

# MODULE 1

## Overview of the Employment Standards Act (Ontario)



### DEFINITIONS

**Employee:** *Someone who...*

1. Works for an employer for wages;
2. Supplies services to an employer for wages;
3. Is trained by the employer in their trade; or
4. A homeworker.

**Employer:** *Someone who is...*

1. An owner OR manager;
2. Of a business OR undertaking;
3. Who does the following:
  - a. Has **CONTROL** or **DIRECTION** of the employment of a person; or
  - b. Is directly or indirectly **RESPONSIBLE** for the employment of a person.

**Establishment:** *Where an employer carries on business. Multiple establishments can be found to be one establishment when:*

1. They are within the same municipality, or
2. Seniority rights carry over between each.

**Wages:**

1. *Money payable under an employment contract;*
2. *A payment required under the ESA; and/or*
3. *Room and board.*

**Wages are NOT:**

1. *Tips or gratuity;*
2. *Discretionary bonus;*
3. *Expense and travelling allowances; or*
4. *Benefit contributions.*

**Tip or Gratuity:** *A tip is a payment...*

1. *Voluntarily left to an employee by a customer;*
2. *Voluntarily made to an employer to be given to an employee; or*
3. *A charge imposed on a customer to be given to an employee(s).*

**NOTE:** *A tip is NOT a charge related to the method of payment used.*



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Ministry of Labour

**Employment Standards in Ontario**  
The *Employment Standards Act, 2000* (ESA) protects employees and sets minimum standards for most workplaces in Ontario.  
Employers are prohibited from penalizing employees in any way for exercising their ESA rights.

**FAIR AT WORK ONTARIO**

### REQUIRED POSTINGS

The Employment Standards Branch of the Ministry of Labour has produced a poster outlining a number of important details under the ESA. This poster is accompanied by a number of obligations on the part of the employer.

This poster is freely available on the Ministry of Labour website in various languages: <https://www.labour.gov.on.ca/english/es/pubs/poster.php>.

#### EMPLOYER MUST:

1. An employer **MUST** ensure each employee is provided with a copy of this poster within 30 DAYS of the employee's first day of work. (i.e., pdf, hardcopy, link to Ministry's website)

### HOW THE ESA APPLIES

The ESA is **REMEDIAL** legislation. Its purpose is to guarantee basic rights for every employee working in Ontario.

Where non-exempt work is performed by a non-exempt employee in Ontario, the employee is covered by the ESA.

#### *Related/Same Employer*

Separate parties may be treated as one employer for the purposes of ESA.

The practical implication of this is that each party may be held jointly liable for violating the ESA, even if an individual party can be totally or partially responsible to face a penalty or fine under the ESA.

It can also mean that each party is liable to an employee for outstanding wages.

#### *No Contracting Out!*

An employer and employee cannot agree to waive the minimum standards under the ESA in a separate contract – even if an employee signs a contract agreeing to it – it will not be valid.

An employee can only contract out of the ESA where it provides the employee with a greater right or benefit than the basics of the ESA.

### What you need to know

#### Minimum wage

Most employees are entitled to be paid at least the minimum wage. For current rates visit: [Ontario.ca/minimumwage](http://Ontario.ca/minimumwage).

#### Hours of work and overtime

There are daily and weekly limits on hours of work, and rules around meal breaks, rest periods and overtime. For more information visit: [Ontario.ca/hoursofwork](http://Ontario.ca/hoursofwork) and [Ontario.ca/overtime](http://Ontario.ca/overtime).

#### Public holidays

Ontario has a number of public holidays each year. Most employees are entitled to take these days off work and be paid public holiday pay. For more information visit: [Ontario.ca/publicholidays](http://Ontario.ca/publicholidays).

#### Vacation time and pay

Most employees earn vacation time after every 12 months of work. There are rules around the amount of vacation pay an employee earns. For more information visit: [Ontario.ca/vacation](http://Ontario.ca/vacation).

#### Leaves of absence

There are a number of job-protected leaves of absence in Ontario. Examples include pregnancy, parental and family caregiver leave. For more information visit: [Ontario.ca/ESAguide](http://Ontario.ca/ESAguide).

#### Termination notice and pay

In most cases, employers must give advance written notice when terminating employment and/or termination pay instead of notice. For more information visit: [Ontario.ca/terminationofemployment](http://Ontario.ca/terminationofemployment).

Learn more about your rights at:

[Ontario.ca/employmentstandards](http://Ontario.ca/employmentstandards)  
1-800-531-5551 or TTY 1-866-567-8893

Twitter: @ONlabour Facebook: OntarioMinistryofLabour

#### Other employment rights, exemptions and special rules

There are other rights, exemptions and special rules not listed on this poster including rights to severance pay and special rules for assignment employees of temporary help agencies.



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Version 8.0



However, there are some exceptions. You may not be covered under the ESA if you are a:

- Co-op college or high school student;
- Ontario works participant;
- Correctional inmate;
- Corporate director;
- Office holder;
- Police officer; and/or
- A member of a quasi-judicial tribunal. **NOTE: For a complete listing of other individuals not governed by the ESA, please check the ESA and its regulations.**



### *Independent Contractor*

Is an individual performing work for a business.

The benefits for a business to use an independent contractor in place of an employee:

1. ESA does **NOT** apply;
2. Tax advantages for **BOTH** parties; and
3. Administrative savings.

It is the businesses' responsibility to prove that the individual is appropriately characterized as an independent contractor. If not, they can be liable for misclassification.

#### Implications of Misclassification:

- Order to comply (at minimum)
- Notice of contravention
- Prosecution

If there are other violations in relation to the employee:

- Order to pay any monetary entitlements the employer has withheld or denied by the employer
- Order to comply

## COMPLAINTS AND ENFORCEMENTS

When an employee feels that the ESA has been breached, they have the right to file a complaint with the Ministry of Labour.

There is no cost to file a complaint.

The employer may **NOT** penalize an employee for filing a complaint.

There is a limitation period of **2 YEARS**. The Ministry will not initiate a prosecution under the ESA more than two years after the alleged offence has been committed.

### *Exceptions*

Not every employee can file a complaint. An employee may not file a complaint if:

1. They are represented by a union; and/or
2. When an employee has privately sued for the same matter.

### *Limitation Period for Unpaid Wages*

There are different time limits relevant to enforce the recovery of unpaid wages.

#### Where the unpaid wages came due **BEFORE** February 20, 2015

The Ministry can only issue an order for unpaid wages that were due prior to Feb. 20, 2015, if the claim was filed within **6 MONTHS** of the date of due wages.

#### Exceptions:

**Vacation Pay:** Unpaid vacation pay may be recovered if the claim is filed within **12 MONTHS** of the date of due vacation pay.

**Multiple Violations:** If an employer has violated the same sections of the ESA more than once with respect to the employee – and if at least one of the violations occurred in the six-month period before the claim was filed, the employee is entitled to recover the wages due for all violations that occurred within a **12 MONTH** period before the claim was filed.



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### **Where the unpaid wages came due ON or AFTER February 20, 2015**

The Ministry can issue an order for unpaid wages (including vacation pay) if the employee has filed a claim within **TWO YEARS** of the date of due wages.

**NOTE: An employee may make a claim outside the time limit if the employer told the employee they did not have an ESA entitlement, when the employer knew they did, or should have known, and that caused the employee to delay filing a claim.**

### ***Outcome of Complaint***

As a result of a complaint, the Ministry may issue one or more of the following to an employer:

- An order to pay wages;
- An order for compensation or reinstatement;
- A compliance order; and/or
- A notice of contravention.

**NOTE: For a complete list of Complaint Outcomes, please refer to the ESA.**

### ***MOL Powers of Investigation***

The Ministry of Labour has a wide range of powers available to it under the ESA. An investigation Employment Standards Officer (ESO) may enter any workplace during business hours, or daylight.

Where the workplace is someone's house, the ESO must obtain a warrant to enter if not allowed by the owner. Of the powers of an ESO, they may:

- Examine any record or thing;
- Require production of any record or thing;
- Remove and copy any record or thing;
- Use the employer's IT; or
- Question any person.

The ESO may request a meeting and compel attendance within **fifteen days**, if one of the following situations applies:

- The ESO is investigating a complaint against an employer;
- The ESO is investigating a place and has reasonable grounds to believe an employer has contravened the ESA;
- The ESO has information suggesting the employer has contravened the ESA regarding an employee; or
- The ESO wishes to determine whether the employer of an employee who lives in the employer's residence is obeying the ESA.

The ESO may also order any or all of the employee, the employer, and a corporate director or employee to the meeting, as well as what materials they are to bring with them or make available to the ESO.

### ***Order to Pay Wages***

If an ESO finds an employer owes wages to an employee, the ESO may arrange with the employer to directly pay wages to the employee, order the employer to pay wages to the employee, or order the employer to pay wages to the Director of Employment Standards.

The order must contain information setting out the amount found to be owing to the employee. The **MAXIMUM** amount of wages an employer can be ordered to pay:

**BEFORE Feb. 20, 2015 = \$10,000 AFTER**

**Feb. 20, 2015 = No Cap**



### *Order for Compensation or Reinstatement*

Some breaches of the ESA may be remedied by compensation for the loss OR compensation AND reinstatement.

Areas of the ESA where a violation results in the employee being ordered reinstatement are:

- Leave of absence;
- Violations of specific provisions of the retail business establishment section of the ESA;
- Violations of the rules in the ESA regarding lie detectors; and
- Reprisal for the employee claiming his or her rights under the ESA.

This is a unique area of the ESA. Outside of the union context, it is almost impossible to have an employee reinstated to his or her previous role. It is reserved for the most serious violations under the ESA.

### *Compliance Order*

An ESO may order:

- The party to stop breaching the ESA;
- What the party must do or not do to comply with the ESA; and
- Specify a date by which the party must do so.

A compliance order is not the ONLY remedy available to an ESO. In some cases, The ESO may make additional orders under different sections of the ESA.

### *Refusal to Issue Order*

Where the ESO refuses to issue an order, it must provide notice in writing to the complainant OR, if no order is issued within 2 years, the ESO will be deemed to have refused to issue the order.

### *Notice of Contravention*

An ESO may issue a notice that sets out the breach has occurred and the specified penalty for the breach. The notice issued must include the nature of the contravention and must be served to the party who allegedly breached the ESA.

A notice of contravention being issued does not necessarily mean the party receiving the notice has contravened the ESA.

Instead, the party receiving the notice has up to **30 days** to apply to the Ontario Labour Relations Board (OLRB) for review of the notice. The OLRB will decide whether or not to uphold the order.

If the party receiving the notice does not apply to the OLRB for review within the 30-day window, the party will be deemed to have contravened the ESA.

If the party is found to have breached the ESA, the party must pay the fee set by the ESO, and the following may be publicized:

1. The name of contravening party;
2. Description of contravention;
3. Date of contravention; and/or
4. Penalty for contravention.



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### *Review of an ESO Decision*

Parties have the option of requesting a formal review of an ESO decision, this is effectively a review that is heard by the OLRB. The request must be submitted in writing within **30 days** of receipt of the Order.

An employer may apply for review of:

- An order to pay wages
- An order to pay fees
- A compliance order
- A notice of contravention of the ESA
- An order to pay compensation
- An order to reinstate an employee

When a request for a review is received, the OLRB may schedule a mediation with the parties. However, no mediation will be scheduled where a notice of contravention has been issued. Where no mediation is scheduled, or is unsuccessful at reaching a settlement, the OLRB will schedule a hearing.

If the ESO issued an order, the OLRB may amend, overturn or uphold the order, or issue a new order.

If the ESO **DID NOT** issue an order, the OLRB may issue its own order, or uphold the ESO refusal to issue an order.

The OLRB's decision is final and binding. Should a party not be satisfied, they may apply for judicial review of the OLRB's decision.

### *Settlement*

The ESO assigned to investigate can attempt to reach a settlement between the employer and employee. If a settlement is reached, the settlement is binding, the complaint is deemed withdrawn, and the investigation is terminated.

Where one party to a settlement disagrees, believes the settlement to be unfair, or that it was reached through fraud or coercion, it may apply to the OLRB to set the settlement aside.

The OLRB may set aside the settlement, and as a result reinstate the complaint and resume the investigation.

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## COLLECTIONS

The Director of Employment Standards may authorize a “collector” to collect amounts owing under the ESA. A collector may also collect a “reasonable” fee from each party associated with the costs of the collection.

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## OFFENCES AND PROSECUTIONS

### *Record-Related Offence*

It is an offence to keep a false record or records, and to provide false or misleading information under the ESA.

### *Breaching the ESA*

It is an offence to breach or fail to comply with an order, direction or other requirement under the ESA



### *Liability of Individuals, Corporate Officers, Directors or Agents*

#### Individual

- Maximum fine of \$50,000;
- 12 months imprisonment; OR
- Both

#### Corporation

- 1<sup>st</sup> offence = \$100,000 max. fine
- 2<sup>nd</sup> offence = \$250,000 max. fine
- 3<sup>rd</sup> offence = \$500,000 max. fine

#### Liability of Corporate Director

- A corporate officer, director or agent may be liable for an offence under the ESA for failure to comply with an ESO order
  - Maximum fine of \$50,000
  - Only a director of a corporation may be responsible for this offence
- A corporate officer, director or agent permitting the corporation to commit an offence ◦ Fine or imprisonment
  - An officer, director, or agent of a corporation may be held liable for this offence

## AGREEMENTS

An employer can obtain an agreement with an employee regarding the threshold for:

- Hours in excess of the daily limit;
- Hours in excess of the weekly limit; and/or
- Averaging hours of work for overtime pay.

### *Hours in Excess of the Daily Limit*

Daily limit on hours of work is **8 hours**. In some cases, it may be greater where an employer has established a regular work day for the employee that exceeds 8 hours (*e.g.*, the employee's regular schedule is four 10 hour days per week). An employee may exceed the limit pursuant to an agreement with the employer. An employee may not exceed this agreement.

### *Hours in Excess of the Weekly Limit*

Weekly limit on hours of work is **48 hours**. An employee may exceed the limit pursuant to an agreement with the employer. An employee may not exceed this agreement.

Two requirements must be met before an employee may work excess daily or weekly hours:

1. The employer and employee agree in writing the maximum number of additional hours the employee will work; and
2. The employee must receive, and acknowledge receipt in writing, the most recent document published by the Director of Employment Standards describing the rights of employees and obligations of employers related to hours of work under the ESA.

The employee may retract approval at any time.



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### *Averaging Hours of Work for Calculating Overtime Pay*

The statutory overtime rate = 1.5x

The standard overtime threshold = 44 hours/week

An employee's hours of work may be averaged over more than **two or more consecutive weeks**.

An employer can average hours of work if two requirements are met:

1. The employee and employer agree in writing the employee's hours of work will be averaged over a specified number of weeks; and
2. The averaging period does not exceed four weeks or the number of hours specified in the agreement, whichever is lower.

The employee may retract approval at any time.

### *Approval to Forego Vacation*

An employee can forego taking a vacation if the Director of Employment Standards and the employer approve. However an employee **cannot** agree to forego receiving vacation pay.

