

# Complying with the Employment Standards Act (ESA)

*A Workbook for Employers*



**Ministry of Labour**

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This workbook has been prepared to assist employers and employees in understanding some of their obligations and rights under the Employment Standards Act (ESA) and its regulations. It does not take the place of the ESA and its regulations and it should not be considered to offer any legal advice on your particular situation.

# INTRODUCTION

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## Who is the Workbook for?

This workbook is a tool designed to help Ontario business owners and managers understand and comply with the Employment Standards Act, 2000 (ESA). Following the ESA is your responsibility – and this workbook is designed to help you do that.

Good working conditions benefit both employees and business owners. Studies show that when employees are satisfied at work, they perform better and stay longer. Knowing how to comply with the ESA – the goal of this workbook – simply makes good business sense!

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## How is it useful?

More than 20,000 employment standards claims are filed each year. These complaints result in hundreds of businesses being prosecuted each year in Ontario. Having a claim filed against your business can be expensive and time consuming.

This workbook is designed to help you avoid these claims. Some of the ways the workbook can be used are:

### In an Inspection

If you receive a notice of an inspection, the workbook can guide you through some of the standards that the inspector will likely cover. Using what you learn by doing the exercises in this book before an inspection occurs will save you time and money, because you'll be ready.

The ES Program also conducts **proactive inspections** and there are plans to do more in the future. Businesses are selected using various methods, such as: random, sector based, as a result of past claims, etc. If a violation is found there are a variety of enforcement tools that may be issued such as: a Compliance Order, a notice of contravention, an order to pay or a Certificate of Offence under the Provincial Offences Act. The inspection will generally include a review of your payroll records.

The best kind of inspection is one that shows a business is interested in, understands and complies with its obligations. This workbook will help you do this.

### In a Claim

If an employment standards claim has been made against you, you will receive a notice from the Ministry of Labour. Sometimes a claim can be settled without an investigation or a hearing. This workbook will help you both understand the claim and determine the best way to resolve it.

### In Preventative Maintenance

You want your facility to be in good working order. You want your heating and cooling to work. You want to ensure all the equipment you need to do business and serve customers is in working order. This business tool can help you ensure that your employee relations are also in good working order. It may even improve your business' performance.

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## How do I use the Workbook?

The workbook has been designed with a busy person in mind – you! It addresses 10 of the standards that make up the Employment Standards Act (ESA), as well as record keeping. The workbook presents the information in a clear and understandable way for easy readability.

However, the workbook does not cover every ESA right and obligation found therein. Consulting “Your Guide to the ESA” will provide you with more complete information on these topics. The guide is available at: [www.labour.gov.on.ca/english/es/pubs/guide](http://www.labour.gov.on.ca/english/es/pubs/guide)

### The 10 standards covered in this workbook:

- |   |                               |
|---|-------------------------------|
| 1. The ESA Poster                       | 6. Overtime Pay               |
| 2. Payment of Wages and Wage Statements | 7. Minimum Wage               |
| 3. Deductions from Wages                | 8. Public Holidays            |
| 4. Hours of Work                        | 9. Vacation with Pay          |
| 5. Eating Periods                       | 10. Termination and Severance |

### Additional resources found in each chapter:

- Important links
- Examples and exercises to assist you
- Checklists
- Interactive tools

### Before getting started, here are some Helpful Hints:

- Clicking on “links” in each chapter of this workbook will help you better understand the rule or obligation.
- We strongly suggest that you print the chart found on <http://www.labour.gov.on.ca/english/es/pubs/guide/special.php>. Referring to the chart throughout the workbook will save you a lot of time.
- A more detailed “Your Guide to the ESA,” should you need it, can be found at: <http://www.labour.gov.on.ca/english/es/pubs/guide/index.php>.
- If you wish speak to someone about your specific type of business, please contact our Employment Standards Information Centre (**contact information below**).
- Certain industries are not covered by the ESA, but by federal (Canadian) law. To determine if your business is federally regulated, refer to the list of Federally Regulated Businesses and Industries at [www.hrsdc.gc.ca/eng/labour/employment\\_standards/regulated.shtml](http://www.hrsdc.gc.ca/eng/labour/employment_standards/regulated.shtml).

*We are interested in your feedback, ideas and insights into employment standards and your workplace. You can send your comments and take our survey, and sign up for further notices about new resources and tools at [EOP@ontario.ca](mailto:EOP@ontario.ca).*

# 1. THE ESA POSTER

***Posting the poster shows your employees that you are aware of your obligations. It also lets them know what their rights are. By posting the poster you are saying to your employees that you are aware of the law.***

Virtually every business in Ontario that employs people is required to post the poster titled “**What You Should Know About the Ontario Employment Standards Act**”. Employers that are not covered by the Employment Standards Act (ESA) are not required to display the poster.

The poster is free. The most recent version (4.0) can be printed or downloaded from a section of the MOL website at: [www.labour.gov.on.ca/english/es/pdf/poster.pdf](http://www.labour.gov.on.ca/english/es/pdf/poster.pdf)

It can also be picked up, free of charge from any Service Ontario office. Visit this link to find the closest office to you: [http://www.ontario.ca/en/services\\_for\\_residents/ONT04\\_020859](http://www.ontario.ca/en/services_for_residents/ONT04_020859)

The poster sets out, in very brief terms, many of the rights that employees have under the ESA. It is a simple way for the Ministry to make sure employees who are covered by the ESA know their rights.

It is important to note that if the majority language of a workplace is a language other than English, the employer must contact the Ministry of Labour to see whether the ministry has prepared a translation of the poster into that language. If so, the employer is required to post a copy of the translation next to the English version of the poster. All multilingual material is available on the Ministry of Labour’s website: <http://www.labour.gov.on.ca/english/multi/index.php>

It is a good idea to be familiar with the contents of the poster. Much of the information on it will be covered later on in the workbook.

***Hanging the poster and ensuring the standards described in it are being followed is an excellent employee relations practice.***

## ESA Poster Checklist

Do you have a copy of the ESA Poster posted in your workplace?  If you answered 'No', you can find it at: <a href="http://www.labour.gov.on.ca/english/es/pdf/poster.pdf">www.labour.gov.on.ca/english/es/pdf/poster.pdf</a>  If you answered 'Yes', please continue with this checklist:	Y <input type="checkbox"/>	N <input type="checkbox"/>
It is the current version (4.0).	Y <input type="checkbox"/>	N <input type="checkbox"/>
It is posted where it will come to the attention of your employees.	Y <input type="checkbox"/>	N <input type="checkbox"/>
If required, have you posted the poster in a second language?	Y <input type="checkbox"/>	N <input type="checkbox"/>
If you have multiple locations, there is a copy posted in each one.	Y <input type="checkbox"/>	N <input type="checkbox"/>

## 2. PAYMENT OF WAGES AND WAGE STATEMENTS

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Proper wage statements and payroll records are important elements of good business. They are **required under the Employment Standards Act (ESA)**. Creating and providing wage statements achieves *three important functions*:

1. It shows that you are being open about what and how you pay your employees.
2. It shows that you are complying with the ESA by creating accurate records.
3. Documenting this information will help to prevent future disputes over pay.

An employer must:

1. establish a recurring pay period and a recurring pay day; and
2. pay all wages earned in a pay period other than accrued vacation pay, on or before the pay day for that period.

Wage statements create common understanding between employer and employee, showing that the employee has been paid for the time worked in the manner they both agreed to.

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### Wage Statement Requirements

The wage statement you give your employee **must** include:

- The pay period for which the wages are being paid;
- The employee's wage rate (if one exists);
- The gross amount of wages (before taxes and other deductions) and how it was calculated (unless the employee is given the information in some other way, as in an employment contract);
- The amount and purpose of each wage deduction;
- Amounts deemed to have been paid to the employee because of the provision of room or board; and
- The net amount of wages.

The wage statement must be in writing **or** provided by email if the employee is able to make a paper copy.

You must keep a copy of each employee's wage statement for three years from the time it was given.

## Example of Pay Period

In this example, the pay period runs from Friday to Thursday, and the payday for this period is the following Wednesday.

Calendar Illustrating a Regular Pay Period & Regular Pay Day						
Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
		1	2	3	4	5
6	7	8	9	10	11	12
13	14	15	16	17	18	19
20	21	22	23*	24	25	26
27	28	29	30			

\* In this example, all the employee's earnings during the pay period from the 11<sup>th</sup> to the 17<sup>th</sup> of the month must be paid on the 23<sup>rd</sup>. (Earnings from the 18<sup>th</sup> to the 24<sup>th</sup> will be paid on the 30<sup>th</sup>)

***IMPORTANT NOTE: Some employees earn commissions based on sales they make. In these situations, it is common for the commission not to be considered fully "earned" (and therefore not to become payable) until the goods or services have been delivered to the customer and the employer has received payment. This is permissible, provided that the employee expressly or implicitly agrees to the arrangement.***

## Wage Statement Checklist

<b>Please verify that:</b>		
You have established a recurring pay period and a recurring pay day.	Y <input type="checkbox"/>	N <input type="checkbox"/>
Each employee receives a written wage statement on his or her regular pay day.	Y <input type="checkbox"/>	N <input type="checkbox"/>
You keep a copy of each employee's wage statement for three years after given	Y <input type="checkbox"/>	N <input type="checkbox"/>
<b>Are the following included in your wage statement?:</b>		
Start and end dates of the work period for which pay is being given.	Y <input type="checkbox"/>	N <input type="checkbox"/>
Wage rate of the employee, if applicable (e.g. \$15 per hour).	Y <input type="checkbox"/>	N <input type="checkbox"/>
Gross amount (before deductions) being paid.	Y <input type="checkbox"/>	N <input type="checkbox"/>
Method used to calculate gross wages (unless information is given another way).	Y <input type="checkbox"/>	N <input type="checkbox"/>
Each deduction you've made from the gross amount with explanation.	Y <input type="checkbox"/>	N <input type="checkbox"/>
Net amount being paid.	Y <input type="checkbox"/>	N <input type="checkbox"/>

## 3. DEDUCTIONS FROM WAGES

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***You should be aware that under the Employment Standards Act (ESA), only three types of deductions can be made from an employee's wages: statutory deductions, deductions authorized by a court order, and, subject to certain restrictions and conditions, deductions authorized by the employee in writing.***

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### Statutory Deductions

Deductions made according to federal and provincial legislation. They include income tax, employment insurance premiums and Canada Pension Plan contributions. The money you deduct must be remitted to the proper authority.

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### Court Orders/Garnishment

A court may order an employer to deduct an amount from an employee's wages. The money you deduct must be paid out in accordance with the court order.

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### Written Authorization

An employer may deduct money from an employee's wages if the employee has agreed to this in writing, subject to certain rules. Written authorization must state that the employee authorizes the deduction from his or her wages. It must also specify the amount of money deducted or a method of calculating the amount of money to be deducted.

A written statement that the employee owes money to the employer without stating that the amount can be deducted from the employee's wages or an oral statement that the employee authorizes the deduction is not enough.

***IMPORTANT NOTE: A deduction from wages, even with signed authorization from the employee, is not allowed if there is:***

- ***A loss due to faulty work. For example, a mistake in a credit card transaction, work that is spoiled or rejected, or damage to company tools or vehicles.***
- ***A cash shortage, or lost or stolen property if a person other than the employee had control over or access to the cash or property. For example, if customers leave without paying the bill (commonly referred to as "dine and dash").***

## Deductions from Wages Checklist

<p>Do you make deductions from employees' wages that are neither statutory deductions nor as a result of a court order?</p> <p>If you answered 'No', see Chapters 4, 5, &amp; 6.</p> <p>If you answered 'Yes', please continue with this checklist:</p>	Y <input type="checkbox"/>	N <input type="checkbox"/>
<b>Please verify that you have written authorization:</b>		
From the employee stating that he or she authorizes the deduction.	Y <input type="checkbox"/>	N <input type="checkbox"/>
That includes either the amount of the deduction or a method for calculating the amount.	Y <input type="checkbox"/>	N <input type="checkbox"/>
<b>Please verify that the deductions are not for:</b>		
Faulty work.	Y <input type="checkbox"/>	N <input type="checkbox"/>
Cash shortages/lost or stolen property where someone other than the employee had access to or control over the cash property.	Y <input type="checkbox"/>	N <input type="checkbox"/>

## 4. RECORD KEEPING

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***Keeping a record of what is going on with your business is the only way to ensure that you are following the law. This is especially true when it comes to your employees. There are numerous forms for businesses in this area. (For example, refer to the Canadian Payroll Association <http://www.payroll.ca/>)***

You are required to keep written records about each employee for a certain period of time. You can either keep them yourself or have someone keep on your behalf (for example, an accountant or a payroll company). Regardless, these records have to be readily available for an employment standards officer.

Other chapters of this workbook often include a records checklist for the particular standard being discussed. Below is a list of record keeping rules. You are required under the ESA to keep these records and have them available when an Employment Standards officer inspects your business.

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### Specific Rules

1. Records of each employee's name, address and employment start date must be kept for three years after the employee ceases to be employed by you.
2. The date of birth of any students under 18 must be recorded and kept until they turn 21 or for three years after he/she ceases to be employed by you, whichever happens first.
3. All documents relating to an employee's leave (including pregnancy, family medical, personal emergency, declared emergency, reservist or organ donor leave) must be kept for three years after the day the leave expired.
4. If you employ homeworkers, you must keep a register showing each homeworke's name, address and wage rate. This information can be deleted from the register three years after the homeworke ceased to be employed by you.

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### Record Keeping Checklist

Are your records kept in a manner that follows the specific rules described above?
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Y <input type="checkbox"/>
----------------------------

N <input type="checkbox"/>
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## 5. HOURS OF WORK

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***There are limits to the number of hours an employee can be required or allowed to work. For most employees, the daily and weekly limits are eight hours and 48 hours, respectively. However, some businesses and/or employees are exempt. To see if this exemption applies to you, please see the chart referred to under “Helpful Hints” on page 5, or find it at: <http://www.labour.gov.on.ca/english/es/pubs/guide/special.php>.***

If you have checked the chart and **you are confident that your employees are exempt** from Hours of Work rules under the *Employment Standards Act (ESA)*, refer to **Chapter 6**. If you think they may be exempt, but are not sure, please call the Employment Standards Information Centre. Otherwise, please continue below.

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### Daily Limits of Work

The maximum number of hours most employees can be required to work in a day is eight hours or the number of hours an employer has established as the employee’s regular work day, if it is longer than eight hours.

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### Exception to Daily Limits of Work

Generally speaking, an employee can be required or allowed to work more than the daily limit only if he/she has agreed in writing **and** was provided with the handout entitled “INFORMATION FOR EMPLOYEES: About Hours of Work and Overtime Pay”, prior to the agreement.

***IMPORTANT NOTE: Even if these conditions are met, an employee must have 11 consecutive hours free from work in each day (24 hour period.)***

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### Weekly Limits of Work

The maximum number of hours most employees can be required or allowed to work in a week is 48 hours.

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## Exceptions to Weekly Limits of Work

Generally speaking, an employee can be required or allowed to work more than the weekly limit if he or she has agreed in writing and was provided with the handout entitled “INFORMATION FOR EMPLOYEES: About Hours of Work and Overtime Pay,” prior to the agreement. Unlike the case with the daily limit, the approval of the ministry’s Director of Employment Standards is also required. (The weekly limit can be exceeded while an application for approval is pending, but certain conditions and restrictions apply.)

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## Things to Consider

- If you plan to have a work week that is longer than 48 hours, it is very important that you read the information in this link: <http://www.labour.gov.on.ca/english/es/forms/hours.php>. There you will find step-by-step instructions on how to apply for approval to schedule a work week that is more than 48 hours.
- Requiring or allowing employees to work more than 48 hours per week without this approval is a violation of the ESA, UNLESS:
  - the employee is exempt;
  - the exceptional circumstances exception applies; or
  - in certain cases, an approval application is pending.
- An agreement between an employee and an employer to work additional daily or weekly hours, or an approval from the ministry’s Director of Employment Standards for excess weekly hours, does not mean you do not have to pay that employee overtime. They are separate standards.

**IMPORTANT NOTE:** *The same application form (available at [www.labour.gov.on.ca/english/es/forms/hours.php](http://www.labour.gov.on.ca/english/es/forms/hours.php)) is used by employers to average an employee's hours of work for overtime pay purposes. It is referred to again in the “Overtime Pay” chapter of this workbook.*

In order to stay concise, we will assume that your employees are not exempt from regular hours of work rules or covered by special rules for the remainder of this chapter.

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## Hours Free from Work

Your employees are entitled to a certain number of hours free from having to do work. These times include:

- Daily rest periods
- Time off between shifts
- Weekly or bi-weekly rest periods

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## Daily Rest Period Requirements

In most cases, an employee is required to 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 you have received approval from the ministry's Director of Employment Standards to exceed weekly limits on hours of work. Generally, this requirement cannot be altered by a written agreement between the employer and employee.

**IMPORTANT NOTE: 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.**

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## Time Off Between Shifts

Employers must give their employees at least eight hours off work between shifts (**unless** the employee and employer agree **in writing** that the employee will receive less than eight hours off work between shifts). This does not apply if the total time worked on both shifts does not exceed 13 hours.

### Example

Monica works in a restaurant. She is on split shifts, working from 6:00 a.m. to 11:00 a.m. and then from 4:00 p.m. to 9:00 p.m. The total time of her two shifts is 10 hours. Monica does not need to have eight hours off between the split shifts, because the hours she works does not exceed 13 hours.

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## Exceptional Circumstances

There are exceptional circumstances where you may require employees to work more than the daily or weekly work limits, or to work during a period that requires time off for the employee. These apply only when it is necessary to avoid *serious interference* with the ordinary operation of your establishment.

**This is explained further below.**

### They exist when:

- there is an emergency;
- Something unforeseen occurs that would interrupt 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 (such as winter ski operations); and/or
- It is necessary to carry out urgent repair work to the employer's plant or equipment.

**Examples include, but are not limited to:**

- a natural disaster/very extreme weather;
- a major equipment failure;
- fire or flood; and or
- an accident or breakdown in machinery that prevents others in the workplace from doing their jobs (e.g. the shutdown of an assembly line in a manufacturing plant).

**Examples of situations that ARE NOT considered exceptional circumstances:**

- Rush orders are being filled
- Periods of inventory-taking
- When an employee does not show up for work
- Poor weather slows shipping or receiving
- During seasonal busy periods (e.g. Christmas)
- During routine or scheduled maintenance

***IMPORTANT NOTE: Requiring an employee to work hours in excess of the daily or weekly limits, or during a period that requires time off for the employee in circumstances that are not exceptional (as described above) would be a violation of the act.***

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## **Miscellaneous Things to Remember**

### **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. Also, the ESA does not require you to provide transportation to or from work if an employee works late.

### **Travel Time**

The ministry considers the time an employee spends getting to or from a place where work was or will be performed (with the exception of commuting time) as working time. Commuting time is usually not seen as working time. Commuting time for an employee who has a regular work location is the time it takes him or her to get to work from home and vice-versa. There are some situations where commuting time has been seen as working time (e.g. where an employee takes a work vehicle home in the evening for the convenience of the employer and where the employee is required to transport supplies or other staff to or from the workplace or work site).

## Training Time

Time spent by an employee in training that is required by the employer or by law is considered to be working time. An example would be training that is a condition to continued employment in a position.

Time spent in training that is optional to the employee (i.e., not required by the employer) would not be considered working time. An example of this would be if an employee was looking for a new position with the employer and training was necessary to obtain that position.

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## Hours of Work Checklist

<b>Please Verify that your employees receive the correct:</b>		
Daily rest periods	Y <input type="checkbox"/>	N <input type="checkbox"/>
Time off between shifts	Y <input type="checkbox"/>	N <input type="checkbox"/>
Weekly or bi-weekly rest periods	Y <input type="checkbox"/>	N <input type="checkbox"/>
Do you have a record of the hours worked by you employees each day and week and have you have kept this for three years after the day or week of work?	Y <input type="checkbox"/>	N <input type="checkbox"/>

<b><i>Please consider the following:</i></b>
<ol style="list-style-type: none"><li>1. For employees who receive a “salary,” you need to record only the number of hours worked in excess of the employee’s regular work week.</li><li>2. For employees who receive a “salary,” you need to record only the number of hours in excess of eight hours or the employee’s regular work day if longer than eight hours.</li><li>3. An employee is considered to have a “salary” if he or she is paid a fixed amount for each pay period and the amount actually paid in each pay period does not vary with the number of hours worked unless more than 44 hours are worked in a week.</li></ol>

## 6. EATING PERIODS

***Most employees are entitled to an eating period during their shift. The length and timing of the eating period (meal break) is somewhat flexible, recognizing work demands. Meal breaks, whether paid or unpaid, are not considered working time and are therefore not counted toward the limits on hours of work, overtime pay or minimum wage.***

An employee must not work for more than five hours in a row without getting a 30-minute eating period free from work. However, you and your employee can agree that the eating period can be split into two periods within every five consecutive hours. Together, these periods must total a minimum of 30 minutes. **This agreement can be verbal 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 during it.

### Non-Eating Period Breaks

There is no requirement to give your employees coffee breaks or any other kind of break other than eating periods.

Time spent by an employee on a coffee break or other non-eating period break during which he or she is required to remain at the workplace is considered to be working time under the Employment Standards Act (ESA). If the employee is free to leave the workplace during the coffee break or other type of break, it is not considered to be working time.

### Eating Periods Checklist

Do your employees get breaks other than meal breaks?	Y <input type="checkbox"/>	N <input type="checkbox"/>
If you answered 'No', refer to Chapter 7.		
If you answered 'Yes', are they required to remain at the workplace?	Y <input type="checkbox"/>	N <input type="checkbox"/>
If you answered 'No', refer to Chapter 7.		
If you answered 'Yes', do you treat the time on break as working time for purposes of the ESA?	Y <input type="checkbox"/>	N <input type="checkbox"/>
<b>Please verify that:</b>		
All of your employees work no more than five hours in a row before receiving a 30-minute meal break.	Y <input type="checkbox"/>	N <input type="checkbox"/>
Employees who are either splitting the 30 minutes have agreed to this, either in writing or verbally, and both periods are taken within the five hours.	Y <input type="checkbox"/>	N <input type="checkbox"/>
Employees are free from work during the meal break(s).	Y <input type="checkbox"/>	N <input type="checkbox"/>

## 7. OVERTIME PAY

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***For most employees, overtime begins after they have worked 44 hours in a work week regardless of whether they are full-time, part-time, students or casual employees. After 44 hours, they must receive overtime pay for each hour worked, which is a minimum of 1.5 times the employee's regular rate of pay (often called "time and a half"). However, some businesses and/or employees are exempt. To see if this exemption applies to you, please see the chart referred to under "Helpful Hints" on page 5, or find it at: <http://www.labour.gov.on.ca/english/es/pubs/guide/special.php>.***

**Helpful Tip:** If you have checked the chart and discovered that the type of work your employees do has an overtime threshold that is higher than 44 hours, the following material is still relevant. You simply need to replace 44 hours with the particular overtime threshold that applies to your employee.

Averaging hours of work for overtime pay purposes can only be done if you have applied and received approval from the ministry's Director of Employment Standards. You also need to have an employee's written agreement to average their hours of work. Additional information on averaging hours of work and step-by-step instructions for applying can be found at: <http://www.labour.gov.on.ca/english/es/forms/hours.php>.

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### Common Questions About Overtime Pay

#### **Q. Does daily overtime exist?**

**A.** Unless the employee's employment contract or collective agreement provides the employee with a right to overtime when the number of hours worked in a day exceeds a certain amount, overtime pay is never calculated on a daily basis.

#### **Q. Can managers and supervisors earn overtime?**

**A.** Managers and supervisors are not covered by overtime rules. However, it is not enough to simply call an employee a 'manager' or 'supervisor'. For the employee to be exempt from the overtime provisions found in the Employment Standards Act (ESA), he or she must do work that is supervisory or managerial in nature and only do non-managerial or non-supervisory work on an irregular or exceptional basis.

#### **Example**

If a manager of a shoe store performs the duties of the employees he or she manages every day from noon to 1:00 p.m. to cover the lunch rush, the performance of these non-managerial duties is not irregular. Therefore, the employee would be entitled to overtime if he or she works more than 44 hours in a week.

**Q. What if an employee does more than one kind of work during the week?**

**A.** If an employee does different kinds of work in a week you must check if at least 50 per cent of the working hours were spent in a job category that is covered by overtime rules. If they were, the employee is entitled to overtime pay if he or she works more than 44 hours in that week.

**Q. How is overtime pay calculated when there is a public holiday during the week?**

**A.** This depends on whether the employee works on the public holiday or not, and how he or she is paid. The following table outlines the **three possibilities**:

Scenario	Outcome
Employee has the day off with public holiday pay.	No hours were worked on the public holiday that can count toward calculating overtime pay.
Employee works on the public holiday and gets <b>Premium Pay</b> * plus public holiday pay for the day.	Hours worked on the public holiday <b>do not</b> count toward calculating overtime pay.
Employee works on the public holiday, is paid at straight time and receives a substitute day off (for which he or she will receive public holiday pay).	Hours worked on the public holiday do count toward calculating overtime pay.

\***Premium Pay** is 1.5 times the employee’s regular rate. Please see Chapter 9 for a full explanation of public holiday rules.

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## Calculating Overtime Pay

Overtime pay calculations are different depending on the type of payment arrangement you have with your employee.

### Categories of Employees & Payment Arrangements

- Hourly
- Hourly rate plus commissions
- Fixed (unchanging) salary
- Fluctuating or adjustable salary
- Piecework or straight commission

On the following five pages, examples are given of overtime calculations for each. These descriptions and examples are intended to help you quickly determine the type of payment arrangement(s) you have with your employees and how to calculate their overtime pay.

**IMPORTANT NOTE: Regular pay is pay for all non-overtime hours in the work week.**

## A) Hourly

This is the most straightforward arrangement. An employee who is paid an hourly rate receives that amount for every hour worked up to 44 hours per week. For any hours over that, the employee receives time and a half his or her hourly rate for each hour worked.

**Example A:** Ravi's regular pay is \$11 per hour. This week Ravi worked 53 hours.

*Calculating his overtime pay:*

1. Ravi's hours of overtime are calculated:
  - $53 \text{ hours} - 44 \text{ hours per week} = 9 \text{ overtime hours}$
2. His overtime rate is calculated:
  - $\$11 \text{ per hour} \times 1.5 = \$16.50 \text{ per hour (overtime rate)}$
3. Then his overtime wages are calculated:
  - $9 \text{ hours} \times \$16.50 \text{ per hour} = \$148.50$
4. Finally, Ravi's regular pay for the week is added to his overtime wages:
  - Regular Pay:  $44 \text{ hours} \times \$11 \text{ per hour} = \$484.00$
  - Overtime pay:  $9 \text{ hours} \times \$16.50 = \$148.50$
  - Total Pay =  $\$632.50 (\$484.00 + \$148.50)$

Therefore, Ravi is owed \$632.50 for his week of work.

## B) Hourly Rate Plus Commission

An employee in this category receives an hourly rate for all hours worked. He or she also receives commissions as part of his or her weekly pay.

For this employee, you must establish a regular rate. This is not the same as the hourly rate; it is calculated as his or her total earnings in a week, divided by the number of non-overtime hours he or she worked in that week. This regular rate is then used to calculate the amount of overtime pay that is owed.

**Example B:** Justine is paid \$10.25 an hour, plus commission. In one work week she worked 50 hours and was paid \$512.50 in hourly wages, plus \$100 in commission.

*Calculating her overtime pay:*

1. Justine's regular rate is calculated:
  - $\$512.50 + \$100 = \$612.50$  (total wages paid)
  - $\$612.50 \div 44 \text{ hours} = \$13.92 \text{ per hour (regular rate)}$
2. Then her overtime rate is calculated:
  - $\$13.92 \text{ per hour} \times 1.5 = \$20.88 \text{ per hour (overtime rate)}$

3. Next her overtime wages are calculated:
  - 50 hours – 44 hours = 6 hours of overtime
  - 6 hours x \$20.88 per hour = \$125.28 earned in overtime wages
4. Finally, the amount already paid at regular wage for the 6 hours of overtime is subtracted from the overtime calculation (Note: She was already paid \$10.25/hour for all the hours she worked, including those 6 overtime hours):
  - 6 hours x \$10.25 per hour = \$61.50 (regular rate for overtime hours)
  - \$125.28 - \$61.50 = \$63.78 (outstanding amount still needed to be paid).

Therefore, Justine is entitled to a total pay of \$676.28 for that week.

### **C) Fixed (Unchanging) Salary**

An employee on fixed salary is someone whose hours of work may change from day to day but whose weekly salary stays the same. The fixed salary is actually the employee's pay for all hours worked up to and including 44 hours per week. Additional hours must be paid at an overtime rate.

**Example C:** Sharon's fixed salary is \$500 per week. This week she worked 50 hours.

*Calculating her overtime pay:*

1. Sharon's regular rate is calculated:
  - \$500 salary ÷ 44 hours = \$11.36 per hour
  - Note: Sharon's salary of \$500.00 covers her first 44 hours of work.
2. Next, her overtime rate is calculated:
  - \$11.36 per hour x 1.5 = \$17.04 per hour (overtime rate)
3. Her overtime wages are calculated:
  - 6 hours x \$17.04 per hour = \$102.24
4. Finally, Sharon's regular pay for the week is added to her overtime wages:
  - Reg. Pay = \$500 (salary)
  - Overtime Pay = \$102.24
  - Total Pay = \$602.24 (\$500.00 + \$102.24)

Therefore, Sharon is entitled to \$602.24 in total pay for that week.

### **D) Fluctuating or Adjustable Salary**

A fluctuating or adjustable salary employee is one who is paid a set salary for a set number of hours. However, his or her salary is adjusted if he or she works more or fewer than the set number of hours. Hours up to 44 are paid at straight time. Additional hours (> 44 hours) must be paid at an overtime rate.

**Example D:** Ben's salary is \$440 in a regular work week of 40 hours. His salary is adjusted for weeks in which he works either more hours or fewer hours. This week he worked 50 hours.

### **Calculating his overtime pay:**

1. Ben's regular rate is calculated:
  - $\$440 \text{ salary} \div 40 \text{ hours} = \$11 \text{ per hour}$
  - Note: The agreement that he is paid \$440 for 40 hours of work means his regular rate will always be \$11 per hour.
2. His non-overtime earnings are calculated:
  - $\$11 \text{ per hour} \times 44 \text{ hours} = \$484$
3. His overtime rate is calculated:
  - $\$11 \text{ per hour} \times 1.5 \text{ overtime} = \$16.50 \text{ per hour (overtime rate)}$
4. His hours of overtime are calculated:
  - $50 \text{ hours} - 44 \text{ hours per week} = 6 \text{ overtime hours}$
5. Overtime wages are then calculated:
  - $6 \text{ hours} \times \$16.50 \text{ per hour} = \$99$
6. Finally, Ben's regular pay for the week is added to his overtime wages:
  - Regular Pay: \$484
  - Overtime Pay: \$99
  - Total Pay: \$583 ( $\$440 + \$99$ )

Therefore Ben is entitled to \$583 in total pay for the week.

### **E) Piecework or Straight Commission**

Piecework or straight commission employees are paid according to what they produce. Their wages are calculated based on the number of pieces they complete or commissions they earn rather than on the number of hours they work.

**IMPORTANT NOTE: Regular pay is pay for all non-overtime hours in the work week.**

**Example E:** 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 \$528.

#### *Calculating their overtime pay:*

1. Their regular rate is calculated:
  - $\$528 \div 44 \text{ hours} = \$12 \text{ per hour}$
2. Their overtime rate is then calculated:
  - $\$12 \text{ per hour} \times 1.5 = \$18 \text{ per hour (overtime rate)}$

3. Their hours of overtime are calculated:
  - 48 hours – 44 hours = 4 hours overtime
4. Overtime wages are then calculated:
  - 4 hours x \$18 per hour = \$72
  - Note: They are **both** entitled to \$72 in overtime pay in addition to \$528 in regular pay.
5. Finally, their regular pay for the week is added to their overtime wages:
  - Regular Pay: \$528
  - Overtime Pay: \$72
  - Total Pay: \$600

Therefore, Becka and Rhian are both entitled to \$600 in total pay.

### F) Mixed Hourly Rate

This is when an employee performs two types of work that have two different rates of pay. These employees are usually entitled to overtime for hours over 44.

**Example F:** Aaron works at two different jobs for his employer. For job A he is paid \$12 an hour, while for job B he is paid \$15. One week he worked a total of 60 hours (36 hours at job A and 24 hours at job B). He received only “straight time” for all the hours he worked. He was paid a total of \$792 (\$432 for job A and \$360 for job B).

Because Aaron has two different hourly rates (depending on what job he is doing for his employer), determining his “regular rate” for overtime pay purposes requires a “weighted average” calculation. This is an average hourly rate based on the proportionate amount of time spent in job A and the proportionate amount of time spent in job B. This requires several steps:

1. Determine the percentage of time Aaron spent in each job:
  - Job A: 36 hours out of a total of 60:  $36 \div 60 = 60\%$
  - Job B: 24 hours out of a total of 60:  $24 \div 60 = 40\%$
2. Using those percentages, determine how many of Aaron’s non-overtime hours (44) should be considered to have been spent on job A and how many should be considered to have been spent on job B:
  - Job A: 60% of 44 hours = 26.4 hours
  - Job B: 40% of 44 hours = 17.6 hours
3. Multiply those hours by the hourly rate for each job to determine how much of Aaron’s total pay should be considered to have been paid for his non-overtime hours:
  - Job A: 26.4 hours x \$12 per hour = \$316.80
  - Job B: 17.6 hours x \$15 per hour = \$264
  - Total pay for non-overtime hours =  $(\$316.80 + \$264) = \$580.80$

4. Divide the total pay for non-overtime hours by 44 to obtain Aaron's regular rate:
  - $\$580.80 \div 44 = \$13.20$  per hour
5. Multiply the regular rate by 1.5 to determine the overtime pay rate:
  - $\$13.20 \times 1.5 = \$19.80$  per hour (overtime rate)
6. Multiply the overtime hours by the overtime pay rate to determine Aaron's overtime pay entitlement:
  - $(60-44) \times \$19.80 = \$316.80$
7. Aaron was paid "straight time" for all hours worked, including the overtime hours. Therefore, he has received \$211.20 of his over time entitlement:
  - $\$792$  total paid -  $\$580.80$  paid for non-overtime hours =  $\$211.20$
8. To determine the outstanding overtime pay entitlement that is due, deduct the total overtime entitlement from the amount that he was already paid:
  - $\$316.80 - \$211.20 = \$105.60$

Therefore, Aaron must be paid an additional \$105.60 to satisfy his overtime pay entitlement.

---

## Time Off In Lieu Instead of Overtime Pay

An employee and an employer can agree in writing that the employee will receive paid time off work instead of overtime pay (referred to as "banked" time or "time off in lieu").

If you and your employee have agreed to this, he or she must be given a minimum of 1½ hours of paid time off work for each hour of overtime they worked. The paid time off must be taken either:

- within three months of the week in which the overtime was earned; or
- within 12 months, if the employee agrees in writing.

***IMPORTANT NOTE: If the employee stops working for you before he or she has taken the paid time off, they must receive overtime pay and it 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.***

An employee can make an agreement to take time off in lieu of overtime pay, or to average hours off work for overtime purposes. *However*, an employer and an employee **cannot agree that the employee will give up his or her right to overtime pay under the *Employment Standards Act (ESA)***. Also, **an employer cannot lower an employee's regular rate** to avoid paying time and a half after 44 hours (or other overtime threshold that applies) in a work week.

**IMPORTANT NOTE:** If the type of work an employee does is covered by overtime rules, the employee's salary cannot cover more than 44 hours per week. A salary arrangement alone cannot disqualify an employee from overtime pay.

## Overtime Pay Checklist

Is the type of work your employees do not covered by (exempt from) regular overtime pay rules?  If you answered 'Yes', skip to Chapter 8.	Y <input type="checkbox"/>	N <input type="checkbox"/>
If you answered, 'No', is the type of work your employees do covered by Special Rules for overtime?	Y <input type="checkbox"/>	N <input type="checkbox"/>
If you answered 'Yes', are you calculating overtime pay according to the threshold listed on the chart?	Y <input type="checkbox"/>	N <input type="checkbox"/>
Do employees who work overtime receive paid time off instead of overtime pay?	Y <input type="checkbox"/>	N <input type="checkbox"/>

<b>Please verify that:</b>		
Your employees have agreed in writing to receive paid time off instead of overtime.	Y <input type="checkbox"/>	N <input type="checkbox"/>
They receive 1½ hours of paid time off for each hour of overtime worked.	Y <input type="checkbox"/>	N <input type="checkbox"/>
Their paid time off is taken within three months from the week in which overtime was worked <u>or</u> if they have agreed <b>in writing</b> , within 12 months.	Y <input type="checkbox"/>	N <input type="checkbox"/>

<b>Please consider the following:</b>		
1. Any employee no longer working with the business must receive any outstanding overtime pay within seven days of their employment ending or on the date that would have been their next pay day.		
2. You need to check which formula you are using to calculate overtime for your employee(s) (i.e. fixed salary, adjustable salary, hourly, etc.).		
3. There is a different way to calculate overtime in a week where a public holiday falls.		

## 8. MINIMUM WAGE

*The minimum wage is the lowest rate of pay per hour that an employer can pay an employee. Over recent years, the minimum wage has increased on an annual basis. Most employees are eligible for minimum wage. However, some businesses and/or employees are exempt. To see if this exemption applies to you, please see the chart referred to under “Helpful Hints” on page 5, or find it at: <http://www.labour.gov.on.ca/english/es/pubs/guide/special.php>.*

### What Kind of Employees Require Minimum Wage?

- Full-time
- Part-time
- Casual
- Those paid hourly rate
- Those paid commission
- Those paid piece rate
- Those paid flat rate, or
- Those paid salary

### Minimum Wage Rates

Minimum Wage Type	Description	Value as of March 31, 2010
General Minimum Wage	Rate that applies to most employees	\$10.25 per hour
Student Minimum Wage	Rate that 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 holiday.	\$9.60 per hour

Liquor Servers' Minimum Wage	Rate that applies to employees who serve liquor directly to customers or guests in licensed premises as a regular part of their work.  <i>Note: "Licensed premises" are businesses for which a license or permit has been issued under the Liquor License Act.</i>	\$8.9 per hour
Hunting and Fishing Guides' Minimum Wage	Rate is based on blocks of time instead of by the hour. They are entitled to one rate for working less than five consecutive hours in a day, and a different rate amount for working five hours or more in a day –whether or not the hours are consecutive.	\$51.25 (rate for working fewer than five consecutive hours in day)  \$102.50 (rate for working five or more hours in day, regardless if the hours are worked consecutively)
Homeworkers' Minimum Wage	Rate applies to 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.  <i>Note: Students under the age of 18 who are employed as homeworkers must be paid the homeworkers' minimum wage.</i>	110% of general minimum wage, which is \$11.28 per hour

### Calculating General Minimum Wage

**Example:** One week in April 2010, Julia works 37.5 hours. She is paid on a weekly basis. The minimum wage applicable to Julia is \$10.25 per hour.

Since compliance with the minimum wage requirements is based on pay periods, Julia must earn at least \$384.37 (37.5 hours × \$10.25 per hour = \$384.38) in this work week.

**IMPORTANT NOTE: Eating periods are not included when counting how many hours an employee works in a week.**

## Calculating Minimum Wage for those on Commission

As in the case of most other employees, if an employee's pay is based completely or partly on commission, the total amount paid in a pay period when divided by the total hours the employee worked in the pay period must equal at least the minimum wage.

**Example:** Luba works on commission and has a weekly pay period. One week in April 2010, she earned \$150 in commission and worked 25 hours. The minimum wage is \$10.25 an hour.

The minimum wage (\$10.25) multiplied by the number of hours worked in the pay period (25 hours) is \$256.25. Luba is owed the difference between her commission pay (\$150.00) and the required regular pay at the minimum wage rate (\$256.25). **Luba's employer owes her \$106.25.**

**IMPORTANT NOTE:** *The calculation is more complicated where overtime hours are worked. Industry-specific and job-specific exemptions and special rules may apply to some salespeople who earn commission. Please see the chart for details:*  
<http://www.labour.gov.on.ca/english/es/pubs/guide/special.php>.

## Minimum Wage: Room and Board Provision

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 or board (meals). Room and board will only be deemed to have been paid as wages if the employee has received the meals or occupied the room.

**Example:** The amounts that are designated "paid to the employee" for room and board are calculated as a value on top of their wages (not deducted). For example, if Sam gets paid \$381.30 per week and receives room and board, which is valued at \$31.70, then he is deemed to be making \$413 per week.

*Calculating whether minimum wage has been paid:* \$413 per week/40 hours = \$10.33 per hour

Therefore, Sam is considered to have been paid at least the general minimum wage (\$10.25 per hour).

For purposes of determining compliance with the minimum wage on the part of an employer who provides room or board to employees, the following amounts are deemed to have been paid to the employee as wages:

1. Room (weekly)
  - Private \$31.70
  - Non-private \$15.85
  - Non-private (domestic workers only) \$0
2. Meals
  - Each meal \$2.55
  - Weekly maximum \$53.55
3. Rooms and meals (weekly)
  - With private room \$85.25
  - With non-private room \$69.40

- With non-private room (domestic workers only) \$53.55
4. Housing for harvesters (weekly)
- Serviced housing \$99.35
  - Unserviced housing \$73.30

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## Miscellaneous Standards to Consider

### Travel Time and Training Time

Travel time, time spent on mandatory training and, in certain circumstances, commuting time are considered to be hours of work for minimum wage purposes. Employers can establish different rates for different types of work as long as they are still complying with the minimum wage and overtime pay provisions.

### Employees Sent Home after Working Less Than Three Hours

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 a minimum wage, or
- The employee's regular wage for the time actually worked.

For example, if an employee who is a liquor server is paid \$10 per hour and works only two hours, he or she is entitled to three hours at minimum wage.

The liquor servers' minimum wage is \$8.90 as of March 31, 2010, and is calculated by multiplying \$8.90 per hour by three hours of work, which comes to \$26.70. She is entitled to three hours at minimum wage instead of two hours at her regular wage, because \$10 per hour x 2 hours of work equals only \$20.

**IMPORTANT NOTE:** The rule does not apply to:

1. Students of all ages.
2. Employees whose regular shift is three hours or less.
3. Situations where the cause of the employee not being able to work at least three hours was due to: fire, lightning, power failure, storms or similar cases beyond the employer's control that resulted in a work stoppage.

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## When the Minimum Wage Changes

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



## 9. PUBLIC HOLIDAY PAY

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*These are days that most employees are entitled to have off work with pay under the Employment Standards Act (ESA). 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 see if this exemption applies to you, please see the chart referred to under “Helpful Hints” on page 5, or find it at: [www.labour.gov.on.ca/english/es/pubs/guide/special.php](http://www.labour.gov.on.ca/english/es/pubs/guide/special.php).*

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### Public Holidays in Ontario

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)

**IMPORTANT NOTE:** *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 Employment Standards Act.*

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### What is Public Holiday Pay?

Public holiday pay is the amount of money a qualified employee is entitled to receive for a public holiday. The amount of public holiday pay an employee is entitled to varies between employees, as it is based on the regular wages\* the employee earned and any vacation pay that was payable in the four work weeks prior to the work week the public holiday fell in, divided by 20.

\* Regular wages are wages other than overtime pay, public holiday pay, vacation pay, premium pay, termination pay and severance pay.

Public holiday pay does not necessarily amount to an employee's regular daily earnings, due to the nature of the calculation for public holiday pay. It is also important to note that **receiving time off and receiving public holiday pay are separate considerations**. One does not always guarantee an entitlement to the other.

Although vacation pay is not considered to be part of one's regular wages, the calculation for public holiday pay includes any vacation pay that was payable to the employee during any of the four work weeks prior to the work week in which the public holiday fell.

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## How Employees Qualify for Public Holiday Pay

Entitlement to public holidays begins as soon as an employee starts working. Employees who qualify can take the day off work and be paid public holiday pay. To qualify, an employee must work his or her last regularly scheduled day before and first regularly scheduled day after the public holiday, or have reasonable cause for failing to do so. This will be explained in more detail in the examples presented below.

There is no waiting period for an employee to qualify for a paid public holiday (although in some situations, the public holiday pay entitlement might work out to be zero). It does not matter if an employee is full time, part time, permanent or on a time-limited arrangement when determining if he or she qualifies for the public holiday entitlements.

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## The 'Day Before, Day After' Rule

Employees who fail, without reasonable cause, to work all their last regularly scheduled day of work before the public holiday and all their first scheduled day of work after the public holiday are not entitled to public holiday pay. There is no requirement for these days to be the actual calendar days before and after the public holiday in order for the employee to qualify for the public holiday entitlements.

For example, an employee who has asked for and received approval to take off the day before the public holiday is still entitled. As the employer agreed to the employee being off the day before the holiday, it would not be considered a scheduled day of work. Also, employees on vacation, on leave, or on a lay-off are also entitled as long as they work their last scheduled day before and first scheduled day after the holiday.

If an employee fails to work his or her last scheduled day of work before the public holiday or his or her first scheduled day of work after but does have reasonable cause, he or she will still qualify for the public holiday entitlements. An employee is generally considered to have "reasonable cause" for missing work when something beyond his or her control prevents the employee from working. It is the employee's responsibility to show he or she has reasonable cause for the absence.

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## How to Calculate 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" mentioned earlier does not necessarily refer to the four calendar weeks immediately before the holiday. This period is based on the *employer's* work week.

A work week is a recurring period of seven consecutive days that the employer has established for the purpose of scheduling work. If you have not established a work week, the default will be Sunday to Saturday.

### Example of Work Schedule

Suppose your work week runs from Thursday to Wednesday. Christmas Day falls on a Tuesday. The four work weeks you would use to calculate public holiday pay for Christmas Day are the four weeks counting backwards from the Wednesday before Christmas Day (December 25):

Calendar Illustrating a Work Schedule						
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	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 by the shaded area (November 22 to December 19) are used in the calculation of public holiday pay.

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## How to Calculate Public Holiday Pay

On the following few pages, examples are given of holiday pay calculations. These descriptions and examples are intended to help you quickly determine the type of situation you have with your employees and how to calculate each type of public holiday payment arrangement. The “Public Holiday Calculator”, available at: [www.labour.gov.on.ca/english/es/eop/index.php](http://www.labour.gov.on.ca/english/es/eop/index.php) can address your questions.

### Example 1: A Typical Case

Iryna works five days a week and earns \$100 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.

*Calculating her public holiday pay:*

1. Iryna’s regular wages are calculated:
  - \$100 per day x 5 days = \$500 per week
  - \$500 per week x 4 work weeks = \$2,000
2. Iryna earned \$2,000 of regular wages in the four work weeks before the public holiday.
  - Nothing is owed because she only receives vacation pay when she takes her vacation. Because she was not on vacation during the four work week period, she is not entitled to vacation pay.
3. Finally, her total wages earned and vacation pay payable are added together and divided by 20.
  - $\$2,000 + \$0 = \$2,000$
  - $\$2,000 \div 20 = \$100$

Therefore, Iryna is **entitled to \$100** in public holiday pay.

### Example 2: When vacation time is involved

Brock works five days a week and earns \$100 a day. He was on vacation for two of the four work weeks before the work week in which the public holiday fell. He received \$1,000 in vacation pay, along with his regular wages, in the four work weeks prior to the work week that the public holiday fell in. Brock worked his last regularly scheduled work day before the public holiday and his first regularly scheduled work day after the holiday.

*Calculating his public holiday pay:*

1. Brock’s regular wages are calculated:
  - \$100 per day x 10 days = \$1,000
2. The amount of vacation pay payable is calculated:
3. \$1,000 is owed because Brock was on vacation for two of the four work weeks prior to the work week with the public holiday. He was paid vacation pay within those four work weeks.

- Finally, his total wages earned and vacation pay payable are added together and divided by 20.
- $\$1,000$  (regular wages) +  $\$1,000$  (vacation pay payable) =  $\$2,000$
- $\$2,000 \div 20 = \$100$

Therefore, Brock is **entitled to \$100.00** in public holiday pay.

### **Example 3: Where vacation pay is included in every pay cheque**

Bert earns \$1,500 in regular wages per week. He and his employer have agreed in writing that he will receive 4% vacation pay in each pay cheque (see Chapter 10 for information on when this is acceptable).

*Calculating his public holiday pay:*

1. Bert makes \$1,500 in regular wages.
2. The amount of vacation pay payable is calculated:
  - $\$1,500 \times 4\% = \$60$
3. Finally, his regular wages earned and vacation pay payable are added together and divided by 20.
  - $\$1,500$  (regular wages) +  $\$60$  (vacation pay) =  $\$1,560$
  - $\$1,560 \div 20 = \$78$

Therefore, Bertie is entitled to \$78 in public holiday pay.

### **Example 4: When an employee is on a leave**

Zoe usually works five days a week, earning \$100 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. She received maternity and parental benefits from the federal Employment Insurance program, but these benefits are not considered wages.

Zoe is entitled to public holiday pay for the public holidays that fell 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.

*Calculating her public holiday pay:*

1. Zoe went on leave June 10 and only worked seven days during the four work weeks before the Canada Day public holiday. Her regular wages earned are calculated:
  - $\$100$  per day  $\times$  7 days =  $\$700$

2. Her vacation pay payable is calculated:

- Nothing is owed because she had no vacation pay payable during the four work week period.

3. Finally, her regular wages earned and vacation pay payable are added together and divided by 20.

- $\$700$  (regular wages) +  $\$0$  (vacation pay) =  $\$700$
- $\$700 \div 20 = \$35$

Therefore, Zoe is entitled to \$35 in public holiday pay for the Canada Day public holiday. However, she does not receive any public holiday pay for other holidays that fell during her leave because she did not earn wages or have vacation pay payable during the four work weeks before each of those holidays.

### **Example 5: When an employee is on a layoff throughout the four work weeks preceding the holiday**

Eugene usually works five days a week, earning \$100 per day. He was placed on temporary layoff on November 15. During his layoff, Eugene was not paid wages or vacation pay. He received Employment Insurance benefits during this time, but these benefits are not considered wages.

Eugene was recalled to work on December 27. He is entitled to public holiday pay for Christmas Day and Boxing Day as long as he:

- works his last regularly scheduled day before the lay-off; and
- his first regularly scheduled day after the lay-off; or
- has reasonable cause for failing to do so.

*Calculating his public holiday pay:*

Because Eugene did not earn any wages or have any vacation pay payable in the four work weeks before those two public holidays, he is entitled to \$0 in public holiday pay.

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## How to Calculate Public Holiday Pay Plus Premium Pay

A public holiday falls on one of Heather's normal working days. She and her employer have agreed in writing that she will work on the public holiday and that, instead of getting a substitute holiday, she will be paid public holiday pay plus premium pay for all the hours she works on the holiday.

Heather regularly works eight hours a day, five days a week. Her regular hourly pay rate is \$12. She has worked on all her scheduled work days in the four work weeks before the public holiday. She receives her vacation pay before she takes vacation; she was not on vacation during the four work weeks before the public holiday. She works eight hours on the public holiday.

### Example Public Holiday Pay Calculation

1. Her regular wages in the four work weeks before the public holiday are calculated:
  - 8 hours per day  $\times$  \$12 per hour = \$96 per day
  - \$96 per day  $\times$  5 days = \$480 per week
  - \$480  $\times$  4 work weeks = \$1,920
  - Heather earned \$1,920 in the four work weeks before the public holiday.
2. Amount of vacation pay payable with respect to the four work week period is calculated:
  - She had no vacation payable during this period because Heather gets paid her vacation pay before she takes vacation and she was not on vacation during the four work week period.
3. Her total regular wages earned plus vacation pay payable is then divided by 20:
  - $(\$1,920 + \$0) \div 20 = \$96$

Therefore, Heather is entitled to \$96 in public holiday pay.

### Example Premium Pay Calculation

4. Finally, the premium pay owing to Heather for her work on the public holiday is calculated:
  - \$12 per hour  $\times$   $1\frac{1}{2}$  = \$18
  - \$18 per hour  $\times$  8 hours worked = \$144

Therefore, Heather is also entitled to \$144 in premium pay. Her total entitlement in respect of the public holiday will be \$240 (\$96 + \$144).

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## Public Holidays on Working Days and Non-Working Days

The rules regarding public holidays vary depending on whether a public holiday falls on:

- a day that is ordinarily a working day for the employee;
- on a day that is not ordinarily a working day for the employee; or
- a day on which the employee is on vacation.

### Public Holiday on a Working Day

If the holiday falls on a day that would ordinarily be a working day for the employee, he or she is entitled to have the day off with public holiday pay (subject to the “day before, day after” rule).

The employer and employee may agree in writing that the employee will instead work on the public holiday. In that case, the employee is entitled to his or her regular wages for the hours he or she worked on the day plus a substitute day off with public holiday pay. However, the employer and employee can instead agree to a pay plus premium pay arrangement. This means that the employee will be entitled to public holiday pay plus premium pay, for each hour worked on the holiday.

***IMPORTANT NOTE: Premium pay is 1½ the employee’s regular rate of pay for an hour of work. (Note that any hours worked on a public holiday for which an employee receives premium pay are not counted for overtime pay purposes.)***

### Substitute Days

Where a day is substituted for a public holiday, the substitute day is treated as if it were the public holiday. Generally speaking, the day that is substituted must be no more than three months after the holiday. However, the employer and employee can agree in writing to a later day, provided that it is no more than 12 months after the public holiday. Where employment ends before the substitute day, the employer must pay the employee public holiday for the day within seven days after employment ends or the day that would have been the employee’s next pay day, whichever is later.

### Public Holiday on Non-working Day

If the holiday falls on a day that would not ordinarily be a working day for the employee (including a day when the employee is on vacation), he or she is entitled to a substitute day off with public holiday pay, provided that the employee is not on pregnancy or parental leave, or a temporary layoff. However, the employer and employee may agree **in writing** that the employee will instead be paid public holiday pay for the day (in which case there is no substitute day off). In either case, the “day before, day after” rule will apply.

If the holiday falls on a day that would not ordinarily be a working day for the employee and the employee is on pregnancy or parental leave, or temporary layoff, the employee’s only entitlement is to public holiday pay for the day. Note that the “day before, day after” rule will apply.

The employer and employee may agree **in writing** that the employee will work on the public holiday even though it is not ordinarily a working day or the employee is on vacation on that day. In that case, the employee is entitled to his or her regular wages for the hours he or she worked on the day plus a substitute day off with public holiday pay. However, the employer and employee can instead agree to a pay plus premium pay arrangement under which the employee will be entitled to public holiday pay plus premium pay for each hour worked on the holiday. If there was an agreement to work on the holiday

and the employee failed to work some or all of the holiday, the “failure to work” rules discussed below will apply.

Some employees can be required to work on a public holiday, even if they are not exempted from the ESA’s public holiday provisions. This will be the case if the employee works in a hospital, hotel, motel, tourist resort, restaurant, tavern or a continuous operation. A continuous operation is one that operates 24 hours a day and either never shuts down or shuts down only once a week.

**IMPORTANT NOTE:** *The ability of a hospital, hotel, motel, tourist resort, restaurant, tavern or continuous operation employer to require employees to work on a public holiday is subject to the employee’s rights under the Human Rights Code ([www.e-laws.gov.on.ca/html/statutes/english/elaws\\_statutes\\_90h19\\_e.htm](http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90h19_e.htm)) and to any rights he or she may have under the employment contract. Some retail employees have the right to refuse to work on a public holiday, even if they are employed in a continuous operation (e.g. a 24-hour convenience store). See “Your Guide to the ESA” for more information. This guide is available at: [www.labour.gov.on.ca/english/es/pubs/guide](http://www.labour.gov.on.ca/english/es/pubs/guide)*

If an employee employed in a hospital, hotel, motel, tourist resort, restaurant, tavern or continuous operation is required to work on a holiday, he or she will be entitled either to his or her regular wages for the hours he or she worked on the day plus a substitute day off with public holiday pay or public holiday pay plus premium pay for each hour worked on the holiday. The choice is the employer’s. The employee’s agreement is not required for a pay plus premium pay arrangement.

Where a hospital, hotel, motel, tourist resort, restaurant, tavern or continuous operation employer requires an employee to work on a holiday but he or she fails to work some or all of that holiday, the “failure to work” rules discussed in the next section will apply.

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## **“Failure to Work” Rules (Employee Fails to Work Some or All of His or her Public Holiday Shift)**

There are special rules that apply if the employee agreed to work on a public holiday (or in the case of a hospital, hotel, motel, tourist resort, restaurant, tavern or continuous operation, if the employee was required to work on the public holiday) and then failed to work some or all of the holiday:

- If the employee failed to do any work on the holiday and did not have reasonable cause, the employee has no entitlement.
- If the employee failed to do any work on the holiday but did have reasonable cause, the employee is entitled to a substitute day off with public holiday pay or, if there was a “pay plus premium pay” agreement, the employee will be entitled to public holiday pay for the day. Note that the “day before, day after” rule still applies. This means that the employee will have no entitlement if he or she fails without reasonable cause to work all of his or her last regularly scheduled day of work before or first regularly scheduled day of work after the holiday.
- If the employee did some, but not all, of the work that he or she was to have done on the holiday and did not have reasonable cause, the employee is entitled to premium pay for the time that he or she did work on the holiday – but nothing more.

- If the employee did some but not all of the work that he or she was to have done on the holiday but did have reasonable cause, the employee is entitled to be paid at his or her regular rate for the time that he or she did work and a substitute day off with public holiday pay.
- If there was a “pay plus premium pay” arrangement, the employee is entitled to public holiday pay for the day plus premium pay for the time that he or she did work. Note that the “day before, day after” rule applies. This means that if the employee fails without reasonable cause to work all of his or her last regularly scheduled day of work before or first regularly scheduled day of work after the holiday, the employee is entitled to premium pay for the time that he or she did work on the holiday – but nothing more).
- If the employee did all of the work that he or she was to have done on the holiday but fails without reasonable cause to work all of his or her last regularly scheduled day of work before or first regularly scheduled day of work after the holiday, he or she is entitled to premium pay for the time that he or she worked on the holiday – but nothing more.

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## Employees Who Perform 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 Employment Standards Act (ESA), while another kind of work might be exempt.

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

### Example

Kris works for a taxi company as both a taxicab driver and as a dispatcher. Cab driving is exempt from the public holiday part of the ESA, while dispatching is covered. In the work week that Canada Day fell, at least half of the work Kris did was as a dispatcher. She is therefore entitled to public holiday entitlements for Canada Day.

Remember to use the “Public Holiday Calculator” at [www.labour.gov.on.ca/english/es/eop/index.php](http://www.labour.gov.on.ca/english/es/eop/index.php) to help determine your obligations under the act.

## 10. VACATION WITH PAY

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*Under the Employment Standards Act (ESA), most employees are entitled to receive two weeks of paid holiday for each 12 months of employment, whether or not active. Most employees are also entitled to vacation pay for their vacation entitlement year equal to four per cent of the wages earned during that year. However, some employees work in jobs that are not covered by the ESA's vacation with pay provisions. To see if this exemption applies to you, please see the chart referred to under "Helpful Hints" on page 5, or find it at: [www.labour.gov.on.ca/english/es/pubs/guide/special.php](http://www.labour.gov.on.ca/english/es/pubs/guide/special.php).*

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### Vacation Time and Vacation Pay

This employment standard has two parts: vacation time and vacation pay. 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 wages (excluding any vacation pay) earned in the 12-month vacation entitlement year or stub period (where that applies).

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### 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 the employee's hire.
- **Alternative Vacation Entitlement Year:** A recurring 12 month period chosen by the employer to begin on a date other than the employee's date of hire (e.g. employee hired June 1, but employer selects alternative vacation entitlement year commencing January 1).
- **Stub Period:** Period between:
  - Date of hire and beginning of the first alternative vacation entitlement year; or
  - End of a standard vacation entitlement year and the beginning of an alternative vacation entitlement year where the employer switches from the former to the latter.
    - Example: if an employer has chosen an alternative vacation entitlement year that runs January 1 to December 31 and the employee was hired on September 1, the stub period will be September 1 to December 31.

**IMPORTANT NOTE: An employee's vacation entitlement year and stub period includes time the employee spends away from work because of: layoff, sickness or injury, leaves of absence (pregnancy, parental, family medical, organ donor, personal emergency, declared emergency and reservist leaves), any other approved leaves where there is no break in the employment relationship.**

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## Vacation Time

**Employees earn a minimum of two weeks vacation time upon completion of every 12 month vacation entitlement year.** The Employment Standards Act (ESA) does not provide for any increases to the two-week vacation time entitlement, although an employee's contract of employment or collective agreement may do so.

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

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. The employee 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.

**An employee's contract of employment or collective agreement may provide a greater right or benefit with respect to vacation time or pay.** An employee who does not complete either the full vacation entitlement year or the stub period (if any) does not qualify for vacation time under the ESA. However, employees earn vacation pay as they earn wages. So if an employee who is paid by the hour works even just one hour, he or she is still entitled to an amount equal to four per cent of the hour's wage as vacation pay.

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## How to Calculate Stub Period Vacation Entitlements

### Example 1: When the employee has a regular work week

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

- 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 (four months)

#### *Calculating Entitlement*

- $R = 4 \text{ months} / 12 \text{ months}$
- $2 \text{ weeks} \times 4/12 = 2/3 \text{ of a week.}$

Therefore, the employee is entitled to 0.67 of a week off in vacation.

## Example 2: When the employee does not have a regular work week

The vacation entitlement for a stub period is calculated as two weeks multiplied by 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).

- 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.

### *Calculating Entitlement*

- $A = 51 \text{ days} / 17 \text{ work weeks}$
- $R = 4 \text{ months} / 12 \text{ months}$
- $[(2 \text{ weeks} \times (51/17)) \times (4/12)] = 2 \text{ days}$

---

## Deadlines for Taking Vacation

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

### **Example**

Riley was hired on February 24, 2005. His employer established an alternative vacation entitlement year of July 1 to June 30. The pro-rated amount of vacation time that Riley earned for the stub period of February 24, 2005 to June 30, 2005 must be taken within 10 months of the end of the stub period (that is, within 10 months of June 30, 2005). The vacation time Riley earned for the entitlement year July 1, 2005, to June 30, 2006, would have to be taken within 10 months of the end of the vacation entitlement year (that is, within 10 months of June 30, 2006).

If the deadline under the Employment Standards Act for taking a vacation comes up when an employee is on pregnancy, parental, family medical, organ donor, personal emergency, declared emergency or reservist leave, the vacation must be taken when the leave ends or, if the employer and the employee agree in writing, at a later date.

Likewise, if an employee's contract requires that his or her vacation must be taken within a specified period or be lost, and that period ends while the employee is still on leave, the employee may, despite the contract, postpone the vacation until the leave ends or, if the employer and employee agree in writing, until an even later date.

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## 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.**

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## Scheduling Vacation Time Earned from a Vacation Entitlement Year

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

### Example 1: 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 two.

*Calculating the entitlement to single vacation days earned:*

- 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 six single vacation days in respect of that vacation entitlement year.

### Example 2: 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 two.

*Calculating the entitlement to single vacation days earned:*

- The employee worked a total of 149 days in the preceding vacation entitlement year.
- There are 52.18 weeks per year.
- The average number of days worked per week in the year would be:  
 $149 \text{ days} \div 52.18 \text{ weeks per year} = 2.86 \text{ days}$
- The single vacation days the employee would be entitled to in respect of that year would be:  
 $2 \times 2.86 \text{ days}$  or 5.72 days of vacation

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## 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” at [www.labour.gov.on.ca/english/es/pubs/guide/vacation.php](http://www.labour.gov.on.ca/english/es/pubs/guide/vacation.php).

If the amount of vacation time earned is between two and five days, the vacation days must be taken consecutively, unless the employee requests in writing that they not be taken consecutively and the employer agrees in writing.

If the amount of vacation time earned with respect to the stub period is more than five days, the first five days must be taken consecutively and any additional days may be taken together with the first five or in a separate period of consecutive days, unless:

- the employee requests in writing that the vacation days not be taken consecutively; and
- the employer agrees in writing.

---

## Vacation Pay

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

**Example:** Suppose Janice earned gross wages of \$16,000 in her vacation entitlement year. She is entitled to four per cent of \$16,000 as vacation pay, or \$640.

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 wages on which vacation pay is calculated include, but are not limited to:*

- Regular earnings, including commissions;
- Bonuses and gifts that are non-discretionary or are related to hours of work, production or efficiency;
- Overtime pay;
- Public holiday pay;
- Termination pay;
- Allowances for room and board

*They do not include:*

- Vacation pay
- Tips and gratuities
- Discretionary bonuses and gifts that are not related to hours of work, production or efficiency (e.g. a Christmas bonus unrelated to performance)

- Expenses and traveling allowances
- Living allowances
- Contributions made by an employer to a benefit plan and payments from a benefit plan (e.g., sick pay) that an employee is entitled to
- Federal employment insurance benefits
- Severance pay

### When to Pay Vacation Pay

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

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

### When Employment Ends

When employment ends (for example, when an employee quits, or his or her employment is terminated), an employee is entitled to be paid the vacation pay that he or 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. Remember that vacation pay is payable on termination pay, but not on severance pay.

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

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## Paying Vacation Pay Owing when Employment Ends

### Example

Jenna was hired on April 1, 2005, and had a standard vacation entitlement year. As of March 31, 2006, she had earned two weeks of vacation time and four per cent 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 four per cent of the wages she earned between April 1, 2005 and May 15).

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## Vacation and Leaves of Absence

Because the employment relationship continues during a period of pregnancy, parental, family medical, organ donor, personal emergency, declared emergency or reservist leave, **the time on leave counts toward the completion of a vacation entitlement year or stub period.** For example, an employee on leave for some or even all of a vacation entitlement year would still have earned a full two weeks of vacation time by the end of the vacation entitlement year. The vacation pay earned during that vacation entitlement year would be a minimum of four per cent 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 three weeks paid vacation for each year of service) an employee on leave may not have earned either vacation time or pay while on leave **according to the contract.** However, the employer must ensure the employee receives the greater of:

- the vacation time and pay that was earned under the contract; or
- the minimum vacation time and vacation pay he or she would have earned under the Employment Standards Act.

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## Contract of Employment Provides 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 and then parental leave for a total of six months of her vacation entitlement year. Although Ingrid's length of service continues to accrue while she is on pregnancy and parental leave for purposes of the Employment Standards Act (ESA), she is not credited with active service while on leave for purposes of the contract.

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 five 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 four per cent of the wages she had actually earned during the vacation entitlement year.**

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## Employees Must Receive at least Two Weeks of Vacation Time (Four-per cent Pay)

Tony earns three weeks of paid vacation for every year of active service. He is on a parental leave for eight months of his vacation entitlement year. Under his contract of employment, Tony earned one-third of the three weeks paid vacation he would otherwise earn in a year. In other words, he earned one week of paid vacation for the vacation entitlement year. However, his employer must ensure that Tony receives at least the minimum Employment Standards Act (ESA) vacation entitlements of two weeks of vacation time and four per cent 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 four per cent of the gross wages he had actually earned in the vacation entitlement year.**

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## When Vacation Records Are Requested

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);
- the amount of wages on which the vacation pay was calculated; and
- the period of time to which those wages relate.

**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 a statement **in writing** 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, 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.

**IMPORTANT NOTE: The employer is required to provide the information with respect to a vacation entitlement year or stub period only once.**

If the employee has agreed that vacation pay that accrues during a pay period will be paid on the pay day for that pay period, the employer does not have to:

- make or keep records of the amount of vacation pay paid during a vacation entitlement year or stub period or the amount of wages on which that vacation pay was based; or
- provide a statement setting out vacation pay and vacation time information contained in the employer’s records as discussed above.

The **employer needs to:**

- 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 the vacation pay information set out in the wage statement or separate statement, as the case may be.

**Vacation Pay Checklist**

Do you keep records of vacation time and vacation pay for three years after they are made?	Y <input type="checkbox"/>	N <input type="checkbox"/>
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# 11. TERMINATION AND SEVERANCE

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Although termination and severance are often spoken together in the same phrase, they are very different. These concepts are among the most common areas of confusion for both employees and employers. A frequent cause of termination and severance is staff and/or business change. These can be charged, emotional events, which makes it all the more important to understand your obligations and to comply with the Employment Standards Act (ESA).

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## Defining Termination of Employment

There are a number of expressions that describe ending employment. A few of them are "let go," "discharged," "dismissed," "fired" and "permanently laid off."

In most cases, when an employer ends the employment of an employee who has been continuously employed for at least three months, the employer must provide the employee with written notice of termination. Alternatively, the employer could provide termination pay instead of notice, or a combination of notice and termination pay.

Under the Employment Standards Act, a person's employment is terminated if the employer:

1. Dismisses or stops employing an employee, including when an employee is no longer employed due to the bankruptcy or insolvency of the employer;
2. Constructively dismisses\* an employee and the employee resigns, in response, within a reasonable time; and/or
3. Lays an employee off for a period that is longer than a temporary lay-off.

\*For more information on constructive dismissals see:

[www.labour.gov.on.ca/english/es/pubs/guide/termination.php#cons\\_dismissal#cons\\_dismissal](http://www.labour.gov.on.ca/english/es/pubs/guide/termination.php#cons_dismissal#cons_dismissal)

***IMPORTANT NOTE: If termination pay instead of notice or a combination of notice and termination pay is given, the total amount of pay received must be equal to the total amount that the employee would have received had full notice been given. The calculator included in this chapter will help you determine your financial obligations in that regard.***

If an employee has not been continuously employed for at least three months, there is no obligation to provide either notice of termination or termination pay. An employer is not required to give an employee a reason why his or her employment is being terminated. There are, however, some situations where an employer cannot terminate an employee's employment even if the employer is prepared to give proper written notice or termination pay.

## Example

An employer cannot end someone's employment (or penalize him or her 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.

This is called reprisal. A reprisal is a serious violation under the ESA and can be costly for an employer if they are found to be in contravention.

An employment standards officer could issue an order requiring reinstatement or compensation for any loss that the employee suffers, or both. Please see the chapter on Reprisals in the *ESA Guide* for more information: [www.labour.gov.on.ca/english/es/pubs/guide/reprisals.php](http://www.labour.gov.on.ca/english/es/pubs/guide/reprisals.php)

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## Requirements During the Statutory Notice Period: Termination

During the statutory notice period, an employer:

- must not reduce the employee's wage rate or alter any other term or condition of employment;
- must continue to make whatever contributions would be required to maintain the employee's benefit plans; and
- must, for each week, pay the employee the wages he or she is entitled to. (If in any week the employee earns less than the amount of his or her regular wages for a regular work week, he or she must still be paid the amount of his or her regular wages for a regular work week.)

### Regular Wages

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

**IMPORTANT NOTE: For more information see *Employment Standards Act, s.5 (2)*:**

[http://www.e-laws.gov.on.ca/html/statutes/english/elaws\\_statutes\\_00e41\\_e.htm#BK7](http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_00e41_e.htm#BK7).

### 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**.

Some employees do not work the same number of hours every week or are paid on a basis other than time. For them, regular wage for a regular work week is the average amount of regular wages earned during the weeks in which the employee worked in the 12 weeks immediately preceding the date of notice or, if no notice was given, the termination date.

An employer is not allowed to require an employee to take vacation during the statutory notice period unless the employee, **after receiving written notice of termination**, agrees to take his or her vacation time during the notice period.

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## How to Provide Notice

In most cases, notice of termination of employment must:

- be in writing;
- addressed to the employee;
- provided to him or her:
  - in person;
  - by mail (if the method of mail delivery permits delivery to be verified);
  - by fax or e-mail (if the employee is equipped to receive fax or email);
  - by courier; or
  - by being left in a sealed envelope at the employee's residence with a person who appears to be at least 16 years old.

There is an optional alternative way of providing notice where the employment contract or collective agreement of the employees concerned allows them to “bump” each other on the basis of seniority.

In that case, the employer may 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 whose employment the employer intends to terminate, and the proposed layoff or termination date. The posting of the notice is considered to be notice of termination, as of the date of the posting, to any employee who is bumped by the employees named in the notice.

***IMPORTANT NOTE: This notice of termination must still meet the length of notice requirements set out in the ESA. There are also special rules regarding how notice is provided when there is a Mass Termination. For more information on Mass Termination see: [www.labour.gov.on.ca/english/es/pubs/guide/termination.php](http://www.labour.gov.on.ca/english/es/pubs/guide/termination.php)***

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## 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, with respect to an employer, means a location where the employer carries on business. When the employer carries on business at more than one location, separate locations are considered one establishment if:

- the separate locations are located within the same municipality, or

- one or more employees at a location have seniority rights that extend to the other location under a written employment contract whereby the employee or employees may displace ("bump") another employee of the same employer.

If a mass termination occurs, the employer must submit the "Form 1" (Notice of Termination of Employment, available at: [www.labour.gov.on.ca/english/es/pdf/Form1.pdf](http://www.labour.gov.on.ca/english/es/pdf/Form1.pdf)) to the Director of Employment Standards. **Notice of mass termination is not considered to be effective until the employer submits this form.**

In addition to providing employees with individual notices of termination (or posted notice where bumping is possible, as discussed above) 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 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 whose employment is being terminated in the same four-week period. **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 of **500 or more employees** is to be terminated.

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## Exceptions 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.

If an employer does not provide termination notice, or does not provide enough notice, the employee will generally be entitled to termination pay to make up for the lack of notice or the insufficient notice.

### Helpful Tips

- To see a more detailed discussion about notice of termination and termination pay, see: [www.labour.gov.on.ca/english/es/pubs/guide/termination.php](http://www.labour.gov.on.ca/english/es/pubs/guide/termination.php)
- To determine whether you have an obligation to pay termination pay and the amount owing, please see the Termination Pay Calculator at: [www.labour.gov.on.ca/english/es/tools/index.php](http://www.labour.gov.on.ca/english/es/tools/index.php)

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## Severance Pay

Severance pay is not the same as termination pay, which is given in place of the required notice of termination of employment. Severance pay is compensation that is paid by an employer to a qualified

employee who has his or her employment severed. It **compensates an employee for loss of seniority and the value of firm-specific skills and recognizes his or her long service.**

## When Severance Occurs

A person's employment is "severed" when his or her 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\* 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;
- Lays the employee off because the employer permanently discontinues all of the business at an establishment (remember that 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 the employer two weeks' written notice, and the resignation takes effect during the statutory notice period.

\*For more information on constructive dismissals see:

[www.labour.gov.on.ca/english/es/pubs/guide/termination.php#cons\\_dismissal#cons\\_dismissal](http://www.labour.gov.on.ca/english/es/pubs/guide/termination.php#cons_dismissal#cons_dismissal)

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## Wrongful Dismissal

The rules under the Employment Standards Act (ESA) about termination and severance of employment are minimum requirements. An employee may have greater entitlements under the common law, which he or she might choose to enforce by suing the employer in court for wrongful dismissal. While an employee cannot both sue an employer in court for wrongful dismissal and pursue a claim for termination pay or severance pay with the ministry if the lawsuit and the claim relate to the same termination or severance of employment, **the fact that the employer has provided notice of termination or termination pay and severance pay in accordance with the ESA does not mean that the employee could no longer sue for wrongful dismissal.** Employees and employers may wish to obtain legal advice concerning their rights and obligations.

### Helpful Tips

- To see a more detailed discussion on when an employee's employment is considered severed, visit: [www.labour.gov.on.ca/english/es/pubs/guide/severance.php](http://www.labour.gov.on.ca/english/es/pubs/guide/severance.php)
- To determine whether you have an obligation to pay severance pay and the amount owing, please see the Severance Pay Calculator at [www.labour.gov.on.ca/english/es/tools/index.php](http://www.labour.gov.on.ca/english/es/tools/index.php)

## 12. LAWS CHANGE – YOUR BUSINESS AND EMPLOYMENT STANDARDS

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Historically, employment standards laws have been frequently reviewed and updated to address changes in the Ontario workplace. For example, in November 2009, the Employment Standards Act (ESA) was changed to assist temporary help agency employees.

Information, resources and tools on these important changes – and others – can be found on our website: [www.labour.gov.on.ca](http://www.labour.gov.on.ca). For additional questions, please call our call centre at 1-800-531-5551. There are also a number of interactive tools that address many topics in this workbook.

Understanding and following the ESA requires that those affected by changes make the time to read about them and ask questions if something is unclear. The Employment Standards website and its materials are updated to include new information, so please check it often. **It is our responsibility to communicate the ESA changes as clearly and quickly as possible. It is your job is to stay informed.**

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This Workbook is provided for your information and convenience only.  
For information, call the Employment Standards Call Centre at 1-800-531-5551 or visit [www.labour.gov.on.ca](http://www.labour.gov.on.ca).

Complying with the Employment Standards Act: *A Workbook for Employers* | September 2010