public holiday pay, the employee is entitled to a substitute day off work with public holiday pay.
- or**
- if the employee had agreed in writing to work on the public holiday for public holiday pay plus premium pay for each hour worked, he or she is entitled to be paid public holiday pay for the holiday. The employee is not entitled to receive any premium pay because he or she did not perform any work on the holiday.

When an Employee Works Only Some of the Hours He or She Agreed to Work on a Public Holiday

If an employee has agreed *in writing* to work on the public holiday but works only some of the hours he or she agreed to work, and does not show reasonable cause for failing to work all of the hours, the employee is only entitled to receive premium pay for each hour worked on the holiday. The employee has no right to public holiday pay or a substitute day off work.

A Typical Case

Trudi had agreed in writing that she would work eight hours on Canada Day but she only worked four hours and did not have reasonable cause for failing to work the other four hours. Trudi is entitled only to premium pay for the four hours she worked on the holiday. She is not entitled to public holiday pay or to a substitute day off work.

However, if the employee can show reasonable cause for working only some of the hours he or she agreed to work on the public holiday, then:

- the employee is entitled to his or her regular rate for all the hours worked plus a substitute day off work with public holiday pay;
- **or**
- if the employee had agreed earlier in writing to work on the public holiday for public holiday pay plus premium pay for each hour worked, he or she is entitled to be paid public holiday pay plus premium pay for every hour worked on the holiday.

Special Rules for Certain Industries

Special rules apply to employees who work in the following types of businesses:

- hotels, motels and tourist resorts;
- restaurants and taverns;
- hospitals and nursing homes;
- continuous operations (which are operations, or parts of operations, that do not stop or close more than once a week -- such as an oil refinery, alarm-monitoring company or casino whose games tables are open around the clock).

An employee who works in any of these businesses can be required to work on a public holiday without his or her agreement, **but only if the holiday falls on a day that the employee would normally work and the employee is not on vacation.**

If an employee is required to work, he or she is entitled to either:

- his or her regular rate for the hours worked on the public holiday, plus a substitute day off work with public holiday pay;
- **or**
- public holiday pay plus premium pay for each hour worked.

The *employer* chooses which of these options will apply.

Note that the employer's ability to require employees to work on a public holiday is subject to the employee's right to take a day off for purposes of religious observance under the Ontario Human Rights Code, and to the terms of the employee's employment contract. Note also that certain retail workers who work in continuous operations (e.g., a 24-hour convenience store) have the right to refuse to work on a public holiday because of the special rules that apply to some retail workers. See the [Retail Workers](#) chapter of this Guide for more information.

An employee in the previously listed businesses who is required to work on a public holiday that falls on their ordinary working day but fails to do so, with reasonable cause, is entitled to:

- a substitute holiday with public holiday pay.
- or**
- public holiday pay for the holiday.

The *employer* chooses which option will apply.

An employee in any of these businesses who is required to work on a public holiday that falls on their ordinary working day but who fails, with reasonable cause, to work *some* of the hours he or she was required to work on the holiday is entitled to either:

- his or her regular rate for each hour worked on the holiday plus a substitute holiday with public holiday pay;
- or**
- public holiday pay for the holiday plus premium pay for each hour worked.

The *employer* chooses which option will apply.

An employee in any of these businesses who is required to work on a public holiday that falls on their ordinary working day but who fails, without reasonable cause, to work part or all of the public holiday is only entitled to receive premium pay for each hour worked on the holiday (if any). The employee has no right to public holiday pay or a substitute day off work.

Overtime Calculations When an Employee Receives Premium Pay

Any hours worked on a public holiday that are compensated with premium pay are not included when determining whether an employee has worked any overtime hours.

If Employment Ends

Sometimes an employee's job comes to an end before the employee can take a substitute holiday with public holiday pay that he or she has earned. In this case, the employer must pay the employee's public holiday pay at the same time it pays the employee's final wages. This is so regardless of the reason the job came to an end, whether it is because the employee quit, was fired for good reason, or for some other reason.

IX. Retail Workers

There are certain rights in the ESA that apply *only* to employees of *most* retail businesses (see [Exclusions](#)). A retail business is a business that sells goods or services to the public.

The Right to Refuse to Work on Public Holidays

Most employees of a retail business have the right to refuse to work on a public holiday even if the employee does not qualify for the public holiday.

If an employee has agreed *in writing* to work on a public holiday, the employee can later decline to work on that day by giving the employer at least 48 hours' notice before the employee's work on the public holiday was to begin.

The Right to Refuse to Work on Sundays

There are two sets of rules for employees of retail businesses. The rule that applies depends on whether the employee was hired before or after September 4, 2001.

Sunday Rules for Employees Hired Before September 4, 2001

An employee of a retail business who was hired before September 4, 2001 has the right to refuse to work on Sundays.

If an employee has agreed to work on Sundays, whether or not the agreement was made when he or she was hired, the employee can later decline to work on a Sunday by giving the employer at least 48 hours' notice before the employee's work was to begin.

Sunday Rules for Employees Hired On or After September 4, 2001

An employee of a retail business who was hired on or after September 4, 2001 has the right to refuse to work on Sundays *unless* the employee agreed in writing at the time of being hired to work on Sundays.

Note that an employer cannot make an agreement to work on Sundays a condition of hire if doing so would violated the [Human Rights Code](#). (Contact the [Ontario Human Rights Commission](#) for further information.)

If an employee *did agree* in writing at the time of being hired to work on Sundays, he or she can later decline to work on Sundays for reasons of religious belief or religious observance by giving the employer at least 48 hours' notice before the employee's work was to begin.

In addition, such an employee would be entitled to refuse to work on a specific Sunday if that Sunday was a public holiday. The employee in that case would be exercising the right to refuse to

work on a public holiday. The employee would be required to give the employer at least 48 hours' notice before the employee's work was to begin.

An employee who *did not agree* in writing at the time of being hired to work on Sundays may agree at some later point to work on Sundays or on a particular Sunday. In that case, the employee could subsequently decline to work the Sunday(s) by giving the employer at least 48 hours' notice before the employee's work was to begin.

No Reprisals

An employee cannot be dismissed, intimidated or penalized in any way for exercising his or her rights under this section.

Exclusions

Retail businesses are *excluded* from these provisions if their main business is to:

- sell prepared meals (e.g., restaurants, cafeterias, cafés);
- rent living accommodations (e.g., hotels, tourist resorts, camps, inns);
- provide educational, recreational or amusement services to the public (e.g., museums, art galleries, sports stadiums, theatres, bars, nightclubs);
- sell goods and services that are secondary to the *businesses* described above and are located on the same premises (e.g., museum gift shops, souvenir shops in sports stadiums).

X. Benefit Plans

Employers are not required to provide employee benefit plans. However, if an employer does decide to provide them, the rules against discrimination under the ESA must be applied to certain plans.

The Anti-Discrimination Rule

The ESA prohibits discrimination between employees or their dependants, beneficiaries or survivors because of their age, sex or marital status.

There are some exceptions to the anti-discrimination rules. They are complex. If you require further information, please contact the Employment Standards Information Centre at 1-800-531-5551.

Plans Affected

The anti-discrimination rule applies to benefit plans including:

- superannuation, retirement and pension benefits;
- termination benefits;
- death benefits (including life insurance plans);
- disability benefits (including short-term and long-term disability plans);
- sickness benefits;
- accident benefits; and
- medical, hospital, nursing, drug or dental benefits.

The rule against discrimination applies to both the plan's contribution requirements and its benefit payments.

Grounds on which Discriminations are not Allowed

The following distinctions between employees or their dependants, beneficiaries or survivors are not allowed.

Age

An employer cannot discriminate between employees who are 18 or over but under 65.

Sex

An employer cannot discriminate between male and female employees, or against pregnant employees. Also, there cannot be a distinction between employees because they are, or are not, the head of a household or the primary wage earner.

Marital Status

An employer cannot discriminate between single and married (whether same or opposite-sex couples) employees, including those who live in common-law marriages (whether same or opposite-sex couples), or against unmarried employees supporting dependent children.

While an Employee is on a Leave of Absence

An employee who is on pregnancy, parental, family medical, personal emergency or declared emergency leave has the right to continue to participate in pension plans, life insurance plans, accidental death plans, extended health plans and dental plans during his or her leave. In addition, a female employee may be entitled to disability benefits during that period of the leave that she would otherwise have been absent from work for health reasons related to her pregnancy or childbirth.

Other benefit plans may allow employees on *other* types of leave to continue to participate in the plan while they are on leave. In that case, employees on pregnancy, parental, family medical, personal emergency or declared emergency leave are also allowed to continue to participate in such plans while they are on leave (this includes any leave negotiated between an employee or union and an employer that is longer than the ESA provides).

XI. Pregnancy and Parental Leave

Pregnant employees have the right to take *Pregnancy Leave* of up to 17 weeks of unpaid time off work. In some cases the leave may be longer. Employers do not have to pay wages to someone who is on pregnancy leave.

New parents have the right to take *Parental Leave* -- unpaid time off work when a baby or child is born or first comes into their care. Birth mothers who took pregnancy leave are entitled to up to 35 weeks' leave. Birth mothers who do not take pregnancy leave and all other new parents are entitled to up to 37 weeks' parental leave.

Parental leave is not part of pregnancy leave and so a birth mother may take both pregnancy and parental leave. In addition, the right to a parental leave is independent of the right to pregnancy leave. For example, a birth father could be on parental leave at the same time the birth mother is on either her pregnancy leave or parental leave.

Employees on leave have the right to continue participation in certain benefit plans and continue to earn credit for length of employment, length of service, and seniority. In most cases, employees must be given their old job back at the end of their pregnancy or parental leave.

An employer cannot penalize an employee *in any way* because the employee is or will be eligible to take a pregnancy or parental leave, or for taking or planning to take a pregnancy or parental leave.

Ontario's ESA and the Federal *Employment Insurance Act*

The ESA provides eligible employees who are pregnant or are new parents with the right to take unpaid time off work.

In contrast, the federal [*Employment Insurance Act*](#) provides eligible employees with maternity and/or parental benefits that may be payable to the employee during the period he or she is off on an ESA pregnancy or parental leave.

The rules governing the right to take time off work for pregnancy and parental leave under the ESA are different from the rules regarding the payment of maternity benefits and parental benefits under the federal [*Employment Insurance Act*](#). For example, a new father may choose to commence a parental leave under the ESA up to 52 weeks after the child is born. However, there may be restrictions on accessing the employment insurance parental benefits at that time. **It is extremely important that employees obtain information about their rights to EI benefits if they are considering taking a pregnancy or parental leave under the ESA.** For information about [maternity and parental benefits](#), contact Service Canada's Employment Insurance Automated Telephone Information Service at 1-800-206-7218.

Pregnancy Leave

Pregnant employees have the right to take pregnancy leave of up to 17 weeks, or longer in certain circumstances, of unpaid time off work.

Qualifying for Pregnancy Leave

A pregnant employee is entitled to pregnancy leave whether she is a full-time, part-time, permanent or contract employee provided that she:

- works for an employer that is covered by the ESA,
and
- was hired at least 13 weeks before the date her baby is *expected* to be born (the “due date”).

Note that an employee does not have to *actively* work the 13 weeks prior to the due date to be eligible for pregnancy leave. It is only necessary that she be hired at least 13 weeks before the baby is expected to be born.

A typical case

Tegan was hired 15 weeks before her due date. She is eligible to begin her pregnancy leave *at any time* after being hired, because there are at least 13 weeks between the date she was hired and her due date.

When an employee is off sick

Fatima was hired 15 weeks before her due date. Soon after starting her new job, she was off sick for five weeks. Fatima is eligible for pregnancy leave because there are at least 13 weeks between the date she was hired and her due date. The fact that she did not actually work 13 weeks is irrelevant.

When a baby is born before the due date

Meredith was hired 15 weeks before her due date. However, 11 weeks after she was hired, her baby was born. Meredith is eligible for pregnancy leave *to begin on the date the baby was born*, because there were at least 13 weeks between the date she was hired and her due date. The fact that her baby was born less than 13 weeks after she was hired is irrelevant.

When a Pregnancy Leave Can Begin

Usually, the *earliest* a pregnancy leave can begin is 17 weeks before the employee’s due date. However, when an employee has a *live* birth more than 17 weeks before the due date, she will be able to begin her pregnancy leave on the date of the birth.

Ordinarily, the *latest* a pregnancy leave can begin is on the baby’s due date. However, if the baby is born earlier than the due date, the latest the leave can begin is the day the baby is born.

Within these restrictions, an employee can start her pregnancy leave any time within the 17 weeks up to and including her due date. The employer cannot decide when the employee will begin her leave even if the employee is off sick or if her pregnancy limits the type of work she can do.

Length of a Pregnancy Leave

A pregnancy leave can last a maximum of 17 weeks for most employees. However, if an employee has taken a full 17 weeks of leave but is still pregnant, she may continue on the pregnancy leave until the birth of the child. If she has a live birth, the pregnancy leave will end on the date of the birth and then, in most cases, she will be able to commence her parental leave.

An employee may decide to take a shorter leave if she wishes. However, once an employee has started her pregnancy leave, she must take it all at once. She *cannot* use up part of the 17 weeks, return to work and then go back on pregnancy leave for the unused portion. If she returns to work for the employer from whom she took the leave, even if it is only part-time, under the ESA she gives up the right to take the rest of her leave.

(Note that under the federal Employment Insurance program, employees *are* able to return to work and earn a certain amount of wages without having their employment insurance benefits reduced. However, under the ESA, a return to work, even on a part-time basis, would effectively end the pregnancy leave.)

Miscarriages and Stillbirths

An employee who has a miscarriage or stillbirth *more than 17 weeks before her due date* is not entitled to a pregnancy leave.

However, if an employee has a miscarriage or stillbirth *within the 17-week period preceding the due date*, she is eligible for pregnancy leave. The latest date for commencing the leave in that case is the date of the miscarriage or stillbirth.

The pregnancy leave of an employee who has a miscarriage or stillbirth ends on the date that is the **later** of:

- 17 weeks after the leave began;
- **or**
- 6 weeks after the stillbirth or miscarriage.

This means that the pregnancy leave of an employee who has a stillbirth or miscarriage will be at least 17 weeks long. In some cases it may be longer.

When an employee has a stillbirth

Wai began her pregnancy leave 15 weeks before her baby was due. On her due date she had a stillbirth. The ESA provides that the pregnancy leave ends on the date that is the later of 17 weeks after the leave began or six weeks after the stillbirth.

In this case, the later date is six weeks after the stillbirth. Wai can stay off work for up to six more weeks after the stillbirth, for a total of 21 weeks of pregnancy leave.

When an employee has a miscarriage

Hélène began her pregnancy leave 15 weeks before her baby was due. One week later (one week into her pregnancy leave) she had a miscarriage. The law says that her pregnancy leave ends on the date that is the later of either 17 weeks after the leave began or six weeks after the miscarriage.

In Hélène's case, the later date is 17 weeks after the leave began. She will get a total of 17 weeks of pregnancy leave.

Notice Requirements for Pregnancy Leave

Giving Notice about Starting a Pregnancy Leave

An employee must give her employer at least two weeks' *written notice* before beginning her pregnancy leave. Also, if the employer requests it, she must provide a certificate from a medical practitioner stating the baby's due date.

Retroactive Notice

Sometimes an employee has to stop working earlier than expected because of complications caused by the pregnancy. In that case, the employee has two weeks after she stops working to give the employer *written notice* of the day the pregnancy leave began or will begin.

An employee does not have to start her pregnancy leave at the time she stops working if she has stopped work due to illness or complications related to the pregnancy. She may choose instead to treat the time off as sick time and plan to commence the pregnancy leave later (but no later than the earlier of the birth date or due date). In that case, she has two weeks after she stops working to give the employer *written notice* of the day the leave will begin. If the employer requests it, the employee has to provide a medical certificate supporting her inability to work and stating the baby's due date.

If an employee stops working earlier than expected because of a birth, stillbirth or miscarriage, she has two weeks after she stops working to give the employer *written notice* of the day the leave began. The pregnancy leave begins no later than the date of the birth, stillbirth or miscarriage. If the employer requests it, the employee has to provide a medical certificate stating the due date and the date of birth, stillbirth or miscarriage.

Changing the Date a Pregnancy Leave Starts

Suppose an employee has given notice to begin a pregnancy leave. She can begin the leave *earlier* than she originally told her employer if she gives her employer new *written notice* at least two weeks before the *new, earlier date*.

Changing the start of a pregnancy leave to an earlier date

Barbara gave her employer written notice that she would begin her pregnancy leave on September 10. Now Barbara wants to start her leave on August 27. She must give her employer new written notice by August 13 (two weeks before August 27).

An employee can also change the date she will begin her leave to a *later* date than she originally told her employer. To do this, she must give her employer new *written notice* at least two weeks before the *original date* she said she would begin her leave.

Changing the start of a pregnancy leave to a later date

Mairead gave her employer written notice that she would start her pregnancy leave on September 10. Now Mairead wants to start her leave on September 15. She must give her employer new written notice by August 27 (two weeks before September 10).

Failing to Give Notice

An employee who fails to give the required notice *does not* lose her right to a pregnancy leave. She may fail to give notice because she did not know she had to, or because she was unable to under the circumstances.

Giving Notice About Ending a Pregnancy Leave

An employee can tell her employer when she will be returning to work, but she is not required to do so. If the employee does not specify a return date, the employer is to assume that she will take her full 17 weeks of leave (or any longer period that she may be entitled to).

An employer cannot require an employee to return from her leave early. Also, an employer cannot require an employee to prove, through medical documentation, that she is fit to return to work. The decision to return to work is the employee's.

Changing the Date a Pregnancy Leave Ends

An employee may want to change the date her leave was scheduled to end to an *earlier* date. If so, she must give the employer a *new* written notice at least four weeks before the *new, earlier* day.

An employee may want to change the date her leave was scheduled to end to a *later* date. In this case, she must give the employer a *new* written notice at least four weeks before the date the leave was *originally* going to end. Unless the employer agrees, she cannot schedule a new end date to her pregnancy leave that would result in her taking a longer leave than she is entitled to under the ESA.

When an Employee Decides Not to Return to Work

Suppose an employee wants to resign before the end of her pregnancy leave, or at the end of the leave. She must give her employer at least four weeks' written notice of her resignation. This notice requirement does not apply if the employer constructively dismisses the employee. (See "Termination of Employment" chapter for information about [constructive dismissal](#).)

Parental Leave

Both new parents have the right to take parental leave of up to 35 or 37 weeks of unpaid time off work.

Qualifying for Parental Leave

A new parent is entitled to parental leave whether he or she is a full-time, part-time, permanent or contract employee provided that the employee:

- works for an employer that is covered by the ESA,
and
- was employed for at least 13 weeks before commencing the parental leave.

An employee does not have to *actively* work in the 13- week period preceding the start of the parental leave. The employee could be on layoff, vacation, sick leave or pregnancy leave for all or part of the 13-week qualifying period and still be entitled to parental leave. The ESA only requires the employee to have been *employed* by the employer for 13 weeks before he or she may commence a parental leave.

A “parent” includes:

- a birth parent;
- an adoptive parent (whether or not the adoption has been legally finalized); or
- a person who is in a relationship of some permanence with a parent of the child and who plans on treating the child as his or her own. This includes same-sex couples.

When a Parental Leave Can Begin

A birth mother who takes pregnancy leave must ordinarily begin her parental leave as soon as her pregnancy leave ends. However, an employee’s baby may not yet have come into her care for the first time when the pregnancy leave ends. For example, perhaps her baby has been hospitalized since birth and is still in the hospital’s care when the pregnancy leave ends.

In this case, the employee can either commence her leave when the pregnancy leave ends or choose to return to work and start her parental leave later. If she chooses to return to work, she will be able to start her parental leave anytime within 52 weeks of the birth or the date the baby first came home from the hospital.

All other parents must *begin* their parental leave no later than 52 weeks after:

- the date their baby is born;
or
- the date their child *first* came into their care, custody and control.

The parental leave does not have to be *completed* within this 52-week period. It just has to be started.

Length of a Parental Leave

Birth mothers who take pregnancy leave are entitled to take up to 35 weeks of parental leave. All other new parents are entitled to take up to 37 weeks of parental leave.

Employees may decide to take a shorter leave if they wish. However, once an employee has started parental leave, he or she must take it all at one time. The employee *cannot* use up part of the leave, return to work for the employer and then go back on parental leave for the unused portion.

(Note that under the federal Employment Insurance Program, employees *are* able to return to work and earn a certain amount of wages without having their employment insurance benefits reduced. However, under the ESA, a return to work, even on a part-time basis, would effectively end the parental leave.)

Miscarriages and Stillbirths

An employee who has a miscarriage or stillbirth, or whose spouse or same-sex partner has a miscarriage or stillbirth, is not eligible for parental leave.

Notice Requirements for Parental Leave

Giving Notice About Starting a Parental Leave

An employee must give his or her employer at least two weeks' *written notice* before beginning a parental leave. If an employee is also taking a pregnancy leave, she may, but is not required to, give her employer notice of both leaves at the same time.

Retroactive Notice

Sometimes, an employee may stop working earlier than expected because a child is born or comes into the employee's custody, care and control for the first time earlier than expected. In this case, the employee has two weeks after stopping work to give the employer written notice that he or she is taking parental leave. The parental leave begins on the day the employee stops working.

Changing The Start of a Parental Leave to an Earlier Date

Suppose an employee has given notice to begin a parental leave. The employee can begin the leave *earlier* than he or she has told the employer by giving the employer new *written* notice at least two weeks before the *new, earlier date*.

Example:

Jon gave his employer written notice that he would begin his parental leave on September 10. Now he wants to start his leave on August 27. Jon must give his employer new written notice by August 13 (two weeks before August 27).

Changing the Start of a Parental Leave to a Later Date

An employee can also change the starting date of the leave to a *later* date than he or she originally told the employer. To do this, the employee must give the employer new *written* notice at least two weeks before the *original date* the leave was going to begin.

Example:

Wendy gave her employer written notice that she would start her parental leave on September 10. Now Wendy wants to start her leave on September 15. She must give her employer new written notice by August 27 (two weeks before September 10).

Failing to Give Notice

An employee who fails to give the required notice *does not* lose his or her right to a parental leave. The failure might occur because the employee did not know he or she had to give notice, or because the employee was unable to under the circumstances.

Giving Notice About Ending a Parental Leave

An employee can tell the employer when he or she will be returning to work, but is not required to do so. If the employee does not specify a return date, the employer is to assume that the employee will take his or her full 35 or 37 weeks of leave. An employer cannot require an employee to return from leave early.

Changing the Date a Parental Leave Ends

An employee may want to return to work *earlier* than the date he or she was scheduled to return. If so, the employee must give the employer written notice at least four weeks before the *new, earlier* day.

An employee may want to return to work *later* than he or she was scheduled to return. In this case, the employee must give the employer *new* written notice at least four weeks before the date the employee was *originally* going to return. However, unless the employer agrees, the employee cannot schedule a new return date that would result in the employee taking a longer leave than he or she is entitled to under the ESA.

When an Employee Decides Not to Return to Work

Suppose an employee decides to resign before the end of his or her parental leave, or at the end of the leave. The employee must give the employer at least four weeks' written notice of the resignation. This notice requirement does not apply if the employer constructively dismisses the employee. (See "Termination of Employment" chapter for information about [constructive dismissal](#).)

Rights During Pregnancy and Parental Leaves

Employees on pregnancy or parental leave have several rights.

The Right to Reinstatement

In most cases, an employee who takes a pregnancy or parental leave is entitled to:

- the same job the employee had before the leave began;
or
- a comparable job, if the employee's old job no longer exists.

In either case, the employee must be paid at least as much as he or she was earning before the leave. Also, if the wages for the job went up while the employee was on leave, or would have gone up if he or she hadn't been on leave, the employer must pay the higher wage when the employee returns from leave.

If an employer has dismissed an employee for legitimate reasons that are *totally* unrelated to the fact that the employee took a leave, the employer does not have to reinstate the employee.

The Right to Be Free from Penalty

Employers cannot penalize an employee *in any way* because the employee:

- took a pregnancy or parental leave;
- plans to take a pregnancy or parental leave;
- is eligible to take a pregnancy or parental leave; or
- will become eligible to take a pregnancy or parental leave.

The Right to Continue to Participate in Benefit Plans

Employees on pregnancy or parental leave have a right to continue to take part in certain benefit plans that their employer may offer. These include:

- pension plans;
- life insurance plans;
- accidental death plans;
- extended health plans; and
- dental plans.

The employer must continue to pay its share of the premiums for any of these plans that were offered before the leave, unless the employee tells the employer *in writing* that he or she will not continue to pay his or her own share of the premiums.

In most cases, employees must continue to pay their share of the premiums in order to continue to participate in these plans.

Employees who are on pregnancy or parental leave can also continue to participate in other benefit plans if employees who are on other types of leave are able to continue to participate in those plans.

In addition, a female employee may be entitled to disability benefits during that period of the leave that she would otherwise have been absent from work for health reasons related to her pregnancy or childbirth.

The Right to Earn Credits for Length of Employment, Length of Service and Seniority

Employees continue to earn credits toward length of employment, length of service, and seniority during periods of leave.

Length of service

Trina's employment contract states that she earns 1 paid vacation day for each month of active service and that after 5 years (length) of service she will begin to earn 1½ paid vacation days for each month of active service. She is on pregnancy and parental leave for her entire 5th year of employment.

Because her leave will count towards "length of service" the year on leave will count to complete her 5 years length of service and she will be then be entitled to earn 1 ½ paid vacation days for each month of active service when she returns from her leave. However, while she was on the leave she was not earning credit for active service and so under her contract she was not earning paid vacation days during the leave itself. At the end of the leave she would not have earned any paid vacation under contract but the employer would be required to ensure that she received at least the minimum vacation entitlement for that year (2 weeks of vacation time off plus 4% of any wages earned in that year).

Seniority

Karen is a member of a union that has bargaining rights at her workplace. Under the collective agreement, an employee's seniority determines such things as order of layoff and recall, job promotions and annual vacation entitlements. Karen continues to accrue seniority for all purposes during her pregnancy and parental leaves, just as if she had been actively employed.

Probation

The period of a leave is not included when determining whether an employee has completed a probationary period. If an employee was on probation at the start of a leave, he or she must complete the probationary period after returning to work.

XII. Personal Emergency Leave

Some employees have the right to take up to **10 days** of unpaid job-protected leave each calendar year due to illness, injury and certain other emergencies and urgent matters. This is known as *personal emergency leave*.

Regularly Employ 50 or More Employees

Only employees who work for employers that regularly employ at least 50 employees are eligible for personal emergency leave. When determining whether the 50-employee threshold has been met, all employees of the employer are counted. It is the number of employees that is counted, not the number of “full-time equivalents.” Part-timers and casual employees are all included as one employee each in the count.

When a single employer has multiple locations, all employees employed at each location in Ontario are to be counted.

For example

An employer owns 5 sandwich shops with 12 employees employed in each shop. This employer regularly employs 60 employees. All employees at all 5 locations are entitled to personal emergency leave.

Reasons for Which an Unpaid Personal Emergency Leave May Be Taken

An employee who is entitled to personal emergency leave can take up to 10 days of unpaid leave due to:

- Personal illness, injury or medical emergency,
or
- Death, illness, injury, medical emergency or urgent matter relating to the following family members:
 - A spouse*;
 - A parent, step-parent, foster parent, child, step-child, foster child, grandparent, step-grandparent, grandchild or step- grandchild of the employee or the employee's spouse;
 - The spouse of an employee's child;
 - A brother or sister of the employee;
 - A relative of the employee who is dependent on the employee for care or assistance.

*Note: “spouse” includes both married and unmarried couples, of the same sex or the opposite sex.

Illness, Injury or Medical Emergency

All illnesses, injuries and medical emergencies of the employee or of a specified family member, as listed above, will qualify an employee for personal emergency leave. It does not matter whether the illness, injury or medical emergency was caused by the employee's own actions or by external factors beyond the employee's control. For example, an employee who sprained his knee while showing off to his friends when waterskiing would still be entitled to personal emergency leave, even though the injury was a result of his own carelessness.

Generally, employees are entitled to take personal emergency leave for pre-planned (elective) surgery. Although such surgery is scheduled ahead of time (and therefore not a medical "emergency"), surgeries performed because of an illness or injury will entitle an employee to personal emergency leave.

Employees are not entitled to personal emergency leave for medically unnecessary cosmetic surgery unrelated to an illness or injury.

Urgent Matter

An employee is eligible for personal emergency leave because of the death, illness, injury or medical emergency of, or an "urgent matter" concerning, a specified family member, as listed above. An urgent matter is an event that is unplanned *or* out of the employee's control, *and* raises the possibility of serious negative consequences, including emotional harm, if not responded to.

Examples of an "urgent matter":

- The employee's babysitter calls in sick.
- The house of the employee's elderly parent is broken into, and the parent is very upset and needs the employee's help to deal with the situation.
- The employee has an appointment to meet with his or her child's counsellor to discuss behavioural problems at school. The appointment could not be scheduled outside the employee's working hours.

Examples of events that do not qualify as an urgent matter:

- an employee wants to leave work early to watch his daughter's track meet.
- An employee wants the day off in order to attend at her sister's wedding as a bridesmaid.

Interaction Between Personal Emergency Leave and Contracts that Provide Paid Sick Leave or Bereavement Leave

If a contract (which includes a collective agreement) provides a greater right or benefit than the personal emergency leave standard in the ESA, then the terms of the contract apply instead of the personal emergency leave provisions of the ESA.

If the contract does not provide a greater right or benefit than the personal emergency leave standard in the ESA, the personal emergency leave provisions of the ESA will apply to the employee. The ministry will not get involved in determining how the leave provisions of the contract are applied.

For example, a contract only provides three paid personal sick days and three paid bereavement leave days per year. It does not provide job-protected time off for any other reason. This contract does not provide a greater right or benefit than the ESA's personal emergency leave provisions. This means that the employee will be entitled to 10 unpaid days of personal emergency leave per calendar year for any of the reasons listed in the ESA. If the employee takes 10 days of personal emergency leave for personal illness, the employee will have used up the entitlement under the ESA. Questions of whether any of those absences must be paid, and whether those absences draw down against the three paid sick leave days under the contract are not matters the ministry gets involved in answering.

Interaction Between Personal Emergency Leave and Family Medical Leave

Personal emergency leave and family medical leave are two different types of leave. Personal emergency leave is unpaid, job-protected leave of up to 10 days each calendar year. Personal emergency leave may be taken in the case of personal illness, injury or medical emergency and the death, illness, injury, medical emergency of, or urgent matter relating to, certain family members, including dependent relatives.

Family medical leave, on the other hand, is unpaid, job-protected leave of up to eight (8) weeks in a 26 week period. Family medical leave is taken to provide care or support to certain family members and people who consider the employee to be like a family member in respect of whom a qualified health practitioner has issued a certificate stating that he or she has a serious illness with a significant risk of death occurring within a period of 26 weeks.

Further, while only employees who work for employers that regularly employ at least 50 employees are entitled to personal emergency leave, this is not a requirement for family medical leave.

The list of persons for whom a family medical leave may be taken is not identical to the list of persons specified for personal emergency leave.

See the "[Family Medical Leave](#)" chapter of this Guide for further information. An employee may be entitled to both leaves. They are separate leaves and the right to each leave is independent of any right an employee may have to the other leave. An employee who qualifies for both leaves would have full entitlement to each leave.

Length of Personal Emergency Leave

Employees are entitled to up to 10 full days of personal emergency leave every *calendar year*, whether they are employed on a full time or part time basis.

There is no pro-rating of the 10-day entitlement. An employee who begins work part way through a calendar year is still entitled to 10 emergency days during the remainder of that year.

Employees cannot carry over unused personal emergency leave days to the next calendar year. The 10 days of personal emergency leave do not have to be taken consecutively. Employees can take personal emergency leave in part days, full days, or in periods of more than one day. If an employee takes only part of a day as personal emergency leave, the employer can count it as a full day of leave.

Part-day personal emergency leave

Kevin's daughter is sick and her doctor has scheduled some tests at the hospital. Kevin tells his employer that he has to be away from work in the morning to take his daughter for tests.

Kevin has the right to be on personal emergency leave for the half-day needed to take his daughter for the tests. His employer does not have to count the absence as a full day of leave but can if it wishes. Because Kevin only needed half of the day, he did not have the right to take the entire day off as personal emergency leave even if his employer counted the half-day absence as a full day of leave.

The employer can only count the half-day absence as a full day of leave for the purpose of determining whether Kevin's 10 day entitlement has been used up. For example, the employer still has to pay Kevin for the half day that he worked, and has to include the hours worked for the purpose of determining whether Kevin has worked overtime or has reached his daily or weekly limit on hours of work.

Notice Requirements

Generally, an employee must inform the employer before starting the leave that he or she will be taking a personal emergency leave of absence.

If an employee has to begin a personal emergency leave before notifying the employer, the employee must inform the employer as soon as possible. Notice does not have to be given in writing. Oral notice is sufficient.

While an employee is required to tell the employer in advance that he or she is taking a leave (or, if this is not feasible, as soon as possible after starting the leave), the employee will not lose the right to take personal emergency leave if the employee fails to do so. An employer may discipline an employee who does not properly inform the employer, but only if the reason for the discipline is the failure to properly notify the employer and *not in any way* because the employee took the leave.

Proof of Entitlement

An employer may require an employee to provide evidence reasonable in the circumstances that he or she is eligible for a personal emergency leave of absence. What will be reasonable in the circumstances will depend on all of the facts of any given situation, such as the duration of the leave, whether there is a pattern of absences, whether any evidence is available, and the cost of the evidence.

Medical Notes where the Employee Was Away Because of Personal Illness, Injury or Medical Emergency

If the circumstances are such that it is reasonable for the employer to require the employee to provide a doctor's note, the employer can ask only for the following information:

- The duration or expected duration of the absence,
- The date the employee was seen by a health care professional,
- Whether the patient was examined in person by the health care professional issuing the certificate.

Employers are not allowed to require information about the diagnosis or treatment of the medical condition of the employee.

Medical Notes Where the Employee Was Away Because of The Illness, Injury or Medical Emergency of a Specified Relative

The employer is not allowed to require a medical note in respect of the relative, nor can the employee be required to give details of the medical condition of the relative. The employer may only require the employee to disclose the name of the relative and his or her relationship to the employee, and to state that the absence was required because of the relative's injury, illness or medical emergency.

Rights During Leave

Employees who take personal emergency leave are entitled to the same rights as employees who take pregnancy or parental leave. For example, employers cannot threaten, fire or penalize in any other way an employee who takes or plans on taking a personal emergency leave. See "[Rights During Pregnancy and Parental Leaves](#)" in the Pregnancy and Parental Leave chapter.

Special Rule Re: Personal Emergency Leave

Certain professionals may not take personal emergency leave where it would constitute an act of professional misconduct or a dereliction of professional duty. For a list of professions to which this special rule applies, please refer to Professionals in the chart [Industries and Jobs with ESA Exemptions and Special Rules](#).

XIII. Family Medical Leave

Family medical leave is unpaid, job-protected leave of up to eight weeks in a 26-week period.

Family medical leave may be taken to provide care or support to certain family members and people who consider the employee to be like a family member in respect of whom a qualified health practitioner has issued a certificate indicating that he or she has a serious medical condition with a significant risk of death occurring within a period of 26 weeks. The medical condition and risk of death must be confirmed in a certificate issued by a qualified health practitioner.

Eligibility

All employees, whether full-time, part-time, permanent, or term contract, who are covered by the ESA are entitled to family medical leave.

There is no requirement that an employee be employed for a particular length of time, or that the employer employ a specified number of employees in order for the employee to qualify for family medical leave.

Care or support includes, but is not limited to: providing psychological or emotional support; arranging for care by a third party provider; or directly providing or participating in the care of the family member.

The *specified family members* for whom a family medical leave may be taken are:

- the employee's spouse (including same-sex spouse)
- a parent, step-parent or foster parent of the employee or the employee's spouse
- a child, step-child or foster child of the employee or the employee's spouse
- a brother, step-brother, sister, or step-sister of the employee
- a grandparent or step-grandparent of the employee or of the employee's spouse
- a grandchild or step-grandchild of the employee or of the employee's spouse
- a brother-in-law, step-brother-in-law, sister-in-law or step-sister-in-law of the employee
- a son-in-law or daughter-in-law of the employee or of the employee's spouse
- an uncle or aunt of the employee or of the employee's spouse
- a nephew or niece of the employee or of the employee's spouse
- the spouse of the employee's grandchild, uncle, aunt, nephew or niece
- Family medical leave may also be taken for a person who considers the employee to be like a family member. Employees wishing to take a family medical leave for a person in this category must provide their employer, if requested, with a completed copy of the [Compassionate Care Benefits Attestation](#) form, available from Human Resources and Social Development Canada, www.hrsdc.gc.ca, whether or not they are making an application for EI Compassionate Care Benefits or are required to complete the form to obtain such benefits.

The specified family members do not have to live in Ontario in order for the employee to be eligible for family medical leave.

Employment Insurance Benefits

Under the federal [Employment Insurance Act](#), six weeks of employment insurance benefits (called “[compassionate care benefits](#)”) may be paid to EI eligible employees who have to be away from work temporarily to provide care to a family member who has a serious medical condition with a significant risk of death within 26 weeks and who requires care or support from one or more family members. For information about EI contact Service Canada’s Employment Insurance Automated Telephone Information Service at 1-800-206-7218.

The right to take time off work under the family medical leave provisions of the ESA is not the same as the right to the payment of compassionate care benefits under the federal Employment Insurance Act. An employee may be entitled to family medical leave whether or not he or she has applied for or is qualified for the compassionate care benefits.

Interaction Between Family Medical Leave and Personal Emergency Leave

Family medical leave and personal emergency leave are two different types of leave. Personal emergency leave is unpaid, job-protected leave of up to 10 days each calendar year. Personal emergency leave may be taken in the case of personal illness, injury or medical emergency and the death, illness, injury, medical emergency of, or urgent matter relating to, certain family members, including dependent relatives.

Family medical leave, on the other hand, is unpaid, job-protected leave of up to eight (8) weeks in a 26 week period. Family medical leave is taken to provide care or support to certain family members and people who consider the employee to be like a family member in respect of whom a qualified health practitioner has issued a certificate stating that this family member has a serious illness with a significant risk of death occurring within a period of 26 weeks.

Further, while only employees who work for employers that regularly employ at least 50 employees are entitled to personal emergency leave, this is not a requirement for family medical leave.

The list of persons for whom a family medical leave may be taken is not identical to the list of persons specified for personal emergency leave.

An employee may be entitled to both leaves. They are separate leaves and the right to each leave is independent of any right an employee may have to the other leave. An employee who qualifies for both leaves would have full entitlement to each leave.

Length of Family Medical Leave

A family medical leave can last up to eight weeks within a specified 26-week period.

The eight weeks of a family medical leave do not have to be taken consecutively. An employee may therefore take a single week of leave at a time. However, if an employee only takes *part* of a week off work as family medical leave, it is still counted as a full week of leave.

That is because “week” is defined for family medical leave purposes as a period of seven consecutive days beginning on a Sunday and ending on a Saturday. Week is defined in this way to correspond with the beginning and end of the week set for EI entitlement purposes.

Example 1

Felicia begins a family medical leave on Wednesday, May 21. First week of leave is defined as beginning on the preceding Sunday, May 18 and will end on Saturday, May 24. Felicia will be considered to have used one full week of the 8 weeks of family medical leave as of Saturday, May 24.

Example 2

Connie takes two days off work for family medical leave on Monday, July 19 and Tuesday, July 20.

The week of family medical leave is defined as beginning on the preceding Sunday (July 18) and will end on Saturday, July 24. Although the Connie chose to return to work on Wednesday, July 21 (and be paid her regular wages for that work) she will be deemed to have used one full week of the 8 weeks of family medical leave as of Saturday, July 24.

Sharing Family Medical Leave

The eight weeks of family medical leave must be shared by all employees in Ontario who take a family medical leave under the ESA to provide care or support to a specific family member. For example, if one spouse took six weeks of family medical leave to care for his or her child, the other spouse would be able to take only two weeks of family medical leave. The spouses could take leave at the same time, or at different times.

Taking More Than 8 Weeks of Family Medical Leave

If an employee has taken a family medical leave to care for a family member who has not passed away within the 26-week period referred to in the medical certificate, and a health practitioner issues another certificate stating that the family member has a serious medical condition with a significant risk of death within 26 weeks, the employee would be entitled to an additional eight-weeks of family medical leave.

As long as a health practitioner continues to issue additional certificates, an employee will be entitled to additional leaves with respect to the same family member.

Whether or not this employee would be eligible for any or further EI benefits would be a matter to be determined by the federal Employment Insurance Commission.

Family Medical Leave for Additional Family Members

If an employee has more than one specified family member who has a serious illness with a significant risk of death within a period of 26 weeks, the employee will be entitled to an eight-week family medical leave for each of the specified family members.

Timing of Family Medical Leave

If a qualified health practitioner issues a certificate stating that a specified family member has a serious medical condition and there is significant risk of death occurring within a period of 26 weeks, an employee must take the family medical leave within that 26-week period.

Where two or more certificates are obtained by two or more employees wishing to take leave with respect to the same family member, the 26-week period within which the family medical leave must be taken is determined by whichever certificate was issued first.

Earliest Date a Family Medical Leave Can Begin

The earliest an employee may start the leave is the first day of the week in which the 26-week period identified on the medical certificate begins.

“Week” is defined for the purposes of family medical leave as a period of seven consecutive days, beginning on a Sunday and ending on a Saturday. If the date indicated on the certificate is a day other than a Sunday, the 26 week period will run from the preceding Sunday. Likewise, regardless of what day of the week the employee actually begins the leave, the week of family medical leave would be considered to have begun on the preceding Sunday.

Example

On Wednesday, June 13, a medical practitioner issues a certificate stating that Mohammed’s spouse has a serious medical condition with a significant risk of death within a period of 26 weeks. Because a week is defined as a period of 7 consecutive days beginning on Sunday and ending on Saturday under the family medical leave provisions, the 26-week period is considered to begin Sunday June 10. Assuming Mohammed wished to commence the leave on the day the certificate was issued, the first week of the leave would be considered to have begun on Sunday June 10.

Last Date of a Family Medical Leave

The latest day an employee can remain on leave is:

- the last day of the week in which the family member dies,
- the last day of the week in which the 26-week period expires
- the last day of the eight weeks of family medical leave,

whichever is *earlier*.

Based on the definition of “week” for family medical leave, the leave would always end on a Saturday.

Medical Certificate

The employee does not have to have the medical certificate before he or she can take the leave. An employee might commence the leave before obtaining the medical certificate. The right to the leave is dependent upon the issuance of the medical certificate **and** the leave must be completed within the 26-week period specified in that certificate. If the employee could not subsequently produce a copy of the certificate and/or purported to take leave beyond the 26-week period, the employee would not be entitled to any of the protections afforded to employees on such a family medical leave.

An employer is entitled to ask an employee for a copy of the certificate of the qualified health practitioner to provide proof that he or she is eligible for a family medical leave. The employee is required to provide the copy as soon as possible after the employer requests it. The certificate must state that the family member has a serious medical condition with a significant risk of death occurring within a specified 26-week period.

The employee is responsible for obtaining and paying the costs (if any) of obtaining the certificate. The Ministry of Labour cannot assist the employee in obtaining the certificate.

If an employee is applying for Employment Insurance (EI) compassionate care benefits, a copy of the medical certificate submitted to Human Resources and Skills Development Canada may also be used for the purposes of family medical leave.

Qualified Health Practitioner

A qualified health practitioner is a person who is qualified to practice medicine under the laws of the jurisdiction in which care or treatment of the family member is being provided.

In Ontario, only medical doctors can issue a certificate. Different types of health practitioners may be able to issue certificates in different jurisdictions – it will depend on the laws of that jurisdiction.

Notice Requirements

An employee must inform the employer in writing that he or she will be taking a family medical leave of absence.

If an employee has to begin a family medical leave before notifying the employer, he or she must inform the employer in writing as soon as possible after starting the leave.

If the employee does not take the eight-week leave all at once, the employee is required to provide notice to the employer each time the employee begins a new part of the leave.

For example

Boris is going to take four weeks of leave from July 1 to July 28, and another four weeks from September 1 to September 28. Boris is required to provide written notice to his employer of both periods of leave. He can do this by providing a single written notice that

sets out the start dates of both periods of leave, or he can provide two separate notices, at the same or different times.

An employee who does not give notice does not lose his or her right to a family medical leave.

While an employee is required to tell the employer in advance that he or she is taking a leave (or, if this is not possible, as soon as possible after starting the leave), the employee will not lose the right to take family medical leave if the employee fails to do so. An employer may discipline an employee who does not properly inform the employer, but only if the reason for the discipline is the failure to properly notify the employer and *not in any way* because the employee took the leave.

Rights During and at the End of a Family Medical Leave

Employers do not have to pay wages when an employee is on family medical leave.

Employees who take family medical leave are entitled to the same rights as employees who take pregnancy or parental leave. For example, An employer cannot threaten, fire or penalize in any other way an employee for taking, planning on taking, being eligible or being in a position to become eligible to take a family medical leave. See "[Rights During Pregnancy and Parental Leaves](#)" in the Pregnancy and Parental Leave chapter.

XIV. Termination of Employment

Termination of Employment Defined

A number of expressions are commonly used to describe situations when employment is terminated. These include “let go,” “discharged,” “dismissed,” “fired” and “permanently laid off.”

Under the ESA, a person’s employment is terminated if the employer:

- dismisses or stops employing an employee, including an employee who is no longer employed due to the bankruptcy or insolvency of the employer;
- “constructively” dismisses an employee and the employee resigns, in response, within a reasonable time;
- lays an employee off for a period that is longer than a “temporary layoff”.

In most cases, when an employer ends the employment of an employee who has been continuously employed for three months, the employer must provide the employee with *either written notice of termination, termination pay or a combination* (as long as the notice and the termination pay together equal the length of notice the employee is entitled to receive).

An employer is not required to give an employee a reason why his or her employment is being terminated. There are, however, some situations where an employer *cannot* terminate an employee’s employment even if the employer is prepared to give proper written notice or termination pay. For example, an employer cannot end someone’s employment, or penalize them in any way, if any part of the reason for the termination of employment is based on the employee asking questions about the ESA or exercising a right under the ESA, such as refusing to work in excess of the daily or weekly hours of work maximums, or taking a leave of absence specified in the ESA. Please see the chapter on [Reprisals](#).

Qualifying for Termination Notice or Pay in Lieu

Certain employees are not entitled to notice of termination or termination pay under the ESA. Examples include: employees who are guilty of wilful misconduct, disobedience, or wilful neglect of duty that is not trivial and has not been condoned by the employer. Other examples include construction employees, employees on temporary layoff, employees who refuse an offer of reasonable alternative employment and employees who have been employed less than three months.

There are a number of other exemptions to the termination of employment provisions of the ESA. See [“Exemptions to Notice of Termination or Termination Pay.”](#) Please also refer to [Industries and Jobs with ESA Exemptions and Special Rules](#).

The termination-of-employment rules are entirely separate from any entitlements an employee may have to be paid [severance pay](#) under the ESA.

Constructive Dismissal

A constructive dismissal may occur when an employer makes a significant change to a fundamental term or condition of an employee's employment without the employee's actual or implied consent.

For example, an employee may be constructively dismissed if the employer makes changes to the employee's terms and conditions of employment that result in a significant reduction in salary or a significant change in such things as the employee's work location, hours of work, authority, or position. Constructive dismissal may also include situations where an employer harasses or abuses an employee, or an employer gives an employee an ultimatum to "quit or be fired" and the employee resigns in response.

The employee would have to resign in response to the significant change within a reasonable period of time in order for the employer's actions to be considered a termination of employment for purposes of the ESA.

Constructive dismissal is a complex and difficult subject. For more information on constructive dismissal please contact the Employment Standards Information Centre, 1-800-531-5551.

Temporary Layoff

An employee is on temporary layoff when an employer cuts back or stops the employee's work without ending his or her employment (e.g., laying someone off at times when there is not enough work to do). An employer may put an employee on a temporary layoff without specifying a date on which the employee will be recalled to work.

For the purposes of the termination provisions of the ESA, a "week of layoff" is a week in which the employee earned less than half of what he or she would ordinarily earn (or earns on average) in a week.

A week of layoff does not include any week in which the employee did not work for one or more days because the employee was not able or available to work, was subject to disciplinary suspension, or was not provided with work because of a strike or lockout.

Employers are not required under the ESA to provide employees with a written notice of a temporary layoff, nor do they have to produce a reason for the lay-off. (They may, however, be required to do these things under a collective agreement or an employment contract.)

Under the ESA, a "temporary layoff" can last:

- A) not more than 13 weeks of layoff in any period of 20 consecutive weeks;
- or**
- B) more than 13 weeks in any period of 20 consecutive weeks, but less than 35 weeks of layoff in any period of 52 consecutive weeks, where:
 - the employee continues to receive substantial payments from the employer;
- or**

- the employer continues to make payments for the benefit of the employee under a legitimate group or employee insurance plan (such as a medical or drug insurance plan) or a legitimate retirement or pension plan;
or
 - the employee receives supplementary unemployment benefits;
or
 - the employee would be *entitled* to receive supplementary unemployment benefits but isn't receiving them because he or she is employed elsewhere;
or
 - the employer recalls the employee to work within the time frame approved by the Director of Employment Standards;
or
 - the employer recalls the employee within the time frame set out in an agreement with an employee who is not represented by a trade union;
- or**
- C) a layoff longer than a layoff described in 'B' where the employer recalls an employee who is represented by a trade union within the time set out in an agreement between the union and the employer.

If an employee is laid off for a period longer than a temporary layoff as set out above, the employer is considered to have terminated the employee's employment. Generally, the employee will then be entitled to termination pay.

Written Notice of Termination and Termination Pay

Under the ESA:

- an employer can terminate the employment of an employee who has been employed continuously for three months or more if the employer has given the employee proper *written notice* of termination and the notice period has expired;
or
- an employer can terminate the employment of an employee *without* written notice or with *less* notice than is required if the employer pays *termination pay* to the employee.

Written Notice of Termination

When an employee is terminated, the written notice required under the ESA is generally determined by how long someone has been employed by an employer.

Notice of termination of employment, once given, cannot be withdrawn without the consent of the employee.

The following chart specifies the periods of statutory notice required.

Length of Employment	Notice Required
Less than 3 months	None
3 months but less than 1 year	1 week
1 year but less than 3 years	2 weeks
3 years but less than 4 years	3 weeks
4 years but less than 5 years	4 weeks
5 years but less than 6 years	5 weeks
6 years but less than 7 years	6 weeks
7 years but less than 8 years	7 weeks
8 years or more	8 weeks

Note: Special rules determine the amount of notice required in the case of “[mass terminations](#)”, i.e. where 50 or more employees are terminated at an employer’s establishment within a four-week period.

Requirements During the Statutory Notice Period

During the statutory notice period, an employer must:

- not reduce the employee’s wage rate or alter a term or condition of employment;
- continue to make whatever contributions would be required to maintain the employee’s benefits plans; and
- pay the employee the wages he or she is entitled to, which cannot be less than the employee’s *regular wages* for a *regular work week* each week.

Regular Rate

This is an employee’s rate of pay for each non-overtime hour of work in the employee’s work week.

Regular Wages

These are wages other than overtime pay, vacation pay, public holiday pay, premium pay, termination pay and severance pay and certain contractual entitlements.

Regular Work Week

For an employee who usually works the same number of hours every week, a regular work week is a week of that many hours, not including overtime hours.

Some employees do not have a regular work week. That is, they do not work the same number of hours every week or they are paid on a basis other than time. For these employees, the “regular wages” for a “regular work week” is the average amount of the regular wages earned by the

employee in the 12 weeks in which the employee worked immediately preceding the date the notice was given.

An employer is not allowed to reduce an employee's entitlement to wages by scheduling an employee's vacation time during the statutory notice period unless the employee—*after* receiving written notice of termination of employment—agrees to take his or her vacation time during the notice period.

If an employer provides longer notice than is required, the statutory part of the notice period is the last part of the period that ends on the date of termination.

How to Provide Written Notice

In most cases, written notice of termination of employment must be addressed to the employee. It can be provided in person or by mail, fax or e-mail, as long as delivery can be verified.

There are special rules for providing notice of termination if an employee has a contract of employment or a collective agreement that provides seniority rights, allowing an employee who is laid off or terminated to displace ("bump") other employees.

In that case, the employer must post a notice in the workplace (where it will be seen by the employees) setting out the names, seniority and job classification of those employees the employer intends to terminate and the date of the proposed termination. The posting of the notice is considered to be notice of termination, as of the date of the posting, to an employee who is named in the notice. However, this notice of termination must still meet the length requirements set out in the ESA.

If an employee exercises his or her bumping rights, the posting of the notice will be considered to be notice of termination, as of the date of the posting, to any employee "bumped" out of his or her job by the employee named in the notice.

There are also special rules regarding how notice is provided when there is a [mass termination](#).

Termination Pay

An employee who does not receive the written notice required under the ESA must be given termination pay in lieu of notice. Termination pay is a lump sum payment equal to the *regular wages* for a *regular work week* that an employee would otherwise have been entitled to during the written notice period. An employee earns vacation pay on his or her termination pay. Employers must also continue to make whatever contributions would be required to maintain the benefits the employee would have been entitled to had he or she continued to be employed through the notice period.

Regular work week

Sarah has worked for three and a half years. Now her job has been eliminated and her employment has been terminated. Sarah was not given any written notice of termination.

Sarah worked 40 hours a week every week and was paid \$12.00 an hour. She also received four per cent vacation pay. Because she worked for more than three years but less than four years, she is entitled to three weeks' pay in lieu of notice.

1. Sarah's regular wages for a regular work week are calculated:
 $\$12.00 \text{ an hour} \times 40 \text{ hours a week} = \480.00 a week
2. Her termination pay is calculated:
 $\$480.00 \times 3 \text{ weeks} = \$1,440.00$
3. Then her vacation pay on her termination pay is calculated:
 $4\% \text{ of } \$1,440.00 = \57.60
4. Finally, her vacation pay is added to her termination pay:
 $\$1,440.00 + \$57.60 = \$1,497.60$

Result: Sarah is entitled to \$1,497.60.

No regular work week

Gerry has worked at a nursing home for four years. He works every week, but his hours vary from week to week. His rate of pay is \$12.00 an hour, and he is paid six per cent vacation pay.

Gerry's employer eliminated his position and did not give Gerry any written notice of termination. Gerry was ill and off work for two of the 12 weeks immediately preceding the day his employment was terminated. Gerry earned \$1,800.00 in the 12 weeks before the day on which his employment ended.

Gerry is entitled to four weeks of termination pay.

1. Gerry's average earnings per week are calculated:
 $\$1,800.00 \text{ for } 12 \text{ weeks} \div 10 \text{ weeks (Gerry was off sick for two weeks therefore these weeks are not included in the calculation)} = \180.00 a week

2. His termination pay is calculated:
 $\$180.00 \times 4 \text{ weeks} = \720.00
3. Then his vacation pay on his termination pay is calculated:
 $6\% \text{ of } \$720.00 = \43.20
4. Finally, his vacation pay is added to his termination pay:
 $\$720.00 + \$43.20 = \$763.20$

Result: Gerry is entitled to \$763.20.

When to Pay Termination Pay

Termination pay must be paid to an employee *either* seven days after the employee is terminated *or* on the employee's next regular pay date, whichever is *later*.

Mass Termination

Special rules for notice of termination may apply when the employment of 50 or more employees is terminated at an employer's establishment within a four-week period. This is often referred to as mass termination. (Note: an "establishment" can, in some circumstances, include more than one location.)

When a mass termination occurs, the employer must submit the [Form 1 \(Notice of Termination of Employment\)](#) to the Director of Employment Standards *before* giving notice to the affected employees. Notice of mass termination is not considered to be effective until the Director of Employment Standards receives the Form 1.

In addition to providing employees with individual notices of termination, the employer must post a copy of the Form 1 provided to the Director of Employment Standards in the workplace where it will come to the attention of the employees it affects on the first day of the notice period.

The amount of notice employees must receive in a mass termination is not based on the employees' length of employment, but on the number of employees who have been terminated. An employer must give:

- 8 weeks' notice if 50 to 199 employees are to be terminated
- 12 weeks' notice if 200 to 499 employees are to be terminated
- 16 weeks' notice if 500 or more employees are to be terminated

Exception to the Mass-Termination Rules

The mass-termination rules do not apply if:

1. The number of employees whose employment is being terminated represents not more than 10 per cent of the employees who have been employed for at least three months at the establishment,
and
2. None of the terminations are caused by the permanent discontinuance of all or part of the employer's business at the establishment.

Mass Termination: Resignation by an Employee

An employee who has received termination notice under the mass termination rules may wish to resign before the termination date provided in the employer's notice.

In this case, the employee must give the employer at least one week's written notice of resignation if the employee has been employed for less than two years. If the employment period has been two years or more, the employee must give at least two weeks' written notice of resignation.

An employee does not have to give notice of resignation if the employer constructively dismisses the employee or breaches a term of the contract.

Temporary Work After Termination

An employee can work for the employer on a temporary basis in the 13-week period *after* his or her employment has been terminated without affecting the original date of the termination. When the temporary work has ended, the employer is not required to provide any further notice of termination to the employee.

If an employee works *beyond* the 13-week period after the termination date, the employee becomes entitled to written notice of termination as if it had never been given. The employee's period of employment will then also include the period of temporary work.

Recall Rights

A "recall right" is the right of an employee on a layoff to be called back to work by his or her employer under a term or condition of employment. This right is commonly found in a collective agreement.

An employee who has recall rights and who is entitled to termination pay because of a layoff of 35 weeks or more may choose to:

- keep his or her recall rights and not be paid termination pay at that time;
- **or**
- give up his or her recall rights and receive termination pay.

If an employee is entitled to both termination pay and severance pay, he or she must make the same choice for both.

If an employee who *is not* represented by a trade union elects to keep his or her recall rights or fails to make a choice, the employer must send the amount of the termination pay (and severance pay, if any) to the Director of Employment Standards, who holds the money in trust.

If an employee who *is* represented by a trade union elects to keep his or her recall rights or fails to make a choice, the employer and the trade union must try to come to an arrangement to hold the termination pay (and severance pay, if any) in trust for the employee. If they cannot come to an arrangement, the employer must send the termination pay (and severance pay, if any) to the Director of Employment Standards, who holds the money in trust.

If an employee chooses to give up his or her recall rights or if the recall rights expire, the money that is held in trust must be sent to the employee.

If the employee accepts a recall back to work, the money that is held in trust will be returned to the employer.

Exemptions to Notice of Termination or Termination Pay

Many of these exemptions are complex. Please contact the Employment Standards Information Centre, 1-800-531-5551, if you need more information.

The notice of termination and termination pay requirements of the *ESA* do not apply to an employee who:

- is guilty of wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer. Note: “wilful” includes when an employee intended the resulting consequence or acted recklessly knowing the effects their conduct would have. Poor work conduct that is accidental or involuntary is generally not considered wilful.
- is free to choose whether or not to work when the employer offers him or her work, and the employee is able to refuse work when it is offered without penalty;
- was hired for a specific length of time or to do a specific task. However, such an employee will be entitled to notice of termination or termination pay if:
 - the employment ends before the term expires or the task is completed; or
 - the term expires or the task is not completed more than 12 months after the employment started; or
 - the employment continues for three months or more after the term expires or the task is completed.
- is employed in construction, this includes employees who are doing off-site work in whole or in part who are commonly associated in work or collective bargaining with employees who work at the construction site;
- builds, alters or repairs certain types of ships
- has his or her employment terminated when he or she reaches the age of retirement in accordance with the employer’s established practice, but only if the termination would not contravene the [Human Rights Code](#).
- has refused an offer of reasonable alternative employment with the employer;
- has refused to exercise his or her right to another position that is available under a seniority system. This usually means the employee gives up the right to displace or “bump” another employee in order to keep working;
- is on a temporary lay-off
- does not return to work within a reasonable time after being recalled to work from a temporary layoff;
- is terminated during or as a result of a strike or lockout at the workplace;
- has lost his or her employment because the contract of employment is impossible to perform or has been frustrated by an unexpected or unforeseen event or circumstance, such as a fire or flood, that makes it impossible for the employer to keep the employee working. (This does not include bankruptcy or insolvency or when the contract is frustrated or impossible to perform as the result of an injury or illness suffered by an employee.)

Wrongful Dismissal

The rules under the ESA about termination and severance of employment are minimum requirements. An employee may choose instead to sue an employer in a court of law for “wrongful dismissal.” An employee cannot sue an employer for wrongful dismissal *and* file a claim for termination pay or severance pay with the ministry for the same termination or severance of employment. The employee must choose one or the other and may wish to obtain legal advice concerning their rights.

Greater Right to Termination Notice, Pay in Lieu, and Severance Pay

The ESA provides minimum standards only. Some employees may have rights under the common law or other legislation that give them greater rights relating to notice of termination (or termination pay) and severance pay than the ESA. Employers and employees may wish to obtain legal advice concerning their rights.

[XV. Severance Pay](#)

“Severance pay” is compensation that is paid to a qualified employee who has his or her employment “severed.” It compensates an employee for loss of seniority and job-related benefits. It also recognizes an employee’s long service.

Severance pay is not the same as termination pay, which is given in place of the required notice of termination of employment.

When Severance Occurs

A person’s employment is “severed” when their employer:

- dismisses or stops employing the employee, *including* an employee who is no longer employed due to the bankruptcy or insolvency of his or her employer;
- “constructively” dismisses (please refer to “[Constructive Dismissal](#)” in the “Termination of Employment” section of the Guide”) the employee and the employee resigns in response within a reasonable time;
- lays the employee off for 35 or more weeks in a period of 52 consecutive weeks;

For the purposes of the Severance provision, an employee who receives **less than one quarter** of the wages he or she would have earned at the [regular rate for a regular work week](#) is considered to have been on a week of layoff. A week of layoff does not include a week when the employee is unavailable for work, unable to work, suspended for disciplinary reasons, or not provided with work because of a strike or lockout at his or her place of employment or elsewhere. Although the 52 weeks are consecutive, the 35 weeks are not required to be consecutive.

- lays the employee off because all of the business at an establishment closes permanently (an “establishment” can, in some circumstances, include more than one location); or
- gives the employee written notice of termination and the employee resigns after giving two weeks’ written notice, and the resignation takes effect during the statutory notice period.

Employee Resigns After Receiving Notice of Termination

An employee who has been given a written notice of termination can resign and continue to keep the right to severance pay. To keep this right, the employee must give the employer *two weeks’* written notice of his or her resignation. The resignation must also take effect during the *statutory notice period*—the period of written notice that is required to be given by the employer.

If an employer provides longer notice than is required, the statutory part of the notice period is the last part of the period that ends on the date of termination.

For example

Heather has worked for seven years, and is entitled to seven weeks' notice of termination under the ESA. Heather's employer gives her 10 weeks' notice. Heather must give her employer at least two weeks' written notice of her resignation. As long as Heather's resignation takes effect during the statutory notice period, in this case the last seven weeks of the 10-week notice period, she continues to be entitled to severance pay.

Qualifying for Severance Pay

An employee qualifies for severance pay when his or her employment is severed and he or she:

- has worked for the employer for five or more years (including all the time spent by the employee in employment with the employer, whether continuous or not and whether active or not)
and
- his or her employer:
 - has a payroll in Ontario of at least \$2.5 million;
or
 - severed the employment of 50 or more employees in a six-month period because all or part of the business closed.

Amount of Severance Pay

To calculate the amount of severance pay an employee is entitled to receive, multiply the employee's *regular wages* for a *regular work week* by the sum of:

- the number of completed years of employment;
and
- the number of completed months of employment divided by 12 for a year that is not completed.

The maximum amount of severance pay required to be paid under the ESA is 26 weeks.

Calculating Severance Pay

A regular work week

Susan regularly works 40 hours a week and is paid \$15.00 an hour. Her employer has a payroll of more than \$2.5 million. Her employer gives Susan seven weeks' notice of termination, and Susan works for the notice period. At the end of the notice period, Susan's employment is severed. On that date, Susan has been employed for seven years, nine months and two weeks.

Here's how to calculate Susan's severance pay entitlement.

1. Calculate Susan's regular wages for a regular work week.
Susan usually works 40 hours a week X \$15.00 = \$600.00
2. Number of Susan's completed years = 7
3. Divide the number of complete months Susan was employed in the incomplete year by 12.
Susan worked 9 complete months ÷ 12 = 0.75
4. Add the number arrived at in Step 2 (7) to the number arrived at in Step 3 (0.75)
7 + 0.75 = 7.75
5. Multiply Susan's regular wages for a regular work week (\$600.00) by the number arrived at in Step 4 (7.75).
\$600.00 X 7.75 = \$4,650.00.

Result: Susan is entitled to \$4,650.00 in severance pay.

A special method of calculating severance pay is used for employees who are paid on a basis other than time worked.

Employee paid on a basis other than time worked

Traylor works as a *commission* salesperson at his employer's high-tech retail store, one of the biggest in the city. He is paid commissions on sales made and not on the basis of time worked.

Traylor's employer decides to downsize and Traylor is given eight weeks' written notice of termination of employment. He works the notice period and his employment is severed. On the date his employment is severed, he has been employed for nine years, six months and three weeks.

Traylor's employer has a payroll of more than \$2.5 million. In the last 12 weeks of his employment, Traylor has received \$7,723.00.

To calculate Traylor's severance pay entitlement.

1. Calculate Traylor's "regular wages for a regular work week"—the average of the regular wages he received in the weeks he worked during his last 12 weeks of employment.
 $\$7,723.00 \div 12 = \643.58
2. Number of completed years = 9
3. Divide the number of complete months Traylor was employed in the last year he was employed by 12
Traylor worked 6 complete months ÷ 12 = 0.5
4. Add the number arrived at in Step 2 (9) and the number arrived at in Step 3 (0.5)
9 + 0.5 = 9.5

5. Multiply Traylor's regular wages for a regular work week (\$643.58) by the number arrived at in Step 4 (9.5)
 $\$643.58 \times 9.5 = \$6,114.01$.

Result: Traylor is entitled to \$6,114.01 in severance pay.

When to Pay Severance Pay

An employee must receive severance pay either seven days after the employee's employment is severed or on what would have been the employee's next regular pay day, whichever is *later*.

However, an employer may pay severance pay in installments with the *written* agreement of the employee or the approval of the Director of Employment Standards, Ministry of Labour. An installment plan cannot be for more than three years. If an employer fails to make a scheduled payment, all of the employee's severance pay becomes due immediately.

Exemptions from Severance Pay

Many of these exemptions are complex. Please contact the Employment Standards Information Centre, 1-800-531-5551, if you need help with these exemptions. Please also refer to [Industries and Jobs with ESA Exemptions and Special Rules](#).

An employee is not entitled to severance pay if he or she:

- has refused an offer of "reasonable alternative employment" with the employer;
- has refused "reasonable alternative employment" that is available to the employee through a *seniority system*;
- is severed and retires on a full pension (not including Canada Pension Plan benefits);
- has his or her employment severed because of a strike, as long as the employer can show that the economic effects of the strike caused the closing of part or all of the business;
- is employed in construction, including employees who are working off-site and who are commonly associated in work or collective bargaining with employees who work at the construction site;
- is employed in the on-site maintenance of buildings, structures, roads, sewers, pipelines, mains, tunnels or other works;
- is free to choose whether or not to work when the employer offers him or her work, and the employee is able to refuse work when it is offered, without penalty;
- is guilty of wilful misconduct, disobedience or wilful neglect of duty that is not trivial and was not condoned by the employer; or
- has lost his or her employment because the contract of employment is impossible to perform or has been frustrated by an unexpected or unforeseen event or circumstance. This does not include bankruptcy or insolvency or when the contract is frustrated or impossible to perform as the result of an injury or illness suffered by an employee.

Recall Rights

A “recall right” is the right of an employee on layoff to be called back to work by his or her employer under a term or condition of employment. If an employee is entitled to both termination pay—because of a layoff of 35 weeks or more—and severance pay, he or she must make the same choice for both. Please refer to “[Recall Rights](#)” in the “Termination of Employment” chapter.

Wrongful Dismissal

The rules under the ESA about termination and severance of employment are minimum requirements. An employee may choose instead to sue an employer in a court of law for “wrongful dismissal.” An employee cannot sue an employer for wrongful dismissal *and* file a claim for termination pay or severance pay with the ministry for the same termination or severance of employment. The employee must choose one or the other and may wish to obtain legal advice concerning their rights.

Greater Right to Termination Notice, Pay in Lieu, and Severance Pay

The ESA provides minimum standards only. Some employees may have rights under the common law or other legislation that give them greater rights relating to notice of termination (or termination pay) and severance pay than the ESA. Employers and employees may wish to obtain legal advice concerning their rights.

XVI. Continuity of Employment

The purpose of the continuity of employment provisions of the ESA is to ensure that an employee retains certain rights when:

- the business the employee works for is sold or transferred in any other way to a new owner;
and
- the employee continues to work in the business for the new owner.

It also applies to an employee of a building services provider when:

- the employer no longer holds the contract at the building where the employee works
and
- the employee is hired to work for the new provider at the same location.

Building Services Provider

This is a person or company that provides *cleaning, security, or food services* for a premises. A building services provider can also provide *property management, parking garage, parking lot and concession stand* services related only to the building, its occupants and visitors. A building services provider includes the owner or manager of a building if that owner or manager provides these services to a building that they own or manage.

The ESA also has specific provisions that apply *only* to building services providers and their employees. (See the [“Building Services Providers”](#) chapter for more information.)

Determining Entitlement to Rights and Benefits

Most employees are entitled to earn such rights as vacations, pregnancy and parental leaves, termination and severance pay. However, they are not eligible to receive them until they have worked for an employer for a certain minimum time, which varies according to each kind of right. The continuity of employment provisions provide that a person’s length of employment with the seller of a business or a previous building services provider is attributed, or “flows through” to the purchaser of the business or to the new building services provider. This means that an employee’s entitlement to rights that are based on length of employment are unchanged, despite the sale of the business or the change in building service providers.

When a person’s length of employment is attributed to a new employer, the new employer has to recognize the time the person worked for the previous employer. This “earned” time must be credited toward any rights the employee has that are based on his or her length of employment.

When a business is sold

Richard has worked for 10 years as a mechanic. His employer, Kim, decides to retire and sell the garage to her son, who chooses to continue to employ Richard. Richard wants to carry on working in the business, and he accepts the job with the new owner.

Because Richard's employment does not end with the transfer of the business, the length of time he worked for Kim must be recognized for any rights he has that are based on his length of employment.

When part of a business is sold

Talia works for a dairy that produces milk and ice cream. The dairy sells the ice cream division so that it can concentrate on milk production. The buyer offers to continue to employ Talia, and she agrees to work for the new owner.

Talia's employment does not end with the sale. The total time Talia was employed by the business must be taken into account when determining any rights Talia may have with the new employer.

When a building services provider is replaced

Suzanna has worked for two years for ABC Cleaning. Her employer has a contract with a building owner to provide cleaning services in the owner's building. The contract is for a specific period of time, and when it expires the owner contracts with a new company, DEF Cleaning.

Suzanna is hired by DEF Cleaning and continues to work in this building. In hiring her, DEF Cleaning must recognize Suzanna's length of employment with ABC Cleaning for any rights she has that are based on her length of employment.

When a service is contracted to a building services provider

Jim has worked for MNO Insurance for six years as a cleaner. His job is to keep MNO's office building clean. MNO decides to contract this service to a cleaning company, GHI Cleaning. GHI Cleaning chooses to hire Jim, and he continues working in the building.

Jim's length of employment with MNO is included when determining his length of employment with GHI.

Continuity of Employment and Entitlements to Vacation Time and Pay

Under the ESA, an employee earns two weeks of vacation time once he or she has completed a 12-month vacation entitlement year and 4% of the gross wages earned in that entitlement year are accrued as vacation pay. The employer must ensure the vacation is taken no later than 10 months after the vacation entitlement year ends and generally, the vacation pay accrued in respect of that vacation entitlement year is due at that time. (See [When to Pay Vacation Pay](#)).

When a business is sold

Steph has worked for a business for 16 months when the business is sold. He has not taken any vacation at the time of the sale. Steph continues to work for the new owner, and his previous employment with the seller must be recognized by the new owner. The new owner must give Steph the vacation he earned in his first 12 months of employment with the seller within six months of hiring him. In addition, the purchaser must pay Steph the vacation pay accrued in respect of that vacation entitlement year (if it has not yet been paid). The purchaser will also be liable for the vacation pay Steph accrued in the last four months of employment with the seller, if it has not yet been paid.

When a building services provider is replaced

Matti has worked as a cleaner with a company for 38 months when the company loses its cleaning contract. He is immediately hired by the company that won the contract. The new provider must recognize Matti's employment with his former employer.

Matti has already taken two weeks of vacation for each of his first two vacation entitlement years with his former employer. His new employer must therefore give him the two weeks of vacation earned in respect of his third vacation entitlement year. The vacation must be taken within 10 months of the completion of the third vacation entitlement year (8 months after he was hired by the new building services provider).

Note: A provider who stops providing services at a premises and who stops employing an employee has to pay the employee the amount of any accrued (accumulated) vacation pay:

- within seven days of the date the provider stops providing services to the premises;
or
- on the employee's next pay day;

whichever is later.

Continuity of Employment and Entitlements to Pregnancy and Parental Leave

To qualify for a [pregnancy leave](#), a woman must have started her employment at least 13 weeks before the date her baby is expected to be born.

When a business is sold

Amy has worked for an accounting firm for three years. The firm is sold and Amy starts working for the new owner. The sale occurred four weeks before Amy's due date, and she will have started her employment with the new owner only four weeks before her baby is due.

Amy's employment with the old business is deemed to have been employment with the new owner. She is considered to have started her employment three years and four weeks before her baby is due, and she qualifies for pregnancy leave.

When a building services provider is replaced

Hannah has worked for five years in a hospital cafeteria for 123 Foods. Hannah is eight months pregnant, and she intends to begin her pregnancy leave in one month's time on the date her baby is due. However, 123 Foods is replaced by a new services provider, 456 Foods, which hires Hannah.

Because 456 Foods must recognize Hannah's years of employment with the previous provider, she is considered to have started her employment five years and one month before her due date. Hannah is entitled to pregnancy leave.

To qualify for a [parental leave](#), an employee who is a new parent must have been employed by his or her employer for at least 13 weeks before the leave begins.

When a business is sold

Marilyn, Leigh's same-sex partner, has worked for a printing company for 13 years. Leigh gave birth six months ago. The printing company was sold when the baby was five months old and Marilyn continues to work for the new owner.

Marilyn planned to take a parental leave when the baby was seven months old. Her total length of employment with the business is attributed to the new owner. Therefore, her total length of employment is more than 13 weeks, and she is qualified for the parental leave.

When a building services provider is replaced

Raph has worked for a security services company as a security guard for three years. His employer provides security services at a local credit union. Raph and his wife Janet have a three-month-old son.

Raph planned on taking a parental leave when his son was five months old. The security services company was replaced by another company at the end of its contract, one month before Raph was planning to begin his parental leave.

Raph is hired by the new security services company. He qualifies for parental leave because the new services provider must recognize his total length of employment, which is more than the 13 weeks he needs to qualify under the ESA.

Continuity of Employment and Entitlements to Termination of Employment and Severance of Employment

In most cases, when a person's employment is going to be ended by an employer, the employee is usually entitled to receive either written notice of termination, termination pay, or a combination of both. Some employees are also entitled to receive severance pay. The length of the notice or the amount of termination pay or severance pay depends on how long the person has been employed.

When a business is sold

Janie Marie has worked for a retail chain of stores for 10 years. All of the stores have been sold to a new owner, and the new owner continues to employ Janie Marie. Six months after buying the business, the new owner decides to downsize, and Janie Marie's employment is ended.

Janie Marie's length of employment with the business is attributed to the new owner. Since she was employed with the business for 10½ years, she is entitled to receive the maximum period of written notice or pay in lieu of notice required under the ESA, in this case eight weeks.

Because Janie Marie was employed with the business for more than five years and her employer's payroll is greater than \$2.5 million annually, she is also entitled to 10½ weeks of severance pay.

When a building services provider is replaced

Arnold has worked as a site supervisor for a building cleaning company, ABC Cleaning, for four years. ABC Cleaning's contract expires and it is taken over by a new services provider, DEF Cleaning. Arnold is hired by DEF Cleaning and works for them for another four years. DEF terminates his employment.

Arnold is entitled to either eight weeks' written notice of termination of employment or eight weeks' pay in lieu of notice from DEF Cleaning. This is because DEF Cleaning must recognize his length of employment with the previous employer.

Arnold may also be entitled to severance pay if DEF Cleaning's payroll is more than \$2.5 million or more than 50 employees have their employment ended within a six-month period as a result of a permanent discontinuance of all or part of DEF Cleaning's business at an establishment.

Exception: 13-Week Gap in Employment when there is a Sale of Business

Where there has been a sale of a business, an exception to the continuity of employment provision occurs if there is a 13-week gap in employment .

A person's employment with a previous employer is not deemed to have been employment with the new owner if the employee is hired by the new owner more than 13 weeks after either the employee's last day of work with the seller or the day of the sale, whichever is earlier.

When an employee is hired more than 13 weeks after stopping work with the seller

John works for Rick & Fred Taxis which is having financial difficulties. His employment is ended by the owners and, 10 weeks later, the business is sold to a new owner, Tamarack Taxis. Tamarack Taxis does not immediately offer to hire John.

After eight weeks, the new owner realizes that he needs more staff. He calls John and asks him to return to his old job. John does, but his employment with the previous owner is not attributed to Tamarack Taxis because he was hired more than 13 weeks after his last day of employment with the previous owner.

When an employee is hired more than 13 weeks after the day of the sale

Trevor works as the manager at Jeff's Restaurant. Jeff decides to sell the business, and Trevor works until the date the restaurant is sold. The new owner decides to manage the restaurant himself and does not hire Trevor.

After 16 weeks, the new owner realizes that he is not able to manage the restaurant as well as Trevor did, and he asks him to return to his job as manager. Trevor agrees, and he starts working again in the business.

Trevor's employment with the previous owner is not deemed to have been employment with the new owner because he was hired back more than 13 weeks after the date of the sale of the business.

Exception: 13-Week Gap in Employment when there is a Change of Building Services Providers

Where there has been a change of building services providers, an exception to the continuity of employment provision occurs if there is a 13-week gap in employment.

A person's employment with a previous services provider is not deemed to have been employment with the new provider if the employee is hired by the new provider more than 13 weeks after either the employee's last day of work with the previous provider or the day the new provider began to provide the services, whichever is earlier.

When an employee is hired more than 13 weeks after employment was ended

Maggie has worked for four years as a parking garage attendant for RST, a building services provider. RST cuts back on its staff and terminates Maggie's employment. Three weeks after her termination, a new building services provider takes over the operation of the parking garage. Three months later, the new provider hires Maggie to work as an attendant at the same parking garage.

Maggie's employment with RST is not deemed to have been employment with the new services provider because there was a gap of more than 13 weeks between the date her employment was terminated by RST and the date she was hired by the new provider.

When an employee is hired more than 13 weeks after a new provider takes over

Al works as a car jockey at a parking lot operated by the owner of an office building. Because the owner provides parking lot services to the building that it owns, it is considered to be a building services provider.

The owner decides that it wants to contract the operation of the parking lot to TUV, a building services provider. Al has been employed by the building owner for three years.

Al's employment is terminated and his last day of work coincides with the last day the lot is operated by the building owner. The next day the new building services provider, TUV, takes over the operation.

TUV does not immediately offer to hire Al. However, six months later, it hires him to work as a car jockey.

Al's employment with the building owner is not attributed to TUV because he was hired more than 13 weeks after his last day of employment with the owner of the office building (who was the previous building services provider).

Special Circumstances

Please contact the Employment Standards Information Centre, 1-800-531-5551 for further information about any of the following circumstances:

- when a business has been taken over by a landlord due to non-payment of rent;
- when a business has been taken over by a trustee or receiver due to a bankruptcy or receivership; and
- when a business is a franchise operation.

XVII. Building Services Providers

As well as the continuity of employment provisions already discussed, additional provisions of the ESA apply *only* to employers and employees in the building services provider sector.

A building services provider is a person or company that provides cleaning, security, or food services for a premises. A provider can also offer property management, parking garage, parking lot and concession stand services related only to a building, its occupants and visitors.

The owner or manager of a building is considered a building services provider if that owner or manager provides these services to the building that they own or manage.

Termination and Severance of Employment

If a building services provider is replaced by a new provider, the new provider may choose not to hire the employees of the former provider. However, the **new** provider must then, in most cases, comply with the Termination and Severance of Employment sections (Part XV) of the ESA as if these employees had been terminated and/or severed by the new provider.

For Example

Jan has worked for ABC Foods for 10 years as a cook in a cafeteria. The company has a contract to provide food services in an office building. When the contract expires, ABC ends their employment relationship with Jan. DEF Foods is contracted to provide the food services, but because DEF Foods has its own staff it does not hire Jan.

DEF Foods is responsible for paying Jan's termination pay and her severance pay (if applicable), even though she was never employed by DEF Foods. Jan is entitled to eight weeks' pay in lieu of notice and, if she is entitled to severance pay, 10 weeks of severance pay. These payments are based on the length of time she was employed with ABC Foods.

A *new* building services provider does not have to provide termination or severance pay to an employee:

1. who continues to work for the previous provider;
2. whose work with the previous provider included providing services at the premises but who did not perform his or her job *primarily* at those premises during the 13 weeks before the date the new provider began to provide services;
3. whose work included providing services at the premises but who:
 - was not actively at work immediately before the date the new provider began to provide services;
 - and***
 - did not perform his or her job primarily at the premises during the most recent 13 weeks he or she was actively employed;

4. who did not perform his or her job at the premises for *at least* 13 weeks during the 26-week period before the new provider began to provide services (this does not include any time the employee was on pregnancy, parental, family medical, personal emergency, or declared emergency leave, or time the building services were not being provided);
5. who refuses an offer of employment with the new provider that is reasonable in the circumstances.

If exemptions 2, 3, 4 or 5 apply, the employee is entitled to termination and/or severance pay from the previous provider.

Providing Information

When a building services provider is considering becoming a new provider of services at a building, it can ask the building's owner or manager for certain information about the employees who are working for the current services provider. This information can help the potential new provider decide whether, and on what terms, to make a bid to take over the provision of the services, and the number of employees, if any, it will retain if it wins the contract.

A potential new provider can ask for information on:

- each employee's job classification or job description;
- the wage rate actually paid to each employee;
- a description of any benefits provided to each employee, including the cost of each benefit and the benefit period to which the cost relates;
- the number of hours each employee works in a regular work day and in a regular work week or, if the employee's hours of work vary from week to week, the number of non-overtime hours for each week worked by the employee during the 13 weeks prior to the date the request for information was made;
- the date each employee was hired by the provider;
- any period of employment attributed to the current provider because of the continuity of employment provisions of the ESA;
- the number of weeks each employee worked at the premises in the 26 weeks before the request for information was made (not including any period during which the provision of services was temporarily discontinued or during which the employee was on a pregnancy, parental, family medical, personal emergency or declared emergency leave);
- a statement indicating whether either of the following paragraphs applies to each employee:
 - the employee's work, before the date the request date, included providing services at the premises, but the employee *did not* perform his or her job *primarily at those premises* during the 13 weeks before the request was made;

- the employee's work included providing services at the premises, but the employee *was not actively at work* immediately before the date the request was made, and the employee did not perform his or her job *primarily at the premises* during the most recent 13 weeks of active employment.

Once a building services provider is awarded the contract and becomes the new provider of the services at a building, it has the right to ask for the name, residential address, and telephone number of each employee.

If a building owner or manager receives a request for information from a new or potential new services provider, it has the right to get the necessary information from the current or former services provider.

Anyone who receives information about employees under this provision must use it only for the purposes outlined here, and must ensure that the information remains confidential.

XVIII. Equal Pay for Equal Work

Ontario has legislation called the *Pay Equity Act* to ensure that women and men receive equal pay for performing jobs that may be very different but are of *equal value*.

The ESA, on the other hand, has provisions that ensure women and men receive equal pay for performing substantially the same job. That is, they are entitled to receive equal pay for “equal work”, meaning work that is *substantially the same, requiring the same skill, effort and responsibility and performed under similar working conditions in the same establishment*.

According to the ESA, a woman cannot be paid less than a man if she is doing “equal work.” This also applies in reverse; a man cannot receive less pay than a woman if he is doing “equal work.”

Substantially the Same Work

This means that the work is similar enough that it could reasonably be considered to fall within the same job classification. The jobs do not have to be identical in every respect, nor do they have to be interchangeable.

Substantially the Same Skill, Effort and Responsibility

Skill refers to the degree or amount of knowledge, physical, or motor capability needed by the worker performing the job.

Effort is the physical or mental exertion needed to perform a job.

Responsibility is measured by the number and nature of a worker’s job obligations, the degree of accountability, and the degree of authority exercised by a worker in the performance of the job.

Similar Working Conditions

Working conditions refer to such things as exposure to the elements, health and safety hazards, workplace environment, hours of work and any other terms or conditions of employment.

The Same Establishment

This means a location where the employer carries on business. Two or more locations are considered a single establishment if:

- they are in the same municipality;
- **or**
- there are common “bumping rights” for at least one employee across municipal borders.

When two people do substantially the same work

Andy and Kyra both work on a production line. Kyra packs plastic spoons into small boxes, and Andy packs the small boxes into bigger boxes. There is not anything about either of these jobs that requires more skill, effort or responsibility.

Andy and Kyra are doing substantially the same work, and they must be paid the same wages (unless one of the exceptions listed below applies).

When a business has two locations

An employer owns two clothing stores in the same city. One sells women's clothes, and the staff are women. The other sells men's clothes, and the staff are men. The two stores are considered one establishment under the ESA, because they are in the same municipality.

Since the staff in both stores do substantially the same work, selling clothes, everyone should receive the same pay.

If employees have not been paid equal pay for equal work, steps must be taken to change this. Employers must raise wages to achieve equal pay. They *cannot* lower wages to achieve equal pay.

Exceptions

If a man and a woman are doing substantially the same work, they can be paid different rates of pay if the difference is due to:

- *A seniority system.* Under an established seniority system, the time an employee has worked for an employer is credited. This can be used to justify paying a more senior employee a higher wage than a less experienced employee.
- *A merit system.* An employee can be paid more money or a bonus based on a system that measures the work performance of the employees objectively.
- *A piecework system.* An employer may have a system that measures higher quality or quantity of work. If this is the case, an employee can be paid a higher rate for producing more work or better quality work if the system is applied equally to both sexes.
- *Any difference that is not based on the gender of the employee.* For example, an employee can receive more money for working at night. Or an employee can be paid more while participating in a well-defined training program that has as its goal the advancement of the employee within the organization.

XIX. Lie Detector Tests

A “lie detector test” means an analysis, examination, interrogation or test that is taken or performed by means of a machine and is used to assess a person’s credibility.

For the purposes of the lie detector provisions of the ESA:

“**Employer**” also includes a prospective employer and a police governing body.

“**Employee**” also includes an applicant for employment, a police officer and a person who is applying to be a police officer.

Prohibition of Testing

Employers are prohibited from using lie detectors to screen employees. *No one* can directly or indirectly require, request, enable or influence an employee to take a lie detector test.

An Employee’s Right to Refuse

An employee has the right:

- not to take a lie detector test;
- not to be asked to take a lie detector test; and
- not to be required to take a lie detector test.

Disclosure

No one can disclose to an employer that an employee has taken a lie detector test, and no one can disclose to an employer the results of a lie detector test taken by an employee.

Use of Lie Detectors by the Police

Nothing in this part of the ESA prevents a person from:

- being asked by a police officer to take a lie detector test;
- consenting to take a lie detector test; and
- taking a lie detector test;

If the test is administered on behalf of a police force in Ontario or by a member of a police force in Ontario in the course of the investigation of an offence.

Powers of an Employment Standards Officer

If an employment standards officer finds that this part of the ESA has been contravened, the officer can order the reinstatement of an employee.

If there is a contravention involving an applicant for employment or an applicant to be a police officer, an employment standards officer can order the employer to hire the applicant.

The officer can also order that the person be compensated by the employer for losses suffered because of the contravention.

XX. Reprisals

Employers are prohibited from penalizing employees *in any way* for:

- asking the employer to comply with the ESA and the regulations
- asking questions about rights under the ESA
- filing a complaint under the ESA
- exercising or trying to exercise a right under the ESA
- giving information to an employment standards officer
- taking, planning on taking, being eligible or becoming eligible for a parental, pregnancy, personal emergency, declared emergency, or family medical leave
- being subject to a garnishment order (i.e., to have a certain amount deducted directly from wages to satisfy a debt)
- participating in a proceeding under the ESA
- participating in a proceeding under section 4 of the [Retail Business Holidays Act](#) (regarding tourism exemptions that allow retail businesses to open on holidays)
- refusing to take a lie detector test
- refusing Sunday work (for certain retail workers only).

An employer that does penalize an employee for any of these reasons can be ordered by an employment standards officer to:

- reinstate an employee to his or her job
- compensate an employee for any loss incurred because of a violation of the ESA
- pay the employee any wages that may be owing.

XXI. Industries and Jobs with ESA Exemptions and/or Special Rules

The ESA applies to most employers and employees in Ontario. However, certain industries and/or jobs are covered by the ESA, but are exempt from (that is, not covered by) some provisions, or are subject to special rules. The following chart is a quick reference tool, for complete information please refer to the ESA and its regulations. Provisions of the ESA that have no exemptions or special rules, such as pregnancy leave, parental leave, or family medical leave, are not included. Jobs and industries with no exemptions or special rules are not included.

Regulations containing special rules and exemptions to the minimum standards of the ESA are:

- [EXEMPTIONS, SPECIAL RULES AND ESTABLISHMENT OF MINIMUM WAGE – O.Reg. 285/01](#)
- [TERMINATION AND SEVERANCE OF EMPLOYMENT - O. Reg. 288/01](#)
- [TERMS AND CONDITIONS OF EMPLOYMENT IN DEFINED INDUSTRIES – O.Reg 291/01](#)
- [TERMS AND CONDITIONS OF EMPLOYMENT IN DEFINED INDUSTRIES – AMBULANCE SERVICES – O.Reg. 491/06](#)
- [TERMS AND CONDITIONS OF EMPLOYMENT IN DEFINED INDUSTRIES — AUTOMOBILE MANUFACTURING, AUTOMOBILE PARTS MANUFACTURING, AUTOMOBILE PARTS WAREHOUSING AND AUTOMOBILE MARSHALLING - O. Reg. 502/06](#)
- [TERMS AND CONDITIONS OF EMPLOYMENT IN DEFINED INDUSTRIES – LIVE PERFORMANCES, TRADE SHOWS AND CONVENTIONS – O.Reg. 160/05](#)
- [TERMS AND CONDITIONS OF EMPLOYMENT IN DEFINED INDUSTRIES – MINERAL EXPLORATION AND MINING – O. Reg. 159/05](#)
- [TERMS AND CONDITIONS OF EMPLOYMENT IN DEFINED INDUSTRIES – PUBLIC TRANSIT SERVICES – O.Reg. 390/05](#)

Job Categories C = Covered NC = Not Covered SRA = Special Rules Apply	MINIMUM WAGE	HOURS OF WORK	DAILY REST PERIODS	WEEKLY/BI-WEEKLY REST PERIODS	EATING PERIODS	OVERTIME	PAID PUBLIC HOLIDAYS	VACATION WITH PAY	TERMINATION NOTICE / PAY SEVERANCE PAY
<p>Ambulance drivers, ambulance drivers' helpers and first aid attendants on an ambulance. (See O.Reg. 285/01.)</p> <p>Special rules apply for emergency medical attendants.</p>	C	C	C	C	C	NC	C	C	C
<p>Automobile manufacturing, automobile parts manufacturing, automobile parts warehousing and automobile marshalling</p> <p>Daily Rest Periods: On one day in each work week, the period that is free from performing work may be shorter than 11 consecutive hours but shall be at least eight consecutive hours. (See O.Reg. 502/06.)</p>	C	C	SRA	C	C	C	C	C	C
<p>Construction employees (on-site and related off-site)</p> <p>Overtime pay 1½ × regular rate for each hour in a work week in excess of:</p> <p><i>Road building: streets, highways and parking lots (on-site) excluding on-site road maintenance</i> 55 hours, with limited averaging over two successive work weeks.</p> <p><i>Road building: bridges, tunnels, retaining walls in connection with streets or highways (on-site employees)</i> 50 hours with limited averaging over two successive work weeks.</p> <p><i>Sewers, watermains and incidental work, including guarding the site:</i> 50 hours (See O.Reg. 285/01.)</p> <p>Public Holidays: exempted if receiving at least 7.3 per cent of wages for vacation pay or holiday pay. (See O.Reg. 285/01.)</p>	C	NC	NC	NC	C	SRA	SRA	C	NC
<p>Construction employees: Road maintenance (on-site)</p> <p>Overtime Pay: 55 hours, with limited averaging over two successive weeks. (See O.Reg. 285/01.)</p> <p>Public Holidays: Exempted if receiving at least 7.3 per cent of wages for vacation pay or holiday pay. (See O.Reg. 285/01.)</p> <p>Termination notice/pay and severance pay: Entitled to notice of termination. Exempted from severance pay. (See O.Reg. 288/01.)</p>	C	NC	NC	NC	C	SRA	SRA	C	SRA

Job Categories C = Covered NC = Not Covered SRA = Special Rules Apply	MINIMUM WAGE	HOURS OF WORK	DAILY REST PERIODS	WEEKLY/BI-WEEKLY REST PERIODS	EATING PERIODS	OVERTIME	PAID PUBLIC HOLIDAYS	VACATION WITH PAY	TERMINATION NOTICE / PAY SEVERANCE PAY
Continuous operation employees (e.g. oil refineries, steel works, breweries) Public Holidays: In some cases, may be required to work on a public holiday. (See Special Rules for Certain Industries.)	C	C	C	C	C	C	S R A	C	C
Crown employees	N C	N C	N C	N C	N C	N C	N C	N C	C
Domestic workers employed by a householder. Provide services in the household or care, supervision or personal assistance to children, senior or disabled members of the household. <i>Does not include</i> a sitter who provides care, supervision or personal assistance to children on an occasional, short-term basis. Minimum Wage: No deductions for non-private room. (See the Domestic Workers fact sheet.)	S R A	C	C	C	C	C	C	C	C
Drivers and drivers' helpers on a 'for hire' delivery vehicle for local cartage. Overtime pay: 1½ × regular rate for each hour in excess of 50 in a work week. (See O.Reg. 285/01.)	C	C	C	C	C	S R A	C	C	C
Drivers of highway transport trucks ('for hire') Overtime pay: 1½ × regular rate for each hour in excess of 60 in a work week; based only on hours driver is directly responsible for truck. (See O.Reg. 285/01.)	C	C	C	C	C	S R A	C	C	C
Elect to work employees may choose to work when requested and may refuse work without penalty. Public Holidays: General standard does not apply, but entitled to 1½ × regular rate for hours worked on the holiday. (See O.Reg. 285/01.)	C	C	C	C	C	C	S R A	C	N C
Embalmers and funeral directors (See O.Reg.285/01.)	C	N C	N C	N C	C	C	C	C	C

Job Categories C = Covered NC = Not Covered SRA = Special Rules Apply	MINIMUM WAGE	HOURS OF WORK	DAILY REST PERIODS	WEEKLY/BI-WEEKLY REST PERIODS	EATING PERIODS	OVERTIME	PAID PUBLIC HOLIDAYS	VACATION WITH PAY	TERMINATION NOTICE / PAY SEVERANCE PAY
Emergency medical attendants or paramedics in the land and air ambulance industry who are represented by a bargaining agent <u>Daily Rest Periods:</u> shall receive period of at least eight consecutive hours free from performing work in each day. <u>Eating Periods:</u> by agreement between employer and bargaining agent may agree to a term that addresses the employee's entitlement to an eating period that term applies to that employer and employee instead of section 20 of the ESA. (See O.Reg. 491/06.)	C	C	S R A	C	S R A	N C	C	C	C
Farm employees who are directly employed in primary production of eggs, milk, grain, seeds, fruit, vegetables, maple products, honey, tobacco, herbs, pigs, cattle, sheep, goats, poultry, deer, elk, raites, bison, rabbits, game birds, wild boar and cultured fish. (See O.Reg. 285/01.) (Also see: 'Farm Related Exemptions', Harvesters, Landscape gardeners.)	N C	N C	N C	N C	N C	N C	N C	N C	C
"Farm related exemptions" Workers directly employed in mushroom growing; growing of flowers, trees and shrubs for the retail and wholesale trade; growing, transporting and laying of sod; breeding and boarding of horses on a farm; or the keeping of fur-bearing mammals under the <i>Fish and Wildlife Conservation Act, 1997</i> for propagation or commercial production of pelts. (See O.Reg. 285/01.) (Also see: Farm employees, Harvesters, Landscape gardeners.)	C	N C	N C	N C	N C	N C	N C	C	C
Film and television industry Recorded visual and audiovisual entertainment production Does not include producing commercials, video games, or educational material. (See O.Reg. 285/01.)	C	N C	N C	N C	N C	C	C	C	C
Firefighters (See O.Reg. 285/01.)	C	N C	N C	N C	C	N C	N C	C	C
Fishers (commercial) (See O.Reg. 285/01.)	N C	N C	N C	N C	N C	N C	N C	N C	C

Job Categories	MINIMUM WAGE	HOURS OF WORK	DAILY REST PERIODS	WEEKLY/BI-WEEKLY REST PERIODS	EATING PERIODS	OVERTIME	PAID PUBLIC HOLIDAYS	VACATION WITH PAY	TERMINATION NOTICE / PAY SEVERANCE PAY
C = Covered NC = Not Covered SRA = Special Rules Apply									
Fresh fruit, vegetable canning, processing and packing or distribution: seasonal employees (with the employer not more than 16 weeks in a calendar year). Overtime pay: 1½ × regular rate for hours in excess of 50 in a work week. (See O.Reg. 285/01.)	C	C	C	C	C	S R A	C	C	C
Garment Industry Women's coat and suit industry Women's dress and sportswear industry. (See O.Reg. 291/01.)	S R A	S R A	S R A	S R A	S R A	S R A	S R A	S R A	C
Harvesters of fruit, vegetables and tobacco Minimum Wage: Special rules for piece work rates and deemed payment of wages for providing room and board. Public Holidays: Standard applies after 13 weeks or more with an employer. In some cases, may be required to work on a public holiday - (See Special Rules for Certain Industries: continuous operations) Vacation with Pay: Standard applies after 13 weeks or more with an employer. (See O.Reg. 285/01.) (Also see: Farm employees, 'Farm Related Exemptions', Landscape gardeners)	S R A	N C	N C	N C	N C	N C	S R A	S R A	C
Homemakers employed by a third party, such as an agency, to perform domestic services for a householder and/or family in their private residence. Minimum Wage: Employer not required to pay more than 12 hours/day at (at least) minimum wage. (See O.Reg. 285/01.)	S R A	N C	N C	N C	N C	N C	C	C	C
Homeworkers (employees who do work such as: word processing, telephone soliciting, online research, sewing, manufacturing, or preparing food for resale in their own home for an employer) (See Homeworkers fact sheet.) Minimum Wage: 110 per cent of general minimum wage.	S R A	C	C	C	C	C	C	C	C
Hospital employees Public Holidays: In some cases, may be required to work on a public holiday. (See Special Rules for Certain Industries.) (Also see: Elect to work)	C	C	C	C	C	C	S R A	C	C

Job Categories	MINIMUM WAGE	HOURS OF WORK	DAILY REST PERIODS	WEEKLY/BI-WEEKLY REST PERIODS	EATING PERIODS	OVERTIME	PAID PUBLIC HOLIDAYS	VACATION WITH PAY	TERMINATION NOTICE / PAY SEVERANCE PAY
C = Covered NC = Not Covered SRA = Special Rules Apply									
Hotel, motel, tourist resort, restaurant or tavern employees (category 1) Public Holidays: In some cases, may be required to work on a public holiday. (See Special Rules for Certain Industries)	C	C	C	C	C	C	SRA	C	C
Hotel, motel, tourist resort, restaurant or tavern employees (category 2) <i>provided with room and board and who work more than 16 and not more than 24 weeks per year</i> Overtime pay: 1½ × regular rate for each hour in excess of 50 in a work week (See O.Reg. 285/01.) Public Holidays: In some cases, may be required to work on a public holiday. (See Special Rules for Certain Industries.)	C	C	C	C	C	SRA	SRA	C	C
Hotel, motel, tourist resort, restaurant or tavern employees (category 3) <i>who are provided with room and board and who work 16 weeks or less per year</i> Overtime pay: 1½ × regular rate for each hour in excess of 50 in a work week. (See O.Reg. 285/01.)	C	C	C	C	C	SRA	NC	C	C
Hunting and fishing guides Minimum Wage: Rates for less than five consecutive hours/day and for five or more hours/day. (See O.Reg. 285/01.)	SRA	NC	NC	NC	C	NC	NC	C	C
Information technology professionals who use specialized knowledge and professional judgement to work with information systems based on computers and related technologies. (See O.Reg. 285/01.)	C	NC	NC	NC	NC	NC	C	C	C
Landscape gardeners (See O.Reg. 285/01.)	C	NC	C	C	C	NC	NC	C	C
Liquor servers Minimum Wage: (special liquor servers rate), does not include tips and gratuities. Public Holidays and Overtime Pay: exemption and/or special rules may apply. (See Hotel, motel, tourist resort, restaurant or tavern employees categories 1-3.)	SRA	C	C	C	C	SRA	SRA	C	C
Live performances, trade shows and convention (See O.Reg 160/05.)	C	C	SRA	C	C	C	C	C	C

Job Categories	MINIMUM WAGE	HOURS OF WORK	DAILY REST PERIODS	WEEKLY/BI-WEEKLY REST PERIODS	EATING PERIODS	OVERTIME	PAID PUBLIC HOLIDAYS	VACATION WITH PAY	TERMINATION NOTICE / PAY SEVERANCE PAY
C = Covered NC = Not Covered SRA = Special Rules Apply									
Maintenance employees working on site on buildings, structures, sewers, pipelines, mains, tunnels or other works except roads. <u>Termination Notice/Pay, Severance Pay</u> : Exempted from severance pay. (See O.Reg. 288/01.)	C	C	C	C	C	C	C	C	S R A
Managerial and supervisory employees (See O.Reg. 285/01.)	C	NC	NC	NC	C	NC	C	C	C
Mining industry/mineral exploration industry (See O.Reg 159/05.)	C	C	C	S R A	C	C	C	C	C
Part-time employees unless employed in an exempted industry or occupational group.	C	C	C	C	C	C	C	C	C
Professionals (Category 1) Employees who are: qualified practitioners of architecture, law, professional engineering, public accounting, surveying, and veterinary science; registered practitioners of chiropody (including podiatry), chiropractic, dentistry, massage therapy, medicine, optometry, pharmacy, physiotherapy or psychology; registered practitioners under the <i>Drugless Practitioners' Act</i> (e.g., naturopaths, osteopaths) teachers, as defined in the <i>Teaching Profession Act</i> , and students training for these professions. (See O.Reg. 285/01.) Personal Emergency Leave may not be taken where it would constitute an act of professional misconduct or a dereliction of professional duty.	NC	NC	NC	NC	NC	NC	NC	NC	C

Job Categories	MINIMUM WAGE	HOURS OF WORK	DAILY REST PERIODS	WEEKLY/BI-WEEKLY REST PERIODS	EATING PERIODS	OVERTIME	PAID PUBLIC HOLIDAYS	VACATION WITH PAY	TERMINATION NOTICE / PAY SEVERANCE PAY
<p>C = Covered NC = Not Covered SRA = Special Rules Apply</p> <p>Professionals: (Category 2)</p> <p>Registered practitioners under Schedule 1 of the <i>Regulated Health Professions Act, 1991</i>, not listed in the previous section:</p> <p>Audiologists, dental hygienists, dental technologists, dentists, dieticians, medical laboratory technologists, medical radiation technologists, midwives, nurses, occupational therapists, opticians, respiratory therapists and speech language therapists.</p> <p>Personal Emergency Leave may not be taken where it would constitute an act of professional misconduct or a dereliction of professional duty. (See also: hospital employees.)</p>	C	C	C	C	C	C	C	C	C
<p>Public transit services: (See O.Reg. 390/05.)</p>	C	C	S R A	C	S R A	C	C	C	C
<p>Real estate salespersons or broker (See O.Reg. 285/01.)</p>	N C	N C	N C	N C	N C	N C	N C	N C	C
<p>Residential care workers who care for or supervise children or developmentally handicapped persons in a residence and live in the residence when working.</p> <p>Minimum Wage: Hourly minimum wage entitlement to a maximum of 12 hours a day, unless employee provides the employer with an accurate daily record of hours worked, in which case the daily maximum is 15 hours.</p> <p>Free time: 36 hours per work week, which are to be consecutive unless the employee consents to another arrangement. If an employee consents to work during free time, wages are calculated at 1½ X the regular rate for time worked or time in lieu may be added to one of next eight free time periods. (See Special Rules Re Residential Care Workers, O.Reg. 285/01.)</p>	S R A	N C	N C	S R A	N C	N C	C	C	C
<p>Salespersons--commission who normally sell away from their employer's office or plant (except those who sell on a route). (See O.Reg. 285/01.)</p>	N C	N C	N C	N C	N C	N C	N C	N C	C

Job Categories C = Covered NC = Not Covered SRA = Special Rules Apply	MINIMUM WAGE	HOURS OF WORK	DAILY REST PERIODS	WEEKLY/BI-WEEKLY REST PERIODS	EATING PERIODS	OVERTIME	PAID PUBLIC HOLIDAYS	VACATION WITH PAY	TERMINATION NOTICE / PAY SEVERANCE PAY
Salespersons--commission in automobile sector Minimum Wage: Maximum pay period of one month. Reconciliation periods for wages are: --Jan. 1 - Mar. 31 --April 1 - June 30 --July 1 - Sept. 30 --Oct. 1 - Dec. 31 (See O.Reg. 285/01.)	S R A	C	C	C	C	C	C	C	C
Students under 18 who: 1. Work 28 hours or less a week during the school term or 2. Work during school holidays. Minimum Wage: special student rate.	S R A	C	C	C	C	C	C	C	C
Students employed: to instruct or supervise children, or at a camp for children, or directly in a recreation program operated by a charitable organization (See O.Reg. 285/01.)	N C	C	C	C	C	N C	N C	C	C
Superintendents, janitors and caretakers of a residential building who reside in the building. (See O.Reg. 285/01.)	N C	N C	N C	N C	C	N C	N C	C	C
Swimming pools Persons employed to install and maintain swimming pools. (See O.Reg. 285/01.)	C	N C	C	C	C	N C	N C	C	C
Taxicab drivers (See O.Reg. 285/01.)	C	C	C	C	C	N C	N C	C	C

XXII. Filing an ES Claim

Most employees covered under the ESA may file a claim with the Ministry of Labour if they believe their employer is not complying with the law.

Employees who believe that their employer, or former employer, has not followed the ESA are encouraged, when appropriate, to discuss the matter with their employer, or with their union representative, if they have one.

The employee can phone the Employment Standards Information Centre for assistance to identify and define issues, and ways to resolve them at:

- (416) 326-7160
- toll free in Ontario at 1-800-531-5551
- TTY (for hearing impaired) 1-866-567-8893

A Ministry of Labour [self-help kit](#) is available to help employees and employers identify and resolve problems related to unpaid wages, vacation pay, public holiday pay, overtime, minimum wage, termination notice or pay in lieu, and severance pay. The kit includes an information sheet for the employer to explain how the kit is used, a “request for payment” form summarizing alleged entitlements identified through the use of the kit, and worksheets for assessing wage related entitlements.

The self-help kit is available on the Ministry of Labour website.

The employee may also choose to send the employer a *registered* letter explaining the problem and asking to have it resolved. Employees and employers should keep a copy of correspondence and proof of its delivery such as a registered mail receipt. If the employee and employer are unable to resolve the matter, the employee may choose to file a claim.

Filing a Claim

To file a claim, an employee must complete the [claim form](#), which can be obtained from the Ministry of Labour’s website, www.labour.gov.on.ca, by mail through the Employment Standards Information Centre, and in person at a [ServiceOntario Centre](#). Completed claim forms can be:

- submitted online
 - mailed to:
The Provincial Claims Centre - Ministry of Labour
700 Foster Drive, Suite 480, Roberta Bondar Place
Sault Ste. Marie, ON P6A 6V4
- or**
- faxed, toll free, to 1-800-252-4684.

When an Employee Cannot File a Claim

There are two situations in which an employee who is covered by the ESA cannot file a claim with the Ministry of Labour:

1. When an employee is represented by a trade union

Generally speaking, employees represented by a union cannot file a claim. These employees--if they are covered by a collective agreement and whether or not they are actually *members* of the union--must use the grievance procedure contained in the collective agreement between the employer and the trade union.

2. When an employee has filed a claim in a court of law

An employee cannot file a claim with the Ministry of Labour for a failure to pay wages or discrimination in benefit plans if the employee has already started a court action against the employer for the same matter.

In addition, an employee who has started a court action for wrongful dismissal cannot file a claim for termination or severance pay under the ESA with respect to the same termination/severance of employment.

An employee with questions about whether it is best to file a claim or to sue the employer in court may wish to consult a lawyer *before* filing a claim.

Employees also need to be aware that if they have filed a claim with the Ministry of Labour for unpaid wages, benefits, or termination or severance pay that he or she must withdraw the claim within two weeks of the date of filing it with the Ministry if the employee intends to start a court action with respect to those unpaid wages, benefits, or alleged wrongful dismissal. This applies even if the employee's claim is for more than the \$10,000 maximum wages that an employer can be ordered to pay by an employment standards officer.

Note that the restrictions on pursuing a claim through both the courts and with the Ministry of Labour do not apply to claims filed with the Ministry of Labour for compensation or reinstatement (for example, where a claim is filed for a violation of the pregnancy, parental, emergency, family medical leave, or reprisal provisions of the ESA).

What is Needed to File a Claim

In completing the claim form, the employee must give details about:

- which minimum standards were violated (i.e., the employer did not pay overtime; the employee did not receive severance pay)
- when it happened (dates and times)
- what is being claimed (including dollar amounts, if applicable)

In addition, the employee will be asked to give information about the employer, such as:

- the employer's name, full address and telephone numbers
- whether the employer is still operating
- whether the employer conducts business at other establishments or operates using any other name(s) .

During the investigation of a claim, the employee will be asked to provide some or all of the following:

- copies of pay stubs or paycheques
- copies of T4 slips
- a copy of his or her written notice of termination (if the employee's employment was terminated and/or severed by the employer and notice was given)
- a copy of the employee's Record of Employment, if received
- a copy of the contract of employment, if there is one
- copies of any warning letters or notices received
- a record of the hours worked if available (i.e., a calendar record, time sheets, attendance records, diary or notes).

Maximum Amount of Money an Employer Can Be Ordered to Pay

With some exceptions, \$10,000 is the maximum amount the Ministry of Labour can order an employer to pay an employee. However, this limit does not apply to claims under those parts of the ESA in which reinstatement and/or compensation can be ordered (for example, parts dealing with leaves of absence, the right of an employee not to be penalized for exercising his or her rights under the ESA, such as a retail employee's right to refuse to work a public holiday).

Time Limits Regarding Claims

Six month/one year time limit for recovering wages:

With two exceptions, an employee must file a written claim with the Ministry of Labour within six months of the date the wages became due in order to try to recover them.

- The first exception to this rule deals with vacation pay. Unpaid vacation pay may be recovered if the claim is filed within 12 months of the date the vacation pay came due (rather than 6 months).

- The second exception is where an employment standards officer finds that an employer has violated the same section of the ESA more than once, with respect to an employee. If at least one of the violations occurred in the six-month period before the claim was filed, the employee will be entitled to recover the wages due for all violations of the same provision that occurred in the 12-month period before the claim was filed.

When wages are due

Generally, wages, except vacation pay, become due on the employee's regular pay day. However, if the employment was terminated by the employer, all the wages owed to the employee (including any unpaid vacation pay as of the date of termination) are due either within seven days of the termination, or on what would have been the employee's next regular pay day, whichever is later.

A typical case

Nhan was employed as a technician for just over three years. His employment was terminated because of a shortage of work on February 1. His next regular pay day would have fallen on February 12. Nhan was given proper notice of his termination but was not paid his last week's wages. On August 30 he filed a claim for those wages. Nhan is not able to recover his last week's wages through the Ministry of Labour because those wages became due more than six months before the date he filed his claim. Nhan might, however, be able to take court action to try to recover them.

When there are repeated violations

Jenny was employed in a restaurant for just over one year and was not paid for public holidays. She quit her job and filed a claim with the ministry on January 5. In the six months before her complaint was filed, Jenny should have been paid public holiday pay for Labour Day, Thanksgiving Day, Christmas Day and New Year's Day.

The employer repeatedly violated the public holiday sections of the ESA by not paying Jenny public holiday pay and at least one violation of the public holiday provisions occurred within six months of the date Jenny filed her claim.

Because of this, the employment standards investigation is not limited to recovering wages that became due in the six-month period before the date her claim was filed (January 5). It will be extended to recover wages that became due to Jenny within 12 months from the date she filed her claim. As a result, Jenny is also entitled to public holiday pay for Canada Day, Victoria Day and Good Friday.

Two-year time limit for filing a claim:

The above-mentioned limitations on recovery only apply to an employee's ability to seek recovery of unpaid wages, including vacation pay. In some cases, the employee has two years after a violation to file a claim with the Ministry. This two-year time limit applies where:

- The employee believes an employer has violated a *non-monetary* section of the ESA for example, the employer did not give proper meal breaks, failed to provide wage statements, or if the violation relates to leaves of absence, lie detectors and retail business employees' rights; or
- The employee is seeking compensation and/or reinstatement in cases where for example, the employer has penalized or threatened to penalize an employee for exercising rights under the ESA.

Extending Time Limits:

Although the limitations on recovery of wages and filing a claim are set out in the legislation and mandatory, it *may* be possible to make a claim that would otherwise be outside the applicable time limit if:

- an employee has been misled as to his or her entitlements under the ESA by his or her employer and for that reason delayed in filing his or her claim; and
- the employee took prompt steps to file a claim after he or she found out that what the employer said about the ESA entitlement was inaccurate.

For example

an employer has stated that no overtime is payable under the ESA to an employee in certain circumstances and the employee relies upon the employer's statement and does not file a claim for overtime until after he or she finds out from another source that overtime *is* payable under the Act. In such a case, an employment standards officer may rule that the time limit that would otherwise not allow all or a portion of the claim should be extended because the delay in filing the claim was caused by the incorrect statement of the employer about the employee's ESA entitlements.

Investigation, Enforcement and Appeals

Once a claim has been filed, it is assigned to an employment standards officer for investigation. (For details about: how an investigation is conducted; the kinds of actions an employment standards officer or the ministry can take; and how an employee can appeal an officer's decision, refer to the section on the "Role of the Ministry of Labour".)

XXIII. Role of the Ministry of Labour

The Ministry of Labour administers the ESA and regulations by:

- Promoting voluntary compliance
- conducting proactive inspections of payroll records and workplace practices to ensure the ESA is being followed.
- investigating possible violations of the ESA and its regulations
- resolving complaints
- enforcing the ESA and its regulations

Voluntary Compliance

The ministry provides a wide range of publications and services to help employees and employers understand their rights and obligations. These include an employment standards poster, which employers are required to post in their workplaces, and four brochures published in 23 languages; a self-help kit to help employees and employers identify and resolve problems related to wage entitlements, and fact sheets on minimum standards.

The ministry is also involved in outreach initiatives that provide information seminars and workshops for employer groups, employment counsellors, and professional associations.

Proactive Inspections

Employment standards officers conduct proactive inspections of payroll and other records, including a review of employment practices. An officer conducting a proactive inspection will usually visit the employer's premises. Officers may notify the employer in writing before the inspection, but are not required to. A notice may include a list of records and other documents the employer must provide at the inspection. The employer is required to produce the records requested and must answer questions that the officer feels may be relevant.

An officer is permitted to take away records or other information for review and copying. The employer is welcome to ask questions, and to request further information. An employment standards officer can also require the employer to attend a fact-finding meeting if, during the inspection, he or she believes the ESA has been contravened.

Investigating Violations

The employment standards officer conducts investigations by telephone, through written correspondence, by visiting the employer's premises or by requiring the employee and/or the employer to attend a fact-finding meeting. During an investigation, both parties have the opportunity to present the facts and arguments they believe are relevant to their case.

After investigating a claim, the employment standards officer makes a decision about whether the employer has or has not complied with the ESA. If the officer finds that the employer *has* complied with the ESA:

- In cases where an employee filed a claim with the Ministry of Labour, the employee is notified in writing of this decision, and can apply for a review within 30 days.

If the officer finds that the employer *has not* complied with the ESA:

- The employer may resolve the issue by voluntarily complying with the officer's decision (i.e., by paying money that is owing to an employee or employees, or by adopting new, or changing existing, workplace practices).
- Officers can also require an employer to post a notice containing specific information about administration or enforcement of the ESA, and/or a copy of the report with the officer's findings.

Enforcement

If an employer is unwilling or unable to comply with an employment standards officer's decision, the officer can issue an order to pay wages to an employee or employees, a compliance order, a ticket, a notice of contravention or, for certain violations, an order to reinstate and/or compensate an employee.

These orders, tickets, and notice of contraventions are not mutually exclusive, and an officer can issue one or more of these orders and/or a notice of contravention in the course of an investigation or inspection.

[Employers have the right to appeal](#) an officer's order or a notice of contravention by making an [application for review](#) to the Ontario Labour Relations Board. The employer also has a number of options if an officer has issued a ticket.

[Employees who have filed a claim have the right to appeal](#) an order to pay wages or an order for compensation/reinstatement issued against their employer.

Order to Pay Wages

An order to pay wages is issued and served on an employer for wages owed to an employee or employees when an employer has refused or is unable to pay money found owing (except when there has been a bankruptcy).

The employer must comply with the order according to its terms or appeal the order within 30 days of the date the order is served. The order also requires the employer to pay an administrative fee of 10 per cent of the money that is owed, or \$100.00, whichever is greater.

An order to pay wages cannot exceed \$10,000.00 in wages for each employee covered by the order.

Order for wages for more than one employee

Lisa was working as graphic artist at a new company with five employees. She worked for four months and then quit her job. Lisa had worked a lot of overtime in the four months she was employed but was not paid overtime pay. She had spoken to her employer about being paid overtime but was refused.

Shortly after quitting her job, Lisa filed a claim with the ministry for her overtime pay. Her file was assigned to an employment standards officer for investigation.

The officer determined that Lisa and the other four employees were entitled to overtime pay going back five months, to the date the company started operation. Specifically, the officer found that the employer owed the five employees \$15,647.87 in overtime plus \$625.91 vacation pay on the overtime, for a total of \$16,273.78. No single employee was owed more than \$10,000.00.

The employer refused to voluntarily pay the money the officer found owing. The officer issued and served an order to pay wages on the employer on behalf of Lisa and the other employees. The amount of the order was \$16,273.78, plus a 10 per cent administrative fee of \$1,627.38. Lisa and the other employees were notified in writing of the officer's findings.

Compliance Order

An officer can issue a compliance order if the officer finds that the employer has contravened the ESA. The officer can order an employer or other person to stop the contravention and to take certain actions or stop taking certain actions. The order may also specify a date by which the employer or other person must comply with the order. These orders do not require payment of wages or compensation

Compliance order in addition to order to pay wages

While investigating Lisa's claim for overtime pay, the employment standards officer discovered the employer was not giving the five employees proper meal breaks of at least 30 minutes after every five consecutive hours of work. Also, the employer had not posted the "What You Should Know About the Ontario *Employment Standards Act*" poster as required under the ESA.

In addition to the order to pay wages, the officer issued and served on the employer a compliance order directing it to: comply with the overtime provisions of the ESA; ensure that employees would receive their proper meal breaks; post the material required by the ESA; and post a copy of the compliance order in a conspicuous place at the workplace for six months.

Tickets

Generally, tickets will be issued for less serious ESA violations, those that do not raise complex factual or legal issues. Tickets will be issued to the employer responsible for the offence.

Ticketable offences fall into three categories:

- Administrative and enforcement offences (e.g. failure to retain records)
- Contraventions of wage-based employment standards (e.g. failure to pay overtime pay)
- Contraventions of non wage-based employment standards (e.g. requiring employees to work hours in excess of daily or weekly limits)

Tickets carry set fines of \$295, with a victim fine surcharge added to each set fine plus court costs. If issued a ticket, an employer can choose to pay the fine or appear in a provincial court to dispute the offence.

Notice of Contravention

Employment standards officers have the power to issue notices of contravention with prescribed penalties when they believe someone has contravened a provision of the ESA. The penalty amount (payable to the “Minister of Finance”) must be paid *within 30 days* of the date the notice was issued or the notice must be appealed *within 30 days* of the date it was served.

If an employer has contravened the mandatory posting requirements of the ESA or has failed to keep proper payroll records or to keep these records readily available for inspection by an employment standards officer, an officer can serve a notice of contravention with the following prescribed penalties:

- \$250.00 for a first contravention;
- \$500.00 for a second contravention in a three-year period;
- \$1,000.00 for a third contravention in a three-year period.

If an employer is found in contravention of *any other* provision of the ESA, the penalties prescribed are:

- \$250.00 for a first contravention multiplied by the number of employees affected;
- \$500.00 for a second contravention in a three-year period multiplied by the number of employees affected;

- \$1,000.00 for a third contravention in a three-year period multiplied by the number of employees affected.

When there are further violations

Six weeks after serving the compliance order on Lisa's former employer, the officer visited the employer and conducted a further audit. The officer found that the employer was now paying overtime to all employees and had posted a copy of the compliance order. However, the employer had not posted a copy of the ESA poster and had not ensured that its five employees received proper meal breaks.

As a result, the officer issued and served a notice of contravention on the employer. This set out the officer's belief that the employer had failed to make the required posting (\$250.00 penalty) and had failed to give proper meal breaks to five employees (five times the \$250.00 penalty), for a total of \$1,500.00 in penalties.

The officer also informed the employer that further violations could result in future notices of contravention being issued and/or prosecution by the Ministry.

Order to Compensate and/or Reinstate

In the case of some violations, an officer can make an order requiring an employer to *reinstate* or *compensate* an employee—or both. These violations include rights related to:

- pregnancy, parental, personal emergency leave, declared emergency leave, and family medical leave;
- lie detectors;
- the right to refuse Sunday work for retail workers;
- an employee being free from any form of reprisal for exercising his or her rights under the ESA.

Unlike an order to pay wages, an order to pay compensation is not limited to a maximum of \$10,000.00. The officer can order compensation in the amount he or she finds owing to the employee.

Review (Appeal) of an officer's decision

Reviews are conducted by the [Ontario Labour Relations Board](#), an independent, quasi-judicial tribunal. If employees or employers are not satisfied with an officer's decision, they may have the right to apply for a review (appeal). They must complete an Application for Review, setting out the facts and reasons for the application.

To obtain an Application for Review form contact:

Ontario Labour Relations Board
505 University Avenue, 2nd Floor
Toronto, ON M5G 2P1
Tel: 416-326-7500
Fax: 416-326-7531
www.olrb.gov.on.ca/english/homepage.htm

The Application for Review form must be submitted to:

The Registrar
Ontario Labour Relations Board
505 University Avenue, 2nd Floor
Toronto, ON M5G 2P1

Employee Appeals

An employee who files a claim can appeal an officer's refusal to issue an Order to Pay Wages, an Order to Pay Compensation and/or Reinstatement or a Compliance Order.

An employee for whom an order has been issued (whether or not he or she filed a claim) can appeal the amount of an officer's Order to Pay Wages or an officer's Order to Pay Compensation and/or Reinstatement.

For employees, the Application for Review must be submitted *within 30 days* of the date the letter advising the employee that an order has been *issued* against the employer, or advising that the officer has refused to issue an order has been *served* on the employee.

Employer Appeals

For employers, the Application for Review must be submitted *within 30 days of the date of being served* with an order or notice.

Employers can apply for a review of a Compliance Order (these orders do not require payment of wages or compensation); a Notice of Contravention (the employer does not have to pay the amount of the penalty before the review hearing can proceed); an Order to Pay Wages (the employer must pay the full amount of the order plus the administrative fees to the Director of Employment Standards in trust); and an Order to Pay Compensation and/or Reinstatement (the employer must pay the amount of the order into trust up to a maximum of \$10,000 to the Director of Employment Standards in trust).

Employers who receive a ticket must, within 15 days of the receipt of the ticket, choose one of the following:

- Plea guilty by paying the amount owing on the ticket
- Plea guilty with an explanation to a Justice of the Peace. The employer must bring their ticket to the Provincial Offences Court to provide explanations as to why the amount or time of payment of the ticket should be reduced.
- Plea not guilty and fill out the notice of intention to appear in court. The court will schedule a trial.

An employer who does not elect one of the above options within 15 days of receiving the ticket, will be deemed not to dispute the charge.

Payments

Payments must be made to the “Director of Employment Standards *in trust*” within 30 days of service of the order. It should be made by cheque, money order or letter of credit. A letter of credit must be in a form that is acceptable to the Director of Employment Standards. That is, it must:

- contain no conditions;
- expire no less than one year from the date it is issued;
- be prepared by a major Canadian bank;
- be for an amount that is five per cent greater than the order, to allow for accrued interest; and
- name the Director of Employment Standards as the beneficiary.

The payment should be forwarded to:

Director of Employment Standards
Ministry of Labour
400 University Avenue
9th Floor
Toronto, ON M7A 1T7

The ministry will issue a proof of payment to the employer, and will hold the money in trust.

The Review Process

When a request for a review is received, an officer of the Ontario Labour Relations Board (the “Board”) will sometimes schedule a mediation meeting with the parties. No mediation meeting takes place in the case of a notice of contravention. If the matter is settled at this meeting, the minutes of the settlement are drawn up and signed off by the parties.

If the matter is not settled, or there has not been an attempt at mediation, a hearing is scheduled. The parties have a right to appear at the hearing, present their information in full and explain why they think the employment standards officer was right or wrong.

The Board can amend, overturn or uphold the employment standards officer's order or notice of contravention. The Board can also issue a new order.

After reviewing an employment standards officer's *refusal* to issue an order, the Board may issue an order or uphold the officer's refusal.

The Board's decisions are final and binding. Although an employer or employee may apply to Divisional Court for a Judicial Review, usually the court will not interfere with a decision as long as it meets a test of "reasonableness."

Collections

If an employer does not apply for a review within 30 days of the date the order was served or the notice of contravention was issued, the order or notice is final and binding on the employer. If the employer has not paid the required amount, the Director of Employment Standards forwards the file to a private collection agency.

The Director may authorize the collection agency to collect a reasonable fee and/or costs from the employer. Once a file is sent to a collection agency the employer must pay the collection agency fees and the ministry's administrative fees.

Prosecution

An employer or other person can be prosecuted and ordered to pay a fine and/or imprisoned for contravening the ESA. A court may also order the employer to take whatever action is necessary to remedy the violation, including paying wages and compensating and/or reinstating an employee.

It is an offence for an employer or other person to:

- contravene the ESA or regulations
- make or keep false records or other documents that must be kept under the ESA
- provide false or misleading information under the ESA
- fail to comply with an order, direction or other requirement under the ESA or regulations.

Offences may be prosecuted and, if there is a conviction, the offender may be subject to fines or imprisonment. The Ministry of Labour may choose to prosecute an employer or any other person who is in contravention of the ESA. Individuals, if convicted of an offence, can be fined up to \$50,000, imprisoned for up to 12 months, or both.

A corporation can be fined up to \$100,000 for a first conviction. If the corporation has already been convicted of an offence under the ESA, it can be fined up to \$250,000 for a second conviction. For a third or subsequent conviction, the corporation can be fined up to \$500,000.

XXIV. Additional Information

Discounts

Discounts are not covered by the ESA. The employer is responsible for deciding whether employees get a discount on products the employer makes or sells, or on services the employer provides. The employer is also the one who determines how much the discount will be.

Dress Codes

The employer is responsible for making decisions about dress codes, uniforms and other clothing requirements -- and about who pays for them.

An employer may make a deduction from wages to cover the cost of a uniform or other clothing requirements with the signed, specific written authorization from the employee permitting the deduction and setting out the amount of the deduction.

A dress code cannot violate a collective agreement at the workplace, the *Human Rights Code* or the *Occupational Health and Safety Act*.

Paid Sick Leave and Bereavement Leave

Some employers have *paid* plans for sickness, death and other leaves of absence. These plans are not required by the ESA. An employer (or an employer and a union if there's a collective agreement) is able to decide what these plans will be. However, the rules about discrimination in benefit plans may apply to these plans. (See "Benefit Plans," for details.)

XXV. Need Help or More Information?

Call the Employment Standards Information Centre:

- 416-326-7160 (Greater Toronto Area)
- 1-800-531-5551 (toll free Canada-wide)
- TTY: 1-866-567-8893 (for hearing impaired)

Visit www.labour.gov.on.ca for more information, to get our publications, and to contact the Ministry by e-mail.

Occupational Health and Safety Inquiries

Telephone toll free in Ontario at 1-800-268-8013 (province-wide).



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