
Your Guide to the Employment Standards Act, 2000

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 Ontario.ca/employmentstandards.

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.

TABLE OF CONTENTS

Introduction	9
About Your Guide to the ESA	9
What Is Covered by the ESA?	9
Greater Right or Benefit.....	9
No Waiving of Rights	10
Other Workplace-Related Laws	10
Who is Not Covered by the ESA?.....	10
1. Posting and Distributing Information: Rights and Obligations	11
2. Record Keeping	13
Contents and Retention of Employee Records	13
3. Payment of Wages	15
How Wages (including Vacation Pay) Are Paid	15
When Employment Ends	15
Wage Statements	16
Special Statements Regarding Vacation Pay	16
Deductions from Wages	17
4. Minimum Wage	19
Minimum Wage Rates	19
Minimum Wage Calculation for Employees Who Earn Commission.....	20
How Provision of Room and Board Affects Minimum Wage	20
Employees Sent Home After Working Less Than Three Hours: The Three-Hour Rule*	21
When the Minimum Wage Changes	22
5. Hours of Work	23
Daily and Weekly Limits on Hours of Work.....	23
Written Agreement Requirements for Exceeding Limits on Hours of Work	23
Director Approval Required to Exceed Weekly Limits on Hours of Work.....	24
Eating Periods and Breaks	26
Night Shifts	27
6. Overtime Pay	28
Overtime Pay.....	28
Exceptions	28
Different Kinds of Work (“50% Rule”)	29
Agreements for Paid Time Off Instead of Overtime Pay.....	29
Calculating Overtime Pay	29
Calculating Overtime When There is a Public Holiday	32
Employees Who Are Paid Wages That Are Not Based on the Hours Worked ...	34
Averaging Agreements	35
7. Vacation	39
Vacation Time and Vacation Pay.....	39
Vacation Time.....	40
Calculating Stub Period Vacation Entitlements	40
Deadlines for Taking Vacation.....	41

	Foregoing Vacation	41
	How to Schedule Vacation Time Earned With Respect to a Vacation Entitlement Year	42
	How to Schedule Vacation Time Earned with Respect to a Stub Period	42
	Vacation Pay	43
	When to Pay Vacation Pay	44
	When Employment Ends	44
	Vacation and Public Holidays	45
	Vacation and Leaves of Absence	45
	Requesting Statements of Vacation Records	47
8.	Public Holidays	48
	Performing Both Covered and Exempt Work	48
	Qualifying for Public Holiday Entitlements	49
	The "Last and First Rule"	49
	Public Holiday Pay	51
	When to Include Vacation Pay in the Calculation of Public Holiday Pay	51
	Calculating Public Holiday Pay	53
	Premium Pay	56
	Substitute Holiday	56
	Entitlements for Public Holidays	56
	Special Rules for Certain Industries	59
	Overtime Calculations When an Employee Receives Premium Pay	60
	If Employment Ends	60
9.	Retail Workers	61
	The Right to Refuse to Work on Public Holidays	61
	The Right to Refuse to Work on Sundays	61
	No Reprisals	62
	Exclusions	62
10.	Benefit Plans	63
	The Anti-Discrimination Rule	63
	Plans Affected	63
	Grounds on Which Discrimination is Not Allowed	63
11.	Pregnancy and Parental Leave	65
	Ontario's ESA and the Federal Employment Insurance Act	65
	Pregnancy Leave	66
	Qualifying for Pregnancy Leave	66
	When a Pregnancy Leave Can Begin	66
	Length of a Pregnancy Leave	67
	Miscarriages and Stillbirths	67
	Notice Requirements for Pregnancy Leave	68
	Parental Leave	70
	Qualifying for Parental Leave	70
	When a Parental Leave Can Begin	70
	Length of a Parental Leave	71
	Miscarriages and Stillbirths	71
	Notice Requirements for Parental Leave	71

	Rights for Employees Taking Pregnancy and Parental Leaves	73
	The Right to Reinstatement.....	73
	The Right to Be Free from Penalty	73
	The Right to Continue to Participate in Benefit Plans	73
	The Right to Earn Credits for Length of Employment, Length of Service and Seniority	74
12.	Personal Emergency Leave	76
	Regularly Employ 50 or More Employees	76
	Reasons for Which an Unpaid Personal Emergency Leave May Be Taken	76
	Illness, Injury or Medical Emergency	77
	Urgent Matter.....	77
	Interaction Between Personal Emergency Leave and Contracts that Provide Paid Sick Leave or Bereavement Leave.....	77
	Interaction Between Personal Emergency Leave, Family Caregiver Leave, Family Medical Leave, Critically Ill Child Care Leave, and Crime-related Child Death or Disappearance Leave	78
	Length of Personal Emergency Leave.....	78
	Notice Requirements	79
	Proof of Entitlement	79
	Medical Notes where the Employee Was Away Because of Personal Illness, Injury or Medical Emergency	80
	Medical Notes Where the Employee Was Away Because of the Illness, Injury or Medical Emergency of a Specified Relative	80
	Rights During Leave	80
	Special Rule Regarding Personal Emergency Leave	80
13.	Family Caregiver Leave	81
	Eligibility	81
	Qualified Health Practitioner.....	82
	The Medical Certificate.....	82
	Interaction Between Family Caregiver Leave and Personal Emergency Leave, Family Medical Leave, Critically Ill Child Care Leave, and Crime-related Child Death or Disappearance Leave	82
	Length of Family Caregiver Leave.....	83
	Notice Requirements	83
	Rights During and at the End of a Family Caregiver Leave.....	84
14.	Family Medical Leave.....	85
	Eligibility	85
	Employment Insurance Benefits	86
	Interaction Between Family Medical Leave and Personal Emergency Leave, Family Caregiver Leave, Critically Ill Child Care Leave, and Crime-related Child Death or Disappearance Leave	86
	Length of Family Medical Leave	86
	Where an Employee Provides Care or Support for Only Part of a Week.....	87
	Sharing Family Medical Leave.....	87
	Taking More Than Eight Weeks of Family Medical Leave	87
	Family Medical Leave for Additional Family Members.....	88

	Timing of Family Medical Leave	88
	Earliest Date a Family Medical Leave Can Begin.....	88
	Last Date of a Family Medical Leave.....	89
	Medical Certificate	89
	Qualified Health Practitioner.....	89
	Notice Requirements	90
	Rights During and at the End of a Family Medical Leave	90
15.	Critically Ill Child Care Leave	91
	Eligibility	91
	Qualified Health Practitioner.....	91
	The Medical Certificate.....	91
	Employment Insurance Benefits	92
	Interaction Between Critically Ill Child Care Leave and Personal Emergency Leave, Family Caregiver Leave, Family Medical Leave, and Crime-related Child Death or Disappearance Leave	92
	Length and Timing of Critically Ill Child Care Leave	93
	Critically Ill Child Care Leave for More than One Child.....	93
	Death of a Child.....	94
	Sharing Critically Ill Child Care Leave	94
	Child Turns 18 While Employee is on Critically Ill Child Care Leave	94
	Further Leave	94
	Additional Leaves	95
	Notice Requirements: Advance Notice and Written Plan.....	95
	Rights During and at the End of a Critically Ill Child Care Leave	96
16.	Organ Donor Leave	97
	Qualifying for Organ Donor Leave	97
	When an Organ Donor Leave Can Begin	97
	Length of an Organ Donor Leave	97
	Notice Requirements	98
	Medical Certificate	98
	Rights During Leave	98
17.	Reservist Leave	99
18.	Crime-Related Child Death or Disappearance Leave	100
	Eligibility	100
	Federal Income Support Grant	100
	Timing of a Crime-Related Child Death or Disappearance Leave	100
	Sharing Crime-Related Child Death or Disappearance Leave	101
	Notice Requirements: Advance Notice and a Written Plan.....	101
	Evidence.....	102
	Rights During and at the End of Crime-Related Child Death or Disappearance Leave.....	102
19.	Termination of Employment	103
	Termination of Employment Defined	103
	Qualifying for Termination Notice or Pay in Lieu.....	103
	Constructive Dismissal	104
	Temporary Layoff	104

	Written Notice of Termination and Termination Pay	106
	Written Notice of Termination	106
	Requirements During the Statutory Notice Period	107
	How to Provide Written Notice	108
	Termination Pay	108
	When to Pay Termination Pay	110
	Mass Termination	110
	Exception to the Mass-Termination Rules	111
	Mass Termination: Resignation by an Employee.....	111
	Temporary Work After Termination Date in Notice	111
	Recall Rights	111
	Exemptions to Notice of Termination or Termination Pay.....	112
	Wrongful Dismissal.....	113
20.	Severance Pay	114
	When Severance Occurs.....	114
	Employee Resigns After Receiving Notice of Termination	114
	Qualifying for Severance Pay	115
	Amount of Severance Pay	115
	Calculating Severance Pay	115
	When to Pay Severance Pay.....	117
	Exemptions from Severance Pay	117
	Recall Rights	118
	Wrongful Dismissal.....	118
21.	Continuity of Employment.....	119
	Building Services Provider.....	119
	Determining Entitlements	119
	Continuity of Employment and Entitlements to Vacation Time and Pay	120
	Continuity of Employment and Entitlements to Pregnancy, Parental, Critically Ill Child Care, and Crime-related Child Death or Disappearance Leave	121
	Continuity of Employment and Entitlements to Termination of Employment and Severance of Employment	124
	Exception: 13-Week Gap in Employment when there is a Sale of Business	125
	Exception: 13-Week Gap in Employment when there is a Change of Building Services Providers.....	125
	Special Circumstances	126
22.	Building Services Providers	127
	Termination and Severance of Employment.....	127
	Providing Information.....	128
23.	Equal Pay for Equal Work.....	130
	Substantially the Same Work.....	130
	Substantially the Same Skill, Effort and Responsibility	130
	Similar Working Conditions.....	130
	The Same Establishment	130
	Exceptions.....	131
24.	Lie Detector Tests	132
	Prohibition of Testing.....	132

	An Employee's Right to Refuse	132
	Disclosure.....	132
	Use of Lie Detectors by the Police.....	132
25.	Reprisals	133
26.	Temporary Help Agencies	134
	The Employment Relationship.....	134
	A Work Assignment	134
	Information Assignment Employees Must Receive When Hired by an Agency	135
	Information Assignment Employees Must Receive When Offered Work	
	Assignments.....	135
	Prohibitions on Charging Fees to Assignment Employees and Restricting	
	Assignment Employees from Accepting Employment with Clients	135
	Prohibitions on Charging Fees to Clients and Restricting Clients from Hiring	
	Assignment Employees	136
	Job References	136
	Public Holidays	136
	When Employee is on Assignment and a Public Holiday Falls on a Day that	
	Would Ordinarily be a Working Day.....	136
	When Employee is on Assignment and a Public Holiday Falls on a day that	
	Would Not Ordinarily be a Working Day	137
	When a Public Holiday Falls on a Day when the Employee is not on an	
	Assignment.....	137
	Termination of Employment.....	138
	Severance of Employment	140
	Reprisal by a Client of an Agency.....	142
	Enforcement of Temporary Help Agency Employment Rules.....	142
27.	Industries and Jobs with ESA Exemptions and/or Special Rules.....	143
28.	Filing an Employment Standards Claim	148
	When an Employee Cannot File a Claim.....	148
	Filing a Claim.....	149
	Reasons Employees May Not Have to Contact Their Employer.....	150
	Investigation, Enforcement and Appeals	151
	Maximum Amount of Wages an Employer Can Be Ordered to Pay	152
	Time Limits Regarding Claims.....	152
	When Wages Are Due.....	152
29.	Role of the Ministry of Labour	157
	Compliance Support	157
	Proactive Inspections	157
	Investigating Complaints	157
	Enforcement	159
	Order to Pay Wages	159
	Compliance Order	159
	Tickets	160
	Notice of Contravention	160
	Order to Compensate and/or Reinstate.....	161
	Review (Appeal) of an officer's decision	162

	Employee Appeals.....	162
	Employer Appeals	162
	Offence Notice (“Ticket”)	163
	Delivering Materials to The Director of Employment Standards	163
	Payments	163
	The Review Process.....	164
	Collections.....	164
	Prosecution (Other than by way of a Ticket).....	165
30.	Additional Information	166
	Employee Discounts.....	166
	Dress Codes.....	166
	Paid Sick Leave and Bereavement Leave	166
31.	Need Help or More Information?	167
	Call the Employment Standards Information Centre.....	167
	Online Resources	167
	Occupational Health and Safety Inquiries.....	167

Introduction

The [Employment Standards Act, 2000](#) (ESA) provides the minimum standards for most employees working in Ontario. It sets out the rights and responsibilities of employees and employers in most Ontario workplaces.

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 employment; provisions to assist employees with family responsibilities; increased flexibility in work arrangements; and mechanisms for compliance and enforcement.

Subjects covered under the ESA include:

- The Employment Standards Poster: Posting and Distributing Requirements
- Hours of Work
- Eating Periods
- Rest Periods
- Wages and Overtime Pay
- Minimum Wage
- Pregnancy and Parental Leave
- Personal Emergency Leave
- Family Caregiver Leave
- Family Medical Leave
- Critically Ill Child Care Leave
- Crime-related Child Death or Disappearance Leave
- Public Holidays
- Vacation
- Termination and Severance of Employment
- Temporary Layoffs
- Equal Pay for Equal Work
- Temporary Help Agencies
- 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 instead of the employment standard.

No Waiving 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 individuals and the persons or organizations they work for, including:

- Employees and employers in sectors that fall under federal employment law 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.

1. Posting and Distributing 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 *Employment Standards in Ontario* (also known as the Employment Standards Poster). All employers covered by the ESA in the province (excluding the Crown) must display this poster in the employer's workplace. Employers must also provide all of their employees who are covered under the ESA with a copy of the poster.

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

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

Posting Requirements

The employer must display the poster in the workplace where it is likely to be seen by employees. If the majority language in the workplace is something other than English and the ministry has published a version in that language, the employer must post a translated version next to the English version. All multilingual material is available on the Ministry of Labour's website at: Ontario.ca/employmentrights.

Providing Copies

Changes in the law that came into force on May 20, 2015 require employers to provide any employees who are covered under the ESA with a copy of the most recent version of the Employment Standards Poster. Any new employees hired after May 20, 2015 must be given a copy within 30 days of their date of hire.

If an employee requests a copy of the poster in a language other than English and the ministry has published a version in that language, the employer must provide the translated version in addition to the English copy. All multilingual material is available on the Ministry of Labour's website at: Ontario.ca/employmentrights.

An employer may provide the poster as a printed copy or as an attachment in an email to the employee. In addition, an employer may provide the poster via a link to the document on an internet database, but only if the employer ensures the employee has reasonable access to that database (i.e. must ensure the employee has access to a computer and is able to access a

working link to the document) **and** ensures the employee has access to a printer **and** that the employee knows how to use the computer and the printer.

Copies of the poster can be obtained:

- free from the Ministry of Labour's website at Ontario.ca/ESAposter;
- ***and***
- for the cost of shipping and handling from ServiceOntario Publications, 1-800-668-9938.

2. 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 during the vacation entitlement year (or stub period), vacation time taken (if any) during the [vacation entitlement year](#) (or [stub period](#)) and the amount of vacation time earned since the date of hire but not taken as of the end of the vacation entitlement year (or stub period). The records must be retained for three years after they are made.
- **Retention of vacation pay records.** The employer must also keep records of the **vacation pay** paid to the employee during the vacation entitlement year (or 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 next vacation entitlement year ends (or first vacation entitlement year if the records relate to a stub period), 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, personal emergency, family caregiver, family medical, critically ill child care, organ donor, reservist, and crime-related child death or disappearance 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 until three years after the homeworker stopped being employed by the employer.

3. Payment of Wages

Employers must establish a regular pay period and a regular pay day 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 pay day 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 "[When to Pay Vacation Pay](#)" for more information.

How Wages (including 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's employment ends, 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 pay day, 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.

Special Statements Regarding Vacation Pay

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

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

1. Statutory Deductions

Certain statutes 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 to pay what is owed.

The court order must specifically state that the employer may make a deduction from the employee's wages in order for the employer to make the deduction.

If an employee owes money to someone other than his or her employer, a court order may direct an employer to make a deduction from an employee's wages and send the money to the court clerk or other official, to be paid in turn to a third party. The employer is not allowed to make this deduction if the money is not sent to the court clerk or other official specified in the order.

The [Wages Act](#) 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 the employer may make a deduction from his or her wages. 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 oral 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 employer vehicles damaged while on employer business;

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 the 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.

4. 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.

Compliance with the minimum wage requirements is determined on a pay period basis.

Minimum Wage Rates

Minimum Wage Rate	Wage rates prior to June 1, 2014	CURRENT RATES June 1, 2014 – September 30, 2015	Rates that will apply as of October 1, 2015
General Minimum Wage	\$10.25 per hour	\$11.00 per hour	\$11.25 per hour
Student Minimum Wage	\$9.60 per hour	\$10.30 per hour	\$10.55 per hour
Liquor Servers Minimum Wage	\$8.90 per hour	\$9.55 per hour	\$9.80 per hour
Hunting and Fishing Guides Minimum Wage	\$51.25 \$102.50	\$55.00 (Rate for working less than five consecutive hours in a day) \$110.00 (Rate for working five or more hours in a day whether or not the hours are consecutive)	\$56.30 (Rate for working less than five consecutive hours in a day) \$112.60 (Rate for working five or more hours in a day whether or not the hours are consecutive)
Homeworkers Wage	\$11.28 per hour	\$12.10 per hour	\$12.40 per hour

General minimum wage – This rate applies to most employees.

Example for calculating general minimum wage

One week, Julia works 37.5 hours. She is paid on a weekly basis. The minimum wage applicable to Julia is \$11.00 per hour. Since **compliance with the minimum wage requirements is based on pay periods**, Julia must be paid at least \$412.50 (37.5 hours × \$11.00 per hour = \$412.50) in this work week (prior to [deductions](#)). (Note that [eating periods](#) are not included when counting how many hours an employee works in a week).

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

Liquor servers minimum 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 minimum 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 minimum 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.

Minimum Wage Calculation for Employees Who Earn Commission

If an employee’s pay is based completely or partly on commission, it must average out 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, she was paid \$150 in commission and worked 25 hours. The minimum wage applicable to Luba is \$11.00 an hour. The minimum wage (\$11.00) multiplied by the number of hours worked in the pay period (25) is \$275.00. Luba is owed the difference between her commission pay (\$150) and the required minimum wage (\$275.00). Luba’s employer owes her \$125.00.

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 refer to the Special Rule Tool (available at [Ontario.ca/ESAtools](#)) 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.

The amounts that an employer is deemed to have paid to the employee as wages for room or board or both are set out below:

Room (weekly)

- Private: \$31.70
- Non-private: \$15.85
- Non-private (domestic workers only): \$0.00

Meals

- Each meal: \$2.55
- Weekly maximum: \$53.55

Rooms and meals (weekly)

- With private room: \$85.25
- With non-private room: \$69.40
- With non-private room (domestic workers only): \$53.55

Harvest workers (only) weekly housing

- Serviced housing: \$99.35
- Unserviced housing: \$73.30

Employees Sent Home After Working Less Than Three Hours: The Three-Hour Rule*

When an employee who regularly works more than three hours a day is required to report to work 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 \$10.00 an hour and works only two hours, he or she is entitled to three hours at minimum wage (i.e., \$9.55, the liquor servers minimum wage, x 3 = \$28.65) instead of two hours at his or her regular wage (\$10.00 x 2 = \$20.00).

***Note:** The rule does not apply to:

- students (including students over 18 years of age);

- employees whose regular shift is three hours or less;
- in some cases where the cause of the employee not being able to work at least three hours was beyond the employer's control.

When the Minimum Wage Changes

The minimum wage rates are subject to annual indexation based on the rate of inflation. If that rate is changed, the new rate will be published on or before April 1 and will come into effect on October 1.

If a change to the minimum wage rate comes into effect partway through an employee's 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.

5. Hours of Work

Certain industries and job categories are exempt from the hours of work rules set out in the ESA. For more information please refer to the Special Rule Tool, available at [Ontario.ca/ESAtools](https://www.ontario.ca/ESAtools).

Daily and Weekly Limits on Hours of Work

Interactive tools are available online; please refer to the Daily and Weekly Hours of Work section in the Hours of Work and Overtime Tool available at [Ontario.ca/ESAtools](https://www.ontario.ca/ESAtools).

Daily Limit

The maximum number of hours most employees can be required to work **in a day** is **eight** hours 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 between the employee and employer.

Weekly Limit

The maximum number of hours most employees can be required to work **in a week** is **48** hours. The weekly maximum can be exceeded only if there is a **written** agreement between the employee and employer and the employer has received the approval of the Director of Employment Standards. However, the ESA provides a limited exception where an application for approval is pending. If, after 30 days after serving an application for excess hours on the Director, the employer has not received an approval or notice of refusal, the employer may require employees to start working more than 48 hours as long as certain conditions are met including, the employee does not work more than 60 hours in a work week or the number of hours the employee agreed to in writing, whichever is less.

An agreement between an employee and an employer to work additional daily or weekly hours, or an approval from the Director of Employment Standards for excess weekly hours, does not relieve an employer from the requirement to pay overtime pay where overtime hours are worked.

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 or 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 most recent [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 pay rules in the ESA. In order to be valid, the agreement must 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, while 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 at [Ontario.ca/ESAforms](https://www.ontario.ca/ESAforms). 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 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

Interactive tools are available online; please refer to the Daily Rest section in the Hours of Work and Overtime Tool, available at [Ontario.ca/ESAtools](https://www.ontario.ca/ESAtools).

In most cases, an employee must receive at least 11 consecutive hours off work each day. Generally, an employee and an employer cannot agree to less than 11 consecutive hours off work each day. The daily rest requirement applies even if:

- The employer and the employee have agreed in writing that the employee's hours of work will exceed the daily limit.
- The employer and employee have agreed in writing that the employee's hours of work will exceed the weekly limit and the employer has received an approval from the Director of Employment Standards to exceed weekly limits on hours of work.

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

This requirement cannot be altered by a written agreement between the employer and employee.

Between Shifts

Interactive tools are available online; please refer to the Rest Between Shifts section in the Hours of Work and Overtime Tool, available at [Ontario.ca/ESAtools](https://www.ontario.ca/ESAtools).

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

Interactive tools are available online; please refer to the Weekly and Bi-weekly Rest section in the Hours of Work and Overtime Tool, available at [Ontario.ca/ESAtools](https://ontario.ca/ESAtools).

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

Interactive tools are available online; please refer to the Eating Periods section in the Hours of Work and Overtime Tool, available at [Ontario.ca/ESAtools](https://www.ontario.ca/ESAtools).

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.

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

Coffee Breaks and Breaks Other Than Eating Periods

Employers are required to provide employees with eating periods as described above. Employers do not have to give employees “coffee” breaks or any other kind of break.

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

Night Shifts

The ESA does not put restrictions on the timing of an employee’s shift other than the requirements for daily rest and rest between shifts described earlier in this chapter. In addition, the ESA does not require an employer to provide transportation to or from work if an employee works late.

6. Overtime Pay

Interactive tools are available online; please refer to the Overtime and Time Off in Lieu section in the Hours of Work and Overtime Tool, available at [Ontario.ca/ESAtools](https://www.ontario.ca/ESAtools).

For most employees, whether they work full-time, part-time, are students, temporary help agency assignment employees, or casual workers, overtime begins after they have worked 44 hours in a work week. Their hours after 44 must be paid at the overtime pay rate.

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 \$12.00 an hour will have an overtime rate of \$18.00 an hour ($12 \times 1.5 = 18$). The employee must therefore be paid at a rate of \$18.00 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. For more information, please see the Special Rule Tool, available at [Ontario.ca/ESAtools](https://www.ontario.ca/ESAtools).

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 are not entitled to 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

Interactive tools are available online; please refer to the Overtime and Time Off in Lieu section in the Hours of Work and Overtime Tool, available at [Ontario.ca/ESAtools](https://www.ontario.ca/ESAtools).

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

Example:

Ravi's regular pay is \$14.00 an hour. His overtime rate (1½ X regular hourly pay) is \$21.00 an hour. This week Ravi worked the following hours:

- Sunday: 0 hours
- Monday: 8 hours
- Tuesday: 12 hours
- Wednesday: 9 hours
- Thursday: 8 hours
- Friday: 8 hours
- Saturday: 8 hours
- **Total: 53 hours**

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 \$14.00 = \$616.00
- Overtime pay: 9 X \$21.00 = \$189.00
- **Total pay: \$616.00 + \$189.00 = \$805.00**

Result: Ravi is entitled to total pay of \$805.00.

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.

Example:

Sharon's salary is \$700.00 a week. She worked 50 hours this work week.

1. First Sharon's regular (non-overtime) hourly rate of pay is calculated:

$$\$700.00 / 44 = \$15.91$$

Sharon was paid a regular rate of \$15.91 for each hour she worked up to and including 44 hours.

2. Next her overtime rate is calculated:

$$\$15.91 \text{ regular rate} \times 1\frac{1}{2} = \$23.87$$

Her overtime rate is \$23.87.

3. Then the amount of overtime she worked is calculated:

50 hours - 44 hours = 6 hours of overtime

4. Her overtime pay is calculated:

6 hours X \$23.87 an hour = \$143.22

Sharon is entitled to \$143.22 in overtime pay.

5. Finally, Sharon's regular salary and overtime pay are added together:

Regular salary: \$700.00

Overtime pay: \$143.22

Total pay: \$700.00 + \$143.22 = \$843.22

Result: Sharon is entitled to total pay of \$843.22.

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.

Example:

Suppose Ben is hired on the understanding that he will be paid \$750.00 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 \$750.00 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:

$\$750.00 / 40 = \18.75

Ben's regular rate of pay is \$18.75 an hour.

2. Next his regular (non-overtime) earnings are calculated. He is entitled to \$18.75 an hour for all hours up to and including 44 hours a week:

$\$18.75 \text{ regular rate} \times 44 \text{ hours} = \825.00

Ben's regular earnings for the week are \$825.00.

3. Then his hourly overtime rate is calculated:

$\$18.75 \text{ regular rate} \times 1\frac{1}{2} = \28.13

His overtime rate is \$28.13.

4. The amount of overtime Ben worked is calculated:
50 hours - 44 hours = 6 hours of overtime.
5. His overtime pay is calculated:
6 hours X \$28.13 an hour = \$168.78
Ben is entitled to \$168.78 in overtime pay.
6. Finally, Ben's regular pay and overtime pay are added together:
Regular pay: \$825.00
Overtime pay: \$168.78
Total pay: \$825.00 + \$168.78 = \$993.78

Result: Ben is entitled to total pay of \$993.78

Calculating Overtime When There is a Public Holiday

Example: When an employee's work week includes a public holiday

Antonio's regular pay is \$13.00 an hour. Antonio worked overtime in a week with a public holiday, but he did not work on the holiday. Antonio's public holiday pay for the Monday is \$104.00 (See [Public Holiday Pay](#) for information on how to calculate public holiday pay).

This week Antonio worked the following hours:

- Sunday: 0 hours
- Monday (public holiday): 0 hours
- Tuesday: 12 hours
- Wednesday: 9 hours
- Thursday: 8 hours
- Friday: 8 hours
- Saturday: 8 hours
- **Total: 45 hours**

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

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

- Regular pay: 44 X \$13.00 = \$572.00
- Overtime pay: 1 X \$19.50 = \$19.50
- Public holiday pay: \$104.00
- **Total pay: \$572.00 + \$19.50 + \$104.00 = \$695.50**

Result: Antonio is entitled to total pay of \$695.50.

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

Etsuko's regular hourly pay is \$13.00/hour. Etsuko 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, Etsuko worked the following hours:

- Sunday: 0 hours
- Monday (public holiday): 9 hours
- Tuesday: 9 hours
- Wednesday: 9 hours
- Thursday: 9 hours
- Friday: 9 hours
- Saturday: 9 hours
- **Total: 54 hours**

Since Etsuko 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

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

- Regular pay: 44 X \$13.00 = \$572.00
- Overtime pay: 1 X \$19.50 = \$19.50
- Premium pay: \$175.50
- Public holiday pay: \$117.00
- **Total pay: \$572.00 + \$19.50 + \$175.50 + \$117.00 = \$884.00**

Result: Etsuko is entitled to total pay of \$884.00.

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

Kathleen's regular hourly pay is \$13.00. 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:

- Sunday: 0 hours
- Monday: 9 hours
- Tuesday: 9 hours
- Wednesday: 8 hours
- Thursday: 9 hours
- Friday: 9 hours
- Saturday: 6 hours
- **Total: 50 hours**

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 hours - 44 hours = 6 hours of overtime

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

- Regular pay: $44 \times \$13.00 = \572.00
- Overtime pay: $6 \times \$19.50 = \117.00
- **Total pay: $\$572.00 + \$117.00 = \$689.00$**

Result: Kathleen is entitled to total pay of \$689.00 and a substitute day off work.

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 based on 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.

Example: 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 \$580.00.

1. First the regular (non-overtime) hourly rate of pay is calculated:

$$\$580.00 / 44 \text{ hours} = \$13.18$$

Their regular hourly rate of pay is \$13.18.

2. Then the hourly overtime rate is calculated:

$$\$13.18 \text{ regular rate} \times 1\frac{1}{2} = \$19.77$$

Their overtime rate is \$19.77.

3. Next, the amount of overtime worked is calculated:

$$48 \text{ hours} - 44 \text{ hours} = 4 \text{ hours of overtime.}$$

4. The overtime pay is calculated:

$$4 \text{ hours} \times \$19.77 \text{ an hour} = \$79.08$$

They are each entitled to \$79.08 in overtime pay.

5. Finally, the regular pay and overtime pay are added together:

- Regular pay: \$580.00
- Overtime pay: \$79.08
- **Total pay: \$580.00 + \$79.08 = \$659.08**

Result: Becka and Rhian are each entitled to total pay of \$659.08.

Example: Calculating the overtime for hourly rate plus commission employees

Justine is paid \$15.00 an hour plus commissions. In one work week, she worked 50 hours and was paid \$750.00 in hourly wages plus \$200.00 in commissions.

1. First Justine's regular rate is calculated:

$$\$750.00 + \$200.00 = \$950.00 \text{ total wages paid}$$

$$\$950 / 44 \text{ hours} = \$21.59 \text{ an hour}$$

Justine's regular rate is \$21.59 an hour.

2. Then her overtime rate is calculated:

$$\$21.59 \text{ regular rate} \times 1\frac{1}{2} = \$32.39$$

Her overtime rate is \$32.39.

3. Next her overtime entitlement is calculated:

$$6 \text{ hours} \times \$32.39 \text{ an hour} = \$194.34$$

She earned \$194.34 in overtime wages.

4. Because Justine was paid \$15.00 per hour for all hours she worked, including her 6 overtime hours, she has already received \$90.00 in respect of her overtime entitlement.

Result: Justine was entitled to \$194.34 for overtime pay and was paid \$90.00. Her employer therefore owes her an additional \$104.34.

Note: Some commission employees are exempt from the overtime provisions. For more information, please see the Special Rule Tool, available at [Ontario.ca/ESAtools](https://www.ontario.ca/ESAtools).

Averaging Agreements

Interactive tools are available online; please refer to the Averaging and Time Off in Lieu section in the Hours of Work and Overtime Tool, available at [Ontario.ca/ESAtools](https://www.ontario.ca/ESAtools).

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 of work for overtime pay purposes from the Director of Employment Standards.

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 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 of work for overtime pay 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 at [Ontario.ca/ESAforms](https://www.ontario.ca/ESAforms).

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.

Example: 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 \$14.00 an hour and his overtime rate is \$21.00 per hour ($1\frac{1}{2} \times \14.00).

Myron's overtime entitlement is calculated as follows:

1. 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.

$$54 + 36 = 90 \text{ hours}$$

$$90 \text{ hours} / 2 \text{ weeks} = 45 \text{ hours per week}$$

2. 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.

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

3. 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.

$$\text{Week 1: } 1 \text{ hour} \times \$21.00 \text{ per hour} = \$21.00$$

$$\text{Week 2: } 1 \text{ hour} \times \$21.00 \text{ per hour} = \$21.00$$

Result: Myron is entitled to \$42.00 of overtime pay in addition to his regular earnings.

Example: Calculating overtime pay when employee works different jobs for different rates of pay and hours of work are being averaged over four weeks

Connor earns \$13.00 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 is \$19.50 an hour ($\13.00×1.5). In the second two weeks of the averaging period, he is working on the assembly line and his overtime rate is \$30.00 an hour ($\20.00×1.5).

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:

- Week 1: 56 hours
- Week 2: 43 hours
- Week 3: 35 hours
- Week 4: 46 hours
- **Total: 180 hours**

Connor's average hours per week in the averaging period are:

$180 / 4 = 45$ hours. Connor's average overtime is 1 hour per week.

Connor's overtime entitlement is:

- Week 1: \$19.50 per hour X 1 hour = \$19.50
- Week 2: \$19.50 per hour X 1 hour = \$19.50
- 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 = \$99.00**

Result: Connor is entitled to \$99.00 in overtime pay in addition to his regular earnings.

What Cannot Be Done

An employee can make an agreement to take time off in lieu of overtime pay or, with the approval of the Director of Employment Standards, an agreement to average hours of work for overtime pay purposes. However, 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 another overtime threshold that applies) in a work week. For example, if Josée's regular pay is \$15.00 an hour, her employer cannot drop her regular rate in a week when overtime was worked to \$12.00 an hour and then pay her \$18.00 ($1\frac{1}{2} \times \12.00) for overtime hours worked instead of \$22.50 ($1\frac{1}{2} \times \15.00).

7. 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. For more information on these job categories, please see the Special Rule Tool [available at Ontario.ca/ESAtools](https://www.ontario.ca/ESAtools).

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. Therefore, if an employee 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 establishes alternative vacation entitlement year commencing January 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, personal emergency, family caregiver, family medical, critically ill child care, organ donor, reservist, or crime-related child death or disappearance 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 of 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 based on length of employment although a contract of employment or collective agreement might 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 $R = \frac{4\text{months}}{12\text{months}}$

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.

Example:

Riley was hired on February 24, 2014. 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, 2014 to June 30, 2014 must be taken within ten months of the end of the stub period (that is, within ten months of June 30, 2014). The vacation time Riley earned for the entitlement year July 1, 2014 to June 30, 2015 would have to be taken within ten months of the end of the vacation entitlement year (that is, within ten months of June 30, 2015).

If the deadline under the ESA for taking a vacation comes up when an employee is on pregnancy, parental, personal emergency, family caregiver, family medical, critically ill child care, organ donor, reservist or crime-related child death or disappearance 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 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 to which the employee is entitled.

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

Example: 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.

Example: 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 52.14 weeks per year.
- The average number of days worked per week in the year would be 149 days divided by 52.14 weeks per year = 2.86 days
- The single vacation days the employee would be entitled to in respect of that year would be 2×2.86 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, five days must be taken consecutively and any additional days may be taken together with those five

days 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 month vacation entitlement year or stub period for which the vacation is being given.

For example, suppose Janice works part-time and 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; or
- 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 pay day for the period in which the vacation falls.
 - For example, Alvaro is taking vacation from January 1 to January 3, and the normal pay day that covers this period is January 30. Alvaro must be given his vacation pay on or before January 30.

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.
 - Alternatively, the employer can issue a separate wage statement for the vacation pay being paid.
2. If the employee agrees in writing, the employer can pay the vacation pay at any time agreed to by the employee.
 3. 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 pay day for the period in which the vacation falls.

When Employment Ends

When employment ends (for example, when an employee quits or his or her employment 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 within seven days of the employment ending or on what would have been the employee's next pay day, whichever is later.

Example: 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, 2006 and May 15, 2006).

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, personal emergency, family caregiver, family medical, critically ill child care, organ donor, reservist or crime-related child death or disappearance 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.

Example: 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.

Example: 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 of 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, personal emergency, family caregiver, family medical, critically ill child care, organ donor, reservist or crime-related child death or disappearance 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.

Requesting Statements of Vacation 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), and the balance of vacation time remaining at the end of the vacation entitlement year (or stub period).

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 pay day after the stub period or vacation entitlement year ends, whichever is later.

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 vacation entitlement year or stub period, the employer is required to provide the information no later than:

- seven days after the start of the next vacation entitlement year (or first vacation entitlement year in the case of a stub period),

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 vacation entitlement year or stub period 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.

8. Public Holidays

Ontario has nine public holidays:

1. New Year's Day
2. Family Day
3. Good Friday
4. Victoria Day
5. Canada Day
6. Labour Day
7. Thanksgiving Day
8. Christmas Day
9. 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, please refer to the Special Rule Tool (available at Ontario.ca/ESAtools).

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.

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.

Note: 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 term contract. 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 has 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. 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

Example: 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 has reasonable cause for failing to work either of those days, she qualifies to be paid for the holiday.

Example: 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.

Example: 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 has reasonable cause for failing to do so, she is entitled to the paid public holiday.

Example: 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.

Example: 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.

Example: 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 does not have 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**. The Ministry of Labour offers a Public Holiday Pay Calculator (available at [Ontario.ca/ESAtools](https://www.ontario.ca/ESAtools)) for your convenience.

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.)

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.

Example:

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.

Table 1 - Calendar Illustrating the Four Work Week Period Before the Work Week With a Public Holiday

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
November 18	19	20	21	22 Week 1	23 Week 1	24 Week 1
25 Week 1	26 Week 1	27 Week 1	28 Week 1	29 Week 2	30 Week 2	December 1 Week 2
2 Week 2	3 Week 2	4 Week 2	5 Week 2	6 Week 3	7 Week 3	8 Week 3
9 Week 3	10 Week 3	11 Week 3	12 Week 3	13 Week 4	14 Week 4	15 Week 4
16 Week 4	17 Week 4	18 Week 4	19 Week 4	20	21	22
23	24	25 Public Holiday	26	27	28	29
30	31					

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 in the calendar above — November 22 to December 19 — are used in the calculation of public holiday pay.

Calculating Public Holiday Pay

Example: 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:

$$\text{\$100.00 per day} \times 5 \text{ days} = \text{\$500.00 per week}$$

$$\text{\$500.00 per week} \times 4 \text{ work weeks} = \text{\$2,000.00}$$

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:

$$\text{\$2,000.00} + \text{\$0} = \text{\$2,000}$$

$$\text{\$2,000.00} / 20 = \text{\$100.00}$$

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

Example: 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.

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

2. Then the amount of vacation pay 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 payable is added together and divided by 20:

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

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

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

Example: 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:

$$\$100.00 \text{ per day} \times 3 \text{ days} = \$300.00 \text{ per week}$$

$$\$300.00 \text{ per week} \times 4 \text{ weeks} = \$1,200.00$$

2. Her vacation pay payable is also calculated:

$$\$4.00 \text{ per day (4\% of } \$100) \times 3 \text{ days} = \$12.00 \text{ per week}$$

$$\$12.00 \text{ per week} \times 4 \text{ weeks} = \$48.00$$

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:

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

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

Example: 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:
 $\$1,500.00$ 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 / 20 = \78.00

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

Example: 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 \times 7 days = $\$700.00$
- Vacation pay payable: $\$0$ (she was not on vacation during the four work week period)
- Public holiday pay: $(\$700.00 + \$0) / 20 = \$35.00$ 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.

Example: When an employee is on a layoff

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 \$15.00 an hour. This means that his premium pay will be \$22.50 an hour ($\$15.00 \times 1\frac{1}{2}$).

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.

Example: 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 \$14.00. 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 \$14.00 per hour = \$112.00 per day

\$112.00 per day X 5 days = \$560.00 per week

\$560.00 X 4 work weeks = \$2,240.00

John-Duncan earned \$2,240.00 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:

$$(\$2,240.00 + \$0) / 20 = \$112.00$$

John-Duncan's public holiday pay entitlement is \$112.00.

Premium pay calculation:

4. Finally, the premium pay owing to John-Duncan for his work on the public holiday is calculated:

$$\$14.00 \text{ per hour} \times 1\frac{1}{2} = \$21.00$$

$$\$21.00 \text{ per hour} \times 8 \text{ hours worked} = \$168.00$$

John-Duncan's premium pay entitlement is \$168.00.

Result: John-Duncan is entitled to public holiday pay of \$112.00 and premium pay of \$168.00, for a total of \$280.00.

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 have 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 has 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 have 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.

Example: 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 has 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 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 the games part of a casino if the 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 [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.

9. 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.

Where the public holiday falls on a day that would ordinarily be a working day, most retail employees qualify for the public holiday off work with for public holiday pay.

Where the public holiday falls on a day that would not ordinarily be a working day, or the employee is on vacation, most retail employees qualify for a substitute day off with public holiday pay.

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 does not have the right to refuse to work on Sundays if he or she agreed in writing at the time of being hired to work on Sundays, unless he or she is refusing to work on Sundays because of religious belief or observance (in which case the employee must give the employer notice before the Sunday at least 48 hours before the Sunday work was to begin). Note that if a Sunday falls on a public holiday, the employee could refuse to work on the day, even if he or she had agreed at the time of hire to work on Sundays. (This is because the refusal to work is because the day is a public holiday, not because it is a Sunday.)

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.

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

No Reprisals

An employee must not be dismissed, intimidated or penalized in any other way because he or she exercised 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).

10. 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 complied with.

The Anti-Discrimination Rule

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

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 (though as noted, there are some exceptions).

Grounds on Which Discrimination is Not Allowed

Employees and their dependants, beneficiaries or survivors must not be treated differently because of the employee's age, sex or marital status.

Age

An employer cannot discriminate because of the age of an employee if the employee is 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: Certain Benefit Plans

An employee who is on pregnancy, parental, personal emergency, family caregiver, family medical, critically ill child care, organ donor, or crime-related child death or disappearance 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.

An employee who is on a reservist leave does not have the right to continue to participate in these plans during his or her leave. However, if the employer postpones the employee's reinstatement, the employer is required to pay the employer's share of premiums for certain benefit plans related to his or her employment and allow the employee to participate in such plans for the period during which the return date is postponed.

A female employee may be entitled to disability benefits during that part of the leave during which she would not have been able to work for health reasons related to her pregnancy or childbirth.

Other benefit plans may allow employees on *other* types of leave that are not provided for in the ESA to continue to participate in the plan while they are on leave. In that case, employees on pregnancy, parental, personal emergency, family caregiver, family medical, critically ill child care, organ donor, reservist, or crime-related child death or disappearance 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).

11. 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 take 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 term contract employee provided that:

- she is employed by an employer that is covered by the ESA,
and
- she started her employment 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 have commenced employment at least 13 weeks before the baby is expected to be born.

Example: A typical case

Aurélie began her employment 15 weeks before her due date. She is eligible to begin her pregnancy leave **at any time** after starting her employment, because there are at least 13 weeks between the date her employment began and her due date.

Example: When an employee is off sick

Fatima began her employment 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 her employment began and her due date. The fact that she did not actually work 13 weeks is irrelevant.

Example: When a baby is born before the due date

Meredith began her employment 15 weeks before her due date. However, 11 weeks after starting her new job, 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 began her employment and her due date. The fact that her baby was born less than 13 weeks after she began her employment 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 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.

Example: 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.

Example: 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 (for example, 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 a complication caused by her 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 stating the baby's due date and stating that she was unable to perform the duties of her position because of the complication.

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**.

Example: 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.

Example: 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.

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 has no right under the ESA to 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 term contract employee provided that the employee:

- is employed by 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. For example, 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 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 the parental leave when she gives notice of her pregnancy leave.

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:

Leroy 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. Leroy 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.

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 for Employees Taking 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 part of the leave during which she would not have been able to 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.

Example: 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).

Example: 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.

12. 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.

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 the 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, Family Caregiver Leave, Family Medical Leave, Critically Ill Child Care Leave, and Crime-related Child Death or Disappearance Leave

Personal emergency leave, family caregiver leave, family medical leave, critically ill child care leave, and crime-related child death or disappearance leave are different types of leaves. The purposes of the leaves, their length, the individuals with respect to whom they can be taken, and eligibility criteria vary.

See the respective chapters of this Guide for more information on each leave.

An employee may be entitled to more than one leave for the same event. Each leave is separate and the right to each leave is independent of any right an employee may have to the other leave(s).

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.

Example: Part-day personal emergency leave

Kevin's employer regularly employs at least 50 employees. 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 after starting it. 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 for Employees Taking Pregnancy and Parental Leaves](#)" in the Pregnancy and Parental Leave chapter.

Special Rule Regarding 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 the EMS, Healthcare, Health Professionals and the Government, White Collar, Professionals sections in the Special Rule Tool, available at Ontario.ca/ESAtools.

13. Family Caregiver Leave

Family caregiver leave is unpaid, job-protected leave of up to eight weeks per calendar year per specified family member.

Family caregiver leave may be taken to provide care or support to certain family members for whom a qualified health practitioner has issued a certificate stating that he or she has a serious medical condition.

Family medical leave is another job-protected leave available under the ESA for employees with certain relatives who have a serious medical condition. One of the main differences between family caregiver leave and family medical leave is that an employee is only eligible for the latter if the family member who has a serious medical condition has a significant risk of death occurring within a period of 26 weeks.

Eligibility

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

There is no requirement that an employee be employed for a particular length of time, or that the employer employ a specific number of employees for the employee to qualify for family caregiver 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 caregiver 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 grandparent or step-grandparent of the employee or the employee's spouse
- a grandchild or step-grandchild of the employee or the employee's spouse
- a spouse of a child of the employee
- a brother or sister of the employee
- a relative of the employee who is dependent on the employee for care or assistance

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

Qualified Health Practitioner

For family caregiver leave purposes, a qualified health practitioner is a person who is qualified to practice as a physician, registered nurse or psychologist under the laws of the jurisdiction in which care or treatment is being provided. In Ontario, this includes psychiatrists and nurse practitioners.

Different types of health practitioners may be able to issue certificates in different jurisdictions; it will depend on the laws of the jurisdiction.

The Medical Certificate

The employee does not have to have the medical certificate before he or she can start the leave, but a certificate must eventually be obtained. If a certificate is never issued, the employee will not be entitled to the leave. This means that the employee would not be entitled to any of the protections afforded to employees on family caregiver leave.

The certificate from the qualified health practitioner must name the individual and state that the individual has a serious medical condition. There is no requirement that the note specify *what* the medical condition is; it need only state that it is “serious.” This can include conditions that are chronic or episodic.

If a medical certificate sets out a period during which the individual will have a serious medical condition, the certificate will support absences as family caregiver leave during that period. If no period is set out, the certificate will support absences as family caregiver leave from the date it is issued until the end of the calendar year in which it is issued.

An employer is entitled to ask an employee for a copy of the certificate to provide proof that he or she is eligible for a family caregiver leave. The employee is required to provide the copy as soon as possible after the request.

The employee may wish to provide the health practitioner with a copy of the “*Medical Certificate to Support Entitlement to Family Caregiver Leave, Family Medical Leave, and/or Critically Ill Child Care Leave*” form to fill out. It is available on the ministry’s website at [Ontario.ca/ESAforms](https://www.ontario.ca/ESAforms). The health practitioner is not required to use this particular form; any certificate stating that the patient has a serious medical condition can be used.

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.

Interaction Between Family Caregiver Leave and Personal Emergency Leave, Family Medical Leave, Critically Ill Child Care Leave, and Crime-related Child Death or Disappearance Leave

Family caregiver leave, personal emergency leave, family medical leave, critically ill child care leave, and crime-related child death or disappearance leave are different types of leaves. The

purposes of the leaves, their length, the individuals with respect to whom they can be taken and the eligibility criteria vary.

See the respective chapters of this guide for more information on each leave.

An employee may be entitled to more than one leave for the same event. Each leave is separate and the right to each leave is independent of any right an employee may have to the other leave(s).

Length of Family Caregiver Leave

A family caregiver leave can last up to eight weeks per calendar year for each specified family member. A “week” is defined as running from Sunday to Saturday.

The eight weeks can be taken consecutively or separately.

The employee may take leave for periods less than a full week (for example, single days, at the beginning, middle or end of a week), but if they do, they are considered to have used up one week of their eight-week entitlement. If the employee is on leave for two or more periods within the same week (for example, on leave on Monday and Thursday of the same week), only one week of the eight-week entitlement is used up.

The employee is entitled to be on leave only when the employee is providing care or support to a specified family member.

The employer cannot require the employee to take an entire week of leave if the employee only wants to take leave for a single day(s), cannot prevent the employee from working prior to taking a single day(s) of leave during a week, and cannot prevent the employee from returning to work after a single day(s) of leave during the week.

Notice Requirements

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

If an employee has to begin a family caregiver 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 with respect to each part of the leave.

Example:

Bella is going to take leave on eight consecutive Wednesdays. Bella is required to provide written notice to her employer of all eight days. She can do this by providing a single written notice that sets out all of the dates of leave, or she can provide separate notices.

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 caregiver 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 Caregiver Leave

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

Employees who take family caregiver 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 caregiver leave. See [“Rights for Employees Taking Pregnancy and Parental Leaves”](#) in the Pregnancy and Parental Leave chapter.

14. 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. Family *caregiver* leave is another job-protected leave available under the ESA for employees with certain relatives who have a serious medical condition. One of the main differences between family medical leave and [family caregiver leave](#) is that an employee may be eligible for family caregiver leave even if the family member who has a serious medical condition does not have a significant risk of death occurring within a period of 26 weeks.

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 Employment and Social Development Canada, <http://www.esdc.gc.ca/eng/home.shtml>, 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 visit Service Canada’s website at:

<http://www.servicecanada.gc.ca/eng/home.shtml>, or 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 Caregiver Leave, Critically Ill Child Care Leave, and Crime-related Child Death or Disappearance Leave

Family medical leave, personal emergency leave, family caregiver leave, critically ill child care leave, and crime-related child death or disappearance leave are different types of leaves. For example, the purposes of the leaves, their length, the individuals with respect to whom they can be taken, and eligibility criteria are different.

See the respective chapters of this Guide for more information on each leave.

An employee may be entitled to more than one leave for the same event. Each leave is separate and the right to each leave is independent of any right an employee may have to the other leave(s).

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.

Where an Employee Provides Care or Support for Only Part of a Week

Employees will not always need or want to take an entire week off to provide care or support to the individual.

In any week (which is defined as running from Sunday to Saturday), an employee's right to take family medical leave only begins on the first day the employee is providing care or support.

If the employee stops providing care or support before the end of that week, the employee is entitled to be on leave until the end of the week, and he or she can return to work only if the employer agrees.* (The agreement does not have to be in writing.)

Even if an employee only takes part of a week off work as family medical leave, it is still counted as one week of the eight-week entitlement.

***Note:** prior to the amendments to the ESA that came into force on October 29, 2014, employees had the right to be on family medical leave only on days on which they provided care or support, and employers could not prevent an employee from returning to work during a week in which leave was taken.

Example:

Felicia works weekdays. She provides care or support to her dying mother on Wednesday and takes family medical leave to do it. The first day of the week that she is entitled to be on family medical leave is Wednesday. She is also entitled to be on family medical leave on Thursday and Friday even though she is not providing care or support on those days. She is able to return to work on Thursday and Friday only if she wants to and her employer agrees to let her. Felicia is considered to have used up one of her eight weeks of family medical leave even though she was on leave for only part of the week.

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 specified family member. For example, if one spouse took six weeks of family medical leave to care for his or her dying 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 Eight 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 qualified health 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 last day an employee can be on leave will always be a Saturday.

Medical Certificate

The employee does not have to have the medical certificate before he or she can start the leave, but a certificate must eventually be obtained. If a certificate is never issued, the employee will not be entitled to the leave. This means that the employee would not be entitled to any of the protections afforded to employees on 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 name the family member and state that the family member has a serious medical condition with a significant risk of death occurring within a specified 26-week period. There is no requirement that the notice specify what the medical condition is; it need only state that it is serious and that there is a significant risk of death occurring within a 26-week period.

The employee may wish to use the Ministry’s “*Medical Certificate to Support Entitlement to Family Caregiver Leave, Family Medical Leave, and/or Critically Ill Child Care Leave*” form when obtaining the medical certificate. It is available on the ministry’s website at [Ontario.ca/ESAforms](https://www.ontario.ca/ESAforms).

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 Employment and Social Development Canada may also be used for the purposes of supporting an entitlement to family medical leave.

Qualified Health Practitioner

For the purposes of family medical leave, 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.

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 for Employees Taking Pregnancy and Parental Leaves](#)” in the Pregnancy and Parental Leave chapter.

15. Critically Ill Child Care Leave

Critically ill child care leave is unpaid job-protected leave of absence of up to 37 weeks within a 52-week period.

Eligibility

Critically ill child care leave may be taken to provide care or support to a critically ill child of the employee for whom a qualified health practitioner has issued a certificate stating:

1. that the child is a critically ill child who requires the care or support of one or more parents, and
2. sets out the period during which the child requires the care or support.

A “child” means a child, step-child, foster child or child who is under legal guardianship, and who is under 18 years of age.

A “critically ill child” means a child whose baseline state of health has significantly changed and whose life is at risk as a result of an illness or injury. It does not include chronic conditions.

All employees who have been employed by their employer for at least six consecutive months and who are covered by the Employment Standards Act, 2000 (ESA) may be entitled to critically ill child care leave, whether they are full-time, part-time, permanent or term contract.

Qualified Health Practitioner

For critically ill child care leave purposes, a qualified health practitioner is a person who is qualified to practice as a physician, registered nurse, or psychologist under the laws of the jurisdiction in which care or treatment is being provided. In Ontario, this includes psychiatrists and nurse practitioners.

Different types of health practitioners may be able to issue certificates in different jurisdictions; it will depend on the laws of that jurisdiction.

The Medical Certificate

The employee does not have to have the medical certificate before he or she can start the leave, but a certificate must eventually be obtained. If a certificate is never issued, the employee will not be entitled to the leave. This means that the employee would not be entitled to any of the protections afforded to employees on critically ill child care leave.

The certificate must:

- name the child
- state that the child is critically ill or has been critically injured (there is no requirement that the certificate specify *what* illness or injury the child has; it need only state that the child is critically ill or critically injured)

- state that the child requires the care or support of at least one parent, and
- set out the period during which the child requires the care or support.

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 critically ill child care leave. The employee is required to provide the copy as soon as possible after the employer requests it.

The employee may wish to provide the health practitioner with the *“Medical Certificate to Support Entitlement to Family Caregiver Leave, Family Medical Leave, and/or Critically Ill Child Care Leave”* form for him or her to fill out. It is available on the ministry’s website at Ontario.ca/ESAforms. There is no requirement that the health practitioner use this particular form. Any certificate that states that the child is a critically ill or injured child needing the care or support of one or more parents, and indicating the period during which the care or support will be required can be used.

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) benefits for parents of critically ill children, a copy of the medical certificate submitted to Employment and Social Development Canada may also be used for the purposes of supporting an entitlement to critically ill child care leave.

Employment Insurance Benefits

Parents who take leave from work to provide care or support to their critically ill child may be eligible to receive Employment Insurance (EI) special benefits for Parents of Critically Ill Children (PCIC) for up to 35 weeks. For information about EI, visit Service Canada’s website at: <http://www.servicecanada.gc.ca/eng/home.shtml>, or contact Service Canada’s Employment Insurance Automated Telephone Information Service at 1-800-206-7218.

The right to take time off work under the critically ill child care leave provisions of the ESA is not the same as the right to the payment of the EI benefits for PCIC under the federal Employment Insurance Act. An employee may be entitled to a critically ill child care leave whether or not he or she has applied for, or qualified for, the new EI benefits for PCIC.

Interaction Between Critically Ill Child Care Leave and Personal Emergency Leave, Family Caregiver Leave, Family Medical Leave, and Crime-related Child Death or Disappearance Leave

Critically ill child care leave, personal emergency leave, family caregiver leave, family medical leave, and crime-related child death or disappearance leave are different types of leaves. The purposes of the leaves, their length, the individuals with respect to whom they can be taken, and eligibility criteria vary.

See the respective chapters of this guide for more information on each leave.

An employee may be entitled to more than one leave for the same event. Each leave is separate and the right to each leave is independent of any right an employee may have to the other leave(s).

Length and Timing of Critically Ill Child Care Leave

A critically ill child care leave can last up to 37 weeks within a 52 week period.

If a medical certificate issued by a qualified health practitioner sets out a period of **less than 37 weeks** that the critically ill child requires care or support of one of the parents, the employee is entitled to take a leave only for the period set out in the certificate.

If the certificate states that a child is critically ill and requires the care or support of one or more parents for a period of 52 weeks or longer, the 37 weeks of leave may end no later than the last day of the 52-week period that begins on the first day of the week in which that child became critically ill. (The employee may, however, be entitled to an “additional” leave at the end of the 52-week period – see the heading “Additional Leaves” later in this chapter.)

A “week” is defined as running from Sunday to Saturday.

The weeks in which critically ill child care leave is taken can be consecutive, or they can be separated.

The employee may take leave for periods less than a full week (for example, single days, at the beginning, middle or end of a week) but if they do, they are considered to have used up one week of their entitlement. If the employee is on leave for two or more periods within the same week (for example, on leave on Monday and Thursday of the same week) only one week of the entitlement is used up.

The employee is entitled to be on leave only when the employee is providing care or support to the critically ill child.

The employer cannot require the employee to take an entire week of leave if the employee only wants to take leave for a single day(s), cannot prevent the employee from working prior to taking a single day(s) of leave during a week, and cannot prevent the employee from returning to work after a single day(s) of leave during the week.

Critically Ill Child Care Leave for More than One Child

An employee is entitled to take leave only for 37 weeks in a 52-week period even if more than one child is critically ill, if the children are critically ill as a result of the **same** event.

Example:

Paul’s two children were exposed to dangerous chemicals. A qualified health practitioner issued certificates on the same day stating that both children were critically ill and required

care or support of a parent for 40 weeks. Paul is entitled to take critically ill child care leave of up to 37 weeks.

Death of a Child

If a critically ill child dies while an employee is on a critically ill child care leave, the employee's entitlement to be on leave ends at the end of the week (which is defined as being a Saturday) in which the child dies.

Exception: More than One Child

The employee's entitlement to be on a leave does not end at the end of the week in which the critically ill child dies if more than one child of the employee is critically ill as a result of the same event and the other child (or children) are still critically ill.

Sharing Critically Ill Child Care Leave

The total amount of critically ill child care leave that may be taken under the ESA by one or more employees in respect of the same child, or children who are critically ill as a result of the same event, is 37 weeks.

For example, a critically ill child requires the care or support of a parent for 40 weeks. If one parent took critically ill child care leave pursuant to the ESA for 35 weeks, the other parent can only take critically ill child care leave pursuant to the ESA for 2 weeks. The parents could take the leave at the same time or at different times.

Child Turns 18 While Employee is on Critically Ill Child Care Leave

Employees do not lose eligibility for critically ill child care leave if their child turns 18 after starting the leave.

Further Leave

A qualified health practitioner might underestimate the period of time a child will require the care or support of a parent. If the practitioner estimated the period to be *less than 52 weeks* but the child is still critically ill at the end of the period set out in the certificate, a second medical certificate can be issued to allow an employee to extend their leave.

Example:

Mark's child became critically ill on January 1. The certificate issued on January 1 stated that the child requires the care or support of a parent for four weeks (until January 28). The child is still critically ill on January 28. Another certificate is issued on January 29, stating that the child will require care or support of a parent for another three weeks (until February 18). Mark is entitled to four weeks of leave during the period January 1 to January 28 and to a "further" leave of three weeks during the period January 29 to February 1, for a total of seven weeks of leave.

Note, however, that the original leave and the extension(s) cannot be longer than 37 weeks in a 52-week period.

Example:

Gail's child became critically ill on January 1. The certificate issued on January 1 stated that the child requires the care or support of a parent for 30 weeks (until July 29). The child was still critically ill on July 29. Another certificate was issued on July 30 stating that the child will require care or support for another ten weeks (until October 6). Although Gail was entitled to take leave during the 30-week period from January 1 to July 29, and to take a "further" leave during the 10-week period from July 10 to October 6, the total amount of leave she is entitled to is 37 weeks during that 40-week period.

Additional Leaves

If one or more children remain critically ill after the 52-week period has expired, the employee is entitled to take another leave if the requirements for eligibility are met.

Example:

A qualified health practitioner issued a certificate on January 1, 2015, stating that Frank's daughter Rooney is critically ill and requires the care or support of a parent for 52 weeks. Frank is entitled to up to 37 weeks of critically ill child care leave during that 52-week period. Rooney remains critically ill on Sunday, January 1, 2016. Another certificate is issued on January 1, 2016, stating that Rooney remains critically ill and requires the care or support of a parent for another 40 weeks. Frank is entitled to a new, "additional" leave of 37 weeks in the 52-week period starting Sunday, January 1, 2016.

Notice Requirements: Advance Notice and Written Plan

An employee who intends to take critically ill child care leave must inform the employer in writing that he or she will be taking such leave and provide the employer with a written plan that indicates the weeks in which he or she will take the leave.

If an employee has to begin a critically ill child care leave before notifying the employer, he or she must inform the employer in writing and provide a written plan as soon as possible after starting the leave.

Change in Employee's Plan

An employee may take a leave at a time other than that indicated in their original plan provided to their employer so long as the new dates fall within the dates the ESA allows, and:

1. the employee requests permission from the employer to do so in writing and the employer grants permission in writing; *or*

2. the employee provides the employer with reasonable advance notice of the change in writing.

There is no limit on the number of times the employee can change their plan, so long as the requirements described above are met each time.

Rights During and at the End of a Critically Ill Child Care Leave

Employers do not have to pay wages when an employee is on critically ill child care leave.

Employees who take critically ill child care 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 critically ill child care leave. See [“Rights for Employees Taking Pregnancy and Parental Leaves”](#) in the Pregnancy and Parental Leave chapter.

16. Organ Donor Leave

Organ donor leave is unpaid, job-protected leave of up to 13 weeks, for the purpose of undergoing surgery to donate all or part of certain organs to a person. In some cases, organ donor leave can be extended for up to an additional 13 weeks.

Qualifying for Organ Donor Leave

An employee is entitled to organ donor leave whether he or she is a full-time, part-time, permanent, or term contract employee.

To qualify for organ donor leave, the employee must:

- be covered by the ESA;
- Have been employed by his or her employer for at least 13 weeks;
- Undergo surgery to donate all or part of one of the following organs to another person:
 - kidney
 - liver
 - lung
 - pancreas
 - small bowel

When an Organ Donor Leave Can Begin

Generally, organ donor leave begins on the date of the surgery. It may begin on an earlier date, as specified in a certificate issued by a legally qualified medical practitioner.

Length of an Organ Donor Leave

The employee may take leave for up to 13 weeks. The employee may extend the leave if a legally qualified medical practitioner issues a certificate stating that the employee is not yet able to perform the duties of his or her position because of the organ donation, and will not be able to do so for a specified period of time. The employee is entitled to extend the leave for the specified period of time.

The leave may be extended more than once, but the total period of extension must not be more than 13 weeks. Therefore, where the leave is extended, the maximum amount of time allowed for organ donor leave is 26 weeks in total. Employees may also have the right to [personal emergency leave](#).

Example:

Gabriel began an organ donor leave on September 1, the day that he had surgery to donate part of his liver to his daughter. Upon the employer's request, he provided a medical certificate from his doctor in advance of the surgery. After 13 weeks of organ donor leave, Gabriel was planning to return to work, but he had complications from the surgery that has

hampered his recovery. His doctor recommended extending Gabriel's organ donor leave for another six weeks. Gabriel provided his employer with a medical certificate from his doctor stating this and extended his leave for an additional period of six weeks.

Notice Requirements

An employee who wishes to take organ donor leave must provide the employer with at least two weeks' written notice both before beginning or extending the leave, if possible. If this is not possible, the employee must provide written notice as soon as possible after beginning or extending the leave. However, if the employee does not provide notice to begin the leave, provided the employee meets the requisite criteria, the employee still has the right to take the leave.

The employee may end the leave early by giving the employer at least two weeks' advance written notice.

Medical Certificate

The employer may ask the employee to provide a medical certificate for the following reasons:

- Confirming that the employee has undergone or will undergo surgery to donate an organ;
- When the employee is to begin the leave if it is before the day of the organ donation surgery; and/or
- To extend a leave for a period of time because the employee is not yet able to perform the duties of his or her position.

The employee must provide the certificate to the employer as soon as possible after the employer's request.

Rights During Leave

Employees who take organ donor 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 way an employee who takes or plans on taking an organ donor leave. See "[Rights for Employees Taking Pregnancy and Parental Leaves](#)" in the Pregnancy and Parental Leave chapter.

The employee's entitlement to organ donor leave is in addition to any personal emergency leave entitlement the employee may have.

17. Reservist Leave

Employees who are reservists and who are deployed to an international operation or to an operation within Canada that is or will be providing assistance in dealing with an emergency or its aftermath (including search and rescue operations, recovery from national disasters such as flood relief, military aid following ice storms, and aircraft crash recovery) are entitled under the ESA to unpaid leave for the time necessary to engage in that operation. In the case of an operation outside Canada, the leave would include pre-deployment and post-deployment activities that are required by the Canadian Forces in connection with that operation.

In order to be eligible for reservist leave, you must have worked for your employer for at least six consecutive months. Generally, reservists must provide their employer with reasonable written notice of the day on which they will begin and end the leave.

Employees on a reservist leave are entitled to be reinstated to the same position if it still exists or to a comparable position if it does not. Seniority and length of service credits continue to accumulate during the leave.

Unlike the case with other types of leave, an employer is entitled to postpone the employee's reinstatement for two weeks after the day on which the leave ends or one pay period, whichever is later. Also, the employer is not required to continue any benefit plans during the employee's leave. However, if the employer postpones the employee's reinstatement, the employer is required to pay the employer's share of premiums for certain benefit plans related to his or her employment and allow the employee to participate in such plans for the period the return date is postponed.

18. Crime-Related Child Death or Disappearance Leave

Crime-related child death or disappearance leave is an unpaid job-protected leave of absence. It provides up to 104 weeks with respect to the crime-related death of a child and up to 52 weeks with respect to the crime-related disappearance of a child.

Eligibility

Employees who have been employed by their employer for at least six consecutive months and who are covered by the ESA are entitled to crime-related child death or disappearance leave if it is probable, considering the circumstances, that a child of the employee died or disappeared as a result of a crime.

An employee is not entitled to this leave if the employee is charged with the crime or if it is probable, considering the circumstances, that the child was a party to the crime.

“Child” means a child, step-child or foster child who is under 18 years of age.

Generally speaking, crime means an offence under the Criminal Code of Canada.

Federal Income Support Grant

An employee who takes time away from work because of the crime-related death or disappearance of their child may be eligible for the Federal Income Support for Parents of Murdered or Missing Children grant. For information about this grant, visit Service Canada’s website at www.servicecanada.gc.ca/pmmc or contact them at 1-877-842-5601.

Timing of a Crime-Related Child Death or Disappearance Leave

A leave for the crime-related disappearance of a child must be taken within the 53-week period that begins in the week the child disappeared.

A leave for the crime-related death of a child must be taken within the 105-week period that begins in the week the child died.

In most cases, an employee must take the leave in a single period.

Change in Circumstances

If an employee takes such a leave and the circumstances change and it no longer seems probable that the child died or disappeared as a result of the crime, the employee’s entitlement to a leave ends on the day on which it no longer seems probable.

If an employee takes a leave relating to the disappearance of his or her child, and the child is found within the 52-week period that begins in the week the child disappears, the employee is entitled to:

1. remain on leave for 14 days after the day the child is found, if the child is found alive; or
2. take 104 weeks of leave from the day the child disappeared if the child is found dead (this applies whether or not the employee is still on leave when the child is found).

If the child is found dead more than 52 weeks after the week in which the child disappeared, the employee is entitled to take a leave related to the death of a child of up to 104 weeks.

Sharing Crime-Related Child Death or Disappearance Leave

The total amount of crime-related child disappearance leave taken by one or more employees under the ESA in respect of the same disappearance (or disappearances that are the result of the same event) is 52 weeks.

The total amount of crime-related child death leave taken by one or more employees under the ESA in respect of the same death (or deaths that are the result of the same event) is 104 weeks.

The employees who are sharing the leave can be on leave at the same time, or at different times; the ESA does not impose any restrictions in this regard. The sharing requirement applies whether or not the employees work for the same employer.

Notice Requirements: Advance Notice and a Written Plan

An employee must inform the employer in writing that he or she will be taking a crime-related child death or disappearance leave and must provide the employer with a written plan that indicates the weeks in which he or she will take the leave.

If an employee has to begin such a leave before notifying the employer, he or she must inform the employer in writing and provide the employer with a written plan as soon as possible after beginning the leave.

An employee who does not give notice does not lose his or her right to the leave.

Change in Employees Plan

An employee may take a leave at a time other than that indicated in their original plan provided to their employer so long as the new dates meets the restrictions of the ESA and,

- a) The employee requests permission from the employer to do so in writing and the employer grants permission in writing;
or
- b) The employee provides the employer with four weeks written notice before the change takes place.

Evidence

An employer may require an employee who takes a crime-related child death or disappearance leave to provide reasonable evidence of the employee's entitlement to the leave.

Rights During and at the End of Crime-Related Child Death or Disappearance Leave

Employers do not have to pay wages when an employee is on a crime-related child death or disappearance leave.

Employees who take crime-related child death or disappearance 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 crime-related child death or disappearance leave. See "[Rights for Employees Taking Pregnancy and Parental Leaves](#)" in the Pregnancy and Parental Leave chapter.

19. 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 where an employee 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 number of weeks of termination pay together equal the length of notice the employee is entitled to receive).

The ESA does not require an employer 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 other 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 the Special Rule Tool, available at Ontario.ca/ESAtools.

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 negative 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 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). The mere fact that the employer does not specify a recall date when laying the employee off does not necessarily mean that the lay-off is not temporary. Note, however, that a lay-off, even if intended to be temporary, may result in constructive dismissal if it is not allowed by the employment contract.

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 at his or her place of employment or elsewhere.

Employers are not required under the ESA to provide employees with a written notice of a temporary layoff, nor do they have to provide 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:

- not more than 13 weeks of layoff in any period of 20 consecutive weeks;
- or*
- 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*
- 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

An employee is entitled to notice of termination (or termination pay instead of notice) if he or she has been continuously employed for at least three months. A person is considered “employed” not only while he or she is actively working, but also during any time in which he or she is not working but the employment relationship still exists (for example, time in which the employee is off sick or on leave or on lay-off).

The amount of notice to which an employee is entitled depends on his or her “period of employment”. An employee’s period of employment includes not only all time while the employee is actively working but also any time that he or she is not working but the employment relationship still exists, *with the following exceptions*:

- if a lay-off goes on longer than a temporary lay-off, the employee’s employment is deemed to have been terminated on the first day of the lay-off—any time after that does not count as part of the employee’s period of employment, even though the employee might still be employed for purposes of the “continuously employed for three months” qualification;
- if two separate periods of employment are separated by more than 13 weeks, only the most recent period counts for purposes of notice of termination.

It is possible, in some circumstances, for a person to have been “continuously employed” for three months or more and yet have a period of employment of less than three months. In such circumstances, the employee would be entitled to notice because an employee who has been continuously employed for at least three months is entitled to notice, and the minimum notice entitlement of one week applies to an employee with a period of employment of any length less than one year.

The following chart specifies the amount of notice required:

If an employee has been continuously employed for at least three months:

Period of Employment	Notice Required
Less than 1 year	1 week
1 year or more but less than 3 years	2 weeks
3 years or more but less than 4 years	3 weeks
4 years or more but less than 5 years	4 weeks
5 years or more but less than 6 years	5 weeks
6 years or more but less than 7 years	6 weeks
7 years or more 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](#) - where the employment of 50 or more employees is 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 any other 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 weeks in which the employee worked during the period of 12 weeks immediately preceding the date the notice was given.

An employer is not allowed to schedule 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 that allow an employee who is to be laid off or whose employment is to be 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 “bumped” by an employee named in the notice. However, this notice of termination must still meet the length requirements set out in the ESA.

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.

Example: 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 \$14.00 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:

$$\text{\$14.00 an hour} \times 40 \text{ hours a week} = \text{\$560.00 a week}$$

2. Her termination pay is calculated:

$$\text{\$560.00} \times 3 \text{ weeks} = \text{\$1,680.00}$$

3. Then her vacation pay on her termination pay is calculated:

$$4\% \text{ of } \text{\$1,680.00} = \text{\$67.20}$$

4. Finally, her vacation pay is added to her termination pay:

$$\text{\$1,680.00} + \text{\$67.20} = \text{\$1,747.20}$$

Result: Sarah is entitled to \$1,747.20. The employer must also ensure continued coverage for any benefit or pension plans that applied to her for three weeks.

Example: 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 \$14.00 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:

$$\text{\$1,800.00 for 12 weeks} / 10 \text{ weeks (Gerry was off sick for two weeks therefore these weeks are not included in the calculation of average earnings)} = \text{\$180.00 a week}$$

2. His termination pay is calculated:

$$\text{\$180.00} \times 4 \text{ weeks} = \text{\$720.00}$$

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. The employer must also ensure continued coverage for any benefit or pension plans that applied to him for four weeks.

When to Pay Termination Pay

Termination pay must be paid to an employee **either** seven days after the employee's employment 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), available at Ontario.ca/ESAforms, to the Director of Employment Standards. Any notice to the affected employees would not be considered to have been given until the Form 1 was received by the Director, i.e. 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:

- Eight weeks' notice if the employment of 50 to 199 employees is to be terminated
- 12 weeks' notice if the employment of 200 to 499 employees is to be terminated
- 16 weeks' notice if the employment 500 or more employees is 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 who wants to resign before the termination date provided in the employer's notice 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. However, the 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 Date in Notice

An employer can provide work to an employee who has been given notice of termination on a temporary basis in the 13-week period *after* the termination date set out in the notice without affecting the original date of the termination and without being required to provide any further notice of termination to the employee when the temporary work ends.

If an employee works **beyond** the 13-week period after the termination date and then has his or her employment terminated, the employee will be entitled to a new written notice of termination as if the previous notice 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 collective agreements.

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 (or severance pay, if he or she was entitled to severance pay) at that time;

or

- give up his or her recall rights and receive termination pay (and severance pay, if he or she was entitled to severance 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 and the trade union advises the employer and the Director of Employment Standards in writing that efforts have failed, 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. Please also refer to the Special Rule Tool, available at Ontario.ca/ESAtools.

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 if he or she knew or should have known the effects his or her conduct would have. Poor work conduct that is accidental or unintentional is generally not considered wilful;
- was hired for a specific length of time or until the completion of 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;
- 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

Rights Greater than ESA Notice of Termination, Termination Pay, Severance Pay

The rules under the ESA about termination and severance of employment are minimum requirements. Some employees may have rights under the common law or other legislation that give them greater rights than notice of termination (or termination pay) and severance pay under the ESA; because such rights generally cannot be enforced under the ESA, some employees may want to sue their former employer in court for “wrongful dismissal” or pursue other options. Employees should be aware that they 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, an employee must choose one or the other. Employees may wish to obtain legal advice concerning their rights.

20. 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 losses (such as loss of seniority) that occur when a long-term employee loses his or her job.

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 where an employee 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 do not have 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.

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 if 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 permanently 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

Example: 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).

$\$600.00 \times 7.75 = \$4,650.00$.

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.

Example: Employee paid on a basis other than time worked

Kwesi works as a commission salesperson at his employer's high-tech retail store. He is paid commissions on sales made and not on the basis of time worked.

Kwesi's employer decides to downsize and Kwesi 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.

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

To calculate Kwesi's severance pay entitlement:

1. Calculate Kwesi'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 / 12 = \643.58

2. Number of completed years = 9

3. Divide the number of complete months Kwesi was employed in the incomplete year by 12

Kwesi 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 Kwesi'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: Kwesi 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 instalments with the **written** agreement of the employee or the approval of the Director of Employment Standards, Ministry of Labour. An instalment 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 the Special Rule Tool, available at Ontario.ca/ESAtools.

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;
- has his or her employment severed and retires on a full pension recognizing all years of service that would have been worked in the normal course. (Canada Pension Plan benefits do not qualify.);
- has his or her employment severed because of a permanent closure of all or part of the employer's business that the employer can show was caused by the economic effects of a strike;
- 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 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

Rights Greater than ESA Notice of Termination, Termination Pay, Severance Pay

The rules under the ESA about termination and severance of employment are minimum requirements. Some employees may have rights under the common law or other legislation that give them greater rights than notice of termination (or termination pay) and severance pay under the ESA; because such rights generally cannot be enforced under the ESA, some employees may choose to sue an employer in a court for “wrongful dismissal” or pursue other options. Employees should be aware that they 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; an employee must choose one or the other. Employees may wish to obtain legal advice concerning their rights.

21. Continuity of Employment

The purpose of the continuity of employment provisions of the ESA is to ensure that an employee's past employment is recognized 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 Entitlements

Most employees are entitled to vacations, pregnancy leave, parental leave, critically ill child care leave, crime-related child death or disappearance leave, notice of termination or termination pay and severance pay. However, in the case of some of these entitlements an employee would not be eligible for them until he or she has been employed by the employer for a certain minimum time, while in the case of other rights, such as notice of termination or severance pay, the amount of an employee's entitlement varies according to the length of employment with the employer. 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 where there is a sale of a business or a change in building service providers and an employee of the seller or previous provider is hired by the purchaser or new provider, he or she does not start as a “new employee” for purposes of these ESA entitlements but instead gets “credit” for their past employment.

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.

Example: 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. If the son terminates Richard's employment one year after the transfer, Richard will be entitled to eight weeks' notice rather than just one week, because his time with Kim is treated as if it was employment with the son.

Example: 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.

Example: When a building services provider is replaced

Xiu 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.

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

Example: 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](#)").

Example: When a business is sold

Roman 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. Roman 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 Roman 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 Roman 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 Roman accrued in the last four months of employment with the seller.

Example: 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 (and the years that follow, so long as Matti stays with the new employer). 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 building services 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, Parental, Critically Ill Child Care, and Crime-related Child Death or Disappearance 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.

Example: 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 so she qualifies for pregnancy leave.

Example: 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 therefore 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.

Example: 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 so she is qualified for the parental leave.

Example: 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 at the credit union premises, which is more than the 13 weeks he needs to qualify under the ESA.

To qualify for a [critically ill child care leave](#), the parent of a critically ill child must have been employed by his or her employer for at least six consecutive months.

Example: When a business is sold

Caitlin has worked as a paleontologist with a research company for one year. The company's owner retired and the company is purchased by another company. Caitlin starts working for the new company. Two months after starting with the new company, her child becomes critically ill.

Caitlin's employment with the old company is deemed to have been employment with the new company. She is considered to have one year and two months of employment with the new company and so she qualifies for critically ill child care leave.

Example: When a building services provider is replaced

Wayne has worked as a cleaner for a building cleaning company, ABC Cleaning for one year; he worked at the same building throughout this time. ABC Cleaning's contract expires and it is taken over by a new provider, DEF Cleaning. Wayne is hired by DEF Cleaning. One month after starting with the new provider, Wayne's child becomes critically ill.

Wayne's employment with the former provider ABC Cleaning is deemed to have been employment with the new provider. He is considered to have been employed by DEF Cleaning for one year and one month and so he qualifies for critically ill child care leave.

To qualify for a crime-related child death or disappearance leave, the parent of the child must have been employed by his or her employer for at least six consecutive months.

Example: When a business is sold

Anna has worked at a retail store for one year. The store was sold to another company, which Anna started to work for. Three months after starting with the new company, her child disappeared and it was probable that it was the result of a crime.

Anna's employment with the old company is deemed to have been employment with the new company. She is considered to have been employed by the new company for one year and three months and so she qualifies for crime-related child death or disappearance leave.

Example: When a building services provider is replaced

Bob has worked as a security guard for a security services company for three years. The company's contract to provide security services at the premises where Bob worked expires and it is taken over by a new provider. Bob is hired by the new provider. One month after starting with the new provider, Bob's child dies, and it was probable that it was the result of a crime.

Bob's employment with the former provider is deemed to have been employment with the new provider. He is considered to have one year and one month of employment with the new provider and so he qualifies for crime-related child death or disappearance leave.

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.

Example: 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 is considered to have been 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 is considered to have been employed with the business for more than five years and her new employer's payroll is greater than \$2.5 million annually, she is also entitled to 10½ weeks of severance pay.

Example: When a building services provider is replaced

Arnold has worked as a site supervisor at a premises 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 to continue as site supervisor at the premises and works for them for another four years before 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 as if it had been employment with DEF.

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 the employee's last day of employment with the seller or the day of the sale, whichever is earlier.

Example: 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.

Example: 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 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 the employee's last day of employment with the previous provider or the day the new provider began to provide the services, whichever is earlier.

Example: 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.

Example: 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.

22. Building Services Providers

As well as the continuity of employment provisions already discussed, additional provisions of the [Employment Standards Act, 2000](#) (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 premise. 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.

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 be employed by 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, personal emergency, family caregiver, family medical, critically ill child care, organ donor, reservist, or crime-related child death or disappearance leave, or time the building services were temporarily 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 seeking a contract to become the 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 at the building 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. (The 26 weeks would not include any period during which the provision of services was temporarily discontinued or during which the employee was on a pregnancy, parental, family medical, family caregiver, critically ill child care, crime-related child death or disappearance, personal emergency, or reservist leave);
- a statement indicating whether either of the following paragraphs applies to each employee:
 - the employee's work, before the date of 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.

If a company 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 of complying with the building services providers provisions of the ESA and determining their obligations or potential obligations under those provisions and shall not disclose the information except as required by those provisions.

23. 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 [Employment Standards Act, 2000](#), 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 employee performing the job.

Effort is the physical or mental exertion needed to perform a job.

Responsibility is measured by the number and nature of an employee’s job obligations, the degree of accountability, and the degree of authority exercised by an employee 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, etc.

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.

Example: 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).

Example: 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 must receive the same rate of 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

Even 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.** An employee with greater seniority than another employee of the opposite sex may be paid more than the other employee even though both are doing substantially the same work if the difference in pay rates is based on a seniority system.
- **A merit system.** An employee may be paid more than another employee of the opposite sex even though both are doing substantially the same work if the difference in pay rates is based on a system that objectively measures merit.
- **A system that measures earnings by quantity or quality of production.** An employee may be paid more than another employee of the opposite sex even though both are doing substantially the same work if the difference in pay rates is based on a system that measures how much employees produce or the quality of what they produce.
- **Any difference that is not based on the sex of the employee.** For example, an employee may be paid more than an employee of the opposite sex even though both are doing substantially the same work if the difference in pay rates is based on a factor other than sex. (For example, employee A may at one time have been in a position that required greater skill than the position that employee B has and so was paid more. However, when A's original position was abolished, he was demoted to the same position that B had but was "red-circled", i.e., he kept the same rate of pay that he had when he was in his original position. The ESA allows this because the reason for A being paid more than B has nothing to do with the sex of either employee.

24. 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

It is against the law for an employer or anyone on behalf of an employer to 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 may 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.

25. Reprisals

Employers are prohibited from penalizing or threatening to penalize 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 pregnancy, parental, personal emergency, family caregiver, family medical, critically ill child care, organ donor, reservist or crime-related child death or disappearance leave;
- being subject to a garnishment order (i.e., a court order to have a certain amount deducted 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).

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.

26. Temporary Help Agencies

Temporary help agencies employ people to assign them to perform work on a temporary basis for clients of the agency. The duration of the assignment does not matter. Such employees are called “assignment employees”.

Under the ESA, temporary help agency assignment employees generally have the same rights as other employees. There are also rules in the ESA that apply specifically to assignment employees, temporary help agency employers and clients of temporary help agencies.

This chapter provides information about the rights and rules that apply only to assignment employees, temporary help agencies, and clients of temporary help agencies. Information about other rights and benefits under the ESA are found in other chapters within the Guide.

The Employment Relationship

Where a temporary help agency and person agree, verbally or in writing, that the agency will assign (or try to assign) the person to perform work on a temporary basis for its clients, the agency is the employer of that person and the person is an assignment employee of the agency.

Once there is an employment relationship between an agency and an assignment employee, the relationship continues whether or not the employee is on an assignment (working) with a client of the agency on a temporary basis. The fact that an assignment ends does not in itself mean that the employment relationship ends.

Example:

Joel and a temporary help agency agree on June 1st that the agency will try to find Joel temporary work with one of its clients. Two months pass before the agency assigns Joel to work for a client on August 1st. The client ends the assignment on September 1st. The agency does not terminate Joel's employment and he does not quit.

One month goes by before Joel is given a second assignment on October 1st. The assignment ends on December 31st. The agency also gives Joel written notice that it is terminating his employment with the agency on that date.

In this scenario, Joel was an assignment employee with the temporary help agency (i.e., had an employment relationship with the agency) from June 1st to December 31st.

A Work Assignment

A work assignment begins on the first day the employee does work (including receiving training) for a client of the agency. It ends when the term of the assignment ends, or when the assignment is ended by the agency, the assignment employee, or the client.

Information Assignment Employees Must Receive When Hired by an Agency

A temporary help agency must provide the following written information to an assignment employee as soon as possible after the person becomes an employee:

- the legal name of the agency, as well as any operating or business name of the agency (if it is different from the legal name);
- contact information for the agency, including its address, telephone number and one or more contact names; and,
- a copy of the information sheet published by the Director of Employment Standards entitled “Your Employment Standards Rights: Temporary Help Agency Assignment Employees”. If the language of the employee is one other than English, the temporary help agency must provide this document to the employee in that language if it is available from the Ministry.

Information Assignment Employees Must Receive When Offered Work Assignments

A temporary help agency is also required to provide the following information to an assignment employee when offering him or her a work assignment with a client:

- the legal name of the client, as well as any operating or business name of the client (if it is different from the legal name);
- contact information for the client, including its address, telephone number and one or more contact names;
- the hourly or other wage rate or commission and benefits associated with the assignment;
- the hours of work;
- a general description of the work;
- the estimated term of the assignment (if known when the offer is made); and,
- the pay period and pay day.

This information can be provided verbally when the work assignment is offered, but must be provided in writing as soon as possible.

Prohibitions on Charging Fees to Assignment Employees and Restricting Assignment Employees from Accepting Employment with Clients

1. A temporary help agency is not allowed to charge a fee to an assignment employee, or prospective assignment employee, for:
 - becoming an employee of the agency;
 - the agency assigning or trying to assign the employee to perform temporary work for a client; or,

- the agency providing the employee with help in preparing resumés or in preparing for job interviews, even if the employee is told he or she can choose whether to take that assistance or not.
2. An agency is prohibited from attempting to restrict an assignment employee from accepting direct employment with an agency client. It also cannot charge the employee a fee for accepting direct employment with a client of the agency.

Prohibitions on Charging Fees to Clients and Restricting Clients from Hiring Assignment Employees

1. A temporary help agency is not allowed to charge a fee to a client of the agency for entering into a direct employment relationship with an agency's assignment employee **unless** the agency charges the fee during the six months beginning on the first day the assignment employee first begins working for that client through the agency;
2. An agency is not allowed to restrict a client from entering into a direct employment relationship with an assignment employee.

Job References

A temporary help agency is not allowed to stop its client(s) from providing a job reference for an assignment employee.

Any written or oral agency contract that includes such prohibited fees or restrictions is not valid.

Public Holidays

Temporary help agency assignment employees generally have the same public holiday rights as other employees. Please see [Public Holidays](#) for more information. You may also wish to refer to the Public Holiday Pay Calculator, available at Ontario.ca/ESAtools.

When Employee is on Assignment and a Public Holiday Falls on a Day that Would Ordinarily be a Working Day

Generally, if a public holiday falls on a day when the employee is on an assignment and that day would ordinarily be a working day under the terms of the assignment, the employee is entitled to the day off with public holiday pay. Public holiday pay is all the **regular wages** earned **plus vacation pay payable** in the four weeks before the week in which the holiday falls, **divided by 20**.

The employee may also agree, in writing, to work on the holiday and in that case will:

1. have a right to their regular pay for that day and a substitute day off with public holiday pay;
- or**
2. get premium pay for every hour worked on the holiday plus public holiday pay.

Example:

Two months after her last assignment, Munira is placed on a two-week assignment working Monday through Thursday each week. She is paid \$1000 per week. The current assignment begins one week prior to the week Family Day occurs and ends the Thursday following the holiday. She would ordinarily have worked on the day the holiday fell (pursuant to her assignment) so is entitled to Family Day as a day off with public holiday pay for the day.

Her public holiday pay in this case is calculated as the regular wages she earned.

(\$1000) plus any vacation pay payable (\$0) within the period of four work weeks prior to the work week in which the holiday fell, divided by 20. Her public holiday pay for Family Day is \$50.

When Employee is on Assignment and a Public Holiday Falls on a day that Would Not Ordinarily be a Working Day

If the employee is on assignment but the holiday falls on a day that is not ordinarily a working day for the employee, the employee will generally get a substitute day off with public holiday pay. The employee may also agree (in writing) to public holiday pay only.

Example:

Shana is on an assignment from March 1 to April 30, 2010 and is scheduled to work only Tuesdays and Thursdays of each week. She earns \$1,000 per week on this assignment. There is one public holiday during this assignment - Good Friday – which falls on the first Friday in April. Since Fridays are not days that she is ordinarily scheduled to work pursuant to her assignment, Shana is entitled to a substitute day off for Good Friday with public holiday pay calculated as if the substitute day was a public holiday.

The substitute day off must be scheduled within three months following the public holiday or within 12 months if Shana and her employer agree in writing. The public holiday pay is based on all the regular wages earned and vacation pay payable in the four work weeks prior to the week in which the substitute day is scheduled, divided by 20.

The substitute day off is scheduled for Thursday April 29. She earned \$4,000 in regular wages (no vacation pay was payable) in the four work weeks prior to the week she is scheduled to take the substitute day off, and is therefore entitled to \$200 in public holiday pay. Alternatively, Shana may agree (in writing) to public holiday pay only for Good Friday (with no substitute day off).

When a Public Holiday Falls on a Day when the Employee is not on an Assignment

If the holiday falls on a day that the employee is not on assignment, the employee will generally be entitled only to public holiday pay for the holiday.

Example:

Willie ends a six-month assignment on Friday, February 12, 2010. He had been earning \$800 a week while on that assignment. He is offered another assignment that begins on April 15, 2010, which he accepts. Family Day falls on February 15, 2010 but because he is on a lay-off when the holiday occurs, he is entitled only to public holiday pay for Family Day (no substitute day off).

The public holiday pay is calculated as the regular wages earned (\$3,200) and vacation pay (\$0) payable in the four work weeks prior to the week in which the holiday falls, divided by 20. In this case, Willie is entitled to \$160 in public holiday pay.

Example:

Deepak ends a six-month assignment on May 30, 2010. Canada Day falls on July 1, 2010. He was available and able to work but was not offered another assignment between May 30 and July 1. Because he is on a lay-off when the holiday falls, he is entitled only to public holiday pay for the day. His public holiday pay is calculated as the regular wages earned and vacation pay payable in the four work weeks prior to the week in which the holiday falls, divided by 20. Because he has no earnings for that period, his public holiday pay for Canada Day is \$0.

Termination of Employment

Temporary help agency assignment employees generally have the same rights as other employees to notice of termination. Please refer to "[Termination of Employment](#)" for more information. However, some termination rules apply only to assignment employees; they are described below.

Requirements During Notice Period

During each week of notice, an assignment employee is entitled to be paid of the wages he or she is entitled to receive, which cannot be less than,

1. In the case of a termination other than a termination that results from a lay-off going on longer than a "temporary lay-off", the total amount of wages earned by the assignment employee in the 12 weeks ending on the employee's last day of work for a client of the agency, divided by 12;

or

2. In the case of a termination that results from a lay-off going on longer than a "temporary lay-off", the total amount of wages earned by the assignment employee in the 12 weeks before the deemed termination date, divided by 12. The deemed termination date is the first day of the lay-off.

Pay in Lieu of Notice

If the employee is being terminated without working notice, pay in lieu of notice is calculated as the amount of wages earned in the 12 weeks ending on the employee's last day of work for a client of the agency or, in the 12 weeks before the deemed termination date, if the termination is triggered by a lay-off going on longer than a "temporary lay-off", divided by 12, and multiplied by the number of weeks of notice to which the employee is entitled.

Termination Resulting from a Lay-Off

Termination of employment may be triggered by a lay-off that lasts longer than a "temporary lay-off". An assignment employee is considered to be on a week of layoff if he or she is not assigned by the agency to perform work for a client of the agency during that week. A week is not counted as a week of layoff (i.e., is an "excluded" week) if, for one or more days, an assignment employee:

- is not able to work;
- is not available for work;
- refuses an offer by the agency that would not constitute [constructive dismissal](#);
- is subject to a disciplinary suspension; or
- is not assigned to perform work for a client of an agency because of a strike or lock-out at the agency.

For information on how a lay-off results in termination of employment, please refer to "[temporary lay-off](#)" in the Termination of Employment Chapter.

Mass Termination

A temporary help agency assignment employee may also have a right to mass notice of termination of eight, 12 or 16 weeks. Assignment employees may have a right to mass notice of termination if 50 or more have their employment terminated by their agency in a single four-week period because their assignments at a single client's establishment ended.

Example:

Christine is one of 100 assignment employees who are assigned by ABC Staffing Services, a temporary help agency, for an anticipated ten-month period of work at one of its clients, DEF Manufacturing.

After six months, DEF Manufacturing changes its production plans and ends the assignments of the 100 ABC Staffing Services employees immediately. Because the assignments with DEF end, and ABC does not anticipate being able to find other assignments for 70 of its affected assignment employees, ABC terminates the employment of these 70 employees, including that of Christine, without notice.

The agency tells the remaining 30 employees that it will try to place them in other assignments, i.e., that it is maintaining its employment relationship with them.

The 70 employees that are being terminated are entitled to mass notice of termination. Because the number of employees who have been terminated is between 50 and 199, Christine and each of the other affected employees are entitled to eight weeks' [pay in lieu of notice](#).

Severance of Employment

Temporary help agency assignment employees generally have the same rights as other employees to severance pay. An employee is entitled to severance pay if his or her employment is severed, he or she has been employed for at least five years and certain other conditions are met. (The five-year threshold is based on the total time the employee is employed by the agency, not the duration of any particular assignment.) Please refer to "[Severance Pay](#)" for more information. However, some severance pay rules apply only to assignment employees; they are described below.

Calculating Severance Pay

To calculate the amount of severance pay an assignment employee is entitled to receive:

1. Either
 - a. in the case of a severance other than a severance that results from a lay-off going on for 35 weeks or more in a 52-week period, take the total amount of wages earned by the assignment employee for work done for clients of the agency during the 12-week period ending on the last day the employee did work for a client of the agency;
 - or**
 - b. in the case of a severance that results from a lay-off going on for 35 weeks or more in a 52-week period, take the total amount of wages earned by the assignment employee for work done for clients of the agency in the 12 weeks before the first day of the lay-off;
2. divide the amount in 1(a) or 1(b) by 12;
3. multiply the result in 2 above by the lesser of 26 and the sum of:
 - the number of years of employment the employee has completed;
 - and**
 - the number of completed months of employment in the incomplete year, divided by 12.

Severance Resulting from a Lay-Off

One of the ways in which a severance of employment may be triggered is by a lay-off that lasts for 35 weeks or more in a 52-week period.¹ An assignment employee is considered to be on a week of layoff if he or she is not assigned by the agency to perform work for a client of the agency during that week. A week is not counted as a week of layoff (i.e., is an “excluded” week) if, for one or more days, an employee:

- is not able to work;
- is not available for work;
- refuses an offer by the agency that would not constitute [constructive dismissal](#);
- is subject to a disciplinary suspension; or,
- is not assigned to perform work for a client of an agency because of a strike or lock-out at the agency.

For information on how a lay-off results in the severance of employment, please refer to “[When Severance Occurs](#)” in the Severance Pay Chapter.

A severance can also be triggered by just one week of lay-off if the reason for the lay-off is because the employer is permanently discontinuing all of its business at an establishment. For more information, see “When Severance Occurs” in the Severance Pay chapter of this Guide.

Reprisal by a Client of an Agency

As the employer of an assignment employee, a temporary help agency is not allowed to penalize an assignment employee for doing things such as asking questions about his or her ESA rights, filing a claim under the ESA or otherwise asserting his or her rights. Please refer to "[Reprisals](#)" for more information.

In addition, a client of a temporary help agency is not allowed to penalize a temporary help agency assignment employee because, for example, he or she has asked about his or her ESA rights, asserted those rights, or asked the client or the agency to comply with the ESA. That means a client is not allowed to:

- intimidate the employee;
- refuse to have the employee perform work;
- refuse to allow the employee to start an assignment;
- terminate the assignment of the employee; or,
- otherwise penalize or threaten to penalize the employee

for any of the above stated reasons.

Enforcement of Temporary Help Agency Employment Rules

Assignment or prospective assignment employees who believe their agency is not complying with the ESA, and assignment employees who believe the agency or a client of the agency has penalized them for, among other things, asking about or for their ESA rights, may file a claim with the Ministry of Labour. Please see the chapter "[Filing an Employment Standards Claim](#)" for more information.

For information on how rights under the ESA are enforced, please refer to the chapter "[Role of the Ministry of Labour](#)".

There are additional ways the Ministry of Labour can enforce the ESA when there are violations of some of the rights specific to assignment employees:

- If an agency has charged an assignment employee or a prospective assignment employee a prohibited fee, an employment standards officer may issue an order to recover the fees for the employee;
- If an agency has interfered with the assignment employee getting direct employment with a client of the agency **or** prevented a client from providing a job reference for an assignment employee, and the assignment employee has suffered damages as a result, an officer may order compensation for any loss incurred; **and/or**,
- If a client of the agency has penalized an assignment employee, an officer may issue an order for compensation for any loss incurred and/or reinstatement in the assignment.

27. Industries and Jobs with ESA Exemptions and/or Special Rules

While most employees and employers in Ontario are covered by the ESA, there are some types of occupations:

- to which the ESA does not apply,
- that are covered by the ESA *generally* but exempt from (not covered by) certain parts of it,
- that are covered by special rules that change how certain parts of the ESA apply.

The Ministry of Labour's Special Rule Tool (available at Ontario.ca/ESAtools) can help you understand how the ESA applies to these types of occupations.

The chart below provides:

1. a list of occupations that are not covered by certain parts of the ESA or are covered by special rules, and
2. the Special Rule Tool categories where you can find more information about each of these occupations.

NOTE: This tool does not deal with the special rules applicable to the Women's Coat and Suit and Women's Dress and Sportswear industries. For information about those special rules, see [O. Reg. 291/01](#).

For more information about your specific situation, please contact the Employment Standards Information Centre at 416-326-7160, **Toll-free** 1-800-531-5551 or **TTY 1-866-567-8893**.

Occupation	Special Rule Tool Category
Ambulance Drivers, Ambulance Driver's Helper or First-aid Attendant on an Ambulance	EMS, Healthcare, Health Professionals
Architects	Government, White Collar, Professionals
Audiologists	EMS, Healthcare, Health Professionals
Automobile Manufacturing	Manufacturing, Construction, Mining
Canning, Processing, Packing or Distribution of Fresh Fruit or Vegetables (seasonal)	Agriculture, Growing, Breeding, Keeping, and Fishing
Chiropodists	EMS, Healthcare, Health Professionals
Chiropractors	EMS, Healthcare, Health Professionals
Commissioned Automobile Salesperson	Hospitality Services, Sales

Occupation	Special Rule Tool Category
Construction Employees (Other than Road Building and Sewer and Watermain Construction)	Manufacturing, Construction, Mining
Continuous Operation Employees (Other than Retail Store Employees)	Manufacturing, Construction, Mining
Continuous Operation Employees (Other than Retail Store Employees)	Others
Dental Hygienists	EMS, Healthcare, Health Professionals
Dental Technologists	EMS, Healthcare, Health Professionals
Dentists	EMS, Healthcare, Health Professionals
Denturists	EMS, Healthcare, Health Professionals
Dieticians	EMS, Healthcare, Health Professionals
Domestic Workers (Employed by the Householder)	Household, Landscaping and Residential Building Services
Embalmers and Funeral Directors	Others
Engineers	Government, White Collar, Professionals
Farm Employees (Other than Harvesting and Horse Breeding and Boarding)	Agriculture, Growing, Breeding, Keeping, and Fishing
Film and Television Industry	Others
Firefighters	EMS, Healthcare, Health Professionals
Fishers	Agriculture, Growing, Breeding, Keeping, and Fishing
Flower Growing	Agriculture, Growing, Breeding, Keeping, and Fishing
Growing Trees and Shrubs	Agriculture, Growing, Breeding, Keeping, and Fishing
Growing, Transporting and Laying Sod	Agriculture, Growing, Breeding, Keeping, and Fishing
Harvesters of Fruit, Vegetables or Tobacco	Agriculture, Growing, Breeding, Keeping, and Fishing
Highway Transport Truck Drivers ("For Hire" Businesses)	Transportation

Occupation	Special Rule Tool Category
Homecare Employees Who Provide Homemaking or Personal Support Services	Household, Landscaping and Residential Building Services
Homeworkers	Others
Horse Boarding and Breeding	Agriculture, Growing, Breeding, Keeping, and Fishing
Hospital Employees	EMS, Healthcare, Health Professionals
Hospitality Industry Employees (Hotels, restaurants, taverns, etc.)	Hospitality Services, Sales
Hunting and Fishing Guides	Agriculture, Growing, Breeding, Keeping, and Fishing
Information Technology Professionals	Government, White Collar, Professionals
Keeping of Furbearing Mammals	Agriculture, Growing, Breeding, Keeping, and Fishing
Landscape Gardeners	Household, Landscaping and Residential Building Services
Lawyers	Government, White Collar, Professionals
Liquor Servers	Hospitality Services, Sales
Live Performances, Trade shows and Conventions	Others
Local Cartage Drivers and Driver's Helpers	Transportation
Maintenance (Other than Maintenance of Roads, Structures Related to Roads, Parking Lots and Sewers and Watermain)	Manufacturing, Construction, Mining
Managerial and Supervisory Employees	Government, White Collar, Professionals
Massage Therapists	EMS, Healthcare, Health Professionals
Medical Laboratory Technologists	EMS, Healthcare, Health Professionals
Medical Radiation Technologists	EMS, Healthcare, Health Professionals
Midwives	EMS, Healthcare, Health Professionals
Mineral Exploration	Manufacturing, Construction, Mining
Mining	Manufacturing, Construction, Mining

Occupation	Special Rule Tool Category
Municipal Employees	Government, White Collar, Professionals
Naturopaths	EMS, Healthcare, Health Professionals
Nurses	EMS, Healthcare, Health Professionals
Occupational Therapists	EMS, Healthcare, Health Professionals
Ontario Government and Ontario Government Agency Employees	Government, White Collar, Professionals
Opticians	EMS, Healthcare, Health Professionals
Optometrists	EMS, Healthcare, Health Professionals
Paramedics and Emergency Medical Attendants	EMS, Healthcare, Health Professionals
Pharmacists	EMS, Healthcare, Health Professionals
Physicians and Surgeons	EMS, Healthcare, Health Professionals
Physiotherapists	EMS, Healthcare, Health Professionals
Psychologists	EMS, Healthcare, Health Professionals
Public Accountants	Government, White Collar, Professionals
Public Transit Employees	Transportation
Real Estate Salespersons and Brokers	Hospitality Services, Sales
Residential Building Superintendents, Janitors and Caretakers	Household, Landscaping and Residential Building Services
Residential Care Workers	EMS, Healthcare, Health Professionals
Respiratory Therapists	EMS, Healthcare, Health Professionals
Retail Business Employees	Hospitality Services, Sales
Retail Business Employees	Others
Road Construction	Manufacturing, Construction, Mining
Road Construction Sites - Work that is not Construction Work	Manufacturing, Construction, Mining
Road Maintenance	Manufacturing, Construction, Mining
Road Maintenance Sites - Work that is not Maintenance Work	Manufacturing, Construction, Mining

Occupation	Special Rule Tool Category
Sewer and Watermain Construction	Manufacturing, Construction, Mining
Sewer and Watermain Construction Site Guarding	Manufacturing, Construction, Mining
Sewer and Watermain Maintenance	Manufacturing, Construction, Mining
Ship Building and Repair	Manufacturing, Construction, Mining
Speech-Language Pathologists	EMS, Healthcare, Health Professionals
Student Employee at Children's Camp	Others
Student Employee in Recreational Program Operated by a Charity	Others
Student Employee Providing Instruction or Supervision of Children	Others
Student Employees (Generally)	Others
Surveyors	Government, White Collar, Professionals
Swimming Pool Installation and Maintenance	Manufacturing, Construction, Mining
Taxi Cab Drivers	Transportation
Teachers	Government, White Collar, Professionals
Temporary Help Agency Assignment Employees	Others
Travelling Salespersons (Commissioned)	Hospitality Services, Sales
Veterinarians	EMS, Healthcare, Health Professionals

28. Filing an Employment Standards Claim

Most employees covered under the Employment Standards Act, 2000 (ESA) may file a claim with the Ministry of Labour if they believe their employer is not complying with the law.

Employees can phone the Employment Standards Information Centre for assistance in identifying and defining issues under the ESA and the EPFNA, and finding ways to resolve them at:

- (416) 326-7160;
- toll free in Ontario at 1-800-531-5551; or
- TTY (for hearing impaired) 1-866-567-8893.

Please note, the Employment Protection for Foreign Nationals Act (Live-in Caregivers and Others), 2009 (“EPFNA”) is a different law from the Employment Standards Act, 2000.

If you are concerned about an Employment Protection for Foreign Nationals Act (Live-in Caregivers and Others), 2009 violation, you must file an EPFNA claim using the correct claim form. You can access an EPFNA claim form at [Ontario.ca/ESAforms](https://www.ontario.ca/ESAforms).

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.

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).

Filing a Claim

Employees can get a copy of the Employment Standards Claim Form:

- on the Ministry of Labour’s website at [Ontario.ca/ESAforms](https://www.ontario.ca/ESAforms)
- by mail through ServiceOntario Publications: www.serviceontario.ca/publications; or
- in person at select ServiceOntario Centres (1-800-267-8097).

Step 1

In general, employees must try to contact their employer or former employer (or the client of a temporary help agency, if applicable) about the employment standards right(s) they believe have been violated and the amount of money they are owed.

This step may not apply to everyone. For more information on reasons why employees may not need to contact their employers please see “Reasons Employees May Not Have to Contact Their Employer” later in this chapter.

Step 2

Employees are encouraged to collect important documents about their work histories before completing the claim form. Having these documents close at hand helps claimants fill out the Claim Form.

Step 3

Employees must fill out the required information on the Claim Form. In completing the Claim Form, the employee must give details about:

- contact information for the claimant;
- contact information for the employer;
- 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); and
- what is being claimed (including dollar amounts, if applicable).

In addition, the employee will be asked to give information about the employer, such as:

- whether the employer is still operating; and
- whether the employer conducts business at other establishments or operates using any other name(s).

Step 4

It is **recommended** that an employee file his or her claim submission online. He or she will receive a **claim submission number** immediately.

Employees may also file a claim:

In person at select ServiceOntario Centres (1-800-267-8097).

By mail to:

Provincial Claims Centre
Ministry of Labour
70 Foster Drive, Suite 410
Roberta Bondar Place
Sault Ste. Marie, ON
P6A 6V4.

By fax: 1-888-252-4684.

Note: If an employee files a claim submission by fax, in person, or by mail, he or she will receive a letter in the mail with the claim number once all of the required information has been provided. If the claim submission is missing required information, the employee will receive a letter in the mail with the claim submission number and a request to provide the information.

A claim submission number is assigned as soon as the ministry receives and registers your Claim Form. You will be provided with a claim number and your claim will be assigned for investigation once the ministry has verified that all required information has been completed.

A claim should only be filed once. For example, if an employee filed his or her claim online, the employee should not send another copy of the Claim Form to the Ministry of Labour.

Reasons Employees May Not Have to Contact Their Employer

In general, employees are required to try to contact their employer about their employment standards issue before their claim will be assigned for investigation. The following are examples of situations where employees may **not** be required to contact their employers:

- The employee already tried to contact his or her employer
- The money owed to the employee became due five months ago or more (there are time limits for recovery).

- The workplace has closed down.
- The employer has gone bankrupt or in receivership.
- The employee is afraid to do so.
- The issue does not involve money.
- The employee is or was working as a live-in caregiver.
- The employee has difficulty communicating in the language spoken by his or her employer.
- The employee is a young worker.
- The employee has a disability that prevents or makes it difficult to contact his or her employer.
- The reason is related to a ground under the Ontario Human Rights Code.

If none of the reasons listed above describe the employee's situation and he or she still feels that there is a good reason not to contact the employer about the issue, the employee will have an opportunity to provide an explanation on the Claim Form.

For more information, please contact the Employment Standards Information Centre at 416-326-7160 or 1-800-531-5551.

Investigation, Enforcement and Appeals

Once a claim submission has been filed, it is reviewed to ensure that all the required information has been provided. If the Claim Form includes all required information, the claim is assigned to an employment standards officer for investigation. If the claim submission is missing required information, the employee will be contacted by the ministry and asked to provide the information within a specified period of time. The claim submission will not be assigned for investigation unless the required information is provided within that time.

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 written notice was given)
- A copy of the employee's Record of Employment, if received
- A copy of the written contract of employment, if there is one
- Copies of any warning letters or notices received

- A record of the hours worked if available (e.g., a calendar record, time sheets, attendance records, diary or notes)

The documents must be provided in the time period set out by the employment standards officer.

Please refer to the chapter entitled "[Role of the Ministry of Labour](#)" for information on topics such as:

- how an investigation is conducted;
- the kinds of actions an employment standards officer or the ministry may take; and
- how an employee may appeal an officer's decision.

Maximum Amount of Wages an Employer Can Be Ordered to Pay

A \$10,000 cap applies when an employment standards officer is issuing an order in respect of a single employee for any unpaid wages that came due prior to February 20, 2015. Because of changes made to the ESA that came into force on February 20, 2015, an order issued by an employment standards officer for unpaid wages that came due on or after that date, is not subject to any cap. There is also no cap on orders for compensation issued when an employment standards officer finds a violation under those parts of the ESA for which compensation and/or reinstatement 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

There are different time limits on the Ministry's ability to enforce the recovery of unpaid wages owed to an employee. Which limits apply will depend on when the unpaid wages came due.

When Wages Are Due

Generally, wages, except vacation pay, become due on the employee's regular pay day. However, if the employment relationship ends, all of the wages owed to the employee (including any unpaid vacation pay as of the date the employment relationship ended) are due either within seven days of that date, or on what would have been the employee's next regular pay day, whichever is later.

Six-month/12 months limitations on recovery: Where the unpaid wages came due prior to February 20, 2015

With two exceptions, an employment standards officer can only issue an order for unpaid wages that came due prior to February 20, 2015 if a claim was filed within six months of the date those wages came due:

- 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 six 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.

Example: 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, 2014. His next regular pay day would have fallen on February 12, 2014. Nhan was given proper notice of his termination but was not paid his last week's wages. On August 30, 2014 he filed a claim for those wages. An employment standards officer will investigate Nhan's claim. However, the officer will not be able to issue an order to the employer to recover Nhan's wages because those wages became due more than six months before the date he filed his claim.

Example: When there are repeated violations

Jenny was employed in a restaurant for just over one year and was never paid for public holidays. She quit her job and filed a claim with the Ministry on January 5, 2014. In the six months before her complaint was filed, Jenny should have been paid public holiday pay for Labour Day, Thanksgiving Day, Christmas Day, December 26 (Boxing Day) and New Year's Day.

The employer repeatedly violated the public holiday sections of the ESA by not paying Jenny public holiday pay. Because at least one violation of the public holiday provisions occurred within six months of the date Jenny filed her claim, the Ministry's ability to enforce the recovery of unpaid wages is not limited to recovering the wages that came due in the six-month period before the date her claim was filed (January 5, 2014). It will be extended to allow the recovery of any unpaid public holiday pay that came due to Jenny in the 12 months before she filed her claim. As a result, an employment standards officer can issue an order to pay against Jenny's employer for public holiday pay not only for Labour Day, Thanksgiving Day, Christmas Day, December 26 (Boxing Day) and New Year's Day, but also for Canada Day, Victoria Day, Good Friday and Family Day.

Two year limit on recovery: Where the unpaid wages came due on or after February 20, 2015

An employment standards officer can issue an order for unpaid wages, including vacation pay that came due on or after February 20, 2015, if the employee has filed a claim within two years of the date such wages came due.

Example: When there are unpaid wages that came due prior to February 20, 2015 AND unpaid wages that came due on or after February 20, 2015

Egan was hired on June 1, 2013 to work at a warehouse. He was never paid overtime even though he regularly worked more than 44 hours a week. He had taken a single two-week vacation with pay just after completing his first year of employment but had neither taken vacation nor been paid vacation pay since that time. Egan resigned on June 1, 2016 and two months later, (August 1, 2016) he filed a claim with the Ministry of Labour.

The officer determined that Egan was owed \$500 in overtime pay that had come due prior to February 20, 2015 as well as \$750 in overtime pay that had come due on or after that date. He was also entitled to vacation pay, \$2,000 earned between June 1, 2014 to May 30, 2015 (due under the ESA on March 15, 2016) and \$2,200 in vacation pay earned between June 1, 2015 and May 30, 2016 which came due two weeks after he resigned his employment (the first regularly scheduled pay day after his employment ended).

Recoverability of wages due prior to February 20, 2015

The officer determined that the \$500 in unpaid overtime pay that came due prior to February 20, 2015 was not recoverable because none of it had come due within the six month period prior to the date the claim was filed.

Recoverability of the wages due on or after February 20, 2015

The \$750 in unpaid overtime pay and the unpaid vacation pay (\$2,000 + \$2,200) that came due on or after February 20, 2015 was all recoverable because Egan filed his claim less than two years after those wages came due. The officer therefore issued an order in the amount of \$4,950.

Two-year Time Limit for Filing a Claim

Under the ESA, generally employees must file a claim within two years of the contravention in order for the claim to be investigated by an employment standards officer.

The above-mentioned six-month/12-month/two year limitations on recovery apply only to an employment standards officer's ability to issue an order for unpaid wages, including vacation pay, termination pay and severance pay. In the case of other violations, (e.g. non-monetary or contraventions related to reprisals or leave entitlements under the Act) an employment standards officer is able to issue certain orders (compliance orders, orders for compensation [*i.e.* not wages] and reinstatement orders for up to two years after a violation has occurred). 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;
- the employee is seeking compensation and/or reinstatement in cases where the ESA leaves of absence, lie detector or retail business employee provisions have been violated or where the employer has penalized or threatened to penalize an employee for exercising rights under the ESA. See "Reprisals" and "Reprisals by a Client of a Temporary Help Agency."

Extending Time Limits

Despite the limitations on recovery of wages and filing a claim, it **may** be possible to make a claim that would otherwise be outside the applicable time limit if:

- an employee has been told by the employer that he or she does not have an entitlement when the employer knew or could have taken steps to find out that the employee in fact does have an entitlement; and
- the employer's untrue statement was the cause of the employee's delay in filing his or her claim.

Example:

An employer tells John-Duncan, who is not at all familiar with the ESA, that no overtime is payable under the ESA to an employee in his circumstances, even though the employer knew or could have taken steps to find out that overtime pay in fact was payable in those circumstances. Because John-Duncan believes the employer, he does not file a claim for overtime pay. Later, after the time for filing a claim has passed, John-Duncan finds out from his friends that overtime pay was payable in his circumstances. In such a case, an employment standards officer might rule that the time limit that would otherwise not allow John-Duncan's claim should be extended because the delay in filing the claim was caused by the untruthful statement of the employer about his ESA entitlements and because that was the cause of his not having filed her claim within the normal time limit.

29. Role of the Ministry of Labour

The Ministry of Labour oversees the ESA and its regulations by:

- providing compliance support
- conducting proactive inspections of payroll records and workplace practices to ensure the ESA is being followed
- investigating and resolving complaints
- enforcing the ESA and its regulations

Compliance Support

The ministry offers a wide range of publications and services to help employees and employers understand their rights and comply with their obligations. These include an employment standards poster, which employers are required to post in their workplaces; a catalogue of fact sheets and information sheets covering a variety of topics; and a suite of interactive online tools and calculators to assist employers and employees to understand provisions of the ESA, such as the Termination Tool, the Public Holiday Pay Calculator and the Severance Tool. These tools are available on the Ministry of Labour website at [Ontario.ca/ESAtools](https://www.ontario.ca/ESAtools).

The ministry is also involved in outreach initiatives such as 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 performing a proactive inspection will usually visit the employer's business location. Officers may notify the employer in writing before the inspection, but are not required to. A notice may set out a list of records and other documents the employer must provide during the inspection. The employer is required to produce the records requested and must answer questions that the officer thinks may be relevant.

An officer is able to take away records or other information for review and copying. The employer is welcome to ask questions, and to request further information.

Investigating Complaints

In general, employees must try to contact their employer or former employer (or the client of a temporary help agency, if applicable) about the employment standards right(s) they believe have been violated and the amount of money they are owed before a claim can be investigated. Issues can often be resolved quickly with this approach.

In some situations, an employee may not be required to contact his or her employer before filing a claim submission (e.g. If the employee is afraid to contact the employer or he or she is a young employee). Employees have an opportunity to tell the ministry on the Claim Form why they did not

contact their employer, or that they have already contacted their employer. If the employer contacted the employer but the issue was not resolved, the employee does not have to contact his or her employer again.

If the parties are unable to resolve the issue on their own, and if the employee has provided all the required information on the Claim Form, the matter is assigned to an employment standards officer for investigation.

When a claim is assigned for investigation, the employment standards officer may conduct his or her investigation by telephone, through written correspondence, by visiting the employer's premises or by requiring the employee and/or the employer to attend a meeting. During an investigation, both parties have the opportunity to present the facts and arguments they believe are important to their case. If a claim has been submitted against the client of a temporary help agency regarding a possible reprisal, employment standards officers have the same powers of investigation with respect to the client as they do for an employer. The officer will make a decision based on the best available evidence which may include employer records, client records, employee records, and interviews.

An employee and employer can enter into a settlement to resolve their dispute. A settlement is an agreement made between an employee and his or her employer that will resolve the claim. The ESA allows this option in certain circumstances after a claim has been filed. If a settlement is made, the employee and his or her employer will have to inform the ministry in writing of the terms of the settlement. If the employee and employer do what they agreed to under the settlement, the claim is considered to be withdrawn and the investigation will come to an end. Claimants and employers are not required to resolve a claim by entering into a settlement.

During an investigation, there are strict timeframes that apply to requests for documents from employees, employers and clients of temporary help agencies. If the information is not provided in a timely manner, a decision may be made without consideration of those materials. Similarly, if both parties were required to attend a meeting but one did not show up, the employment standards officer may make a decision based solely on the evidence provided to the officer before the meeting and the evidence provided by the other party at the meeting.

After investigating a claim, the employment standards officer makes a decision about whether the employer has or has not followed the ESA. If the officer finds that the employer has complied with the ESA:

- 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).
- issue an order against the employer. (For more information, see "Enforcement", below.)

- 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 or part 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, 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.

In the case of a reprisal by a client of a temporary help agency, an officer can issue an order to reinstate in the assignment and/or compensate an employee for any loss incurred as a result of the contravention.

[Employers and clients of temporary help agencies 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 or for whom an order has been issued have the right to appeal](#) an order to pay wages or an order for compensation/reinstatement issued against their employer or against a client of a temporary help agency.

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 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 cost of 10 per cent of the amount of the order, or \$100.00, whichever is greater.

A \$10,000 cap applies when an employment standards officer is issuing an order in respect of a single employee for any wages that came due prior to February 20, 2015. Because of changes made to the ESA that came into force on February 20, 2015, an order issued by an employment standards officer for wages that came due on or after that date is not subject to any cap.

Compliance Order

An officer can issue a compliance order if the officer finds that the employer has contravened a provision of the ESA. The officer can order an employer or other person to stop contravening the provision, and to take certain steps or stop taking certain steps in order to comply with it. The order

must also specify a date by which the employer or other person must comply with the order. These orders cannot require payment of wages or compensation.

Example of a 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: 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

An offence notice (commonly called a "ticket") can be issued under Part I of the *Provincial Offences Act*. Typically, tickets are issued for less serious ESA violations. 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 charge set out in the ticket.

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 either be paid or appealed *within 30 days* of the date the notice was served.

If an employer has contravened the poster 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.

Example of 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 post the ESA poster (\$250.00 penalty) and had failed to give proper meal breaks to five employees (five times the \$250.00 penalty = \$1,250.00), 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. The violations in question relate to the following provisions of the ESA:

- pregnancy, parental, personal emergency, family caregiver, family medical, critically ill child care, organ donor, reservist, and crime-related child death or disappearance leave;
- lie detectors;
- the right to refuse to work on a Sunday for certain retail employees;
- reprisal against an employee for exercising his or her rights under the ESA.

There is no cap on the amount of a compensation order that can be issued by an employment standards officer. The officer can order compensation for any reasonable, foreseeable loss the employee may have incurred.

Review (Appeal) of an officer's decision

Reviews are conducted by the [Ontario Labour Relations Board](#), an independent, quasi-judicial tribunal. If employees, employers or clients of temporary help agencies 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 within 30 days of service of the order or notice.

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 Fees, an Order to Pay Compensation and/or Reinstate 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, Order to Pay Fees, or an officer's Order to Pay Compensation and/or Reinstate.

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 client of a temporary help agency, or letter advising that the officer has refused to issue an order has been *served* on the employee.

Employer Appeals

For employers and clients of temporary help agencies, 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 an Order to Pay Wages (the employer must pay the full amount of the order plus the administrative costs to the Director of Employment Standards in trust); an Order to Pay Fees (the employer must pay the full amount of the order plus the administrative costs to the Director of Employment Standards in trust); 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).

In addition, employers and clients of temporary help agencies can apply for a review of an Order to Pay Compensation and/or Reinstate an employee. The employer or the client of a temporary help agency must pay the lesser of the amount owing under the order or \$10,000, whichever is lesser, to the Director of Employment Standards in trust.

Offence Notice (“Ticket”)

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 his or her 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.

Delivering Materials to The Director of Employment Standards

The copy of the Application for Review Form and other documents:

In order of preference:

1. email to appforreview.directorofES@ontario.ca or fax to 1-855-251-5025
2. regular mail*
3. courier or hand delivery*

Payments

Payments must be made to the "Director of Employment Standards in trust" within 30 days of service of the order. It is to 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. While the Director of Employment Standards may establish other criteria, generally speaking the Director will find a letter of credit to be acceptable if:

- it is irrevocable;
- it contains a condition providing for its automatic renewal following the expiry date of the letter of credit;
- it contains no other conditions, i.e., conditions other than the automatic renewal condition;

- it permits “partial drawings”, i.e., the Director can demand and receive payment of less than the entire amount specified in the letter of credit. (This is in case the application for review of the order is partially successful and the Ontario Labour Relations Board reduces the amount of the order.);
- it is issued by a bank or similar financial institution having an office in Ontario.

The payment is to be forwarded to:

***Address for mail, courier or hand delivery:**

Director of Employment Standards
Employment Practices Branch
Ministry of Labour
400 University Avenue, 9th Floor
Toronto, ON M7A 1T7

The ministry will issue a proof of payment to the employer or client of a temporary help agency, and will hold the payment in trust.

For more information on letters of credit, please refer to the Ministry of Labour website. There is a link to “Letter of Credit” information under the “Topics” menu.

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 employee, employer, or client of a temporary help agency may apply to Divisional Court for Judicial Review.

Collections

If an employer or client of a temporary help agency does not apply for a review within 30 days of the date the order or Notice of Contravention was served, the order or notice is final and binding. If

the employer or client of a temporary help agency has not paid the required amount, the Director of Employment Standards forwards the order or notice to a collector.

The Director may authorize the collector to collect a reasonable fee and/or costs from the employer or client of a temporary help agency. The fees and costs are added to the amount of the order.

Prosecution (Other than by way of a Ticket)

An employer or other person who is believed to have committed an offence under the ESA can be prosecuted under Part III of the *Provincial Offences Act*. 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.

If convicted, the employer or other person could be subject to a fine or a term of imprisonment or both. 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.

In addition to the imposing a fine or term of imprisonment, a court could also order the convicted person (including a corporation) to take whatever action is necessary to remedy the violation, including paying wages and compensating and/or reinstating an employee.

30. Additional Information

Employee 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. However, if there is a discount, the employer is the one who determines how much the discount will be.

Dress Codes

Generally, 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 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, bereavement and other leaves of absence. Payment for such leaves is not required by the ESA. Whether a leave is paid is a decision for the employer or a matter for negotiation between the employer and the employee or, if the employee is represented by a union, between the employer and the union. However, the rules about discrimination in benefit plans will apply to paid leave plans. (See "[Benefit Plans](#)," for details.)

31. 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)

Information is available in multiple languages.

Online Resources

Visit Ontario.ca/employmentstandards for more information, to get our publications, and to contact the Ministry by e-mail.

For resources in languages other than English and French, visit Ontario.ca/employmentrights.

Occupational Health and Safety Inquiries

Telephone toll free in Ontario at 1-800-268-8013 (province-wide).



© Queen's Printer for Ontario, 2015

ISBN 978-1-4606-4791-2 (PDF)

ISBN 978-1-4606-4790-5 (HTML)