

MODULE 5

Other



CONTINUITY OF EMPLOYMENT

There are two ways to consider continuity of employment.

1. Transfer of business from one employer to another;
2. Transfer of building from one building services provider to another

Continuity Provisions

The continuity provisions allow for an employee's entitlements to "flow through" uninterrupted to the new employment agreement. An employee is not a "new employee" after transfer of business/ building.

This preserves the employee's entitlements such as:

- Seniority
- Performance records
- Leaves of absence & vacations
- Termination/severance pay

Example 1: Business is Sold

Jodi's employment does not end with the transfer of the business. The length of time she worked for Michael must be recognized for any rights she has that are based on her length of employment.

For example, since Jodi has five or more years of employment, she earns three weeks of vacation time after completion of each vacation entitlement year. She also earns six per cent vacation pay. If the new company terminates Jodi's employment one year after the transfer, Jodi will be entitled to eight weeks' notice rather than just one week, because her time with Michael is treated as if it was employment with the new company.

Example 2: Part of Business is Sold

Farrah works for a manufacturing company that produces cars and airplanes. The company sells the car division so it can concentrate on plane production.

The buyer of the car division offers to continue to employ Farrah, and she agrees to work for the new owner.

Farrah's employment does not end with the sale. The total time Farrah was employed by the business must be taken into account when determining her rights while working for the new employer.

BUILDING SERVICE PROVIDERS

Is a person or company that provides services related to a premises/building, its occupants and visitors. This can include a building's owner or manager if he/she is providing these services. Services include:

- Cleaning
- Food services
- Parking garage/parking lot
- Security
- Property management
- Concession stands



Information Request

When a building services provider (BSP) shops for new contracts, it can ask the building owner/ manager for information, including:

- Employee job classifications/descriptions;
- Employee wage and benefit information;
- Previously existing continuity periods; and
- Hours worked.

This information can help the potential new provider decide whether, and on what terms, to make a bid to take over the provision of the services, and the number of employees, if any, it will retain if it wins the contract.

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

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

Anyone who receives information about employees under this provision must use it only for the purposes of complying with the building services providers provisions of the ESA and determining their obligations or potential obligations under those provisions and shall not disclose the information except as required by those provisions.

Example 3: Building Services Provider is Replaced

Daniel worked as a security guard for 2 years at ABC Security. His employer has a contract with a building owner to provide security services in the owner's building. The contract is for a specific period of time, and when it expires the owner contracts with a new company, XYZ Security. Daniel is hired by XYZ Security and continues to work in this building.

Example 4: Service is Contracted to Building Services Provider

Zack has worked for DEF Insurance for 6 years as a cleaner. His job is to keep DEF's office building clean. DEF decides to contract this service to a cleaning company, Busy Bee Cleaning.

Busy Bee Cleaning chooses to hire Zack, and he continues working in the building. Zack's length of employment with DEF must be included when determining his length of employment with Busy Bee Cleaning.

Continuity of Employment: Vacation Time & Pay

If an employee works for one year and less than 5, the employee qualifies for **2 weeks'** vacation pay, and **4%** of gross wages accrue as vacation pay.

If an employee works for 5 years or more, the employee qualifies for **3 weeks'** vacation pay, and **6%** of gross wages accrue as vacation pay.

Example 1: Sale of Business

Arash has worked for a business for 16 months when the business is sold. He has not taken any vacation at the time of the sale. Arash continues to work for the new owner, and his previous employment with the seller must be recognized by the new owner.

The new owner must give Arash the vacation he earned in his first 12 months of employment with the seller within 6 months of hiring.

The new owner must also pay Arash the vacation pay accrued in respect of that vacation entitlement year (if it has not yet been paid).



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Example 2: Replacing Provider

Connie has worked as a cleaner with a company for 38 months when the company loses its cleaning contract. She is immediately hired by the company that won the contract. Connie has already taken two weeks of vacation for each of her first two vacation entitlement years with her former employer.

The new provider must recognize Connie's employment with her former employer. Her new employer must therefore give her the two weeks of vacation earned in respect of her third vacation entitlement year (and the years that follow, so long as Connie stays with the new employer).

The vacation must be taken within 10 months of the completion of the third vacation entitlement year (8 months after she was hired by the new building services provider).

Example 3: Sale of Business

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

She is considered to have started her employment three years and four weeks before her baby is due, and so she qualifies for pregnancy leave.

Example 4: Replacing Provider

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

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

Example 5: Sale of Business

Stacy, Julie's same-sex partner, has worked for a printing company for 13 years. Julie gave birth six months ago. The printing company was sold when the baby was five months old and Stacy continues to work for the new owner. Stacy plans to take a parental leave when the baby is seven months old.

Her total length of employment with the business is attributed to the new owner, and therefore her total length of employment is more than 13 weeks, so she qualifies for parental leave.

Continuity of Employment: Termination & Severance

In most cases, when a person's employment is ended by an employer, the employee is usually entitled to receive either written notice of termination, termination pay, or a combination of both.

Some employees are also entitled to severance pay – the length of the notice or the amount of termination pay or severance pay depends on how long the person has been employed.

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

DEF Foods is responsible for paying Boris **termination pay and severance pay** if applicable, even though he was never employed by DEF Foods. Boris is entitled to 8 weeks' pay in lieu of notice, and if he is entitled to severance pay, 10 weeks of severance pay.

NOTE: The entitlement to severance depends on DEF's payroll, not ABC's.



Exception “13-Week Gap” (Sale of Business)

An employee’s history does not transfer between the old and new employees when:

- 13 weeks pass between the date of hire and (the earlier of):
 - Employee’s last date of employment; or
 - The date of the sale of the business

Example: Joshua works for 123 Taxis which is having financial difficulties. His employment is ended by the owners and, 10 weeks later, the business is sold to a new owner, 456 Taxis. 456 Taxis does not immediately offer to hire Joshua. After eight weeks, the new owner realizes he needs more staff. He calls Joshua and asks him to return to his old job. He agrees to return to his old job.

Jacob’s employment with the previous owner is not attributed to 456 Taxis because he was hired more than 13 weeks after his last day of employment with the previous owner.

Exception “13-Week Gap” (Change in Provider)

An employee’s history does not transfer between the old and new providers when:

- 13 weeks pass between date of hire, and (the earlier of):
 - Employee’s last day of employment; or
 - The date the new service provider begins providing service

Example: Donald has worked for four years as a parking garage attendant for BSP, a building services provider. BSP cuts back on its staff and terminates Donald’s employment. Three weeks after his termination, a new building services provider takes over the operation of the parking garage.

Three months later, the new provider hires Donald to work as an attendant at the same parking garage.

Donald’s employment with BDP is not deemed to have been employment with the new service provider because there was a gap of more than 13 weeks.

Special Circumstances

1. A business has been taken over by a landlord due to non-payment of rent;
2. A business has been taken over by a trustee or receiver due to a bankruptcy or receivership; and/or
3. **A business is a franchise operation.**

Franchises

There are 3 circumstances in which the transfer of a franchise can affect continuity:

1. Where the previous owner transfers the franchise directly to the new owner, continuity will apply;
2. Where the previous owner must transfer the franchise back to Corporate prior to transferring the franchise to the new owner, continuity will NOT apply;
3. Where the previous owner transfers the franchise back to Corporate prior to transferring the business to the new owner and Corporate is involved in hiring and operating the business, continuity will apply.



TERMINATION AND SEVERANCE

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

Irrespective of the term used, they all mean the employer no longer wishes to employ the individual and has advised the individual of its wishes.

Termination happens if the employer:

- Dismisses or stops employing an employee;
- “Constructively” dismisses an employee and employee resigns within reasonable time; or
- Lays an employee off for a period longer than “temporary layoff”.

Employer’s Obligations

Where the employee has been continuously employed for 3+ months, the employer must provide the employee with:

- Written notice of termination;
- Termination pay; or
- A combination of both.

NOTE: the employer does not need to have or provide the employee a reason for terminating the employment.

However, there are some situations where an employer cannot terminate an employee’s employment even if they are prepared to give proper written notice or termination pay.

Example: An employer cannot end someone’s employment, or penalize them in any other way, if any part of the reason for the termination of employment is based on the employee asking questions about the ESA or exercising a right under the ESA, such as refusing to work in excess of the daily or weekly hours of work maximums, or taking a leave of absence specified in the ESA.

This is considered a reprisal under the ESA. An employer who is found to have dismissed or otherwise punished an employee for claiming his or her rights under the ESA may be found to have committed a reprisal. The penalties for this include an order to compensate the employee for the losses they suffered as a result of the employer’s reprisal, up to and including ordering the employee reinstated in their pre-dismissal position.

Termination vs. Severance Pay

Termination pay: given in place of required notice under the ESA.

- Maximum of 8 weeks is provided

Severance pay: compensates long-term employees for losses when dismissed.

- Maximum of 26 weeks is provided

Qualifying for Severance Pay – Employee

An employee qualifies for severance pay where:

- The employee’s employment with the employer is severed; and
- The employee has 5+ years of employment with the employer.

Qualifying for Severance Pay – Employer Criteria

Where the employee meets the criteria above, and the employer meets one of the following two criteria, the employee will be entitled to severance pay:

1. Employer has a payroll in Ontario of at least \$2.5 million; or
2. Severed employment of 50+ employees in a 6 month period due to complete/partial business closure.



When Severance Occurs

Employment is “severed” when the employer:

- Dismisses or stops employing the employee (includes insolvency or bankruptcy of employer)
- “Constructively” dismisses the employee and the employee resigns within reasonable time.

Employment is “severed” when the employer:

- Lays the employee off for 35+ weeks in 52 week period;
- Lays the employee off due to permanent business closure; or
- Gives the employee written notice of termination and the employee resigns after giving two weeks’ notice and resignation takes effect during the statutory notice period.

Example: Jacquelyn has worked for seven years, and is entitled to seven weeks’ notice of termination under the ESA. Jacquelyn’s employer gives her 10 weeks’ notice. Jacquelyn must give her employer at least two weeks’ written notice of her resignation.

As long as Jacquelyn’s resignation takes effect during the statutory notice period, in this case the last seven weeks of the 10-week notice period, she continues to be entitled to severance pay.

Calculating Severance Pay

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

of completed years of employment X # of completed months of employment (divided by 12 for a year that has not completed)

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

Example 1: Theresa regularly works 40 hours a week and is paid \$17.00 an hour. Her employer has a payroll of more than \$2.5 million. Her employer gives Theresa seven weeks’ notice of termination, and Theresa works for the notice period. At the end of the notice period, Theresa’s employment is severed. On that date, Theresa has been employed for seven years, nine months and two weeks.

1. To calculate Theresa’s regular wages for a regular work week. Theresa usually works 40 hours a week
 $\$17.00 \times 40 = \680.00
2. # of Theresa’s completed years
7 years
3. Divide the # of completed months Theresa was employed in the incomplete year by 12.
 $9 \text{ complete month's} \div 12 = 0.75$
4. Add the # arrived at in Step 2 (7) to the number arrived at in Step 3 (0.75),
7.75
5. Multiple Theresa’s regular wages for a regular work week (\$680.00) by the number arrived at in Step 4 (7.75)
 $\$680.00 \times 7.75 = \5270.00

Therefore Theresa is entitled to \$5270.00 in severance pay.

Example 2: Commission/Other pay

Charlie works as a commission salesperson at his employer’s high-tech retail store. He is paid commissions on sales made and not on the basis of time worked. Charlie’s employer decides to downsize and Charlie is given eight weeks’ written notice of termination of employment. He works the notice period and his employment is severed. On the date his employment is severed, he has been employed for nine years, six months and three weeks.



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

1. Calculate Charlie's "regular wages for a regular work week" – the average of the regular wages he received in the weeks he worked during his last 12 weeks of employment

$$\$7,723.00 \div 12 = \$643.58$$

2. Number of completed years
9 years

3. Divide the number of completed months Charlie was employed in the incomplete year by 12
6 months \div 12 = 0.5

4. Add the number arrived at in Step 2 and the number arrived at in Step 3
(0.5) 9 + 0.5 = 9.5

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

Therefore, Charlie is entitled to \$6114.01 in severance pay.

When to Pay Severance Pay

The employer must pay the employee's severance pay by the later of:

- 7 days after employment is severed; or
- The employee's next regular pay day.

Severance Pay – Installment Plan

An employer may pay severance in installments where:

- The employee has agreed electronically or in writing to receive payment in installments; or
- With approval from Director of Employment Standards

Installment Plan:

- Cannot be more than 3 years; and
- If payment is not made, full sum is due immediately.

No Entitlement to Severance Pay

An employee will not be entitled to severance pay where the employee:

- Refused a reasonable alternative employment offer;
- Refused a reasonable alternative employment offer through a seniority system;
- Retires on full pension after employment is severed;
- Has employment severed because of permanent closure due to strike;
- Is employed in construction;
- Is employed in on-site maintenance;
- Is guilty of willful misconduct, disobedience, or willful neglect of duty that is not trivial/ condoned; or
- Lost his or her employment because the contract is impossible to perform due to unforeseen circumstances.

Unforeseen circumstances do **NOT** include bankruptcy or insolvency, or when the contract is frustrated or impossible to perform as the result of an injury or illness suffered by an employee.



Recall Rights

Recall right is the right of an employee on layoff to be called back to work by the employer under terms/conditions of employment. This is commonly found in collective agreements.

An employee with recall rights who is laid off for 35 or more weeks may:

- Keep their recall rights and not be paid termination or severance pay; or
- Give up their recall rights and receive termination and/or severance pay.

The employee must make the same decision for termination and severance pay, where entitled to both.

Wrongful Dismissal

The ESA provides the **minimum** employer payment obligations. Some employees could have rights under common law which give them **greater** rights than notice of termination (or pay) and severance pay under the ESA.

Under the ESA and the common law, the employee has a right to reasonable notice of their employer's intention to sever their employment contract.

When the employer does not provide this, it will have wrongfully dismissed the employee.

Qualifying for Notice of Termination of Pay in Lieu

Some employees are not entitled to notice of termination/termination pay under the ESA, including:

- An employee who is guilty of willful misconduct, disobedience or willful neglect of duty;
- A construction employee;
- An employee on a temporary layoff;
- An employee with less than three months employment; or
- An employee who refuses an offer of reasonable alternative employment.

Constructive Dismissal

A constructive dismissal may occur when an employer makes a significant change to fundamental term(s)/condition(s) in employment imposed by the employer without the employee's consent. This can include:

- A significant negative change; (work location, authority, position etc.)
- An employer harassing or abusing the employee into resigning; and/or
- An employer giving the employee an ultimatum such as "quit or be fired".

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

Temporary Layoff

Temporary layoff is when an employer is cutting back or stopping an employee's work without ending employment. If a recall date has not been provided, layoff can still be temporary.

A layoff may result in a constructive dismissal if it is not allowed by the employment contract.



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Week of Layoff

Is a week in which the employee earned less than half of what they would ordinarily earn in a week.

A week of layoff **does not** include any week where the employee did not work for one or more days because he/she was:

- Not available to work;
- Subject to disciplinary suspension; or
- Affected by strike/lockout.

Length of Temporary Layoff

The maximum length of a temporary layoff under the ESA is either:

- Not more than 13 weeks in any period of 20 consecutive weeks; or
- More than 13 weeks in any period of 20 consecutive weeks, but less than 35 weeks of layoff in any period of 52 consecutive weeks, where:
 - The employee continues to receive substantial payments from the employer
 - Insurance/benefit coverage continues;
 - The employee receives supplementary unemployment benefits;
 - The employee would be entitled to receive supplementary unemployment benefits but isn't receiving them because they are employed elsewhere;
 - The employer recalls the employee to work within the time frame approved by the Director of Employment Standards; or
 - The employer recalls the employee within the time frame set out in an agreement with an employee who is not represented by a trade union.

Where Notice of Termination or Termination Pay Required

Under the ESA, an employer may terminate the employment of an employee of 3 months or more if the employer provides:

1. Written notice of termination and the notice period has expired; or
2. Without written notice/less notice than required and termination pay in lieu of notice.

Written Notice of Termination Pay in Lieu of Notice

An employee is entitled to written notice of termination or pay in lieu of notice where the employee has been continuously employed for the same employer for a **minimum 3 months**.

The amount of notice an employee is entitled to depends on the employee's "period of employment".

Period of Employment

A person is considered "employed" not only while he or she is actively working, but also during any time in which he or she is not working but the employment relationship still exists. (Ex. Sick leave, or on layoff).

The following are exceptions:

- Layoff is extended longer than a temporary layoff;
- If 2 separate periods of employment are separated by more than 12 weeks, only the most recent period counts for purposes of notice of termination.



Required notice (3 months +)

Amount of notice required if an employee has been continuously employed for at least three months	
Period of employment	Notice required
Less than 1 year	1 week
1 year but less than 3 years	2 weeks
3 years but less than 4 years	3 weeks
4 years but less than 5 years	4 weeks
5 years but less than 6 years	5 weeks
6 years but less than 7 years	6 weeks
7 years but less than 8 years	7 weeks
8 years or more	8 weeks

NOTE: Special rules determine the amount of notice required in the case of mass terminations – where the employment of 50 or more employees is terminated at an employer’s establishment within a four-week period.

Employer Requirements during the Statutory Notice Period

The employer must:

1. **Not** reduce employee’s wage rate/alter any employment terms/conditions;
2. **Not** schedule employee’s vacation without agreement;
3. Continue to make benefit contributions; **and**
4. Pay the employee’s wages they are entitled to
 - This may not be less than the employee’s regular wages for a regular work week.

Regular Wages

Are wages **other than** overtime pay, vacation pay, public holiday pay, premium pay, domestic or sexual violence leave pay, domestic or sexual violence leave pay, termination of assignment pay, termination pay/severance pay, and certain contractual entitlements.

Regular Work Week

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

For these employees, the “regular wages” for a “regular work week” is the average amount of the regular wages earned by the employee in the weeks in which the employee worked during the period of 12 weeks immediately preceding the date the notice was given.



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Where Employer Provides Notice beyond Statutory Minimum

An employer may provide notice of termination or pay in lieu longer than the statutory minimum.

The statutory part of the notice period is the last part of the period that ends on the date of termination.

Delivery of Notice of Termination

In most cases, written notice of termination of employment must be addressed to the employee. It can be provided in the following ways as long as delivery can be verified:

- In person
- By mail
- By fax
- By email

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

In that case, the employer must post a notice in the workplace (where it will be seen by the employees) setting out the names, seniority and job classification of those employees the employer intends to terminate and the date of the proposed termination.

Termination Pay

Termination pay may replace a written notice, and is a lump sum payment of regular wages for regular work weeks an employee would have received during the notice period.

The employer **must** also:

- Pay vacation pay that would be earned during the notice period; and
- Continue to make benefit contributions.

Example 1: Regular Work Week

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

Fatimah worked 40 hours a week every week and was paid \$17.00 an hour. She also received four per cent vacation pay. Because she worked for more than three years but less than four years, she is entitled to three weeks' pay in lieu of notice.

Fatimah's regular wages for a regular work week are calculated:

\$17.00 an hour X 40 hours a week = \$680.00 a week

Her termination pay is calculated:

\$680.00 X 3 weeks = \$2040.00

Then her vacation pay on her termination pay is calculated

4% of \$2040.00 = \$81.60

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

\$2040.00 + \$81.60 = \$2121.60

Fatimah is entitled to **\$2121.60**. The employer must also ensure continued coverage for any benefit or pension plans that applied to her for three weeks.



Example 2: No regular work week

Harris has worked at a nursing home for four years. He works every week, but his hours vary from week to week. His rate of pay is \$17.00 an hour, and he is paid 6 per cent vacation pay.

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

Harris is entitled to four weeks of termination pay.

Harris' average earnings per week are calculated:

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

His termination pay is calculated:

\$180.00 × 4 weeks = \$720.00

Then his vacation pay on his termination pay is calculated:

6% of \$720.00 = \$43.20

Finally, his vacation pay is added to his termination pay:

\$720.00 + \$43.20 = \$763.20

Harris is entitled to **\$763.20**. The employer must also ensure continued coverage for any benefit or pension plans that applied to him for four weeks.

When to Pay Termination Pay

The employee must receive termination pay on the later of:

- 7 days after employment is terminated; or
- On the employee's next regular pay day.

Mass Termination

A mass termination is where:

- 50+ employees are dismissed within a 4 week period;
- At an employer's establishment (this may refer to multiple locations)

In cases such as these, the employer is obligated to:

- Submit Form 1 to Director of Employment Standards
 - Notice of termination is not effective until Director receives Form 1
- Copy of Form 1 must be posted in the workplace for the attention of the affected employees on first day of the notice period.



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Form 1 Sample



Ministry of Labour

Form 1 – Notice of Termination of Employment Under Subsection 58(2) of the *Employment Standards Act, 2000*

This form, when completed, should be sent to the Director of Employment Standards, Ministry of Labour, 6th floor, 400 University Avenue, Toronto ON M7A 1T7. Fax 416 326-7001, Monday to Friday, between the hours of 9:00 a.m. and 5:00 p.m.

Please note that the completed Form 1 must be received at the above address before the notice of termination to employees can commence. A copy of this Form 1 must be posted in the workplace

Where the employer decides to pay termination pay rather than providing written notice of termination, the employer is still required to provide the Director of Employment Standards with the completed Form 1.

The Ministry may, after filing by the employer, request supplementary information relating to the questions in the Form and/or to the responses given to the questions in the Form.

The Ministry of Labour will supply the Ministry of Training, Colleges and Universities with information from the Form 1 for the purposes of providing a range of programs and services to help workers make a rapid and effective transition to new employment.

Termination Information			
Employer Business / Trade Name		Legal Name	
Employer's Mailing Address			
Unit Number	Street Number	Street Name	PO Box
City/Town		Province	Postal Code
Location(s) where employees whose employment is being terminated work			
Number of employees at each location who are paid		Number of employees at each location whose employment will be terminated and anticipated dates	
Hourly		Hourly	Date Terminations Effective (yyyy/mm/dd)
Salaried		Salaried	
Other		Other	
Name(s) of the trade union local, if any, representing employees whose employment is being terminated.			
What are the economic circumstances surrounding the terminations?			
Has the employer implemented or discussed with employees (or their agent) any alternatives to termination? Please describe alternatives to termination implemented or discussed.			
Alternatives Implemented			
Alternatives Discussed			

Mass Terminations: Amount of Notice Due

# Assignment Employees Terminated	Minimum Notice Required
50-199	8 weeks
200-499	12 weeks
500+	16 weeks



Exceptions to Mass Termination Rules

The mass termination rules **do not** apply if:

1. The number of employees being terminated is **10% or less** of the number of employees who have been employed for at least **3 months**; and
2. None of the terminations are caused by the permanent discontinuance of all or part of the employer's business at the establishment.

Employee Resignation and Mass Termination

An employee whose employment is part of a mass termination may resign, but must provide written notice to the employer:

- Less than two years' employment: **1 week**
- More than two years' employment: **2 weeks**

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

Temporary Work after Termination Date in Notice

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

If an employee works beyond the 13-week period after the original termination date, and then has their employment terminated, the **employee will be entitled to a new written notice of termination** as if the original notice had never been given.

Recall Rights

Is the right of an employee on a layoff to be called back to work by their employer under a term or condition or employment.

This right is commonly found in collective agreements. This is not a right under the ESA and must be contracted for with the employee.

An employee who has recall rights and is entitled to termination pay because of 35 week + layoff may:

- Keep recall right and not be paid termination pay at that time; or
- Give up recall rights and receive termination pay and severance pay, if entitled.

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

No Entitlement to Termination Pay

An employee is not entitled to termination pay where the employee:

- Refused a reasonable alternative employment offer;
- Refused a reasonable alternative employment offer through a seniority system
- Is on a temporary layoff;
- Is dismissed during or because of strike/lockout;
- Employed in construction;
- Terminated at retirement;
- Guilty of willful misconduct, disobedience, or willful neglect of duty; or
- Lost employment because contract is impossible to perform due to unforeseen circumstances*.



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***NOTE:** Unforeseen circumstances include fire, flood, etc, but DOES NOT include bankruptcy, insolvency, or when contract is impossible to perform as the result of an injury or illness suffered by an employee.

An employee is not entitled to termination pay where the employee:

- Does not return after being recalled from temporary layoff within a reasonable time; or
- Was hired for a specific length of time or until completion of specific tasks

UNLESS: the employment ends before the term expires or task is completed; or

- Task is not completed more than 12 months after employment started; or
- Employment continues for three months or more after the term expires or task has completed

LIABILITY OF DIRECTORS

Under the ESA, a Director is:

- A Director of a corporation; and
- A shareholder who is party to a unanimous shareholder agreement.

NOTE:

This part applies:

To shareholders only to the extent that the directors are relieved, under subsection 108(5) of the Business Corporations Act or subsection 146(5) of the *Canada Business Corporations Act*, of their liability to pay wages to the employees of the corporation.

This part does not apply: to directors of corporations to which Part III of the *Corporations Act* applies or to which the *Co-operative Corporations Act* applies.

Joint and Several Liability

Directors of an employer can be jointly and severally liable if:

- The employer is insolvent, an employee claims unpaid wages, and these wages aren't paid;
- The employer has not paid an Employment Standards Order; or
- An Employment Standards Order has been made, making the Director liable for wages.

Wages – Director Liability

For purposes of director liability, wages do not include severance or termination pay.

The employer is primarily responsible for outstanding wages, and the Director can still be liable at any time.

Overtime Wages – Director Liability

A Director is liable for the payment of the greater of these two outstanding overtime wages:

- The amount required under the ESA; or
- The amount agreed to in the employment contract.

Vacation Pay – Director Liability

Director liability for vacation pay is the greater of:

- The minimum vacation pay required under the ESA; or
- The minimum vacation pay agreed to in the employment contract.



Holiday Pay – Director Liability

Director liability for holiday pay is the greater of:

- At the rate required under the ESA; or
- At the rate agreed to in the employment contract.

Maximum Director Liability

The maximum amount a corporation's directors are jointly and severally liable to each employee of the corporation is **6 months' of wages that became payable while the Director is a Director of the corporation.**

Contribution to Director Liability

If one Director pays a claim, he/she can claim contribution from other liable Directors.

Example: A company has two Directors: Sal and Harry. Sal pays an order from an ESO for the unpaid wages of an employee after the employer becomes insolvent. Harry was also liable for this order, but was away on vacation and did not know about the order. When Harry gets back, he must provide his contribution for the order to Sal.

Contracting Out of Liability

No provision(s) in a contract, article of incorporation or corporation by-law can relieve a Director from liability under the ESA.

Indemnification – Director Liability

Any employer can cover costs, charges and expenses to satisfy an order made against a Director under the ESA if:

- The Director acted honestly and in good faith/best interests of the employer; and
- The Director believed his or her conduct was lawful.

NOTE: This refers to a Director, a former Director, and the heirs or legal representatives of a Director or former Director.

Limitation Period – Director Liability

An order for unpaid wages **cannot** be brought:

- **More than 2 years** after the employee filed a complaint;
- **More than 2 years** after another employee of same employer filed a complaint;
- **More than 2 years** after an ESO started an inspection for wages

NOTE: Civil remedies are protected; any civil remedy available to an employee or a Director can still be pursued regardless of whether this limitation period has expired.

NOTE: A 2 year limitation period in the ESA prevails over a limitation period in any other Act, unless the other Act states that it does in fact prevail over the ESA.



TEMPORARY HELP AGENCIES

A temporary help agency is one that provides workers to employers for temporary tasks and/or assignments.

Employment Relationship

An individual becomes an employee of an agency where:

- The agency and an individual agree the agency will assign or attempt to assign the individual to perform temporary work for clients or potential clients

NOTE: The agreement can be oral or written.

Agency Must Provide the Employee

- Legal Name of the Agency;
- Operating/Business Name (if applicable);
- Contact Information;
- Copy of the most recently published Ministry of Labour Temporary Help document; and
- If needed, a translated copy of the document.

Assignment Employee – Overview

Temporary help agencies employ people to assign them to perform work on a temporary basis for clients of the agency.

The duration of the assignment does not matter. Such employees are called “assignment employees.”

Under the ESA, temporary help agency assignment employees generally have the same rights as other employees.

There are also rules in the ESA that apply specifically to assignment employees, temporary help agencies and clients of temporary help agencies.

Start of Assignment

An assignment starts the first day work is performed by the employee for the client. An assignment does **not** start because the agency:

- Provided client with a resume;
- Arranged an interview; and/or
- Introduced the employee to the client.

The Agency Must Provide its Employee with:

- Its client’s legal name;
- Its client’s contact information;
- Wage information/benefits;
- Hours of work;
- Work description;
- Pay period and pay day; and
- Estimated assignment term (if available).

NOTE: Information must be provided in writing.



End of Assignment

An assignment ends when:

- The end of the scheduled term has come; or
- When ended by the agency, the employee or the client.

While on assignment for a client, the employee is still an employee of the Agency

- The end of an assignment does not mean the assignment employee's employment relationship with the agency ends.

Termination of Assignment

An agency has obligations towards an assignment employee during termination where:

1. The assignment employee is assigned to perform work for client;
2. The assignment employee was advised the assignment was to be 3 months or more; and
3. The assignment is terminated earlier than the scheduled length of the assignment.

Where this happens, the Agency must provide the assignment employee with either:

1. One week's notice of termination of assignment;
2. Termination of assignment pay; or
3. A combination of both.

Termination of Assignment Pay

Where the Agency provides an assignment employee with pay in lieu of notice of termination of employment, the assignment employee is entitled to the wages he or she would have received had the one week's notice been provided.

No Termination of Assignment Pay or Notice Required

No termination pay or notice is required where:

1. The assignment employee is offered reasonable, alternate work with a client lasting one or more week during the notice period;
2. The assignment employee is guilty of willful misconduct, disobedience, or non-trivial neglect of duty;
3. The assignment has become impossible to perform; or
4. A strike/lock-out happens at location of assignment.

Public Holidays

Where a public holiday falls during an employee's assignment, they are entitled to a day off with public holiday pay.

Public Holiday Pay = Regular wages earned and vacation pay payable in four weeks prior to the week of the public holiday
20

However, an employee can agree to work on the holiday, as long as the agreement is **in writing**. Where this happens, he or she must receive:

- Regular pay for that day and a substitute day off with public holiday pay; or
- Premium pay for every hour worked on the holiday plus public holiday pay (with employee and employer agreement).

If the employee is **not scheduled** to work on the day of a public holiday, they will receive:

- A substitute day off with public holiday pay; or
- Public holiday pay only (with agreement electronically or in writing).



MODULE 5

Other

If the employee is **not on assignment** on the day of a public holiday, they are only entitled to public holiday pay.

Example 1:

Chris ends a six-month assignment on Friday, February 12. He had been earning \$800 per week, working 4 days a week while on that assignment. He has a weekly pay period that runs from Sunday to Saturday. He is offered another assignment that begins on April 15, which he accepts. Family Day falls on February 15, but because he is on a layoff when the holiday occurs, he is entitled only to public holiday pay for Family Day (no substitute day off).

Chris' public holiday pay is calculated as the regular wages earned and vacation pay payable in the four weeks prior to the week of the public holiday ($\$800 \times 4 = \3200) divided by 20.

Chris is entitled to **\$160** in public holiday pay.

Example 2:

Elias ends a six-month assignment on May 30. Canada Day falls on July 1. He was available and able to work, but was not offered another assignment between May 30 and July 1.

Because he is on a layoff when the holiday falls, he is entitled only to public holiday pay for the day.

Elias' public holiday pay is calculated as the regular wages earned and vacation pay payable in the four weeks prior to the week of the public holiday ($\$0 \times 4 = \0) divided by 20.

Because he has no earnings for that period, his public holiday pay for Canada Day is \$0.

Agency Record Keeping Obligations

The Agency must:

- Record hours worked by each employee for each client in each day and week; and
- Keep copies of any written notice;
- Keep records for 3 years; and
- Records must be readily available.

Agency is **NOT** Allowed to:

1. Charge employees membership fees;
2. Charge employees job skills training fees;
3. Charge "assignment" fees;
4. To stop client from providing references for assignment employee;
5. To stop an assignment employee from working with an agency client;
6. Restricting a client from providing references in respect of an assignment employee of the agency;
7. Restricting a client from entering into an employment relationship with an assignment employee;
8. Charging a fee to a client in connection with the client entering into an employment relationship with an assignment employee;
9. Charging a fee that is prescribed as prohibited; or
10. Imposing a restriction that is prescribed as prohibited.



Agency's Client is NOT Allowed to:

Penalize an assignment employee for:

- Asking client/agency to comply with ESA;
- Asking about or exercising his/her rights;
- Filing a complaint under ESA;
- Giving information to an Employment Standards Officer; or
- Asking about/disclosing pay rate to see if agency/client is complying with ESA.

Penalize an assignment employee for:

- Disclosing his/her pay rate to help another employee determine if agency is complying with ESA;
- Testifying or participating in proceedings under ESA;
- Participating in proceeding under Retail Business Holidays Act;
- Takes or becomes eligible to take a leave; or
- Is owed money and client/agency is required to pay third party amount owing to employee.

Where an employee has claimed his or her rights under the ESA, the Agency's client may not:

- Intimidate that employee;
- Refuse to have employee perform work;
- Refuse to allow employee to start an assignment;
- Terminate the assignment of that employee; or
- Otherwise penalize or threaten to penalize that employee.

Enforcing Agency Rules

An assignment or prospective employee may file a claim with the Ministry of Labour where he or she:

- Believes the agency is not complying with ESA; or
- Thinks he or she has been penalized for using/asking about their ESA rights.

Client Reprisal or Punishment

The burden of proof will lie with the client.

An Employment Standards Officer may order:

- Employee compensation; or
- Employee compensation **and** reinstatement.

If an order is issued under this section requiring a client to reinstate an assignment employee in the assignment, the temporary help agency must do whatever it can reasonably do to show compliance by the client with the order.

Employee Compensation

Employment Standards Officer may issue an order instructing a client to pay to the Director in trust:

- The amount of the compensation; and
 - Administration costs equal to the greater of \$100 and 10 per cent of the amount of compensation; or
 - Pay compensation amount to the assignment employee.



MODULE 5

Other

Agency Client May Be Liable For:

The assignment employee's:

1. Regular Wages;
2. Overtime Pay;
3. Public Holiday Pay; and
4. Premium Pay.

Multiple Client Liability

Where an assignment employee who performs work for more than one client in a pay period, each client is liable for its portion of the work performed by the assignment employee.

Meaning, if wages are not paid by the agency for the employee's pay period, each client will have to pay proportional wages for that period.

Termination of Employment

Temporary help agency assignment employees generally have the same rights as other employees to notice of termination. However, some termination rules only apply to assignment employees.

Requirements During Notice Period

Wages paid to an assignment employee during the notice period must be:

1. Terminations because of extended layoff:
 - a. Total wages in 12 weeks before termination date, divided by 12
2. All other terminations:
 - a. Total wages earned in 12 weeks ending on last day of work for client, divided by 12

Calculating Pay Instead of Notice

If the employee is being terminated without working notice, pay in lieu of notice is calculated as:

- The amount of wages earned in the 12 weeks ending on the employee's last day of work for a client of the agency, or
- In the 12 weeks before the deemed termination date, if the termination is triggered by a layoff going on longer than a "temporary layoff", divided by 12, and multiplied by the number of weeks of notice to which the employee is entitled.

Termination Resulting From Layoff

An extended layoff can trigger termination of employment. If an assignment employee is not assigned to perform work for client during the week, the agency "lays off" him/her for a week.

What Constitutes a Layoff?

A layoff is when for **1 or more** days, the assignment employee:

- Is not able to work;
- Not available for work;
- Refuses an offer by agency;
- Subject to disciplinary suspension; or
- Not assigned to work due to strike/lock-out.



Mass Termination – Assignment Employees

Special mass termination rules apply where 50+ assignment employees working for the same client are terminated in the same 4 week period, and termination happened because:

1. The term of the employees’ assignment ended; or
2. The client or agency ended the assignments.

# Assignment Employees Terminated	Minimum Notice Required
50-199	8 weeks
200-499	12 weeks
500+	16 weeks

Notice Obligations – Assignment Employees

If 50+ employees are being terminated, the agency will:

- Provide the Director with a form outlining the notice;
- Provide a copy of the form to every assignment employee facing termination; and
- Post form in a visible and noticeable part of the agency on the first day of notice and keep the form up until the last day of the notice period.

Example: Hosanna is one of 100 assignment employees who are assigned by XYZ Staffing Services, a temporary help agency, for an anticipated ten-month period of work at one of its clients, ABC Manufacturing. After six months, ABC Manufacturing changes its production plans and ends the assignments of the 100 XYZ Staffing Services employees immediately.

Because the assignments with ABC end, and ABC does not anticipate being able to find other assignments for 70 of its affected assignment employees, XYZ terminates the employment of these 70 employees, including that of Hosanna, without notice.

Severance of Employment

Temporary help agency assignment employees generally have the same rights as other employees to severance pay. An employee is entitled to severance pay when:

- Their employment is “severed”
- They have been employed for at least 5 years; and
- Certain other conditions are met.

NOTE: The five-year threshold is based on the total time the employee is employed by the agency, not the duration of any particular assignment.



MODULE 5

Other

Calculating Severance Pay

If severance is due to layoff going on for 35 weeks or more in a 52 week period, then they are due:

- The total wages earned by the assignment employee for client work in the 12 weeks before first day of the layoff; or
- (if severance due to other circumstances) the total wages earned by the assignment employee for client work during 12 week period ending on the last day of client work.

Then...

Divide the previous amount by 12.

Then...

Multiply the result by whichever is less:

1. $26 + \# \text{ of years of employment completed}$; or
2. $26 + \# \text{ of completed months of employment in the incomplete year divided by 12}$.

Severance Resulting From a Layoff

A layoff lasting 35+ weeks in a 52 week period can trigger severance.

An assignment employee is considered to be on a week layoff where the agency does not assign the employee to perform work for a client of the agency during that week.

What Constitutes a Layoff

An agency has not laid off an employee if for 1 or more days during a week, the assignment employee:

1. Is not able to work;
2. Not available for work;
3. Refuses an offer by agency;
4. Subject to disciplinary suspension; or
5. Not assigned to work due to strike/lock-out.

For more information regarding your rights and obligations under the *Employment Standards Act, 2000*, please visit www.labour.gov.on.ca, or call the Employment Standards Information Centre:

(GTA): (416) 326-7160

(Canada-wide): 1 (800) 531-5551

